Jan Cremers
Peter Donders
(Editors)

The free movement of workers

in the European Union

European Institute for
Construction Labour Research

CLR
Studies 4

Reed Business Information

Jan Cremers and Peter Donders (Editors)

The free movement of workers in the European Union

Directive 96/71/EC on the posting of workers within the framework of the provision of services: its implementation, practical application and operation.

CLR/Reed Business Information

CLR Studies 4:
The free movement of workers in the European Union

CLR Studies are publications of work by
the European Institute for Construction Labour Research
and its network of academics and practitioners,
and open to related contributions from all sources.

Series editors:
Linda Clarke, Jan Cremers, Jörn Janssen

CLR
Rue Royale 45
B-1000 Bruxelles
email clr@mjcpro.nl

This report was drafted by order of the
European Federation of Building and Woodworkers

With financial support
of the European Commission
DG Employment and Social Affairs

ISBN 90 5901 507 x

Cover and interior design: Beryl Janssen.

English version subedited by Linda Clarke and Clare Moore.

Contents

Preface

The creation of the internal market and the introduction of the free movement principle have had an impact on all industries. With regard to the free movement of workers, construction is an especially key industry that has been faced with an enormous challenge since the opening up of the European market. Early research by the European Commission made it very clear: mobility over national borders is low in the European labour market, but, if it happens, it takes place either at management level in all industries or on building sites everywhere in Europe.

The Posting Directive, discussed since the late 1980s, therefore touches the heart of construction industry activity. The idea behind the Directive is the need to create a basic frame of equal treatment principles within the territory where (building) work is undertaken. The Directive does not say what the content of labour conditions has to be, just that for a hard core of working conditions there should be no difference between workers wherever they come from.

The European Federation of Building and Woodworkers (EFBWW) and the European Institute for Construction Labour Research (CLR) have through the years followed the preparation, modification and coming into force of the Directive. This was often done in close cooperation with the employers' organisation, the European Construction Industry Federation (FIEC). For many years the social partners in construction at national and European levels have concerned themselves with the effective and efficient implementation, application and operation of the Directive. Employers, for their part, are very sensitive to unfair competition between construction companies. The trade unions, for their part, have a particular interest in defending the principle of equal labour conditions for building workers. It is then logical that these organisations have monitored the work of the European Parliament and the European Commission during the evaluation of the application of the Directive.

In the past 15 years EFBWW has taken the lead in advising the European Institutions on the issue of free movement and it stuck to this in the stage of evaluating the Directive. Here we present you with the results of an intense research project.

The first part of the final report is the synthesis of analyses and research undertaken, divided into five chapters:

- Chapter 1 is a legislative analysis of the implemented Directive to find out if the legislative instruments contribute to the balance between the social protection of workers and the free movement of services. The focus is mainly on legislative issues that have not been attended to by the European Commission in its legislative analyses so far and that have a practical impact in the application of the Directive.
- Chapter 2 is about the administrative cooperation of appointed liaison offices in the Member States and more specifically the application of Article 4 of the Directive. How do these offices work, what information on labour conditions is available, how is compliance with the Directive assured and which measures are taken to do so?

- Chapter 3 deals with the practical implementation of the Directive in the Member States. In this part attention is paid to the question of which labour conditions are applicable and how implementation functions in practice. Some practical situations on construction sites are also described to illustrate problems and best practice with regard to the efficacy of the Directive.
- Chapter 4 focuses on the special position of social partners in the industry concerning the practical application and operation of the Directive and the role they play with regard to information and control.
- Chapter 5 deals with the actual situation in the acceded countries, as the Directive also applies to new Member States.

The second part is composed of 10 country reports, from Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden and Switzerland. These provide an insight into the way the Directive is dealt with and the political and organisational structuring chosen at national level. This information is of great importance because it helps us to better understand the practical and operational application of the posting Directive in these countries.

The third part comprises general conclusions and recommendation for the future development of the Posting Directive. In fruitful debates during the project period the European social partners of the construction industry, FIEC and EFBWW, decided not only to examine the findings and results of the first and the second part of the research but also to formulate common conclusions and recommendations. Their joint statement has therein become an integral part of this report.

At the beginning of this report we would like to underline an important consideration formulated in the report of the European parliament: 'The Directive continues to be necessary in order to provide legal certainty for posted workers and the companies involved.' In times of deregulation and an even increasing competition, not only between companies but also between Member States, this statement is of great importance for the construction industry.

On behalf of the CLR network and the EFBWW we thank all those who have contributed to this research. For the organisations that initiated the research, the aim of the work has been to provide considerations for a better application of the Posting Directive at national level. We consider European Directives in the social field to be an indispensable and fundamental part of the legal fundaments of the internal market in the EU. The social dimension of European cooperation is what counts for European citizens.

Jan Cremers and Werner Buelen
September 2004

Introduction

Jan Cremers,
CLR coordinator

The importance of the Posting Directive for the construction industry

Directive 96/71/EC did not have an easy birth. Its origins go back to the debate about public procurement principles in the single European market. In the late 1980s the European building unions pleaded in line with ILO Convention 94 and the Davis Beacon Act in the USA for a social clause in procurement rules for public works to guarantee compliance with working conditions and collective agreements in the country where the work is carried out (Cremers 1994). The European Parliament backed this demand with an overwhelming majority. The Council of Ministers, however, dropped the idea of an obligatory clause and watered down the proposal to a voluntary act. Thereupon the European Commission decided to put forward a proposal for a posting of workers Directive in the action programme of the Community Charter of Fundamental Social Rights of Workers.[1] After the first proposal in 1991, it took five years of hard work to reach agreement on this Directive.[2] Member States were divided on the necessity for a posting Directive. The slow and difficult decision-making process forced some Member States, i.e. France, Germany and Austria (not an EU member at the time) to develop their own initiatives to guarantee national provisions and labour conditions to workers from abroad. The agreement on the Directive in 1996 made it necessary for these countries to adapt their

[1] Other important legal instruments announced in the action programme of the Community Charter of Fundamental Social Rights of Workers (adopted by the Council of Ministers in December 1989) were an initiative to regulate liability in the chain of subcontracting (dropped later on) and several initiatives on health and safety and on information/consultation.

[2] OJ No. C225 of 30.8.1991.

already-existing national legislation on posting and we shall see later that it was also necessary to re-examine the collective bargaining systems in almost every country.

In 1996 the Council and the European Parliament finally adopted the Directive concerning the posting of workers.[3] With the introduction of this Directive, to be implemented by the Member States at the end of 1999, a second definition of posting was introduced into Community law. The earlier Regulation 1408/71, concerning the coordination of social security within the EU in the case of the free movement of workers, introduced posting as a possibility to stay socially insured in the regular working state when working for a short period in another member state for a maximum period of 12 months. Directive 96/71/EC introduced 'posting', that is the situation whereby an employer sends an employee to work in another country for a limited period of time, within the juridical sphere of labour law.

The Directive is about finding a balance between improving the possibilities for undertakings to provide services in other Member States and the social protection of workers. It therefore defines a set of terms and conditions of employment in the host state that must be guaranteed to workers posted in its territory, irrespective of the law that governs the contract of employment of the posted worker. As such the Directive touches two of the four pillars of the internal market: the free movement of workers and the free movement of services. The free movement of workers would be hampered if workers were to lose their social protection when they actually moved within the Community. Furthermore, the free movement of labour could disturb fair competition when social dumping is at issue. Social dumping can occur in cases where workers from countries with lower labour costs are posted to countries with higher labour costs. Workers would then not be covered by the protective rules in the host country. As a result, companies are confronted with unfair competition concerning labour costs and rules governing working conditions.

The European social partners in construction played a key role in the decision-making process. They came up with two important joint statements, one in 1993 about the general principles of equal treatment and the fight against a distortion of competition through social dumping. A second joint statement formulated a way out of too many administrative and practical problems by recommending bilateral agreements between the partners of countries involved in (frequent) posting.

The main principle of Directive 96/71/EC is equal treatment; posted workers are to be treated in the host state like workers who are normally working in that state and undertakings are to be treated equally when they seek to provide services in another state. Although Member States have a possibility to implement the Directive for all industries, implementation is often restricted to construction. In an Annex the Directive pays especial attention to the construction sector.

Although not the largest industrial sector, construction is a key industry in Europe with some 11 million workers directly employed. Compared with other industries, construction is by far the most labour-intensive industry. About 50% of turnover is achieved through the labour of workers. The workforce of construction firms constitutes the heart of the business and the main economic pillar for future survival.

[3] Directive 96/71/EC of the European Parliament and the Council of 16th December 1996 concerning the posting of workers in the framework of the provision of services, OJL 18 of 21st January 1997.

Construction workers are traditionally an exceedingly vulnerable group in a highly competitive battle between building firms. A fiercely competitive situation in the construction sector is apparent inter alias from the strong pressure to drive down prices ever lower. A major adverse effect of the competitive pressure is the relative high number of bankruptcies in the sector. The incidence of 'fraud' is also extremely high. All in all, the construction sector is sensitive to social dumping and unfair competition, arising from the special character of the sector.[4]

- The location of production is mobile, with workers constantly moving from one site to another, with cooperation that takes place between and with different partners, with employers and their employees that cannot be located at a fixed workplace. Hence construction labour contracts or collective agreements usually contain tailor-made sectoral provisions to compensate for travelling time and expenses, severance from families, accommodation at distant workplaces, etc.
- The character of work in the industry is that of a temporary duration. The factory is dispersed and limited in time. Workers are engaged for the duration and the site of a building. Once in a while they may even live there. Labour contracts, if any, are often of a fixed-term nature related to finishing one project, building or constructed item. To compensate for this insecurity (and to guarantee continuity of the workforce) wages may just be higher than in more continuous jobs.
- To meet the vicissitudes of weather and of seasonal disruption, the industry has again developed sectoral provisions. Labour relations not only have an economically-related cyclical character, but also an annual or seasonal cycle. These variations in work and working time cause considerable insecurity for the earnings of construction workers, with repercussions also for those not directly affected. Since construction trades are a specialised occupation these conditions have been met by various structural and industry-wide provisions, such as funds, insurance, and benefits schemes to even out the ups and downs in earnings and employment conditions.
- The building process is characterised by a unique production chain, with main contractors, supplying industries, specialised subcontractors and all sorts of subcontractors and self-employed (even into the 'grey' area). Contract compliance, social liability in the chain, health and safety coordination on site, continuity and competition, quality and craftsmanship feature in this chain.

All these circumstances lead to an environment for industrial relations where discontinuity, the loss of skilled labour and craftsmanship and the general image of the industry are central worries to be dealt with strategically as well as in day-to-day business at national and European levels. The introduction of free movement principles accelerated the need to look at this process from a European angle.

[4] For the international context see L. Clarke, J. Cremers and J. Janssen (eds) (2003) EU Enlargement, CLR Studies 1, The Hague.

European Commission Communication on the implementation of the Directive in Member States

According to European law, a Directive must be implemented by Member States into national law. From 1st May 2004 this included the newly-joined Member States of the EU. Implementation guarantees the legal instruments to protect workers and increases the possibilities of undertakings to provide services in another member state.

In Article 8 of the Directive the European Commission announced a report whose objective was to present an overview of the legal situation in the Member States without assessing the compatibility of the national transposing measures.[5] As a follow up, the Commission drafted a Communication on the implementation of Directive 96/71 in the Member States. This report on the transposition of the Directive in the 15 Member States is intended to ascertain the present situation as regards national legislation and collective agreements (EC 2003). At the same time, national administrations were sent a questionnaire asking them to describe their experiences of applying the Directive and any difficulties encountered. The results of the transposition study and the replies to the questionnaire were discussed by a group of government experts. The purpose of the Communication was to draw conclusions from all this preparatory work concerning the transposition and practical implementation of the Directive in the Member States and to define the Commission's position as to whether the 1996 Directive needed revising.

The main conclusion of the Communication was that none of the Member States had encountered any particular legal difficulties in transposing the Directive. This observation indicated (to the Commission) that it was not necessary to amend the Directive. The difficulties encountered in implementing so far tended to be more of a practical than a legal nature. Consequently as things stand at present the Commission does not plan to present a proposal to amend the arrangements and provisions of the Posting Directive.

For a number of reasons the EFBWW believed that the Commission's approach was unsatisfactory[6]:

- First, the assessment is of a strict juridical nature. Looking at experiences on building sites, a greater in-depth empirical study would have been more appropriate. The opening up of the market in Europe brought with it some unexpected side effects. The risk of social or environmental dumping emerged, while the relocation of production and competition in the spheres of taxation and social security became commonplace. Detailed socio-economic research could have made clear whether the Directive served to prevent bogus practices and the distortion of competition.
- Secondly, the sometimes very controversial debates at national level during the implementation process are not mentioned at all. Adoption of a Posting Directive had been resisted for a long time at EU level by several Member States (e.g. Portugal, Spain, the UK and Greece). Because of this reluctance, the governments of some countries (such as Austria, France and Germany) decided to introduce

[5] Article 8 stipulates that by 16th December 2001 at the latest the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council when appropriate.

[6] The EFBWW's position was based on Cremers (2002), p. 10.

national posting regulations. Whereas France and Austria had already adopted their own posting regulations in 1993-94, in Germany there was a political controversy concerning the need for and the scope, form and content of such regulations. Other countries had to adapt their collective bargaining system in order to deal with the Directive in an effective way. All this is important missing information.

- Thirdly, it would have been worthwhile to produce empirical data to serve as arguments for or against this Directive. On a number of occasions in recent years the European Commission has been forced to acknowledge that the expectations of the mid-1980s concerning mobility in Europe have not been realised, or only to a very modest degree. Fewer than 2% of the European working population work in a country other than the country of origin. Figures for annual mobility are even lower. EU estimates refer to 600,000 workers working outside their home country. This mobility appears to be confined, on the one hand, to middle management and other middle-ranking or senior executives and, on the other, to workers in the construction sector. Despite a low level of immigration, the existence of wage and social dumping in individual EU countries is related to the fact that in high-risk areas even a relatively low number of workers offering their services in the labour market at much lower wages can upset the existing wage structure and can trigger a downward wage/price spiral.
- Analyses of actual migration at regional and border levels are necessary. Border regions are particularly exposed in this regard. In addition, sectors like construction are especially threatened. There are still risks that, through the free movement of persons together with the liberalisation of services, construction and service companies will use their personnel to fulfil contracts in another country without restriction. Construction companies have a competitive advantage if they can underbid the local and sectoral wage and labour protection rules. Even relatively small differences not only in wage and working conditions but also in social security costs, which still exist between countries, can play a role in this regard. Taking into account that the free movement of workers was one of the key issues in the enlargement debate, it would have been very useful to have had this information updated for those countries or regions already members of the EU.

The conclusion was that a whole series of questions were not considered in the Commission's examination. These needed a better assessment. The posting of workers cannot be seen or analysed in a vacuum. There is a link with the development of the countries' labour legislation, the (juridical frame of) collective agreements, the social security systems and finally with aspects of social security and protection that are settled by both sides of the industry (via paritarian provisions and funds). Free movement of workers is and always has been one of the fundamental characteristics of construction work. For economic reasons construction companies and individual workers have an incentive to work abroad. For economic and demographic reasons countries, clients and contractors engage workers coming from elsewhere. But it must be clear that the application of the legal regulations and collective agreements of the country where the work is done, or, better said, the application of equal treatment principles, has to be the leading principle in avoiding any problems with migrating foreign workers.

European Parliament Report on the implementation of the Directive in Member States

In line with the above, the European Parliament asked the European Commission for a second fundamental assessment report of the Directive's implementation in the light of both national and European case law. Parliament asked in particular for an investigation into the practical interpretation of certain concepts and definitions in the Directive (such as the minimum wage including overtime, the minimum number of paid holidays and of work and rest periods, and workers subject to posting), as well as the Directive's implementation through collective labour agreements and the effect thereof on relations of competition between undertakings and employees from different Member States.

Additionally the European Parliament indicated that the report should take into consideration the impact of solutions being urged in Member States upon certain problems relating to subcontractors and the system of subcontract chain liability for the payment of taxes and other contributions.

Finally the European Parliament called on the Commission to conduct more in-depth research in close cooperation with the social partners, and to submit proposals for simplifying and improving the existing Directive with a view to obtaining more effective practical implementation and application, as well as better achieving its goals (that is, the dual goals of fair competition and respect for workers' rights).

The European Parliament report formulated some considerations that deserve to be highlighted (European Parliament 2003):

- the Directive continues to be necessary in order to provide legal certainty for posted workers and the companies involved;
- a number of problems affecting implementation of the Directive can also be overcome by means of better information and administrative and operational cooperation between the bodies concerned (authorities, inspectorates, social partners, etc.) in the Member States;
- the Commission should submit practical proposals for strengthening such cooperation, not least with a view to combating moonlighting and other abuses;
- better and more concrete data on the effects of national implementation have to be collected;
- the Commission is called upon to consider problems resulting from the different options that are allowed by the EU Directive (unfair competition, different and diverging social protection, unclear definition of workers' status);
- constructive legislative solutions should be examined that could lead to the prevention and elimination of unfair competition and social dumping as a consequence of the abuse of posting of workers;
- in addition, a European legislative framework or other provision governing liability in the case of subcontracting should be examined;
- the consequences of EU enlargement should be taken into consideration;
- judgements of the European Court of Justice and judgements handed down by national courts should be taken into the analysis.

Research methodology

This report seeks to answer the main questions of the European Commission as to how the Directive works in practice. Its purpose is to reflect on the main concerns of the European Parliament. Amongst other issues, the Parliament expressed concerns about the exchange of information (Article 4 of the Directive), fear of unfair competition and how to avoid the risk of social dumping.

These answers cannot be found behind a desk in an office somewhere in Europe. It is absolutely necessary to carry out some fieldwork, to work out cases and to investigate in dialogue with the main industry actors and the national authorities involved. Finally, it is necessary to work out a methodological frame for comparison. One of the problems was finding experts in the EU countries familiar with industrial relations in the construction sector, as well as with the implementation process of this Directive. The EFBWW, as the organisation in charge, decided to ask the European Institute CLR[7] and BMT Consultants to carry out this work in close cooperation. For this reason a steering group with the involvement of EFBWW affiliates was created to back up the findings and to deliver a platform for debate and feedback.

The division of labour between BMT and CLR turned out to be very positive. Nine national experts from the CLR network carried out research in their respective countries. While the study attempts to do justice to the specificities of the individual countries, at the same time it explores general features. In order to streamline results a questionnaire was elaborated by BMT. This was not a binding instrument, but a guide for the experts, who conducted interviews with the most relevant actors (such as trade unions and employers' organisations in the construction industry, social law inspectors, policy advisors and national liaison officers) with proven knowledge of how the Posting Directive operates in the daily reality. The results of the interviews were combined with desktop research by the experts, leading to a national report. BMT Consultants examined the legal, administrative and practical implementation and application of the Posting Directive. They thus used the information from the national researchers combined with their own desktop research as the main sources for the final overview and synthesis.

The overall result of the BMT research and analysis can be found in the first part of this publication. The national reports have been edited, streamlined and summarised by the main CLR editor and can be found in the second part of this publication. The EFBWW constantly informed FIEC, their social partner in the European social dialogue in construction, about the on-going process. Finally it was decided to sit together and formulate the main conclusions and recommendations of this study. This latest result of the European Social Dialogue in construction can be found in the third part of this publication. The fact that social partners (again) come up with a joint statement in this area emphasises the political impact of this subject for the industry. It demonstrates that the research undertaken is extremely topical.

[7] CLR is the European Institute for Construction Labour Research, an independent research network based in Brussels with members and liaisons throughout Europe.

Research on implementation of Posting Directive 96/71/EC

Peter Donders and Karin Sengers,
BMT Consultants

1. Legislative analyses

Directive 96/71 concerning the posting of workers within the framework of the provision of services had to be implemented into the national law of the Member States. The report of the Commission was used as a starting point for our legal analyses.

Definitions in the Directive

The Directive defines a posted worker as a worker who, for a limited period, carries out his or her work in the territory of a member state other than the state in which he or she normally works (Article 2.1). For the purpose of this Directive, the definition of a worker is that which applies in the law of the member state to whose territory the worker is posted (Article 2.2). This last provision differs from Regulation 1408/71 on the application of social security schemes to cross-border working persons and self-employed persons. For the coordination of social security the definition of a worker that is posted is determined in the statutory social security law of the member state in which the worker normally works ('sending Member State'). Within the framework of the Directive, a posted worker has to be connected with the provision of transnational services of an undertaking established in one Member State to another Member State by posting employees to that state (Article 1.1). Article 1.3 provides the conditions under which posting takes place. The Directive describes in Article 1.3 (a-c) three situations where posting according to the Directive is allowed:

a. The employee works for a limited period in another Member State on account of the sending undertaking and the labour relation between the sending undertaking and posted employee stays intact;
b. Within a multinational group of undertakings an employee is posted to another undertaking of that group in another state. The labour relation between the posted worker and the sending undertaking has to stay intact;

c. A temporary work agency posts a worker to another Member State within the framework of a hiring out contract. A labour relation between the sending undertaking and the posted worker has to be maintained.

The main element in these three situations is the maintenance of employment relations between the sending undertaking and posted workers. As a result, this condition and the definition of what should be considered as a posted worker are two aspects that need to have a legal basis in the Member States.

Maintaining employment relations

From the evaluation of the European Commission it becomes clear that not all Member States have implemented the provision of the maintenance of the employment relation between sending undertaking and posted worker (EC 2003, pp. 4-5). Most Member States refer to phrases like 'being a posted worker whose employment contract is governed by the law of another Member State'. Some Member States implemented the text of the Directive literally into their national law. Others made no reference at all to the status of the employment contract or employment relation of the posted worker.

It should be noted that it is important to verify, juridically and practically, if a worker is correctly posted and falls under the scope of the Directive. Practically this is important in the sense that the actual situation under which the worker works is essential to examine if the employment relation is maintained. The employment contract can be a crucial indicator for verifying this. It is recommended that the condition that the employment relation should be maintained when referring to posting in national law for those Member States who did not do so (Ireland, the UK) or did not do so directly (Portugal, Luxemburg and the Netherlands) be added. We refer here also to the parallel condition on posting in Regulation 1408/71 where it is stated that an organic bond between the sending undertaking and the posted worker should be maintained. The meaning of the notion 'organic bond' has been given in several court cases.[8] For the Regulation this is directly applicable into the national juridical system of the Member States. In relation to a Directive a notion such as 'organic bond' or 'maintenance of the employment relation' should be implemented into national law.

Definition of a posted worker

With regard to the definition of a posted worker, most Member States just reflect the text of the Directive under Article 2.1 (EC 2003, pp. 5-6). The difficulty is, however, how to distinguish between a worker and a self-employed person. The Directive applies to employed persons. The self-employed can provide services in another Member State and even post themselves under Article 14a of Regulation 1408/71. In

[8] Such as Case C-209/97 Fitzwilliam, ECJ of 10th February 2000.

that case they maintain their social insurance in the sending state. Therefore it is important that Member States establish what should be understood by a worker who is posted to another Member State. The Directive only refers to the law of the receiving Member State (Article 2.2). This differs considerably from Regulation 1408/71 where it is decided according to the social security law of the sending state whether a person is a worker or not. Within the evaluation of the European Commission no reference is made to this point. The same reasoning holds, of course, for the definition of a self-employed person.

According to Austrian law, the definition of employee or self-employed in the sending state has no influence on the decision as to whether the person is an employee or not. The main definition of employee can be found in Austrian labour law. The subordinate relation of the employee is the key characteristic that decides if a person is an employee or not. In the Finnish situation the actual circumstances are finally decisive in deciding if a person is working as a self-employed or an employee. Aspects such as one or more employers, working under supervision, the definition of working time, work contract, etc., are taken into account.

A posted worker as defined in Belgium is a worker who carries out work in Belgium and who usually works on the territory of one or more states other than Belgium or who was recruited in another state than Belgium.[9] Thus workers, regardless of their nationality, are regarded as 'posted' as soon as they carry out work on Belgian territory except for merchant navy undertakings regarding seagoing personnel. A worker is defined as a person who, by virtue of a contract, carries out work for pay and under the authority of another person. An employer is defined as the natural or legal person who employs the persons described. The definition of a worker in the Belgian Act is also wide, as it concerns not only persons who are employed with a labour contract but every contract to carry out work for pay and under supervision (for example, learning-contract, traineeship-contract, …). The applicability of the Act can be extended totally or partially to other persons who carry out work under the authority of another person. Important to note is that, in the implementation of the Directive, only the Belgian definition of worker is considered and the definition of the Member State of origin is not taken into consideration at all. There is no provision for a distinction to be made between a posted worker and a posted self-employed person. As the aspect of working under authority as a factual situation is crucial, only posted workers fall within the Directive's scope. The Belgian Ministry of Labour issued a draft law that included criteria to verify if a person is self-employed or a worker. This draft is part of the programme launched by the Belgian government against social fraud, of which abuse of self-employed status is part. Crucial in this draft is the authority relationship in the triangle authority, leadership and control.

The three types of posting distinguished in the Directive do not occur in the Dutch WAGA (Law on Labour Conditions of Posted Workers).[10] But, as the responsible Minister assured members of the Dutch Parliament, WAGA is meant to apply to all three types of posting. Explicit implementation in WAGA was not deemed

[9] The Act of 5th March 2002 implements the Directive into Belgian law, Belgian Bulletin of Acts of 13th March 2002.

[10] Dutch bulletin of laws, No. 554 of 2nd December 1999.

necessary. The problem in practice with this 'implicit' method of implementation is that the posting definition of Article 1.3 does not correspond to the Dutch national definition of posting.[11] In Dutch (legal) usage, only posting types b. (posting in multinational companies) and c. (posting through temporary agencies) are understood as posting, while type a. (temporary cross-border working in the framework of a subcontract of the employer) is normally seen as something different from posting.[12] Interviews with representatives of the social partner organisations confirmed this confusion. Another problem is that the definition in WAGA includes (probably unintentionally) other workers than the temporary service workers that usually work in another Member State: it also extends to workers that carry out their work in other Member States on a temporary basis. In this situation no member state can be seen as the permanent workplace of a worker. International truck drivers and tour guides, for instance, are not posted and/or working within the framework of the provision of services but can still benefit from the WAGA, if this would prove more favourable for them than applying only the rules laid down in Articles 6 and 7 of the Convention on the Law applicable to Contractual Obligations (EVO 1980). Also, at least in theory, it would be possible to bring within the scope of the WAGA someone who has a temporary job in the Netherlands under an employment contract in which parties have explicitly chosen to apply foreign law (Article 6 1 EVO). As Article 1.1 of the Directive is not explicitly transposed, WAGA is not limited to companies that post workers within the framework of a provision of services. Also, no explicit distinction is made in WAGA between a posted worker and a posted self-employed worker. But from Parliamentary documents and the applicable Dutch legislation for posted workers it can be deduced that only the Dutch definition of an employee is to be taken into account should a question arise about the status of the worker.

The Spanish law literally reproduces the text of Article 1 of the Directive (Law 45/1999).[13] The definition of worker refers more specifically to the Labour Statute (1/1995) in which a worker is defined as someone who voluntarily lends his or her services on the account and within the organisation and management sphere of another physical person or legal entity, known as the employer or entrepreneur. Law 45/1999 neither specifies the distinction made between a posted worker and a posted self-employed worker nor makes any reference to the definition of the worker in the country of origin. None of those interviewed reported problems involving the definition or identification of posted worker.

In Sweden no legal definition of an employee exists; its meaning has been clarified in relation to a variety of borderline cases in an extensive body of case law. When examining such cases, the courts attach overriding importance to a few factors, but usually make an overall assessment in which they take into account the contractual terms as well as the real circumstances in which the work is performed. This means in practice that a contractor who is self-employed can under certain conditions be subject to regulations on employee rights. The same way of reasoning also applies to

[11] See Parliamentary Documents II, 1998-1999, 26 524, No. 5, p. 3 and No. 6, p. 3.

[12] A judgement of the court in Heerlen, 24th September 2003 (JAR 268/2003), shows that this confusion has already occurred in practice.

[13] Law of 29th November 1999 as published in the Spanish register of laws.

posted workers within the Directive. The definition of worker is rather broad in Swedish law.

In the German implementation no definition on self-employed has been included. The decision on whether a person is self-employed is taken on the basis of criteria developed in a recent regulation. In this, employment is defined as a negative notion of self-employment where the decisive criteria are the place of a person in a labour organisation and the subordination of that person, subordination in the sense that the person has to work according to the instructions of an employer.[14] From the reports of the countries examined it can be concluded that in no implementing legislation reference is made to a definition of a self-employed person. Where reference is made in a Member State the definition of employed persons is used. In some cases, Member States refer to other laws (Spain, the Netherlands). This practice assumes that a person who does not meet the definition falls outside the scope of the implementing law. However, it should not be denied that in practice, especially in the construction sector, the activities of persons acting as self-employed cause problems and are even regarded as undermining the application of the Posting Directive.

The position of the self-employed

The fact that a posted person should be regarded as self-employed within the framework of social security and as employee when labour conditions are concerned does not make the situation easier. According to Regulation 1408/71, it is the sending state that judges with regard to social security if a person is self employed[15]; according to Article 2.2 of Directive 96/71 the receiving state does this with regard to labour conditions. This juridical inconsistency can cause many misunderstandings and a lack of clarity in sectors like construction. Clear references to the definition of a worker and a self-employed person in the implementing legislation of the Member States are therefore needed. This does not necessarily mean that such a definition should be included in the implementing legislation itself. A reference to other legislation that gives clear definitions or criteria from which the actual situation under which a person is working can be judged is also workable. The main purpose is that a posted worker can be clearly identified for the application of the Posting Directive. The practical problems reported show that this is not always the case. The European Commission and the European Parliament[16] are also aware of these problems in initiating a joint hearing and an in-depth study[17] on economically dependent workers. Recent years

[14] Law on the correction of the social security and assurance of the rights of employees (Gesetz zur Korrektur in der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte), Article 7 of 1st January 1999.

[15] This was also stated by the European Court in the Banks case C-178/97 from 30th March 2000.

[16] Parliament asked for an in-depth study in its legislative resolution on the Council's common position on Directive 2002/74/EC of 23rd September 2002 amending Directive 80/987/EEC of the European Parliament and the Council on the approximation of the laws of the Member States relating to the protection of employees in the event of insolvency of their employer, OJ 270/10 of 8th August 2002.

[17] Economically-dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects by Aldalberto Perulli.

have seen the emergence of a group of workers that cannot be classified within the traditional notions of employees and self-employed. The result is the appearance of a grey area of economically dependent work that has the characteristics of self-employment as well as employment.

In several Member States debates continue on the question how to deal in law with this economically dependent category. For example, in the UK the Inland Revenue is reviewing the Construction Tax Scheme where one of the major issues is the large number of self-employed working in British construction and how to deal with them.[18] The outcome of the debates is important for the application of the Posting Directive, and the European Commission could play a helpful coordinating role in this respect. Moreover, the problem could become even more urgent, because of the transition period for the free movement of workers that most Member States apply with regard to the new Member States. The self-employed do not have to respect these transition periods.[19]

Minimum period of temporary work

The Directive does not define the posting period. In Article 2.1 it stipulates that it is about a worker who for a limited period of time works in another Member State. From the European Commission report it becomes clear that no Member State gives a definition of 'limited period of time'. All national legislation refers to temporary work, temporary transfer of workplace, or limited period of time posted. Some Member States literally transpose the text of Article 2.2 into their own national legislation.

Article 3.6 stipulates that the length of the period of a person being posted to another Member State shall be calculated on the basis of a reference period of one year from the beginning of the posting. It does not provide a definition of the posting period itself within the meaning of a limited period of time; nor does it say that the maximum posting period allowed is one year. Unlike Regulation 1408/71, the Directive does not define the notion of limited period of time as such. Article 14 of this Regulation refers to a maximum period of 12 months.[20]

Although no definition of limited period is used, Member States regard it as important that the posting period is of temporary nature. In the Netherlands, the approach to implementation of Directives is neutral. As the Directive gave no period, neither should the implementing law. In Germany the implementing law does not define a maximum posting period, although in practice this will follow the posting period established under Regulation 1408/71. The Italian law links the length of the posting period with the predetermination of a certain and future event.

[18] In UCATT research by Mark Harvey, for instance, an estimated 750,000 self-employed are active in the British construction industry, of which 300,000-400,000 are estimated as not purely self-employed (Harvey 2001).

[19] Nor do posted workers. Only Germany and Austria have transition periods for posted workers.

[20] In the Regulation, extension of the posting period is possible for another maximum of 12 months or for a longer period (up to five years) by bilateral agreement of the administrations of both the Member States involved. In both cases the extension is granted after consent of the receiving state.

The question that can be put is, when is posting considered at an end and who decides on that? It is not clear how Member States deal with this topic in practice. It seems that Regulation 1408/71 provides enough legal points of departure in deciding when a posting is regarded as finished or not.

Article 3.1: the nucleus of minimum regulations on labour conditions

Article 3.1 is at the heart of the Directive. It defines under which labour conditions posted workers may work in other Member States. The Article guarantees that terms and conditions are being respected in the Member State where the work will be carried out so far as these conditions are laid down in legislative and administrative provisions and/or collective agreements or arbitration awards declared generally binding in so far as it concerns activities as defined in the Annex to the Directive. From these collective agreements the following provisions fall within the scope of Article 3:

- maximum working periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates. This point does not apply to supplementary occupational retirement pension schemes;
- conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women, women who have recently given birth, children and young people;
- equal treatment of men and women and other provisions on non-discrimination.

The European Commission states clearly that the general applicability of collective agreements is particularly important because of the wages, which are mainly determined in these agreements.[21] Most Member States have these agreements and only Denmark, the UK and Sweden have another way of agreeing labour conditions. According to the Commission, only the legislative and administrative provisions apply for these countries, although the optional derogation of Article 3.8 of the Posting Directive was originally meant as a political declaration of acceptance of the Swedish and Danish models of collective bargaining.

The Directive lays down a core of minimum regulations for the protection of workers' rights in the host state. To apply these rules one should be able to establish whether or not this minimum is met. Moreover, the interpretation of Article 3.7 is of importance here. This provision states that the Directive shall not prevent the application of terms and conditions of employment that are more favourable to workers. This requires comparison of provisions on, for instance, the minimum wage, paid holidays, etc., that are very difficult to compare in practice. In its report the European Commission recognises this problem but refers mainly to the difficulty of paid leave funds and the solution of making bilateral agreements to mutually

[21] Communication of the Commission on the implementation of the Posting Directive, p. 9.

recognise each other's paid leave schemes. Furthermore, the Commission refers to the European Court, which ruled that:

- workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the receiving Member State confers a genuine benefit on the workers concerned that significantly adds to their social protection, and
- the application of those rules by the receiving Member State is proportionate to the public interest objective pursued.[22]

As a solution to meeting the requirements of the European Court, the Commission refers to the importance of administrative cooperation between the Member States specifically on the conditions of employment.[23]

As stated above, it is very difficult in practice to compare terms and conditions of employment, as this is often a comparison between apples and oranges. Especially when referring to collective agreements with regard to wages, for instance, it becomes clear that wages are connected with function levels, which differ considerably in the Member States.[24] So in practice any comparison of minimum wages becomes very difficult. This is even more striking when another European Court ruling is taken into account. In the Arblade Leloupe case the Court stated that labour conditions should be transparent and accessible if these are to apply in receiving Member States.[25] This makes it possible for employers to inform themselves about what labour conditions should be applied for their workers in host Member States.

As stated in the European Commission report, nearly all Member States have collective agreements that are declared applicable to posted workers. These apply, first of all, to the construction sector but in some countries also to other sectors that have generally-binding collective agreements. Legal implementation does not cause any problems. How it works out in practice will be dealt with in Chapter 2.

Optional derogations

Directive 96/71 offers options for the implementation into national legislation:

- Articles 3.3 and 3.5 authorise Member States not to impose the rules of domestic law governing minimum rates of pay and minimum paid annual holidays if the length of posting does not exceed one month or the amount of work is not significant;
- Article 3.8 offers options for guaranteeing equal treatment by giving the possibility, in the absence of a system of generally-binding collective agreements or arbitration awards, of applying two other categories of collective agreement: generally applicable collective agreements to be observed by all undertakings in a

[22] Cases C-49/98, C-50/98, C-52/98 and C-68/98 to C-71/98, Finalarte judgement of 25th October 2001.

[23] Communication of the Commission on the implementation of the Posting Directive, p. 16.

[24] BMT Consultants noticed in a limited survey that the minimum wage levels in generally-binding collective agreements of Germany, Belgium, the Netherlands and Ireland are not comparable.

[25] Case 369/96 Arblade-Leloup, ECJ 23rd November 1996.

geographical area and in the profession or industry concerned and/or collective agreements concluded by the most representative employers and trade unions.
- Article 3.9 gives the possibility of ruling that undertakings that provide services in other Member States must guarantee workers of temporary working agencies the same terms and conditions that apply to temporary workers in the host State.
- Article 3.10, first indent, stipulates that Member States can deviate from the core of labour conditions mentioned in the Directive as far as public policy provisions are concerned. Deviation is allowed only when in compliance with the Treaty and more specifically with the equality of treatment principle. The second indent concerns the possibility for Member States to apply the Directive to collective agreements of sectors other than the construction sector.

The Commission reports make it clear that certain optional derogations are commonly used; others are not. Derogations with regard to Articles 3.3 and 3.5 are scarcely used (EC 2003, pp. 12-13). Only the Dutch implementation states that social partners can decide by collective agreement to exempt the provisions of the Directive if the posting lasts no longer than a month. This provision has not been implemented in the construction sector collective agreement, so in practice the Dutch optional derogation is not used. Denmark and Spain have a restricted extension of their legislation in so far as postings lasting more than eight days are concerned. This refers more to Article 3.2, which deals with assembly work and/or first installation of delivered goods for which the posting period does not exceed the period of eight days.

Article 3.8: absence of a system for declaring collective agreements generally binding

It is interesting that Member States, such as the UK, Sweden or Denmark, without a system of declaring collective agreements generally binding do not use Article 3.8. In Sweden and Denmark the main issue in the debate was whether Article 3.8 could be used to preserve the industrial relations system and at the same time comply with the Directive. After consultation with the social partners, both governments decided not to use Article 3.8 and to exclude terms and conditions of employment embedded in collective agreements from the implementation into Swedish and Danish law. The main reason was that the terms and conditions of Article 3.1 were covered by law except the minimum rate of pay, which is part of the Swedish and Danish bargaining system and is the exclusive responsibility of the social partners. According to the Swedish and Danish governments, foreign undertakings normally sign collective agreements, or application agreements, with trade unions in the sector concerned or are simply covered by a collective agreement and in so doing will pay the rates belonging to those agreements. Given the fact that trade unions supported by the employers' organisations have declared that they have good control over foreign undertakings in Sweden and Denmark and that application agreements are signed and followed, both governments decided that the use of Article 3.8 was unnecessary. It should be borne in mind, however, that according to the Commission only those Swedish and Danish laws apply that exclude minimum pay rates.

A debate took place in Germany concerning the question of whether collective agreements at company level with lower minimum wages could undermine the generally binding agreement of the construction sector, regardless of whether the issue concerns foreign or German undertakings. Central to the discussion was the conclusion of the European Court of Justice on the Portugaia case. The European Court ruled that if, within the national context, the possibility exists of concluding a collective agreement at company level that includes a level of minimum wage lower than the sectoral collective agreement, this must also be possible for foreign companies. This ruling was passed in order to avoid unequal treatment and as a consequence an unjustified restriction on the freedom to provide services.[26] The German Labour Court decided that it was not possible for foreign and German undertakings to conclude company agreements that included wages lower than the minimum wages concluded in the generally binding collective agreement. The German Federal Labour Court decided in a recent case that this was also the case for contributions to be paid to the holiday leave fund under the construction sector collective agreement.

Article 3.9: terms and conditions applicable to temporary workers

Nothing is said in the European Commission report about the use of Article 3.9. This is strange, as in practice the relationship between posted workers from temporary work agencies and from other undertakings is fragile, considering the labour conditions under which both work. Some Member States such as the Netherlands have – apart from the generally-binding collective agreements for the construction sector – also a generally-binding collective agreement for the sector of temporary work agencies. This can create legal problems: which provision of which collective agreements has preference with regard to Article 3.1, especially when the generally binding collective agreement for temporary work agencies does not fall within the scope of the Directive? In the Netherlands only wages and supplements are obligatory under the collective agreement of the user undertaking.[27] The other provisions have to be resolved by the social partners themselves. This has lead to difficult discussions. The use of Article 3.9 would avoid these conflicts. It is clear that for Belgium, Germany and Finland the collective agreement provisions of the construction sector wholly apply also to workers employed by labour agencies. Sweden and Denmark do not have collective agreements that are generally binding: possible conflicts between different sets of collective agreements are resolved by the social partners themselves.

In Spain temporary employment workers are also subject to a specific collective agreement. However Spanish law includes the principle of wage equality and, as a result, Spanish temporary workers are subject to the collective agreement of the user company with respect to wage levels. Of course, this also applies for the construction sector. It is not clear if these rules also apply to posted temporary employment workers, as these workers are unknown in Spain and there is no case law on the issue.

[26] ECJ Case C-164/99 Portugaia Construções Lda.

[27] According to the Dutch Law on Temporary Work Agencies (WAADI), Staatsblad 1998, 306.

Furthermore, regulation prohibits the employment of temporary workers in certain dangerous tasks. In practice these regulations are interpreted by trade unions, employers and the labour inspectorate in such a way that temporary employment workers are not allowed to work in the construction sector.

Article 3.10: public policy provisions and activities other than those mentioned in the Annex

Article 3.10, second indent, is a derogation that is used by all Member States except the Netherlands. In the Netherlands the application of collective agreements is restricted to construction, and in Germany to construction and to services assisting maritime navigation (EC 2003, p. 14). Article 3.10 is not relevant to Denmark, the UK and Sweden. From a legal point of view this means that for all other Member States transparent and accessible information must exist in all sectors with generally-binding collective agreements to ensure compliance with the Arblade-Laloup judgement.

With regard to Article 3.10, first indent, Member States such as Spain, France, Finland, Greece, Luxemburg and Sweden apply public policy provisions under domestic law to posted workers, such as lay-offs due to bad weather, remittance of pay slips, respect for privacy, rules for dismissal, the right to strike or to become a trade union member, etc. The European Commission refers to European Court rulings on the meaning of public policy provisions (EC 2003, pp. 12-14). The Court ruled that the concept of public policy has to be interpreted in the sense that for justification:

- an overriding general interest must exist;
- a genuine and sufficiently serious threat affecting one of the fundamental principles of society exists;
- conformity with the general principles of law, in particular fundamental rights and the general principle of freedom of expression, is guaranteed.[28]

As explicitly stated in Article 3.10, the application of public policy provisions has to be carried out in compliance with the Treaty and on the basis of equal treatment. Member States are limited to imposing all their mandatory law provisions on service providers established in another Member State.[29] The European Commission refers to fundamental rights and freedoms as laid down by the law of the Member State concerned and/or by international law, such as the freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and elimination of exploitive forms of child labour, data protection and the right to privacy. The European Commission states that Member States who in their legislation oblige foreign undertakings to comply during the period of posting with the labour law of the host country in its totality are exceeding the framework established by the Community legislation. Other Member States that explicitly add to

[28] Case 260/89 of 18th June 1991, ECR 1991, p. I-2925; Case 484/93 of 14th November 1995, ECR 1995, p. I-3955; Case 30/77 of 27th October 1977, ECR 1977, p. 1999.

[29] Case 164/99 Portugaia Construções of 24th January 2002 and Case 165/98 Mazzonelli of 15th March 2001, ECR p. I-2189.

the list of mandatory rules their own domestic public policy provisions will, according to the European Commission, have to revise their legislation in the light of the Community provisions set out by the European Court and the Treaty (EC 2003, p. 14).

From the national reports it becomes clear that Belgium used Article 3.10 to declare more national rules applicable. Article 5, §1 of the Belgian Posting Act states that the employer who posts workers to Belgium is obliged, for the work that is carried out, to comply with the labour, wage and employment conditions set out in the legislative, regulatory and collective provisions sanctioned by criminal law. 'Sanctioned by criminal law' is explained as a general and objective criterion conforming wholly to Article 3.10, as it cannot be denied that provisions sanctioned by criminal law are definitely public policy provisions. The Act is seen as a clarification of Article 3 of the Belgian Civil Code, which states that the laws of police and security have to be respected by all who live on Belgian territory. The notion 'laws of police and security' lead to a profound technical legal debate. The Ministry of Employment defended a broad interpretation of the notion, whilst others distinguished between labour regulation that touches on the organisation of the state and has the character of 'law of police and security' and the rules concerning labour contracts that do not have a mandatory nature and are not 'laws of police and security'. In one of its decisions the Court of Cassation[30] confirmed the broad interpretation of the notion in social affairs and stated that all mandatory provisions that in their nature tend to protect the worker are laws of police and security. The Belgian legislator decided that this broad interpretation does not violate the jurisprudence of the European Court of Justice and specified that those provisions will be applicable in so far as they are compatible with the free movement of services.

Other Member States made declarations under Article 3.10, including Sweden and France. These declarations involve basic rights, such as sectoral bargaining or the right to organise. Provisions concerning the remittance of pay slips and declaration of working hours are also obligatory in, for instance, France. But in these cases no explicit reference has been made in the implementing legislation to Article 3.10. As stated above, the Dutch government wanted a neutral implementation, which means to implement no more and no fewer provisions of the Directive than are necessary.

The principle of equal treatment

The principle of equal treatment is present in several provisions: for instance Articles 1.4, 3.1 under g, 3.8 and 3.10, second indent. Equal treatment within the framework of the Directive works in two ways: equal treatment of undertakings that want to provide services in other Member States, and equal treatment for posted workers, who are as protected (for a nucleus of minimum rules and labour conditions) in the host state as workers normally working in that state. The principle of equal treatment represents the main objective of the Directive – that is to achieve a balance between the free movement of services and the social protection of workers. Article 3.7 gives

[30] Cass, 25th June 1975, Pas., 1975, I, 1038 by the Supreme Court in Belgium. Its task is to oversee the correct interpretation and application of the law and to ensure the unity of Belgian jurisprudence.

the possibility of applying more favourable conditions of employment to workers. As a consequence, the balance between free movement and social protection is met when the set of minimum rules on employment conditions are applicable to the posted worker. The applicable minimum rules are all set out in national legislation or generally binding agreements. There is not a legislative problem; the problems occur when applying the rules in practice. The Commission reports that all Member States fulfil the obligation that undertakings established in a non-member state should not get more favourable treatment than Community undertakings (EC 2003, p. 14).

Legislative conclusions

The following conclusions can be drawn from the legislative analyses:

- The maintaining of an employment relation and the definition of a posted worker, as according to Article 2 of the Directive these are of great importance. For posting, the employment relation should be maintained in the actual work situation. Not all Member States have implemented the notion 'maintenance of an employment relation' directly into national law. These countries (Ireland, the UK, Netherlands, Portugal and Luxemburg) are highly advised to do so because only then can an assessment of posting take place.
- A grey area of economically-dependent workers exists. The fact that under Regulation 1408/71 the decisive authority as to whether a person is self-employed or employed is the sending state, whereas under the Directive it is the receiving state, causes misunderstandings and a lack of clarity. This could become more urgent following the accession of the new Member States. The self-employed do not fall within the transition period for the free movement of workers, therefore it is recommended that a definition of a worker, or reference to another law that defines a worker, is included in the implementing legislation. It should be stressed that it is not the task of the European legislator to define worker or self-employed; for European law the notion worker or self-employed simply has a general scope.[31] Member States must refer to their own legislation in order to verify if a person is employed or self-employed. Efforts at coordination by the European Commission could be helpful in this respect.
- It is important to consider when a posting has come to an end and who decides this. Most Member States apply the posting periods used in Regulation 1408/71.
- The legal implementation of generally-binding collective agreements does not cause problems.
- In most Member States temporary construction workers come, at least for wages and paid holidays, under the collective agreement of the construction sector even if they have a collective agreement of their own, as is the case in Member States such as the Netherlands and Spain.
- All Member States fulfil the obligation to implement the principle of equal treatment. Application of this principle is not a legal but a practical problem.

[31] More specifically ECJ, May 1979, C-182/78 Pierik II, ECR 1979, 1977.

2. Administrative cooperation

Article 4 of Directive 96/71 obliges Member States to designate one or more liaison offices or national bodies and to notify these to the other Member States.[32] All Member States (including the new ones) have appointed liaison offices at national level. Spain has distributed administrative, information and monitoring tasks between a series of national and regional bodies. France has appointed a different institution as monitoring authority.

The main tasks of the liaison offices and monitoring authorities are to:

- make information on terms and conditions of employment generally available;
- monitor compliance with the terms and conditions of employment referred to in the Directive;
- reply to reasonable requests from public authorities for information on the transnational hiring out of workers, including abuses or possible cases of unlawful transnational activities;
- examine eventual difficulties arising in the application of public policy provisions.

Availability of information on labour conditions in Member States

Several Member States and/or social partners have issued brochures about the labour conditions applicable in the case of posting and/or made information available on internet sites.

- The Dutch social partners drafted brochures that cover the labour conditions arising from the generally-binding collective agreements for the construction

[32] National liaison bodies are listed on http://europa.eu.int/comm/employment_social/labour_law/docs/liaisonoffices_en.pdf

sector. These conditions refer to the core conditions mentioned in the Dutch law that implements the Directive. The brochures have been translated into English to increase the possibility of foreign employers and employees informing themselves about Dutch labour conditions in the sector. The brochures are made available by the social partners and the Labour Inspection (liaison office), part of the Ministry of Social Affairs and Employment.

- In Finland no special information policy has been established. When requested, the social partners give elementary information. With EC support the Finnish trade unions have established an information bureau in Tallinn, Estonia, to give information direct to workers who are to be posted to Finland. Detailed information for posted workers on terms and conditions of employment in construction exists in Finnish and Swedish, with less detailed brochures in English, Estonian and Russian. However, it is not clear whether this information has been adapted to take account of the provisions of the Posting Directive.
- Austria has information in English and German on the labour conditions for posted workers published on the internet site of the Ministry of Economics and Labour. It refers to legislative provisions and relevant collective agreements. The information is basic and for more detailed information the Ministry refers to employers' representatives in Austria.
- With regard to France both trade unions and employers mainly react when questions are asked. Their position is that workers should know their rights and duties when being posted to France. The trade unions are willing to help if the rights of posted workers are not respected. Both social partners admit that there is an information deficit, but in their view this does not hamper the mobility of companies and employees.
- The Danish social partners in construction have elaborated an internet guide for companies and construction workers who seek work outside Denmark. The homepage contains information about collective agreements, health and safety regulations, social security systems, unemployment benefits, taxation, construction standards and conditions for establishing a company. A new internet project with the German partners is in preparation.
- In Belgium brochures on the collective agreements applicable in the construction industry are available and provided by the social partners in Dutch and French.
- The Swedish liaison office refers to the social partners for information about conditions of employment, including the relevant content of collective agreements.
- Germany offers information to foreign undertakings on the labour conditions applicable in Germany.[33] Brochures in many languages, including some of the new Member States, are available at the German Labour Office and special information on the paid holiday leave fund prepared by the responsible paritarian fund SOKA-BAU. The European department of SOKA-BAU has a large staff with skills in all the European languages so that questions can be answered in the enquirer's mother tongue. Requests for information at the national liaison office are not always answered or are answered rather late.

[33] Most recently the brochure on 'holiday entitlements for workers posted to construction sites in Germany' – May 2004.

The EU website about the Posting Directive includes a list with websites on the terms and conditions of employment in several Member States.[34] On the Belgian, Danish and Swedish websites information on posting is available in several languages. The websites of Austria, Germany, Ireland, Luxembourg and the UK contain information in the national language about posting, and such information will soon be published on the Norwegian website. The website of the other Member States, France, Greece, Hungary, Iceland, Italy, the Netherlands, Finland, Portugal, Spain, Latvia, Lithuania, Malta and Slovakia, may contain information about posting but it is not easily found.

Information is vital for a decent application of the Directive. Foreign undertakings and posted workers should be able to inform themselves on the labour conditions applicable when working in another member state. Two important criteria in this respect are accessibility and transparency.[35] It becomes clear from the national reports that there is still a world to win. Transparency requires that Member States translate their labour conditions, including generally-binding collective agreements, into a package of conditions that meets the conditions mentioned in the Directive. Simply stating that a collective agreement is applicable is not sufficient. Progress can still be made with regard to accessibility, although there are good initiatives in several Member States. Use of the internet, brochures, leaflets and good information points can be helpful, as is making information available at the EURES helpdesks, as in Germany. The practice in some national liaison offices of referring enquirers to the social partners can be good working practice. It has to be said, however, that it is not the social partners but the Member States (according to Article 4.3) who are responsible for the availability of information.

Reply to reasonable requests

The national liaison offices have received only a few requests for information about posting. The Belgian liaison office has received 20-30 telephone calls since its installation, the Netherlands only one telephone call, and the Spanish regional offices received six requests in 2000 and 2001 and the national office receives five or six enquiries a month. In Belgium and the Netherlands the liaison office can be considered a transit desk for specific questions. In the Netherlands questions about collective agreements are delegated to the Dutch social partners. The Spanish regional liaison offices seem to be unaware of their obligation to provide information on the minimum labour standards established in law and on the provisions of collective agreements that companies are obliged to meet.

The Finnish liaison office only occasionally receives requests for information on posting to Finland. So far there has been no specific request on the transnational hiring out of workers, and there is no experience of administrative cooperation when posting has already ended. The few cases there were handled by the Construction Trade Union. The long tradition of tripartite cooperation between the government and the social partners also covers the work of the liaison office.

[34] http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm#7

[35] See also Case 369/96, Arblade-Leloup, ECJ 23rd November 1996.

The Swedish liaison office receives very few calls (fewer than one a week) from foreign undertakings wanting information on conditions in Sweden. Companies that do get in touch mostly know quite a lot about conditions, merely calling to verify what they already know. The liaison office provides general information and refers enquirers to the social partners when questions are asked about payment and the content of collective agreements.

The fact that almost no requests for information have been made is alarming. It seems that undertakings that provide services in other Member States by posting workers are not obtaining the necessary information from national liaison offices on the labour conditions applicable in the Member State where the posted work is done.

Cooperation between liaison offices

Only France and Germany made some official requests to other liaison offices. France contacted the liaison offices of the Netherlands and Spain for information on transnational hiring out of workers to check the correctness of information given by companies to the French authorities.

The German and French experience is that in cases of legal and actual problems the liaison offices are unwilling to help. Requests regularly go unanswered and answers when given are rather vague. In waiting the answer time of great value passes by, and in the meantime the undertaking concerned has ended its activity and any further possible prosecution becomes almost impossible. The French liaison office tried to convince other countries to strengthen cooperation between the liaison offices; however only a few Member States share this view and almost nothing has yet happened. France has concluded detailed cooperation agreements with Germany and Belgium, while the cooperation agreements with Italy, Spain and the Netherlands are of a more general, informal character.

Cooperation between Belgian and foreign inspection services works well with the neighbouring countries – France (protocol Franco-Belge) and the Netherlands – and will be upgraded with Germany and Luxembourg. With other Member States such as the UK, Portugal and Greece cooperation remains difficult if not non-existent, mainly due to the language barrier and a lack of interest in the Member States. The existing exchange of information with local inspection services from the border regions of neighbouring countries does not take place in an organised or nationally orchestrated way but is rather 'in the field', 'based on goodwill', and 'at own initiative'.

Officials of the Swedish liaison office receive very few questions from liaison offices in other Member States. Apart from questions from the Scandinavian countries there have been questions from Germany, the UK and Poland. Basically the liaison office does not touch on the conditions in the Directive, but rather informs about the Swedish model and otherwise refers to the social partners.

In 2003 the Spanish and Portuguese Labour Inspectorates signed a cooperation agreement on postings. This is designed to facilitate the exchange of information and enforcement with respect to the social security status of posted workers, health and safety, working conditions (including wages), the identification of posted workers, and the legal status of posted workers from third countries. In a 7-8 month period the

Spanish Labour Inspectorate visited 42 Portuguese companies under the agreement, mainly in the construction sector. From these 42 interventions 24 infractions of topics mentioned in the agreement were identified.

Monitoring compliance with the Directive and the involvement of social partners

How far the social partners are involved in the monitoring of compliance and enforcement of the Directive varies from country to country. In Denmark and Sweden the liaison body simply provides information and depends heavily on the trade unions for enforcement. The local organisations of the Building Workers' Unions help to localise the activities of foreign undertakings and posted workers. In France the Labour Inspectorate meets on a regular basis with social partners at regional level.

A general complaint in all national reports was that liaison offices have insufficient staff to enforce the Directive properly. In some cases also it was noted that offices were not well informed and were unaware of the specific provisions of the Directive. A conclusion that can be drawn from the reports is that the social partners play an important role in monitoring the actual and practical situation on construction sites. In this way they can be seen as the eyes and ears of the liaison body. Labour Inspectorates often only come into action after receiving information, for instance by trade unions, about suspected abuse.

A good example of positive cooperation is the partnership agreement between the Belgian administration and the social partners in the Antwerp region. The partnership consists in the collection of data on the undertakings concerned, preventive action, for example informing and sensibilising the sector, and curative action, such as analysis of suspicious contracts, signalling of suspicious activities to the inspection services, and enhanced cooperation with the local registration authority. The secretariat of the partnership has become de facto a contact point for reporting and transmitting social fraud and unfair competition to the inspection services. An initial working paper stresses some conclusions of the partnership: the importance of a contact point, the overall lack of respect for rules on working time, rest time and overtime pay, the threats from southern, central and eastern Europe and from 'posting agencies', and the uncontrollability of foreign employers.

Social and labour documentation

A difficult part of the administrative implementation is to find out under what labour conditions posted workers are really working. Documentation such as pay slips, labour contracts and notification of employment is needed to verify the labour conditions applied. Some Member States therefore request social and labour documents from foreign employers who want to provide services.

Employers in Belgium can be exempted from this obligation for six months if they transmit a posting declaration (employer data, name of posted workers, etc.) and put at the disposal of the Labour Inspectorate the pay slip and documents drawn up

according to the rules of the Member State of establishment that are comparable with the individual account for each worker. After this six-month period foreign employers are considered as if they were established in Belgium and thereafter are obliged to draw up and keep social and labour documents in accordance with Belgian rules.

In Spain, Germany, Austria and France notification of providing services is obligatory and foreign companies must hand over information about the number of posted workers, the nature of the contract, place of work, etc. In case of posting, the pay slip is considered one of the most important documents. Given the temporary nature of posting, delays in monitoring occur and enforcement of the law is difficult as documents are not kept on construction sites. An obligation to this extent could be very helpful, at least for pay slips and labour contracts. For this reason the Austrian notification request must include information on the amount of pay for each worker.

Another feature that could be helpful is the use of E101 forms as a mean of control in the case of posting. Although the E101 form is issued within the framework of Regulation 1408/71, which coordinates the social security schemes of Member States, it could be useful as it gives information on the social security status of the posted worker. When the form is not given the competent institution can require additional information of the competent institution of the sending country. If the information on the E101 form is invalid or if no form was issued by the sending state it can be concluded that the posting is invalid and that the worker should be fully socially-insured in the receiving country. The Belgian administration is considering linking the E101 form with the posting declaration or notification. In the Netherlands the idea was discussed but not implemented. It should be noted that the possession of an E101 form is no guarantee that the posting is legitimate. Falsified E101 forms are regularly reported by Labour Inspectorates, and investigations to find out if the E101 form is issued correctly can be time-consuming and costly.[36]

Public procurement

Many contracts in the construction sector are contracts for public works with the public administration as main client. European Public Procurement Directives apply for larger contracts. Administrations can make reference to the social conditions applicable for the project within the public procurement notices. ILO Convention number 94, ratified by the majority of EU countries, rules that public works contracts should only be rewarded when the applicable provisions for employment and social security of the host country are respected.

Interesting in this respect are the provisions of Directive 2004/18/EC of the European Parliament and the Council of 31st March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.[37] In Consideration 34 of the Directive a direct reference to the Posting Directive is made:

[36] Case C-202/97, Fitzwilliam Executive Search Ltd., February 2000. See also BMT Consultants (2002) Current practice in Posting according to Regulation 1408/71, p. 42.

[37] OJ L134 of 30th April 2004.

> The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of the employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71 (...) concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

This consideration is operationalised in Articles 26 and 27 of the Public Procurement Directive. It is striking that it is left to Member States to make use of both Articles and to lay down special conditions concerning social considerations related to the execution of a public contract. Furthermore, a contracting authority may state in the contract documents where the tenderer may obtain information on obligations regarding, among other things, the working conditions in force at the place where the works are to be carried out. When doing so the contracting authority shall request the tenderers to indicate, when drawing up their tender, that they have taken into account the obligations related to the working conditions in force.

The fact that these provisions in the Public Procurement Directive are not obligatory does not mean, of course, that the Posting Directive is not applicable. By referring to the applicable working conditions in the tender documents the candidate in the contract award will be aware that working conditions according to national and Community law have to be taken into account when making a bid for a contract. In this way public procurement can become an important tool with which to influence the behaviour of economic operators and for monitoring compliance with the Posting Directive. Article 55 of the Public Procurement Directive is of importance in this respect. When offers are considered to be abnormally low the contracting authority can request further details from the tenderer on, among other things, compliance with the provisions relating to employment protection and working conditions in force at the place where the work is to be performed. In order to make it possible to monitor compliance with the Directive it is of the utmost importance that these provisions in the Public Procurement Directive are well implemented into national law and correctly applied in the practice of public procurement.

Measures taken to assure compliance

Article 5 of the Directive states that Member States shall take appropriate measures in the event of failure to comply with this Directive. They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. Supervising, controlling and enforcing the application of the Posting Directive and its implementation Act can be seen as the

most difficult aspects. From Article 4 it becomes very clear that national governments are held responsible for the supervision of compliance with the Directive and all its provisions. In most countries the liaison office is also the institution responsible for enforcement (Article 5). Only France and Spain appointed another institution for this.

In the Netherlands the situation is unusual in that most of the legal provisions applicable to posted workers have the character of private law through generally-binding collective agreements. And the enforcement of collective agreements belongs substantially to the competence of the social partners themselves. Some help is provided for in public Acts, where it is laid down that social partners or individual workers can ask the Labour Inspectorate to check, for example, working conditions in specific companies.[38] However, insiders generally agree that these possibilities do not mean very much in practice because the Labour Inspectorate has a huge workload and very often is not able or prepared to give priority to these requests.

In Finland the only administrative control measure tailored to posting and included in the implementation law (Section 8) is the obligation to provide information on working conditions. Hence, employers, or, if they have no business location in Finland, customers (clients, main contractors, etc.) must (but only on request) provide the authorities with information on the employment conditions applicable to posted workers' employment relationships. Sanctions for neglecting or falsifying the documentation are applied under Penal Code, with a maximum penalty of six months imprisonment. Since 1st May 2004 labour inspection may use administrative means of compulsion (a conditional fine or even stoppage of work) against an employer who does not show or provide it with copies of working time documentation. In addition the employer is obliged to give a calculation showing the amount of pay and the grounds for its determination. Fines have sanctioned this obligation. A special investigations unit has been established recently with competence to investigate cases in any sector involving violation of the Penal Code. Up until now 10 cases of social dumping have been tracked involving hundreds of abused workers.

When a collective agreement is applicable, which is nearly always the case, Swedish trade unions have the right to inspect pay slips and relevant documents. From their practice, however, it is very difficult to assess if posted workers are really paid what they deserve according to the agreement. Examples have been presented where subcontractors ask for the money back when the employee returns to his or her country. As well as the trade union, the Work Environment Authority also has the right to visit workplaces, although in the Authority's opinion it is rather ill suited for the entire role designated to it. As such there is little or no control on the number of foreign undertakings active. Notification of foreign activities could be helpful, although in Sweden notification is not obligatory. Offences against the law or collective agreements can be penalised according to general civil or penal law proceedings. In Denmark the construction sector unions have established regional taskforces specialised in communicating with foreign companies and workers. Given

[38] See Article 18a WMM, Article 21 WGB m/v, Article 10 Wet AVV. Assistance from the Labour Inspectorate can often only be asked in case of a lawsuit or when legal proceedings are at least pending.

the special characteristics of the social model, the Danish unions, as in Sweden, have a controlling role.

Infringement of the Belgian rules concerning social documents can be penalised by administrative measures or proceedings before a court. The same is true for infringements of notification procedures in France and Spain. In Austria administrative fines varying from €700 - €1,450 are imposed when an employer fails to notify the posting of workers.

In the Netherlands a special team was established within the Labour Inspectorate to inspect construction sites for illegal employment, moonlighting and other forms of fraud. From their experience the chances of being caught as an illegal worker in the Netherlands are around 1.5%, which can be considered low. The fine for illegal work is €900, making it worthwhile for employers to risk employing illegal workers. As in other Member States, the Labour Inspectorate refers to the difficulty of controlling subcontracting networks.

Undertakings seeking to provide services in Germany have to make themselves known. Moreover, every month these undertakings have to notify the holiday leave fund about the total gross salaries to be paid. In this way SOKA-BAU, the construction industry social fund, can verify whether paid holiday contributions have to be paid. Not paying can bring financial penalties of up to half a million Euro. Control with regard to other employment conditions lies with the German Customs Service. A proposed new law on moonlighting is under discussion in the German Parliament. Its main purpose is to achieve better cooperation between German institutions, exclusion of public works contracts in the case of fraud and other measures to combat and prevent illegal work.[39] All the national institutions state that penalties such as administrative fines are difficult to apply because fines are not easy to collect abroad, and administrative cooperation is also needed. The social partners do not have any competence to apply sanctions for abuse or misconduct. Trade unions recently started a name-and-shame campaign in which good and bad practices are communicated through posters on construction sites and articles in local newspapers.[40]

Joint and several liability of main contractors

The problem of complex subcontracting networks was mentioned in most national reports. With regard to measures under Article 5, the possibility of joint and several liability with regard to employment conditions was several times brought up. Joint and several liability in the construction sector is quite common as it concerns social security and fiscal fraud (wage and salaries tax). In nearly all Member States legal provisions exist on joint and several liability in the case of subcontracting.[41]

In the Netherlands social liability existed in Article 3 of the construction sector collective agreement until 1998. The main contractor was held liable for a

[39] Draft law of 20th February 2004, mid 2004 in discussions in the German Parliament.

[40] Campaign 'Without rules it does not work', IG-Bau 2004.

[41] EFBWW Study document, 'Towards a European legal framework on the liability of main contractors for Fiscal or Social Fraud on Building Sites.'

subcontractor's non-compliance with the collective agreement. At that time this provision was also generally binding. Since 1998, for reasons that are not quite clear, the social partners have weakened this provision. According to employers' representatives, extension is no longer possible because of the policy rules published in 1998 by the Ministry of Social Affairs. Declaring collective agreements generally binding depends on the character of the collective agreement provision. When a provision only consists of obligations between contracting parties, no extension of the scope of the collective agreement is possible. If a provision has intrinsic meaning for workers and employers, extension of its scope can be provided.[42] The Ministry of Social Affairs could not confirm that extension of Article 3 of the collective agreement is no longer possible.

The Austrian and Belgian social partners and controlling institutions also refer to the liability of main contractors and/or clients if the Directive's provisions are not respected. In Austria joint and several liability is anchored in law. Workers are entitled to minimum wages or wages set down in collective agreements, depending on the provisions applying at the construction site concerned. Employers and their principals, as the ultimate 'debtors', are liable for the rights of workers.

Administrative conclusions

Information on the labour conditions applicable is vital for the good application of the Directive. As stated by the European Court, this information should be transparent and accessible. From the national reports it becomes clear that many national improvements are still necessary. Information should take more account of the conditions referred to in the Directive and accessibility can be improved by making use of more channels than just the social partners or liaison offices. The EURES network and competent institutions for social security provide a network that can contribute to the accessibility of information. The establishment of direct information points, as the German and Finnish examples show, are very valuable initiatives that need to be encouraged.

Most initiatives concerning the development of information come mainly from the construction sector social partners. Although this is not a problem as such, liaison offices should be aware that the responsibility for information lies not with the social partners but with them. Article 4.3 obliges Member States to take measures to make the information generally available. From this survey it becomes clear that use of the internet is still very limited when it comes to providing information on labour conditions relevant to posting. On many internet sites information is difficult to find and/or only in the home language and therefore cannot be considered accessible and transparent. Further development of the European Commission site on the Posting Directive could be helpful in stimulating Member States to implement Article 4.

There are reservations with regard to the functioning of the liaison offices. A main concern is that the implementing institutions in the Member States suffer from a lack

[42] See Rules on Verification Collective Agreements within the framework of Declaration of General Applicability (Toetsingskader AVV), first published in 1998.

of staff and of sufficient information to give real content to Article 5 of Directive 96/71. It is alarming that liaison offices receive scarcely any requests for information. Mutual cooperation between liaison offices needs improvement. Direct communication seems to be difficult because of language problems. Mutual cooperation agreements between some Member States are good initiatives that need following up in other Member States. It is further recommended that an awareness campaign be started in liaison bodies, for instance by organising a conference where collaborators in the bodies have a chance to meet and exchange experiences.

In general one can conclude that the measures taken by the Member States to assure compliance with the Directive are not yet very well developed. The possibility of joint and several liability with regard to labour conditions could be an interesting option that is worth further thought and elaboration. It could prove an answer to the problem of the lack of transparency of subcontracting networks. The use of public procurement provisions is also a possible way of influencing the behaviour of economic operators. What is difficult is the actual control of the labour conditions under which a posted worker works. Notification of provision of services could be a useful instrument for improving enforcement of the Directive. This notification should contain information about the labour conditions of the posted workers. A link with the possession of form E101 would be helpful as well, because if workers are not in possession of such a form suspicion about their social security status arises. The labour conditions applied are then also under suspicion.

3. The Posting Directive in practice

Which labour conditions are applicable?

In all countries that took part in this study, leaving aside the legislative and administrative provisions, the provisions of generally-binding collective agreements are applied. Although several Member States have extended the scope of application of Article 3.1 to sectors other than construction, here we shall mainly concentrate on the provisions of construction sector collective agreements.

From the national reports it is clear that the provisions with regard to minimum wage, working/rest periods and paid annual holidays in particular are the most difficult to compare as far as the application of the most-favourable principle (Article 3.7) is concerned. As mentioned above, the European Commission simply reflects on the problem of annual paid holidays through paid leave funds (EC 2003, p. 15).

The most-favourable principle

Article 3.7 of Directive 96/71/EC states: 'Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers. For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker.' This Article is a very important one as it can be seen as one of the provisions that balance the social protection of workers and the free movement of services. It is therefore of the utmost importance to find out how this most-favourable principle works in practice. In a way the application of this Article is closely connected to the obligation to provide transparent and accessible information on labour conditions.

An important question to be answered is what should be compared. Is comparison of the level of each provision, or between units of provision covering the

same subject, preferable? Or is comparison of the whole package of working and employment conditions the right point of departure? According to the Dutch Ministry, the Dutch legal system prescribes a comparison on the level of each provision because, in the case of posted workers, only (a minimum level of) mandatory law is at stake. The mandatory character of provisions does not allow the exchange of one provision for another, dependent on the arbitrary preference of an individual worker.[43]

Interesting within Dutch-Belgian practice for the construction sector is the mutual recognition of each other's collective agreements. As a result of this bilateral agreement between the social partners the Belgian collective agreement applies to a posted worker who usually works in Belgium during the period of posting in the Netherlands and vice versa. But if a posted worker from Belgium appeals to more favourable extended Dutch collective agreement provisions, the Belgian provisions have to yield as far as minimum entitlements are concerned. As long as posted workers are satisfied with the agreement, no objections against prolongation exist.[44] This pragmatic attitude leaves enough room to make the comparison more workable in practice. The only reverse side is that it does not give 100% legal security, but this is no problem when no individual appeals for deviance are to be expected.

A similar cooperation exists in the Nordic countries between Finland, Sweden, Denmark, Norway, the Faeroe Islands and Iceland. The building and woodworkers' unions of these countries have signed bilateral agreements on cooperation on issues related to the posting of workers. The main element in this agreement is the rule that for members of a union working in another country, as a minimum the collective agreement and legislation in the working country apply. In this case the host country's collective agreement is the leading one, which is different from the Dutch-Belgian example where posted workers keep working under the collective agreement of the (home) country where they normally work.

Spanish law stays close to the text of Article 3.7. There is very limited information available on its practical implications in Spain, suggesting that the most-favourable clause is applied very roughly and almost exclusively through comparing provisions on wage levels set in the relevant Spanish agreements. The unionists and labour inspectors consulted say that one potential/actual fraudulent practice is attempts by employers who post workers to have, for comparative purposes, supplements paid for expenses incurred included in the wage sum.

French trade unions are of the opinion that it is the responsibility of posted workers themselves to find out which labour conditions are most favourable. Contacts with the Ministry concerning Article 3.7 are non-existent. In Austria the most-favourable principle is defined in the Labour Contract Law Adjustment Act, which implements the Directive. On remuneration it is stated that a posted worker is at least entitled to receive the remuneration due to workers of comparable status payable by comparable employers at the place of posting and as provided by law, government

[43] See Handelingen II, 1998-99, No. 104, p. 5980, 5987. A statement confirmed by the Supreme Court, JAR 2000/43.

[44] See Handelingen II, 1998-99, No. 104, p. 5980, 5987 and Kamerstukken II, 1998-99, 26 524, No. 6, p. 4-5. See also Sengers and Donders, who speak of 'gentlemen's agreements', SR 2001/5, p. 143..

regulation or collective agreement. Although this definition gives some criteria, the practical implications for comparisons are still very difficult. The German Arbeitnehmer-Entsendegesetz implements Article 3.7, but in practice only the provision concerning the paid holiday leave fund is fully operational. In Finland Article 3.7 is not regarded as a big issue. Here also the problem occurs that no attempts have been made to clarify which provisions of the collective agreements are applicable to posted workers. The example of compensation and daily allowances due to distance work (or 'travelling work') illustrates this problem. The relevant Finnish collective agreements generally include compensation for extra housing costs and a per diem allowance arising from such distance work. These are considered part of the total remuneration and hence are also to be paid to workers posted to Finland.

There is little or no control by the authorities of foreign undertakings coming to Sweden. Foreign undertakings have no duty to announce their presence when posting workers there. The Work Environment Authority controls work environments through visits and workplace inspections (33,199 visits in 2003, of which 22,574 were inspections). Some visits are to workplaces with foreign undertakings but do not compare terms and conditions of employment other than working time and the work environment. The major part of control of workplaces with foreign undertakings is done by local trade unions, mostly regarding payment, insurance and other terms and conditions of employment. The system of collective bargaining in Sweden is based on the activity of the social partners themselves. They have to check that collective agreements (and application agreements) are signed and applied to workers in undertakings, whether national or foreign. It should be mentioned that the Building Workers' Trade Union information on foreign undertakings is very good due to the construction sector collective agreement stating that contractors (almost always members of the Swedish Construction Federation) must notify the Building Workers' Trade Union which subcontractors they will use. The issue of control is important because there are basically two moments when a comparison of terms and conditions of employment can be conducted: when the foreign undertaker signs a collective agreement with the trade union or when the foreign undertaking is about to fulfil its obligation under the collective agreements. The union does not consider it to be its job to compare terms and conditions of employment in other Member States when negotiating application agreements with foreign undertakings. If foreign undertakings claim that they already pay posted workers more than in their home state and provide insurance and other terms and conditions of employment at an equal or better level, then there can be a reduction in the provisions of the collective agreement. Better provision in the home state has though to be proved by the employer, and there have been few cases where this was able to be proved.

From the national reports it is clear that the applicability of Article 3.7 is complex. However, practical solutions such as recognition of each other's collective agreements can be very useful in order to avoid comparing labour conditions that are in structure and content sometimes very different even when the socio-economic conditions are comparable, as in the Netherlands and Belgium. In other cases comparison will not be that difficult, especially when posting takes place from a country with less developed labour conditions to countries with relatively well-developed labour conditions. This is mostly the case when only legislative minimum provisions apply

in one country and collective agreements apply in other countries. In these situations it can be presumed that provisions under the collective agreements are better and therefore apply. The practical situation described below with regard to paid holiday leave funds illustrates this. That successful comparisons are closely connected to the availability and transparency of information is obvious. If good information is not available no comparison can be made and as a result posted workers cannot invoke most-favourable principle. Comparison also presumes that the posting undertaking and posted worker are well informed about the labour conditions applicable in the country where they normally work.

Paid holiday leave funds

Bad weather and paid holiday leave funds have a special position in the construction sector in many EU Member States. The main reasons are the specific characteristics of the sector with its dependence on weather conditions and the project-based production process, as described in the Introduction. The sector social partners therefore include provisions in their collective agreements in order to reduce the risk of loss of income due to bad weather. This guarantees employees paid holiday leave even in periods of lower production or frequent changes of employer. Paid holiday leave fund provisions exist in the generally-binding collective agreements of Germany, Belgium, the Netherlands, France and Austria, but not in the agreements of Sweden, Denmark, Finland or Spain.

With regard to holiday leave funds, the European Court case Finalarte is of importance. The question arises whether undertakings that post workers to another state can be obliged to participate in the holiday leave funds of that state. In principle the answer is yes, if participation in such a fund confers real additional protection on posted workers. According to the European Court:

> To that extent an assessment must take account of the paid leave that workers already enjoy under the law of the Member State where their employer is established since the rules at issue in the main proceedings cannot be regarded as conferring real additional protection on posted workers if the latter enjoy the same protection or essentially similar protection, under the legislation of the Member State where their employer is established. Furthermore the application of those rules by the first Member State is proportionate to the public interest objective pursued.[45]

Referring to the Arblade Leloupe case, the Court stated that social protection could be considered as public interest.[46] In the Finalarte case the Court also reflected on the advantages of participating in the holiday leave funds (in this case the German), more specifically that the fund pays directly to the posted worker.

It is interesting to elaborate on how the Finalarte case works out in practice, especially because the Posting Directive was not in force at the time the case occurred.

[45] Joined cases C-49/98, C-50/98, C-52/98, and C68/98 to C-71/98 Finalarte ECJ of 25th October 2001.

[46] Joined cases C-369/96 and C-376/96 Arblade ECR I-8453.

Within the slipstream of the mutual recognition of each other's collective agreements, participation in holiday paid leave funds was mutually recognised and Belgium, the Netherlands and Germany concluded an agreement to that affect. The German paid holiday leave fund reached a similar agreement with Austria and France.[47] In this way a very practical solution has been found to ensure the social protection of posted workers with regard to paid leave. However, situations can occur where one of the two Member States involved does not have a holiday paid leave fund or no such fund exists in either state. In the latter situation payment has to be made by the employer directly to the posted worker, depending on the most favourable conditions for the worker. Where a holiday paid leave fund exists in one of the states involved the posted worker is in most cases better off when participating in that fund. In situations where the paid leave arrangements are comparable, even when one of the two Member States does not have a paid leave fund, mutual recognition of each other's arrangements can be accomplished by means of an agreement on a bilateral basis. Germany and Denmark recently concluded an agreement to that affect.

Over the years participation in paid holiday leave funds has proved to contribute to the social protection of construction workers in a sector that is vulnerable to economic cycles. In the Finalarte case the Court recognised this important function of paid leave funds: participation in a paid holiday leave fund can offer real additional protection for posted workers. It is therefore important to implement the Posting Directive in such a way that the funds can continue their function of protecting workers. Mutual recognition of each other's fund is a key step in achieving this objective. However, serious problems can be expected with Member States that do not have a similar provision, as occurs now with the entry of new Member States. Given the development of labour conditions in countries with paid holiday funds and countries without, it can be assumed that participation in paid holiday leave funds guarantees better protection. Article 3.7 provides in these cases better implementation in that posted workers are obliged to participate in the paid holiday leave funds of countries where these funds exist.

Mixed businesses

This section deals with the question of which sectoral agreements are applicable in the case of undertakings active in several sectors.[48] This problem occurs in many Member States and the provision of services by undertakings of other Member States in posting workers makes the problem even more complicated. An example of Belgian practice illustrates the nub of the matter. An undertaking makes glass but also fits ready-made glass in place. Fitting glass comes under the joint committee 'construction', but the employer attempts to fall within the competence of the joint committee 'glass-industry' where the social protection of workers is lower than in construction. To

[47] Also agreements with Denmark (at Ministerial level); still under negotiation with Italy.

[48] Activities of temporary work agencies are seen here as part of the mixed business problem, although the real issue with regard to temporary work agencies is the question of which collective agreement prevails: the agreement of the user company or the agreement (if any) for temporary workers.

determine the competent joint committee (for example, joint committee 'construction') and thus the applicable sectoral agreements in Belgium, the undertaking's activity is determinant. This activity is the one that justifies the existence of it and cannot be abolished without changing the nature of the undertaking. This activity can be precisely determined by the Labour Inspection after research, using different criteria such as the commercial, industrial or service sector to which the undertaking belongs, the activity for which personnel are recruited, applied techniques, material used, the nature of the product, demands for payment, social security numbers, etc. In principle it is the main activity that determines which joint committee the undertaking comes under, but the main activity is not always the decisive factor in determining competence. Sometimes it is the 'usual activity' that is determinant, in contrast to an occasional activity, but this is not always the same as the main activity. If an undertaking carries out different sorts of activities it can come under several joint committees. In case of doubt an employer can seek advice from the Service Collective Agreements of the Belgian Administration.[49] As there are many different joint committees in Belgium, this sometimes inevitably leads to joint committee-shopping as the employer searches for the most favourable and lowest cost joint committee. In the case of posting of workers, checking the activity of the sending foreign employer is even more difficult. Particularly in cases of complex subcontracting networks, as is often the case in construction, it becomes a very hard mission to determine the competent joint committee or collective agreement.

In the Netherlands, Sweden and Denmark it is for the social partners to define a policy with regard to mixed businesses. To determine which collective agreement is applicable in the case of mixed businesses with some construction activities, the Dutch collective agreement of the construction sector defines the scope and provides a clue in Article 2.2: 'In case of a separate department where the construction activities are carried out, the collective agreement applies to all the workers in this department (or section) of the company. When no such distinction can be made, wage costs have to point to a predominant activity in the construction sector to make the collective agreement for the construction sector applicable.' Although no experience has yet been acquired, social partners have no intention of applying different rules to foreign undertakings with mixed businesses that post workers to the Netherlands. When a mixed business objects (correctly) to application of the collective agreement for this reason, the Minister of Social Affairs has the policy of postponing any decision to extend the agreement until the social partners have found a way to solve the problem with the company in question.

In many cases problems about a coincidence of collective agreements are not solved in advance. When a worker goes to court with a claim that a certain collective agreement must be applied whereas the employer applies a different agreement, case law shows that no general standards exist to decide which agreement has priority. Sometimes judges choose to look at the (predominant) kind of labour of the worker and not of the undertaking as a whole; on other occasions the most favourable agreement from the workers point of view is given priority. Another way of solving the dispute pursued by judges is to look at the legal hierarchy of the coinciding collective

[49] FOD WASO (Federal Department of Employment, Labour and Social Dialogue).

agreements (an extended provision is higher in the hierarchy; when two extended collective agreements coincide the most favourable for the worker is given priority).[50] What is special in the Netherlands compared with other Member States is that the material scope of the Directive is limited to the activities listed in the Annex. In other Member States the material scope is widened to other generally-binding collective agreements according to Article 3.10, second indent. As a result, posted workers working in sectors other than construction are not covered by a Dutch collective agreement. This makes the problem of mixed businesses especially urgent in relation to the collective agreement of labour agencies. It is still not clear which agreement has priority when employees work for a labour agency in the construction sector.

Spain extended the material scope to all types of activities and therefore no problems with mixed businesses are reported. Finland, Germany, France and Austria have, however, developed procedures to establish which collective agreement is applicable. As in Belgium, an assessment of the main activities of the undertaking takes place, including an appeal procedure if the employer or employee does not agree. In Germany, social partners include definitions of what should be regarded as construction activities in the collective agreement. An assessment of the working time spent on these activities is then decisive as to whether companies should apply the collective agreement of the construction sector or another sector. The situation in France is unusual, where, with the exception of obligatory participation in the holiday pay leave fund, it is possible to apply a collective agreement other than the construction one if only a small part of the activity takes place in construction. With regard to temporary labour agency workers that also have their own collective agreement, paying wages lower than those of the receiving company's workers is not permitted.

With regard to the relationship between company and sectoral agreements, a debate took place in Germany concerning which minimum wage should be paid. In general it can be concluded that in construction the sectoral agreement prevails. Only large companies have company agreements, but because the trade union negotiators at company level are in most cases the same as those negotiating the sectoral agreements they also follow the sectoral agreement.

Summarising the national reports it becomes clear that the question of which agreement to apply in the case of mixed businesses is an increasing problem that is expected to become more manifest with the use of posting. It is not a problem of legality but of applying the appropriate national criteria in practice. It is very difficult for an undertaking operating in another Member State to assess which activities are main activities and therefore which labour conditions apply. Member States besides the Netherlands used the possibility of Article 3.10, second indent, to expand the material scope of the Directive beyond the Annex to other generally-binding collective agreements.[51] This limits the effect of mixed businesses, although it has to be noted that in general the construction collective agreements are considered expensive. A problem exists in the Netherlands in terms of the priority of collective agreements relating to labour agencies. No problems are reported with regard to company agreements.

[50] See Van Hoek, o.c. 2000, p. 56.

[51] There is at present a draft proposal in the Netherlands to extend its scope to all other sectors.

Practical situations on construction sites: examples, facts and figures

We shall first present an overview of the facts and figures on posting, followed by some practical cases from the construction sector.

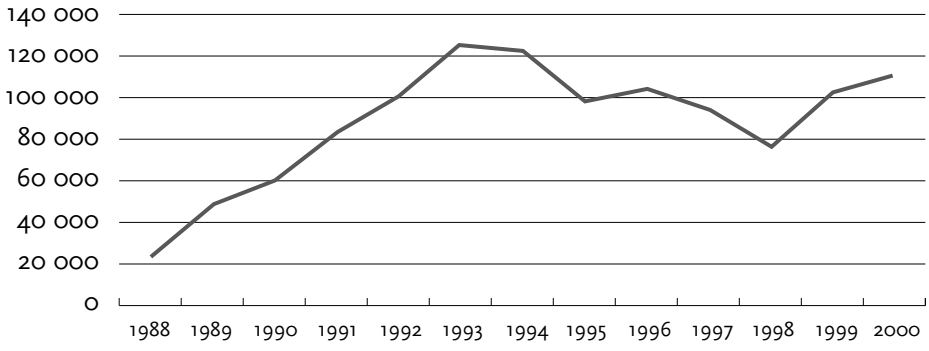
It is very difficult to collect reliable statistics on posting under Directive 96/71. There are no documents or other tokens of proof issued when someone is going to work in another Member State within the EU or EEA area. To gain an idea of how many persons are posted, we have to use other available data/indicators. The E101 forms issued under Regulation 1408/71 are good indicators of posting. It is reasonable to assume that a worker who falls under this Regulation for the purposes of social security also falls under the scope of the Posting Directive.

It became clear in an EC survey on the application of the posting provisions of Regulation 1408/71 over the period 1988-2000 that use of the provisions is rising and that the construction sector is one of the main users (Figures 1 and 2).[52]

Given the specific characteristics of the construction sector – temporary and mobile project-based work and sensitivity to season and economic cycles – the fact that posted workers are frequently used is not surprising. This was also one of the main reasons for including an Annex on construction activities in the Posting Directive.
Another source of data on posted workers is the number of application agreements concerning collective agreements for foreign undertakings in Sweden and Denmark. The Swedish Building Workers' Union claims that over the years about 1,600-1,700 application agreements have been concluded with foreign undertakings. These data are no more than an indication because the actual number of posted workers falling under these agreements is unknown.

In France a survey was made by DILTI in 2000 and 2001 on the posting of workers. From this it became clear that the number of applications to provide services in France rose by 36% in one year; 41% of these applications came from east-European

Figure 1: Number of E101 forms issued according to Article 14 1a (1988-2000)



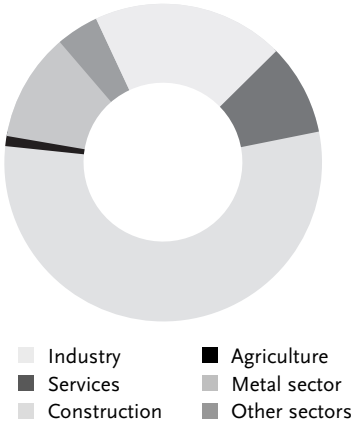
[52] Article 14 1a (employed persons), 14 a 1 (self employed persons) and Article 17 used for the (long-term) posting purposes of Regulation 1408/71 on the application of social security schemes to employed or self employed persons and their families moving within the Community. See BMT Consultants (1995 and 2002).

undertakings, a rise of 7%. The number of posted workers increased from 1,443 to 1,819 (26%), most of whom were working in the industrial and construction sectors.

For Spain, the National Liaison Office reports biannually on notifications of providing services: the number was 67, with a total of 257 posted workers.

In Germany too some statistics are available on notifications of providing services.[53] These indicate that the number of posted workers in construction fluctuates at around 120,000 a year. The number of undertakings providing services in Germany in the construction sector fluctuates at around 4,000. Unfortunately the German Liaison Office does not have posting statistics concerning social security under Article 14 1a of Regulation 1408/71, otherwise conclusions could have been drawn on the relation between posting under that Regulation and posting under the Directive. For the moment we do not know if the E101 forms issued match notifications of services. Significantly, the posting to Germany from the 'old' Member States shows a declining tendency while the posting of workers from the 'new' Member States is rising. Of course it should be borne in mind that these are figures from the years before accession.

Figure 2: Share of posted workers on the basis of Article 14 1a specified per sector



The following conclusions can be drawn from the data obtained. Reliable data are in general not available. The only data that could give an indication of postings numbers are the numbers of E101 forms issued under Regulation 1408/71. From these it becomes clear that there is an upward trend in posting and that construction is one of the sectors where posting is most used. This rising trend is in most cases supported by the figures on notifications of providing services in some Member States. German statistics on the notification of services in the construction sector reveal that the number of postings has stabilised overall over the last three years, with a slight decline in postings from the old Member States and a slight rise in postings from the new.

An overview of practical cases of posting in six countries

It is not easy to discover what really happens on construction sites and how far the provisions of the Directive are applied in the Member States. However, some experiences of major construction projects do help us to gain a picture of the practice of posting and of the problems in construction workplaces and on sites.

In the Netherlands two major infrastructure projects are under construction, namely the cargo rail transport line (Betuwelijn) that will connect the port of

[53] Figures can be found in the annual reports of the SOKA-BAU, the institution in charge of the construction sector paid holiday fund. The figures referred to in this report are from the 2003 annual report.

Rotterdam with the German Ruhr area, and the high-speed track connecting Amsterdam and Paris. International building consortia including Dutch, French, Belgian and German contractors are carrying out the projects and trade union representatives frequently visit both. The general suspicion is that the provisions on labour conditions for posted workers are in practice not very adequately applied. This problem increases the further down the contracting chain one goes. As soon as a subcontractor with unskilled labour lower down the line is involved, competition on costs grows stronger and the extent of compliance with the Directive drops proportionally. Foreign companies providing specialist services such as special drill techniques seem to conform to the rules quite well. Current examples of fierce (labour) cost competition can be found in the steel reinforcement sector and to a lesser extent in scaffolding and bricklaying. Recently a trade union official was confronted with the bankruptcy of a steel reinforcement company in the south of the Netherlands. One of the reasons indicated was that foreign steel fixers are currently available on the Dutch market for an hourly wage of around €5-€8, whereas a domestic steel fixer is paid according to the construction sector collective agreement at a cost of around €30 - €32 an hour.[54] Research into the painting sector shows that main contractors who use posted workers are unfamiliar with the labour conditions applicable to posted workers. Besides legal competition on labour costs, there are also areas and sectors where a substantial illegal workforce appears to be active (BMT 2004a).[55] In the east and south of the Netherlands especially, many Polish workers are used. In the past two or three years widespread use has been made of (often illegal) east-European groups of construction workers in private house renovation projects. A problem frequently mentioned with regard to posted workers is the working of longer hours than allowed in the Dutch legal and collective agreement provisions.

Experience on posting in Spain was gained in the Vitoria-Gasteiz region, where during a construction boom many Portuguese and east-European construction workers were active. Working in close cooperation, the Spanish and Portuguese building unions were able to prove that wages in some cases were not being paid at Spanish levels (which are considerably higher than the Portuguese) and that working time provisions were being infringed. The Spanish Labour Inspectorate was able to act on the basis of proof given by the Spanish union. The problem in practice was to compare the Portuguese and Spanish minimum wages and proof was able to be found because the difference between the applicable minimum wage and the actual wage paid was very substantial, even when factors such as productivity were taken into account.

The construction of the fast railway track between Cologne and Frankfurt in Germany also provided interesting information on the application of posting legislation. The 200 kilometre construction site was divided into approximately 400 smaller sites on which at the peak 4,000 construction workers were present from 13 different west-, central- and east-European countries (most of which are now EU members). The German Railway Company put the project out to public tender and

[54] The legal minimum gross wage level is around €7 an hour for an adult worker.

[55] According to the report of the Labour Inspection of January 2004, illegal workers were found on 50% of building sites visited and 15% of the total workforce inspected was illegal (Press Release Ministry of Social Affairs No. 04/009, 19th January 2004).

the German union IG-BAU coordinated and monitored on site. Subcontracting was common, given the size of the project. At the beginning it was relatively easy to trace the chain of subcontracting, but once the project was in progress this became more and more complex. Because of its size, companies were forced to search for workers in other labour markets and to subcontract further, especially for steel fixing. From IG-BAU figures it is clear that in the first part of the project 65% of the workers were directly employed by the contracting companies and 35% worked under temporary work contracts. At later stages the number of workers on temporary work contracts rose to 75-80%. Most of these came from central- and east-European countries. From several investigations by public authorities and the German trade union it became clear that the posting legislation was being seriously violated, especially with regard to the payment of minimum wages. Illegal as well as grey labour was traced. The main contractor and the client (the German Railway Company) were forced, as a result of regular controls by the authorities involved and union cooperation with the media, to exert their control over compliance with the posting legislation. Contracts with approximately 15 subcontractors were terminated and the German Railway Company included social clauses in all subsequent contracts with companies. The German trade unions provided legal assistance to Polish workers and 14 legal disputes were taken on their behalf to courts in Frankfurt and Koblenz.

The construction of the Svinesund Bridge in Sweden is a case that falls directly within the scope of the Directive. A German company, Bilfinger Berger, was commissioned to construct the new bridge. The company took the commission on a low tender price. The company used only German and Polish workers via its subcontractors. It initially had difficulties in adapting to the Swedish labour market model, but later became a member of the Swedish Construction Federation. The Building Workers' Union at local level was very dissatisfied that no local construction workers were used despite high unemployment locally. A Polish posted worker employed by a subcontractor (IMO) died at the construction site in August 2003. When investigations by the Work Environment Authority began, IMO argued that another subcontractor (by then in liquidation) had employed the dead worker. The workers present when the accident occurred were sent back to Poland and Germany before the investigations took place. And it was suspected that the cause of death was linked to bad health and safety measures on site.

A second Swedish case relates to a Slovakian company, Termostav, which was commissioned to renovate the SSAB coke plant. Although the Directive did not apply in this case, it showed how contractors can work with regard to labour conditions. Only Slovakian workers were present at the construction site. The company and the Building Workers' Union signed an application agreement when work started and pay was agreed at 137SKR an hour for the posted workers. Investigations after a fatal accident revealed that the posted workers were not paid according to the agreement. The Slovakian workers had signed an agreement before leaving Slovakia granting them 8SKR an hour. Termostav denied this, but after a threat of industrial action signed an agreement remunerating all the Slovakian workers at 20MSKR. It was not possible afterwards to verify whether the workers retained the payments.

An example of good practice, is the construction of a dam within the Karahnjukar project in Iceland. The object of this project is to generate more electricity by using

Iceland's great glacial rivers. The main contractor is the Italian company Impregilo. On average 700-800 persons will be employed at the project, of whom 500 are foreigners coming from Italy, Portugal, Romania, Turkey and China. The Icelandic employers and trade union federations concluded a special collective agreement for the project, generally binding by law. This agreement covers mainly minimum wages, paid holiday leave, working time, and health and safety. Although the Posting Directive is also applicable to EEA countries such as Iceland, not all the categories in the provisions of the collective agreement could be applied to posted workers.[56] For this reason a separate agreement with the main contractor was concluded expanding the scope of the collective agreement to labour conditions related to vocational qualifications and to social insurance in cases of work-related injuries.

With regard to Belgium, abuses have been reported that to a certain extent occur in other countries. These examples are treated in the Belgian country report.

The conclusion has to be drawn that the application of the Directive in the construction sector is very sensitive to fraud. Apart from those above, two further aspects can be mentioned: first, the role of public institutions when putting out to tender, especially for large construction work, and, second, the practice of multiple subcontracting that stimulates intense competition on prices. Member States have a major responsibility, as contractors and providers of services and as bodies for maintaining social protection. Both functions should be combined equally, otherwise the balance between free movement of services and social protection remains an illusion.

Practical conclusions

The practical application of the Posting Directive has been investigated. The use of Article 3.7 is regarded as complex because of the difficulty of comparing labour conditions, especially when paid holidays and minimum wages are concerned. In a number of Member States social partners avoid comparisons through the mutual recognition of each other's collective agreements or paid holiday leave funds. This practical solution offers good results. The remaining problem is verification of whether labour regulations are really applied. Article 3.7 is in practice easy to apply and offers no difficult comparison when it is obvious that the receiving state has better labour conditions than the sending state.

It is difficult to check the main activity of an undertaking in a foreign country. In most countries the labour conditions in construction apply when activities take place in this sector. Article 3.10, second indent, limits the effect of mixed businesses because all generally-binding collective agreements fall under the scope of the Directive.

Although figures on posting are limited, the available figures show a rising tendency. It is clear from practical descriptions of construction sites that the applicability of the Directive needs further improvement. The practice of tendering and the extended networks of subcontracting make application of the Directive difficult.

[56] The Directive is implemented in an Act on the legal status of employees posted temporarily to Iceland in the service of foreign undertakings.

4. The role of the social partners

In this section we would like to reflect on the role of the social partners with regard to implementation, practical application and operation of Directive 96/71/EC. Several examples have already been given in this report of the role that the social partners play. They provide and develop information; they have established information contact points in several new Member States; and they have concluded mutual agreements on the recognition of collective agreements or participation in paid holiday leave funds.

The important role that the construction sector social partners have to play follows from the Annex to the Posting Directive through which the scope of Article 3.1 is expanded to generally-binding construction sector collective agreements. Social dialogue has a grand tradition in the construction sector and the social partners have, in general, developed a institutionalised proces of collective bargaining. Legal instruments to declare collective agreements generally binding for the whole sector extend their influence even further.

Cooperation between liaison offices/inspection services and the social partners is therefore a key element in applying the provisions of the Directive. Sometimes, as in Sweden, social partners have far-reaching competences concerning control. This has to do with the special function of social dialogue in Sweden. It is necessary for foreign undertakings seeking to become active in Sweden to be aware both of legislation on the terms and conditions of employment and of the likelihood of their being forced to sign a collective or application agreement. In Sweden companies that are not members of an employers' organisation that has signed a collective agreement can sign an application agreement, the name given to the agreement that a union concludes with an individual employer who does not belong to a signatory employers' organisation. This means essentially that the employer undertakes to apply the collective agreement envisaged in the application agreement, usually the sectoral agreement covering the sector of activity. Most foreign undertakings in the

construction sector that come to Sweden sign application agreements, which thus play a central role in the application of the Posting Directive. In other Member States too social partners can be the eyes and ears of the administration, and therefore cooperation between liaison offices and the social partners needs to be improved.

In Finland the Construction Trade Union and the Confederation of Finnish Construction Industries adopted a joint guide, 'Responsible Construction in the Enlarged EU', in May 2004. It covers in comprehensible language the legal and contractual obligations of different players, especially on subcontracting (temporary work included), but also on the guiding principles for the client when concluding an agreement with a foreign company. It also gives practical information on taxation (including VAT) and accident insurance and recommends paying wages via a (Finnish) bank. It includes a model clause for subcontracting agreements, confirming the commitment to apply Finnish working conditions and justifying invalidation of the agreement should this not be the case. The model clause also obliges the subcontractor to show all the evidence to a client or a main contractor that is not party to the agreement concerned. Finally, it recommends an on-site access control system (an RFID-based access control system that consists of a plain ID card with photograph for visual recognition, and an RFID Cardholder for electronic recognition).

There is strong evidence in the UK that the weakening of Britain's employment legislation will lead to the exploitation of migrant workers. It has become difficult to recruit and retain skilled workers due to the industry's poor record of dangerous working conditions and insecure employment. This situation leads to an increase in foreign workers on British building sites. At the moment the British Construction Skills Certification Scheme (CSCS)[57] is seeking for all construction workers in the UK to possess an individual registration card (similar to a credit card) valid for three or five years. The CSCS card also provides evidence that the holder has undergone health and safety awareness training or testing. With this card the British construction industry social partners wish to put in place measures to monitor and record the use of foreign labour.

The Dutch situation is rather unusual in that the Netherlands has been the only Member State not to use Article 3.10, second indent, to bring collective agreements within the scope of the Directive other than those related to the activities mentioned in the Annex. Nor are all the activities in the Annex tackled at the moment. It is apparently quite difficult to motivate the bargaining parties belonging to construction-related trades to include posted workers within the scope of their collective agreement.[58] Nevertheless, they should be strongly encouraged to follow the example of the main construction sector collective agreement. It is not a matter of free choice, because the Directive prescribes it. Social partners in the metal and steel industry and even in the cleaning industry should also be included in this

[57] The CSCS (Construction Skills Certification Scheme), owned and managed by CSCS Limited, is controlled by the Construction Confederation, Federation of Master Builders, GMB Trade Union, National Specialist Contractors' Council, Transport and General Workers' Union, and the Union of Construction, Allied Trades and Technicians.

[58] As with the collective agreements for plasterers and related companies, for roofers, and even (partly) for mortar, for timber/carpentry-firms, for furnishing companies/industry, and for residential services.

encouragement. In these industries some collective agreements cover parts of the Annex to the Directive.[59] In the present situation, for instance, posted plasterers that are aware that the collective agreement for plasterers is not being applied to them (although the trade falls within the scope of the Annex) are left to take action themselves and have to go to court with their claims. Because everyone knows that posted workers will not easily resort to court and are as well probably unaware of their rights, this is rather a theoretical situation.

From the national reports it has become clear that social partners can play an important role in the application of the Posting Directive, not only by providing information on the labour conditions applicable but also in controlling and enforcing compliance with the Directive. Although social partners have different positions concerning the enforcement of labour conditions that depend on the situation in the Member States, they can in any case have an important signalling function for liaison offices on what is happening on construction sites.

[59] As with the collective agreements for concrete products, plumbing, fitting and central heating, the collective agreement for insulation companies, and the agreement for cleaning companies.

5. Directive 96/71/EC in the new Member States

All the new Member States have implemented the Posting Directive into national law as part of the acquis communautaire and no irregularities were reported by the European Commission during this process. The major difference with the 'old' Member States is that the provisions on collective agreements are not applied, because as the result of a lack of social dialogue at sectoral level the new states have practically no collective agreements.[60] Although some new Member States have procedures for declaring collective agreements generally binding, the possibility is never used in practice and has, as such, no relevance with regard to the implementation of the Directive (BMT 2004b[61]). As a result, only legal terms and conditions or administrative provisions apply when working in the new states. The Directive was also implemented in a very minimalist way.[62]

It was reported from some new Member States (the Czech Republic, Hungary and the Baltic States) that many workers from the Ukraine and Belarus were active in the construction and service sectors (horticultural and hotel businesses) (BMT 1995 and 2002). For this reason Member States like the Czech Republic were very eager to implement the Posting Directive into national legislation. These observations came from the period before accession and there are no figures available about the numbers of workers from outside the EU active in the new Member States. Article 1.4 of the Posting Directive is important in this respect because it states that undertakings established in a non-member state must not be given more favourable treatment than

[60] See Clarke et al., 2003. Based on a study in six CEE states, the authors concluded that sectoral collective bargaining at national level is absent in Estonia, Poland, Hungary and Bulgaria.

[61] For example, in Poland the possibility of declaring collective agreements generally binding exists in theory but is never used in practice.

[62] This became clear, for example, from several twinning projects on the free movement of workers in Hungary, Lithuania and the Czech Republic in which BMT Consultants participated.

undertakings established in a Member State. The implementation laws of the new Member States should be applicable, therefore, to all undertakings established abroad and to all workers exercising an activity on national territory. Within the framework of this report it was not possible to verify if this was indeed the case.

The situation is different, of course, where employees from the new Member States start working in the old EU states. Although nearly all the old Member States introduced transition periods for the free movement of workers, these do not apply for the free movement of services, including posted workers. Germany and Austria were the only two Member States that made an exception by applying the transitional period to posted workers also in so far as they work in the construction sector. From the national reports many problems were reported with the posting of workers from the new Member States. The difficulty is that in most cases these refer to illegal labour (not posting) and to the situation before accession, when the Directive was not even applicable in the new Member States (although it has to be noted that Article 1.4 on undertakings established in a non-Member State already applied for workers posted from undertakings in the accession states). Given the short period since accession, care is needed when drawing conclusions about the new entrants and the application of the Directive. All national institutions of the Member States involved in this study expect a significant rise in illegal labour from the new Member States, especially in sectors like construction. How far this expected rise will be caused by the application of a transition period is difficult to say.

Available and transparent information for workers and undertakings from the new Member States is crucial, even more so because the new Member States are unfamiliar with the application of collective agreements and the autonomy of social partners to conclude these. Some interesting initiatives were launched by several EU countries to inform workers from the new Member States about the labour conditions to be applied when working there. In Finland brochures were drafted in Estonian and Russian to inform workers from those countries. The Confederation of Finnish Trade Unions (SAK) even established a special information bureau in Tallinn. The Russian brochure was drafted to provide information not only for the Russian minority in Estonia but also in the other Baltic States. Similar initiatives were developed in Denmark, where an agreement on minimum labour conditions was concluded between the Danish and Polish construction unions. Germany also has information available in several languages and IG-BAU (the German construction union) has opened an information office and helpdesk in Warsaw.

From the national reports it is clear that the social partners are mainly active in the exchange of information with new Member States. It is of great importance, however, that liaison bodies also start to become more active in exchanging information and monitoring compliance with colleagues and sister bodies in the new states within the framework of Article 4.2. Until now nothing has happened and, given the reported mobility and activities of workers from new Member States into the old ones, initiatives are necessary. The Posting Directive is an instrument to prevent illegal working; it therefore needs European cooperation. Use of the EURES network could help as well.

National implementation of Posting Directive 96/71 EC: Country reports

Jan Cremers,
CLR coordinator[63]

[63] The nine original country reports were summarised and edited by Jan Cremers. Authors of the original reports are to be found at the beginning of each summary.

Overview

The main consequence for the construction sector of the introduction of the EU's free movement principle is the economic migration and posting of workers.

Directive 96/71/EC of the European Parliament and European Council of Ministers of 16th December 1996 required EU Member States to guarantee by law or collective agreement a series of working and employment conditions. Depending on its legal system, each Member State had the possibility of introducing different provisions in order to implement the Directive. Some countries had to repair their collective bargaining systems in order to deal with the Directive in an effective way.

From the very beginning it has been clear that the issue of the posting of workers cannot be seen or analysed in a vacuum. This observation has important consequences for national implementation of the Directive. The development of a country's labour legislation, the (juridical framework of its) collective agreements, the social security system and finally aspects of social security and protection that are settled by both sides of the industry (via paritarian provisions and funds) are all linked.

As well as providing a descriptive overview of implementation and the national debate in the countries examined, we sought to answer the question of whether the Directive has served to prevent bogus practices and distortion of competition. We therefore formed a team of experts in industrial relations in nine countries. The country reports produced within the framework of this cooperation are summarised here. The Swiss report was written and added by the editor. For reasons of comparability we have used the same format for these summaries.

- Introduction: national debate before and during implementation
- National implementation (Definitions of posted worker, Applicable national rules, Applicable collective agreements, Comparison of labour conditions, Equal treatment)
- Administrative cooperation • Measures and the execution of penalties
- Experiences and practices • Evaluation of the Directive

Austria[64]

Introduction: national debate before and during implementation

In Austria the posting of workers was already regulated through the Labour Contract Law Adjustment Act (AVRAG) before the entry into force of Directive 96/71/EC of the European Parliament and the Council of 16th December 1996. Under AVRAG, in its version prior to implementation of the Posting Directive, workers posted by an employer not officially registered in Austria to perform work, lasting over one month within the framework of the hiring out of workers or for a continuous period of work, were entitled to at least the pay laid down by law or by collective agreement that a comparable worker would receive from a comparable employer at the place of work. An exception to this provision was the 'preferential treatment of assembly work', that is assembly and repair work connected with the supply of machinery and plant where the work did not last for more than three months.

In 1995 a 'Law to combat abuses' was issued and consequently the 'one-month threshold' for the applicability of the Austrian provisions on pay was abolished. In order to safeguard the rights of posted workers, provisions also followed governing the joint liability of foreign employers and their Austrian contractors regarding the pay entitlement of workers. The basis for supervising and enforcing the rights of posted workers was created by the obligation to keep at the place of work all documents and records relating to pay necessary for registering the worker with the social security system of their home country. Infringements of the requirement to ensure that pay corresponded to the levels customarily prevailing at the place of work and to keep the necessary records were punishable by an official fine.

[64] The author of the original country report was Mag. iur. Sebastian Wotruba, Gewerkschaft Bau-Holz, Austria.

Doubts about the compatibility of the joint liability with the freedom to provide services laid down in Article 49 of the EC treaty, as well as the adoption of the Posting Directive, made it necessary to amend AVRAG. The liability provision was fiercely contested by the employers' organisations. The EC took the view that it did not conform to Community law as joint liability is foreseen solely where it is sought by a foreign contractor, but not in the case of a domestic contractor. In this respect, the Austrian legislators were endeavouring to establish a liability provision that could stand up in all cases to scrutiny by the European Court of Justice.

With this amendment in the course of being implemented, a division was created between the 'posting of workers under contract' within the meaning of the Posting Directive, on one hand, and cross-border hiring out of workers, on the other. Whereas the legislators laid down the rights of 'workers posted under contract' in AVRAG, the cross-border hiring out of workers was removed entirely from the scope of AVRAG and incorporated in a new Law on the Temporary Provision of Employees (AÜG). A further distinction is made concerning the provisions governing posted workers as to whether or not the foreign employer is officially registered in an EEA country.

In Austria a model of voluntary cooperation among the employers' and workers' organisations as well as government representatives has existed since the 1950s, the principal aim of which is to enable conflicts to be resolved by seeking consensus. When the Posting Directive was being transferred, numerous discussions took place under the partnership about the details of provisions to be modified and created in the country's national laws. The discussions and resulting agreement by the social partners had a considerable influence on the content of the implementing provisions. Only on the question of including construction workers posted to Austria within the Austrian holiday fund system was it not possible to reach agreement.

National implementation

Definitions of posted worker

Posting within the meaning of the Posting Directive is deemed to exist in the following cases:

- The worker is employed under the direction and on account of an employer in another State under a contract concluded by this employer with the beneficiary of the service in the host country. From the Austrian viewpoint, this contract is in most cases an employment contract so that it is possible to refer to posting under an employment contract. Regardless of the law governing the employment relationship, workers posted to Austria have the right to enjoy the conditions of work and employment laid down in AVRAG. Posted workers are entitled to receive at least the level of pay laid down by law, regulation or collective agreement corresponding to that paid to comparable workers by comparable employers at the place of work, to paid leave where the leave provided for under the laws of their home country is shorter, and to compliance with the working time provisions of the collective agreements.
- The worker is posted by a temporary employment undertaking. This cross-border hiring out of workers to Austria is governed not by AVRAG, but by AÜG. In this

connection, the intention of the legislator was to ensure that all the provisions of AÜG applicable to Austrian temporary workers would also apply to cross-border hired workers. Extending all the labour provisions applying in Austria to temporary workers to cover also workers hired from across the border is considered permissible and in conformity with Community law on the basis of the provisions of Article 3 (9) of the Posting Directive.
- The worker is employed in another state within an undertaking or group of undertakings. The hiring out of workers between group undertakings within a group is excluded from the scope of application of AÜG provided that the place of operation of both group undertakings is located within the EEA and hiring out workers is not the business objective of the company making the workers available.

Posting is defined as sending a permanently employed worker to Austria to carry out certain work. The legal provisions governing posting are also to be interpreted according to Austrian international private law, such that a precondition of posting is a temporary removal of the workers from the place of work, customarily in the workers' country of origin. The Directive makes it quite clear that the concept of worker may only be determined in accordance with the laws of the host state. It must therefore be determined solely by Austrian law whether or not the posted person is a worker. The concept of worker is not a uniform concept in Austrian labour law. Depending on the purpose of the legal provisions, it defines the scope of application in some cases more widely and in others more narrowly. Workers within the meaning of the Labour Contract Law are those persons who are required under the terms of an employment contract to provide services to another party in a relationship of personal dependency. The work is carried out for the benefit of another party, namely the employer. Key features are: a personal obligation to work under the direction and control of the employer, using work equipment made available by him or her; work carried out under orders, the financial benefits of which fall to the employer; personal duty of care and loyalty; incorporation of the worker within the organisational structure of the undertaking; being subject to supervision. Any person not bound by any kind of working time provisions is not deemed to be a worker. Those persons not under an obligation to carry out the work themselves are also not considered to be workers.

The Posting Directive defines posted workers as being those workers posted temporarily. The word 'temporarily' was not included in the Austrian law. A decisive criterion for the purposes of posting, however, is that it concerns the performance of work for a certain duration or to attain a temporary objective. This immediately rules out ad-hoc assignments and long-term assignments, which would lead to the establishment of a new 'habitual' place of employment. There is no upper or lower limit. A posting can also last for a number of years.

Applicable national rules

The Directive allows Member States to lay down conditions of work and employment where provisions concerning public order are involved. Austria did not use this 'authorisation'.

The following provisions were adopted in the course of implementing the Posting Directive: compulsory conditions of work covering pay and leave, and compliance with working time provisions laid down in collective agreements; preferential treatment concerning assembly work; mechanisms for implementing the law, such as the obligation of the posting employer to provide information to the posted worker, the obligation of the posting employer to provide information to the authorities of the host state, cooperation concerning information, and main contractor liability.

Applicable collective agreements

It is permissible for general standards to be set in collective agreements. In this way, despite its basically private-law character, the collective agreement is a genuine legal regulation, a law in essence. The provisions of the collective agreement, apart from those that govern the legal relationship between the parties, are directly legally binding for the employment relationship covered by the scope of application and defined in geographical or occupational terms. It is laid down by law which aspects of employment relationships may be regulated in agreements. Where a collective agreement exists covering the aspects applying to the specific employment relationship, this is deemed to have precedence over the provisions of the law.

There is no formal system in Austria whereby the terms of collective agreements are extended to cover all those undertakings carrying out the activity concerned within the geographical area concerned. Where no such system exists, the Member States may also deem applicable either those collective agreements which are in general application or those which have been concluded by the most representative organisations of the bargaining parties at national level. As a rule, agreements are concluded on the employers' side by the relevant group in the Chamber of Commerce and on the workers' side by the Austrian Trade Union Confederation.

In the collective agreement not only is pay entitlement laid down, but also important protective provisions for workers. The agreement secures the same basic conditions within companies in a particular sector.

The collective agreement for construction essentially covers the following production areas: building and civil engineering, assembling construction using prefabricated units, sinking shafts, bridge building, road building, power plant construction, railway superstructure construction, and fireproof and chimney/ smokestack construction. Its provisions include:

- A basic 39 hour weekly working time, normally to be distributed over five consecutive working days. It is permissible to increase normal working time to 40 hours but during the set calculation period average weekly working time may not exceed 39 hours.
- Minimum rates of pay for individual occupational groups as well as overtime premiums, extra payments and performance-related bonuses. Locally prevailing wage levels may, however, be higher than those laid down in the agreement.
- Minimum amounts of paid annual leave are not normally laid down in the collective agreement and construction workers are subject to the provisions of the law. Time off must be allocated to the construction worker by the relevant employer. Holiday pay rights are payable by the construction industry holiday

fund, BUAK, to which body every employer must pay regular contributions for the workers employed. Leave provisions do not apply to posted construction workers, who are subject to the general leave provisions.
- Minimum conditions concerning occupational health and safety.

According to AÜG, temporary workers are entitled to reasonable pay on a par with levels normally paid locally. During the period of hiring out, AÜG stipulates that provisions of the collective agreement governing working time and applying in the user undertaking to comparable workers shall apply. Finally, AÜG establishes holiday entitlement in the case of the cross-border hiring out. According to this provision, a worker who is hired out across the border to work in Austria is entitled to paid leave for the duration of the hiring out period, regardless of the law applicable to the employment relationship, and provided that the legal provisions on leave in his home country are less favourable. Regarding holiday entitlement provisions, reference is therefore made to the law on holiday entitlement. For construction workers the same problem raised earlier applies concerning the BUAG holiday fund system.

Comparison of labour conditions

The intention of the legislator is that all provisions of AÜG applying to Austrian temporary agency workers should also be applicable to workers hired out cross-border. In determining the equity of provisions, the pay levels laid down by the collective agreement for comparable workers doing comparable work in the user undertaking should be taken into account. Comparability for this work must be judged according to the type of work and duration of employment in the user undertaking as well as the worker's qualifications for this work.

This means, consequently, that for temporary posted workers the same conditions of work and employment shall apply as those applicable to Austrian temporary workers. Since 2002 there has been a collective agreement in Austria for temporary employees. This lays down the minimum rate of the 'basic wage' of temporary employees. AÜG stipulates that, regardless of the basic wage, the worker must be paid at least the rate of pay fixed by the collective agreement applying to the user undertaking. For instance, a temporary worker in the construction sector must receive the minimum pay laid down by collective agreement for comparable construction workers. Where the working wage is higher than the basic wage agreed in the employment contract, the higher working wage must be paid. Should it be lower, the agreed basic wage applies.

Summing up, the Austrian collective agreement for temporary employment undertakings does not create any disadvantage for temporary workers, as the actual pay for their employment is in line with the corresponding collective agreement for this type of employment. The pay provisions of the collective agreement for temporary workers apply where the worker is not in fact placed with an employer or the rate of pay fixed in the agreement for this type of employment is lower than the basic wage. As a result of the implementation of the Posting Directive with respect to temporary workers, the national provisions for the protection of temporary workers are also rendered applicable to cross-border hired-out workers.

The most-favourable principle established is also reflected in the implementation provisions. AVRAG stipulates that the posted worker is entitled to paid leave under the general law on leave. However, this only applies where the leave entitlement according to the legal provisions of the worker's home country is less favourable. A similar provision is contained in AÜG. Furthermore, there is no doubt that the laws of the state of origin are decisive where they are more favourable for the posted worker than those of the host state. For example, workers posted from Germany to Vienna benefit from what is often a higher pay entitlement.

Equal treatment

The regulatory part of the collective agreements – setting out the rights and obligations of workers and employers and also including the level of pay – has in essence the force of law. The provisions of the collective agreement are unalienable. As a rule the agreement has a unilaterally compulsory effect, such that it is permitted to implement individual and plant agreements more favourable for workers. In principle it is not possible to pay lower wages than those laid down in the collective agreement. This is in fact prohibited for employers who post workers to Austria. Owing to the lack of an 'outsider effect' of collective agreements on the employers' side, cases may theoretically arise in which an domestic employer would not be subject, although in practice such a situation would be of little significance.

An employment contract should always be subject to only a single collective agreement. From this it follows that, where a worker carries out different types of work, only one agreement is applicable. In principle, only one collective agreement should apply within an undertaking. In this respect the legislators have sought to uphold the principle of 'bargaining unity'. Only in those cases where the undertaking has been divided into different organisational units for technical reasons may different agreements be applicable in the different units. The principle of 'diversity of bargaining' is therefore only manifest where the undertaking is clearly divided into well-differentiated units and not just into a business engaged in different activities. Of the various collective agreements the one most closely applicable to the activity carried out should apply. In principle, therefore, in each undertaking only the most closely applicable agreement for the sector of activity that is economically most relevant to the undertaking from a technical and geographical viewpoint will apply.

Administrative cooperation

Workers can obtain information about the applicable provisions concerning the posting of workers to Austria from the Federal Ministry for Economics and Labour (BMWA, *Bundesministerium für Wirtschaft und Arbeit*). The BMWA outlines some key particulars about posting workers[65] and by this means fulfils its remit as a liaison office

[65] www.bmwa.gv.at/NR/rdonlyres/454EC977-6636-4B53-9372-D5DD806F7EBB/8070/GrenzueberschreitendeEntsendungenoderdcberlass.pdf.
Information is also available in English at: www.bmwa.gv.at/NR/rdonlyres/454EC977-6636-4B53-9372-D5DD806F7EBB/8418/cross_border_bosting_1.pdf. Information is not available in other languages.

within the meaning of the Posting Directive. As well as the internet, it is also possible to obtain information by telephone about the existing posting regulations. Employers posting workers to Austria are recommended by the BMWA to contact the Austrian employers' organisations to obtain information about the conditions of work and employment applicable.

Measures and the imposition of penalties

Employers who post workers to Austria must notify the Central Coordination Agency charged with investigating illegal employment in accordance with the Act governing the employment of foreigners and the Labour Contract Law Adjustment Act (*Zentrale Koordinationsstelle für die Kontrolle der illegalen Beschäftigung nach dem Ausländer-beschäftigungsgesetz und dem Arbeitsvertragsrechts-Anpassungsgesetz*) not later than one week prior to the start of their work. A copy of the notification must be handed to the person authorised to act on behalf of the posted worker or, where only a single worker is posted, to the worker himself. Should the employers fail to meet this obligation, the authorised representative or the worker has an obligation to report this fact without delay no later than the time the work is started. The Agency must forward a copy of the notification to the appropriate sickness insurance institution and, where construction work is concerned or activities fall within the province of the transport labour inspectorate, to BUAK or the transport labour inspectorate authority.

In the event that a posted worker does not have any social insurance obligations in Austria, the employer or the authorised representative or, where a single worker has been posted, the worker must, in addition to keeping a copy of the notification of taking up work, keep a record documenting that the worker is registered with a social insurance institution in the respective home state.

Infringements are subject to a fine of up to €1,450 if the offence is repeated.

The purpose of introducing this notification procedure and the penalties in the case of non-compliance are based on Article 5 of the Directive. Notification to the Central Coordination Agency informs the authorities about the posting, thereby enabling them to monitor mandatory conditions of work and employment. Subsidiary liability of the authorised representative or the worker is subject to administrative fines and based on the fact that sanctions imposed by the authorities cannot normally be enforced abroad. Employers who post workers to Austria are in most cases not officially registered in Austria. Liability of the authorised representative or the worker serves to secure a minimum degree of effectiveness for the notification obligation and/or the obligation to keep social insurance records. Although required by law, the construction industry holiday fund only occasionally and sporadically receives copies of the notification from the Agency. The holiday fund law in Austria has not been extended to posted workers. For this reason, the copies of notification of posted workers reaching BUAK have no legal force and simply provide information.

At present it is not possible to check whether a posted worker actually receives an amount paid out corresponding to the pay due. It would in practice be extremely difficult to organise such checks. A statutory reporting requirement by the worker of

the pay received during their period of posting could be useful. With the aid of bank account statements the amounts received could be shown. It is considered that an obligation on the credit institutions to disclose incoming amounts in the accounts of posted workers could not be implemented. It would scarcely be possible to force foreign credit institutions to disclose such information to the Austrian authorities.

Experiences and practices

According to information from BUAK, each year about 4,000 construction workers are posted to Germany. Little can be deduced from this figure as it also includes postings for just one or a few days. For example, where a construction worker is posted regularly for a single day, each of these days is counted as a 'posting'. Posting figures in other EU States are not available.

Some provisions and objectives have not been realised during implementation.

- According to Article 1 (4) of the Posting Directive, undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. AVRAG does not provide for the application of working time provisions laid down by collective agreement to workers posted from non-Member States, whereas in the case of posting within the Community it is mandatory for such provisions to apply also to posted workers.
- With regard to the provisions governing 'preferential treatment for assembly work', only initial assembly and installation work is covered. Meanwhile AVRAG also excludes application of the Austrian pay and holiday provisions in the case of repair work connected with the supply of plant or machinery. The types of work covered by the preferential treatment of assembly work in AVRAG do not therefore correspond to the provisions of the Directive. At the same time, AVRAG stipulates that pay provisions shall not apply only in relation to the pay level fixed by collective agreement. Exclusion of pay provisions laid down by law or regulation, on the other hand, is not mandatory.
- Where the amount of work to be done is not significant, Member States may derogate from applying the provisions governing pay and leave. They may themselves decide what constitutes a 'not significant' amount of work. AÜG excludes the application of leave provisions to the temporary hiring out within company groups, without however being more specific as to how 'temporary' is to be understood. Furthermore, AÜG stipulates non-application of working time provisions in collective agreements to temporary hired-out workers, which in the construction sector constitutes a further infringement of the Directive owing to the lack of a corresponding exemption provision.

Evaluation of the Directive

The Posting Directive has made a considerable contribution to employers fulfilling their social responsibility towards their workers. At the same time, it has made it more difficult to use social dumping for competition.

From the viewpoint of the Austrian building and woodworkers trade union (*Gewerkschaft Bau-Holz*), all further developments in the sphere of the posting of workers must aim to reinforce the original objectives and motivations of the Directive. Another aim must be to raise the level of protection from social and wage dumping of workers legally employed in a Member State, and to safeguard posted workers against exploitation by foreign employers and their national contractors. The Directive itself should be worded more clearly and unambiguously to protect wage and social standards. Even though it is not the Directive's objective to bring labour and social legislation in individual EU States more closely into line, only by achieving similarly high standards of pay and social conditions will it be possible ultimately to secure fair and undistorted competition.

A particular problem is the inclusion or non-inclusion in the holiday fund schemes. The impossibility of foreseeing whether or not employers' contributions are required by a holiday fund in the host country constitutes a considerable stumbling block to fair competition. Anchoring into the Directive the manner in which national holiday fund law is to be incorporated in the transposition could clarify this issue. There is nothing to stop provision being made for the compulsory inclusion of posted construction workers within a holiday fund scheme or some other institution, which after all already exists.

A major objective is to ensure that workers and/or their representatives can have recourse to appropriate procedures for implementing the obligations arising from the Directive. To achieve this objective it is essential and indispensable that the contractor in the host state and the employer in the posting state are jointly liable for the pay of the posted workers. Only when these workers have the option of demanding the remuneration owing to them for the work performed during the posting from the contractor in the host state can their rights concerning guaranteed conditions of work and employment be said to be adequately protected. The main contractor-contractor relationship should not however be defined too narrowly. The aim is for the main contractor to be made jointly liable with every contractor in the 'subcontracting chain', regardless of whether the main contractor and the posting subcontractor have entered into a direct contractual relationship with one another.

It also needs to be considered whether the workers' representative organisations should have a right to file an action to enforce not only the pay entitlement actually withheld from workers but also the economic damage inflicted on the labour market.

Clarification is finally needed about the cooperation of the posting undertaking and its Austrian contractors with respect to supervision of employment documents. The obligation for foreign tenderers to have employment documents translated is, quite inexplicably, viewed as a disadvantage for these companies. The documents must be made available to the supervisory bodies and translated into the corresponding national language. The national supervisory bodies must not be hindered in applying the provisions of the Posting Directive as a consequence of documents not being understood.

Belgium[66]

Introduction: national debate before and during implementation

The Belgian Implementation Act (Act of 5th March 2002) came into force on 1st April 2002 and was further implemented by a Royal Decree. Implementation was delayed due to two criminal cases at the Criminal Court of Hoei concerning two French construction companies that had failed to comply with Belgian legislation on drawing up and keeping social and labour documents. In the Arblade decision of the Court of Justice (in November 1999) Belgian legislation on the drawing up, keeping and retention of social documents was found to be a forbidden restriction of the free movement of services in the internal market. On the one hand the Act of 5th March 2002 had to put into practice the Directive and, on the other, it had to introduce a new and simplified system of drawing up and keeping social documents in the case of posting of workers in Belgium in order to comply with the Arblade ruling. It was this combination of implementing the Directive and adjusting legislation to the Court's new jurisprudence that constituted a difficult exercise during the implementation phase.

The national implementation debate can be situated in the discussion that took place between the representative workers' and employers' organisations in the National Labour Council when their advice was sought. After long and tough discussions, social partners failed to agree on the proposal and gave divided views. The trade unions were very satisfied with the broad interpretation given by the government. The maximalist proposal from the government to a large extent made use of the possibilities to broaden the scope of application (using the 'public policy'-provision and the 'other sectors' provision concerning collective agreements) and did

[66] The authors of the original country report were Prof. Dr Yves Jorens and Filip Van Overmeiren, Social Law Unit, Ghent University, Belgium.

not use the optional derogations. In contrast, the employers' organisations argued that the application of all Belgian laws, regulations and collective agreements concerning terms and conditions of employment to service providers from other Member States that posted workers to Belgium was surely in breach of the principles of Community Law as interpreted by the Court of Justice. Secondly, they were of the opinion that the proposal did not comply with the Directive's goal and the will of the European legislator to define a nucleus of applicable provisions of national labour law on posted workers and their employers. The employers' representation proposed to restrict the scope of the Act to the provisions of national labour law that were defined in the Directive as the nucleus of mandatory rules and to provide the opportunity to broaden the scope of application to other provisions of national labour law after social partner consultation and in full respect of Community law. Finally, they were in favour of a limited enumeration of the Belgian law applicable, the insertion in the Act of specific provisions to make sure that foreign employers respected this, and the obligation on the foreign employer to declare before posting workers to Belgian territory.

The difficult exercise of drawing up a list of applicable provisions of Belgian labour law was avoided by the legislator by implementing in a maximalist way. The wide interpretation and the broadness of the Act of 5th March 2002 have in fact four aspects. First, the legislator chose to incorporate larger definitions than those in the Directive. Secondly, the application was not restricted to a nucleus of mandatory rules but was extended to nearly all Belgian law on the terms and conditions of employment. Thirdly, as the application of collective agreements is respected, this is not limited to the application of agreements in the construction sector but to all sectors. And finally, the legislator made no use of optional derogations.

National implementation

Definitions of posted worker

The distinction made by the Directive between three types of posting was not implemented in the Act. The type of posting is of no importance to the legislator. A posted worker as defined by the Act of 5th March 2002 is: 'a worker who carries out work in Belgium and who usually works on the territory of one or more other states than Belgium or who was recruited in a state other than Belgium'. Apart from merchant navy undertakings and seagoing personnel, a worker regardless of nationality and the scope and period of their work is encompassed by the Act as soon as they carry out work on Belgian territory. A worker is defined as: 'a person who, by virtue of a contract, carries out work for pay and under the authority of another person'. An employer is defined as: 'the natural or legal person that employs the persons described'. The definition of a worker is also wide, as it not only concerns persons who are employed under a labour contract, but every contract to carry out work for pay and under supervision (for example, a learning contract, traineeship contract, …). The applicability of the Act can be extended totally or partially to other persons who carry out work under the authority of another person. With regard to implementation, it is important that only the Belgian definition of worker is considered and that the definition of the state of origin is not taken into consideration

at all. The Act is applicable to all posted workers and not only to those posted from Member States. There is no provision that distinguishes between a posted worker and a posted self-employed person. As the aspect of working under authority is crucial, only posted workers fall within its scope. The term 'limited period' is not defined.

Applicable national rules

The legislator made no attempt to sum up the national law applicable and opted instead for a broad translation of the term 'nucleus of mandatory rules'. The legislation declared more national rules applicable than the nucleus laid down in Article 3 of the Directive. The employer who posts workers to Belgium is obliged for the work that is carried out to comply with the labour, wage and employment conditions set out in the legislative, regulatory and collective provisions sanctioned by criminal law. The explanation for the choice of 'sanctioned by criminal law' is that it is a general and objective criterion conforming wholly with the Posting Directive (provisions sanctioned by criminal law are undeniably public policy provisions). It allows matters other than those enumerated in the Directive to be envisaged and makes it possible for other and new provisions to be included without the need to change the law in order to complete the list of applicable provisions. The legislator preferred not to give a limited list of the legislative, regulatory and collective provisions that should be respected by foreign employers and made all labour law sanctioned by criminal law applicable. The Act is seen as clarifying the Civil Code, which states that the laws of police and security have to be respected by all who live on Belgian territory.

The legislator considers that this broad interpretation does not violate the jurisprudence of the Court of Justice and is confident that the Court will monitor if certain provisions, whether belonging to the nucleus of mandatory rules or not, are incompatible with Treaty provisions on the free movement of services. The legislator has further specified that, in the case of the posting of workers, those provisions will only be applicable in so far as they are not incompatible with the free movement of services. In an explanatory statement, the applicable provisions envisaged are provided in an illustrative way relating to legislation and regulations in the field of public holidays and minimum holiday rights, temporary work agencies, working rules and payment, the well-being of workers and other protective measures, as well as all the generally-binding collective agreements (not restricted only to construction). However, this explanatory statement cannot serve as a limiting list of applicable provisions when considering the above-mentioned scope of the Act under the criterion 'sanctioned by criminal law'. Furthermore, there is a provision in the Act that gives an opportunity to make additional applicable provisions. This means that an employer must in principle respect nearly all the Belgian legislative, regulatory and generally-binding collective provisions on terms and conditions of employment.

Applicable collective agreements

All collective agreements have to be respected in Belgium including by foreign employers. Where the Directive gives Member States the option of extending the scope of applicability from the construction sector collective agreements to other

activities, this was accepted by the legislator. All collective agreements that are generally binding, sanctioned by criminal law (all generally-binding agreements are sanctioned by criminal law) and concluded at National Labour Council, joint committee or joint subcommittee levels are applicable (agreements at company level are excluded). Once a collective agreement has been declared generally binding, there is equal applicability to the whole territory for all employers. The provisions of construction sector collective agreements apply in their entirety to workers employed on agency work.

Derogation for short-term assembly/installation is not applicable for certain activities in construction, which means that, even in a situation foreseen in the derogation, the employer who posts workers to Belgium for those construction sector activities still has to respect all pay conditions agreed at construction joint committee level and the holiday scheme.

Comparison of labour conditions

A separate provision of the Act of 5th March 2002 states that: 'the provisions of this Act shall not prevent application of terms and conditions of employment that are more favourable to workers', a literal insertion of the Directive's provision. This means that the terms and conditions of employment provided in the field in different Member States must be compared. In reality this comparison is almost impossible and thus does not exist. The Social Law Inspectorate (the Labour Inspectorate) is the institution that should compare different regimes during an inspection or after a complaint, but because of language barriers and lack of administrative cooperation this is impossible.

The initiative was taken at the level of the social partners to compare the different regimes so as to avoid the imposition on a foreign undertaking of obligations already applying in the undertaking's home state. The social partners tried in a structured way to compare Belgian employment terms and conditions with those of neighbouring countries. Preliminary research into the nature, quality and quantity of terms and conditions in Belgium, the Netherlands and Germany has lead to bilateral agreements as a sort of tailor-made solution in any comparison. This enforces reciprocal respect for the results of each other's collective bargaining.

Equal treatment

In Belgium it is impossible for an employer to pay lower wages if a company-level collective agreement has been concluded. Minimum wage levels are fixed in sectoral agreements that are generally binding and therefore applicable to the whole territory. These generally-binding sectoral collective agreements are sanctioned by criminal law and the Labour Inspectorate guards compliance. Agreements negotiated at company level can only include higher wages.

The question which sectoral agreements are applied should be resolved in the first place by the (Belgian and foreign) employers themselves and be their own responsibility, with the possibility of seeking advice from the Belgian administration. To determine the competent joint committee and thus the sectoral agreements that

apply, the undertaking's activity is determinant and is the activity that justifies its existence and that cannot be abolished without changing its nature. This activity can be precisely determined by the Labour Inspectorate after an investigation, using different criteria such as the commercial, industrial or service sector to which the undertaking belongs, the activity for which personnel are recruited, techniques applied, materials used and the nature of the product. In principle it is the main activity that determines which joint committee the undertaking comes under, but the main activity is not always the decisive factor in determining competence. Sometimes it is the usual activity, not the occasional activity, that is determinant. If an undertaking carries out different sorts of activities it can come under several joint committees.

Administrative cooperation

A liaison office was set up inside an already existing service within the Belgian administration and received the task without the recruitment of extra workers. This seems not to have been necessary, as only a very small number of telephone calls reach the liaison office (20-30 calls since its installation). The office does not have the means to provide a complete information service and can be considered no more than a transit desk for specific questions. It has not yet received any calls about manifestly illegal activities and these are alleged not to be likely in the future, as most of those carrying out the infringements are aware of the illegality of their activities. Figures on the posting of workers to and from Belgium are not at the disposal of the social partners. The authorities responsible for monitoring employment terms and conditions also lack these and the only source of information is a social security database available at the Federal Department of Social Security.[67]

Cooperation between the inspection services and the neighbouring countries of France (protocol Franco-Belge) and the Netherlands works well and is in place to a lesser extent with Germany and Luxembourg, though it is planned to be upgraded. With other Member States (such as the UK, Portugal and Greece), this cooperation remains difficult if not non-existent, mainly due to language barriers and the lack of interest of some Member States. Inspection services in the acceding countries of central and eastern Europe are not of the same level as the inspection services of the 'old' Member States. The existing cooperation helps in the fight against border-related benefits and contributions fraud, but the exchange of information with the local inspection services from the border regions of neighbouring countries does not take place in an organised or nationally-orchestrated way. This is not surprising as even internally there is little to no systematic communication and exchange of expertise and information on the topic between national actors. A big problem confronting the inspection services is the impossibility of follow-up after a posting period. Once workers go back home they are out of sight of the inspection services and because of the malfunctioning of administrative cooperation control stops at the border. The inspection services' most important demand concerning information is for a

[67] GOTOT, an application that enables undertakings to complete certain administrative forms on the posting of workers via the internet.

structured multidisciplinary information channel to be installed that could function as a central contact point and partner in the cooperation with foreign inspection services. Social fraud and unfair competition do not recognise borders; the inspection services in Europe do. Accordingly, an important step could be the installation of a European Inspection Service (Euro Inspection) that would raise the battle against fraud to a higher level. The question remains whether the competent authorities of all Member States, in particular of the new Member States, would be interested in such an initiative at EU level.

Measures and the execution of penalties

Checks of social and labour documents are the main instruments for verifying the application of pay, labour and employment conditions to posted workers. These documents can at least provide formal proof that the nucleus of mandatory rules is being respected on paper. The rules on social documents are intended to guarantee respect for a number of social terms and conditions and to make sure that effective control through inspection is possible. By virtue of these rules both Belgian and foreign employers have to draw up and keep such social and labour documents as staff register, special staff register or the individual document, presence register, the individual account for each worker, labour regulations, pay slips, labour contracts for the employment of students, domestic workers and part-time workers, and the immediate notification of employment.[68]

In order to respect the Arblade Judgement of the Court of Justice, the government has reviewed its system of drawing up and keeping social documents for employers from other Member States and has worked out a new simplified system in the Act of 5th March 2002. Employers who post workers to Belgian territory are exempt for a period of six months from drawing up and keeping the social and labour documents mentioned above. To enjoy this exemption they have to fulfil two cumulative conditions. First, they have to transmit to the Labour Inspectorate a posting declaration (via letter, e-mail or fax and available on the website of the competent Belgian administration) that has to contain certain important information: data concerning the employer and/or their representative, the posted workers (for example, name, address, starting date of posting), the labour conditions applied (for example, weekly working time, work schedule), and the posting (for example, type of services, starting date of posting). Any change has to be immediately notified to the Labour Inspectorate, by letter, e-mail or fax, in an attachment to the posting declaration. This is the case whenever one or several new workers are posted, new workplaces are established or any other modification of the data referred to in the posting declaration is made. An employer who does not respect the rules when modifications occur cannot be exempted from the obligation to draw up and keep social and labour documents. Secondly, the employer has to put at the Labour Inspectorate's disposal a

[68] There is immediate electronic notification of both the beginning and end of an employment relation between a certain worker and a certain employer. The obligation rests on all employers in Belgium for all their workers.

copy of those documents, drawn up according to the regulations of the Member State of the undertaking, that are comparable to the individual account and pay slip for each worker.

As the main working instrument, social and labour documents are very important in order for the inspection services to ensure effective control. But there is a large gap between regulations and paper, on the one hand, and the reality of the work place, on the other. Inspection services face many problems in executing control in the case of the posting of workers and they are convinced that the existing instruments are insufficient for effective control. Most foreign employers do not use the posting declaration and are out of sight for the inspection services. It is up to the Labour Inspectorate to ask for the documents when carrying out checks or after a complaint. Posted workers cannot be forced to prove under which labour conditions they are working, and the social security E101 form does not contain enough information on pay, labour and employment conditions and is too easily falsified. Nor is the registration system[69] for Belgian construction companies a solution, as it can easily be circumvented by making out invoices outside Belgium, rendering the registration system unworkable. Declaring a workplace to the social security system only becomes necessary above a turnover of about €25,000. Whereas a representative of the foreign employer can be appointed in Belgium, this is not obligatory. In this way the inspection services do not have a Belgian contact point, which means in practice that most foreign undertakings do not keep social and labour documents in Belgium and, if the inspection services ask, either they do not respond or they draw up falsified documents. In the exceptional case that useful documents are being kept, there are almost no means of checking their content effectively and so a wide gap between paper and reality is often the case.

Experiences and practices

Three categories of abuse and circumvention can be distinguished: (1) legal circumvention by social engineering, for example shopping for sectoral agreements that offer lower social protection; (2) semi-legal circumvention in a grey zone of construction between legality and illegality, for instance using self-employed from other countries who can be considered as workers even though their employers circumvent the higher social protection accorded to workers; and (3) illegal circumvention/moonlighting, in some cases close to people trafficking. Examples include:

- the supply by interim or posting agencies of German, English, Irish and Polish and other east-European workers to contractors at prices that do not respect minimum wage levels;
- the falsification and uncontrollability of identity, social and labour documents;

[69] A prior application for registration as a contractor for the execution of work in real estate or similar activities is required for all contractors (especially in construction) established in the EEA. Registration enables the contractor (1) to avoid a customer withholding social benefits due when paying for the work (30-50% of the invoiced amount) and (2) to participate in public tendering. It enables the co-contractor to avoid being severally liable for the payment of the contractor's social benefits and tax debts and to enjoy tax and other advantages.

- a combination of illegal posting and circumventing social/fiscal contributions in the state of origin.
- the ignoring of social protection rules on working time, rest periods and safety measures;
- the aggressive infiltration of foreign posting agencies that supply low-cost workers that makes it very difficult for Belgian undertakings to refuse these attractive offers;
- bogus 'self-employed persons' who work for one contractor whilst in fact under the authority of their 'client'. These 'self-employed' can freely enter territory respecting certain regulations concerning residence, circumventing the Posting Directive and Belgian mandatory rules;
- the complexity of a cascade system of contractors and subcontractors that makes goal-oriented control impossible; even the contractor of the network loses sight of the situation;
- costs for residence and food are accounted in the wage at 'Hilton-prices' but workers sleep in tents and get low quality food;
- circumvention of the Belgian agency work rules for the construction sector;
- working time on paper in accordance with the rules but in reality posted workers work lots of hours from early morning until late in the evening or at wages that respect the minimum wage levels but where workers themselves have to work more hours than they are paid;
- the permanent presence of foreign employers through circumvention of the temporary character of posting;
- the establishment of agencies in low-cost countries (Greece, Portugal, Poland) from where workers are later posted. Certain undertakings give Belgian contractors the opportunity to choose a crew (with 100%, 80%, 60%) of posted EU workers, with the remainder coming from low-wage countries and with, of course, prices differing according to the percentage.

A partnership between the Belgian administration and the social partners in the Antwerp region is a perfect example of how cooperation in the field can lead to a better view on the issue. The partnership was limited to a subsector of construction and was chosen because it is known that the construction sector suffers most from moonlighting, bogus self-employed workers, circumvention of the nucleus of mandatory rules, etc. The partnership involved collection of data on the undertakings concerned, preventive action such as informing and reasoning with the sector, and curative action, such as analysis of suspicious contracts, signalling of suspicious activities to the inspection services, and enhanced cooperation with the local registration authority. The secretariat of the partnership became a de facto contact-point to report social fraud and unfair competition which could be transmitted to the inspection services. The first working report concluded by emphasising the importance of a contact point; the overall disrespect for rules concerning working time, rest time and overtime pay; the threat from southern, central and eastern Europe; the threat of agencies; and the uncontrollability of foreign employers. Important findings were the dissuasive role of the contact point and the role of the client of the foreign undertakings. Another conclusion was the abuse of certain documents (for example, E101, registration number, posting declaration) by foreign employers.

Evaluation of the Directive

Both the government and the social partners are in favour of the text of the Directive as it is and approve the principles it upholds. No need for change there, notwithstanding the fact that doubts still exist concerning the conformity with European law of the broad implementation into Belgian law. On the other hand, they are also convinced that new initiatives concerning control and enforcement, both at national and European level, are necessary. It is evident that a rule that is not accurately sanctioned and enforced remains unapplied.

Denmark[70]

Introduction: national debate before and during implementation

The Danish labour market is regulated by the social partners through collective agreements on central issues such as pay, working hours, co-determination, etc. To a large extent the government, whether liberal or social-democratic, respects the autonomy of the social partners. The government invites the partners to take part in the policy-making process as well as in the process of implementing laws and EU Directives, including the Posting Directive.

The labour market is based on a collective approach in the sense that workers' rights are obtained through their being members of a union and thereby covered by a collective agreement. Under Danish legislation workers have only limited rights on central labour market issues such as pay and working time, giving them a strong incentive to be members of a union and the major reason for the high unionisation rate. This way of regulating the market has functioned well for more than a 100 years in the common interest of workers, employers and politicians. It is a balanced system based on strong and influential partners creating the necessary dynamic in the labour market. If this balance is threatened the labour market might become deregulated.

If EU Directives set standards in areas that are core elements of the agreements in Denmark, this might create less support for collective agreements and union membership would fall. Why pay membership fees for rights that you are entitled to anyway through EU Directives? This has been the crucial discussion throughout the policy-making and implementation process and is still so with future Directives (including those concerning elements of pay, working time, overtime pay, sick pay, and occupational pensions – all important elements of Danish collective agreements).

[70] The author of the original report was Morten Olesen, Aalborg University, Consultant BAT, Denmark.

From an early stage the social partners began lobbying for a Directive in tune with the Danish Model. The political and administrative institutions at European level were informed about the Danish labour market system and the consequences of the Directive for Denmark. The political level in Denmark naturally was also a prime target for the social partners: if employers and workers can reach a common position then members of parliament are very likely to follow. This was to a very large extent the case with the Posting Directive.

As concerns the implementation the social partners were key players. Their seat around the table was assured as they regulate large parts of the labour market and represent the majority of Danish companies and workers. The most important discussions were on whether or not to implement paragraphs in the Directive relating to pay and working time (Article 3, point 8) and how this should be done.

The alternatives were:

- *To implement the article by law covering all foreign posted workers*. From a juridical point of view, legislation targeted at all foreign workers posted to Denmark would guarantee wages and working time but would not be applicable to all Danish workers. Collective agreements in Denmark cover a large part but not all of the labour market. The fear was that this could, according to EU law, be discriminatory and it was therefore not seen as a possible way of implementing the Article.
- *To implement the Article by law, covering all workers, posted foreigners and national Danish workers*. This would not lead to discrimination towards posted workers as all workers would by law be guaranteed a minimum set of standards on pay, working time, etc. The social partners saw this solution, however, as the beginning of the end for the Danish Model. The argument was, why be covered by a collective agreement or be member of a union if you get the rights by law anyway! All the politicians and representatives regarded this as an impossible solution.
- *Not to implement the Article at all*. As the juridical possibility of not implementing the Article is allowed, this was the solution chosen backed by all participants in the political process. As the labour market is well regulated, posted workers delivering services would in most cases be covered by collective agreements and thereby given the same rights as other workers in Denmark.

National implementation

Definitions of posted worker

The Directive is implemented by the law of posting[71] whereby a posted worker is defined as: 'a worker, who usually does his work in another country than Denmark and works in Denmark on temporary basis'. The implementation follows the definition of the Directive. An undertaking is regarded as posting workers in situations when:

- the undertaking at its own expense and under its own leadership posts workers for the delivery of services to a receiver in Denmark;
- an undertaking posts workers to a site within the same enterprise or to another undertaking that is in some way connected and undertakes the posting of workers;

[71] Lov om udstationering af lønmodtagere issued 17th December 1999.

- an undertaking as a temporary labour agency or another undertaking makes workers available, posts workers to a user undertaking, etc.

Applicable national rules

Not all issues on the labour market are regulated by the social partners through collective agreements. Health and safety standards, equal treatment of men and women, unemployment benefits, etc., are set by legislation. When an undertaking posts workers to Denmark, the following legislation is in force no matter which country regulates the employment contract:

- health and safety;
- equal treatment of men and women in relation to employment and child leave, etc.;
- equal pay for men and women;
- ruling the status of white-collar workers;
- forbidding unequal treatment on the labour market;
- in addition to these there are some detailed paragraphs on holidays.

The preliminary clauses in the posting law furthermore state that the law does not affect the use of ILO Convention 94 on working clauses in public contracts.

Applicable collective agreements

A primary task for the unions is to sign agreements with employers, either by signing a collective agreement with an employer organisation or by signing supplementary agreements with employers not wanting to be members of an employer organisation. On 1st January 1993 the central organisations of workers (LO) and employers (DA) signed an agreement on foreign undertakings posting workers to Denmark whereby those that are members of DA are asked in tendering processes only to consider those offers made by employers that respect Danish collective agreements by becoming members of a Danish employers' federation. LO and DA agreed that posted workers are entitled to the same rights as their Danish colleagues performing similar types of jobs. If foreign employers are given notice from the unions of an industrial dispute, including sympathy strikes against members of DA, DA is bound to make no objection about the legality of the conflict.

Comparison of labour conditions

From 1st January 1999 the construction sector employers' federation (*Dansk Byggeri*) and the construction unions in the BAT cartel signed an agreement concerning foreign undertakings being members of the construction employers' federation. The intention of the agreement was to make sure that signing up new members into the construction employers' federation does not interfere with the general interests of unions and employers and stipulates that:

- new members do not have to pay the same expenses twice;
- posted workers do not work under 'poorer' conditions than those prescribed by Danish law and in collective agreements with the unions in the BAT cartel.

Foreign undertakings are here defined as having their origin in another country and delivering services in Denmark. Employers operating through a Danish registered company are not part of this agreement. Only workers without Danish citizenship or other close connection to Denmark are covered by this agreement.

Before foreign employers become members of the construction sector employers' federation a meeting has to take place with the unions at which the relevant legislation and collective agreements are presented. Foreign undertakings becoming members of the employers' federation must respect the conditions in these agreements. If it is too difficult or expensive to follow the agreements strictly, it is possible to make arrangements to apply workers' rights set down in agreements in other ways.

Equal treatment

As the law on posting is not regarded as the most efficient tool for handling the working conditions of posted workers, arrangements have been made to facilitate the coverage of posted workers by collective agreements. In recent years several bilateral and national agreements have been made to follow up the good intentions of the Directive to secure, as a minimum, equal treatment for posted workers. These agreements are meant to support the daily practice of the unions in organising foreign workers and covering them by collective agreements – regarded as an efficient way of minimising social dumping without destroying the Danish Model. The agreements include:

- a cooperation agreement between the Nordic construction unions (membership recognition, compliance with working conditions and collective agreements in the host countries, legal assistance);
- an additional agreement between the Swedish building workers' union and the Danish construction unions (on procedures for cooperation, priority of negotiations in the host country, information on national laws and agreements);
- agreements in the border regions. One important pilot in this field was cooperation on the construction of the Øresund bridge (the result is an internet-based homepage with information on collective agreements and other important regulations);
- an agreement on holiday payment between Germany and Denmark (May 2002);
- an agreement between the Polish construction union (*Budowlani*) and the Danish unions (on cooperation, fair treatment, compliance with agreements).

Administrative cooperation

In relation to Article 4, the Labour Market Authority (*Arbejdsmarkedsstyrelsen*) is responsible for coordinating the work and for giving information to posting employers and posted workers on the rules applying during their posting in Denmark.

Measures and the execution of penalties

All the agreements mentioned play an important role in maintaining control of the labour market and ensuring compliance with collective agreements. They are,

however, not the only means of securing the labour market in respect of posted workers. The unions also inspect work sites to ensure that workers are covered by a collective agreement, and this is in fact respected by employers. If this is not the case the unions take action to oblige employers to fulfil the collective agreements. The unions regularly make use of the possibility of blockading employers unwilling to sign the collective agreement as well as sympathy strikes against other companies, for instance those delivering materials to employers not covered by a collective agreement.

Labour inspections are made continuously by the unions, creating a well-regulated labour market with a high minimum standard of working conditions. Danish employers also provide unions with information if they suspect that undertakings are working without a collective agreement. It is a common view amongst the social partners that this way of regulating the labour market is much more efficient than a system based on legislation and government labour inspectors.

To do this in the most efficient way, the construction unions have established regional task forces that specialise in communicating with foreign employers and workers. Some of these have language skills, making dialogue easier. Regional task forces are in close contact, as employers and posted workers may move from one part of the country to another delivering their services. Employers and posted workers from the new Member States are met with a claim/demand to comply with collective agreements when they start working in Denmark. This is no different from Danish workers not complying with the agreement.

Experiences and practices

The construction unions (BAT cartel) have produced information brochures that can be handed out on construction sites (translated into Polish, Russian, English and the languages of the Baltic States). A special homepage will be created in connection with EU enlargement, with guidelines for unions on how to handle the new situation. The unions also use collective agreements with the text translated into several languages.

The general opinion is that posted workers will respect the agreements even though Article 3.8 is not implemented. The unions consider that they can provide much more comprehensive supervision and labour market regulation than the authorities would provide if elements on pay and working time were implemented into law.

Evaluation of the Directive

As the Directive is currently formulated it leaves room for implementation respecting the Danish Model. There is a risk that, during the political process of revision, this space could be narrowed or even eliminated. The social partners have made a great effort in their work on the Directive to safeguard the advantages of the Danish Model. This was not easy as the model is very different from labour market regulation in most other EU countries. EU enlargement will not make this task easier, as the new Member States have labour market regulation characterised by legislation and rather weak collective agreements.

Finland[72]

Introduction: national debate before and during implementation

Finland was one of the Member States where national law was generally interpreted as including, even without a European Directive, the obligation for foreign companies to comply with Finnish pay and other working conditions when carrying out work in Finland. Thus, the main debate in the first implementation of the Directive in 1999 dealt with structural issues in supervising and enforcing the Directive. However, consensus was simply reached on a rather legalistic and technical implementation without structural change to control measures in the national law. The safety and health authorities were burdened with administrative supervision over and above their already heavy workload. Judicial enforcement was essentially left to rely upon the possibility of posted workers themselves bringing cases before courts either in Finland or in the country of origin.

The social partners were consulted via a permanent tripartite expert group in the Ministry of Labour dealing with EC labour law. The government bill was prepared in an ad hoc tripartite expert group. The confederal social partners participated in the legislative working group in the Ministry of Labour that prepared the national law implementing the Directive. As usual, when discussing the bill, the Social Affairs Committee in the national Parliament also heard the social partners. The confederal representatives consulted the sectoral social partners on both sides of industry. Similar participation took place in 2002-2003 in preparing modifications intended to make the control measures more effective, when the working group heard social partners from several sectors, including construction. A further tripartite working group of the Ministry of Labour is actually still working.

[72] The author of the original country report was Jari Hellsten, Helsinki, Finland.

At the beginning a law-based (quasi-automatic) erga-omnes stance for national collective agreements was applied which was in a way more than required by the Directive. Since 2001 Finland, in realising the erga-omnes effect, has applied a declaration by the state board (with the Labour Court acting as a court of appeal).

It is an old tradition to maintain the equality of different sectors. Postings also happen outside construction, such as in the cleaning industries, the shipyards and industrial maintenance and renovation. Hence, with regard to collective agreements it was a natural solution to cover all sectors by the implementation law.

National implementation

Definitions of posted worker

The Posted Workers Act (law 1146/99) first notes that 'posted worker means a worker who normally carries out his or her work in a country other than Finland and whom an employer established in another country posts to Finland for a limited period within the transnational framework of services'. In addition, the Act in practice repeats Article 1(3) of the Directive and in this way gives a definition of a posted worker. Limited period is not defined. There is no written law on posted self-employed. The labour legislation and collective agreements concerned are mainly compulsory and should not, therefore, be circumvented by bogus self-employment. The definition of an employee is in the Employment Contract Act and means someone under a personal contract performing 'work for an employer under the employer's direction and supervision in return for pay or some other remuneration'. The borderline between employment relationship and self-employment is drawn in individual cases by a comprehensive evaluation whereby the definition of a worker of the home Member State is just one factor. The actual circumstances are finally decisive, such as having one (or more) employer(s), working under supervision, the definition of working time, the existence of business risk and labour-only contract.

Applicable national rules

The Act takes account of national provisions in law concerning (i) working hours and work and rest periods, and overtime pay included, (ii) holiday pay, (iii) pay and housing benefits, (iv) family leave, (v) gender equality, (vi) health and safety, (vii) occupational health care and (viii) the status of young workers. These provisions apply to posted workers the same as in purely domestic employment relations. Besides these, the Act guarantees freedom of association, right of assembly and application of the general non-discrimination principle. The national law does not include relevant provisions on the hiring out of labour.

Applicable collective agreements

The Act prescribes that for all sectors the provisions of the national collective agreements (with an erga-omnes effect) on holiday, working time, safety and health as well as on pay apply to posted workers. For no sector are the applicable provisions in

the collective agreements especially identified or counted. The agreements are public and available – in Finnish – on the internet.

All seven agreements of the construction industry and its subsectors are generally binding (erga omnes). Each agreement includes a specified pay structure, covering, for instance, bonuses for experience and for output. Piecework is rather common. For building, plumbing, painting, floor covering and asphalt work the national collective agreements include tailor-made unit prices for piece work. For other work, the collective agreements set up the framework for defining the basis for piecework remuneration. Every agreement still also includes minimum basic pay. However, the minimum pay to be complied with in posting situations varies from one subsector to another and depends also on the worker concerned and the circumstances. In legal terms, this is formulated so that the Act expressly requires posted workers to be paid at least the wages defined in the generally-binding collective agreement concerned. The strict presumption is that the wage scale and structure of the agreement apply as such. Holiday pay provisions depend on the sector, but a common attraction is that they are higher than the corresponding provisions in law. Again, and as expressly required by the Act, the holiday provisions in the collective agreement concerned apply to posted workers.

The provisions applicable can be illustrated by using the largest collective agreement in the construction sector, which covers building work proper. The other agreements are quite similar, except in terms of piecework and holiday pay remuneration systems and in some sectors (plumbing, earth and water construction). For timework, too, every agreement includes its own wage scale.

There are minor differences in various compensations and allowances, such as:

- Maximum working time is 8 hours a day and 40 hours a week. Taking into account a scheme to shorten working time by 12.5 days a year, the real maximum is approximately 37.5 hours a week. In practice Saturdays are days off and the weekly minimum rest is 30 hours.
- Annual holiday pay, including bonuses, is 18.5% of the annual gross wage earned. Simplifying a little, the length of holidays is four weeks if the length of service is less than one year and five weeks thereafter. There is no social fund to run the holiday pay scheme.
- Piecework provisions in collective agreements apply also to posted workers.
- In daily overtime, for the first two hours the bonus is 50%, thereafter 100%. In weekly overtime (normally Saturday work, after 40 hours worked between Monday and Friday), for the first eight hours the bonus is 50%, thereafter 100%. An extra bonus of 100% always applies for Sunday work.
- If the worker cannot stay overnight at his/her normal place of housing the employer has to pay a daily allowance and to reimburse accommodation costs. Furthermore, travel costs have to be compensated according to the distance between the place of housing and the site.
- Finally, compensation has to be paid for the use of personal hand tools.

Short periods of interruption of a working day due to bad weather are paid 100% according to the collective agreements (and apply for posted workers); longer periods are part of the unemployment insurance scheme (and therefore do not apply).

Collective agreements include restrictions on hiring out labour, such that:
- the use of temporary labour should be confined to limited tasks that cannot be performed by permanent staff because of a deadline, limited duration, skills qualifications, special tools or similar reasons;
- hiring out of labour is not allowed if this means that permanent and temporary staff are working side by side for a longer period;
- as some main contractors have very limited permanent staff and employ a great deal of subcontract as well as temporary labour, this is de facto accepted in selected cases by the trade union, especially when the main contractor as a member of the employer organisation is bound by a collective agreement;
- the commercial agreement between the main contractor and subcontractor (labour agency) must include a clause on applying sectoral agreements (plus labour and social legislation).

The main contractor is liable to guarantee payment of wages, final payment for piecework included, and holiday pay, all earned on the site concerned. However, such claims are precluded if not announced to the main contractor in the seven days of the date due.

If main contractors are not members of the employers' organisation, their collective agreement-based responsibility does not work as such, but the trade unions may take various industrial actions to impose corresponding payments on them; and naturally they can do the same against any non-organised subcontractor or labour agency.

Comparison of labour conditions

The Act does not expressly define a method for comparing terms and conditions of employment in different Member States, the possible methods normally being a benefit-by-benefit or package (of benefits) comparison. However, when counting the provisions concerned (pay, working hours with overtime pay and holiday provisions) the Act operates with the idea of applying Finnish conditions if they are more favourable for the worker than those otherwise applicable (in the country of origin). This is a de facto stocktaking in favour of the benefit-by-benefit comparison. The law does not use the expression 'they together' or anything corresponding that would refer to a package comparison. The methods of comparison have not been a big issue.

Special allowances paid are considered part of a worker's pay unless paid as reimbursement for actual costs incurred due to posting. What is more, any part of pay and holiday pay is to be included in the comparison. Nothing in Finnish law excludes any part of pay applicable in the country of origin from the comparison, such as the thirteenth month salary. However, if, for example, the thirteenth month salary is not paid during the posting, it is not possible to take it into account in calculating remuneration per hour.

Other elements are the compensation and daily allowances due to distance work (or 'travelling work') carried out as posted by the employer. The agreements concerned generally include such compensation as extra housing costs and a per diem allowance. They are to be considered part of the total remuneration and hence are also to be paid to workers posted.

Equal treatment

If a collective agreement (normally in a given sector/subsector) is declared generally binding, it is of an absolutely minimum nature. The only exception lies in the (quite unlikely) possibility that the national trade union of the workers concerned is on labour's side in the party concluding the company-level agreement. The law expresses this possibility in temporary work, requiring then that the collective agreement concluded in this way apply to the work agency. Foreign employers are in the same position (as required by the Directive).

The law defines the agreements applicable in a given case on the basis of the economic sector concerned. Therefore, all the subsectors referred to within construction industry (under the heading 'Generally-binding collective agreements in the construction sector') are 'sectors', with a generally-binding (*erga-omnes*) agreement.

A company active in several sectors must apply the agreements in force for those sectors. For instance, a construction company may have several collective agreements for blue-collar workers, added to at least two for white-collar. In theory, if the same company is also active in sectors outside construction (be it, for instance, the food industry), it must apply any corresponding generally-binding collective agreement. There is no such principle (or norm) that says that the majority of the workforce (or corresponding hours worked) pushes the whole company under the collective agreement applicable to the majority.

Foreign mixed businesses are, self-evidently, in the same position.

Determination of the applicable collective agreement for mixed businesses is not covered by special rules. However, the problem is the same for a company that is perhaps active on the borderline of two agreements or is simply the member of the 'wrong' employer organisation. The Labour Court may give an advisory (in practice a decisive) opinion for common courts in this kind of case or may decide it by a declaratory ruling if the parties to the collective agreement(s) do not agree. If the social partners concerned agree on the collective agreement applicable, the courts in practice follow their agreement. So far there has been no case where the social partners between two sectors had differing opinions, and there is no legal provision for such a case either.

Over recent years there have been Estonian and Russian undertakings active in the construction sector, in practice always with labour-only contracts. There are examples of real social dumping, sometimes guaranteed by mafia-style conditions or realised by using so-called one-day companies. In occasional cases the undertakings have had work permits. While the output of labour in the provision of services via Estonian undertakings has been unregulated since 1st May 2004, both demand and supply factors will push more posted workers to Finland. In 10 years the total share of the foreign workforce in the construction industry will probably grow to 10-15% of the total. As for Russian undertakings, it is appropriate to resort to extra measures to guarantee adequate accident insurance, taxation and social security contributions.

Since 1st May 2004 the Penal Code sanctions unlawful discrimination on the basis of nationality, with a maximum penalty of six months imprisonment. Since that date the Penal Code has also included a more severe type of crime, that of profiteering-like discrimination at work, with a maximum imprisonment of two years. It applies in cases involving grave abuse.

Administrative cooperation

The liaison office (the national health and safety board with district organisations) only occasionally receives requests for information about posting into Finland. No figures exist; the authorities have no data on possible or manifestly unlawful cases, nor is there experience of administrative cooperation when posting has already ended. The office sees no special difficulties in applying the Directive.

Lack of information does not constitute an obstacle to free movement. The laws concerned (mainly the Posted Workers Act, Employment Contract Act, Holiday Pay Act and Working Time Act) are available in English. The totality of collective agreements is only available in Finnish and Swedish, whereas in the construction, cleaning and metal industries their essential provisions should be in English, Estonian and Russian. Another issue is that an understanding of the labour market is required in order to use the information appropriately. The position of the government is that those wanting to provide services in Finland on a sound basis have the capacity to surmount these hurdles. Besides, Finnish employer organisations are open to companies occasionally active in Finland. This normally alleviates any lack of information before and during posting. Accordingly, trade unions are open to foreign workers.

There is a long tradition of tripartite cooperation, enshrined even in the government's political programme, next to corresponding legal obligations in the administration of various parts of labour law. Contacts are regular, although often informal, and happen at several levels and on several issues but cover anything important concerning labour relations. Tripartite cooperation also covers the work of the liaison office. However, in this framework there is no separate policy of information to the social partners.

The Confederation of the Finnish Trade Unions has established an information bureau in Tallinn, Estonia, to give information directly to workers who are to be posted or moving of their own initiative. The full texts of the building sector collective agreements applicable at posting are available only in Finnish and Swedish, apart from the agreement on technical installations, which the union side has translated into Russian. In addition it has translated selected parts of the so-called building agreement. Brochures that are detailed enough otherwise exist in English, Estonian and Russian.

Measures and the execution of penalties

There is no obligation to declare a forthcoming posting in advance. Trade unions claim that such an obligation should be set up, but so far the government has taken no position. The work permit system covers both posted workers and those moving of their own initiative without being EU/EEA citizens. However, it does not apply to permanent workers of companies established in the EEA if they have the right to work in that country after the posting in Finland. A precondition for granting the permit is whether it is impossible to fill the post(s) concerned from the domestic workforce in a reasonable period of time. When applying for work permits the employers, or if they have no business location in Finland, their customers (clients, main contractors, etc.) have to sign a declaration that the working conditions applicable comply with the

Finnish minimum standards (in practice the relevant collective agreement). It is still unclear under which circumstances the Penal Code (providing false documents to a public authority) applies, with its maximum punishment of imprisonment for at most six months. Cases are rare and normally just fines are given.

The only administrative control measure included in the Act and tailored to posting is the obligation to provide information on working conditions. Hence, employers or, if they have no business location in Finland, their customers (clients, main contractors, etc.) must, although only on request, provide the authorities with information on the employment conditions applicable to posted workers' employment. There is, however, no sanction on this obligation, which is subject to debate. The information covers, for example, the domicile or business location of the employer, the duration of a fixed-term contract, any trial period, place of work or principles for working in various locations, principal tasks, the collective agreement applicable, grounds for determination of pay and other remuneration, regular working hours, manner of determining annual holiday and the period of notice. When possible, the information may simply contain a reference to a law or collective agreement as a source for the data concerned. The law does not define the language of the information, but any meaningful interpretation implies a language understood by the worker concerned.

The Act imposes on foreign employers the same obligations imposed on domestic employers (according to the Working Hours Act) to document the hours of work per worker, the overtime included and the wages paid. The same obligation applies for annual holidays, which are covered by the Annual Holidays Act. Working time documentation must be shown and copies thereof must be given to shop stewards and labour inspectors. Neglecting or falsifying the documentation is sanctioned under Penal Code, with a maximum penalty of six months imprisonment. The employer must hold the documentation at least until the end of the period for filing lawsuits, which is two year after the year when the employment relationship ends. By virtue of an amendment of 1st May 2004, labour inspectors may use compulsory administrative means (conditional fines or even stoppage of work) against an employer who does not show or give the labour inspectorate copies of working time documentation, the calculation of pay and the grounds for its determination. The labour inspectorate has the right to contact posted workers and to obtain from them the data and documents needed. This also covers the pay slip.

In January 2004 a specialised, although fixed-term, investigation unit began to operate within the National Bureau of Investigation (central criminal police), consisting of nine officers directly concerned with actual cases and in charge of investigating cases in any sector involving alleged violations of the Penal Code. The results are already visible: some 10 flagrant cases of social dumping, involving hundreds of abused workers, have been found.

Experiences and practices

There are no available figures on workers posted from Finland. In the 1990s there were a few hundred in construction work in Germany; the overall estimate is that this is no

longer the case. In 2003, according to social security statistics, some 3,500 workers and employees were posted into Finland.

Where there is a main contractor belonging to the Confederation of Finnish Construction Industries, RT, the collective agreement imposes that basic data be given to shop stewards. Sites/other workplaces where there is nobody (such as the shop stewards of the trade unions concerned) to exert control are problematic. They are normally small and/or remote sites; on big sites a pass system helps in everybody being recognised.

Over the last few years perhaps four or five thousand construction workers have been posted from Estonia and Russia to work temporarily in Finland. In some cases businessmen with connections to the grey economy in those countries have done this. The union side has even faced work permits being cashed in, threatening relatives insisting that much of the Finnish wage be paid back, threats to the workers concerned, false attestations of the authorities that payments have been made, the use of one-day companies and of indecent housing, neglect of safety and health, neglect even of accident insurance and, of course, remarkable profits being made from social dumping.

As to patterns of fraud, the commonest is direct under-payment, sometimes embellished by a (low) daily allowance. However, most difficult to deal with are cases where workers even accept that they pay back part of their wages to the employer. Some cases have also occurred involving a formal cooperative with 'independent' workers as members, so escaping the ambit of national labour legislation.

The construction social partners have adopted a joint guide called 'Responsible Construction in the Enlarged EU' (May 2004). It covers the legal and contractual obligations of different players, especially on subcontracting (including temporary work), includes a model clause for subcontracting agreements, and recommends an access control system on-site.

Evaluation of the Directive

The opinion of the government is that the Directive creates a reasonable balance between fair competition and the protection of workers. This opinion is shared by management, which emphasises adequate human resources for the supervisory bodies so that those carrying out criminal or similar activities can be blocked and pushed out of the market by hard measures. The unions want to modify the Directive by enshrining in it the obligation of the authorities – including the courts – in the state of origin to apply the host country conditions. At present it is just an interpretation – let it be unquestionable. Labour also fully supports the idea of establishing by European law the civil law responsibility of the main contractor.

France[73]

Introduction: national debate before and during implementation

The history of the French posting legislation dates back to 1986 when the European Community was enlarged to embrace Spain and Portugal. With effect from the date of accession Portuguese and Spanish undertakings benefited from the freedom to provide services. However, as the legal status of posted workers was unclear the French government issued Decree 86-127 of 8th December 1986 establishing that until the expiry of the transition period a work permit would be required for posted Greek, Spanish and Portuguese workers. Consequently, the posting of workers from those countries became the responsibility of the immigration authorities (at the time ONI; now OMI). Posted workers could not be paid less than the minimum wage laid down by law (SMIC) or less than the minimum wage fixed by collective agreement or be employed under less favourable conditions of employment.

Inspections at construction sites in 1986/87 repeatedly discovered workers employed under significantly worse conditions of employment and pay than those of French colleagues. A well-known case concerned the construction of the Atlantic line of the TGV high-speed train where workers from the Portuguese firm Rush Portuguesa carried out subcontracting and sub-subcontracting work for the French construction companies Bouygues and Nord-France. As Rush Portuguesa could not produce proof of any work permits for its workers and had violated the monopoly of the immigration authority, ONI, over the recruitment of third-country nationals, a special fine was imposed on the company. In addition, it was accused of organising illegal hiring out of workers, under the pretence of engaging in subcontracting, on less favourable conditions than those prevailing in France.

[73] The author of the original country report was Marcus Kahmann, MA in Political Studies, Paris, France.

Bouygues and Rush Portuguesa filed an objection in court on the grounds that the use of posted workers, whether or not as permanent staff, was covered by the freedom to provide services guaranteed to Portugal in 1986 and therefore no work permits were necessary. The French government and the employment authorities rejected this argument on the basis that posting constitutes the movement of persons. As freedom of movement did not yet exist for Portuguese nationals, they ought to continue to be considered third-country nationals and a ruling otherwise would be contrary to the meaning of the transition period.

The proceedings concluded with two legal rulings and finally, in the European Court of Justice, with the high-profile judgement Rush Portuguesa vs. ONI of 27th March 1990 in which the judges defined the posting of workers as coming under the freedom to provide services. Portuguese undertakings were therefore allowed to post their own workers to carry out contracts regardless of whether these were skilled or unskilled workers. In this connection, the host country was not permitted to require a work permit or authorisation from the posting party, as the workers were not seeking access to the labour market of the host country. At the same time, the ECJ permitted Member States to temporarily extend and implement their national minimum provisions under labour law or collective agreement to workers posted to their territory, provided that corresponding provisions also applied to national undertakings. New labour law with international binding provisions therefore appeared to be necessary.

On 20th December 1993 the *Loi Quinquennale* No. 93-1313 was promulgated. This law was supplemented by a Decree of 11th July 1994 and its interpretation by a ministerial circular of 30th December 1994. The posting clause contained in this legal package reads as follows:

> Without prejudice to international treaties and agreements, where an undertaking not established in France is engaged in the provision of services within the national territory, the workers posted temporarily by this undertaking to carry out services are subject to the provisions of the laws, regulations and agreements applying to workers employed by undertakings in the same sector, established in France, relating to social security, cross-sectoral or sectoral supplementary schemes covered by Title III of Book VII of the Social Security code, pay, working time and terms and conditions of employment, within the limits and according to the procedures laid down by Decree *(unofficial translation)*.

No formal consultations of the social partners took place subsequently at national level when the Directive was implemented. But it can be stated that overall the construction employers, trade unions and government agreed in principle on securing the national arrangements. From a legal viewpoint, no serious problems were anticipated at the outset with transposing the Directive into the existing body of national regulations. There were no fears of a head-on clash of legal provisions. For this reason the Directive was celebrated by government, unions and construction industry employer organisations as a success, particularly as it continued to allow French terms and conditions of work and employment to be applied from day one of the posting and did not introduce any compulsory restriction on the scope of national provisions.

The government issued two decrees in 2000 in the course of implementing the Posting Directive. Both decrees served to establish supplementary and more detailed provisions and since then have formed an integral part of labour law.

National implementation

Definitions of posted worker

Application of the French posting regulation encompasses all economic sectors, not just construction. The regulation concerns all undertakings and self-employed workers not established in France that provide services for third parties in France and temporarily posted workers there for this purpose, under an employment contract or arrangement for the hiring out of workers through a temporary employment agency or any other form of hiring out of workers. The existence or otherwise of self-employed status can be ascertained under French labour laws, which apply a very wide definition of employed worker then considered to be an employee of an employer. Furthermore, labour law does not provide a precise legal definition but some conditions for considering a worker as an employed worker are based on case law.

Applicable national rules

With effect from the first day of posting, all the provisions of the labour laws and of collective agreements declared generally binding are applicable that apply to French workers carrying out comparable work in the same sector and region. In principle, under French labour law, the provisions of collective agreements take precedence over provisions of the law provided that these provisions are more favourable for workers. In order that provisions of collective agreements can be applied to posted workers on the basis of the prohibition of discrimination, corresponding agreements need to be declared generally applicable in the sector concerned by the Employment Ministry. Where no such extension exists, minimum provisions of the law and the national minimum wage apply.

In keeping with the legal provisions of 1998 and 2000, the provisions of the collective agreements on working time declared generally binding in the construction industry make reference to the duration of weekly working time as 35 hours or 1,600 hours a year compensated at full pay. Enterprises have the possibility of working longer on condition that they pay supplementary rates or choose annualisation.

A worker who can justify a minimum of 270 hours of night work during a reference period of 12 months is covered by the legal provisions on night work, including premiums. The collective agreement can provide premiums for those that work less than this. The legal provisions for Sunday working and time-off provide for a weekly minimum of 48 hours time-off on two consecutive days. Sunday is a statutory rest day and the time between the end and beginning of work must be at least 11 hours.

Eleven statutory holidays are laid down in the minimum provision for public holidays, but only 1st May is a paid public holiday. As regards leave provision, workers accumulate an entitlement to 2.5 days paid leave a month or one month of

accumulated working hours (150 hours). The same legal provisions apply to the hiring out of temporary (posted) workers as to French workers. This includes the provision that temporary workers must receive the same pay as workers with the same qualifications at the same place of work.

The equal status of posted workers in law also applies with regard to provisions for occupational health and safety. Provisions concerning the setting up of Committees for supervising Health, Safety and Working Conditions are contained in the Labour Code.

On the question of equal treatment for men and women, legal anti-discrimination provisions apply as well as protective measures concerning conditions of work and the employment of pregnant workers, mothers, children and young people.

Decree No. 2000-462 (of 29th May 2000) establishes the right for workers posted to France to take matters of pay, working time and terms and conditions of employment to the joint-industry employment arbitration committees (*conseils de prud'hommes*).

Applicable collective agreements

The French construction industry is divided into civil engineering on the one hand (*travaux publics*, mainly infrastructure work carried out for the public sector) and private building (*industrie du bâtiment*) on the other. Each year separate bargaining takes place for both sectors with two employers' organisations that are independent of one another. There are two national collective agreements for workers in the building industry, one for workers in craft enterprises and the other for undertakings employing more than 10 workers. Wages are negotiated within the 22 regions of the decentralised structures of the employers' organisations and unions and a total of 88 bargaining sessions for manual workers take place annually in the French construction industry. The collective agreements for non-manual workers and technical personnel, on the other hand, are negotiated at national level, although they are not declared generally binding by the Employment Minister. However, these negotiated rates of pay do have a spin-off effect on non-organised firms. In the case of mixed businesses, the collective agreement applies that most closely corresponds to the undertaking's main sector of activity on French territory.

Generally-applicable collective agreements have existed in construction since the early 1990s. For posted workers the rates of pay of the occupational groups corresponding to their own qualifications apply. In some cases these fall below the national minimum wage (SMIC), in which case the latter applies. The Decree of 4th September 2000, enacted during the course of the Directive's transposition and establishing more precise provisions and broader application for the regulation of 1993/94, outlines the provisions of the generally-applicable collective agreements that are to be applied. Accordingly, the applicable provisions concern working time, Sunday working, night-time working, paid leave, leave for family reasons, length of leave, qualifications and wages (including bonus arrangements, premiums, reimbursement of expenses of all kinds as well as sickness and accident benefits). In addition there are collective agreement provisions for occupational health and safety, equal treatment for men and women, and anti-discrimination, as well as protective

measures on the conditions of work and employment of pregnant workers, mothers, children and young people.

Particular mention must be made of the fact that all employers operating in construction are obliged to pay contributions into the social fund OPPBTP, run jointly by employers and unions. This body is concerned more particularly with preventing industrial accidents and to this end provides information and advice to undertakings via its trained personnel.

It should be pointed out that the activities listed in the Annex to the Directive fall entirely within the scope of the construction industry collective agreements and to this extent these incorporate the conditions of work and employment of the Directive's target group.

Comparison of labour conditions

In practice there are borderline cases of various kinds that often present major headaches for labour inspectors, for instance when it comes to working out whether the wage of a posted worker corresponds to the minimum rate. Until now, however, there have been no attempts to compare conditions of work and employment on a uniform basis with foreign conditions, although there are individual cases where this has happened. In addition the social partners have initiated contacts with neighbouring countries such as Germany and Belgium about social funds and these contacts have lead to agreements in this area.

Equal treatment

With regard to the wages to be applied, it should be emphasised that the national posting regulation provides effective equality of direct wage costs for posted and domestic workers: workers are paid according to the (minimum) gross wage corresponding to the rates for their qualifications fixed by collective agreement. In this area, unions and employers' organisations perceive a major problem in applying the rates of pay to posted workers where the corresponding national qualification profiles and occupational categories differ from one another and consequently make it difficult to classify the worker in question correctly within the negotiated pay scales.

Administrative cooperation

The liaison office is based in the Employment and Social Affairs Ministry, with the Department against Illegal Employment (DILTI). Its cooperation agreement comes into play when contact with the corresponding authority is needed to deal with a matter relating to the country of origin of an undertaking or a posted worker. Such cases involve matters such as checking the genuineness of an E101 certificate to ensure that a worker really is covered by a social insurance scheme in the country of origin. Cooperation between authorities is also necessary if it is suspected that a posting company is only a bogus or mailbox company. In that case the authorities must not only have the entry in the trade registry checked, but must also ascertain whether the

undertaking really exists. Corresponding investigations are also carried out in the posting country. In practice, according to the Employment Ministry, this cooperation proceeds with difficulty with those countries that have a great interest in their citizens' mobility and little interest in upholding the higher social standards of host countries such as Belgium, Germany, France, Luxemburg and the Netherlands. There are the additional problems of inadequate supervisory machinery and few sanctions in such states. DILTI frequently has the impression therefore that enquiries are swept under the carpet or else that (legal) objections are sought in order to avoid further investigation. Occasionally enquiries have simply remained unanswered. Valuable time is then lost during which the undertaking concerned has returned home and in practice made further investigations or pursuit impossible. At present DILTI is endeavouring to persuade other countries of the need for more effective cooperation. Progress has only been achieved so far with countries that share the common interest and detailed cooperation agreements have been signed with Germany and Belgium. Less formal agreements exist with Italy, Spain and the Netherlands.

In order to fulfil its information remit more effectively DILTI is currently developing a five-language website aimed at providing foreign undertakings (and workers) with key information about posting to France. It is also organising extra training schemes for its inspectors and providing them with special documents for checking up on posting companies.

The cooperation of the labour inspectorates responsible for posting matters with employers and unions has been institutionalised at regional level. Accordingly, a meeting takes place each year in the *Departements* to bring together these three groups of key players under the chair of the Prefect of the Department. Here the general policies and priorities of the labour inspectorates are hammered out jointly. However, this cooperation relates primarily to supervising and pursuing undeclared employment. It is important to increase the presence of labour inspectors on construction sites, but in reality attempts to do this have foundered, due partly to the small number of inspectors and partly to their working hours, which do not match those of the construction industry. Inspection visits are also needed on Saturdays and Sundays as well as during holiday periods.

Measures and imposition of penalties

The provisions of the posting regulation relating to supervision and sanctions can be described as detailed and comprehensive. Under Article D. 341-5-7 of the Labour Code, posting undertakings must notify the competent labour inspectorate of the place of work or place at which the posted worker is to work most frequently. Moreover, the times of beginning and ending work as well as break times must be notified in writing to the authorities. Before commencement of work, the following particulars concerning the undertaking must be recorded in writing: its legal form; its registration number in the trade registry; the name and address of the posting undertaking's representative in France; the address of the place of work; start date and duration of the work as well as the type of service provided; name, age and gender of the posted worker; and date of commencement of the employment contract.

Temporary employment firms hiring out workers to France must provide the competent regional employment authorities (direction départementale du travail, de l'emploi et de la formation professionnelle) with particulars, including the address, management and legal form of the undertaking, the posted worker and the social insurance body concerned. In addition, a guarantee must be given to cover non-compliance with the contract of services provided such surety is not prescribed in the country of origin (Article D. 341-5-8 of the Labour Code). Likewise, the management of an undertaking using posted workers has an obligation to provide the labour inspectorate with particulars concerning the beginning and end of the work, working hours and duration of breaks (Article D. 341-5-9 of the Labour Code). Name, address and legal form of the undertaking concerned must be clearly displayed at the site (Article D. 341-5-11 of the Labour Code). Accidents sustained at work by posted workers without social insurance cover in France must be notified to the labour inspectorate within 48 hours, and all information provided to the competent authorities must be in French.

The unions emphasise that it is not their role to exercise supervision on sites. This is true of French as well as foreign undertakings. The workers themselves must continue to retain the right to report violations of collective agreements or labour law to the relevant authorities.

Experiences and practices

An analysis by economic sector of postings registered by the regional employment authorities (DDTEFP) and the special regional employment supervisory authorities in agriculture (ITEPSA) shows that 28% of registrations concerned industrial sectors, 26% the construction sector, 25% agriculture and forestry, and 21% the service sector (DILTI 2002). The average duration of all registered postings was given as 101 days, with tourism and the woodworking industry recording the longest posting periods. The shortest work periods were registered in industry (metalworking; maintenance/repairs) and vegetable production, while the duration of postings in construction varied substantially. In considering registered posting activities broken down by individual state, companies from the UK (mainly in tourism) and Poland (chiefly in construction and metalworking) far outnumbered those from Slovakia, Germany and the Czech Republic. However, these five nationalities accounted for 46% of all registered postings by foreign companies on French territory during 2001. The study shows that the nationality of posted workers largely corresponds to that of the posting undertaking.

According to the DILTI report, the regional labour inspectorates are confronted with a number of key problems when performing their supervisory duties:

- the duration of posting, particularly in construction and industrial production, is often so short that there is no time between the registration form being received by the labour inspectorate and the end of the provision of service to make an inspection visit to the undertaking concerned, let alone to determine whether there has been a violation of the legal provisions;
- the language barrier is frequently an additional and sometimes insoluble problem

for the inspectors. This applies to contacts with posted workers during inspections, but also to written enquiries to the undertaking and the understanding of documents submitted. An additional problem is that posting undertakings are inadequately informed about the legal status of a foreign company as well as about French employment and social legislation;
- the flow of information from foreign undertakings or their authorities to the French labour inspectorate authorities is often very limited;
- the labour inspectorates are confronted with practical problems in checking documents, for instance when analysing salary calculations or deciding which different allowances applicable to the posting (lump sum expatriation allowances, travel allowance, etc.) have to be calculated in relation to the minimum wage. The at-times extremely sparse information given in the documents does not make this task easier, let alone the difficulty of checking whether the worker has actually received the wage indicated into their account at home.

Evaluation of the Directive

The Employment Ministry has indicated that it does not oppose amendment of the Directive in principle, but considers that it is still too early to do so. There is not enough hindsight, experience and knowledge of the posting issue. But it cannot be denied that the scale of cross-border service provision, particularly from eastern Europe, is growing by leaps and bounds. What is needed in the first instance is to conduct a differentiated analysis of the causes and forms of this phenomenon: on which industrial sectors are posting companies focusing? The problems and irregular practices are probably not the same in the different economic sectors. It is necessary, in hand with an assessment of the need for action, to know whether the transnational provision of services is developing for motives of cost alone (wages, social insurance costs, taxes). In the final analysis it could also be that shortage of labour, the productivity and qualifications of certain groups of workers or the excessive cost of particular types of employment are crucial factors.

All the employer and union representatives have expressed satisfaction with the posting regulation in force. The problem lies rather with its application in practice. There is therefore no need for amendment at European level.

Germany[74]

Introduction: national debate before and during implementation

In the run-up to adoption of the German posting law, a number of variations were debated in the early 1990s. The federal government bill for a national regulation dating from 1996 largely restricted the scope of application to the main construction industry in terms of undertakings and sectors covered. In an appendix ('Inventory of the construction industry within the meaning of the Act') to the Posting of Workers Act, 19 types of construction work were listed as belonging principally to the main construction industry and where the Posting Act would be applicable. The government justified the restriction by the particular relevance of posting for these activities. However, other restrictions included working conditions. Only the provisions governing pay and leave, including contributions to social funds, were to be established here.

A generally-binding collective agreement already existed with respect to leave provisions, while the minimum rates of pay to be applied still remained to be agreed by the bargaining parties. Furthermore, the government bill stipulated that the Posting Act would be valid for an initial period of two years from the time of entry into force. During the course of further debate, the restrictive provisions proposed by the government were watered down. As a consequence the scope of application in terms of undertakings and sectors covered was widened to encompass undertakings engaged in the allied trades and finishing sector.

According to the proposal, a posting regulation would only cover the basic aspects, leaving the specific details to be laid down by collective agreement. The

[74] The author of the original country report was Dr Stefan Hochstadt, Fachhochschule Dortmund, Germany.

Posting of Workers Act was adopted by a large majority (about 90%) in the federal parliament in February 1996, following the intervention of the Mediation Committee, together with a number of amendments mainly concerning the scope of application and supervisory measures and sanctions. The Act came into force on 26th February 1996. All that this meant, at the time, was that a law existed which depended essentially on a collective agreement on minimum pay being declared generally binding in order to be effective in practice. This required that a declaration of general application be issued by the responsible Bargaining Committee on which representatives of all industries sit. Accordingly, the interprofessional employers' organisations, which opposed a minimum wage or even regulation in principle, announced that they could not support a declaration of general application. They viewed as too high a minimum rate of pay that could spark off pressure to adjust wage levels in other low-pay sectors. The two construction employers' organisations threatened to withdraw from the overall confederations. The dispute in the employers' camp meant that no agreement could be anticipated in the Bargaining Committee. Consequently the Posting Act could not be implemented as it was founded on declaring the general application of a minimum wage. As a result of this inability to implement the law, the level of the minimum wage to be agreed was repeatedly adjusted downwards in order, finally, to gain the consent of the organisations represented on the Bargaining Committee and thereby to help bring the Act into effect.

The newly-elected government in September 1998 overturned the threatened change to the procedure for a declaration of general application by the previous federal Labour Minister Blüm, so that the federal Labour Minister could declare a collective agreement to be generally binding by means of a regulation.

National implementation

Definitions of posted worker

The Posting Act contains no definition of posted workers. The distinction between a posted employed worker and a posted self-employed worker is not made in the Posting Act. Whether or not someone is an employed or self-employed worker is determined by applying the general criteria of the law in Germany concerning the status of employees. For the social insurance institutions, certificate E101 or E111 issued by the home country is relevant. And the opinion of the person's country of origin about their status as employee or self-employed worker is of key importance for the issue of these certificates.

Applicable national rules

For all industries and undertakings, whether German or foreign, several legal provisions apply. The German Civil Code already guaranteed (in Article 34) the application of legal mandatory national rules. With regard to working time and rest periods, legislation defines a maximum of 10 consecutive hours. German law provides for annual paid leave of 24 days, and if the construction collective agreement applies then this has to rise to 30 days. Minimum pay was already partly guaranteed by a law

of 1952 on minimum labour conditions. The national posting regulation confirmed this. In the field of health and safety Germany has a package of sectoral and general legal regulations that applies. The hiring out of workers in the construction industry, as well as being governed by the Posting Act, is also covered in the Temporary Works Act. This act contains in particular a special provision laying down specific requirements for the hiring out of workers in the construction industry.

The system of declaring collective agreements generally binding is anchored in law. This means, for instance, that if a generally-binding agreement is applicable with more favourable prescriptions than the legal minimum prescriptions, the more favourable ones from the agreements take precedence. No maximum duration is set in the Posting Act for a period of posting but is supplemented by social legislation provisions governing the length of posting.

Applicable collective agreements

The restriction in scope to the construction industry carried out at an earlier stage is still basically valid. According to the statute book of social legislation, an undertaking performs construction work where it carries out building work relating to the construction, repair, upkeep, alteration or demolition of buildings. In view of the objective of guaranteeing all workers binding conditions of work laid down in collective agreements, the interpretation of the concept of construction work according to case law of the Federal Labour Court is of importance. According to this case law, construction work is deemed to be performed where the materials, equipment and methods of a construction undertaking are used. Also, according to the Court's case law, the performance of construction work covers all works that serve – even if only in a small and specialised area – to produce and complete buildings.

The law prescribes the minimum rates of pay, including overtime, and length of leave, holiday pay and the additional holiday allowance that an employer registered abroad must apply to posted workers within the geographical area of application of a collective agreement.

The same assessment criteria apply in mixed businesses to employers registered in Germany and those registered abroad. What is decisive is whether the undertaking is predominantly engaged in construction work in terms of the working time devoted to this activity. It is laid down in the collective agreements which activities constitute construction activities. In practice, however, it is more difficult to check the sphere of activity of undertakings registered abroad as the regulation initially foreseen (that for employers registered abroad, workers hired out to Germany were deemed to be an undertaking as a collective) is no longer applicable. According to the ruling in the Finalarte case of the European Court of Justice of 25th October 2001 this provision violates the EC Treaty.

Furthermore, the law provides for when labour agency workers are employed by a user undertaking to perform work covered by a generally-binding collective agreement or by a statutory order stipulating that the legal provisions of a collective agreement apply to all employers and employees, even those not bound by collective agreements. Then the hiring agency must at least guarantee them the conditions of employment laid down in the collective agreement or in this statutory order and pay

the corresponding contributions to the Joint Institutions. Since 1st January 1997 undertakings established outside Germany that post workers to Germany to perform construction work are obliged under the Posting Act to pay holiday fund contributions. Since amendment of the Posting Act on 1st January 1999, undertakings that post workers to German construction sites under bilateral labour contingent agreements (*Werkverträge*) are also covered by this procedure.

Comparison of labour conditions

In almost all west-European states bordering Germany institutions comparable to the holiday fund exist. If, during posting to Germany, employers continue to provide holiday-related benefits under national law of materially equal value (duration of leave and holiday pay) and pay holiday contributions to a comparable institution, they may be exempted from the obligation to pay contributions to the holiday fund. To date the recognised comparable institutions are the holiday schemes in France, Austria, the Netherlands, Denmark and Belgium. Bilateral exemption agreements exist with the French, Austrian and two Dutch holiday funds, and the Belgian holiday fund and social insurance body, aimed at cutting red tape so that the posting employer concerned only has to prove payment of contributions to the home-country fund. Exemption of Danish posting undertakings is based on a negotiated government agreement. Negotiations are currently in progress on mutual recognition with the Italian national joint industry Construction Funds Committee, CNCE.

Equal treatment

In the past, the ECJ has ruled that foreign tenderers were disadvantaged by the practice of posting and quotas in Germany because domestic employers were in principle allowed to agree provisions less favourable than those declared binding across the industry by concluding plant-level collective agreements, while foreign tenderers could not. This is at least open to question, as the construction workers' trade union is prepared to negotiate and also to conclude agreements on pay with every tenderer in the construction market, although never below the level of the collective agreement declared generally binding.

The Federal Labour Court takes the view that individual undertakings may not agree less favourable provisions than the collective agreements declared generally binding by concluding plant-level agreements. Furthermore, according to the ruling by the Federal Labour Court of 25th June 2002, in practice neither domestic nor foreign employers can conclude agreements at plant level to establish rates of pay below the minimum levels.

Administrative cooperation

Until 31st December 2003 the Federal Employment Office and the customs administration authorities were responsible for supervising and monitoring conditions of employment. Since 1st January 2004 the responsibility for supervising conditions

of employment falls exclusively on the latter. On holiday fund procedures, the Posting Act provides that employers registered abroad are in principle subject to collective agreements on contributions to a Joint Institution. Exceptionally, foreign employers are exempted from participation where the employer at the same time pays contributions into a comparable institution in the state of establishment or the procedures of the Joint Institution make provision for crediting payments that the foreign employer has made to meet the holiday entitlement of his workers. Comparability is determined in corresponding agreements between the funds.

The Posting Act provides that an employer registered abroad has to notify the employment administration authorities and, with effect from 1st January 2004, the customs administration authorities. Undertakings registered abroad are informed about holiday fund procedures and applicable regulations by the Federal Employment Agency through information leaflets and by the holiday fund as Joint Institution of the construction industry bargaining parties.

There is very little cooperation in this area between the legal systems of the different Member States. The liaison office provided for in the Posting Directive is also not helpful in the case of legal and other problems. Enquiries made to the liaison office regularly remain unanswered or else a reply is only made after some delay. Posted workers in Germany are only identified by the German authorities on the basis of notification under §3 of the Posting Act.

Measures and imposition of penalties

The state retains supervisory powers over the Federal Employment Office (recently renamed the Federal Employment Agency) and the principal customs offices; the supervisory and sanctioning powers of the bargaining parties have thereby been removed.

Formal provisions for supervision of the Posting Act and the minimum wage exist, as all documents must be made available on the spot. Failure to do so constitutes an administrative offence. In practice, there is no 'other party' in the posting countries, as provided for in the Posting Act (and in the Directive), so that a violation cannot actually be pursued. The Act provides that, in the case of violation of the minimum working conditions, an employer may be required to pay a fine and in addition stipulates exclusion from competing for public contracts. It should be pointed out, however, that enforcement of fines imposed abroad is virtually impossible and as foreign employers do not as a rule tender for public contracts exclusion from competition is in practice irrelevant.

Since 1st January 1999 a main contractor's liability has been introduced. In practice it is not easy to enforce this liability as it is impossible (or only with very great difficulty) to prove intent or at least 'negligent ignorance'. Accordingly, the basic premise must be the existence of a 'general' interest whereby the circumvention of prevailing laws, collective agreements and regulations, including the Posting Act and the associated collective agreement on minimum pay, has become current practice. It is expressly stipulated that an undertaking that instructs another entrepreneur to perform construction work stands surety and has waived right of execution. This

means that main contractors can be deemed directly liable if one of the undertakings commissioned by them to carry out building works contravenes the provisions of the Posting Act (and thereby its associated laws and regulations).

Undertakings established abroad are further obliged to make monthly notifications of the gross wages paid to their workers posted to Germany and to pay the contribution established by collective agreement directly to the holiday fund. The holiday fund has the right of inspection such that it may examine the documents necessary to implement the collection and reimbursement procedure. In addition to the holiday fund, the employment and customs administration authorities conduct extensive inspections. Under the Posting Act the authorities may impose fines of up to half a million Euro for non-payment of holiday fund contributions.

All in all, the persons interviewed jointly criticised the extreme difficulty of supervising and implementing the Posting Act. The liaison office foreseen in the EU Directive did not exist, nor were there any further bilateral agreements for enforcing fines, etc., apart from two cases (Austria and the Netherlands) on which, in any case, opinion was divided and about which few details were known. One positive aspect has been the move to standardise supervisory procedures, resulting in the clarification of responsibilities and an improved capacity for customs authorities with principal responsibility to act. The employment administration authorities previously in charge in such matters (the Federal Employment Office, now renamed the Federal Employment Agency) are reported to have suffered from a conflict of objectives in the area of supervision and sanctions that now no longer applies following the reallocation of responsibilities.

Experiences and practices

The following aspects are considered to be the main problems in implementing the Posting Act: the minimum wage declared to be generally binding is not being paid; and it is scarcely possible to prove compliance since, for example, it is impossible to supervise working hours.

Furthermore, a whole host of other illegal methods are known, all of which result in pay owing to workers being withheld from them. Coupled with this is the problem of overtime payments. It is apparent that overtime is in practice either not being paid at all or at least not as overtime and is tantamount to paying less than the minimum rate of pay. Also equivalent to paying below the minimum rate of pay is the practice whereby the worker is not compensated separately for expenditure ('allowances') incurred through being employed abroad (which is, after all, always the case in posting), as is generally obligatory for workers in undertakings established in Germany. Conversely, workers posted from foreign undertakings to Germany frequently have to pay over the odds for their transport, accommodation and food.

The commonest forms of circumvention are to pay lower than the minimum rate of pay and not to include overtime, in other words direct or even indirect wage dumping. Working hours are determined in the Posting Act, not in the form of negotiated provisions but as statutory amounts; these are significantly less favourable than the standard laid down in collective agreements.

Evaluation of the Directive

It is true that the inadequate powers of the Posting Act are generally criticised, making it easy and in practice correspondingly common for the provisions laid down to be circumvented or ignored. However, nobody wanted to mention the term 'paper tiger', much-used in the late 1990s, as this had negative connotations. All the persons interviewed were clear on one matter: that the Act is both necessary and useful. Clearly the profit motive continues to cause the law to be disregarded, so that urgent steps must be taken to strengthen its implementation.

The Netherlands[75]

Introduction: national debate before and during implementation

The Posting Directive was officially implemented by the Act 'Employment conditions: cross-border employment', hereafter referred to by its Dutch abbreviation, WAGA.[76] In spring 1999 this Bill was sent to the Dutch Parliament and in the ensuing debate the central motto of the government became clear: to transpose no more and no less than necessary. Thus, none of the optional provisions were considered in the Bill. Discussion about broadening the scope of WAGA to other sectors dominated the parliamentary debate. Finally, the Second Chamber agreed the Bill without any amendments on condition that the government sought the advice of the national Social Economic Council. The representatives from the employers' associations and the unions were divided about the desirability of broadening the scope of the Bill to other sectors: union representatives were in favour whilst employers' representatives spoke out against it. In January 2001 the government concluded that the advice did not give it cause to adjust its policy. This conclusion was accepted by Parliament. The topic has again been raised since the autumn of 2003, this time in relation to a debate about the transitional period for the free movement of workers from middle and east-European countries after accession on 1st May 2004. In June 2004 the government announced a 'scope broadening' that will again put it on the legislative agenda.

Obviously other questions were part of the parliamentary debate: the definition of 'posting'; the mode of compliance of the applicable employment conditions for

[75] The author of the original country report was Mijke S. Houwerzijl, Master in Dutch Law, Researcher at the Department of Labour Law and Social Security Law, Faculty of Law, Tilburg University.

[76] Wet arbeidsvoorwaarden grensoverschrijdende arbeid, 2nd December 1999, date of entrance 24th December 1999.

posted workers (Articles 4, 5 and 6); the non-use of the derogation option for postings not exceeding one month (Articles 3 .3 and 4) or 'non-significant` postings (Article 3 .5); and the application of the 'most-favourable principle' (Article 3.7). None of these questions lead to adjustments.

National implementation

Definitions of posted worker

A posted worker is defined in WAGA as someone who works temporarily in the Netherlands and on whose employment contract foreign law is applicable. The three types of posting distinguished in Article 1(3) do not occur in WAGA. Still, as the responsible Minister assured members of Parliament, WAGA is meant to apply to all three types of posting. The problem in practice with this 'implicit' method of implementation is that the posting definition of Article 1 (3) does not correspond to the internal definition of posting. In Dutch (legal) usage only types b (posting in multinational companies) and c (posting through labour agencies) are understood as posting, while type a (temporary cross-border working in the framework of the employer's subcontract) is normally seen as something different from posting.[77]

In contrast, it can be deduced from a jointly-published leaflet (Posting in the Dutch construction sector, September 2003) that the social partners in construction, while not mentioning the three types either, have at least limited the scope of the applicable provisions of their collective agreements to workers that 'normally work for their employer in another EU country'. Article 1a.a in the extended collective agreement for construction begins by repeating the definition of WAGA, but in addition stresses that in this respect a 'posted worker' means every worker that usually works in a Member State other than the Netherlands. This addition makes the provision in the agreement more accurate than the WAGA definition.

No explicit distinction is made between a posted worker and a (posted) self-employed worker in WAGA. But it can be deduced from the Parliamentary documents and the applicable legislation for posted workers that only the Dutch definition of an employee is to be taken into account should a question arise about a worker's status.

Furthermore, no definition is given in WAGA for the 'allowed' length of posting.

Finally, the scope of WAGA is not limited to workers originating from one of the EU Member States. Posted workers from a 'third country' are entitled to (at least) the same protection and their employers are obliged to comply with (at least) the same conditions as workers and employers from within the EU.

Applicable national rules

Applicable national rules corresponding to the subject matter covered by the Directive are partly identified by WAGA. WAGA makes sure that two provisions about employment contracts in the Civil Code are applicable to posted workers in the

[77] A judgement of the Court of Heerlen of 24th September 2003 shows that in practice this confusion has already occurred.

Netherlands. Here (all) the mandatory civil provisions on minimum paid annual holidays, equal treatment, health and safety at work, and one of the protective measures for pregnant women are implemented.
All the legislation of a 'public law/administrative law' character is omitted from WAGA because this legislation is (without dispute) already in and still applicable under Article 7 of the Rome Convention. Several provisions of the Minimum Wages Act, the Working Time Act, the Health and Safety Act, the Temporary Employment Agencies Act and the Equal Treatment Act are mandatory for all posted workers while working in the Netherlands:

- Minimum paid annual holidays are laid down in the Civil Code. The minimum entitlement to holidays is four times the number of working hours a week.
- Maximum work periods and minimum rest periods are laid down in the Working Time Act. The maximum number of hours worked a week is fixed at 45 hours excluding overtime and 48 hours including overtime. The limit is 60 hours a week, but the average number of hours may not exceed 48 hours measured over a 13-week period.
- Minimum rates of pay, including overtime rates, are covered by the Minimum Wages Act. At the moment the minimum wage rate for full-time work is €1,264.80 a month, €291.90 a week and €58.38 a day for an adult worker. These rates are lower for young workers.
- Conditions for hiring out of workers, in particular the supply of workers by temporary employment undertakings, are laid down in the Temporary Agencies Act. Unless a collective agreement provides other rules, temporary workers are entitled to the same wage and allowances as comparable workers in the industry where the worker is temporarily working. The Act obliges employers to give temporary workers all information about necessary vocational qualifications and working conditions before the temporary work starts.
- Regulations about health, safety and hygiene at work can be found in the Health and Safety Act, and for employment-related diseases and accidents in the Civil Code. The user undertaking has to give the posting employer in good time a survey and evaluation of the risks of the job for which the worker has been hired. Subsequently, the posting employer has to hand this document to the workers before they start on the job.
- Protective measures with regard to the terms and conditions of employment of pregnant women, women who have recently given birth, children and young people are found in the Working Time Act, the Health and Safety Act and the Minimum Wages Act. For pregnant posted workers the Civil Code also applies. But the usual sanction that accompanies this provision is not applicable. It is unclear for a posted pregnant worker how she can enforce her right to protection against unlawful dismissal.
- Equal treatment of men and women and other provisions on non-discrimination are laid down in the Equal Treatment Act and the Civil Code. Posted workers cannot be treated less equally on grounds of nationality. Unequal treatment is only allowed in the specific employment situation that goes with cross-border postings.

Applicable collective agreements

Implementation has been restricted to generally-binding collective agreements in construction. The Dutch method of extension of collective agreements results in an erga- omnes scope during the period of extension. The system therefore fits the definition of the Directive: 'Collective agreements that have been declared universally applicable' means collective agreements or arbitration awards that must be observed by all undertakings in the geographical area and in the occupation or industry concerned. Although the government recognised that the Directive's Annex defines construction more broadly than is usual in the Netherlands, it did not try to identify all the possible collective agreements.

Bargaining provisions in the Netherlands can only be made for subjects that are not laid down in a statutory provision of an absolutely mandatory character. Some statutory provisions explicitly mention that derogation is possible and by whom (derogation is generally only possible for social partners). As part of the collective bargaining process the construction social partners have labelled the applicable provisions in subsequent collective agreements from 1998 onwards. Between 1998 and the last negotiations for the period 2002-2004, they explored the possibilities and limitations of two collective agreements: the one for the construction industry and the agreement for Site Management, Technical and Administrative Personnel in construction.

Not all allied sectors and occupations are included in the construction agreement. Occupations such as painter, plasterer, installation engineer and electrician are subject to other agreements. Quite recently for the first time the scope of the collective agreement for painting (and related trades) has been successfully extended to posted workers.

The agreement for construction covers by far the largest number of occupations and companies in the building industry. It contains regulations for six of the seven core categories of conditions referred to in the Directive:

1. The maximum work periods and minimum rest periods; daily and weekly working hours; shift work; overtime; travelling time; paid leave due to special personal circumstances.
2. The minimum length of paid annual holidays; (seven) compulsory national holidays.
3. Minimum rates of pay include: overtime rates, guaranteed gross wages, special allowances, bonuses and rewards for on-call duty, shift work, infrastructure work, performance, mode of wage payment, clothing, equipment and other compensation, payment of travelling time and expenses, holiday pay, paid holiday leave.
4. The conditions for hiring out of workers, in particular the supplying of workers by temporary employment undertakings, are laid down.
5. Important prescriptions and prohibitions for health, safety and hygiene at work: pile-driven systems and performance-based systems are not allowed; employers are required to distribute and workers obliged to wear hard hats; the use of solvent-rich products is forbidden in sealed-off areas or when working inside; lifting of sacks heavier than 25 kg is not permitted; building blocks and glued

blocks weighing 14 kg or more may only be handled with a lifting device; the use of asbestos is forbidden; special safety measures are required for the demolition of asbestos-bearing products; lifts must be installed on buildings 15m or more in height, and so on.

6. Some (protective) measures on the terms and conditions of employment for young people: prohibitive rules, guaranteed gross wages for young employees, and the minimum number of paid holidays.

In the field of equal treatment (7), only the legal rules apply (minimally) to posted workers.

Against each applicable provision is an indication of which parts are meant for posted workers and sometimes the text has been rewritten to adjust it to the conditions of posted workers. In addition, a special explanation is given about the job-related pay system and guaranteed gross wages. Special attention is paid to workers from temporary labour agencies.

Altogether half of the total extended agreement provisions applicable to domestic employees are applicable to posted workers (25 out of a total of 53). In practice all basic working and employment conditions are included. One of the union representatives interviewed estimated that the gap in labour costs between a posted worker and a domestic worker was around 25%, because fringe benefits and other provisions (such as vocational training and stipulations about the end of an employment contract) meant for 'permanent workers' are not applicable to posted workers. Expenditure on travel and board and lodging for the foreign employer is left out of this cost comparison.

No use is made of the optional derogations. Nor is the compulsory derogation implemented if the posting period does not exceed eight days, nor for 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 or specialist workers of the supplying undertaking. So far in practice this has not raised any particular problems.

Comparison of labour conditions

In Dutch law there is no legal basis for the most-favourable principle. The Directive gives posted workers the right to the most favourable terms and conditions of employment, but no method of comparison to determine this is prescribed. Is a comparison preferable on the level of each provision, or between units of provisions covering the same subject, or is a comparison of the whole package of working and employment conditions the right point of departure? According to the Minister, the Dutch legal system prescribes a comparison on the level of each provision because, in the case of posted workers, only (a minimum level of) mandatory law is at stake. The mandatory character of provisions does not allow the exchange of one provision for another, depending on the arbitrary preference of an individual worker.

The Minister also referred to the existing agreement between the Dutch and Belgian construction social partners to acknowledge each other's collective agreements as equivalent. As a result of the agreement, the Belgian collective agreement applies to

a posted worker that usually works in Belgium during the posting period in the Netherlands and vice versa. According to the Minister this agreement can be prolonged. But if a posted worker from Belgium appeals to more favourable extended Dutch provisions, the Belgian provisions have to yield as far as minimum entitlements are concerned. As long as posted workers are satisfied with the agreement, no objections against a prolongation exist. This pragmatic attitude leaves enough room for collective bargaining to make the comparison more workable in practice. It does not give total legal safety, but that is no problem when only a few or even no individual appeals for deviation are to be expected.

Equal treatment

Exemption from generally-binding collective agreement provisions is possible. A request for exemption can be directed to the Minister of Social Affairs on the condition that the employer has concluded a legally valid collective agreement at enterprise/company level. Although not stated explicitly in legislation, it must be considered possible for an employer to pay lower wages if a collective agreement is concluded at enterprise/company level. In the current situation the Ministry does not investigate how many of the exemptions granted have been given on the basis of company agreements at a lower level than the sectoral agreement.

There may be some practice of lower level company agreements. However, most of these agreements are settled with union representatives that are also involved in sectoral collective bargaining.

The social partners have also agreed on the possibility of exemption from their collective agreement. The construction agreement states that an employer may send a request for exemption to a committee of social partner representatives. This committee is only to give exemption when there is a company-level collective agreement that has on average the same level of wages and other conditions as the industry-level agreement.

In theory there are no elements in law or in custom that would obstruct the same exemption possibilities being used for foreign employers with a company agreement to which Dutch law applies and in which Dutch unions are represented.

With regard to mixed businesses, it is within the competence of the social partners to define a policy. In the case of a separate division where construction activities are carried out, the construction agreement applies to all workers in this division or section of the company. When no distinction can be made, wage costs have to point to a predominant construction activity to make the construction agreement applicable. Although no experience has yet been acquired, the social partners have no intention of applying different rules to foreign undertakings with mixed businesses that post workers to the Netherlands.

Administrative cooperation

The Labour Inspectorate is the competent national body and main organisation responsible. So far it has met with no difficulties in applying the Directive's provisions. One of the stipulated tasks is to reply to reasonable requests from

equivalent authorities in other Member States for information on the transnational hiring out of workers, including manifest abuses or possible cases of unlawful transnational activities. So far there has twice been a request from France (in 2001) for information about Dutch companies that posted workers to France. The requests were for checks to see if the information given by the undertakings to the French authorities was correct. A German agency of the construction social partners also once approached the Dutch Ministry of Social Affairs with a request that was delegated to the Dutch social partners. The Labour Inspectorate has not made any requests to liaison offices in other Member States. It may be that because of the small scale of mutual administrative assistance that involves the Netherlands no official figures are yet available.

The same is true of general requests from the public for information about WAGA or the application of the Directive. Information on the terms and conditions of employment can be found on the website of the Ministry of Social Affairs (www.szw.nl). The Dutch version of the site refers to a phone number (+ 31-800-9051) available for questions. The English version of the site refers first of all to the frequently asked questions (with some information about sanctions on illegal employment) and gives the possibility to submit questions by e-mail. Up until now the number of questions submitted has been very small. According to the Ministry, no deficit of information has been evident that would constitute an obstacle to the free movement of services. Improvement in the accessibility of information is not planned.

In September 2003 the construction sector social partners published a special leaflet in English aimed at posted workers and their employers.

Measures and the execution of penalties

The government is held responsible for (the supervision of) compliance and therefore has to ensure in particular that adequate procedures are available to workers or their representatives for the enforcement of obligations under this Directive. As a safeguard, the Dutch judge has jurisdiction to decide in proceedings started by a posted worker. Apart from this, unions are entitled to start proceedings on behalf of posted workers or on behalf of their own interests.

According to the Minister, the Labour Inspectorate has supervision over the enforcement of, for example, working conditions and working time. This occurs when a provision in the relevant Acts is sanctioned by imposing a penalty or fine (according to criminal or administrative law). In this respect no difference is made between domestic and foreign companies. But most of the applicable legal provisions on posted workers are of a private law character. Provisions in the Civil Code as well as provisions with the character of a public law, such as the Act on Minimum Wages, are mainly sanctioned by private law mechanisms. And the enforcement of collective agreement provisions belongs substantially within the competence of the social partners themselves. Some help is provided for in public Acts, where it is laid down that social partners or individual workers can ask the Labour Inspectorate to check, for example, working conditions in specific companies. However, these possibilities

do not mean very much in practice because the Labour Inspectorate often has a huge workload and is not able or prepared to give priority to such requests.

The Minister defends this system of enforcement, which is quite untypical compared with other Member States such as, for instance, Belgium and Germany. The main advantage for the government is that the costs are limited. Critics have warned that trust in this system may be too high with regard to the ability of workers to raise a claim in court. Everyone can understand that for posted workers the barriers to going to Court are even higher than for Dutch workers. Therefore, the question can be asked whether the procedures available are adequate. Because of the mainly private law-based enforcement system, the state does not use special control mechanisms to prevent fraud and ensure correct application of the Directive. It is left to posted workers and the social partners involved to ensure correct application and, where possible, to prevent fraud. Only the Labour Inspectorate can check the pay slip of a posted worker and in practice this only happens in an investigation targeted at illegal workers. Although the enforcement of labour law is mainly regulated through private law sanctions, there are some so-called risk sectors, of which the construction industry is one. Since 2002 a special building team within the Labour Inspectorate has existed to inspect construction sites to see if illegal employment, moonlighting and other forms of fraud are taking place.

It depends on the provisions applicable in Dutch labour and employment law whether the 'user undertaking' of workers posted by a labour agency can be held liable when the temporary agency does not fulfil its duty to pay wages, etc., to the posted worker. The Civil Code provides for such a liability of the user undertaking, namely in cases of industrial accidents or work-related disease. The user undertaking is normally not liable for the compliance of other statutory employment conditions, such as minimum wages and paid holidays. However, such a user undertaking liability is foreseen in the construction agreement.

Besides this liability of the user undertaking, the construction agreement obliges associated employers to contract subcontractors only on the condition that they apply the provisions of the agreement to their employees. An appropriate sanction used to exist for cases of non-compliance. Until 1998 the main contractor was held liable for non-compliance of the subcontractor and this provision was also made generally binding. Enforcement is nowadays delegated to the social partners but at the same time one of the most effective tools is missing. The liability of the main contractor could give workers a better guarantee that the working conditions granted to them can really be obtained. The same kind of liability for social security contributions exists for the main contractor and this works quite effectively.

Experiences and practices

The only figures officially available about posted employees from and to the Netherlands are available from the Social Security Institution responsible for issuing E101 forms. These figures are not divided into sectors. According to annual figures collected for the period 1995-2000, the number of E101 (and E102) forms issued in the Netherlands fluctuated around 20,000. This implies that some 20,000 workers a year

were posted from the Netherlands to other Member States, of whom 60% went to Belgium, 30% to Germany, 3.2% to France, 1.9% to the UK, 1.3% to Italy, 1% to Spain, with the remaining 2.6% spread over Denmark, Finland, Sweden, Austria, Luxembourg, Portugal, Ireland and Greece.

In the same period 1995-2000, some 5,500 workers were posted to the Netherlands from Denmark, Sweden, Finland, Ireland, Portugal, France and Austria. As data were not provided by Belgium, Germany, Greece, Italy, Luxembourg, the UK and Sweden, it is very likely that in reality this figure must at least be doubled. Of the reporting countries, 42% of the workers were posted from Ireland, 33% from France, 17% from Portugal and around 8% from Denmark, Sweden, Finland and Austria together (Sengers and Donders 2002 and 2003).

Everyday experience on building sites gives reason to suspect that the provisions on the labour conditions applicable for posted workers are actually not very adequately applied, if applied at all. Most cooperative on average are the French, German and Belgian contractors, who post their workers to huge European infrastructure sites and are enlisted because of their special knowledge. Belgian and German contractors in frontier districts also seem to comply quite well with the rules. As soon as a (sub)contractor is involved who is lower in line for more unskilled labour, competition on costs gets stronger and the extent of compliance drops. Current examples of fierce labour cost competition can be found in the steel reinforcement sector and, to a lesser extent, in scaffolding and bricklaying. Besides legal competition on labour costs, there are areas and sectors where a substantial illegal workforce seems to be active.[78] In the past two or three years widespread use has also been made of (often illegal) groups of east-European construction workers on private house renovation projects.

Employers confirm the practical impossibility for the main contractor of being sure that the whole chain of subcontractors will, over the entire period of a project, send the same (posted) workers to a building site.[79] Only a daily check of all the workers would solve this problem. Employer representatives refer to the fact that no hard evidence is available. The experience of contractors with primarily German, English and Irish workers is that they are paid in accordance with the provisions applicable (at least at the so-called 'guaranteed wage level'). Everyday experience teaches that it is attractive for posted workers and their employers to work longer working hours than allowed under legal and customary Dutch provisions.

Evaluation of the Directive

The government has not observed large-scale problems and sees no reason for modification. This opinion is shared by employer representatives, who add that other, national legal regulations and the often-complicated character of the regulations

[78] Labour Inspection reports in January 2004: illegal workers were found on 50% of building sites visited; 15% of the total workforce inspected was illegal.

[79] Employers interviewed speak of a long-term trend copying the Anglo-Saxon 'outsourcing' model. Compared with 10 years ago fewer and fewer construction workers are employed by a main contractor.

applicable are the real problem, not the Directive as such. For instance, it is difficult to be sure what construction is allowed legally. The different outcomes of labour, social security and fiscal regulations also make it more difficult to know what one has to comply with. With regard to the position of self-employed workers, they refer to the fact that no means to regulate/monitor this group exists, either in terms of working time or of vocational requirements. Those who want to be a self-employed only need to register at the Chamber of Commerce and can start next day.

According to union representatives in construction, the Directive does not establish an equitable balance. The balance in practice is negative as far as the working conditions and overall treatment of (posted) workers are concerned. In relation to this, the aim of fair competition towards domestic fellow workers is under pressure. The main cause is found in the weak enforcement regulations. The 'enforcement gap' on the side of the social protection of workers is further deepened by an enforcement system sanctioned mainly under private law. To improve monitoring, the unions suggest a requirement for posting employers to make themselves known to the competent authorities before posting begins. But also necessary are better mechanisms for applying sanctions at national and local levels, a European database containing all the provisions applicable, and a broadening of the scope of WAGA at Dutch level, at least to temporary labour agencies, cleaning activities and some activities in the metal industry and agriculture. Unions themselves have to try more than they do at present to reach casual construction workers and posted workers must be included in the recruitment activities.

For Articles 4 and 5 measures, it can be concluded that it would help if the text of the Directive were modified. These Articles should be much more concrete and should force Member States to take the enforcement of the working conditions of posted workers genuinely seriously. The introduction of a liability clause for the user undertaking, already proposed by the European Economic and Social Council during the legislative process that lead to the Directive, would probably be the most effective. Priority should be given, however, to the practical enforcement and execution of the Directive as it stands today.

Spain[80]

Introduction: national debate before and during implementation

Directive 96/71/EC was transposed into Spanish law through the *Ley sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacionales* 45/1999 (henceforth Law 45/1999) of 29th November 1999. Thus the law came into effect just one month before the deadline established for implementation. Law 45/1999 is a fairly direct transposition in terms of its structure and content. Within this, the government adopted an extensive approach towards defining the scope of application, establishing only limited exceptions, as well as introducing the obligation for companies to notify all postings covered by the law. The government's position was to extend the law to all sectors of the economy in order to avoid, first, unfair competition or social dumping to the detriment of Spanish firms and workers and their jobs, and, second, the creation of exceptions that might be used as loopholes to circumvent the law.

Neither the government nor the social partners considered posting to be a particularly relevant issue. Both the major trade union confederations – *Comisiones Obreras* (CCOO) and the *Union General de Trabajadores* (UGT), and the top-level employers' association – the *Confederación Española de Organizaciones Empresariales* (CEOE), were consulted. As is standard procedure for social and labour legislation, consultation took place through direct bilateral contacts with the Ministry of Labour (*Ministerio de Trabajo y Asuntos Sociales*) and then again within the tripartite consultative body, the Economic and Social Council, which issued a legal opinion on the draft bill. Significantly, the consultations with the social partners took place at the

[80] The author of the original country report was Dr Justin Byrne, Researcher, Center for Advanced Study in the Social Sciences (CEACS), Instituto Juan March de Estudios e Investigaciones, Madrid.

economy-wide confederal level, without direct intervention by either construction employers or the two representative building workers' federations.

Since the provisions of the Directive were to be extended to cover activities in all sectors of the economy (except for merchant shipping), it was considered by both social partners to be an economy-wide rather than a sectoral issue. Neither unions nor employers questioned this general principle; they did, however, raise a number of concerns and issues.

The unions aimed to make the law as generally applicable as possible and to tighten the monitoring and supervision of the law, including their own role in this. The employers were concerned with ensuring, first, that the new law was in step with laws implemented in other Member States so that Spanish companies posting workers abroad would not find themselves at a competitive disadvantage. Second, they were concerned that the law should not prove an unnecessary impediment to posting workers to Spain to provide services required by Spanish companies. They asked for exemption for all postings to companies belonging to the same group and expressed concern about the administrative burden of prior notification for all postings of over eight days. The main concern of both employers and unions was the modification in the law on temporary labour agencies, settled that same year, which prompted fears of the entry of European agencies operating under less rigid bureaucratic and financial requirements than their Spanish counterparts.

National implementation

Definitions of posted worker

Law 45/1999 maintains the distinction between the three types of posting situations defined in the Directive and reproduces the scope of the law virtually word for word, albeit with an addition that excludes workers posted for training purposes from the effects of the law. The definition of a posted worker given in the law is a 'worker, of whatever nationality, employed by companies covered by the scope of the law posted to Spain for a limited period time in the context of the transnational provision of services, always providing there is an employment relation between such undertakings and the worker during the period of the posting'. The emphasis on the existence of an employment contract is to ensure that postings are used for the free movement of workers and labour trafficking.

The definition of worker implicitly applying is that of the Labour Statute (1/1995) that applies 'to workers who voluntarily lend their services on the account and within the sphere of organisation and management of another physical person or legal entity, known as the employer or businessman.' Law 45/1999 does not specify the distinction made between a posted worker and posted self-employed worker, or make any reference to the definition of the worker in the country of origin. The duration of 'the limited period' is not defined. However, Article 3.6 (on the minimum conditions to be applied to workers posted to Spain) does state that, for the effects of the calculation of the minimum wage: 'the duration of the posting will be calculated in a period of reference of one year from the start of the posting, and including, when relevant, the duration of the posting of another, previously posted worker, substituted by the worker.'

Applicable national rules

The Spanish law does introduce some additional minimum conditions in areas not mentioned specifically in the Directive with respect to aspects of working time (night and shift work, holidays and leave of absence), non-discrimination of part-time and temporary workers, respect for the privacy and dignity of workers, and workers' rights of assembly and association and to strike.

Law 45/1999 does not identify the national laws and regulations corresponding to the subject matter covered by the Directive, apart from:

- The rules on working time established in Labour Statute 1/1995, which establish maximum weekly working hours of 40 hours (calculated over the course of the year), a maximum standard working day of nine hours, minimum rest periods of 12 hours between shifts, one and a half days off a week (normally Saturday afternoon and Sunday), a minimum 30 days holiday a year, annual overtime limits and shift and night work.
- The work of minors, prohibiting the employment of those under 16 and establishing restrictions on the work of those aged 16-18.
- The law establishes that workers posted by temporary employment agencies from Member States are also covered by the provisions of the Spanish laws on temporary agencies. A worker posted by an agency is entitled to receive at least the minimum hourly rate established by the collective agreement applicable in the company where the worker is employed for the post in question.
- Finally, all postings of under eight days, regardless of the type of activity, are exempt from the provisions of this law with respect to notification, minimum wages and annual paid holidays.

Applicable collective agreements

In the Spanish transposition the terms and conditions of employment applicable are those laid down in generally-binding collective agreements (not company-level collective agreements) and arbitration awards. Generally-binding collective bargaining in the construction industry takes place fundamentally at the national (through the General Agreement of the Construction Sector) and provincial levels. National-level collective agreements define the general conditions of hiring and dismissal, professional classification and wage scales, annual total of working hours and holidays, the structure and concepts of wages and other allowances, maximum overtime work, health and safety and so on. With respect to wages, the national collective agreement does not set wage or wage and non-wage complementary rates, but rather the percentage increase on existing wage rates, adjusted annually in line with inflation. Generally-binding provincial-level collective agreements, which may improve on the terms of the national-level agreement, also define the actual minimum wage rates, the rates of wage and non-wage complements (for instance, overtime and night-work rates, productivity bonuses), the distribution of working time across the year, and holidays.

Flexible working can be agreed by companies and workers' representatives at company level but within the standard nine-hour daily limit established by the Labour

Statute. In the absence of company-level agreements, the calendar of working hours is that set down in provincial-level collective agreements.

Neither the government nor the social partners has made any attempt to identify the applicable provisions of the generally-binding collective agreements, or any others, to the subjects covered. The national collective agreement in the construction sector makes no reference to the posting of workers.

Comparison of labour conditions

Law 45/1999 refers generically to the application of the most favourable conditions established in 'legislation applicable to the [workers'] employment contract'. The Spanish clause reads that: 'The provisions of this Article [on minimum terms and conditions] operate without prejudice to the application to posted workers of more favourable working conditions derived from the provisions of their employment contracts, collective agreements or individual employment contracts.' Article 4 specifies the concepts incorporated into the minimum wage that posted workers must receive. This is defined as the basic wage and wage complements, extraordinary payments and overtime, and night work rates, but excludes any voluntary additional social security payments. For the purposes of comparison, this is in terms of annual gross pay (without discounting tax or the workers' social security payments), and includes allowances specific to the posting. The law follows the Directive in expressly excluding for comparative purposes the travel and living expenses actually incurred on account of the posting.

In practice, the most-favourable clause is applied very roughly and almost exclusively by comparing the provisions on wage levels set in the relevant provincial-level agreement and wages paid to posted workers. In this respect, the unionists and labour inspectors consulted said that one potential/actual fraudulent practice was the attempt by employers posting workers to have, for comparative purposes, complements paid to workers for expenses actually incurred included in the sum of the wage.

Equal treatment

Company-level agreements are rare in Spain, particularly in construction, and are limited almost exclusively to the few very large companies. Moreover, as in the economy as a whole, company-level agreements invariably improve on the terms of other collective agreements. Company-level agreements may not include lower wage rates than those established in the provincial-level agreements that define wage rates in individual provinces/regions. The only exception to this is in cases of economic necessity, in circumstances defined by the Labour Statute, and in some cases (but not construction) in generally-binding collective agreements.

Spanish legislation on temporary employment agencies establishes the principle of wage equality, that is, that with respect to wage levels all workers employed by Spanish agencies are subject to the collective agreement applicable in the user company. In construction, in nearly all cases this would mean the minimum hourly wage rates set in the relevant provincial-level collective agreement.

While there is no doubt about the applicable collective agreements in the case of workers employed by agencies, the situation with respect to workers posted by agencies is less clear.

The problem of mixed-businesses does not arise, given the extension of Law 45/1999 to all types of activities. None of the interviewees had encountered problems in deciding which was the applicable Spanish collective agreement. No information is available regarding the application of the law to undertakings from non-Member States as determined in the Fourth Additional Disposition of Law 45/1999.

Administrative cooperation

Spain has distributed administrative, information and monitoring tasks between a series of national and regional bodies, which contrasts with the greater institutional concentration in other Member States, where one body has been designated responsible for both liaison and monitoring. The National Liaison Office has been established in the Ministry of Labour, responsible for monitoring implementation of the law and for representing Spain in its contacts with the European Commission.

However, competence for the execution of labour legislation within Spain's highly decentralised political and administrative system lies with the Labour Departments of Spain's 17 Autonomous Communities (or regional governments) and two North African enclaves. Each Autonomous Community has therefore designated a regional Liaison Office within the Labour Department responsible for administering Law 45/1999, to register notifications of postings, to provide information for posting undertakings about relevant labour standards and applicable collective agreements, and to cooperate with the Administrations of other Member States. It should also be noted that most Autonomous Communities are made up of various provinces (there are a total of 50, plus the enclaves of Ceuta and Melilla), and the provincial delegations of the regional Labour Authorities are responsible for administering the law.

The various regional Labour Authorities or Liaison Offices receive virtually no requests for information related to postings. Those they do receive come, above all, from Spanish undertakings enquiring as to their obligations and labour conditions in other Member States. Figures compiled by the Labour Inspectorate indicate that during the first two years of the law (2000 and 2001), only six requests for information from Spanish companies were received by the regional liaison offices (three in Madrid, two in Valencia, and one in the Basque Country). The Madrid office also reported receiving five or six enquiries a month (which would make some 120-144 over the course of the two-year period), but the administration noted that it was impossible to say if these enquiries were about working conditions in Madrid or in other Member States.

All undertakings posting workers to Spain for more than eight days are obliged to provide advance notification to the relevant Labour Authority. The information they must provide is:

- fiscal details of the undertaking posting the workers;
- 'the personal and professional details of the displaced workers';
- details of the contracting undertakings or workplaces where the workers will be employed;

- description of the work the displaced workers will carry out in Spain, including an indication of which type of posting;
- in the case of temporary labour agencies, the posting agency is obliged to provide proof of its operating licence in its country of origin and details of the temporary needs that its workers will meet.

The national expert consulted confirmed the impression gained from research that undertakings posting workers would find it difficult to obtain information about both the notification process and their obligations with respect to minimum working conditions in Spain. The Labour Inspectorate has received requests for information from the French authorities with regard to various French undertakings, and self-employed workers, established in Northern Spain that then posted workers to France, apparently to exploit Spain's lower social security costs. Transport companies were mentioned as a sector where this phenomenon existed. The principal question at stake was whether the undertaking/individual in fact operated in Spain in any real sense. According to information collected by the Labour Inspectorate (the body charged with monitoring compliance with the law) in the first two years of the application of 45/1999, the authorities only received notification of a total of 67 postings involving 257 displaced workers.

Measures and the execution of penalties

While the regional Labour Authority is responsible for administering the law, the Labour Inspectorate (dependent on the central Ministry of Labour) is responsible for its monitoring and enforcement. At national level, the Labour Inspectorate has not prioritised the inspection of posted workers. Apart from site visits, inspections of posted workers would also be carried out in response to reports from unions or the workers of suspected irregularities. Given the scant incidence of posting or problems arising from this, awareness of the law among the Labour Inspectorate is likely to be low. Union representatives highlighted that the overall level of collaboration between unions and the Labour Inspectorate often depends on the state of personal relations between individuals. The Labour Inspectorate does have powers to require the posting undertakings to present any documentation relevant to the law at the office of the Labour Inspectorate (Law 45/1999, Article 6). However, the law should be reinforced, requiring the posting undertakings to have this information available on site in order to avoid delays in its monitoring and enforcement – particularly problematic in the case of foreign undertakings and given the temporary nature of postings.

The Labour Inspectorate indicated that the vast majority of all its interventions with respect to posted workers involved Portugal and it has established cooperative relations with its Portuguese counterpart. In October 2003 the Spanish and Portuguese Labour Inspectorates signed a cooperation agreement on postings to facilitate the exchange of information and enforcement with respect to: the social security status of posted workers; health and safety; the identification of posted workers; and the legal status of posted workers from third countries (a problem has been identified in that the Portuguese police do not recognise the work permits of third-country nationals

posted to Portugal by Spanish companies, unlike the Spanish authorities, which do recognise work permits issued by Portugal as valid). The agreement also establishes that the respective Labour Inspectorates will cooperate in notifying sanctions applied to companies that have committed infractions in the other state.

The social partners in construction, at least at national level, have not initiated any special measures to monitor or ensure compliance with Law 45/1999. The national employers' confederation has received no request for action from member organisations and companies. The construction unions have acted recently on an ad-hoc basis, responding to requests for information about the content of the law and for organisational support from their local organisations. They could each recall only one or two interventions involving posted workers.

In undertakings with works councils, union representatives have the right to see all employment contracts on signing. However, this obligation does not extend to subcontractors, although in theory the main contractor does have to declare all subcontracts. Spanish unions do not have the right, therefore, to see the contracts of posted workers working for a foreign subcontractor. Their intervention consists of instigating the investigation by the Labour Inspectorate of any suspected infractions of the law. At local level, research has uncovered only very isolated instances of union intervention in the monitoring of posted workers in response to denunciations of suspected abuse from union members or the workers involved.

The agreement signed by the Spanish and Portuguese Labour Inspectorates does provide for cooperation over the notification of sanctions, it does not establish mutual recognition by the two countries' judicial systems. An additional problem in construction regarding the execution of penalties is that these small, essentially labour-only undertakings frequently 'disappear' in legal terms before penalties can be executed, whether in Spain or in Portugal.

Experiences and practices

As has been said, all postings of more than eight days duration must be notified in advance to the relevant Labour Authority. However, the territorial and functional fragmentation of administrative responsibilities in this field, the weak cooperation between different bodies and levels of the administration (provincial, regional and national authorities), and the fact that posting has not been incorporated as a distinct entity into the information and data-collecting systems of the relevant bodies means that no reliable or recent figures are available for the number of postings and posted workers. The impression is that the figures notified bear a very loose relation to the actual incidence and, as a result, only anecdotal evidence is available as to the size and nature of the posting practice.

There is a broad consensus on the profile of the workers posted to Spain. It should be noted, first, that no cases were identified or references made to postings by foreign temporary labour agencies. Posted workers would appear essentially to be divided into two groups:

- Generally highly-qualified workers posted to large companies in the same group, or to provide specialised services (often consisting of installation work). Postings of

this type appear to take place across all sectors, to involve workers from a wide range of Member States, and are not considered to pose any specific problems in terms of respect for the provisions of the law (beyond notification). It is assumed that they work in conditions superior to the minimum referred to in the law.

- The second type of postings consists of workers from Portugal (although not necessarily themselves Portuguese) posted by labour-only subcontractors in the construction industry. Concerns about social dumping are restricted almost exclusively to this second type, which is considered to account for the vast majority of all postings and posted workers. For example, all of the approximately 16 notified postings to Andalusia of an estimated 160 workers in a six-month period (2004) have involved Portuguese subcontractors in construction. The same is true of approximately half the notified postings to Madrid over the course of the last year, which consisted of repeated small-scale postings by Portuguese subcontractors to a number (also repeated) of Spanish construction companies. The building unions in Madrid also reported isolated sightings of this type of posting, and confirmed the impression that the postings in the construction industry usually take place in large scale civil engineering and construction projects rather than in the private building sub-sector of the industry. Steel fixers and structural concrete workers are the two occupations most widely mentioned.

Evaluation of the Directive

The Ministry of Labour believes that Law 45/1999 constitutes an effective legal framework for transnational operations involving posted workers, guaranteeing both the freedom of movement of labour and of services, and fixing limits for unfair competition. The government considers that Spain has too little experience in the application of the law to be able to propose any changes to the Directive. Rather than modification, the government believes that greater effort should be made to implement the Directive, particularly by strengthening transnational cooperation, for example in the communication of social security data in order to confirm that posted workers are in legal employment in their country of origin. The social partners, too, propose no specific changes to the Law or Directive. Their position is similar to that of the government in highlighting the need for diffusion of Law 45/1999 rather than modification of the law or of Directive 96/71.

It appears that the institutional fragmentation of responsibilities in the field of posting may hinder effective monitoring and implementation. It explains the absence, despite the obligation for notification, of any reliable figures for postings to Spain. The involvement of different provincial, regional and central government-level institutions hinders the rapid and effective flow of information on postings, which, given the temporary nature of these, would be vital to ensure compliance with the law. Equally, given the undoubtedly limited incidence of posting, individual regional and provincial administrations have only very limited experience of posting, which delays their developing knowledge of the law and administrative procedures required in order to assume their obligations with respect to information and compliance. As in many other fields, there is no inter-regional contact or collaboration in this respect.

Sweden[81]

Introduction: national debate before and during implementation

Industrial relations in Sweden differ from the common continental picture. One of the most predominant features of the Swedish model is the high degree of organisation. The social partners have a very high membership density. About 85% of employees are members of a trade union and membership is equally distributed between men and women and the private and public sectors as well as employees on typical and atypical contracts.

The social partners enjoy an extensive freedom of self-governance. There is no state or other authority that oversees the activities or mode of functioning of the social partners. Collective agreements are not declared generally binding. The absence of legislative regulations leaves the partners considerable freedom in running their internal affairs. These organisations are, therefore, used to a high degree of inner self-regulation without state interference.

A spirit of cooperation between the trade unions and employer organisations characterises Swedish collective bargaining. The links between the trade unions and the employers are long-standing and are based on mutual tolerance and, sometimes reluctant, understanding of the opposite side. Cooperation between the social partners takes place through numerous agreements that form a base for continuity in their relationship.

Sweden transposed the Posting Directive through a new Act, the Posting of Workers Act, that came into force in December 1999 and that in its structure, scope and definitions follows the Directive. The Directive is considered by the government

[81] The authors of the original country report were Claes-Mikael Jonsson and Niklas Bruun, National Institute for Working Life, Sweden.

to be fully implemented into Swedish Law. The main issue when it was implemented into national law was how to preserve the system of industrial relations and at the same time comply. The discussion was whether or not to make use of the option provided by Article 3.8 in the Directive where it is stated that Member States, in the absence of a system for declaring collective agreements to be of general application, can decide to base themselves on collective agreements that have been concluded by the most representative employer and labour organisations at national level and that are applied throughout national territory. The government, after consultation with the social partners, settled for a solution whereby the terms and conditions of employment in collective agreements were excluded from the Posting of Workers Act.

The government referred to the characteristic of the Swedish bargaining system, that collective agreements cover most of the labour market. Swedish and foreign undertakings normally sign collective agreements, or 'application agreements', with trade unions in the sector concerned. The possibility of taking industrial action is important for the continuation of the system of collective bargaining, although action is rarely used. The trade unions, supported by the employers' organisation, declared that they have good control over foreign undertakings and that application agreements are signed and followed. It was not considered possible to declare collective agreements applicable only to foreign undertakings since that would put foreign undertakings in a position unequal to national undertakings. The government therefore considered the functioning and procedures of the Swedish collective bargaining system as hindering social dumping within the meaning of the Directive.

National implementation

Definitions of posted worker

The three types of posting of workers in Article 1.3 have been fully implemented into national law. The definitions used in the Posting of Workers Act aim to reflect the definitions in the Directive without adding or changing anything. No legal definition of an employee exists in Sweden and its meaning has been clarified in relation to a variety of borderline cases in an extensive body of case law. The courts attach overriding importance to a few factors when examining such cases, but usually make an overall assessment in which they take into account contractual terms as well as the real circumstances in which the work is performed. This means in practice that a contractor who is self-employed can under certain conditions be subject to the rules on employee rights. The same way of reasoning applies to posted workers.

The notion of 'limited period' has not been defined in law and has to be defined on a case-by-case basis.

Applicable national rules

The interplay between public and private regulation, legislation and collective agreements is rather complex. However, legislation is in many cases kept general, leaving more detailed provisions to be settled by collective agreements. There is no legislation on minimum wages or guidelines on rates of pay and the settlement of pay disputes.

The Posting of Workers Act refers to several provisions and national rules in other Acts that were to a large extent applicable to posted workers even before implementation of the Directive. These Acts are mandatory regulations that cannot be departed from by individuals but can be discretionary for the social partners. Some of this legislation is termed 'semi-discretionary', which means that it can be derogated by a collective agreement:

- The legislation on maximum work periods and minimum rest periods is to be found in the Working Time Act. This law, based on the European Working time Directive, is semi-discretionary, with a so-called EC bar, which means that no collective agreement granting exemptions from the Act's provision may have the effect of creating conditions less favourable to the employee than the minimum standard laid down by the Directive.
- Regulations concerning minimum paid annual holidays are to be found in the Annual Holidays Act. The regulations in the Act have not been applied fully to posted workers, since they work in Sweden for short periods and the Directive concerns only paid holidays. Regulations in the Act on holiday pay and payment in lieu of holiday pay are applied to posted workers, while those on unpaid holiday generally do not. Furthermore, posted workers have the right to time off but not to paid time off.
- The conditions of hiring out of workers are regulated in the Private Job Placement and Hiring Out of Labour Act. The person being hired out is an employee of the agency and has no contractual relationship with the client. The client though is responsible for health and safety matters for the agency worker. It is possible in cases of long-term assignments to class an agency worker as an employee of the user company.
- Health, safety and hygiene at work regulations are to be found in the Work Environment Act. The Work Environment Authority is responsible for these issues and can make legally binding non-statutory regulations. It can also make work place inspections.
- Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth are to be found in the Parental Leave Act, regulations on children and young people in the workplace in the Work Environment Act.
- Regulations on equality of treatment between men and women and provisions on non-discrimination can be found in the Equal Opportunities Act and other non-discrimination legislation. The Posting of Workers Act refers, furthermore, to the Act against Ethnic Discrimination in Working Life, the Act Prohibiting Discrimination in Working Life based on Sexual Orientation, and the Act Prohibiting Discrimination against Disabled Persons in Working Life.

The Posting Act refers to a number of paragraphs in the Co-determination Act. These regulations concern the right to organise and to bargain, the peace obligation (parties to a collective agreement and their members cannot take industrial action during the life time of the agreement) and sanctions against breaches of these regulations. According to the government these regulations form the core of the Swedish collective bargaining system. It should also be mentioned that certain provisions in the

Employment Protection Act not explicitly among the fundamental Posting regulations are considered mandatory public policy. For individual employment contracts, these mandatory regulations giving protection against unlawful dismissal protect the employee notwithstanding the choice of law made by the parties.

Applicable collective agreements

The government settled for a solution whereby the terms and conditions of employment in the collective agreements were excluded from the Posting of Workers Act. Most of the applicable legal provisions mentioned above are semi-discretionary, so that the social partners can derogate from them through collective agreements.

Collective bargaining takes place at three levels in the private sector: at national inter-sectoral level between the central collective organisations; at sectoral or branch level; and at company level. A process of decentralisation is taking place and bargaining on pay and some conditions of employment is no longer being held at national inter-sectoral level. Bargaining at sectoral level has also changed and is now less detailed, although it remains the key element in the system of collective bargaining. Legally-binding collective agreements can be concluded at all three bargaining levels and there is a collective agreement for each sector of economic activity. It is at sectoral level though that notice of the intention to take industrial action can first be given, although the final bargaining process takes place at local establishment level where pay increases whose scope is agreed at sectoral level are actually distributed. Bargaining at local level can be either collective or individual.

Rates of pay in collective agreements are not subject to judicial examination, although individual contracts can be referred to the courts on the basis of paragraph 36 of the Contracts Act. In coming to its decision the court will take as a starting point the leading collective agreement in the industry concerned. Collective agreements can thus be said to constitute a normative source for establishing minimum rates of pay. Employees not covered by a collective agreement can also negotiate freely with their employer on individual rates.

Employers operating in more than one sector, so-called mixed business, have to have agreements for each sector that they operate in. Employers in mixed businesses sign the different collective agreements applicable to the workers within each sector.

Undertakings not members of an employers' organisation that has signed a collective agreement can sign an application agreement, the name given to agreements that a trade union concludes with an individual employer not belonging to a signatory employer organisation. This means essentially that the employer applies the collective agreement envisaged in the application agreement, usually the agreement covering the sector of activity. Most foreign undertakings in the construction sector that come to Sweden sign an application agreement drawn up by the construction sector social partners. These application agreements play a central role for the foreign undertakings in terms of application of the Posting Directive.

Wages in construction cannot be lower than indicated in the Construction Agreement, whether paid by national or foreign undertakings. It is one of 10 agreements in the construction sector and is, together with the Construction Work Agreement, the core of the sectoral agreements. The rules in the Construction

Agreement are binding for social partner members and for those who have signed an application agreement; in other words they are not generally binding or generally applicable. They include:

- Normal working time is 40 hours a week (excluding rest periods). Overtime, length and duration of rest periods are decided locally at the workplace.
- Construction workers have a minimum of 25 days paid holiday a year. The holiday period is generally between June and August, when workers have the right to four weeks continuous holiday, but it can be moved to other periods after negotiation at local level.
- Pay is negotiated at local level. If an agreement on pay cannot be reached then the minimum pay in the Construction Agreement will be applied.
- The conditions for hiring out workers are to be found in the Agency Work Agreement, which complements the law and whose basic idea is that agency work is to be conducted under the terms and conditions of the collective agreement for the sector of placement.

Comparison of labour conditions

In practice it is difficult to compare the terms and conditions of employment of different Member States. There is little or no control by the authorities of foreign undertakings coming to Sweden and foreign undertakings have no duty to announce their presence when posting workers to Sweden. The Swedish Work Environment Authority controls work environment through visits and inspections to workplaces (33,199 visits in 2003 of which 22,574 were inspections). Some of the visits are to workplaces with foreign undertakings. However, terms and conditions of employment are not compared in respects other than working time and the work environment.

Control of workplaces with foreign undertakings is largely carried out by the local trade unions, mostly in terms of pay, insurance and other terms and conditions of employment. The system of collective bargaining is based on the activity of the social partners themselves, who have to make sure that collective and application agreements are signed and applied to workers in undertakings whether national or foreign.

The issue of control is important because there are basically two moments when a comparison of employment terms and conditions can be conducted: when the foreign undertaking signs a collective agreement with the trade union or when it is about to fulfil its collective agreement obligation. The Building Workers' Union does not consider it its job to compare terms and conditions of employment in other Member States when application agreements with foreign undertakings are written. If foreign undertakings claim that they already pay posted workers more in the home state and provide insurance and other terms and conditions of employment on an equal or better level, then the provisions of the collective agreement can be reduced. Better provisions in the state of origin have though to be proved by the employer and there have been few cases where the employer has been able to do so.

A current issue of great practical importance concerns insurance included in the collective agreement for the construction sector. When foreign undertakings sign application agreements they are liable to pay insurance for their workers as set down in the collective agreements. National companies that sign application agreements or

are members of an employer organisation have to pay this insurance. In some cases there is a situation of double payment of insurance for foreign workers because the employer has similar insurance in the home country. The government did not provide a solution to such situations in the Posting of Workers Act, but claims rather that the issue of double payment is to be resolved within the framework of ECJ case law. The social partners have discussed how to solve the question. If the pension payment concerned is part of pay, then it could fall within the scope of the Posting Directive although the Directive does not apply to supplementary occupational retirement pension schemes. There are models for comparing Scandinavian countries but no models for other countries, and cases of comparison are also quite few.

Equal treatment

A foreign undertaking must be able to anticipate which conditions will be met when posting workers to Sweden as it must be possible to estimate the costs of contract work. It is therefore necessary to make a foreign undertaking aware both of legislation on terms and conditions of employment and of the likelihood of being forced to sign a collective agreement. The government has reasoned that it is important that the liaison office's responsibility to refer foreign undertakings to the social partners in a comprehensive manner and to inform them about the content of collective agreements should be evident in legislation. The need to anticipate conditions for contract work was considered by the government to be fulfilled through the role and functioning of the liaison office. The starting point is that the liaison office should provide information and refer to the social partners for answers with respect to certain conditions of employment. It is not certain if such a procedure is in compliance with the Directive. It should be underlined, however, that the information model used is understandable in the context of the role and functioning of the social partners.

A criticism of the way chosen to implement the Directive has been that the Swedish system is well suited to preventing social dumping but less suited to ensuring that the Swedish terms and condition of employment are applied to foreign workers. It is not possible for foreign workers to make legal claims on the basis of the sectoral collective agreement unless they become member of a Swedish trade union. A posted worker could in this case be considered to lack the legal right to invoke rights in the collective agreements. The government has reasoned that a posted worker who is not a member is in the same situation as a national worker who has chosen not to become a member of a union. A foreign worker can always become a union member and, thereby, legally invoke the collective agreements.

Administrative cooperation

The Work Environment Authority is the liaison office designated by the Posting of Workers Act. It has to provide information on the working and employment conditions applicable during a worker's posting to Sweden. The Authority receives very few calls for information from foreign undertakings (fewer than one call a week). Undertakings that get in touch with the office mostly know quite a lot about

conditions and merely call to verify what they already know. The office often refers callers to the social partners, since the Work Environment Authority cannot answer questions about payment and the content of collective agreements. The officials receive very few questions from liaison offices in other Member States and have never contacted a liaison office in another Member State.

The Work Environment Authority appears to be rather ill-suited to the entire role designated to it through the Directive. It has very high expertise on questions concerning the work environment and working time and can visit workplaces and conduct inspections on these issues. Many foreign undertakings are, however, more interested in economic conditions; they want to know if there is a minimum wage, about insurance cost, etc. Those questions have to be answered by the social partners on the basis of collective agreements regulations.

The greatest problem when giving information to foreign undertakings and posted workers is the language barrier, as employers have to hire a translator if they do not understand Swedish. The collective agreements are in Swedish.

Measures and the execution of penalties

The Authority has little or no control over the number of foreign undertakings carrying out work in Sweden and it would be much easier to monitor them if there was a duty to notify. This would change the role of the liaison office, but at the same time make it more effective. The Swedish juridical system comes into play on employment issues on the basis of general civil proceedings or penal law proceedings. Cooperation with the juridical systems in other Members States is based on general regulations.

Experiences and practices

There is no obligation for a foreign undertaking to notify authorities or trade unions of their presence in Sweden. Thus it is very difficult to find any figures on the number of posted workers. The Building Workers' Union, through its large local organisation and the duty for contractors to notify subcontractors, basically traces all the foreign undertakings in the construction sector that declare earnings and concludes application agreements with them. The trade union says that it has negotiated about 1,600-1,700 application agreements with foreign undertakings over the years; at present 167 are active, although there are no figures for the number of posted workers covered by these agreements. Moreover it has not been possible to find figures on the number of Swedish workers posted to other Member States.

In legislation posted workers are put on an equal footing with national workers; this also circumvents conditions in the collective agreements if application agreements are signed with the employer. The Building Workers' Union says that it is normally easy to obtain an application agreement with a foreign undertaking and that many will sign any paper given to them. The problem is to guarantee that all conditions in the application agreement (mostly about payment) are fulfilled, even though the

collective agreements give the unions the right to check pay slips and other relevant documents. According to the unions, this problem applies most of all to subcontractors from eastern Europe. Even though there have been receipts for payments to posted workers, the union suspects that the foreign subcontractor takes the money back when returning to the home country at the end of the posting. Thus, compliance with the law and collective agreements is no guarantee that the posted worker is finally paid in accordance with the agreement.

Another way to circumvent the rules in the Posting of Workers Act in practice is where workers declare themselves self-employed. Self-employment means that collective agreements do not apply. It has become rather easy lately for foreigners to declare themselves as self-employed as it is simply sufficient to say that one intends to conduct business in order to get the status self-employed. Control will take place after a period, but most foreign self-employed workers will have returned home by then. According to the tax authorities, the number of applications from foreign workers for self-employed status has grown from 300 in 2000 to 1,000 in 2003. According to an official, the Swedish tax authorities have to wait for about three months when asking authorities in East-European Member States about the fiscal status of an undertaking or a self-employed worker. In practice this means that an undertaking has left the country by the time the tax authority receives the answer, so the undertaking pays no tax in either country and fiscal and social dumping are created.

Evaluation of the Directive

A duty on foreign undertakings to notify the authorities of their presence in a Member State could support the functioning of the Directive in Sweden. Such a duty would probably also strengthen the role and functioning of the liaison office, as this is interpreted in a minimalist way today and needs to be developed. For instance, with regard to national conditions, the core provisions of the collective agreements could be translated and made available to the liaison office. It is possible that the Directive could strengthen the liaison office role, so making Swedish employment conditions more understandable for foreign undertakings.

Finally, a wider responsibility for contractors to guarantee that subcontractors abide by legislation and collective agreements is being discussed. Under this the contractor would hold back part of the remuneration due to a subcontractor until the end of the commission, so making difficulties for unbusinesslike subcontractors.

The Ministry of Industry, Employment and Communications (the governmental department responsible for the Directive), however, sees no significant problems with the Directive. The government has received no objections or other critique from the social partners, individuals, foreign companies or other interest groups. The Ministry has no specific view on the balance between preventing social dumping and facilitating the free movement of persons and services. The Ministry has no reason to believe that the Directive is unbalanced and no objections have been brought to the Ministry.

The social partners consider the balance between the two purposes of the Directive, to prevent social dumping and to facilitate the free movement of persons and services, to be sufficient.

The Swedish Construction Confederation (the building employers' organisation) has no specific opinion on the functioning of the Directive. Free competition is good for the construction market, but foreign undertakings should compete on the same terms as national undertakings, and the role and functioning of the Swedish collective agreements should be preserved.

The Building Workers' Union basically shares this opinion whilst supporting the modification that foreign undertakings have a duty to notify the authorities of their presence in a Member State. The role and functioning of the liaison office has to be strengthened through better cooperation with the social partners.

Switzerland[82]

Introduction: national debate before and during implementation

In 1999 the Swiss government negotiated a package of free movement items with the European Union. The outcome of the negotiations was formulated in a bilateral agreement covering several areas: air and overland transport, public procurement, technical barriers and so on. The question of the free movement of workers was also included. The decisive factor in the public debate was the question of whether the transport section and arrangement for the free movement of persons was acceptable to the public. This essentially depended not on the text of the treaty per se but on the supporting legislative amendments and flanking measures through which the agreements on overland transport and the free movement of persons were to be implemented in Switzerland. With this bilateral agreement, Switzerland accepted the adoption of the acquis communautaire, including the current status of arrangements in the EU governing the free movement of persons.

In the bilateral agreement a gradual liberalisation over a 12-year transition period was formulated, more than any other newly-acceding country has ever been allowed. Whereas the EU countries had to grant Swiss citizens free movement after two years, Switzerland could maintain its quotas on foreigners for another five and only then eliminate them 'on a trial basis', with the possibility of reintroducing them unilaterally at any time in the case of a massive influx of foreign workers. The social partners backed these regulations because they expected significant and positive improvements for EU citizens living in Switzerland: so-called 'national treatment', meaning the abolition of the 'seasonal worker' status; the granting of family accompaniment and full freedom of movement in both geographic and professional terms; the right to

[82] Written by Jan Cremers; based on documentation provided by Hans Baumann, GBI, Switzerland.

automatic renewal of residence permits; and other items. In the case of Switzerland, the EU Posting Directive was to be unilaterally implemented and the enforcement of Swiss working conditions and labour protection regulations was to be guaranteed for posted workers. As a support measure, the government (the Executive Federal Council) developed a law on posted workers modelled on the EU Directive. Furthermore, the government revised the legislation on generally-binding collective agreements and settled new legislation on statutory minimum wages.

From 1st June 2004 the second phase of the transition period began. For Swiss citizens this means that free movement into the EU labour market is complete. The reverse is not the case; foreign workers seeking to enter the Swiss labour market are still subject to quotas until 2007. However, posted workers and workers with short-term contracts up to three months are not subject to quotas. In 2005 the bilateral agreement on the free movement of persons shall be extended to the new EU Member States with a transition period up to 2011 during which labour market restrictions and quotas will remain in force. Extension to the new EU Member States will be subject to a referendum in 2005.

National implementation

Definitions of posted worker

According to the Posting Law, posted workers are persons employed by an undertaking based in a foreign country that enter Swiss territory to work for a limited period. Those regulations basically apply that are formulated in the labour contract settled between the foreign undertaking and the worker concerned. The Posting Law includes regulations for a minimum wage guarantee and other labour conditions that have to be complied with in order to avoid social dumping and the distortion of competition on the Swiss market.

The rules and regulations of the Law apply to all sectors and all labour contracts.

Applicable national rules

The legislation applicable to foreigners not only regulated immigration by means of quotas but also stipulated that foreign workers could only be hired in accordance with local and occupational working conditions. Among other things, this rule also meant strict compliance with wages and working conditions laid down in collective agreements. In the past employment contracts were subject to monitoring by the authorities, mainly the Foreigners Police Agency.

In the Swiss Posting Law the basic items of the Directive are taken on board, that is rules on minimum wages, working time, holidays, health and safety, protection of pregnant women and children, and equal treatment issues.

The law on the 'ordinary labour contract' applies in sectors where no collective agreements exist. Although basically of a voluntary nature, this provides the opportunity, in those cases where there is manifest and repeated breach of the usual local or trade wage regulations, to fix an obligatory minimum wage through legislation (for a certain sector or profession).

Applicable collective agreements

Construction, with its small business tradition and a highly flexible labour market of workers willing to move from one place to another, is especially vulnerable to wage and social dumping. Contracting parties and the authorities have consequently built in added guarantees to prevent the labour market deteriorating. As a rule, at the request of the contracting parties, the Executive Federal Council declares collective agreements in construction to be generally binding; as a result the most important material provisions, which also include all those related to wages, apply to all firms in the sector and also to posted workers. Implementation and monitoring are the responsibility of the competent Joint Committees, which are staffed and funded by the contracting parties. In addition, the provisions on public procurement stipulate that contracts may only be awarded to undertakings that guarantee to meet local working conditions or those specified in collective agreements. Monitoring and implementation can be delegated to the competent Joint Committees.

Legislation on generally-binding agreements was recently modified. Via a so-called 'light' procedure, it is nowadays possible to restrict the binding effect to minimum wages, related working time and the paritarian control mechanism. The procedure has been developed as an extraordinary and additional instrument to fight abuse of wages or working time, and the initiative to trigger it lies in the hands of tripartite commissions (unions, employers and government).

Comparison of labour conditions

According to the Swiss Posting Law, minimum wage comparison have to include obligatory bonuses and premiums. It is usual in the process of comparing wages and working time to refer to case law and to the relevant provisions and components of generally-binding agreements.

The Swiss social partners have been very active over the last decade; they have developed transnational cooperation with neighbouring countries and are involved in the main European institutional debates. With some countries (such as, for instance, Germany) efforts have been made to reach bilateral agreements and mutual assistance. The Swiss construction unions have developed strong cooperation with European partners and since the early 1990s have undertaken studies and comparisons of working and labour conditions.

Equal treatment

The legislative framework formulated with the 'ordinary labour contract' provision and the 'light' procedure is meant to fight against non-compliance of national or customary rules, especially in situations where collective agreements are lacking. These instruments serve as a crash barrier in the case of repeated misuse and in this respect they are important legal provisions for equal treatment in unregulated segments of the Swiss labour market. It has to be said that these grey zones in the economy are often difficult to tackle. To monitor the transparency of wages and other labour conditions in occupations that have no decent collective bargaining and no tradition of social

partnership is no easy thing. It is up to the so-called tripartite commissions to act and in practice these often come up with proposals for a range of wages to be complied with, taking into account the regional wage levels in specific occupations.

Administrative cooperation

The tripartite commissions (employers' organisations, unions and government representatives) exist at federal state and regional levels and deal with legislation, whilst the joint, paritarian structures (unions and employers' organisations) deal with collective agreement compliance. The commissions have to observe and monitor the whole labour market, including posted workers, the first focus being on unregulated parts. They have the right to begin an investigation if there is an indication of shady or questionable practices concerning wage dumping.

Measures and the execution of penalties

Tripartite commissions can take the following measures in cases of wage dumping:
- deliberations with the undertakings involved;
- formulation of a generally-binding agreement through the 'light' procedure;
- formulation of an obligatory minimum wage scale via the 'ordinary labour contract' rules.

Individual workers, the trade unions or competing undertakings can initiate judicial action. Trade unions have subsequently been able to achieve some improvements in this area; in particular the strengthening of provisions on punishments and sanctions. The liability provisions for main contractors and clients are still inadequate.

Experiences and practices

The Posting Law has created a shift from the systematic control (in the past) of all labour contracts with regard to wages and labour conditions to a system of random and regular control. As a consequence the labour conditions of every Swiss and foreign worker are subject to assessment. The role of union representatives on site is therefore growing. In cases of questionable practice the tripartite commission's role will become the litmus test for the measures chosen.

Evaluation of the Directive

Although at the very beginning the Swiss were not subject to the Posting Directive, this part of European legislation has become a very important instrument for regulating the labour market. Representatives of employers' and workers' organisations, lead by the Federal Office for the Economy and Labour, at an early

stage reached agreement in a tripartite working group on the principle of support measures for the free movement of workers. If we compare the implementation of the free movement of workers and the flanking support measures with the situation in the EU countries, then Switzerland does not come out too badly. The Swiss Posting Law compares quite favourably with the laws in force in the EU countries. However, the high hurdles for declaring a collective agreement generally binding are a serious weakness relative to other countries. This creates a problem mainly because the Posting Law is closely linked to the validity of agreements: it only applies where there is also a generally-valid collective agreement. It is too early for an in-depth evaluation of the new and additional legal instruments.

General conclusions and recommendations

Joint statement

as formulated by the European Federation of Building and Woodworkers (EFBWW) and the European Construction Industry Federation (FIEC)

1. This report deals with Directive 96/71 of the Council and European Parliament concerning the posting of workers in the framework of the provision of services. The main aim was to determine how the Directive works in practice and whether it meets its objective of finding a balance between the free movement of workers and social protection.
2. From a legislative point of view the answer in general would be 'yes', although some legal problems still occur. From a practical point of view the answer is 'possibly' if some conditions are fulfilled – conditions that have to be fulfilled mainly on national level. Therefore the European social partners of the construction industry confirm that changing the Directive will not contribute to a better application in practice and as such the Directive does not need to be amended, which was also the conclusion of the January 2004 Resolution of the European Parliament and the European Commission in its Communication on the implementation of Directive 96/71 in the Member States. The conclusion of the Commission that the difficulties encountered are more of a practical than a legal nature is supported by the results of this report. However, this does not mean that these difficulties are to be neglected, as stated by the European Parliament in its Resolution.

Some legal issues

3. From a legal point of view two problems have to be mentioned, which should be solved by the Member States in their national legislation.
   First, the grey zone of economically-dependent work is a growing problem in the construction industry. A good definition of 'employees' and 'self employed' in

national law can avoid problems with the application of the implementing legislation of the Directive. Secondly, it is important to be able to verify, legally and in practice, if a worker is correctly posted and falls under the scope of the Directive. In both cases the national regulation should not only contain clear and feasible definitions but should also contain clear rules about the liability in cases of fake self-employment and/or fake posting with the aim to effectively guarantee that the correct payment of the minimum conditions, fines, taxes and social contributions can be claimed by the worker and can be effectively enforced by the authorities with the aim to minimise the profit made by using fraudulent practices and enhance the economic risks of violators. It is recommendable that all the Member States implement the provision on the maintenance of the employment relationship between the sending undertaking and the posted worker in such cases where the sending undertaking is not a only a letterbox company but a real posting company. It is also recommendable to implement a provision to define who is deemed to be the real employer and thus can be held liable in such cases as fake-posting by letter-box companies or fake self-employment.

Information on applicable rules

4. Information on the applicable labour conditions is vital for a good application of the Directive – information that should be 'transparent' and 'accessible'. Some Member States should make a greater effort to convert the generally binding collective agreement provisions to the categories of conditions mentioned in Article 3 (1) of the Directive. This would increase transparency and make the verification of compliance with the Directive easier.
5. In practice, many efforts were made to make information available for foreign undertakings. From the report it can be concluded that the social partners are more active in this respect than the liaison offices. It is required that information is passed on to more institutions such as EURES labour agencies and competent institutions for social security, etc.. It should be noted that not the social partners but the Member States are responsible for making information available (Art. 4.3 Directive 96/71). Making information on applicable labour conditions better available on the internet, also in different languages, improves the accessibility of information. The internet site of the European Commission (http://europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm) is a good start to this extent but should be further developed and improved.
6. For the European construction industry one could think of a European portal website with links to national websites and/or databases. These national websites should provide a clear overview of the applicable legislative provisions in each Member State. Each Member State would have the responsibility and duty to keep the information 'up-to-date', 'accessible' and 'transparent'.

Bi-lateral actions in favour of a Europe-wide approach

7. Another important, but very complex issue concerns the application of the favourability principle. The comparison of labour conditions is complicated because in practice it is comparing apples and oranges. It is therefore a positive development that social partners of several Member States with similar socio-economic development and structures conclude bilateral agreements to recognize each others collective agreements, minimum wages and/or paid holiday schemes. Between Member States with unequal socio-economic conditions the application of the favourability principle is not so difficult as the best provisions will apply.
8. With regard to the functioning of the liaison offices, the conclusion would be that in all the Member States still much has to be improved. An active cooperation with liaison offices in other Member States should be stimulated and also the cooperation with the national social partners has to be improved. Social partners know the sector best and can be the eyes and ears for monitoring and controlling compliance with the Directive. It is advisable to create more awareness within the liaison offices concerning their responsibilities and tasks.

First conclusions and the way forward

9. In general one can conclude that the measures taken by the Member States to assure compliance with the Directive are not very efficient yet. The study has identified a number of practical problems and the national legal instruments to combat these problems. The European social partners of the construction industry will analyse the specific problems and legal instruments, in order to see to which extent they would improve the overall respect of the applicable legislative provisions and generally binding collective agreements.
10. Although the Posting Directive, as implemented into national law by all the Member States, has to be respected by everyone, the public authorities when awarding public contracts should set a good example, ensuring effective respect of the Posting Directive.

Efficient control is essential

11. It is necessary to have an ‘efficient’ and ‘effective’ control (checks and investigations), by the host country, of the labour conditions under which the posted worker is working. The notification of the provision of services is a useful instrument to enforce the Directive. At the same time labour and social inspectors must be fully authorised to check and investigate whether the labour conditions of the posted workers are respected. A link with the possession of form ‘E101’ is only one instrument, because when a worker is not in possession of such a form, suspicion on the social security status of the worker arises. The

valid labour conditions are then under suspicion as well. Although one should not exaggerate the positive experiences with the actual 'E101' forms, still many incomplete, false and even fraudulent 'E101' forms are found.

12. At European level, the national social and labour inspectors should step up their activities and co-operation. Fraudulent service providers – who abuse the possibility of posting to distort the construction market and create social dumping – (ab)use the national border limitations in order to avoid being caught and sanctioned. The more effective execution of sanctions also in cross-border situations should be ensured.
13. The European social partners of the construction industry recommend that the European Commission either extends the competences of the European 'Committee of Senior Labour Inspectors' 'SLIC' (see Commission Decision 95/319/EC of 12 July 1995) so that it can give its opinion to the Commission, either at the Commission's request or at its own initiative, on all problems relating to the enforcement by the Member States of the Posting Directive 96/71EC.
14. From the report it becomes clear that bilateral (coordination) agreements between the social partners, social funds, social and labour inspections and between liaison offices are very useful to solve concrete problems at legislative, administrative and practical level. Such joint agreements on cooperation should be promoted and stimulated.

References

BMT Consultants (1995) *The application of the provisions of Regulation (EEC) 1408/71 and the issue of posting: facts and problems*, EC DG Social Affairs and Employment.

BMT Consultants (2002) *Current practice on posting according to Regulation 1408/71*, EC DG Social Affairs and Employment.

BMT Consultants (2004a) *The use of temporary foreign employees in the Industrial Painters branch, honest and unfair competition*, April, Industrial painting social partners..

BMT Consultants (2004b) *Comparative study on the structure of Polish and Dutch social dialogue.*

Clarke, L., J. Cremers and J. Janssen (2003) *EU Enlargement: Construction Labour Relations as pilot,* CLR Studies 1, Reed Business Information.

Cremers, J. (1994) The Posting Directive: origins and assessment, in B. Köbele and J. Cremers, *European Union: Posting of workers in the construction industry*, Bonn: Wehle Verlag.

Cremers, J. (2002) A decent assessment needed, *CLR News 3*, Brussels.

Délégation interministérielle contre le travail illegal (DILTI) (2002) *L'intervention en France des enterprises étrangère prestataires de services*, Inquiry report, Paris.

EIRO (2000) *Belgian, Dutch and German construction unions sign cooperation agreement*, Euroline 28.9.00 (BE 009327G).

European Commission (2003) *Report from the European Commission on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, February (COM 2003/458).

European Parliament (2003) *Report on the implementation of Directive 96/71/EC in the Member States*, document A5 0448/2003 final. Rapporteur: Ms. Anne-Karin Glase.

Harvey, M. (2001) *Undermining Construction: The corrosive effects of false self-employment*, London: The Institute of Employment Rights.

Sengers, K. and P. Donders (2002) *Current Practice in Posting according to Regulation ITO8/71*, 4th February, European Commission.

Sengers, K. and P. Donders (2003) *European Journal of Social Security*, 2.

Glossary

AÜG	Arbeitnehmerüberlassungsgesetz (German Temporary Works Act)
AVRAG	Arbeitsvertragsrecht-Anpassungsgesetz (Austrian Labour Contract Law Adjustment Act)
BAT	Bygge-, Anlægs-og Trækartellet (Danish union (8 unions) cartel)
BMWA	Bundesministerium für Wirtschaft und Arbeit (Austrian Ministry for Economics and Labour)
BUAG	Bauarbeiter-Urlaubs-und Abfertigungsgesetz (Austrian law on holiday leave in the construction sector)
BUAK	Bauarbeiter-Urlaubs-und Abfertigungskasse (Austrian holiday fund)
CCOO	Comisiones Obreras (Spanish trade union confederation)
CEOE	Confederación Española de Organizaciones Empresariales (Spanish employers' association)
CLR	European Institute for Construction Labour Research
CNCE	Commissione Nazionale Paritetica per la Casse Edile (Italian national joint industry Construction Funds Committee)
CSCS	Construction Skills Certification Scheme
DA	Danish Employers' Confederation
DILTI	Délégation interministérielle contre le travail illégal (French Department against Illegal Employment)
EC	European Commission
ECJ	European Court of Justice
EEA	European Economic Area
EFBWW	European Federation of Building and Woodworkers
EIRO	European Industrial Relations Observatory
EURES	European Employment Services
FIEC	European Construction Industry Federation
GBI	Gewerkschaft Bau und Industrie (Building and industry workers' union)
ILO	International Labour Organisation
LO	Danish trade union confederation
ONI (now OMI)	Office national d'immigration (French immigration authority)
OPPBTB	Organisme Professionel de Prévention du Bâtiment et des Travaux Publics
SMIC	Salaire minimum interprofessionel de croissance (French minimum wage)
SOKA-BAU	Sozialkassen des Baugewerbes (German Social Fund for Construction)
UGT	Union General de Trabajadores (Spanish trade union confederation)
WAGA	Wer Arbeidsvoorwaarden Grensoverschrijdende (Dutch Act on cross-border employment)

Project team

Management team:

Werner Buelen (project manager),
European Federation of Building and Woodworkers, Belgium

Jan Cremers (main editor),
European Institute for Construction Labour Research, Belgium

Steering group members:

Guy Bonnewijn,
General Christian Trade Union Building and Industry, Belgium

Sven Ljung,
Swedish Building Trade Union, Sweden

Peter Radmacher,
SOKA-BAU, Germany

Dana Schäfer,
SOKA-BAU, Germany

Frank Schmidt-Hullmann,
Industry Trade Union Building-Agriculture-Environment, Germany

Morten Olesen,
Trade Union cartel for building and construction, Denmark

Country experts:

Niklas Bruun,
National Institute for Working Life, Sweden

Justin Byrne,
Center for Advanced Study in the Social Sciences, Instituto Juan March, Spain

Jari Hellsten,
Finish Trade Union Confederation, Finland

Stefan Hochstadt,
Fachhochschule Dortmund, Germany

Mijke Houwerzijl,
Tilburg University, the Netherlands

Claes-Mikael Jonsson,
National Institute for Working Life, Sweden

Yves Jorens,
Ghent University, Belgium

Marcus Kahmann,
political scientist, France

Filip Van Overmeiren,
Ghent University, Belgium

Sebastian Wotruba,
Trade Union Building and Wood, Austria

External researchers:

Peter Donders,
BMT Consultants, the Netherlands

Karin Sengers,
BMT Consultants, the Netherlands

Editorial team:

Linda Clarke
Jan Cremers
Jörn Janssen
Clare Moore

The free movement of workers in the European Union

The creation of the internal market and the introduction of the free movement principles have had an impact on all industries. With regard to the free movement of workers construction is a key industry that has been faced with an enormous challenge since the opening up of the European market.

Early research by the services of the European Commission made it very clear: mobility over national borders is low in the European labour market, but, if it happens, it takes place either at management level in all industries or on building sites everywhere in Europe.

The EU Posting Directive, discussed since the late 1980s, touches the heart of construction industry activities. The idea behind the Directive is the need to create a basic frame of equal treatment principles within the territory where (building) work is undertaken.

CLR Studies 4 is dedicated to an analysis of the implemented Directive in 10 countries. The study includes common conclusions and recommendations as formulated in a joint statement by the European social partners of the construction industry.

Reed Business Information