ENFOSTER Project
(ENFOrcement STakeholders coopERation)

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

SUMMARY REPORT
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• 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.
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Summary

Introduction

*by Debora Giannini**

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: Foundation 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

* "Istituto Guglielmo Tagliacarne" Foundation – Coordinator of the Enfoster Project.

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 spe-

cific 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**.

The contents of this summary report

This report provides a summary of the main project's findings that partners reported in the above mentioned "Enfoster Briefs". It is based on extracts taken from the full version of the "Briefs", and as such, does not represent the full thought of each of the authors.
The reader is therefore invited to consult the full text of the "Enfoster Briefs" available at: http://enfoster.tagliacarne.it, to know the full thoughts of the authors.
This report is structured in three sections corresponding to the three "Enfoster Briefs":

- Section one is based on *Brief no. 1 on "Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation"*
- Section two based on *Brief no. 2 on "Responsible Posting of workers within the EU: actions by Unions, answers by control authorities"*
- Section three based on *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".*

Section 1
Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation*

1. The social partners for the transnational protection of posted workers in the construction industry**

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.
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.
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.
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

* This section is based on some extracts of the report called *Brief no. 1: "Posting of workers within the EU: some practices and reflections about social dialogue and administrative cooperation".*

** Summary based on Chapter 1 of "Enfoster Brief no.1", written by Francesco Lauria (CISL, Italy). In order to know the full thoughts of the author please refer to the full text of the "Enfoster Brief no. 1" that is available at: http://enfoster.tagliacarne.it

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 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.
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*

Arbeit und Leben Berlin is a non-governmental organisation affiliated to the trade unions working in the field of political education[1] and supported by the German Trade Union Confederation (DGB). Both are responsible for the Counselling Office for posted workers in Berlin, which represents a meaningful practice of social dialogue and inter-institutional cooperation for the enforcement of posting legislation.

* Summary based on Chapter 2 of "Enfoster Brief no. 1, written by Doritt Komitowski (Arbeit und Leben .V. Berlin, Germany). In order to know the full thoughts of the author, please refer to the full text of the "Enfoster Brief no. 1" that is available at: http://enfoster.tagliacarne.it

[1] http://www.berlin.arbeitundleben.de/

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.

3. How the social dialogue has solved a critical case for workers in the air transport sector*

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 been paid in Germany.
These conditions lasted several years. According to the Posted Workers Directive

* Summary based on Chapter 3 of "Enfoster Brief no. 1, written by Monika Fijarczyk (Arbeit und Leben .V. Berlin, Germany). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 1" available at: http://enfoster.tagliacarne.it

(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 he 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.
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 aw (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 Regulation3922/91 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 ab-

sence 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. Administrative cooperation on posting of workers through the IMI system: the experience of the Romanian Labour Inspection and of the Italian Ministry of Labour*

The EU Directive 2014/67, the so called "Enforcement Directive" at par. 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.
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.

* Summary based on Chapter 5 of "Enfoster Brief no. 1", written by Iolanda Guttadauro (Italian Ministry of Labour and Social Policies), Simona Iuliana NEACȘU and Cătălin ȚACU (Romanian Labour Inspection). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 1", available at: http://enfoster.tagliacarne.it

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

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.
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).

Section 2
Responsible Posting of workers within EU: actions by Unions, answers by control authorities*

1. Combating non-genuine Posting: Corporate Social Responsibility and Union Monitoring**

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

* This section is based on some extracts of the report called Brief no. 2 on "Responsible Posting of workers within EU: actions by Unions, answers by control authorities".

** Summary based on Chapter 1 of "Enfoster Brief no.2", written by Francesco Lauria (CISL, Italy). In order to know the full thoughts of the author, please refer to the "Enfoster Brief no. 2", available at: http://enfoster.tagliacarne.it

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. 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.[2] This 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.[3] A central area of discussion in these industry-specific alliances is the issue of cross-border services and the posting of workers.[4]
The Berlin and Brandenburg Alliance for Rules for Construction (*Berliner und BrandenburgerBündnisfürRegeln 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), 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.[5] Every member can

* Summary based on Chapter 2 of "Enfoster Brief no. 2" written by Bettina Wagner (Arbeit und Leben Team, Germany). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 2", available at: http://enfoster.tagliacarne.it.

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

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

[4] https://www.igbau.de/Binaries/Binary3546/Bericht_Schwarzarbeit_Bekaempfung_16_13768.pdf

[5] 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

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.[6] 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.[7]
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.
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 (Ver.di), 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, the Federal Office for Freight Transport and the Financial Control of Illegal Work are also part of the alliance.[9]

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

[7] 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

[8] heute das Bundesministeriums für Verkehr und digitale Infrastruktur www.bmvi.de

[9] http://www.bundesfinanzministerium.de/Content/DE/Monatsberichte/Publikationen_Migration/2006/06/060620agmb008.pdf?__blob=publicationFile&v=3

3. The experience of SOKA-BAU (Germany)*

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. 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.

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4. Questions and answers on the Transnational Posting of Workers in the European Union in accordance with The Directive 96/71/ EC and the Directive 2014/67/ EU*

The chapter within the Enfoster Brief no. 2 on "Responsible Posting of workers within EU: actions by Unions, answers by control authorities" provides 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.
To learn more or to clarify some of the answers, some "Focus boxes" have been prepared. Some "Focus boxes" are useful to analyze the theme more in depth, regardless of the country in which inspections are carried out; some other "Focus boxes" refer specifically to the Italian legislation or inspection practice, 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.
Some of the key-questions you can find answers to in chapter 3 of the Enfoster Brief no. 2 are:

- *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?*
- *Can you define the meaning of transnational posting as expressed by Directive 96/71/EC?*
- *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?*
- *But then, in situations of illegal/unlawful transnational posting, does the law of the host country prevail over the discipline of transnational posting?*
- *In which cases shall Directives 96/71/EC and 2014/67/EU apply to road transport?*
- *Which documents should be present on the workplace, in order to facilitate and speed up controls?*
- *Which documents are normally requested during the inspection in case of transnational posting?*
- *Which documents are normally required to prove the regularity of employment in the country of origin?*
- *Which documents may be requested to demonstrate the adequacy of the salary?*
- *Which documents may be requested in the field of health and safety at work?*

* Summary based on Chapter 3 of "Enfoster Brief no. 2" that has been written by Davide Venturi in cooperation with 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). The full text of the "Enfoster Brief no. 2" is available at: http://enfoster.tagliacarne.it

Section 3
Transnational Posting of Workers within the EU: emerging challenges and opportunities in the light of Directive 2014/67/EU*

This section in based on the "Enfoster Brief no. 3 - Policy Brief" that provides a summary of information, perspectives, point of views collected by the Enfoster's partners about the emerging challenges related to the enforcement of the posting legislation in the light of Directive 2014/67/EU: which is the point of view of control authorities? Which is the position of social partners? Positions, reflections, warnings reflect the situation at the time of drafting of this part of the project report (i.e. end of 2014), only few months after the approval of Directive 2014/67/EU and in the middle of the challenge of the transposition at national level.

1. Directive 2014/67/EU: main issues and transposition problems for the Member States. Opportunities and critical issues, possible solutions and open questions**

Directive 2014/67/EU was published on May 28, 2014. It is aimed at enforcing Directive 96/71/EC on the posting of workers and at amending EU Regulation n. 1024/2012 on administrative cooperation (IMI). The claim for a new directive on the posting of workers was widely expressed by the European institutions: Parliament (Resolution 2008/2085 (INI) of October 22, 2008), Commission (proposal "COM (2012) 131 final 2012/0061 (COD)" of March 21, 2012), as well as by Member States and by Social Partners. In fact, it was commonly considered that Directive 96/71/EC needed enforcement, on the one hand, because of the objective problems related to the diffusion of abusive commercial practices of social dumping, and, on the other hand, the European regulation on the posting of workers often encountered national protective measures in contrast with the European rules.

The case of fraud, abuse and circumvention and the application of Regulation n. 593/2008 (Rome I)

A preliminary concern of Enfoster partners was the perspective, explicitly introduced by Directive 2014/67/EU, on preventing that fraudulent transnational commercial practices, carried out through abuse and/or circumvention of EU law, could benefit from the opportunities of the EU posting regulation. Therefore, in case of fraud, abuse and/or circumvention, neither Directive 96/71/EC nor Directive 2014/67/EU

* This section is based on some extracts of the report called Brief no. 3 "Transnational Posting of Workers within the EU: emerging challenges and opportunities in the light of Directive 2014/67/EU".

** Summary based on Chapter 1 of "Enfoster Brief no. 3 – Policy Brief" written by Davide Venturi - Adapt Senior Research Fellow. In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 3", available at: http://enfoster.tagliacarne.it

shall apply. In fact, the subject matter of the new Directive (art. 1.1) introduces the provision of "measures to prevent and sanction any abuse and circumvention", defined by the indicators set in Art. 4.2 and Art. 4.3. These indicators, set up in order to achieve "a common interpretation" (recital 7) of genuine posting practices throughout Europe, should be interpreted by the "competent authorities" (see Art. 2.a) on the basis of "an overall assessment of all factual elements" (Art. 4.1).
Once fraudulent practices (as well as abuse and/or circumvention) are assessed by the competent authorities on the basis of the indicators provided for in Art. 4.2 and Art. 4.3, the consequences are as follows (see recital 11):
a. Application of the national law of the Member State where the provision of services is performed, as long as the fraudulent/abusive practice has no genuinely transnational character;
b. or, once established a "conflict of national laws" (transnational contract), have recourse to Regulation 593/2008 (Rome I), and in particular to the provisions of Art. 8.1 on the protection of the workers involved.
The explicit reference to the non application of the EU regulation on posting in case of fraud, abuse and circumvention is a main achievement of the new Directive. However, it should be noted that, in other fields such as tax legislation, this principle has already sound legal basis in the interpretation provided by the CJEU, whose legal reasoning could be extended also to fraudulent/abusive posting.
Having discussed the main points of Directive 2014/67/EU, the partners of the Enfoster project, (the public authorities as well as the social partners) started a debate on its principal innovations, critical matters and opportunities of the transposition process. The main questions still open are:

Art. 4 – genuine posting and prevention of abuse and circumvention: How to afford the transposition process, with specific concern on the enforcement (sanctions) of the provisions on fraud, abuse and circumvention? How to reconcile an effective fight against fraud practices and the principle of the free provision of services? Will the new clear regulatory position against fraud, abuse and circumvention promote a new trend of mutual trust among MSs in tackling genuine posting? Under what circumstances?

Art. 5 – access to information: What type of information shall be considered necessary? What is the Member State responsibility when some "necessary" information should not be "clearly" available on each national website? What does it happen in case of sanctions imposed to an undertaking and some information is claimed to be not sufficiently "clear" and/or easily available? What is the role of the social partners in the provision of information on posting?

Art. 9 and Art. 10 – administrative requirements and control measures: Inspections: to which extent any "other administrative requirement" or control measure can be considered "justified and proportionate"? Shall this lead to increased political/judicial conflicts at EU level? What are the risks related to an "open list" whose choice is left to the MS? Shall this lead to new protectionist measures? How can this be avoided?

Art. 12 – subcontracting liability: Is joint and several liability effective in posting? Or, is it just a way to replace the responsibility of the EU employer with that of the subcontracting company established in the country of execution of work? Can "due diligence" systems be effective? Under what circumstances?

2. The new Enforcement Directive: challenges and opportunities from the point of view of the Italian Control Authorities*

Directive 96/71/EC was transposed into Italian law by Legislative Decree 25 February 2000 n.72 ("*Implementation of Directive 96/71/EC on the posting of workers in the framework of the provision of services*"),[10] issued by the Government upon mandate of the Parliament according to Community Law of 1998, whose provisions shall be supplemented and amended in the light of the changes introduced by the *Enforcement* Directive (2014/67/EU).
In fact, an examination of the new Directive shows legal provisions particularly relevant in the field of inspection that necessarily require to be transposed in the national law of each Member State; other rules, however, are **directly applicable** in the national law as they can be qualified as **authentic interpretation** with respect to rules and precepts already in force and adopted by the Member States pursuant to Directive 96/71/EC.
The articles analysed here below are, in our opinion, among the most significant provisions for the control action pertaining to the inspection staff (Articles 6, 9, 4 and 12).

Article 6 – Cooperation between national authorities responsible for the posting – Request for information
The enforcement of Article 6 requires the provision **–** through administrative channels – of some operative clarifications related to the dual deadline set for the requests for information, in order to make timely and effective the cooperation between the concerned Member States, and to implement all organizational arrangements of territorial labour offices and local provincial offices of the Italian Ministry of Labour and Social Policies, competent to carry out the supervisory activities in the field of labour and social legislation.
With reference to the first deadline of **2 working days** from receipt of the request, given the particularly stringent time limit in question, it is necessary to point out that not all the relevant information aimed at verifying the actual incorporation of an undertaking in the country is available on the databases that the inspection staff of the aforementioned Territorial Offices can consult. Therefore, it is believed that urgent requests to be evaded within two days can only concern that information contained in the following systems: **InfoCamere**, **Sistema Informatico per le Comunicazioni Obbligatorie** (Information System for Compulsory Communications), **INPS database**.
To this end, we underline the need to implement the IMI system at national level by extending its participation to other bodies such as the Revenue Agency.

* Summary based on Chapter 2 of "Enfoster Brief no. 3 – Policy Brief" written by a working group at DGAI – General Direction Inspection Activities of the Italian Ministry of Labour and Social Policy: Antonio Allegrini, Roberta Fabrizi, Sonia Colantonio, Mariagrazia Lombardi, Marina Strangio. In cooperation with: Massimilano Mura, Fabrizio Nativi, Davide Venturi. The full text of the "Enfoster Brief no. 3" is available at: http://enfoster.tagliacarne.it. (Original version in Italian).

[10] The Legislative Decree n. 72/2000, implementing Directive 96/71, significantly extends its scope of application in two respects: with regard to working conditions, not limited to the list of topics contained in the Directive, and with reference to collective bargaining as a source of these conditions, not limited to the construction industry only. In the case of domestic procurement, a non-transposed provision of this Decree, already present in the Italian law, provides that the posted worker be granted the same legal and economic treatment of the employees of the client company which, furthermore, is jointly and severally responsible for such treatment.

With regard to **urgency reasons**, which shall be clearly indicated in the requests made by Member States, it is believed that these reasons **can be found only** where there are indexes detecting pathological phenomena such as an illegal employment of significant economic-social impact (due to the number of workers involved or days of irregular employment); serious infringements to health and safety regulations on the workplace; cases of labour exploitation and use of children where prohibited by law and other significant criminal offenses.
No specific criticalities arises, however, for the "usual deadline" of **25 working days** from receipt of the request for information, which covers all other cases, including those **involving investigations or inspections.** In light of the foregoing, in cases of emergency requiring an inspection, effective cooperation between Member States could be achieved through two successive stages of action. First, within a maximum of 2 working days, all requests for information that can be obtained from the databases available at Offices shall be dealt with, with the right reserved – within a maximum of 25 working days – to carry out all investigations and inspections deemed necessary.
Finally, please note that, because of the implementation of the new Directive, **the IMI system** necessarily becomes the strategic tool to achieve an effective cooperation between national authorities responsible for labour supervision.

Article 9 – Administrative requirements and control measures
The examination of Article 9 of the new Directive clearly shows the importance of the inspection for the purposes of the provisions contained therein. The first part of the rule, with general requirements, provides for a list of typical control measures which Member States may introduce to ensure the verification of the authenticity of the posting, as well as the protection of working conditions for posted workers.
In particular, the above mentioned list is an illustrative and not an exhaustive one, and contains a list of control measures that Member States may impose without the need to subordinate them to the so-called proportionality/compliance principles, unlikely other control measures, additional to those listed in paragraph 1, in accordance with paragraph 2 of the same provision. With respect to these additional measures (paragraph 2), Member States are required to undergo a prior test of "justification" and "proportionality" in order to ensure their conformity with Union law.
In short, based on the above mentioned Art. 9, Member State may impose:

- "In particular", the control measures identified in the list included in the second part of paragraph 1 of Article. 9, without the need of the so-called proportionality/compliance with Union law (typical measures - second sentence, paragraph 1, letters from a) to f)).
- "Only" administrative requirements and control measures not contained in the list, necessary to ensure an effective supervision, provided they are justified and proportionate in accordance with Union law (first sentence of the 1st paragraph).
- Additional administrative requirements and control measures to those typical and atypical referred to in paragraph 1, in case of new situations or new developments showing that the existing administrative requirements and control measures are insufficient and inefficient for an effective supervision, to be communicated to the Commission which shall assess their compliance with Union law (2nd paragraph). These measures must, however, aim at "ensuring an effective monitoring of compliance with the obligations laid down in this Directive and Directive 96/71/EC" (first sentence, 1st paragraph), and not be the expression of national protectionist principles.

With regard to those typical measures identified in the list, we highlight the importance of introducing, through transposition into national law, in countries where this is not already present, the obligation for the service provider to make a prior declaration of posting to the competent national authorities of the host State, in the official language or any other language accepted by the latter, containing information relating to the identity of the service provider, the expected number and identification of posted workers, their workplace address, the type of services justifying the posting, and the contact persons.
With particular reference to the prior declaration of posting – to be presented, at the latest, at the beginning of the provision of service – the possibility shall be evaluated to create a special platform so that companies established in another Member State could carry out this requirement by electronic means and in a *user-friendly* manner, as required by the Directive itself, or shall use already existing IT systems.
When transposing all this into national law, it is also necessary to predispose an appropriate regime of administrative sanctions in order to ensure the fulfillment of the obligations created by the rule in question and, therefore, improve the impact of the supervisory action.
In contrast, with regard to the atypical measures referred to in Article 9.1 and the additional measures mentioned**,** in Art. 9.2 of the Directive, the national legislation transposing the Directive must first list such measures and then – with reference to the latter – identify the condition in the presence of which it is possible to implement them.
A tentative list of administrative requirements to be introduced, which meets the requirements of the supervisory bodies of our country, is contained in the table below.

Additional measures to be introduced by national legislation transposing the Directive
The obligation, during the period of posting, to make or keep available and/or retain the following documents in an accessible and clearly identified place in the territory of the host State: *1.* E101-102 Forms and/or A1 Forms (Focus on INPS) *2.* Document identifying the workers (to be requested already on first access)/ID Card *3.* Any letter of employment, as this originates from a European law (Legislative Decree of 26 May 1997 no. 152 – Implementation of Directive 91/533/EEC on the obligation of the employer to inform employees of the conditions applicable to their contract or employment relationship) *4.* Declaration of hiring – public registration – or equivalent documentation (according to the legislation of the country of establishment of the employer) *5.* Certificate of Incorporation of the undertaking (according to the legislation of the country of establishment), in order to verify its technical-professional competence *6.* Commercial contract between the posting company and the host company: procurement, transport, employment services (temporary), and so on. *7.* Any administrative authorizations of the country of establishment (e.g., in the case of employment services, personnel selection) *8.* Driver attestation for the transport sector *9.* Certificate of affiliation to the Construction Workers' Social Security Fund (or equivalent document) for the construction sector

The above documents may be requested by the inspectors if elements hinting at the existence of a case of fake posting are detected in the investigation. This is our understanding of the words "*justified and proportionate*", contained in this Directive. In this way, the possibility of enforcing optional measures to be identified by the national legislation would be triggered whenever some of the facts set out in Article 4 of the Directive in question should arise and not allow, however, to qualify the employee as a posted worker within the meaning of Directive 96/71/EC.
As these are only indicative, and not mandatory elements, and can be considered only as part of an overall assessment of the case, it is considered appropriate that a certain amount of discretion be left to the supervisory bodies regarding those investigations, without the need for further specification of the requirements of Art. 4 of the Directive by the appropriate national legislation transposing it.

Article 4 – Key facts aimed at identifying a genuine transnational posting
The rule is silent with regard to the penalties applicable in the event of a fake posting. Therefore, in the transposition of the new Directive, it seems useful to clarify, first of all, that the Directive 96/71 does not apply, and therefore the worker must be considered as employed in the territory of the host State, as well as the main sanctions in the event of detection and assessment of a fake posting according to Art. 4. In this regard, in Italy it is considered appropriate to recall the national systems of penalties, both criminal and administrative, contained in Art. 18 of the Decree n. 276/2003, applicable in case of suspected illegal employment, and fake posting and contract. That provision, as a compulsory rule, would apply irrespectively of the national law which governs employment contracts.

Article 12 – Subcontracting liability
The extent of liability referred to at paragraph 1 may concern:
- remunerations to be paid to posted workers (to the extent corresponding to the minimum rates of pay provided for in the place of performance of the service);
- contributions and insurance premiums owed to social security and insurance funds or institutions.

The measures for subcontracting chains may be provided by Member States as additional or replacement measures with respect to the employer responsible for the transnational provision of services, and in any case must comply with the principles of non-discrimination and proportionality.
The term "transnational provision of services" means the case made pursuant to Art. 1, paragraph 3, letters a), b) and c) of Directive 96/71/EC, with the exceptions indicated. The scope of responsibility for subcontracting is set by Art. 3 of Directive 96/71/EC (see, in particular, the exclusion of "initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days", set for in Art. 3, paragraph 2 of the above mentioned Directive).
The activities mentioned at point 2 of the table are those listed in the Annex to Directive 96/71/EC and include all activities in the construction industry relating to the construction, repair, maintenance, alteration or demolition of buildings, and, in particular, excavation work, accommodation, construction, assembly and dismantling of prefabricated elements, fitting out or installation, alteration renovation repairs, dismantling, demolition, maintenance, painting and cleaning work, improvements.
Directive 2014/67/EU, Art. 12, par. 3, provides that the liability of the subcontract shall

be limited to workers employed in the provision of services inferred in the contract between the contractor and his/her subcontractor. It seems that the limitation of liability to the sole periods in which the provision of services has taken place is implicit.
It should be noted that, pursuant to Art. 12, paragraph 4, the Member States, when implementing Union laws on liability in subcontracting, can:

- provide for more stringent rules, while respecting the principles of non-discrimination and proportionality;
- extend the scope of liability to areas other than those referred to in the Annex to Directive 96/71/EC.

A final, but no less important reflection on the foregoing reasoning concerns the due diligence, mentioned in Art. 12, paragraph 5. Based on this general provision, Member States, when implementing it, shall define the monitoring and control practices and procedures planned and implemented by the contractor of the transnational service, involving the overall compliance of the subcontractor, which may held the contractor not liable for the subcontract. The provisions of Art. 12 of Directive 2014/67/EU give way to important reflections on the specific methods of implementation of the Directive, under the objective and subjective profiles of the exact scope of application (see, for example, under Italian law, the need to overcome the obsolete formulation of Art. 3, paragraph 3, of Legislative Decree no. 72/2000, affected by the regulations then in force in the prohibition of interposition in the performance of work).
Another very sensitive matter is the identification of effective practices of due diligence ensuring the effective controls on the overall compliance of the transnational service provider and by consequence guaranteeing, through their observance by the contractor, the latter not to be held liable for the subcontract.

3. Reflections from Romanian control authorities and social partners on emerging challenges and opportunities about the posting of workers within the EU in the light of Directive 2014/67/EU*

Romanian Labour Inspection (Labour Inspection – Inspec ia Muncii) is an institution subordinated to the Ministry of Labour, Family, Social Protection and Ederly (Ministry of Labour) having following general responsibilities:

- enforcing the legal provisions, general and special, in the areas of labour relations, occupational health and safety and market surveillance;
- supplying information to employers and employees on the means of complying with the legal provisions in its areas of competence;
- bringing to the notice of the competent authorities the deficiencies or abuse related to the application of the legal provisions in force;
- providing services, specific to its field of activity;
- initiating proposals meant to improve the legal framework in its areas of competence, and submitting them to the Ministry of Labour.

Concerning transnational posting of workers Labour Inspection has following responsibilities:

- controlling the posting situations in terms of labour relations and occupational health and safety (workers posted to and from Romania);

* Summary based on Chapter 3 of "Enfoster Brief no.3 – Policy Brief", written by "Team Inspec ia Muncii": Gabriela RADU, Simona-Iuliana NEACȘU, Cătălin ȚACU. In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 3", available at: http://enfoster.tagliacarne.it

- controlling the operation of temporary work agencies;
- receiving written communications from employers – service providers – from other European Union (EU) member states (MS) regarding the posting of workers to Romania;
- liaison office-exchange of information with the competent authorities concerning posting of workers;
- managing general register of the employees in electronic format;
- employer level collective agreements registration and conciliation of the collective labour conflicts.

Labour Inspection is fully determined to maintain its role as central authority involved in the phenomenon of transnational posting and to be actively involved in protecting the rights of posted workers while ensuring fair treatment of employers, through consultation, regulation, information, control and institutional collaboration.
Romanian normative acts involved in the future transposition of Directive 2014/67 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation") could be:

- Law no. 108/1999 for the establishment and organization of the Labour Inspection and G.D. no. 1377/2009 for the approval of the Regulation about the organization and functioning of the Labour Inspection;
- G.O. no. 2/2001 regarding the legal regime of contraventions;
- Law no. 53/2003 – Labour code;
- G.D. no. 500/2011 regarding the general register of employees;
- G.D. no. 1256/2011 regarding the authorization and functioning of temporary-work agency;
- Law no. 344/2006 concerning the posting of employees in the framework of the transnational provision of services;
- G.D. no. 104/2007 to regulate specific procedures concerning the posting of employees in the transnational provision of services in Romania.

Another possibility could be the drafting of a new law covering all regulatory requirements of Directive 96/71 and Directive 2014/67.
In any case, *Labour Inspection* will be involved in this process, even if some of the tasks of the new Directive will be allocated to other national authorities (for instance, enforcement of fines). For this reason we have started an evaluation process of Directive 2014/67, to find the most appropriate formal transposition and prepare *Labour Inspection* for its new tasks and objectives.
Some challenges involved in the transposition of Directive 2014/67 into national law have been identified at this stage of analysis.
At national level, authorities have different competencies on labour relations, occupational health and safety, hygiene at work and social security. As a result, the model of cooperation is unique for each MS and each requesting authority may be requested to set up relationships with more authorities in a same state.
Although the Directive provides a framework to assess a genuine posting and prevent abuse and circumvention, the possibility of a jurisdiction conflict between inspection authorities of the origin and the host MS still remains. Therefore, the duplication of administrative measures may occur or differences may be evidenced in the appraisal of different states' authorities.
In order to ensure that service providers established in Romania supply *Labour Inspection* with all the information necessary for supervising their activities, first we have

to identify those employers. To this end, the general register of employees shall contain information about the place where the worker performs his/her activity (within and outside Romanian borders).
In case of a request for recovery of an administrative penalty and/or fine or the notification of a decision imposing such a penalty and/or fine, "procedural mismatch" in administrative practices of the host and origin MS may arise.
Directive 2014/67 requires a convergent approach of the national inspection authorities. The communication and cooperation process shall involve at least two partners. In this case, all 28 MS are engaged in finding individual solutions for the transposition of the EU legal framework.
For the effective functioning of institutional cooperation mechanisms, *Labour Inspection* considers as fundamental a direct relationships with inspection authorities of the other MS. In this context, it is essential to accommodate our strategy to meet the new labour inspection challenges in other MS.

Problems encountered and solutions proposed by labour inspectors

To investigate the practical situation encountered inspecting posting of workers situations, a written open questionnaire was used and disseminated to Territorial Labour Inspectorates (TLI).
Discussion topics have tried to cover the most important aspects of the activities control: complaints received against employers who are posting workers abroad and if these cases were the subject of control; if posted workers have noticed the host country authorities; information on judicial practice on transnational posting of workers; difficulties encountered in controls that had as objective checking aspects of transnational posting of workers; suggestions (administrative tools, legislative changes) to improve control activities regarding transnational posting of workers.
60% of labour inspectorates described at least one special situation encountered and identified solutions to improve control activity regarding the transnational posting of workers.
The main problems encountered by labour inspectors were:

- lack of accessible data about posting situations without receiving a complaint or a request for information;
- majority of complaints from the employees regarding non-payment of wages;
- impossibility of checking documents recording the working time;
- undeclared or delayed-declared work;
- difficulty in identifying the real employer in a subcontracting chain;
- lack of regulations regarding working conditions for self-employed workers and company owners;
- translation of the documents needed for the control;
- the enforcement of fines imposed;
- successive postings by a temporary work agency (TWA);
- interpretation of the concept of minimum wage;
- tangled employment relationships;
- absence of legal representative of the legal person in Romania;
- logistic problems;
- uneven practice of inspectorates.

Solutions and suggestions proposed by labour inspectors:

- obligation for the employers to translate the documents needed for the control in the Romanian language;

- extending the applicability of Romanian law transposing Directive 96/71 to self-employed people and the owners of companies posted in Romania;
- obliging Romanian employers who post workers to notify Romanian authorities;
- more effective and dissuasive penalties;
- better access to information for employers and employees;
- decentralization of portable document A1 at county level of issuing (now one national office);
- flexibility in assessing significant activity;
- better cooperation and exchange of information with the authority issuing portable document A1;
- financial guarantees provided by the employer posting workers.

Romanian Labour Inspection conclusions

An active involvement of the *Labour Inspection* in the transposition of Directive 2014/67 is necessary, after an in-depth internal analysis. We must prepare our organization for the new perspective on transnational cooperation: providing information, training human resources, technical equipment - communications - transport needs.
To realize a better monitoring of posting situations, we must rethink labour relations declaring system and develop a closer cooperation with other authorities involved in this issue.
We must evaluate and try to anticipate the possible judgment courts' position in case of a judicial procedure regarding evidence issues and procedural conditions provided or fulfilled by the foreign authorities.
In order to have an efficient implementation of the Directive, a special focus on the fraudulent conduct of employers is mandatory. This include a fight against any abuse of rights (freedom to provide services, freedom of establishment, temporary/permanent workers relocation, non-registration and non-payment of social security taxes) and actions against undeclared work (fake self-employment, fake posting, workforce sale).
Labour Inspection considers learning from good practice of other MS labour inspection authorities an important element in areas such as effectiveness and dissuasive effect of penalties, subcontracting chains, or personal "offences" records. Instruments such as these should be implemented in a uniform manner in all EU Member States.
The involvement of social partners is essential to find the best and most appropriate means to support the correct postings and combat irregular conducts.
Enhancing permanent cooperation with other authorities, unions and employers associations, national and European, is a good conduct to give a real continuity to the protection of posted workers' rights.
Mutual trust in transnational cooperation can be improved through the feed-back results from the host MS inspection (requesting) to the origin MS authority in the provision of information (IMI).
The project "*EN-FOSTER – Enforcement Cooperation stakeholders"* VS/2014/0009 has been an excellent opportunity to strengthen the *Labour Inspection* institutional cooperation with control authorities and national social partners from other MS.
Projects like this provides the necessary financial and operational framework to adapt *Labour Inspection* to the new requirements in the field of cooperation with inspection authorities of the other MS of the EU.

4. Some reflections on the Enforcement Directive 2014/67/EU by CISL and FILCA CISL*

Directive 2014/67 concerning the transnational posting of workers is the outcome of a compromise, and in many ways it is an unsatisfactory compromise when it comes to restore the social value of the Community legislation for the protection of posted workers, bridging those gaps present in Directive 96/71 which lead to numerous and negative judgments of the European Court of Justice.
After the official publication of the European Directive, on May 28th, 2014, the scope for concrete improvement was entrusted especially to national transposition processes. These played a fundamental role in restoring the focus on the protection of individual rights and collective actions in the transnational posting of workers, without prejudice to other fundamental rights of the European Union.
As concerns the transposition of new "Enforcement" Directive 2014/67/UE concerning the posting of workers, we believe that the active involvement of national unions is of the utmost importance. The dialogue between national governments and social partners has an overwhelming importance, but it must be extended also to labour inspectorates, to issue transposition laws exceeding the basic elements of the Directive. Far from being considered as a mere technical issue, transposition acquires a clear political connotation.
But how will this transposition occur?
Shall it take place through a shared position among the social partners? Or through discussions and negotiations between the Unions and Confindustria (Employer's'Association)?Or, as it is unfortunately often the case, without any substantial discussion and through measures issued by the Italian government in the month of January of the year in which other directives of the European Parliament shall be transposed, through a single and comprehensive package?
Any "copy and paste" of this European Directive should be clearly avoided...
The transposition in our national system must try to bridge all gaps and interpretations that could lead to abuse by unscrupulous undertakings, thus protecting those undertakings that intend to use the posting of workers in the correct way.
Here are some possibilities for expansion and improvement of the transposition:

- *Unions should be granted access to construction sites*: the fight against social fraud is a matter of public policy. Directive 2014/67 entrusts important tasks to national unions (requests of information, complaints) and therefore unions must have full access to construction sites. The national transposition law can foresee practical arrangements to be developed by social partners of the industry through collective bargaining.
- *Possibility to organize and present collective legal actions*: since social fraud in temporary posting concerns a group of workers who are in a same situation, it is desirable that the transposition law could provide for the possibility of collective actions and collective legal claims. A single, collective claim should be allowed against a fraudulent employer to request compensation for workers.
- *Compulsory information and consultation requirements in case of transnational workplaces*: the scope of Directives on information and consultation already applied only at corporate level (European Works Councils and the European Un-

* Summary based on Chapter 4 of "Enfoster Brief no. 3 – Policy Brief" written by Francesco Lauria (CISL, Italy) and Claudio Sottile (FILCA CISL, Italy). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 3", available at: http://enfoster.tagliacarne.it

dertaking) should be extended. Since Directive 2014/67 imposes information requirements towards the social partners, this tool can be used to inform posted workers about their rights and duties.
- *Protection of the right to strike*: the transposition law may expressly provide that workers cannot be used to replace other workers who have taken strike actions.

Finally, in the same period in which the transposition of this Directive will take place, other European Directives (intra-corporate transfers – seasonal workers and free movement of workers) shall be transposed.
Since the European Directive on seasonal workers regulated in detail the issue of equal treatment, this issue could constitute a reference to achieve equal treatment also for Directive 2014/67. The need not to penalize posted workers from a EU-member State could be used as a leverage, based on the right of equal treatment granted to seasonal workers from non-EU countries.

5. Transposition of Directive 2014/67/EU in Belgium*

Position of Belgian unions

The three Belgian unions (CSC/FGTB/CGSLB) have sent a letter to the president of the CNT (*Conseil National du Travail/National Labour Council*) calling for this transposition to be done in a way supporting the rights of mobile workers and those of permanent domestic workers as best as possible, as well as supporting the interests of Belgian companies wishing to maintain healthy competition without recourse to social dumping to the detriment of everybody.
In the view of the three unions and looking beyond the proper management of intra-EU posting theory, the question is whether the industrial relations system set forth in the Law of 5 December 1968 can be maintained and whether the principles of the Law of 5 March transposing Directive 96/71/EC are complied with.
What is clear is that, for the three Belgian unions, the CNT has an important coordination role to play.
Directive 2014/67/EU covers a range of aspects needing to be dealt with in the EU Member States, at very different levels and with the risk of legal inconsistency reducing its effectiveness.
Though it is obvious that questions covering all sectors will arise, there will also be aspects specific to a sector (as in the road haulage sector). As a result, we need the CNT to ensure coordination, even if unofficially.
One important aspect will involve the role of the supervisory authorities and cross-border collaboration measures in which the economic and social councils with which the CNT maintains contacts could also play a role.
It will also be important to ensure that the directive is implemented in a manner consistent with the measures taken by Belgium with regard to social security fraud and social security criminal law.
Directive 2014/67/EU does not question Directive 96/71/EC, respecting the fundamental rights recognised in the Member States and at EU level.

* Summary based on Chapter 5 of "Enfoster Brief no. 3 – Policy Brief" written by Roberto Parrillo (CSC Transcom, Belgium). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 3", available at: http://enfoster.tagliacarne.it

Role of the Belgian sectoral unions

It is clear that transposition must take into account the specific features of the main sectors, i.e. construction, transport, temp work, the food industry, etc.
To do this, it is essential that in each Joint Commission the social partners take up their responsibility and undertake to work for a transposition ensuring equal competition conditions between companies and the respect of workers' rights.

Practical transposition aspects in the road haulage sector

In transposing the directive, we need to take the specific nature of the road haulage sector into account. Indeed, while the construction sector can be characterised as being a "site-bound" sector, the road haulage sector is, by definition, a mobile sector. We must therefore also view transposition from this angle.

Article 4 of the Directive: Identification of a genuine posting and prevention of abuse and circumvention
Transposition of the Directive in the road haulage sector must set the criteria laid down by the Directive itself as being the factual elements to be taken into consideration to assess the worker's situation.

Article 5 of the Directive: Improved access to information
Transposition of the Directive in the road haulage sector must include a website managed by the SPF Mobility & Transport and accessible by all supervisory departments. Its purpose would be to coordinate all information regarding road transport. The social partners should be closely involved in distributing information on working conditions (wages, ways of calculating them, etc.).

Article 6 of the Directive: Mutual assistance – general principles
Given the recurrent occurrence of social dumping and unfair competition in the road haulage sector, there is an urgent need to implement the "IMI" system in the sector. For this purpose, transposition should specify a time limit of two working days for urgent information demanded by a Member State or the European Commission.
For all other non-urgent information for which a 25-day time limit is foreseen, appropriate steps should be taken to reduce this.

Article 9 of the Directive: Administrative requirements and control measures
As foreseen by Article 9.1 and 9.2, an advance declaration (Limosa declaration) needs to be foreseen for the road haulage sector, taking account of the sector's specific features. Such a declaration should be made for each haulage operation.
This declaration could also be done electronically (e.g. via an IT system, mobile phone or smartphone) in the following three situations: cabotage, cross-trade transport and intermodal transport.

Article 11 of the Directive: Defense of rights – facilitation of complaints – back-payments
In transposition, a provision needs to be foreseen enabling a worker to submit a complaint in defense of his rights not just against his employer but also against the person placing the order, the freight forwarder, the consignor, the party for whom the services are intended as well as all those involved in the subcontracting chain.
Transposition of the Directive in the road haulage sector should clearly specify the concept of a minimum wage as foreseen in the sector's collectively agreed wage

scale. For this purpose, as foreseen in Article 5, an obligation should be included requiring posted workers to receive (prior to posting) the necessary information on the working and employment conditions listed in Article 3 of Directive 96/71/EC.

Article 12 of the Directive: Subcontracting liability
Given the recurrent occurrence of social dumping and unfair competition in the road haulage sector and the sector's specific features, there is a need not just to impose co-liability throughout the whole logistic chain involved directly or indirectly in service provision, but also to extend it to the whole period applying to a non-posted worker when a breach and/or circumvention of the applicable rules has occurred.

Article 20 of the Directive: penalties
Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 18 June 2016. They shall notify without delay any subsequent amendments to them.

Enforcement of the Posted Workers Directive in the road haulage sector

For the PWD to be applicable in road haulage, the driver needs to execute his employment contract for a limited period in a Member State other than the one in which he habitually works, and that:

- either he is posted within the company/group - i.e. the driver is assigned to a company branch located in another Member State or to another company within the group;
- or that he is provided by a temporary employment agency;
- or that he is performing a transnational provision of services **which in the transport sector means**:
  - provision of services: transporting on behalf of a third-party - i.e. the haulage company is not the owner of the goods;
  - transnational: this refers to the nationality of the contracting parties, where at least three are listed in the haulage contract: the sender, the haulier and the recipient. All that is needed is for two of these three contracting parties to be based in two different Member States for service provision to be transnational;
  - working conditions in the service recipient's country which are more favourable than those in the country in which the driver habitually works. This means that the driver has to be paid in accordance with the minimum pay scales applicable in the country to which he is posted when these are more favourable than in the country in which he habitually works.

Posting legislation needs to allow the restoration of the rights of drivers who, while habitually working in a country with a lower level of wages, temporarily work in Belgium in the context of an international carriage – for the part performed on Belgian territory –, a cabotage or intermodal operation or agency work.

A few thoughts from CSC-Transcom

- The criteria used by the Court of Justice of the European Union (the Koelzsch ruling C-29/10 and the Voogsgeerd ruling C-384/10) allow the restoration of the rights of road haulage drivers excluded from the labour law of the country in which

they habitually work on the basis of the provisions of a contract concluded under foreign law but not executed in reality.
- Whether reporting or dealing with an offence, there are often several monitoring agencies involved.
- Enforcement of road transport rules and regulations is closely linked to the sector's innate problem, i.e. road transport is a mobile activity, with vehicles constantly on the move throughout Europe.
- National registers should have been introduced in all European countries by the end of 2012 and to have been linked together. The current status is that just 10 countries are linked up.
- As regards labour inspectors, there are great differences in how they enforce the rules and regulations.
- There are no data or overviews on the punishment of infringements regarding compliance with transport rules and regulations and, more particularly, with posting regulations in the haulage sector.
- The difficulty in enforcing the rules and regulations is associated on the one hand with increasingly complex fraud structures which are difficult to control and consequently to punish, and on the other hand a flagrant lack of cooperation between certain Member States in the context of cross-border fraud.
- The strategies used by Belgian-based fraudsters involve in particular the use of a subsidiary registered in a neighbouring Member State to employ drivers subject to a less favourable labour law. Such a law is very often not that of the country in which they habitually work. Certain Member States pursue such fraudsters. Which cooperation measures could be introduced to detect and punish fraudsters benefiting from a lack of cross-border coordination?
- With regard to the enforcement of the PWD in the haulage sector or the enforcement of Regulation 593/2008, there are at present practically no precise figures available. At most, there have been perhaps a dozen surveys of illegal cabotage. And even here, the findings have rarely been used to enforce the PWD. However the response just in the field of transport legislation is incomplete and not a sufficient deterrent given the magnitude of the fraud.
- Last but not least, as a trade union organisation, in our view it is up to us in particular to make use of the instruments introduced on the basis of the directives to assist deprived workers in exercising their rights. Whether by acting on their behalf in legal disputes in courts foreign to them, or by supporting criminal charges pressed by inspectors and public prosecutors; by acting as civil parties and helping them in court. At a European level, unions may also pose the question of the admissibility of the right to sue in a foreign court.

6. Perspective of the German Stakeholders on the Directive 2014/67/EU*

Within the Enfoster Project, the partner "Arbeit und Leben" has made some interviews and meetings with German stakeholders about the new Directive 2014/67/EU (the "Enforcement Directive"). The collected feedback is shortly reported in the summary below.

* Summary based on Chapter 6 of "Enfoster Brief no. 3 – Policy Brief" written by Bettina Wagner (Arbeit und Leben, Germany). In order to know the full thoughts of the authors, please refer to the "Enfoster Brief no. 3", available at: http://enfoster.tagliacarne.it

According to its website, the employers' organization "Professional Association for the Construction Industry" calls, similarly to the IGBAU, for an increase in the investigative staff of the FKS, and demands an intensive examination of employers prior to the awarding of contracts. Like the IGBAU, they also support the introduction of a smart, electronic social security card, in order to make labor conditions more transparent for all workers.[11]
The IGBAU was also very active in the period leading up to the Services Directive and issued several statements. Moreover, the IGBAU has been very active at the European Level calling upon action and presenting possibilities for altering the text during the policy making process in order to strengthen the directive and protect the workers. The IGBAU is particularly skeptical about the implementation of the Services Directive in Germany and the almost simultaneous introduction of the minimum wage act. Another point of concern is the regulation of the opportunity for exculpation on the European level within the framework of general contractor liability, under Art. 12 of the Enforcement Directive. The IGBAU calls for the introduction of a labor inspection, which would be responsible for the assertion of wage claims, as it is already practiced in other Member States, e.g. Poland. It is furthermore stipulated that the expansion of cross-border cooperation of the social partners is necessary in order to solve complex problems such as the identification of foreign companies and cross-border organized false self-employment, which is organized across the border, quicker and in a more sustainable fashion.
The Enforcement Directive has not yet been discussed internally at the FKS, the responsible institution for combating illicit employment. The primary focus has been on the introduction of the minimum wage in January 2014. However, it was discussed already within the sector-specific alliances. It is expected that once the Directive must be implemented at national level, the finance offices will also address it and verify in how far changes will be necessary in the present handling.
According to the SOKA-Bau all sectors have to be included into the German Posted-Workers Act. The implementation of the Enforcement Directive would offer a good opportunity to include them. This would help at the national level to impede circumvention mechanisms as they are used at present.
Moreover, given the fact that the national minimum wage will be introduced the implementation of the Directive could be used to enforce the application of the *lex locus labori* in Germany and hereby equal pay according to the services trade union in Germany.

7. The Enforcement of the Posting of Workers Directive 2014/67/EU: the position of EFBWW (European Federation of Building and Wood Workers)*

In view of the significance for trade unions and workers of transposition of the Enforcement Directive, the EFBWW recommends that this discussion be conducted against the backdrop of appropriate media focus on cross-border social fraud and exploitation of workers. Every effort must be made to ensure that transposition is not viewed as a technical discussion to be held within a limited group. Naturally, it is also

[11] http://www.fg-bau.de/unsere-leistungen/bekaempfung-von-schwarzarbeit-am-bau.html

* By Werner Buelen – (EFBWW). See chapter 7 on the "Enfoster Brief no. 3 Policy Brief".

crucial for national trade unions to play a direct role in transposing the Enforcement Directive. Since some articles of the Directive relate directly to the role of trade unions, the national unions must be involved in its transposition. In this context, unions must also seek out support from other parties such as labour inspectorates and NGOs, for example.
Despite the low targets set by the Enforcement Directive in the form of minimal requirements as regards national enforcement of the Posted Workers Directive, it is crucial that transposition of it by Member States into national law seeks to achieve the very highest targets possible. The underlying principle throughout must be that of "equal pay for equal work", and the provisions contained in Articles 1 and 21.1 of the Charter of Fundamental Rights of the European Union should be taken as the benchmark in this context. Said articles state, respectively: "*Human dignity is inviolable. It must be respected and protected*" and "*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*". Since the Charter now forms part of the EU Treaty, its provisions should be viewed as authoritative as regards the interpretation, transposition and application of the Enforcement Directive.
Furthermore, reference should be made to the *Laval* ruling by the European Court of Justice (case 0341/05) on 18 December 2007, which stipulates that practices to combat social dumping "may constitute an overriding reason in the general interest" (point 103).
In looking at transposition of the Enforcement Directive, consideration should also be given to whether failure to comply with the Posted Workers Directive should be subject to penalties. The previous two comments could be used in this context. Adopting a criminal approach to non-compliance would offer more options in terms of inspections and penalties than going down the civil route.
In any case, however, discussion of transposition of the Enforcement Directive should take place within a much broader framework than merely non-compliance with the Posted Workers Directive. It should certainly be extended to include non-compliance with the Temporary Workers Directive, the Free Movement of Workers Directive, rules governing the movement of workers from non-Member States and, by extension, aspects of undeclared labour. Points for discussion should certainly include the number of labour inspectors, frequency of inspections, extension of the scope of inspections, authority as regards penalties and necessary resources.

The reality of posting in the European construction industry

Over the past decade, the labour market and economic situation for the construction sector have changed dramatically. Some of these changes are quite logical transformations that have affected all sectors, such as the greening of the economy and the effects of the financial and economic crisis.
In addition to these changes, there has also been a sharp increase in unfair competition, which now affects thousands of workers and construction companies daily. This trend is significantly undermining companies' competitiveness, as well as being an obstacle to the sustainable development of the construction sector. Such unfair competition is an unequal fight based strictly on lowest price, rather than on innovation, expertise and quality. Within the current system, there is almost no longer a level playing field for companies, which is leading to further abuse. In the long term, this is a lose-lose model: companies are no longer able to compete with each other

on equal terms, workers are increasingly considered solely as a cost factor, governments lose out on billions of euro annually in revenue (through un-paid social security contributions and taxation) and consumers get products with lower quality for their money.
Because construction is a highly labour-intensive industry, in which around 50% of the turnover consists of staff costs, it is no surprise that the unfair competition occurs primarily on the labour market and particularly in relation to the labour cost of workers.
Since construction projects cannot be moved from one place to another, the construction sector is characterized by a high level of mobility among companies and workers. Cross-border mobility is also very high.
The current system of unfair competition has its origins in a failed EU policy that has resulted in a wide g between the Europe 2020 strategy, which aims to develop the European economy into a highly competitive, social and green market economy, and the current reality of growing unfair competition and social dumping on the labour market in the construction sector.
In view of these serious developments, the EFBWW has sound the alarm, at national and EU-level and insists that the exiting problems acknowledged, discussed and that viable solutions are found.
These problems can only be addressed by acknowledging the reality of the situation, without hindrance from “political taboos”. This is the only way to resolve the problems we face.
All national labour markets within the European Union are in many aspects unique and completely different from each other. This is not a problem in itself and it is a characteristic feature of the pluralistic European labour market.
However, a number of labour markets (mainly in Eastern European countries and some southern European countries) are seriously distorted by phenomena such as undeclared work, widespread mistrust of government institutions due to inefficiency and corruption, absence of social dialogue between the two sides of industry, no efficient labour market supervision, etc. In addition, the minimum wages applied in some countries are not high enough to give ordinary workers a normal quality of life, further exacerbating the above phenomena. These major distortions of national labour markets foster a culture of resignation and acceptance among both employers and workers, which in turn leads to a culture of “we sort out our own problems”.
Within the context of a European internal market, with its freedom to provide services and freedom of movement, these national characteristics are exported, as it were, to other countries. When this “culture” is applied in a country where the national labour market operates in a normal regulated way, the phenomenon leads to major labour market conflicts in the country of employment. Many employers and workers know very little about the operation, structures and rules of labour markets in other countries and their automatic response is to take their “system, model and culture” with them when they go abroad.
To solve this fundamental problem, it is not enough simply to provide adequate information to employers and workers when they start operating in another Member State. This crucial problem can and must be addressed in the Member States where the problems arise. This means that all Member States must be obliged to “regularise” their labour markets in order to create a level playing-field and a common base within the European labour market.

Possibilities for expanding the Enforcement Directive (thinking outside the box)

The EFBWW considers that the Enforcement Directive is a minimum-standards framework directive and in addition to expanding the provisions it already contains, it could also be expanded at national level to comprise additional specifications. A few possible examples are given below – examples which could also be included in the implementing legislation or in addition to the implementation law:

A. Union access to work sites
Given that combating social fraud is a public-policy issue and that the Enforcement Directive makes specific provision for certain key tasks to be assigned to national unions (e.g. information, complaints), it would be logical for unions to be granted access to work sites. If required, national implementing legislation could make provision for the practicalities of such an arrangement to be drawn up by the social partners in the construction sector by means of a collective agreement.

B. Possibility of organising and lodging action for collective redress (class action)
Since social fraud in the context of temporary posting in almost all cases affects a group of workers in the same situation, and given the substantial cost to an individual of legal action, it would be advisable for implementing legislation to make provision for class actions for collective redress. In such a scenario, a single action could be brought against employers who engage in social fraud and they could be compelled to pay greater compensation. Higher levels of compensation would, in turn, act as stronger deterrent to other such employers.

C. Requirement for "transnational information and consultation of employees" with regard to jobs
A requirement for transnational information and consultation already exists via Directives 2009/38/EC (EWC) and 2001/86/EC (European Company), however the provisions only apply in the context of companies. The Enforcement Directive makes provision for a special temporary yet mandatory information and consultation procedure as regards jobs where foreign workers are temporarily posted elsewhere (transnational jobs). Since the Enforcement Directive places a special information requirement on the social partners (and therefore also on unions), such a mechanism may be used to inform foreign workers of their rights, options and obligations. If necessary, additional measures could be included such as inspections, consultations, complaints procedures and so forth.
In the past, EFBWW has spearheaded a range of projects in relation to transnational jobs (e.g. Alp-Transit, sites along the Cologne-Frankfurt rail line) and is currently organising a similar project in France/Italy for the Lyon-Turin site. This experience could be utilised as an example of best practices.

D. Safeguarding the right to strike
Implementing legislation could include the specific provision that temporary posted workers may not be hired to replace workers who have stopped work as a result of industrial action (i.e. strike or lock-out). Recital 7 of the Enforcement Directive makes indirect reference to this and could be used as a basis.

E. Strengthening checks, investigations and control
All Member States should use the Enforcement Directive as an opportunity, to ensure that labour checks, investigations and controls are effective and adequate, an-

nounced and unannounced, inspections must be carried out on their territory to control any form of social fraud. The EFBWW whishes' to emphasise that such inspections shall primarily take place on site. In order to achieve the highest outcome, at least 20 percent of all services providers, must be controlled annually by the competent authorities in the Member States.
With a view to increasing effectiveness of inspections, Member States shall on the basis of a periodical (minimum once a year) risk assessment increase the number of controls of those activities in which illicit employment are concentrated on their territory.
An efficient control requires that there is a smooth internal coordination between the different national administrative bodies (migration, taxation, social security, labour, traffic…) and that all relevant information and data is exchanged with bureaucratic, organisational or political obstacles. The EFBWW strongly insists that all member states must ensure an enhanced coordination of strategies and operations, including uniform data sharing at national, regional and local levels with a wide array of relevant social partners included at all special levels.

F. Specific rules to tackle illicit labour providers (gang masters) and labour users
The EFBWW strongly encourages all Member States to lay down strict conditions on employment intermediaries in the labour market (such as temporary agency work, temporary recruitment, posting…). The reasons for this are clear as, based on our experience, posted workers who are hired via intermediaries – within the so-called triangular employment relationship – are significantly more likely to be illicitly engaged.
All Member states should ensure that all intermediary labour providers must clearly demonstrate and prove that they are complying with the law, regulations and collective agreement of the country to which they provide labour. In addition to this all "business-users" must play their part by using only those labour providers that can demonstrate and prove that they are complying with the law, collective agreements, regulation and relevant practices of the construction sector. The national sectoral social partners of the construction industry are strongly encouraged to discuss this.
Possible suggestions are that all labour providers must:
1. join a mandatory register set up by the Member States;
2. must be regularly audited by an independent body;
3. provide tangible proof that labour suppliers are in compliance with the law and in particular working time, applicable minimum wage, adequate pay slips, social security, health and safety, housing allocation.
Due to the high incidence of social fraud by intermediaries, which provide labour in a transnational context (posting), the EFBWW favors that they should be subject to additional controlling measures as well in the host as the country of origin. Due to the high risk of social fraud, in case of a cross-border employment, the EFBWW proposes that those intermediaries should prove that they have paid the payment of the wages, respected the working conditions and paid all social security premiums for each worker they employ abroad.