ENFOSTER project
(ENFOrcement STakeholders coopERation)
Grant Agreement VS/2014/0009

A project for a stronger cooperation on posting of workers within the EU

"Enfoster Brief no.2"

"A Responsible Posting of workers within EU: actions by Unions, answers by control authorities"

(January 2015)

This document has been fulfilled by the ENFOSTER project “ENFOrcement STakeholders coopERation” . The project received the financial support of the European Union (Contracting Authority European Commission – DG Employment, Social Affairs and Inclusion - Grant Agreement no. VS/2014/0009 – Progress Programme, Budget heading 04.04.01.03, Posting of workers: enhancing administrative cooperation and access to information).

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

- Arbeit und Leben e.V.
- 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).

With the financial support of the European Union
European Commission – DG Employment, Social Affairs and Inclusion

The content of this document does not reflect the official opinion of the European Union.
Responsibility for the information and views expressed therein lies entirely with the authors.

This publication is supported by the European Union Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is implemented by the European Commission.
It was established to financially support the implementation of the objectives of the European Union in the employment, social affairs and equal opportunities area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in these fields. The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.
For more information see: http://ec.europa.eu/progress.

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 (DG Inspection Activities and DG for Policies and Services for Employment and Training)
- Romanian Labour Inspection.

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.

Chapter 1 and Chapter 2 refer to the perspective of trade unions, mentioning concrete experiences and alliances to sustain a correct posting of workers. Chapter 3 has been written by labour inspectors, with the aim to provide clarifications useful to companies and social partners in order to comply with the EU legislation for a correct posting of workers. More in detail:

- **Chapter 1** shortly sums up cases and reflections related to the following question: is it possible to combine the posting of workers, corporate social responsibility and territorial responsibility?
- **Chapter 2** shortly sums up a case of a territorial alliance and specific actions to improve the working conditions of posted workers
- **Chapter 3** is about “Questions and answers on the Transnational Posting of Workers in the European Union in accordance with Directive 96/71/EC and Directive 2014/67 / EU”: the most recurrent questions by companies and the related clarifications and suggestions by control authorities.

1. COMBATING NON-GENUINE POSTING: CORPORATE SOCIAL RESPONSIBILITY AND UNION MONITORING

Author: Francesco Lauria, CISL nazionale - Italy

Is it possible to combine the posting of workers, corporate social responsibility and territorial responsibility?

In view of the increased reporting of troubling cases, in which the existing Italian working conditions and contractual provisions on the posting of workers do not match, in whole or in part, those established by Legislative Decree No. 72 of 25 February 2000 transposing Directive 96/71, the above question may seem a rhetorical one.

In fact, for some years now, Italian trade unions have started a monitoring of these phenomena also to increase social attention on the non-genuine posting of workers and promote good behaviour in undertakings and territories in relation to this issue, in particular in the public procurement sector.

All solutions based on social equity and sustainability and regardless of economic efficiency seem impracticable, as the increasing global competition leads to social dumping. But those who think that profit maximization is the only "subjective" parameter of the economic action, to the detriment of social justice and equity, incur in a widespread social opposition as well as in precise legal and contractual measures.

It should be remembered that Italy has used the opportunity, provided for by Directive 96/71 (Art. 10), to take national contracts as a reference, even in the absence, in our country, of the *erga omnes* extension of such contracts.

The full application of collective agreements to posted workers remains a not fully resolved issue with respect to some elements (as for instance the issues linked to corporate or local bargaining) and some industries, among which the construction industry, chose the solution of agreements with the unions and the joint bodies of the prospective countries of origin.

In some specific cases, the transnational mobility of workers showed obvious elements of social dumping. These cases allow a reflection that rises above the abstractness of legal provisions and focuses on union monitoring and the promotion of a culture of social responsibility and legality not to be underestimated.

In recent years, the social monitoring action promoted by CISL, in particular in the Lombardy region, revealed a number of very significant cases.

The Province of Brescia case was one of these, in which, upon denunciation by some employers, the union took action against a self-styled company that, in a note to the Lombardy companies, proposed Romanians posted workers at "simpler and more convenient conditions." These were “low-cost” teams of construction or cleaning workers to be hired at 10 € per hour (for core staff) or 12 € per hour (for qualified staff). All contributions, in addition to holidays, sick leaves, maternity leave, overtime, also at night and during holidays, were included in the stated fees, and comparative tables were produced and disseminated, worthy of the most exaggerated end-of-season sales in a large shopping centre.

This is a clear case of abuse of the posting of workers. The Romanian workers, however, were almost certainly already resident in Italy. In fact, they were formally employed by a Rumanian company that "lent" them to an Italian company and were paid no more than 5 € per hour. This illegal provision of labour was made in defiance not only of the Directive on the posting of workers, but also of the basic rules governing the labour market in Italy.

The union action on the provincial labour directorate, along with the mobilization of some "responsible" entrepreneurs and the press support, forced the company to a clamorous retreat and to shut down its website.

A second similar case with a less positive outcome occurred in Milan, in a construction site in which there were (non-EU) Macedonian workers. Twenty workers had only documents in Macedonian language, which presupposed a regular posting, certified by labour inspectors, but they turned to be false documents. The workers had reported wages far below the minimum wage, but in a subsequent inspection, carried out also with the union (Filca CISL), they retracted their previous statements. A subsequent judicial investigation led to the full resolution of this issue.

Building on this and other cases, the office of the Chamber of Commerce of Milan in charge of verifying the actual consistency and compliance of businesses operating in the Milanese territory with the posting requirements was potentiated.

In view of Expo International 2015 and the countless public and private construction sites activated on this occasion, a "Legality Protocol " was then signed on February 13, 2012 between the Prefecture of Milan and Expo 2015 SpA., whose Article 4 states, among other law enforcing provisions, the obligation for the contractor to post workers in compliance with Art. 30 of Legislative Decree no. 276/2003, only after EXPO SpA has authorized their access to the construction site. This authorization is subject to prior acquisition by EXPO itself of all necessary anti-Mafia information requested in Art. 10, paragraph 7, letters a), b), c) of Presidential Decree 252/98 on the posting undertaking.

Similar rules apply to all those subjects, howsoever involved in the execution of the work for Expo 2015, which will make use of posted workers. The contractor is therefore obliged to send to the Prefecture of Milan all documentation relating to the posting undertaking.

The implementation of this Protocol shall be constantly monitored, but it certainly represents an important starting point.

Recently, always in the Milan area, the unions, and CISL in particular, have monitored troubled posting situations. The construction of a restaurants chain was one of these cases, also reported in a Parliamentary question filed at the Italian Chamber of Deputies. The restructuring of the Milanese restaurant that took the place of an historic theatre in Milan was carried out by a Romanian undertaking, with a subsidiary in Italy, through a contract in which (allegedly?) posted workers perceived wages of about 3€ per hour, and it was difficult to ascertain the payment of social security contributions.

Many other cases could be added to those mentioned above, including those specific cases of frontier workers not to be underestimated.

In all these cases, the unions have been able to take action due to their presence on the territory, their relationships with the institutions and businesses as well as with the public opinion.

Clearly the reported and solved cases are probably the mere tip of the iceberg.

That's why good local monitoring and social corporate responsibility actions will be implemented and strengthened in view of the transposition in Italy of the Enforcement Directive 96/71/EC concerning the posting of workers.

In this perspective, the culture of social responsibility is promoted not only with undertakings but among all those who come into contact with them. The undertaking is an actor who creates "social value", but it lives and grows in a social environment and produces a specific impact on its territory. Tools and agreements should be promoted, even beyond laws and directives, also in public procurement and mechanisms based on labour cost pressure, to reward good behaviours, raise awareness in workers, employers and the public opinion, and foster a relationship between the local and the global dimension, in which transnational, border-free fairness and justice should prevail over social dumping.

2. EXPERIENCES OF ALLIANCES FOR BETTER WORKING CONDITIONS IN GERMANY

Author: Bettina Wagner (Arbeit und Leben e.V. Berlin)

2.1. Alliances for better working conditions, against illicit employment and for regulations at the work site – Case study: The Berlin and Brandenburg Alliance for Practices at the construction site

Since 2004, various alliances have been forged on the federal, state and regional level in order to find solutions for those industries particularly affected by precarious employment outside of the law.1This initiative is supported by the Federal Ministry of Finance across all industries. The primary focus is on combating "illegal work and illegal employment", but the alliance's partners also act as social partnerships at a regional level. The alliances conduct actions and activities that have the goal of maintaining fair competition, raising general awareness about the negative consequences of illegal employment and joint initiatives for law enforcement to protect the labor market and economy.[2]A central area of discussion in these industry-specific alliances is the issue of cross-border services and the posting of workers.[3]

The Berlin and Brandenburg Alliance for Rules for Construction (*Berliner und Brandenburger Bündnisfür Regeln am Bau)* was the pioneer in the construction sector and consists of representatives of the trade union IG BAU (Industrial Union of Construction, Agricultural and Environmental Workers),

[1] http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Zoll/2012-03-19-BuendnissSchwarzarbeit-Flyer.pdf?__blob=publicationFile&v=2
[2] http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Zoll/2012-03-19-BuendnissSchwarzarbeit-Flyer.pdf?__blob=publicationFile&v=2
[3] https://www.igbau.de/Binaries/Binary3546/Bericht_Schwarzarbeit_Bekaempfung_16_13768.pdf

the Social Fund for Construction, representatives of the construction industry, representatives of the Ministries of Labor and Economic Affairs from both states as well as the office of Financial Control of Illegal Work and the State Office for Occupational Safety.[4]Every member can raise current issues or concerns at the meetings, which take place in 6-month intervals, with the aim of finding common solutions to problems within the sector.

One of the achievements of the Alliance is the Berlin Public Procurement Act, which regulates the competition and rules for awarding public contracts which was issued in July 2010. The Procurement Act requires that each contractor must assure adherence to collective agreements for the entire period of construction before being awarded a public contract.[5]Since 01.01.2012 such a Procurement act also exists for Brandenburg. The Members within the Alliance has also published common statements of trade unions, employers' organizations as well as the responsible ministries at the occasion of policy changes and political proposals to be implemented at the federal level regarding the construction sector.

Furthermore, in the run-up to major construction projects such as the Berlin-Brandenburg airport, the Alliance intensively discussed how to ensure that certain regulations and initiatives of collectively adopted working standards are met. The meeting of the alliances also offers the opportunity to gain insight into the operations of respective alliance partners, such as the work of the Financial Control of Illegal Employment. Although the staff of the Financial Control cannot provide information on ongoing cases, their inclusion within the alliance is perceived as beneficiary as insights in the way a prosecution works in general can be offered.

Each member organization of the Alliance writes a report prior to each meeting on relevant events of the last six months. In this report they can also make proposals and suggest initiatives. The agenda for the biannual meetings is usually created in consensus with all involved partners. However, the trade union in the construction sector is the main driving force and responsible for invitations and sets the frame for the meetings. An example of such a proposal is the smart card proposed by IGBAU, which would be introduced for each employee and would store all construction activities independently of the employer. This would ensure that the working hours on a building site are stored centrally and cannot be tampered with individually. So far, however, this proposal has not yet been implemented.[6]

The Alliance uses the biannual meetings also as occasions to inform

The alliances also provide a way to cooperate in formulating political demands and subsequently representing them collectively. In this way, a comment on the Enforcement Directive of the Posted Workers Directive was written cooperatively and jointly presented to the public by the alliances for the construction sector.

The Counselling office for posted workers has also been invited to present its work to the Members of the Alliance and discuss currently trends and problems of posted workers in the construction industry.

---

[4] http://www.berlin.de/imperia/md/content/sen-arbeit/schwarzarbeit/03_12_flyer_berlin_bekaempft_schwarzarbeit_barrierefrei.pdf?start&ts=1268412546&file=03_12_flyer_berlin_bekaempft_schwarzarbeit_barrierefrei.pdf

[5] http://www.hfk.de/w/files/fachbeitraege/berlinerausschreibungsundvergabegesetz.pdf

[6] http://www.berliner-zeitung.de/archiv/eingangskontrollen-und-besondere-ausweise-sollen-es-bei-der-flughafen-baustelle-illegal-beschaeftigten-schwer-machen-kein-zutritt-fuer-schwarzarbeiter,10810590,10550566.html

The Alliance provides a platform for direct exchange, information and institutional learning among the partners and hereby enhances the social dialogue between all involved actors.

In May 2006, a nationwide action alliance was founded in the freight forwarding, transportation and logistics industry. The current members of this alliance are the United Services Union (Verdi), the Federation of Furniture Forwarders (AMÖ), the Federal Association of Road Haulage, Logistics and Disposal (BGL) and the German Freight Forwarders and Logistics Association (DSLV). The Federal Ministry of Transport, Construction and Urban Development[7], the Federal Office for Freight Transport and the Financial Control of Illegal Work are also part of the alliance[8].

2.2. The experience of SOKA-BAU

Shortly after the End of World War II, various problems typical of the construction industry appeared: only short-term durations of employment, regular declines in labour force demand during winter etc. The social partners therefore agreed on a solution without direct government involvement. In this context, the SOKA-BAU was established. The Sozialkasse- Bau or SOKA-BAU is an umbrella organisation providing various very specific services for the construction industry since 1949. It unites two different institutions, the holiday and wage equalization fund of the construction industry (Urlaubs- und Lohnausgleichskasse der Bauwirtschaft ULAK) and the supplementary care fund of the construction Industry (Zusatzversorgungskasse des Baugewerbes AG ZVK). Both are institutions of social partners in the construction industry, which are the Federation of German Construction Industry, the Trade Union for Construction, Agriculture and Environment and the Central Association of German Construction Industry. Tasks of ULAK are securing leave entitlements and the financing of vocational training. The CVC manages the pension allowance to compensate for structural disadvantages in the pension plan. SOKA-BAU is responsible for approximately 75,000 domestic and foreign companies with about 720,000 employees and 387,000 retired workers.

Before posting or becoming economically active on the German labour market, every foreign company has to contact the SOKA-BAU and register itself as well as the posted workers. The SOKA-BAU provides an employer number and sends all the necessary information and brochures in the respective language. The employer has to register every employee posted to German for the entire duration of the construction. Once registered the SOKA-BAU expects the monthly contributions to both funds as well as communication of eventual changes in any form. The employer is requested to fill out forms for each month of economic activity in German and to pay no later than the midst of the next month. Based on this information the SOKA-BAU calculated the leave entitlements for every registered worker. If a posted worker takes holidays during the posting, the employer has to pay for the leave and inform the SOKA-BAU about the exact duration. If the contribution account is balanced, the SOKA-BAU will reimburse the employer for the holiday contribution and recalculate and inform the employer as well as the worker about the new fund level per worker.

Compensations:

[7] heute das Bundesministeriums für Verkehr und digitale Infrastruktur www.bmvi.de
[8]http://www.bundesfinanzministerium.de/Content/DE/Monatsberichte/Publikationen_Migration/2006/06/060620agmb008.pdf?__blob=publicationFile&v=3

Once the employee finished its economic activities on the German market and does not return within the context of any new activities on German construction sites or when he changes the employer or the working relation, he may submit a request for compensation to the SOKA-BAU. The form is available in several languages.

The SOKA-BAU will then pay the worker out regarding his contributory compensation. As far as the regulation of the social security contributions, the SOKA-BAU will deduct from the compensation a lump sum payment and forward it to the employer or the relevant collecting institution. This compensation has to be paid before taxes.

For further information from foreign employees, the institution has set up a telephone information line in various EU languages for employers and employees. In addition, detailed informational material can be downloaded in several European languages from the website www.SOKA-BAU-bau.de.

3. QUESTIONS AND ANSWERS ON THE TRANSNATIONAL POSTING OF WORKERS IN THE EUROPEAN UNION IN ACCORDANCE WITH DIRECTIVE 96/71/EC AND DIRECTIVE 2014/67/EU

Authors: Davide Venturi, Massimiliano Mura and Fabrizio Nativi, with the supervision of the Enfoster team at DGAI – Direction General Inspection Activities of the Ministry of Labour and Social Policies (Antonio Allegrini, Sonia Colantonio, Roberta Fabrizi, Mariagrazia Lombardi, Marina Strangio). Author of the box "Focus Romania" is Cătălin ŢACU (Romanian Labour Inspection). The box "Focus Germany" has been written with the support of Matthias Menges (National Agency Combatting Illicit Employment, Germany).

This chapter is aimed at providing a basic informative framework on the Transnational Posting of Workers in the European Union in accordance with Directive 96/71/EC and Directive 2014/67/EU, through an exemplification of the questions that are usually asked by businesses and the social partners. The answers are those that a control authority would provide in order to support a correct and responsible transnational posting of workers. Please note that the answers given have merely informative purposes and have no binding legal force.

To learn more or to clarify some of the answers, some "Focus boxes" have been prepared. Some "Focus boxes" are useful to analyse the theme more in depth, regardless of the country in which inspections are carried out; other "Focus boxes" refer specifically to the Italian legislation or inspection practice, and other "Focus boxes" refer to the Romanian legislation or inspection practice. The final "Focus box" is related to some specific aspects of controls in Germany.

1. Q. What is the relationship between the new Directive 2014/67 / EU and the previous Directive 96/71/EC? Are they both dealing with the posting of workers within the EU territory?

A. The new Directive 2014/67 / EU, like Directive 96/71 / EC governs the posting of workers within the EU territory as part of a transnational provision of services. The new directive provides some interpretations and new implementation ("enforcement") systems that the previous directive did not contain. Therefore, the new directive, which was published in the OJEU on 28.05.2014, entered into force last 18.06.2014 and will be implemented by the 28 EU Member countries before 06/18/2016, shall not repeal, but integrate and interpret the previous Directive 96/71/EC on transnational posting.

2. Q. CAN YOU DEFINE THE MEANING OF TRANSNATIONAL POSTING AS EXPRESSED BY DIRECTIVE 96/71/EC?

A. The issue of the temporary posting according to Directive 96/71/EC and Directive 2014/67/EU covers workers employed by undertakings established in the European Union if:

- the employees are posted to the host country for a limited period;
- they continue a working relationship with the posting (employer) undertaking.

FOCUS 1: BUT IN PRACTICE, WHAT IS THIS REFERRED TO?

To better understand, see this example: an entity established in country A enters into a contract for the realization of a work or the performance of a service with an undertaking established in a EU country other than country A.

The foreign undertaking in charge of the work or service (contractor) performs its obligations towards its customer, organises the means necessary for the fulfilment of contractual obligations and manages the contract at its own risk.

The foreign contractor, in the performance of its obligations towards its customer, with the above contract, shall use

– its capitals and assets;

- its workers who temporarily perform their work in the territory of Country A.

The use of equipment and materials provided by the contractor may be irrelevant when the contract of works or services relates to labour intensive activities, and that is when the provision of materials and equipment is not crucial for the acceptance of risk by the contractor.

These workers are employees of the contractor and they remain so even during their work performance in the territory of Country A, in the carrying out of the contract. They are directed and paid by the contractor who is also responsible for the exercise of disciplinary power.

A. (more ...) As for the undertakings (employers), Community posting is realized in one of the following cases (art. 1, paragraph 3 of Directive 96/71 / EC):

- commercial contract (mostly tenders, but not only) to be performed in a country other than that in which the undertaking (employer) is established;
- temporary transfer of an employee to an establishment of the same undertaking that operates in a country other than that in which the employee was hired and ordinarily operates. This is an intra-group posting of workers to an undertaking of the group that operates in a country other than that in which these workers normally operate;
- posting under a staff labour supply by an temporary work agency established in a country other than that in which the user operates.

FOCUS 2: BUT IN PRACTICE, WHAT DOES THIS MEAN?

To better understand, see these examples, which refer to three different economic and productive sectors:

1) construction industry: to construct a building in the territory of Country A, a principal established in country A commissions the construction of a marina to a contractor established in another EU Country.
   The economic operation indicated above is realised between a principal established in country A and a contractor established in another EU country through the conclusion of a commercial contract.
   With regard to the relationship between the foreign EU contractor and its workers employed in the construction of the work in the territory of the country of performance of the work, in the interest of the principal established herein, a type of transnational posting is identified, subject to Directives 96 / 71 / EC and 2014/67 / EU.
2) the transport sector: a sender, established in country A enters into a contract of carriage of goods with the shipping undertaking Alfa (carrier), established in the territory of Country A. Alfa is therefore obliged to transfer the goods given to it by the sender from one place to another, to carry out the specific carriage operation. Alfa, in relation to a particular time of the year, or within a certain geographical area where the carriage operation commissioned to it shall take place, entrusts the implementation of the transport commissioned by the sender to a different transport undertaking, called Beta, established in another EU country. Beta operates in its domestic territory with its own vehicles and drivers that perform the instructions given by their employer (Beta). Beta is compelled to carry out the assignment received by Alfa.
   The economic operation consists in entrusting the transportation from Alpha to Beta and is achieved through subcontracting the transport.
   With regard to the employment relationships between Beta and its drivers, a Community posting is detected, subject to Directives 96/71/EC and 2014/67/EU.
   The situation does not change if the carriage performed in the interest of the sender foresees the transfer of goods from Country A to another country.
   The economic transaction may fall within the scope of cabotage if the assignment of transportation from Alpha to Beta meets the following requirements:
   - Beta is the holder of a Community license and the driver, if a citizen of a third country, has a driver's certificate;

- Beta is already on the territory of the host country since it has carried out an international transport and, after performing such transport, it carries out up to a maximum of three transports (three loading and three unloading operations) on the national territory of the host country;
- The last cabotage unloading by Beta occurs within the seventh day following the last unloading of the international transport carried out by Beta;
- Cabotage operations can also be carried out in different Member States, provided that they do not exceed the number of three operations and take place within three days from the entrance of the vehicle in the host member state.

Such rules on cabotage are contained in art. 8, Regulation (EC) n. 1072/2009 and their violation entails the adoption of specific sanctions, but does not necessarily imply the unlawfulness of the posting. In other words, even if international rules on cabotage are violated, the discipline of the (genuine) Community posting referred to in Directives 96/71 / EC and 2014/67 / EU could still be applicable.

3) the hospitality sector: a tourist resort belonging to an entity established in country A instructs a service provider established in another EU member state to carry out some of the services that the resort offers to its residents (for example, tourist entertainment, the Spa) and entrusts to specific companies, established in another EU member state, for instance, the entire management of typical hotel activities (for example, room cleaning, meal preparation, guest service during meals, plonge services).
The economic operation that entrusts these services to a third party is realised through a service contract. With regard to the employment relationships of the persons in charge of these services and their workers, this is a case of Community posting subject to Directives 96/71 / EC and 2014/67/EU. The employment relationship between the various undertakings entrusted with the services mentioned above and their workers, who carry them out in the above mentioned resort are regulated by Directives 96/71 / EC and 2014/67 / EU.

3. Q. *WHAT HAPPENS DURING THE INSPECTION IF THE COMMUNITY POSTING DOES NOT RESPECT THE CRITERIA REFERRED TO IN ARTICLES 4.2 AND 4.3, THAT IS, IF THE POSTING IS ABUSIVE AND ELUSIVE?*

A. Article 4 of Directive 2014/67 / EU sets out some "indicators" that, on the basis of an "overall assessment of all factual elements" provide a clear indication that:

- an undertaking, genuinely established in another EU country, temporarily "carries out activities" (i.e. activities other than the mere "internal organizational / administrative activities") in another country;
- a worker (hired) is really posted to a Country other than that in which he normally works, and performs a temporary supply of services in the host Country.

These provisions, in hindsight, are an *authentic interpretation* of the content of Directive 96/71/EC, and therefore, regardless of the deadline for the transposition of the Directive in accordance with article 23 of Directive 2014/67/EU ("transposition"), shall immediately apply.

Article 4, therefore, in proposing an overall assessment of the factual situation on the basis of some indicators determined by the Directive (art. 4.2 and art. 4.3), suggests that the cross-border economic transactions carried out in the form of transnational posting are only apparently a Community posting, as in reality this posting is abusive and / or elusive, and therefore these activities should not be classified as transnational posting.

Therefore, from the point of view of sanctioning and qualifying purposes, an undertaking whose situation highlights, unequivocally, that it does not operate in a situation of transnational posting as defined in Directive 96/71/EC, on the basis of the criteria established pursuant to art. 4 of the new directive, in the light of the "overall assessment of all factual elements", should fall within the application by the supervisory bodies of the entire legislation of the country in which the contract is performed, as it appears from a reading of Article 4 of the new directive. It must be said, in fact, that the above mentioned Art. 4 includes the " prevention of abuses and circumvention," which basically can be traced to the hypothesis of contravention of the law present in many domestic legislations of many EU countries (in Italy, this contractual fraud is governed pursuant to art. 1344 Civil Code).

This solution that “re-positions” the entire economic activity is supported by recital n. 11 that calls for the application of the Rome Regulation I, Reg. (EC) 593/2008, in particular with reference to the mandatory protections, even by the will of the parties, for the worker who operates in a transnational situation. As a logical consequence, therefore, for the protection of the workers concerned, and in opposition to unlawful acts of "social dumping", the national law of the country in which the contract is performed, namely the national law of the country in which the service is carried out, shall apply.

Consequently, with regard to the position of workers in a situation of "abuse and/or circumvention", it is considered necessary to apply the administrative sanctions related to the non performance of the administrative duties involved in an employment relationship in the country of performance of the contract, as well as the payment of social security contributions in that country, with all appropriate civil sanctions. The irregularity however, is not comparable to "undeclared work" and therefore it is not subjected to its related sanctions.

FOCUS 3: BUT IN PRACTICE, WHAT DOES THIS MEAN?

To better understand, see this example already mentioned in the FAQ n.2. Let’s suppose that a formal contract for the provision of cross-border services (in the construction industry, in the transport sector, in the hotel and tourism sector or in another sector) exists - according to what outlined above - between an entity established in country A (the “client”, in this example) and an entrepreneur established in another EU country (the “contractor”, in this example).

It should be noted that in posting operations, pursuant to art. 12 of Regulation (EC) n. 883/2004, the contributions (social security and welfare) and insurance premiums are those of the country in which the contractor is established or, in case of subcontracting, the country in which the subcontractor is established.

Notwithstanding the application of the laws of the country in which the work is performed with regard to wages (see below), this could lead (and in fact often leads) to a non genuine Community posting, aimed at circumventing the payment of contributions, in which an entity established in a country other than Country A just sends workers to that country. These workers, however, in the territory of Country A, do not perform the orders of the foreign entrepreneur/employer and do not fall within its disciplinary power, but perform the orders of the contractor or the local national entity. And therefore the employer of the "posted" staff is essentially the latter.

Basically, the inspection may reveal that the parties in the contract did not want to implement what stated in the contract (i.e. to entrust the realization of the work or service). And therefore it is essential to check the real purpose pursued by the parties.

If, from a comprehensive examination of all facts, it appears that these parties intended to violate the rules in force in the legal system of the host country with regard to a regular establishment of an employment relationship, pension benefits, assistance and compulsory insurance, and thus the workers were given minor protections than those foreseen for the other workers of that country, a situation of abuse or circumvention can be envisaged. As stated above, the assessment of the abuse or circumvention should be considered in the light of the indicators included in paragraphs 2 and 3 of Art. 4 of Directive 2014/67 / EU, after a comprehensive assessment of all relevant facts which must not be considered separately.

Once the abuse is ascertained, the relationship between the local client and the contractor established in another EU country will be re-positioned. In particular, if the workers formally "posted" from an EU country are in reality working for the national contractor, the main consequence will consist in their qualification as workers of the national contractor (the employer established in country A) and this will result in:

- the recovery of social security, welfare and insurance contributions in favour of the relevant social security institutions in Country A (although to do this the supervisory bodies shall first obtain the annulment of any A1 model - on this, see below)
- the application for the employer established in country A of sanctions for violations to the employment relationships.

This situation, however, cannot be considered as "underground work" and therefore cannot be submitted to the specific sanctions foreseen for underground work in the country where services are performed.

4. Q. BUT THEN, IN SITUATIONS OF ILLEGAL / UNLAWFUL TRANSNATIONAL POSTING, DOES THE LAW OF THE HOST COUNTRY PREVAIL OVER THE DISCIPLINE OF TRANSNATIONAL POSTING?

A. Absolutely not. In accordance with art. 4 Directive 2014/67 / EU, the law of the host country applies only for those cases of "abuse and/or circumvention," which the Control Authority can detect on the basis of an "overall assessment of all factual elements". But when in the context

of a genuine transnational posting some specific rules are violated (mostly in areas in which the law of the country of performance applies pursuant to art. 3 Directive 96/71 / EC), the specific set of sanctions established by the law of that specific country of performance shall apply.

FOCUS 4: ITALY

For example, in the case of a violation of the rules on working hours and rest periods, the sanctions referred to in Legislative Decree N. 66/2003 shall apply; in the case of violations of health and safety rules, the sanctions referred to in Legislative Decree N. 81/2008 shall apply; in the case of non-application of the minimum wage set by the National collective labour agreement, this minimum wage shall be replaced with the less used tables of minimum rates, and the formal notice pursuant to art.12 Legislative Decree n. 124/2004 can be also sent to the client by reason of its joint and several liability in this matter (Circular letter /2011).

To better understand, we continue the example shown in the FAQ 2 and 3.

The parties of the service contract (in this example, the contract is a service contract under Article 1655 of the Civil Code) have created a genuine posting not only "on paper" but also in reality, and therefore the supervisory body cannot proceed according to the logic of the "denial" of the transaction formally declared by the client and the contractor and "assignment" of the labour relationship to the false client.

When the posting is genuine, to the workers of the contractor established in another EU country who work on the Italian territory, in compliance with the contract signed with the Italian contractor, shall be applied the working and employment conditions in force in the legal system of the country in which they perform the work (Italy, in this example), as per Art. 3, paragraph 1 of Directive 96/71 / EC, transposed in Italy by Art.3, Legislative Decree N.72/2000.

In fact, when the posting is genuine, posted workers shall be subject to the existing provisions of the law in force in the country where work is performed as concerns the following subjects: a) maximum work periods and minimum rest periods; b) minimum paid annual leave; c) minimum rates of pay, including overtime rates; this point does not apply to supplementary pension schemes; d) conditions of hiring-out of workers, in particular, the temporary supply of workers by temporary employment agencies; e) health, safety and hygiene at work; f) protective measures with regard to working conditions and employment of new or expectant mothers, children and young people; g) equality of treatment between men and women and other provisions on non-discrimination.

To the employer (i.e. the EU contractor), shall apply the consequences provided for by the Italian law for the violation of the above mentioned rules and, in particular, the administrative sanctions and criminal and civil consequences related to wage issues, among which, the notice referred to in Article 12, Legislative Decree N.124/2004. The latter is an act adopted by labour inspectors, with whom the employer is requested to pay the employee according to the applicable collective agreement, and this notice shall be directly enforceable by the Director of the office and then puts the employees in a position to exercise their rights without necessarily generating a court proceeding. This right may also

be exercised against the contracting entrepreneur, resident in Italy, who has joint and several liability as concerns the payment of the wages owed to the workers employed in the contract.

In short, when the contract entered by the parties gives way to a genuine transnational provision of services (genuine posting), for the above mentioned conditions, the workers shall be subject to the rules provided for by the law of the place of performance of the work.

An exception to this rule, as regards the Italian law, is provided by Article 3, paragraph 2, of Legislative Decree N. 72/2000, which states that "the provisions of the law and the collective agreement relating to minimum length of paid annual leave and minimum salary, including increased pay for overtime, **shall not apply in the case of initial assembly work or first installation of an asset, provided for in a contract for the supply of goods, indispensable for operating the assets supplied and executed by skilled or specialized workers of the employment undertaking, if the duration of the work in relation to which the posting was foreseen does not exceed eight days. "**

The rule is applicable again, however, for "*building work (...) concerning the construction, restoration, maintenance, alteration or demolition of buildings, and in particular the following work: 1) excavation; 2) restoration; 3) construction; 4) assembly and disassembly of prefabricated elements; 5) design or equipment; 6) transformation; 7) renewal; 8) repair; 9) dismantling; 10) demolition; 11) maintenance; 12) painting and cleaning; 13) reclamation."* The indication of these activities is provided in Annex A, Legislative Decree. n.72/2000.

5. Q. In which cases shall Directives 96/71/EC and 2014/67/EU apply to road transport?

A. It is not easy to give this question a precise answer shared by all. But leaving aside the issue of normal cross-border transports, in relation to the different assumptions in which significant uncertainties still remain, it is rather possible today to clarify what certainly falls within the scope of application of Community directives on posting. The assumptions on which it is believed that there are no doubts as to the application of Community directive on posting are as follows:

a. **cabotage,** governed under Chapter III of the Regulations 1072/2009 (the recital n. 17, in fact, explicitly provides that 'the provisions of Directive 96/71 / EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, shall apply to transport undertakings which carry out cabotage operations");
b. in case of a contract for **the provision of transport services** (transport services by road permanently organized by the contractor) in which the service is to be performed in a country other than that of establishment (e.g. .: the undertaking ALFA, established in country A, orders a series of transport services to the undertaking BETA, established in country B. The services shall be performed on the territory of country A). This hypothesis is different from cabotage because transport services on the territory of country A are not

necessarily included in cabotage operations within the meaning of Regulation n. 107 2/2009.

c. in case of the supplying of workers (drivers) for domestic transport in country A by an temporary work agency established in a country other than that in which the transport services are performed (e.g. .: temporary work agency ALFA, established in country A supplying drivers to transport company BETA, established in country B, to perform transportation services on the territory of country B). This case, too, cannot be considered as cabotage as explained at paragraph "a.", since such transport services on the territory of country B do not necessarily take place within cabotage operations.

FOCUS 5: STUDY ON THE APPLICATION OF COMMUNITY LAW ON POSTING TO THE TRANSPORT SECTOR

For an in-depth study on this issue, with all the "gray areas" where it is not clear whether or not the EU directive on posting can be applied, please refer to the Final Report of the document "The inspection activity within transnational posting of workers in road transport: a guide for Control Authorities (TRANSPO Project, Ref .: VS / 2010/0624), "Sec. I, Chap. I.1 (available on the web in http://www.tagliacarne.it/P42A0C14S42/Road-transport-sector-and-Posting-of-workers.htm).

6. Q. WHICH DOCUMENTS SHOULD BE PRESENT ON THE WORKPLACE, IN ORDER TO FACILITATE AND SPEED UP CONTROLS?

A. For a faster check of the documentation certifying the regularity of the employment status of posted workers, in particular in order to verify that the situation is not one of undeclared work, nor a situation of illegal provision of services (art. 29, paragraph 1, of Legislative Decree n. 276/2003), the following documents shall be made available on the place of performance of the services, already during the inspection or at a time immediately following it:

a. commercial contract under which the undertaking operates in the country of performance of services although not being established in it (e.g. contract / subcontract, contract / subcontract of carriage, logistics contract, contract of temporary provision of employment, etc..).
b. A1 models of the workers concerned;
c. If possible, pay slips already processed or the documentation needed to prove the payment of wages and the relative amount (in practice, if the job lasts at least a month and the inspection occurs after the preparation of the pay slip),
d. documentation relating to health and safety (depending on the situation, Risk Assessment Report “RAP”, OSP, health monitoring, etc.).;

For the construction sector, the undertaking performing the work must also demonstrate the payment to the “Building Funds”, if they exist in the country of origin.

7. Q. WHICH DOCUMENTS ARE NORMALLY REQUESTED DURING THE INSPECTION IN CASE OF TRANSNATIONAL POSTING?

A. The Ministry of Labour has already made available the following document: "The posting of workers in the European Union - Instructions for use for the inspection staff" (available via web at http://www.lavoro.gov.it/md/AreaLavoro/Vigilanza/Documents/Vigilanza/Vademecumdistaccocomunitario.pdf). This document contains a checklist of documents that the labour inspector may request during the inspection. The following is a copy of this list.

FOCUS 6: CHECKLIST

1) *A1 Models;*
2) *List of posted workers. Many countries already require a prior declaration to be made to the competent authorities in the field of labour inspection. Even where, as in Italy, this rule is not yet part of the Italian set of laws, it is however possible to make a request (in Italy, according to art.14 Legislative Decree n°. 124/2004) to the EU employer to deliver a "list of posted workers", stating the estimated period of posting;*
3) *Advance notification of posting abroad, if compulsory in the country of origin (as in the case of Romania);*
4) *ID of workers (to be requested already on first inspection);*
5) *Individual contract of employment of posted workers and any letter of recruitment, as this is the European standard;*
6) *Notice of recruitment - public records - or equivalent documentation (according to the legislation of the country of establishment of the employer);*
7) *Chamber's Certificate of Incorporation of the undertaking (according to the legislation of the country of establishment), in order to verify the technical – professional qualifications;*
8) *Commercial contract between the posting undertaking and the receiving undertaking: procurement, transport, (temporary) supply of employment, and so on.;*
9) *In the field of safety and health at work, the rules on health surveillance and information/training of workers shall apply. As concerns the former, it is possible (necessary) to request the medical certificate attesting to the suitability to the tasks (if required by the rules of the country of performance). Also the medical certificate issued by the competent medical authority of the country of establishment can be accepted and therefore can be obtained during the inspection. As for the compulsory documentation required for security purposes, the EU undertaking operating in the construction sector, where the regulations of the country of performance require it, must submit the appropriate risk assessment documentation (in Italy, the OSP - Operational Safety Plan).*
10) *Pay slips (or equivalent document in the country of establishment). Also pay slips signed by the workers can be shown, so that the workers can at least recognize them as delivered and as showing the data of their salary;*
11) *Attendance sheet (or equivalent document in the country of establishment);*
12) *Any administrative permissions of the country of establishment (e.g. temporary employment, personnel selection);*
13) *For non-EU workers operating in EU undertakings under the regime of transnational posting: residence permit issued by the Authority of the EU country of establishment;*

14) *This case falls within the scope of the law of the country of performance as concerns the employment of minors, as this is a compulsory law to be applied;*
15) *Invoices of the EU undertaking to the contractor undertaking established in the country of performance;*
16) *In the case of road transport: Tachographs, in order to detect working hours and breaks, for possible sanctions.*

8. Q. WHICH DOCUMENTS ARE NORMALLY REQUIRED TO PROVE THE REGULARITY OF EMPLOYMENT IN THE COUNTRY OF ORIGIN?

A. The employment relationship of posted workers should be regularly established according to the rules of the country in which the employee normally works and where the undertaking for which he works is located. As a result, the labour inspector shall make a request to the public institutions of the country of origin of the employee to obtain his notice of recruitment, and these are the institutions that according to the national law of the country of origin of the employee are responsible for receiving the compulsory notices of recruitment. Model A1, then, can replace this notice, as it demonstrates that a control in this sense has already been made by the National Authority of the country of origin that issued Model A1. In addition, the labour inspector may request a copy of the letter of recruitment (obligation to provide information pursuant to Directive 91/533/EEC) and the notice of posting (if required by law in the country of origin).

9. Q. WHICH DOCUMENTS MAY BE REQUESTED TO DEMONSTRATE THE ADEQUACY OF THE SALARY?

A. Directive 2014/67 / EU, Art.9.1.b states that during the inspection both pay slips (in use in the country of origin) and "evidence of the payment of wages" can be requested. The request of inspectors about the relevant bank records (bank transfers) does not therefore appear to exceed what stated in the new directive.

10. Q. WHICH DOCUMENTS MAY BE REQUESTED IN THE FIELD OF HEALTH AND SAFETY AT WORK?

A. The normal documentation that would be requested to a local undertaking in a similar case. Of course, with regard to health surveillance and training, documents proving its normal performance in the country of origin must be accepted.

FOCUS: ITALY FAQ

IT 1. Q. SHALL THE RULES OF THE ITALIAN NATIONAL COLLECTIVE LABOUR AGREEMENT (WORKING HOURS, HOLIDAYS, OVERTIME, WAGE SUPPLEMENTS, ETC.) BE ALWAYS RESPECTED?

A. Article 3.1 of Directive 96/71 / EC does not require the application of the National Collective Labour Agreement as concerns its rules of "general application". This principle does not apply even in the Italian law. Indeed, in Italy, the opposite principle of freedom of association applies, so that the national collective labour agreements concluded by the most representative organizations are of general application only as concerns the minimum wage established therein, by reason of a consistent interpretation of the law that identifies in them the practical application of Art. 36 of the Italian Constitution.

The statement contained in art. 3, paragraph 1, of Legislative Decree N. 72/2000, for which to workers operating under EU posting shall be applied "the same working conditions" set by the Italian law, and the more representative national collective labour agreements, must be understood in a manner consistent with Community law and the case law of the Court of Justice, namely in a restrictive way, that is only in reference to the matters referred to in art.3.1 Directive 96/71 / EC.

Basically, therefore, by virtue of the principle of freedom of association that exists in our system, the Italian National Collective Labour Agreements, and in particular those concluded by the most representative trade union organizations, apply to the transnational posting only in reference to the minimum wage and not for other issues covered by the provisions of the contract (holidays, working hours, etc..), as the minimum wage required by the national collective labour agreement "is generally applicable to all undertakings" (art.3.8 Directive 96/71 / EC). It can be assumed that the remuneration aspects also include increases related to overtime, night work, holidays, etc.., according to what stated in the Directive, which explicitly includes in the minimum wage also "overtime rates."

However, the Italian laws (and regulations) relating to the issues covered by art.3.1 Directive 96/71 / EC (e.g. working hours and rest periods) shall be applied to workers under transnational posting.

IT 2. Q. SHALL A CONSTRUCTION COMPANY OPERATING IN ITALY UNDER THE TRANSNATIONAL POSTING IN THE PERFORMANCE OF A CONTRACT (OR SUBCONTRACT) NECESSARILY REGISTER WITH THE BUILDING FUNDS?

A. The requirement to register with the Building Funds in the Italian law also covers areas directly related to the determination of the minimum wage. Therefore, it is generally considered that the registration is compulsory also for those undertakings that operate in a situation of transnational posting, unless they have entered into a mutual recognition agreement between the Italian Building Fund and a similar system existing in their country. However, as already highlighted in the answers to questioning n. 24/2007 and n. 6/2009, in the case of undertakings operating in Italy with their employees in a transnational posting regime "for the EU undertakings that obligation arises only in cases where they have not already in place with a public or contractual body those obligations aimed at ensuring the same standard of protection resulting from the discipline imposed by the contractual provisions in force in our country". It should be noted also that on this issue the AVCP (Authority for the Supervision of Public Contracts) – now called ANAC – in a document relating to the DURC (statement of

correct fulfilment of welfare contribution obligations) (available at http://www.avcp.it/portal/public/classic/FAQ/FAQ_durc), referring to the above questioning by the Ministry of Labour n. 24/2007 and n. 6/2009, expressly refers to their content.

IT 3. Q. WHICH ARE THE OBLIGATIONS OF NON EU UNDERTAKINGS OPERATING ON THE ITALIAN TERRITORY IN RELATION TO THE DURC? (QUESTIONING BY THE MINISTRY OF LABOUR N. 24/2007 AND N. 6/2009).

A. Non-EU undertakings operating the posting of their workers on our national territory have the obligation to register with the Building Funds and are consequently obliged to get a DURC, while for EU undertakings this obligation exists only if they do not have already in place with a public or contractual body those requirements designed to ensure the same standards of protection resulting from the discipline imposed by the contractual provisions in force in our country.

Basically, the issue can be summarized as follows: for non-EU companies registered with the Italian Building Fund (or having a bilateral convention), such registration allows the issuing of the DURC, while in all other cases the relevant social security institution in the country of establishment shall produce a statement of correct fulfillment of welfare contribution obligations substantially equivalent to our DURC.

IT 4. Q. SHALL THE JOINT AND SEVERAL LIABILITY ESTABLISHED BY ART. 29, PARAGRAPH 2, OF LEGISLATIVE DECREE N. 276/2003 APPLY TO THE CONTRACT OF CARRIAGE?

A. No, because Art. 29, paragraph 2, of Legislative Decree N. 276/2003 refers to work contracts and not to contracts of carriage. In Italy, in fact, the work contract (article. 1678 civil code) is separated from the contract of carriage (article 1655 civil code). However, for the application of joint and several liability pursuant to Art. 29, paragraph 2, of Legislative Decree N. 276/2003, the Circular Letter MLPS n. 17/2012 stipulates that work contracts for transport services differ from those of carriage as in the former "a series of transports are planned to achieve an overall result to which the parties are mutually bound by a single contract, so that these operations take on the character of continuous supplies, to meet which the carrier must organize the resources required by the specific terms of the contract".

FOCUS: ROMANIA FAQ

RO 1.Q. HAS THE TERM "POSTING" PROVIDED BY DIRECTIVE 96/71 THE SAME MEANING AS THE TERM "POSTING" (SECONDMENT) REGULATED BY THE ROMANIAN LABOUR CODE (LAW 53 FROM 2003)?

The answer is NO.

In the Romanian's labour relation area, the term *posting* (*detaşare*) has different meanings, though all refer to some form of workers' mobility.

In the *Labour Code, posting* means a temporary cession of the labour contract between two employers, through a suspension of the employment relationship with the first employer and the temporary carrying out the work to the benefit of the second employer. In contrast, in

Directive 96/71, posting means a temporary relocation of workers who maintain their labour relations with the first (and only) employer.

RO 2.Q. SHALL A ROMANIAN EMPLOYER POSTING WORKERS ABROAD COMPLY WITH THE PROVISIONS OF ROMANIAN LAW 344 OF 2006 OR WITH THE PROVISIONS OF DIRECTIVE 96/71 AND DIRECTIVE 2014/67?

The answer is: with none of these.

Concerning the minimum package of working conditions from the temporary place of work host Member States (MS): national laws transposing *Directive 96/71*. In the same manner, regarding the administrative obligation abroad, host MS: national laws transposing *Directive 2014/67* apply. At the same time, the provisions of the *Romanian Labour Code* are still applicable to the entire labour relationship for the protection of the Romanian workers.

Law 344 is applicable to the other MS employers who post workers on the Romanian territory. The *Directives* are not directly applicable in any MS, but are important to understand the principles contained by all national laws of transposition.

This is the reason of the crucial importance of the prior, precise and complete information concerning the provisions of the law in the MS where the service will be provided and the workers will be posted.

RO 3.Q. IN CASE OF POSTING OF WORKERS, CAN AN EMPLOYER BE INSPECTED BY AUTHORITIES FROM HOST/HOME MEMBER STATE (MS)?

The temporary relocation of workers within posting involves at least two national territories. Inspections on labour relations and health and safety of posted workers are conducted by the authorities of the host MS as well as those of the MS of origin, separately, in cooperative investigations, or with exchange of information. Powers of control differs from a Member State to another, so an inspection in a MS can correspond to two or three inspections in another MS.

The prior communication / declaration to the host MS authority, the responsibility and obligation of the service beneficiary to make available to inspectors all papers and documents (relating to the posting of workers), the possibility of obtaining them after a period of time, and the cooperation with the authorities of the MS of origin, are monitoring and control mechanisms.

RO 4.Q. DOES THE LACK OF THE A1 PORTABLE DOCUMENT MEAN THAT THE POSTING OF WORKERS IS ILLEGAL?

In case of a transnational posting of workers, at least three levels of norms and institutions occur. These are at the same time linked and separated. Linked, because they refer to a same unique fact (the labour relation underpinning the posting within the EU). Separated, because they concern different administrative systems: labour relations, social security and taxation systems.

Directive 96/71 and Directive 2014/67 regulate the working conditions of workers in case of temporary relocation to another MS. Regulation 883/2004 and portable document A1 attest the mobile worker's affiliation to a national social security system. Tax legislation concerns the

taxation of income and avoidance of double taxation between MS. The lack of the document A1 does not mean illegal or fraudulent posting, however, it represents a violation of the social security system.

FOCUS: GERMANY FAQ

B. Q. WHICH DOCUMENTS DO THE AUTHORITIES IN CHARGE OF CONTROLS GENERALLY REQUIRE IN ROAD TRANSPORTS?

In the context of drivers' controls, the presentation of the following documents is generally required: passport or identity card, driver's license, transport documents (e.g. CMR), licenses, dials or printouts of digital recording equipment, social security documents (e.g. posting certificate A1).

In principle, the primary goal of these controls is to find out where and how the driver has been hired, i.e. in which country the employer maintains- at least formally - it's operation and if the driver is also properly registered within the social security system there.

If it is a German employer, the verification using the available online database is very easy. However, in the case of a supposedly posted worker, the matter is more complex.

If the allegedly posted driver is able to present the certificate of posting (A1 certificate), the Authorities are able to check using an online database if the certificate was issued for the driver in the country of origin. Otherwise, an appropriate deadline for submission is set.