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Labour Inspections' strategies and tools used in enforcement of posting

Experiences from Nordic and Baltic states

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Labour Inspections' strategies and tools used in enforcement of posting

Preface

This working paper is written as part of the Better Enforcement Through Improved Nordic–Baltic Cooperation (BETIC) project, funded by European Social Funds+. The project brings together the Labour Inspectorates in the Baltic and Nordic states and is coordinated by the Fafo Institute for Labour and Social Research in Norway.

The Nordic and Baltic countries have a tradition for regional cooperation, a political dialogue and practical cooperation. Short geographical distances and familiar climate and culture, combined with discrepant wage levels, are factors that promote cross-border service and labour mobility.

The Nordic-Baltic labour inspectorates asked Fafo to carry out comparative analyses and to suggest and collect experiences with new innovative tools to be used in national inspections and transnational cooperation. The labour inspectorates in Denmark, Estonia, Finland, Iceland, Latvia, Lithuania and Norway are our partners. Sweden is the only Nordic country not participating due to lack of capacity in the inspectorate.

In August 2023, we published the first working paper from this project about the Transposition of the Enforcement Directive (2014/67/EU) in the participating countries. This current working paper will be a combination of findings from a literature review and results from interviews with labour inspectorates from all countries and from some social partners in the Nordic countries.

In the fall of 2024, we will publish a final report. This will give a more complete overview and analysis of our findings than in these working papers. Moreover, we will then present results from a testing-period with new questions from the inspectors to posted workers, aiming to find better ways to determine whether the posting is genuine or not. The testing phase is from September to December 2023.

We want to thank our partners, the representatives from the labour inspectorates, for their efforts in providing background material, statistics, proposing people to interview and for their active and fruitful participation in our workshops. We are also grateful to the interviewees for their willingness to talk with us.

Oslo, October 2023 Anne Mette Ødegård Project Manager

Summary

The EU regulatory framework for posted work has a different impact in The Member States because it is applied in a variety of national industrial relations and collective bargaining systems. Hence, very different outcomes can result from the protection of workers, depending on how labour inspectorates, other authorities and the social partners engage with posting. The overriding theme in this working paper is enforcement of regulations for posted work, bringing together experiences from the Nordic (except Sweden) and Baltic states. Both Iceland and Norway are bound by these regulations through the Agreement on the European Economic Area (EEA).

Posted workers moving between different national systems are facing a multitude of problems such as labour right violations and difficult access to social insurance security systems. Competences of the national labour inspectorates and the possibility of their cooperation with other authorities constitutes the basis for enforcement of the regulations. However, national actors have neither the geographical scope nor the authority to effectively enforce regulations for free movement of services in an integrated market. Therefore, it is vital for the authorities to have contact and cooperate across national borders. Enforcement related to posting of third-country nationals (TCNs)—i.e., countries outside the EU/EEA—is also part of the picture.

Enforcement and cooperation at the national level

According to the Enforcement Directive (2014/67/EU), monitoring and control of compliance with the rules laid down in the Posting of Workers Directive (96/71/EC), shall primarily be based on a risk assessment and must not be discriminatory and/or disproportionate (article 10).

The competences for the labour inspectorate in all participating countries vary from solely occupational safety and health (Denmark) to control with wages (i.e., statutory minimum wages and extended collective agreements, working hours and employment contracts). The inspectorates (except Norway) also have different forms of registers/notifying systems for posted workers.

In some countries there are targeted inspections on posted work. The Danish inspectorate uses algorithms to decide where to conduct inspections. Among other things, the data analysis includes previous inspections—including any subsequent reactions—and firms that are newly registered, the size of the firm and industry. The most common industries for posting are construction, shipbuilding, transport and agriculture.

Inspections of posting are considered to be complex and time-consuming for most inspectorates. Thus, tools and resources in the inspectorates are important. Resources can include skills of the inspectors, for example language proficiency, access to translators, questionnaires, access to registers and real-time information via digital tools.

One of the main problems reported from all our partners is confirming the posted workers' legal employment and whether the company is legally established in the sending country.

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The countries involved have experience with cooperation between authorities on a national level, but cooperation differs in both scope and depth. It varies between joint centres to case-by-case cooperation. It is most common to cooperate with tax authorities and police. Secrecy Acts that prevent sharing and compiling certain information among the authorities are a pending challenge.

Enforcement and cooperation at the transnational level

The Enforcement Directive aims to achieve better cooperation between national authorities. Experiences from our partners show that transnational cooperation is complicated. Nonetheless, bilateral and multilateral cooperation is taking place across borders, both formally and informally. The combination of informal and formal cooperation may lead to greater outcomes. The bilateral agreement between the labour inspectorates in Estonia and Finland and the trilateral agreement between the Baltic States are two examples of this.

Labour inspectors emphasize that transnational cooperation provides the opportunity to follow companies and posted workers across countries. This can, for example, be through joint and concerted inspections. Joint inspections refer to inspections carried out in one Member State with the participation of national authorities from another or several other countries. Concerted inspections refer to inspections carried out in two or more Member States at the same time regarding related cases.

The inspectors also underline the value of establishing contacts as well as the ability to get a new perspective on the way in which they themselves operate. Nonetheless, a premise for this type of cooperation to succeed is the commitment of the authorities in the participating states as resources, time and money are required to operationalize it.

Lithuania has implemented a law stating that foreign inspectors have the right to perform their competences while participating in cross-border joint inspections in Lithuania. Moreover, the Lithuanian and Norwegian inspectorates are currently cooperating on a pilot project on work-related crime. Lithuanian inspectors have visited the work-related crime centres in Norway and presented their idea about a pilot project to the Lithuanian government.

Today, cross-border information sharing in relation to posted work generally takes place through ad hoc exchange of information about individual workers or companies, i.e., through The Internal Market Information System (IMI) or personal contacts.

Posting of Third Country Nationals (TCNs)

Third-country national workers (TCNs) can be posted to other countries in the same way as EU/EEA citizens. TCNs are often seen as more vulnerable than other posted workers, as their right to work will depend on them having the right to reside and work in the sending country. Such rights to work will often be related to an employment contract with a company, and if this contract is terminated the right to reside and work in the EU/EEA will lapse.

None of the participating countries do inspections especially targeted at TCN posting. Inspections of these workers are either done as a part of inspections of posting in general or other kinds of inspections.

There are some more specific challenges related to TCNs. A number of issues must be clarified by the authorities in the receiving countries to verify whether a posted TCN is legally posted, e.g., whether the worker is legally and habitually employed in the sending state. To do this, an understanding of the legal framework in the sending country is often needed. Further, as case law plays an important role in the interpretation of regulations governing TCN posting, there are still a number of issues that remain unclear and may be practiced differently within and between different Member States. For instance, it could be hard to decide what is meant by 'habitual' employment. This makes enforcement more challenging.

It has also been discussed whether the Inspectorates should ask for nationality of the workers, as is required in the notification procedure in Denmark, Iceland and Lithuania. This could make it easier to target posted TCNs. Further, some inspectors report that they come across workers posted through countries that the workers have never been to but are sent directly from a third country. Some inspectors have little knowledge of TCN posting and what they should look for when talking to posted TCNs and their employers. Therefore, it seems to be a need for training in this field, including the conditions for TCN posting, what inspectors could ask for and what documents to require.

Introduction

As opposed to intra-EU free movement of workers, posting is legally based on the freedom of movement for services and establishment. Workers sent by their employer to provide a service on a temporary basis in another Member State are granted minimum rights regarding wages and working conditions by the Posting of Workers Directive ((EU) 2018/957). Both Iceland and Norway are bound by these regulations through the EEA-agreement.

Posted workers, moving between different national systems, are facing a multitude of problems such as labour right violations and difficulty accessing social insurance security systems. Posting-related issues are among the most highly politicized questions in recent European integration. It has come to symbolize the tension between East and West, between free trade and social protection, and between employers and workers (Arnholtz & Lillie 2020).

The EU regulatory framework for posted work is identical in each country, but its impact differs because the framework is applied in a variety of national industrial relations systems and collective bargaining systems. The division of control, enforcement responsibilities and Labour Inspectorates' competencies each differ from country to country, as does the role of the trade unions. Some countries do inspections targeting posting, while others have a more general approach where both posted workers and employed workers are part of the inspection. There are also more thematic inspections, i.e., on occupational health and safety or revealing illegal work. Hence, very different outcomes can result for the protection of workers, which may also be affected by how labour inspectorates, other authorities and the social partners engage with posted workers. However, national actors have neither the geographical scope nor the authority to enforce regulations for free movement of services effectively in an integrated market. Therefore, it is necessary for the authorities to have contact and cooperate across national borders.

This working paper's overriding theme is the enforcement of regulations for posted work and is divided in two parts:

- Enforcement at the national level by labour inspectorates and other public authorities, including the enforcement of posted work at the transnational level.
- Enforcement related to posting of third country nationals (TCNs).

Our focus is primarily on the countries participating in this project: Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, and Norway. The approach is both 'top-down' and 'bottom-up', referring to effects of central political decision-making on the bureaucrat level and, conversely, feedback from the practitioners to promote policy renewal and innovation. Construction is the main industry for posting in the participating countries. However, the inspectorates also have experiences from other industries, like transport and shipyards.

The Baltic states are primarily sending countries, while Denmark, Finland, Iceland, and Norway are primarily receiving countries of posted workers. Still, posting of third country nationals (non-EU/EEA-citizens) is a growing phenomenon in Estonia, Latvia, and Lithuania. When non-EU citizens who are granted a work permit for one

Member State are posted to another, the right of the host Member State to control immigration from third countries (outside EU) is undermined. These workers might also be extra vulnerable for abuse (Čaněk et al., 2018).

National actors have neither the geographical scope nor the substantive authority to regulate and enforce service-based free movement effectively in an integrated market. In order to strengthen rule compliance connected with posting, it is necessary for the authorities to have contact and cooperation across national borders. This might also give the opportunity to share experiences and good practices. Good practice cannot always be adopted from one country to another, but elements, ideas and experiences can be of help and inspiration. This is also why it is important to bring forward views and suggestions for how to make enforcement with posted work more efficient.

Methods

The working paper is based on a literature review and qualitative interviews with labour inspectorates and social partners in the participating countries. Relevant literature—including grey reports—with topics linked to our interview guides was collected using Google Scholar, Solidar, European Labour Authority (ELA), the websites of labour inspectorates and other relevant sources related to posted work. One of the aims was to identify areas of improvement and initiatives that have been effective for enforcement. To achieve this aim, we expanded the literature review to include other countries outside of the ones participating in the project.

During the spring and summer of 2023, we conducted interviews with 35 informants in the Nordic (except Sweden) and Baltic countries. Interviewees were labour inspectors, managers in the inspectorates, some representatives from other authorities and social partners (in the Nordic countries). There are still some interviews to be done with social partners later in the project. Most of the interviews were conducted in physical meetings and the rest via Microsoft Teams. The interview guide consisted of the following topics:

- How inspections are planned.
- How the inspections among posted workers are carried out, i.e., in what industries, competences, resources, barriers.
- Cooperation with other authorities and social partners at national level
- Cross border cooperation, including experience with IMI (Internal Market Information System).
- Suggestions for making the inspectors' work easier and more efficiently.

The guide was adjusted to match different interviewees. Supplementary information was gathered and findings discussed in one digital and one physical workshop with the project partners.

1 Enforcement and cooperation at national level

The rules and regulations that apply to posted workers are shaped by an interplay between the EU, the home and host country, but also by industry specific regulatory environments (Alsos & Ødegård, 2018). The Enforcement Directive (2014/67/EU) leaves room for the Member States to adopt relevant enforcement measures that are justified and proportionate, seeing to avoid unnecessary obstacles to the free movement of services (Seeliger & Wagner 2020).

Structure and functions for the Labour Inspectorates differ between countries, and so does their position in the legal system. Hence, the attention during inspections with posted workers will vary, according to the competences. According to the Enforcement Directive, the inspections and control shall primarily be based on a risk assessment and must not be discriminatory and/or disproportionate (article 10).

In this chapter, we will present findings from the national level, i.e., competences of the inspectorates in our participating countries, registration/notification-systems, planning and conducting inspections, cooperation between national authorities and the role of social partners. The findings will be supplemented with experiences and examples of good practices from other countries.

1.1 Competences of the labour inspectorates

The focal point for inspections varies according to the competence of the Labour Inspectorates. National systems can be divided into single, dual, or multifunctional inspectorates (Walters 2017). In the single system, the inspectorates are responsible only for Occupational Safety and Health (OSH). In the dual system, the inspectorates cover a range of matters related to working conditions including employment contracts and wages. In the most multifunctional system, industrial relations, social security, and employment-related matters are all covered to varying degrees. Examples of the latter are France and Spain (ibid.).

Pertaining to countries taking part in our study, Denmark is the only one with a single system. The dual system is found in Estonia, Latvia, Lithuania, Finland, and Norway. The inspectorate in Iceland is somewhere in between these models since another authority is responsible for occupational safety and health.¹ It is also worth mentioning that in Finland the Labour Inspectorate is divided in five independent region agencies (inspectorates).

Giving guidance to foreign workers about working conditions and regulations is also an important task for the Labour Inspectorates participating in this project. Most inspectors, according to our interviews, do not want to be misjudged as a kind of police. They are dependent on a certain level of trust to get information from the workers in order to accomplish their task.

¹ This is the Administration of Occupational Safety and Health. The foreign Labour and inspections is part of the Directorate of Labour.

The role of the social partners is also very varied. In the Nordic countries, the trade unions are very active in checking wages and conditions at the workplaces. In Denmark, controls from trade unions are responsible for securing the right wages for posted workers since the labour inspectorate does not have any competence in this area.

The table below gives an overview of some of the competences of the Labour Inspectorates in the participating countries. There are also other competences not listed here, like control of PD A1-forms, health and safety cards, proof of accident insurance and sufficient health care while posted.

	Denmark	Estonia	Finland	Iceland	Latvia	Lithuania	Norway
Occupational health and safety (OSH)	х	Х	(X)		(X)	(X)	(X)
Request ID-documents (voluntarily to answer)	х	Х	Х	Х		х	х
Wages		Х	Х	Х	Х	Х	(X)
Working Hours	(X)	Х	х	х	Х	Х	Х
Employment contracts		Х	х	х	Х	Х	Х
Accommodation	(X)				(X)	(X)	(X)

Table 1.1 Competences for labour inspectorates in Nordic-Baltic countries.

X=competence, (X)=partly competence. This is explained below.

Iceland has a separate authority that is responsible for occupational health and safety (OSH). In Norway, there is a special unit in the Labour Inspectorate that checks OSH and do normally inspect foreign labour. It is the same division between OSH and inspection of foreign labour in Finland, Latvia and Lithuania.

In Denmark, the question of not complying with Danish wage-standards is a matter for the trade unions. In Norway, the Labour Inspectorate has the authority to control wages in the parts of the labour market covered by extended collective agreements between industries (i.e., construction, shipyards, cleaning, transport, electricians,² agriculture and horticulture sectors, fish processing industry and hotels and restaurants). In Finland and Iceland, wages are determined by extended collective agreements and can be controlled by the labour inspectorates. In most countries, the inspectorates cannot impose payment of wages as this is deemed to be a matter of civil law, except in Iceland where the inspectorate has this competence. In Lithuania, a specific tripartite body in the inspectorate (labour disputes commission) has the right to impose payment of wages. From 2022, the Norwegian Labour Inspectorate can claim backpay in areas covered by generally binding collective agreements.

In Denmark, resting hours are part of the inspections, but not working hours.

Accommodation could be something that the labour inspectorates check when the employer is responsible for housing. In Lithuania, this goes for third country national, seasonal work only.

The most extensive wage regulation systems for posted work are found in countries with generally binding, collective agreements that cover most of the posted workers (for Finland, Iceland and Norway); 22 out of 28 EU member states have a statutory minimum wage.

² Installation, assembly and maintenance of electrical systems.

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1.2 Notifying systems and registers

According to the Enforcement Directive (article 9), host member states may impose an obligation on posting undertakings to make a declaration to the responsible competent authority. Moreover, payment of social insurance is compulsory for all employed persons in the European Economic Area, which is confirmed through the Portable Document A1³ (see below). This document proves that an individual has no obligations to pay social security contributions in another Member State.

Registers

The national notifying systems/registers typically require information about the posting company, the number of posted workers, as well as individual data concerning the workers. It varies whether nationality (citizenship) is part of the required individual data, which might be important when inspecting posting of third countrynationals.

After implementing the Enforcement Directive in national law, most countries have introduced national registration schemes or prior declaration tools. In Belgium, Denmark, Slovenia and Iceland this also applies for self-employed persons.⁴

An overview of posted workers is valuable for the authorities in the host countries to evaluate and enforce regulation; and to limit fraud, fake postings, and undeclared work (Alsos & Ødegård 2018). According to our informants, the notifying systems/registers make it easier to choose companies for labour inspections. In combination with information on the duration of posting, this data can also be used as a source for statistics.

Among our partners, all countries except Norway have established a register to which of the posting employers must notify the posting to the Labour Inspectorate. The detailed requirements in these registers are described in the working paper on transposition of the Enforcement Directive (Alsos, 2023).

In Norway, companies must notify the tax authorities instead of the Labour Inspectorate, but this duty is not part of the transposition of the Enforcement Directive. Several years ago, the Norwegian Labour Inspectorate made a request to the Ministry of Labour and Social Affairs to implement a similar register of posted workers as the Danish RUT⁵-register, in connection to the implementation of the Enforcement Directive (Alsos & Ødegård, 2018). The Ministry responded that it would be considered at a later stage, but still nothing has happened. Currently, there are—in general—few problems for the Norwegian labour inspectors to retrieve information from the tax authorities on, but the data that is handed over might, according to our informants, be old (up to one month) and lacking information on individual workers.

In Lithuania, there are two registers. One is the responsibility for the sending company, notifying the posted workers sent to Lithuania. Then, the host company must declare their posted workers separately, and submit information to the labour inspectorate. It is this second register (from the host company) that is most used by the Labour inspectors. In Iceland, the assignor has an obligation to oversee the registration that is made by the sending companies. In Denmark, the companies will, when finalizing the notification, receive a receipt with a number they must declare when

³ Regulation (EC) No 883/2004 on the coordination of social security systems

⁴ Self-employed persons without employees only need to notify RUT, if they provide services to con-

struction and building companies or within the installation or repair of machinery and equipment. ⁵ Register of Foreign Service Providers.

contacting Danish authorities. In Latvia, the register of posted work was recently made electronic, easing the use for the inspectors.

One of the most well-known registration systems in EU is LIMOSA in Belgium, which is described in the textbox below.

LIMOSA in Belgium

LIMOSA is an online compulsory system of registration of service provisions in the country, introduced in 2007. All posted workers, including third-country nationals, as well as interns and self-employed persons who plan to perform economic activities in Belgium on a temporary basis must register in advance. The employer receives a 'LIMOSA-form' that the posted worker must keep with them for the full duration of the posting. The Belgian assignor must check that the workers carry this document. The system enables actors to map whether there are streams of circular mobility, for instance if the same posted worker registers repeatedly within a year (Mussche et al. 2018).

LIMOSA became well known because it was subject to a case in the Court of Justice of the European Union (CJEU) in 2012. The ruling was that LIMOSA violated the free movement of services, and that the information asked from foreign workers must be reduced. Despite the reduction of information required, the database still offers comprehensive information on posting (Mussche et al. 2018).

Portable Document A1 for social security - PD A1

PD A1 confirms that a worker remains subject to the social security system in his/her home-country while working abroad. In other words, bringing an A1 indicates that you are a posted worker. The current legal framework provides that the employer or the person concerned must inform the competent authorities about their planned transnational activities whenever possible and before these activities take place (De Wispelaere et al. 2020). In some countries, the control of A1 is very strict; in other countries there is no control at all. France and Austria have implemented sanctions in cases of failure to show a PD A1 as a condition for legal posting (DeWispelaere et al. 2022).

A1-documents can be a valuable source of the scope of intra EU-posting. However, there is an inconsistency between the number of posted workers notified in prior declaration tools, the number of workers with PD A1 and the real number of incoming and outgoing workers in the EU (DeWispelaere et al. 2022). This is largely because the practice on checking A1 documents varies among the participating countries. In Finland, the main contractors are obliged to oversee that the posted workers are equipped with A1 documents. Host companies in Iceland are required to register what kind of insurances the workers are covered by, but they are not obliged to submit A1 documents. The labour inspectors in Norway do not ask for A1 documents during their inspections, but the tax authority can check. The labour inspectorate in Denmark do not ask for PD A1, but it can be uploaded in RUT. In Lithuania, it is obligatory for the labour inspectors to check PD A1 for third country nationals, which are dominant among posted workers in the country. The inspectorate uses these documents as indirect evidence of whether the posting is legitimate or not.

Polish and Portuguese⁶ authorities have made a tool to increase the trust in PD A1. To avoid missing, incomplete or falsified PD A1s, the Polish social institution has

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⁶ Portuguese validation: https://en.seg-social.pt/posting-of-workers

developed an A1 validator that can be used by authorities in the host countries (see textbox below).

A1 Validator in Poland

In April 2022, ZUS (the Polish social insurance institution) launched the 'A1 ZUS validator', a tool enabling online verification of the validity of the A1 certificate. The validator will be available to the employer, the foreign social security institution or any other entity wishing to verify the validity and authenticity of the certificate issued by ZUS. Verification is possible by entering the relevant data into the online tool.

1.3 Planning and conducting inspections

Article 10 of the Enforcement Directive prescribes that inspections on posted workers shall primarily be based on a risk assessment by the competent authorities. The risk assessment may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. This includes large infrastructural projects; the existence of long chains of subcontractors; geographic proximity; the special problems and needs of specific sectors; the past record of infringement; and the vulnerability of certain groups of workers. Moreover, the directive states that the inspections must not be discriminatory and/or disproportionate.

Among the labour inspectorates in our participating countries, there is a huge variety of how inspections are planned and conducted. The variation relates, among other things, to the different competences and resources available. However, there are also many common features. Most inspectorates have different action weeks, national and regional plans, both unplanned and planned inspections all of which can be announced or unannounced. It is also common to prioritize industries, like construction, transport and shipyards, and inspections with seasonal work like in agriculture. 'Driving around' is sometimes a method for the inspectors, especially for spotting construction sites. Moreover, the inspectorates act on tips and complaints from, for example, the public or trade unions, or reports in media, which is not possible to plan for.

Due to several years of cooperation among national authorities and contact between the Baltic and Nordic countries, it has also become more usual to receive requests from other authorities and countries to conduct inspections within certain firms. This also includes requests via the IMI (Internal Market Information System).

Risk assessment

The inspectorates are preoccupied with risk assessment and this is underlined in most of our interviews. The more critical approach is how to be sure that the right objects are singled out, i.e., do the inspectorates succeed to target the riskiest firms? Among other things, high incidence of accidents at work, high numbers of migrants, and in industries in which posting and/or undeclared work is known to be common, are all factors that constitute basis for inspection.

In Denmark, the inspectorate uses algorithms to decide where to conduct inspections. Among other things, the data analysis includes previous inspections with reactions and firms that are newly notified in RUT, size of the firm and industry. In Finland, all inspections are planned at the national level, using posting notifications and information from inspectors as foundation. The Icelandic labour inspectorate has few staff and uses the notification system and reports from the trade union as basis for inspections. The aim is to reach out to most of the posted firms, one way or another, but mostly online. In Norway, the inspections are based on a mix of annual plans and investigation. This might also vary between the regions since it is not likely that 'one size fits all'.

Estonia, Latvia and Lithuania are mainly sending countries. This implies that posted workers have not been on the top of the agenda for these inspectorates. Nevertheless, posting of workers from third countries is increasing, and third country posting is considered to be a risk factor in itself. Third country nationals are often seen as more vulnerable than other posted workers, as their right to work will depend on them having the right to resident and work in the sending country (see part 2 in this working paper). There have been separate campaigns on posting in Latvia during 2023, and targeted inspections on posting in Lithuania during the last two years.

Identifying posting

One of the interview questions of this project asked if the inspectorates have specific strategies for targeting posted workers. In some countries there are targeted inspections on posted work; Denmark is one example. The Register of Foreign Service Providers (RUT) is used as one basis for inspections, and the inspectors check that the workers at the workplaces are the same as notified in the register. As mentioned, the inspectorate in Iceland uses the registration system to identify posting. Estonia does not target posted workers, even if the information is available, but use other indicators to decide where to go. In Finland, there is a mix where the posting notifications are sometimes used as a basis, and other times not. As mentioned, Lithuania and Latvia have recently had specific inspections towards posting. In Norway, the inspectorate targets foreign workers in general, not posted work specifically. This is partly explained by the lack of a notification system (register) administered by the inspectorate.

In most countries, posted workers are also identified during regular inspections, but not necessarily. Norwegian inspectors say that many of the checkpoints at the workplaces are the same, whether the workers are posted or not. This implies that the workers might not be asked if they are posted. Not knowing about posted workers also hinders doing research before going out, e.g., raised questions in the IMI.

The most common industries for posting in our participating countries are construction, shipbuilding, transport and agriculture. Not surprisingly, there are more inspections in construction than in other industries. Construction is dominating when it comes to posting, and accounts for around 25% of portable documents PD A1s issued in EU Member States.⁷

Desk- and physical inspections

Inspections can be carried out from the office, physically by visiting workplaces, or as a combination of these two methods. According to our interviewees, it might be efficient to start with a desk-inspection, asking for relevant documents and give written advice, and then eventually visit the workplace. Written communication is also necessary since the employer is located in the home country.

However, it is emphasized that it is easier to get answers on follow-up questions if the meeting, often with a representative in the host country, is physical. Requests for

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⁷ https://www.ela.europa.eu/en/news/leaflet-posted-workers-construction-sector-know-your-rights-and-obligations-available-online

documentation is often standardized, but when meeting face-to-face it is easier to ask questions outside the scheme. Anyway, to meet and talk with the workers it is necessary to have an on-site inspection. Additionally, the inspectors' qualitative impressions of the workplaces can be valuable for further investigations.

In the Baltic states and Finland, a combination of desk- and physical inspections is often used. As stated by an Estonian informant, the inspectors normally start out with document inspections which are the basis of selecting sites for physical inspections. In Iceland, there are, as mentioned, so few people in the inspectorate that most of the work has to be done digitally. On the other end of the scale is Denmark where the inspectors solely do physical inspections. There, the inspectors are typically 'on the road' four days a week and have one day for administrative work. Also in Norway, most of the inspections are done on-site.

Resources

Inspections of posting are considered to be complex and time-consuming for most parties. Thus, tools and resources in the inspectorates are significant. Resources can include skills of the inspectors, for example language proficiency, access to translators, questionnaires, access to registers and real-time information via digital tools. The need for different tools is related to the scope of the inspections that varies according to the competences (see Table 1.1). For the inspectors, there is, according to some of our informants, also a constant balance between 'need to know' and 'nice to know'.

In addition to the above-mentioned resources, some inspectorates also have access to drones and body cameras. In Iceland, the inspectorate can use drones to get an overview over large construction sites, but only in cooperation with the police. The Lithuanian inspectorates also have the ability to use drones and do not need assistance from the police. The result is normally that illegal workers tend to start running when they see the drones. Inspectors will then be able to find out the direction that the workers flee and place their own people at strategic places to get in touch with them. Moreover, drones are useful to reveal OSH-breaches, for example the use of helmets and other safety equipment. In Lithuania, there is currently a project from an IT-company to film construction sites from above for OSH-purposes.

Lithuanian inspectors are also equipped with body cameras. These are, firstly to secure the safety of the inspectors, and secondly to prevent corruption. In some cases, recordings from these cameras (with sound) have also been used in court to prove that people were working at the construction site in question.

A less spectacular tool is the use of tablets with real-time information, for example inspectors in Denmark can look up and check if the firms and workers they meet are notified in RUT. In Estonia, the inspectors use tablets in most of the inspections, and everything is done online in a self-service system. In Lithuania, inspectors can check if employees are registered in social security system (SODRA). In Latvia and Norway, there is limited access to real time databases, while Finnish inspectors do not have access to tablets at all.

The Norwegian inspectorate regularly does research, and sometimes observations, before visiting a construction site. While a stakeout is not permitted, observation is ok, but sometimes it is difficult to judge the difference, according to one of our informants. The use of drones is not permitted in Norway.

In Finland and Norway, it is compulsory for some groups of workers to bring a personal card for identification at the workplaces. In Finland, this applies for construction and shipyards. The card must have the name and a picture of the worker, in addition to the tax-number of the firm. In Norway, there are so-called obligatory health and safety cards for all workers in construction and cleaning. Such cards are, according to the inspectors, useful to identify the workers and firms, and contributes to efficiency during inspections. However, there have also been some trouble with misuse when workers borrow cards from each other or have cards from previous employers. From 2022, a QR code is required for all employees (including posted workers and self-employed persons) in the construction industry in Lithuania. This code is generated in the social security system to verify data about the person and to identify that the person is insured by a specific insurer.

In case of language barriers, the Danish inspectors have access to translators via phone within minutes. Also, the Finnish inspectors have access to translators either physically or on the phone. In some inspectorates, there are also inspectors that speak several languages. The use of google translate is common in most countries. In the Baltic states, Russian is often a common language for the inspectors and the posted workers, especially those coming from countries that earlier used to be part of the Soviet Union. For younger people, English is more common. For historical reasons, language can be a hot topic in the Baltics, according to our informants, and there is often a need for better language skills.

The inspectors' knowledge when it comes to regulations of posting is also an important and discussed topic. Not all inspectors are familiar with the posting legislation and/or have experience with inspection of posted workers. Hence, many of our interviewees report that there is need for more training, especially in inspectorates with broad competences and newly hired inspectors.

Barriers during and after inspections

One of the main problems reported from all our partners is confirming the posted workers' legal employment and whether the company is legally established in the sending country. This will be the main subject in the next phase of this project (a final report will be published in 2024).

The status of the employees can change from being posted to not being posted but does not necessarily mean any change in their working situation (Ødegård & Alsos 2018). Our informants say that workers do not always know whether they are posted or not, or who their employer is. This normally occurs when the employer is situated in another country than where the work is conducted and the representative is not obliged to be situated in the host country. Then, the problem is that the inspectorates are often not able to speak with a representative for the employer. It might also be one of the workers that act as a representative for the firm.

In other cases, the workers might move between different employers from one project to another. Additionally, they can be labelled as self-employed without knowing it themselves, or they have been instructed by employers, representatives, or foremen what to answer to inspectors' questions. To determine whether a worker is employed or self-employed is sometimes complicated and needs to be clarified from case to case.

Another problematic topic is working time, which is difficult for the inspectors to control. The inspectors suspect that there are a lot of falsified and incomplete timesheets, and their experiences are—for the most part—that there are no measures to get hold on this problem. The Norwegian inspectors normally check documents 2-3 months in the past to get a broader picture. This might be hampered by the fact that the representatives—which in some cases is only a letter box—do not keep documentation after the posting has ended. The Enforcement Directive (article 9) imposed an obligation to deliver the documents after the period of posting, at the request of the

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authorities of the host Member State and within a reasonable period of time. But it is not specified in the directive what a 'reasonable period of time' implies. In Estonia, some documents might be requested by the inspectorate within three years after the end of the posting period. In Iceland, an undertaking shall have a copy of relevant documents available one month after it ceases to provide services in the country (including pay slips and working-time records). In Finland, the posting undertaking shall keep the information for 2 years (including identification details, employment conditions applicable to the employment contract, timesheets, pay slips and verification from financial institution that the wages are paid).

Reaching out to workers and employers

Another barrier is that the posted workers generally lack knowledge about their rights in the country where they perform their work. Jorens & De Wispelaere (2019) emphasize the importance of providing information to posted workers and their employers on their rights and obligations in the country in which the posting takes place.

The Enforcement Directive states that the Member States must take the appropriate procedures in ensuring that the information on terms and conditions of employment referred to in in the posting of workers directive is made available, free of charge, in a clear and transparent manner, and easily accessible by electronic means (article 5).

This is followed up by Directive (EU) 2019/1152 on transparent and predictable working conditions. The directive states that workers sent abroad should receive additional information specific to their situation. If the work period is longer than four consecutive weeks, posted workers should also be notified of the single official national website developed by the host Member State where they are able to find the relevant information on the working conditions applying to their situation.

The countries involved in this project have different measures when it comes to information. For example, national websites directed to posted workers covering a variety of issues related to employment rights and social security issues. The inspectors offer different leaflets or QR-codes with information about national regulations. Another example is from Iceland where the trade union has translated a lot of information to other languages. The European Labour Authority (ELA) has also recently (summer 2023) launched an information campaign for posted workers in construction.⁸ However, the problem is often that neither the workers nor the employers are familiar with such websites.

Another well-known situation for our inspectorates is that some workers do not want any support or do not dare to talk to representatives from the authorities. Sometimes the employers have instructed them not to speak to the Labour Inspectorates or the trade unions. Some workers come from countries where corruption is widespread and have lost their trust in authorities and/or trade unions.

Based on our interviews, we got the impression that the inspectors try to be polite and make the workers feel safe so that they are willing to be interviewed and give useful information. As one of the main tasks for most inspectors is to give information and guidance, they do not want to be regarded as some kind of police. The guidance also includes the employers or the representatives on site. Some informants emphasize that it is important to speak to several foreign workers to try to check what kind of information they have received from the employer or the representatives.

⁸https://www.ela.europa.eu/en/news/leaflet-posted-workers-construction-sector-know-yourrights-and-obligations-available-online

Doing joint inspections with the police or border guards can sometimes be problematic in this respect. These situations can be perceived as more frightening than they actually are, since police officers are often not trained for such tasks.

Sanctions

According to the Enforcement Directive (2014/67/EU), Member States should take appropriate measures in the event of failure to comply with the obligations in the directive, including administrative and judicial procedures, and should provide effective and proportionate penalties. Posted workers are protected by national regulations in the host countries under the principle of equal treatment, which includes remuneration, minimum paid annual leave, maximum work and rests periods, and health and safety at work (Directive (EU) 2018/957).

For years it has been clear that the national systems of warnings and fines are not well fit for posting situations. It takes time, also due to the fact that the firms have the opportunity to dispute sanctions. The result is often that the firms have left the country before the sanction process is completed. These kinds of obstacles constituted the background for the opening for cross-border enforcement of administrative penalties and/or fines in the Enforcement Directive. However, a common experience from the labour inspectorates that are partners in this project is that there are still complicated and lengthy difficulties with sanctioning across national borders particularly in cases when the employer is just a letterbox company.

In each of our participating countries, there are also other types of sanctions, like warnings and suspension of work. In Latvia and Lithuania, firms can be excluded from public tenders for one year if it is revealed that they use illegal/undeclared work.

There are differences when it comes to specific sanctions concerning posted work. In some countries (Denmark, Estonia and Lithuania), the firms (sending- or host-company) can be fined for not registering posting. The inspectorate in Iceland cannot sanction the host-company, only the sending company. In Denmark, this fine – which is fixed for all firms — is given on the spot and has immediate effect. In Norway, there are no specific sanctions towards posting situations.

The general sanctions, covering all workers regardless for their status, are connected to breaches on OSH-regulations and other employment-related obligations. A regular proceeding can be that the inspectorate gives a warning (or several) before issuing a fine. The fines vary according to the seriousness of the breaches. Our informants do agree that the levels of the fines are generally too low, but this also depends on the size of the firm that receives them. For example, it seems unfair to give the same penalty-amount to a single self-employed person and a big shipyard. Otherwise, economic sanctions are considered effective when adjusted to size of the firms and seriousness of the breaches. In most cases, it is also possible for the firm to complain or appeal after having received a fine. There are also rules on how to contact and give fines, for example firms have an obligation to have an electronic address. In Estonia, the authorities may use an expedited procedure. In order to do this the inspectorate needs a signature from the employer. If they do not sign the decision that concludes the expedited procedure, then it is considered that they do not consent to the expedited procedure. Then the inspectors must continue with the regular procedure, which does not need to be signed by the employer. A more common rule is that when sending fines to an address (inclusive e-mail or digital post), it is considered delivered/received.

To suspend work is considered an effective sanction among our informants. In cases of immediate danger, the inspectorates have the means to stop the work. There

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are also other examples, like in Iceland, where the work can be stopped until the authorities get the information that is required. Normally, it will take several rounds of reminders and/or warnings until the work is suspended.

When the inspectors suspect or reveal serious breaches, or when they are not able to get in contact with the firm for imposing fines, it may become relevant to report the matter to the police. In these situations, the inspectorates normally face obstacles, like that the police do not have resources or competence to follow up the case. Moreover, that relevant workers do not want to speak about or witness the breaches. This implies that it is difficult to bring cases to court.

Strict implementation in Austria

The Austrian implementation of the Enforcement Directive in the Anti-Wage and Social Dumping Act is considered one of the strictest in Europe with high administrative penalties in cases of infringements. Measures include: (1) Posted workers must be notified to the financial police; (2) continued reporting and wage and salary documentation; (3) liability provisions, especially in the construction industry, with general contractor liability in cases of public sector clients; (4) penal provisions, payment freeze, security deposit, prohibition of services, enforcement of fines in administrative penalty law (Haidinger 2018).

1.4 Cooperation between national authorities

The countries involved in this project have experience with cooperation between authorities on a national level, but cooperation differs in scope and depth. It varies between joint centres to case-by-case cooperation. Formal agreements are probably decisive for long-term solutions. However, informal and personal contacts can result in the solving of single cases (Nordic Baltic Undeclared Work project 2021). A typical example is when inspectors suspect tax fraud, they will contact the tax authority for follow up, or if they discover illegal work, they call for the police.

Exchanging information and data

Dedicated recourses and routines to share information are among the topics that need to be in place to establish and perform cooperation between authorities. Secrecy acts that prevent sharing and compiling certain information among the authorities are a pending challenge. Moreover, some of our informants emphasize that it is not just about information sharing, but also a question of resources to collocate the information in an effective manner.

In general, there is high level of data protection in public authorities. This makes it difficult to retrieve information in specific cases. For our informants, exchanging information and data has been a problematic area, especially from the tax authorities. This might be linked to the fact that the tax authority often is the most relevant cooperation partner for the inspectorates, and where the inspectors have most experience.

But there is an exemption to every rule, and there has been substantial progress in this field during recent years in several countries. The exchange of information in Estonia is by interviewees described as 'smooth' where the inspectors have access to employer register and can get information when needed from the tax authority and customs. In Iceland, it is legally permitted to share and combine relevant information. Moreover, Norway has a new regulation for sharing information which makes it easier for the social and welfare administration (NAV) and tax authorities to share information. Still, cooperation outside the labour crime centres, is hampered with practical difficulties, for example lack of access to shared archives. In Finland, where the Labour Inspectorate is divided in different regions, there is a central IT-system where all the five agencies share and get relevant information from each other. The inspectorate has access to the payment register from the tax authority. They are not able to get hourly wage rates, but this access is useful for references on background information and to find companies and workers that are not notified. The inspectorate in Lithuania has written agreements of sharing data with other authorities but has problems with connecting to the IT-systems. In Latvia, there is a need for new agreements, but it is possible to get data when this is justified. Also in Denmark, it is possible to share information 'in practice'.

Joint inspections

Joint inspections between different authorities are also becoming more widespread. Topics during such inspections are usually related to undeclared work and working hours, employment contracts, legal residence and wages. Different legislations and competences entail that the topics will differ between countries.

Besides joint inspections and labour crime centres, Norway has established centres for foreign workers (SUA). Foreign workers, employers and self-employed workers can get information about Norwegian regulations, wage-levels and other working conditions, taxes, as well as receive help with necessary registrations and applications. SUA is a cooperation between the labour inspectorate, tax authority and the directorate of immigration (UDI). Finland has a national website directed at posted workers, covering a variety of issues related to employment rights and social security issues (Ahlo, 2018). Nevertheless, it is unclear to what extent this information reaches the workers and to what extent they can make use of the information, for instance due to weak bargaining positions in relation to their employer.

In Table 1.2, there is an overview of which authorities the labour inspectorates' often conduct joint inspections with.



Table 1.2 Joint inspections between the labour inspectorates and other authorities

* Might include social welfare administrations, municipal offices, or food safety authorities.

In Denmark, a certain amount of days is reserved for joint inspections with the tax authorities and the police (34 days a year in the Copenhagen area). Plans and priorities are done in cooperation with the participators. Labour related crime has been high on the agenda, resulting in higher budget allocations to the Labour Inspectorate and the tax authorities. One problem is that the allocations to the police have not been followed up simultaneously.

In Estonia, the cooperation with other authorities varies between the regions. In the West-Region, the Labour Inspectorate, tax authorities and border police meet on a weekly basis to exchange information and plan inspections. In the South-Region,

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the cooperation is more case-oriented, i.e., working together to solve a special problem and/or case. In Iceland, there is a task force with one meeting per month on social dumping and labour market crime, which also decides and plans joint inspections. The group consists of members from The Directorate of Labour, The Administration of Occupational Safety and Health, Iceland Revenue and Customs, and the police. There is no extra funding for this cooperation, and lack of resources affect the scope and quality of the joint inspections. The Labour Inspectorate in Latvia signed an official agreement on cooperation with the State Border Police in 2022, and the plan is to conduct inspections with them. The aim is to establish cooperation bottom-up and to show the value of such joint actions.

One important challenge in Iceland seems to be a lack of interest for such cooperation from the top-level in the relevant authorities and ministries, according to our informants.

Lithuania has currently joint operational and risk analysis centres that meet once a month, with responsible persons from different authorities. They decide and coordinate joint inspections, which are most regular in transport and construction. The plan is to set up labour crime centres, like in Norway.

For many years in Norway, there were joint inspections with the tax authority and the police, and since 2015 it has established labour crime centres (see insertion below). In 2020, it became clear that the Norwegian police do not have the legal authority to participate in joint inspections. However, the police still have a duty to assist if necessary and can be called upon. This has led to public discussion and demands for amending the regulations. From the inspectors' side, the practice from the police differs between the police regions and makes the situation unclear and messy.

In Finland, the inspectorates have joint inspections with the tax administration twice a year at construction sites. There are also joint inspections with the police and border guards.

Labour crime centres

Norway has established eight so-called labour crime centres in the period from 2015 to 2022. These are practical cooperation and investigation-centres between the labour inspectorate, police, tax-authority, and social welfare administration (NAV). The regions without such centres have agreements on cooperation between the same authorities.

The centres each have an analysing team and an inspection team. The centres conduct joint inspections, sometimes with other authorities such as the fire-department, custom services, etc. A central challenge for this cooperation has been the exchange of information between authorities due to sensitive personal data issues. In 2022, new regulations on the sharing of confidential information and the processing of personal data between authorities came into force (FOR-2022-06-17-104).

A recent evaluation shows that the centres have contributed to several good results and have facilitated more effective cooperation between the authorities (KPMG 2022). This has strengthened efforts against organized crime at a strategic level and contributed to more effective coordination at operational level. Moreover, the cooperation has produced several successful cases through good use of various data sources, actions and effective use of sanctions and contributed to valuable and necessary changes in legislation and regulations. On the other hand, the evaluation points to significant challenges related to the organization, knowledge building and strategic management.

There are plans for establishing similar permanent centres in **Lithuania**, in cooperation with the Norwegian Labour Inspectorate (see chapter 2 in this working paper).

1.5 The role of social partners

One of the questions in this project has evolved around the role of social partners (especially in the Nordic countries) and the contact and cooperation between the partners and the national inspectorates.⁹

Union rights are based in systems of national industrial relations. As posting is set apart from national systems, recruitment efforts of posted workers do not result in sustained posted worker memberships (Lillie et al. 2020). Interactions with the workers to provide information about wages and working conditions are less risky from the perspective of posted workers and is usually the level of engagement the unions seek (ibid.).

Additionally, it seems hard to establish solidarity among domestic and transnational workers due to the short-term nature of the transnational workers' stay, language barriers, cultural differences, economic disincentives (Caro et al., 2015), and lack of common identity and objectives (Arnholtz & Refslund 2019). However, trade unions are one of the key national enforcement actors in the Nordic countries when it comes to wages and working conditions.

Our informant from the Danish trade union in construction says the union aims to conclude collective agreements with firms that are posting workers. Sometimes picketing and sympathy strikes are used to get collective agreements in place. Most information in the RUT is public, and the trade unions use it as basis for their patrols. Every year, approximately 2500 construction firms are notified in RUT. The collective agreements cover around 10% of the foreign firms, constituting of approximately 35% of the posted workforce. In other words, the union is unable to fully secure wages and working conditions for posted workers in the construction industry. It is also established a 'fast-track'-system where the union, within 48 hours, can ask for a proceeding in cases where they suspect that a foreign company breaches conditions in the collective agreement. Then, the firm is obliged to prove that the conditions are in line with the agreement.

In Iceland, the trade unions have agreements with the employers on where they can do their own inspections, and what they can ask about. However, our union informant indicates that the unions have not done a good enough job when it comes to posted workers. Partly because union representatives lack knowledge about posting and partly because it is so difficult to get in contact with the posted workers.

The Icelandic labour inspectorate has, a on a day-to-day basis, closer relation to unions than employers' organizations mainly because the employers do not seek cooperation with the inspectorate. However, the inspectorate emphasizes their impartiality towards social partners, as do the other partners in this project. It is a general impression from our interviews that it is more difficult to engage the employers' organizations than the trade unions when it comes to posting.

The trade unions have the legal right to use boycotts towards employers who do not respect Finnish collective agreements and has, for instance, boycotted Estonian and Polish companies entering the Finnish labour market (Ahlo, 2018). A more recent development is, according to one of our informants, that the Estonians have become aware of their rights and are not afraid to claim them. Instead, posted workers from

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⁹ The information in this working paper is for most part from the trade union side, mainly because the employers' organizations have been reluctant to take part in interviews. The exception is the Finnish employers' organization in construction. In the next phase of the project, the aim is to contact and interview more employers, and also more trade unions.

Romania, or third country-nationals are more subject to low payment and bad working conditions.

The construction trade union in Finland visits thousands of workplaces annually, and they undertake joint inspections with the employer organization. The union gives initial support for non-members, but it is not possible to offer full union services, such as legal help, to non-members.

In most of the participating countries, the labour inspectorates receive tips from the trade unions on firms that they suspect to violate labour regulations. The inspectors appreciate this and often use tips to target inspections. However, inspectors find it impossible to follow up on all of the reports.

The informal contact between inspectors and trade union representatives is also quite widespread, especially in construction. In Lithuania, the contact is closer with the transport union. The trade union density is generally low in the Baltic states. Still, all countries involved in the project have established a high-level cooperation between ministries and/or the labour inspectorate and representatives from the social partners. At this level, representants typically meet once per year to share information and discuss relevant challenges.

Norway has established so-called tripartite industry programs between the labour inspectorate and the relevant social partners in four industries: the automobile sector (repairs, car-cleaning etc.), cleaning, hotels/restaurants, and transport. The purpose is to jointly document and address commonly recognized challenges regarding working conditions and working environment in these vulnerable industries.

It's a unison understanding that it is difficult, but not impossible, to organize foreign/posted workers, as shown in the insertion below.

Union organizing at Copenhagen metro station.

Danish unions succeeded in creating a more self-sustaining enforcement situation around transnational workers on the construction of the Copenhagen Metro City Ring (CMCR) from 2009 to 2019. The main contractor on the CMCR was the Copenhagen Metro Team (CMT), a consortium of Italian construction companies. It started out as a union-hostile project. During 2015, however, a significant shift occurred which covered three key changes: (1) long-term union organizing efforts, which gradually became more strategic and inclusive as the result of a learning process; (2) mobilization of political attention regarding the CMCR, increasing engagement of the Metro Company in collective labour rights enforcement; and (3) a shift in the unions' enforcement strategy from targeting all violations to building one strong case to display their power for workers and companies alike. In sum, the interaction between the three processes of change facilitated the creation of a self- sustaining virtuous circle, which was furthered by the improved conditions granted by the new local agreement that led to a massive increase in the number of shop stewards and trade union membership among the transnational workers (Arnholz & Refslund 2019).

2 Enforcement and cooperation at the transnational level

While enforcement practices need to be evaluated, positive and negative experiences ought to be shared between countries. In this chapter, we present experiences from the participating countries of cooperation on the enforcement of regulations regarding posted work at the transnational level.

Through a previous joint project among the Nordic and the Baltic Labour Inspectorates, named the Nordic-Baltic Undeclared Work Project (2021¹⁰), inspectors were able to learn about regulations, organization, priorities, inspection methods, paperwork, and culture in the collaborating countries. One important lesson from the project, was that cross-border cooperation is crucial for successful combat of undeclared work, work-related crime, and unhealthy competition in the labour market (Nordic-Baltic Undeclared Work Project, 2021). We expect this lesson to be equally important to the enforcement of regulations concerning posted work.

The Enforcement Directive aims to achieve better cooperation between national authorities by laying down an obligation to respond to requests for assistance on questions, as well as setting time limits for the responses to information requests across borders (Alsos, 2023). Further, the Directive enables administrative penalties and fines imposed on service providers by one Member State to be enforced by and recovered in another Member State.

Despite these efforts, transnational cooperation is complicated. The reasons for this are manifold and include: differences between national laws, bureaucratic processes, divisions of labour, a lack of trust, knowledge and access to data, language barriers, and so forth. Moreover, national competences are spread among several actors, like social security institutions and fiscal authorities, complicating the development of comprehensive enforcement approaches (Cremers, 2020; see also chapter 1 in this working paper).

Nonetheless, bilateral and multilateral cooperation is taking place across borders for better enforcement of legislations concerning posted workers, most of which have taken the form of information sharing and networking between labour inspectorates and other administrative bodies (Čaněk et al., 2018).

Moreover, cross-border concerted and joint inspections make important measures for addressing challenges related to posted work as they promote cooperation between different enforcement bodies and demonstrate the tackling of cross-border fraud to the public (Stefanov et al. 2020). Concerted inspections refer to inspections carried out in two or more Member States regarding related cases, e.g., joint inspections carried out in the same enterprise operating in different countries. Joint inspections refer to inspections carried out in one Member State with the participation of national authorities from another or several other Member States.

¹⁰ This is sometimes referred to as the 'workgroup cooperation between national authorities and between authorities and social partners', and was established as one of the four working groups participating in this project.

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In addition to inspections, the transnational level consists of informal networks, information sharing through the IMI-system, inspector exchanges between Member States, enforcement of sanctions across borders and the effort of the European Labour Authority (ELA) to promote cooperation.

2.1 Formal and informal transnational cooperation

Most Member States have implemented some sort of cooperation mechanism with other countries on the enforcement of regulations concerning posted workers. However, how, with whom, and to what extent varies greatly between countries. Ahlo (2017), finds that a key barrier for transnational cooperation is that national authorities are not necessarily aware of what competences the authorities who oversee labour inspection issues in other countries have. Hence, informal cooperation through networks and personal contacts, as well as formalized bilateral or multilateral agreements, constitute central measures for becoming more coordinated at the transnational level. Čaněk et al. (2018) emphasize the necessity for establishing personal relations to create common objectives, trust, and a feeling of mutual benefit. Nevertheless, the authors also underline that the combination of informal and formal cooperation may lead to greater outcomes.

The bilateral agreement between Estonia and Finland, and the trilateral agreement between the Baltic states are two examples of the latter (see two insertions below).

Agreement and cooperation between Estonia and Finland

Southern Finland and Estonia have become one integrated labour market with workers constantly crossing borders. Travelling between Tallinn and Helsinki takes approximately two hours, and the average salary for a construction worker was more than double in Finland compared to Estonia in 2015 (Floman, 2018). Therefore, thousands of construction workers have travelled from Estonia to Finland over the past decades. The salary gap, together with a considerable gap in union density,¹¹ has led to several challenges that authorities, employers and trade unions have aimed to counteract.

In December 2014, the Labour Inspectorate of Estonia together with the Division of Occupational Health and Safety of the Regional State Administrative Agency for Southern Finland concluded on an agreement on cooperation (Agreement on cooperation, 2014). The agreement was concluded based on the need to ensure safe and healthy conditions as well as effective protection of the employment of workers posted to work in the territories of the contracting parties. In the agreement, the parties agree to collaborate on information sharing, biannual meetings, exchange of inspectors, and raising awareness of Estonian workers posted to Finland.

¹¹ In 2015, the union density was at approximately 7 percent in Estonia and 74 percent in Finland (Floman, 2018).

Trilateral agreement between the Baltic states

The labour inspectorate in Estonia, Latvia and Lithuania signed an agreement on trilateral cooperation and exchange of information in the field of occupational safety and health and of posted workers in 2018 (Agreement, 2018).

The agreement acknowledges the increased mobility of persons in the territory of the EU for economic reasons, and the recognized an increased importance regarding periodic economic migrants and posting of workers for the economic development of the three states.

In the agreement, the parties decide to hold annual meetings, and the cooperation is chaired by each party for one year on rotation. Meetings are organized by the inspectorate that is currently in the chair, but all parties can present issues for these meetings. Further, the parties agree to exchange information and cooperate on matters of posting of workers in the framework of the provision of services, as stipulated by the Posting of Workers Directive (PWD) and the Enforcement Directive through the IMI-system.

The parties also agree that 'if needed and requested so by the other parties, to carry out joint inspections in compliance with the national provisions on posting of workers regulation and in matters concerning cross-border employment relations in the territory of the States of the Parties.' (Agreement, 2018)

Experiences with formal and informal transnational cooperation

Inspectors from several of the labour inspectorates participating in the project emphasize that transnational cooperation through bilateral agreements provides the opportunity to follow companies and posted workers across countries. Inspectors also underline the value of establishing contacts through these types of formalized collaborations, as well as the ability to get a new perspective on the way in which the labour inspectorate of their country operates. Nonetheless, a premise for this type of cooperation to succeed is the commitment of the authorities in the participating states as resources, time, and money are required to operationalize it.

In addition to their bilateral agreement with Southern Finland and the other Baltic states, Estonia has a cooperation agreement with Norway through which the two countries plan on carrying out joint inspections. Estonian labour inspectors report that their bilateral and trilateral agreements provide them with a network of contacts, and emphasize that the personal contacts it offers make it easier to exchange information on posted work across borders.

Inspectors from the Danish labour inspectorate report that the Nordic Council of Ministries provides a network for the labour inspectorates of the Nordic countries to share information and for inspector exchanges. Like Estonian inspectors, Danish inspectors emphasize the importance of the informal contact they have with their Nordic colleagues as it makes it easier to cooperate across borders. Further, Danish inspectors highlight the collaboration between German and Danish police on labourrelated crime that takes place on both sides of the border. Further, the Norwegian Labour Inspectorate has agreed upon a number of bilateral cooperation agreements with labour inspectorates in other countries. These include agreements with Romania, Poland, Lithuania, Latvia, Estonia, and Bulgaria.

'The Hub' is an informal network between representatives from the Nordic and the Baltic labour inspectorates, originating from the previous project among these actors, also referred to as the Nordic-Baltic Undeclared Work Project. The Hub is underlined as one important arena for networking between the Baltic and the Nordic

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countries by several of our informants. One of our informants from the Icelandic labour inspectorate informed us that before the Hub was established, the Icelandic inspectorate had received very little information from inspectorates in other Member States. This informant also emphasized the benefit it had provided for countries to compare practices and share both good and bad experiences to help one another.

As presented above, the Baltic states cooperate closely, and all three states describe the collaboration as very valuable. The three countries have annual meetings, organize seminars, share experiences, and communicate with each other through personal contacts. During the seminars, the hosting country makes the agenda, and the inspectorates discuss different topics and share experiences. The Lithuanian labour inspectorate describes their cooperation with the Latvian inspectorate as especially close, as the two countries share border.

The Lithuanian and the Norwegian inspectorates are currently cooperating on a pilot-project on work-related crime. Lithuanian inspectors have visited the work-related crime-centres in Norway, and then presented their idea about a pilot project to the Lithuanian government. The cooperation between the two countries is described by both inspectorates as very active; they also conduct joint inspections and share analytical information on the transport sector.

Evaluations of the effectiveness of formal and informal transnational cooperation

Representatives from the Finnish inspectorate point out that the level at which cooperation takes place is of great importance. One of our informants emphasized that cross-border cooperation should take place between inspectors, as they are the ones to carry out the inspections and, therefore, also are the ones in need of contact persons in other Member States.

The notion of 'levels' was also made for the cooperation between the Nordic and the Baltic states. Our informants emphasized that participants in cross-border collaborations should represent the same level of their respective authority. Another informant emphasized the need to concretize transnational cooperation through, for instance, defining concrete cases for cooperation.

Inspectors in several of the participating countries describe informal, personal contacts in other Member States' inspectorates as a necessity, and one very important factor to solve a cases rapidly. At the same time, informants note that to make cooperation between different labour inspectorates last, they must be formalized through binding agreements: 'Commitment is one premise. Another is that the contact between people is maintained. We must establish relations and trust to one another' (inspector, Norwegian inspectorate). As stated by Čaněk et al. (2018), inspectors also imply that the combination of informal and formal points of contact is the most sustainable for transnational cooperation.

Generally, our informants describe a need for common priorities as they emphasized cross-border cooperation being difficult when the participating parties have different interests. One of our informants explained that inspection exchanges can be one effective way to initiate a network in another Member State, making it easier to establish a more formal cooperation afterwards, e.g., through a bilateral agreement. It was also mentioned that some Member States are more difficult to establish a cooperation with than others. Several of our informants mentioned that they would like to improve their cooperation with Poland, as this is an important 'posting corridor' for third country nationals to enter the European labour market (see also section 2 in this working paper for further details). Other hinders that were mentioned through our interviews for effective cross-border cooperation are language barriers and the inspectorates' use of different practices during inspections.

2.2 Exchange of information and data

Stefanov et al. (2020) emphasized that to build a case in relation to posted work, information exchange on wages, taxpayer statuses, reported working hours, social security payments, results from previous inspections and the like are required. The lack of information concerning companies who post workers abroad and the workers they employ therefore complicates efforts to enforce the regulations concerning posted work (Čaněk et al., 2018). Cross-border data exchange can be challenging, and must meet both legal and data protection requirements in accordance with GDPR (Stefanov et al., 2020).

During the previous joint project between the Nordic and the Baltic Labour Inspectorates, or the 'Workgroup Cooperation' (2021), all participating parties agreed that barriers the sharing of certain types of information constitute the main obstacle for a coordinated approach between Member States on enforcement.

The A1 portable social security document is the only European-wide data source on posting (Čaněk et al., 2018). Nonetheless, PD A1s do not provide a sufficient basis of information for labour inspections, as labour enforcing bodies do not necessarily have access to them (see more on PD A1 in section 1 in this working paper).

Inspectors can also cooperate and exchange information regarding posting by communicating with personal contacts through e-mail, phone calls, or meetings (Kall, 2018). If an employer is not cooperating in a host country, the labour inspectorate from the sending country might have useful information that could help the labour inspectorate in the host country to carry out an inspection, for instance by providing the correct contact information.

Today, cross-border information sharing in relation to posted work, generally takes place through ad hoc exchange of information about individual workers or companies, for instance through The Internal Market Information System (IMI) or personal contacts.

Risk assessment through information sharing between Belgium and the Netherlands

Belgium and the Netherlands cooperate on analyzing the most risk-prone industries and companies operating in the two countries by exchanging data and ranking the companies through national risk assessment tools (Stefanov et al., 2020). The assessments are based on factors like industries (e.g., construction or agriculture), the type of company (e.g., temporary work agencies or letterbox companies), or groups of workers (e.g., posted workers or recruiters). Further, the countries decide whether to carry out cross-border inspections based on factors like the cases' geographical scale, the consideration that the violations in question cannot be proven through other means, or when indirect controls to increase legitimate behaviour will not work.

Varied usage of the Internal Market Information System (IMI)

As of now, IMI is the only mechanism at EU level that providing inspection bodies of labour rights to share information about specific posting companies and posted worker cases across borders in a systematic way (Čaněk et al., 2018). Some inspectors

have emphasized that information exchange through IMI can be too formal, providing little real knowledge about an enterprise, or a relevant regulation in another country (Alsos & Ødegård, 2018). However, inspectors have also reported that the system makes it much easier to reveal letterbox companies and has provided useful information on the owner of such companies.

The use of IMI varies greatly between Member States. In Austria, several national authorities have access to the system (Haidinger, 2018). While the coordinating responsibility lies with the Federal Ministry of Science, Research and Economy, the financial police, BUAK, the competence centre, specific courts, and district administration authorities also have access to IMI. In other countries, the access to and responsibility for IMI requests could lay on a single person in the Labour Inspectorate. Further, it is our impression from the interviews that there are also large variations between Member States in how much the IMI-system is used by each labour inspectorate. Some of our Norwegian informants noted that it would be helpful if a larger number of inspectors received training and became aware of IMI so that more inspectors would be able to use it.

Inspectors' evaluation of IMIs function and effectiveness

Several of our informants reported to have good experiences with IMI and see it as a useful tool for information exchange about companies and posted workers between Member States. Inspectors informed us that enquiries in IMI are typically concerned with whether a company posting workers to another state is operating in the sending state or the enforcement of a penalty claim.

Some inspectors expressed that most of the time, they receive answers to their enquiries within a reasonable amount of time, while others reported that response time varies greatly depending on the Member State. The sending party can choose between sending an urgent enquiry or a regular enquiry, where the urgent enquiry typically requests quite specific information that cannot typically be found in a register.

The Enforcement Directive (2014/67/EU) article 6 regulates what kind of information the sending party should receive swift answers to and what kind of information the receiving party could take longer to locate. The Directive states that for urgent enquiries requiring the consultation of registers, such as the confirmation on VAT registrations to check the establishment in another Member State, it should take no more than two working days to get an answer from the receipt of the request. For all other requests for information, it can take up to a maximum of 25 working days, unless the Member States have mutually agreed upon a shorter time limit.

Some inspectors note that one reason for varied response time between Member States is the respective inspectorates' access to relevant databases, connected to the issue that other authorities are responsible for these areas. For example, several inspectors were under the impression that there is a need in some countries to conduct inspections to find the information requested by another state in IMI, making it very time consuming to receive answers from these countries.

It was emphasized that belated or missing IMI-responses hinder the cooperation in practice, for instance if a labour inspectorate needs to find out whether a group of workers really are posted or not. A reason for this is that the companies and workers in question are typically very mobile and may have moved on to a new location before the inspectorate can 'solve' the case.

Several inspectors also emphasized the need to communicate outside of the IMIsystem as well, for instance through personal contacts. This was reasoned by the need to ask follow-up questions, as IMI requires the sending part to send a new request to add questions. Some inspectors do not see the need to change or develop the IMIsystem any further, as users already can include additional questions or more detailed information in comment boxes. Other inspectors describe the system as too bureaucratic, and therefore too time-consuming to use.

2.3 Concerted and joint inspections

Carrying out cross-border inspections can be useful to address challenges related to posted work (Stefanov et al., 2020). As mentioned earlier, concerted inspections are inspections carried out in two or more member states at the same time regarding related cases, while joint inspections are carried out in one Member State with the participation of national authorities from another, or several other countries. Concerted inspections are less resource intense than joint inspections, as less coordination, and minimal travel expenses are needed. Joint inspections, on the other hand, have a surprise effect through the presence of foreign inspectors, as they understand the language of the posted workers, and can have insights on the company's activities from the sending country.

Stefanov et al. (2020), emphasizes that cross-border inspections are often hindered by incompatible legal frameworks within different Member States or limited prospects for the sharing of data across borders. Therefore, some countries' enforcement authorities have strategic approaches for going through with their inspections. For instance, France, Belgium, and the Netherlands have cross-border inspections included in their annual inspection plans.

Because cross-border inspections usually require more resources than national inspections, political and high-level support is often needed (Stefanov et al., 2020). In some cases, specialized network teams are also used. The Belgian Labour Inspectorate has established such teams, based on the increase in cross-border employment and postings.

As an indication on the extensiveness of cross-border joint inspections, Table 2.1 provides an overview of which Member States have a legal framework for cross-border joint inspections and specific documentation.

As Table 2.1 (page 32) presents, most Member States do have a legal framework for cross-border joint inspections either stipulated in their national law, or in multilateral or bilateral agreements. Eighteen EU Member States have a regulatory framework for cross-border joint inspections either in the form of statutory provisions or on the grounds of a bi/multi-lateral agreement (Welz et al., 2019). Only eight Member States¹² have a legislative basis offering the possibility of joint cross-border inspections stated in bilateral agreements, while one member state (SI) refers to 'other sources'. Nine Member States¹⁴ have no legal basis for joint cross-border inspections.

¹² AT, BE, DE, IE, LU, PL, PT, and RO.

 $^{^{\}rm 13}$ BG, EE, EL, ES, FR, LT, LV, NL, and SK.

¹⁴ CY, CZ, DK, FI, HR, HU, IT, MT, and SE.

Member State	Yes – national law	Yes – multilateral / bilateral agreement	No
Austria	Anti-Wage and Social Dumping Act, Section 17 paragraph 1.		
Belgium	Social Criminal Code (Art. 56 and 57)	Yes, various bilateral/multilateral agreements.	
Bulgaria		Bilateral agreements with France, Germany, Poland, and Norway.	
Croatia			Х
Cyprus	Law No 63 of 2017, Part II: Application of the Law Provisions, article 17 and 18,		
Czech Republic	Act No 255/2912, Coll, the Control Act (Section 6)		
Denmark			Х
Estonia		Agreements with limited scope with South- Finland, Baltic states, and Norway. Agreement with Poland more focused on the exchange of information.	
Finland		Southern Finland: Agreement with Estonia.	
France		Agreement with Germany, Belgium, Bulgaria, Luxembourg, Spain, Netherlands, Portugal, and Italy.	
Germany			Х
Greece			Х
Hungary			Х
Ireland	Section 35 of the Workplace Relations Act 2015.	Agreements with the UK and Portugal.	
Italy		Agreements with France and Romania.	
Latvia		Agreement with Estonia and Lithuania.	
Lithuania*		Agreements with the Baltic states and Norway. Agreement with Poland more focused on the exchange of information.	
Luxembourg		Treaty establishing the Benelux Union (Belgium, the Netherlands, and Luxembourg), and bilateral agreement with France.	
Malta			Х
Netherlands		Yes, various bilateral/multilateral agreements.	
Poland	Art. 22(3) of the Act of 13 April 2007 on the National Labour Inspectorate.	Agreements with Bulgaria, Denmark, Estonia, Norway, and Slovakia.	
Portugal		Agreement with Spain, as well as agreements with France and Bulgaria on the exchange of information.	
Romania			Х
Slovakia	Act No 125/2006 Coll. On the Labour Inspection (Article 7(3) (q) and Article 15).	Agreement on bilateral cooperation and exchange of information with Poland.	
Slovenia			Х
Spain	Act 23/2015 regulating the system of Labour and Social Security Inspectorate.	Agreements with Poland, Portugal, and France.	
Sweden			Х

Table 2.1 Legal framework for cross-border joint inspections (Source: ELA, 2020).

* Lithuania has stated by law that foreign inspectors have the right to perform their competences while partici-pating in cross-border joint inspections in Lithuania. The Law is described in further detail in the text box on the following page.

In most countries, foreign inspectors only carry an 'observer status' while participating in cross-border inspections, hence primarily offering guidance and translation support, or gathering information (Stefanov et al., 2020). Therefore, they cannot apply sanctions or issue legal remedies. Countries also use different approaches to regulate the role of foreign inspectors during these inspections. National legislations often leave the investigation powers unspecified or open to interpretation, while some countries have more rigid legislation, such as Denmark, which explicitly state that foreign inspectors may only act as observers. Further, Lithuania has implemented a law stating that foreign inspectors have the right to perform their competences while participating in cross-border joint inspections in Lithuania (see insertion below).

Foreign inspectors' ability to work in Lithuania

The Lithuanian State Labour Inspectorate's Law on the division of general provisions (2022)¹⁵, Article 11 regarding inspections, states:

(1) When bilateral or multilateral agreements are made, inspectors and civil servants from other EU/EFTA Member States can participate in inspections carried out by the State Labour Inspectorate within the territory of the Republic of Lithuania.

(2) Together with the inspectors of the State Labour Inspectorate, inspectors and civil servants from foreign states participating in the inspections mentioned in section 1 of the Article (11) have the same rights as stated in Article 9, regarding the rights and obligations of inspectors in the State Labour Inspectorate number 1, 3, and 12, as well as the obligations in Article 9, number 7 and 8.

The rights stated in Article 9 refer to performing controls of employers' compliance with the laws regulating working conditions and OSH, the right to receive explanations from these employers, and the right to perform prevention and controls of breaches of these laws during inspections. Obligations stated in Article 9 refer to providing the employers with instructions when the enterprise does not comply with the laws, and to forbidding employers and self-employed workers from using labour and personal protective equipment that do not comply with OSH requirements.

Experiences from the Nordic and Baltic states

Estonian and Finnish labour inspectorates and tax authorities have cooperated on carrying out cross-border joint inspections. Our informants were under the impression that both countries benefit from this cooperation. For instance, Finnish inspectors observed that Estonian inspectors asked different questions during inspections that Finnish inspectors do.

Danish labour inspectors have also participated in cross-border joint inspections, e.g., through cooperation with Estonia and Germany. Danish inspectors emphasize that joint inspections and staff exchanges have been useful to understand the ways in which other inspectorates are organized. However, Danish labour inspectors also note that their need for cross-border joint inspections is limited due to the Danish labour inspectorate's competences. The inspectors are under the impression that cross-border joint inspections are more effective for combating work-related crime

¹⁵ LIETUVOS RESPUBLIKOS VALSTYBINĖS DARBO INSPEKCIJOSĮ STATYMAS. 2003 m. spalio 14 d. Nr. IX-1768 Vilnius. PIRMASIS SKIRSNIS BENDROSIOS NUOSTATOS.

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at the transnational level, while the Danish labour inspectorate is solely concerned with OSH.

As presented above, Lithuania has changed their law so that foreign inspectors can officially participate in their inspections. Lithuanian inspectors have carried out cross-border joint inspections with Latvia and Belgium and others. The Latvian labour inspectorate has carried out cross-border joint inspections with Finnish and Swedish inspectors, as well as with the Estonian and Lithuanian inspectorates. Latvian inspectors emphasize that foreign inspectors can observe and ask questions during such inspections, as opposed to foreign inspectors in Lithuania. Some of the inspectors see this as a disadvantage.

Norwegian labour inspectors have recently carried out joint inspections in cooperation with Estonia and Lithuania, and previously with Romania and Bulgaria. As emphasized by Latvian labour inspectors, Norwegian labour inspectors underline that they are only observers and have no authority when participating in joint inspections in other countries. Nonetheless, Norwegian inspectors express that the aim of such cooperation is to learn from one another and see how inspections are carried out in other countries. For instance, the inspectors pointed to the effectiveness of the inspections in Romania and Estonia when enforcing sanctions:

They do not have HSE-cards in the construction industry like in Norway, but they are very strict that the employers must have their employment contracts in order, and if not, 1000 euro are required on the spot. In Norway, the process is much longer and more bureaucratic (inspector, Norwegian labour inspectorate).

Several of the participating countries also have good experiences of inspector exchanges between Member States. Often, these exchanges are financed through The European Labour Authority (ELA), described in closer detail in the following chapter.

2.4 The European Labour Authority (ELA)

As part of the Social Fairness Package in 2018, proposed by the European Commission, ELA was established in 2019 and is expected to reach its full operational capacity by 2024. The aim is, among other things, to support Member States' cooperation in their effort to enforce union law related to labour mobility across borders. ELA has also provided a platform for organizing joint inspections. As EEA States, Norway and Iceland solely participate as observers in ELA's Management Board (ELA, n.d.).

On that note, ELA organizes the Forum on the Posting of Workers, bringing together national authorities from the Member States in Bratislava twice per year (ELA, 2023). The aim is for the national authorities to exchange views with ELA and the European Commission on aspects related to posted work. Further, ELA has launched the 'Posting 360 Programme', which is a framework for the cooperation between relevant stake-holders to improve the exchange of information, increase knowledge, and enhance administrative cooperation on EU and national rules on the posting of workers.

Experiences with ELA in the Nordic and Baltic states

The informants from the Estonian inspectorate have good experience with ELA. The inspectorate participates in most of the seminars, workshops, and trainings that ELA coordinates. It was also emphasized that Estonian inspectors would not have had the opportunity to go on staff exchanges without ELA's financial support. Like Estonian inspectors, Latvian inspectors report to have participated in most of ELA's events, for
instance the EU labour mobility training on posted workers and road transport this year (2023). It was also emphasized that the possibility to participate through Microsoft Teams makes it easier to prioritize participating.

Inspectors from the Danish labour inspectorate also emphasize ELA's contributions to staffing exchange between different states' inspectorates, as well as the Authority's overview and role as a common platform for posted work. However, as with cross-border joint inspections, Danish labour inspectors added that it is quite limited what ELA can do for their work, as the inspectorates' work is solely concerned with OSH and the notifications in RUT.

One of our informants opined that ELA struggles with their external communication, as their labour inspectorate has not yet received any material from this year's ELA-campaign, and wondered whether this was due to a lack of resources or just the lack of communication. Nevertheless, our informant was under the impression that ELA does a great job concerning the organization of inspections and mutual learning between Member States.

Another of our informants from the Lithuanian labour inspectorate expressed that ELA works very efficiently by initiating inspector exchanges and cross-border joint inspections, for which the Lithuanian labour inspectorate has used ELA's support. Like the Estonian and the Latvian inspectorates, Lithuanian inspectors informed us that they try to use all the opportunities provided by ELA.

Inspectors from the Norwegian labour inspectorate noted that it is important to be part of ELAs work and hoped that Norway's connection to the authority will be 'solved' soon. Nevertheless, inspectors also note that it is important to maintain bilateral agreements as well, and to not solely depend on ELA for transnational cooperation.

2.5 Sanctions and cross-border enforcement

The Enforcement Directive (2014/67/EU) article 15, provides the ability for cross-border administrative penalties and fines. Before the implementation of the directive into national law, the labour inspectorate in a hosting country did not have any means to sanction foreign companies. Rather, they had to point out challenges, and inform the inspectorate of the foreign company's home state. As mentioned by way of introduction, the directive now enables administrative penalties and fines imposed on service providers by one Member State to be enforced by and recovered in another Member State (Alsos, 2023).

Most of the Nordic and Baltic labour inspectorates reported to have quite limited experience with the use of cross-border enforcement of sanctions, and often this is not under the inspectorates' authority. For instance, representatives from both the Finnish and the Norwegian inspectorates informed us that it is another authority that collects the fine. While the labour inspectorate delivers the decision of a fee to the responsible authority, the other authority sends the claim.

It was mentioned by our informants that the size of the fee also affects whether the sanctions are imposed or not. For instance, it was noted by an informant from the Latvian inspectorate that the sanctions for general breaches are quite low. Therefore, imposing fines in cases of breaches concerning posted work is not very popular as it takes up a lot of time and resources to reach out and impose the fine on the foreign company in question.

One of our informants from the Finnish inspectorate emphasized that an improvement would be a cooperation between the labour inspectorate and the authority that collects the fine, so that the inspectorate could receive information on the results of

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such cases. An informant from the Icelandic inspectorate also emphasized the lack of following up in such cases and was concerned about the fact that the receiving country, or the country initiating a cross-border fine, is not notified on whether the fine is imposed in the other country or not. It was added that, in cases concerning the criminal liability of companies, the police might weigh the possible outcome for the employer with the price of the investigation:

If it is a foreign company and we tell the police, the police have such a big pile on their table. Because there is a cross-border level, they often answer that there will be a need for more resources and so on (inspector, Finnish labour inspectorate).

Several Norwegian inspectors informed us that they have heard about the possibility to enforce sanctions across borders but are under the impression that there are very few examples of this from Norway. It was also emphasized that that the money falls to the country the fine is imposed in, and that this might not work as an incentive to spend time and resources for the receiving country to impose it.

2.6 Cooperation between social partners across borders

In this project, we have interviewed some representatives from the social partners in the Nordic countries. We still have limited information about transnational cooperation between social partners in the countries that participate in this project, as several of our planned interviews with social partners are still outstanding. The topic will be discussed further in the final report that will be published the autumn of 2024. Our impression is still that the practical transnational cooperation is limited.

As previously discussed, there is cooperation between the Finnish and the Estonian labour inspectorates. However, there are quite few trade unions in Estonia, none of which represent the construction industry. Still, the Confederation of Finnish Construction Industries, and the Finnish Construction Trade Union are active in Estonia (Floman, 2018). For example, the Finnish construction employers have arranged courses for their Estonian colleagues, while the trade union has spread information on salaries and trade union rights on the ferries between Estonia and Finland.

Representatives from a Finnish trade union working in the construction industry informed us that they cooperate with the Latvian construction union. While it is small, they report that the information exchange between the two unions has been very effective. Further, the representatives from the Finnish trade union would want to cooperate more comprehensively with both their Nordic and Baltic colleagues. They inform us that they do have personal contacts in the Nordic construction trade unions if they have specific questions, but emphasize that they should cooperate more, as the foundation is there.

2.7 Suggestions for improvements

Our informants were asked to suggest what they believed could be useful to improve enforcement on national and transnational level. In this section, we will refer points from their answers. Some of these will be elaborated and discussed further with our partners and presented more extensively in our final report. One challenge for such a summary is that the national regulations vary, meaning that suggestions from some countries might already be implemented in others. The headlines from our talks on improved enforcement are listed below.

National Level:

- More responsibility for the assignor/main contractors for salaries and taxes.
 - The Enforcement Directive (art. 12) allows for measures ensuring that posted workers in subcontracting chains can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer. Subcontracting creates a triangular employment relationship, where (1) the client, (2) the principal or main contractor, and (3) the subcontractor are the three principal partners. The companies within this chain could be jointly and severally liable, directly in a straight contractual relationship between two directly contracting parties or throughout the entire chain. This makes it easier for posted workers to always be able to hold a contractor liable as a guarantor when the worker is not paid. Advocates of an extensive liability, such as trade unions from affected industrial sectors, argue that one main benefit is the incentive for contractors to inspect their subcontractors' compliance with the minimum working conditions (Bogoeski 2017).
- Resources and skills to conduct digital risk analysis in preparation of inspections.
- Give the labour inspectorates admission to check identity. This will reduce the time spent on finding the right identity of the workers and who their employers are.
- Faster sanctioning processes.
- Greater opportunities for the inspectors to give direct fines on the spot. This could be relevant for clear-cut breaches, for example missing employment contracts.
- Higher fines and broader access to suspend work, especially for employers that do not cooperate or conduct breaches repeatedly. The fines should be better adjusted to the size of the firm.
- Real time access to income registers and other relevant registers.
- Include nationality in the declaration/registers of posted workers, to improve statistics and target third country nationals.
- Access to construction contracts, i.e., the agreement between the contractor and the firm on when and how to accomplish the tasks.
- Declare all bank payments to employees: name of company, month and payment amount.
- Conclude formal agreements on cooperation between national authorities to avoid grey zones and ease processes with shifts in personnel.
- Educate inspectors in interview techniques to get as much information as possible during inspections.

Transnational level:

- Combine formal and informal cooperation on a transnational level that complement one another.
 - For instance, establishing a network in another Member State can promote formal cooperation, and formal cooperation such as establishing bilateral agreements can provide contacts in other Member States.
- Keeping transnational cooperation at the 'same level' by making sure that inspectors are able to establish networks and personal contacts in other Member States.
 - One suggestion was the arrangement of seminars for inspectors to participate in to get familiar with each other and discuss relevant topics.

- Make it easier to share information, as lack of information constitutes the main obstacle for a coordinated approach between Member States. One measure could be that a larger number of inspectors received training and became more familiar with the use of IMI.
- Cooperation between the labour inspectorate and the authority that collects fines in another country, so that the inspectorate could receive information on the results of such cases.

3 Posting of Third Country Nationals

3.1 Introduction

Third-country national workers (TCNs) can be posted to other countries in the same way as EU/EEA citizens. In general, these workers are covered by the same regulations as posted EU citizens However, TCNs are often seen as more vulnerable than other posted workers, as their right to work will depend on them having the right to resident and work in the sending country. Such rights to work will often be related to an employment contract with a company, and if this contract is terminated the right to resident and work in the EU/EEA will lapse. TCNs are more dependent on their employer than other posted workers and can therefore be more hesitant to speak up if their rights are infringed (Cucut Krillic et al. 2020).

For the Labour Inspectorates, challenges when it comes to enforcement of TCN posting are, in many respects, the same as for posted EU/EEA Citizens. However, there are also some issues that make the job of the Labour Inspectorates more complex. The aim of this chapter is to look into challenges identified by the Labour Inspectorates in this respect, and also to point to best practices and possible changes when it comes to enforcement of TCN posting.

3.2 The right to post TCNs

The EU regulations on posting of workers are the same, regardless of the nationality of the posted worker (ELA 2023). The Vander Elst case¹⁶ confirmed that the right to post workers from one Member State to another also applied where the posted workers are third-country nationals. However, this right depends on the workers being lawfully and habitually employed in the Member State where their employer is established. This depends on the regulations in the sending state and whether these are fulfilled. The implication is that receiving states cannot require a work permit of the posted TCN if the person is lawfully and habitually employed in the sending country.

The Vander Elst case does not provide further guidance to what is required in order to fulfil the conditions of 'lawfully and habitually employed'. The Court of Justice of the European Union (CJEU) has, however, concluded that the states cannot require that the worker to hold an employment contract of indefinite duration or have at least one year of prior employment before being posted. Such conditions are disproportionate according to the CJEU.¹⁷ Further, the court has said that 'habitually employed' means that the worker is 'carrying on their main activity' in the country where the employer is established.¹⁸ The court has further indicated that an obligation for the service provider to give information showing that the TCN has a lawful residence,

¹⁶ Raymond Vander Elst v Office des Migrations Internationales (C-43/93).

¹⁷ See ELA 2023, p. 17 with references to case law, i.e. C-445/03, C-244/04 and C-168/04.

¹⁸ ELA, 2023, p. 18, C-445/03.

work permit and social coverage, as well as carrying out the main activity in the sending state, is acceptable.¹⁹

For the receiving country, the Vander Elst ruling means that they cannot require a work permit for granting TCNs the access to work as posted workers, so long as they are lawfully employed in the sending country. As immigration law, to some extent, is the competence of the Member States, conditions for granting such a work permit can vary depending on which Member State the worker is posted from.

A Schengen visa (C-visa) grants a TCN the free movement throughout the Schengen area during its period of validity. This period cannot exceed 90 days in any 180-days period. However, this visa does not give the person a right to work in the EU Member States. Stays that last longer than 90 days, as well as residence in the Schengen countries, are governed by national legislation (D-visa), except for legal stays of specific categories of people, for example seasonal workers (Directive 2014/36/EU), beneficiaries of temporary protection (Council implementing decision 2022/382 for Ukrainians), workers having a Blue Card (Directive 2009/50/EC) and long-term residence (Directive 2003/109/EC).²⁰

The right to move freely implies no queuing at airports, sea or land borders, and no internal border checks. However, the Schengen states have the right to perform police and customs checks on persons anywhere inside its national territory as part of the everyday work of the police, customs and immigration control. Examples range from road traffic checks to the fight against organized crime.

Furthermore, one has to make a distinction between the work and residence permit in this respect. The Vander Elst case did only concern the work permits, meaning that for third-country nationals that are not covered by specific EU-regulations, the receiving Member State still has some competence when it comes to the residence permit of posted workers, and—as we will return to—the Baltic and Nordic countries take different approaches in this respect.

For TCNs that are not covered by specific EU regulations, Member States have the competence to decide the rule for entry, residence and the right to work. For these workers, the conditions for receiving a work and resident permit varies between the Member States. The employment visa criteria and requirements, as well as the application process, often depend on the labour needs of each country. Some Member States have also concluded bilateral immigration agreements with third countries that may set out more favourable entry and residence permits for workers from these countries (ELA 2023).

3.3 Posting corridors

Since it is partly for the Member States to decide the conditions for third-country nationals to enter and to take up work, national regulations may create posting channels for these workers. In ELA (2023) some examples of such regulations are given. Slovenia has a bilateral agreement with Bosnia, Herzegovina and Serbia, making it easier for citizens of these countries to take up work in Slovenia. These workers may obtain a special work permit and will not need a residence permit as required for other TCNs, and procedures to enter are swifter. In Poland, citizens of Ukraine, Belarus, Moldova, Armenia and Georgia are able to take up work without a work permit, based

¹⁹ C-445/03, C-168/04 and C-244/o4 summarised in ELA 2023, p. 105.

²⁰ Even if the conditions for receiving a residence or a work permit are harmonised for these categories of workers, the decision to issue or withdraw a permit shall be taken by the sending Member State, thus not giving the receiving Member State any competence in this respect (ELA 2023).

on a declaration of entrusting work to foreigners (ELA, 2023, p. 35). Furthermore, workers being citizens of Ukraine, Georgia and Moldova may use biometric passports to enter and reside in Poland and do not need a visa. If they take up work limited to 90 days within a period of 180 days, they benefit from simplified rules for being hired, where a working permit is not required.

Such regulations can be seen as a pull-factor for companies to establish businessmodels to hire workers from these third countries and post them to other countries. If we look into the number of TCNs posted between different countries, they indicate that some posting corridors are more common than others. This has changed as a consequence of the war in Ukraine, where special regulations have come into force for Ukrainians, as well as Russians and Belarussians.

Sending member state	Share of TNCs in total outgoing / incoming posted workers (2020)	Main nationalities concerned	Main flows	Main sectors of activity
Slovenia	60%	Bosnia and Herzegovina	TNCs from Bosnia and Herzegovina being posted from Slovenia to Austria	Construction
Poland	17%	Ukraine	Ukrainian workers being posted from Poland to Germany, France, Austria, Belgium and the Netherlands	Road freight transport, construction (live-in care)
Spain	11%	Morocco and Ecuador	Moroccan workers being posted from Spain to France	Agriculture
Receiving me	ember state			
Belgium	20%	Ukraine and Belarus	Ukrainian and Belarusian workers being posted to Belgium from Poland and Lithuania	Construction and road freight transport
Austria	22%*	Ukraine, Bosnia and Herzegovina, Belarus	TCNs from Bosnia and Herzegovina being posted from Slovenia to Austria. Ukrainian and Belarusian workers being posted to Austria from Poland and Lithuania.	Road freight transport and construction
France	23%	Ukraine and Morocco	Moroccan workers being posted to France from Spain	Agriculture
The Netherlands	30%	Ukraine and Belarus	Ukrainian and Belarusian workers being posted to the Netherlands from Poland and Lithuania	Transportation and storage, agriculture and road freight transport

Table 3.1 Posting corridors for TCN.

Source: Based on ELA 2023, p. 98 following, with further references * Number for 2019

Data on posting is not easily available and is partly based on PD A1 data. As such information is collected in different ways, numbers do not give a precise overview of the flows of workers but can be used as an indication of corridors and level of posting. Table 3.1 shows the countries that have the highest share of TCNs among their posting workers, either as sending countries or as receiving countries. As we can see, both Slovenia and Poland are among the three sending countries with a high share of TCNs, and the majority of posted workers in Slovenia are TCNs. If looking at actual

numbers, it increased in Slovenia before and during the Covid 19 pandemic from 23,800 in 2018 to above 45,500 in 2021 (ELA 2023, p. 92 with reference to the HIVA project). For Poland, the number increased in the same period from 23,200 to 115,000 (ibid).

Looking at the receiving side, more than 9,000 TCNs were posted to Austria (2022), 26,000 to Belgium (2019), 17,800 to Germany (2020) and almost 10,900 to the Netherlands (ibid),

There are scarce numbers when it comes to TCN posting to and from the Baltic and Nordic states. In ELA (2023) the number of incoming posted TCNs to Lithuania is included, and the number increased from 1,752 in 2019 to 3,139 in 2021 (p. 91). When it comes to outgoing posting, Estonia and Finland are listed with small numbers, 787 and 333 respectively. According to Geyer et al. (2022) 75 percent of posted workers going from Lithuania to Austria in 2019 were TCNs. In 2021, more than 15,000 Belarusian and Ukrainian workers were posted form Lithuania to Belgium (ELA, 2023, p. 96).

In the interviews with labour inspectorates, the informants were asked about where the TCNs they met on inspections came from. The findings are summarised in table 3.2.

Country	Corridors of receiving posted TCNs	
Denmark	From Ukraine and Belarus through Poland Poland, Romania, Bulgaria and Germany are the most used transit countries From Albania, the Philippines and Thailand through Czech, Poland and Cyprus	
Estonia	Ukrainians through Poland Moldova Belarus (but do not get visa anymore)	
Finland	Ukrainians through Latvia or Lithuania (not since given temporary protecting in the EU) Belarus through Poland Russians through Estonia and Latvia	
Iceland	From Ukraine and Belarus through Poland, Lithuania and Latvia	
Latvia	Few TCN posted workers From Russia and China through France and Portugal	
Lithuania	Belarus and Ukrainians through Poland 'Stan-countries'	
Norway	Ukrainians through Poland (not since given temporary protecting in the EU) 'Stan-countries' through Baltic states From Serbia, Bosnia H, Albania, Moldova, Montenegro and North Macedonia through Croatia, Slovenia and Slovakia (All countries that do not need a tourist visa) Staffing agencies send workers to Norway Shipyards through Romania and Italy	

Table 3.2 Overview of posting corridors for TCN.

Note: The Russian full-scale invasion of Ukraine in 2022 has led to changes when it comes to access for workers from Russia and Belarus to these countries.

In general, construction is the predominant industry where posted TCNs can be found, but road freight transport and agriculture are also important industries for these workers (ELA, 2023). Construction is the industry mentioned most frequently in interviews in the Nordic and Baltic states. For Estonia, Finland and Norway, shipbuilding is also an important receiving industry for posted TCNs.

3.4 National conditions covering posting of TCN

Posted TCNs are covered by the same regulations as other posted workers. However, most Member States have some additional requirements when it comes to posted TCNs. In the following, we will give an overview of such regulations both in the countries covered by this project and in other EU Member States.²¹

- Most Member States require a residence permit for posted TCNs, usually if the posting exceeds 90 days.²² However, some also require it if the posting is shorter, and some do not require it at all. Denmark, Estonia, Finland, Latvia and Norway require this if the posting exceeds 90 days.
- While most states do not refer to the conditions laid down in case law of a lawfully and habitually employment in the sending state, some do, either by repeating these conditions or a variation over these, e.g., Luxembourg, France, Austria, and the Netherlands.
- Finland requires that the work permit allows the worker to return to the sending state, while German law requires the worker to have a principal activity in the sending state. This is not considered to be the case if the work permit corresponds exactly to the posting period, or if the employer does not have any business activity in the sending country.
- Some Member States require the posting employer to notify the receiving Member State that the condition for lawful employment is fulfilled.
- The assignor in the receiving state is also made responsible, in some countries, for making sure that the conditions are met. In Croatia, the assignor cannot make use of the worker if they know or could know that the worker is not legally employed in the sending country.²³ In Lithuania the assignor is obliged to require copies of the residence permit/visas, ID cards etc., and to keep these documents for the duration of the posting. If this requirement is not met, the assignor will be liable.
- All Member States and Iceland require the employer to make a declaration of the posting. In relation to this:
 - Most states require that notification contains provision of the nationality of the worker. This is the case for Iceland, Denmark, and Lithuania, but is not required in Latvia and Finland. In Estonia and Norway, this information is given to other authorities, and is not—or not easily—accessible for the labour inspectors.
 - Some states require the submission of information related to the work and residence permit of TCNs in the sending country. These states include Austria, Luxembourg, Croatia, Ireland, Latvia and Lithuania. However, while some countries only require a declaration of this, other requires that a copy of the permit is included.
 - Some states require confirmation that the worker is legally employed in the sending country.
- Some states require the work permit to be kept in the receiving country or that it could be made available if requested.

²³ Law 128/2020, art. 20.

²¹ This overview is mainly based on ELA 2023 p. 104 following and interviews and document studies of countries covered by the project.

²² The condition of 90 days refers to the Schengen right to move freely for periods not exceeding 90 days within a period of 180 days.

3.5 Inspection of posted TCNs in the Baltic and Nordic countries

In some EU Member States like Germany and Belgium, the authorities carry out inspections targeted toward posted TCNs (ELA 2023). None of the participating countries in this study do inspections especially targeted at TCN posting. Inspections of these workers are either done as a part of inspections of posting in general or other kinds of inspections. If the labour inspectorates find TCN as part of the inspections, it depends on their formal competences how they proceed. In Denmark, Latvia and Estonia only the police have the competence to check whether they are lawfully working in their country. In Denmark, inspectors will often involve the police to check work permits etc.

Sometimes we use it to find interesting places to go on joint inspections with the police. We typically also have the immigration authority with us, to see whether the workers have the permissions they might need. But the labour inspectorate does not have any competences in terms of whether they are here legally or not (labour inspector, Denmark).

In Latvia, the Labour inspectorate cooperates with the State Border Guard and the police, depending on the issue. The State Border Guard is responsible for checking the ID documents of TCNs.

In Finland the labour inspectorate will check whether the worker has a work permit in the sending country, and for how long they have been working in Finland. The latter is important in order to assess whether the working permit has expired and if the worker needs a residence permit in Finland. In Lithuania, they check visa and residence permit, as well as the notification made. They also ask for the PD A1 document through the IMI. If the sending countries has issued a PD A1, they assess the posting to be lawful.

Also, in Norway the labour inspectorate enforces the right to work for posted TCNs. However, as Norway does not have any notification system, inspectors will not know where to find posted TCNs until they meet them at the site. If they lack papers, the inspectors could try to check whether they have a valid work permit, but if the worker has something to hide, he will often have left the site before the request is answered. In this respect, it might be useful to involve the police, as in Denmark. There, the police will take the worker into custody until the lawfulness of the residence in Denmark is clarified (max. 48 hours). Some Norwegian inspectors stated that the Norwegian police are reluctant to assist the inspectors, as they have been criticised for wrongful deportations, while others find it easy to get the police involved.

3.6 Challenges related to inspection of posted TCNs

While the labour inspectorates face many of the same challenges when it comes to posting of TCN as for posting of EU citizens, there are also some more specific challenges related to TCNs. A number of issues must be clarified by the authorities in the receiving countries to verify whether a posted TCN is legally posted. To do this, an understanding of the legal framework in the sending country is often needed. It goes without saying that this can represent a challenge for the receiving country. As Member States still have the competence to regulate the right for TCNs to reside and work at national level, the conditions for legal employment will depend on which country the sending company is established in. Further, as case law plays an important role in the interpretation of regulations governing TCN posting, there are still many issues that remain unclear and may be practiced differently within and between different Member States. For instance, it could be hard to decide what is meant by 'habitual employment'. This makes enforcement more challenging. These challenges are also reflected in the interviews by the labour inspectorates in the Balkan and Nordic countries. In this chapter, we look into some challenges that were raised by the inspectors during the interviews.

Locating and identifying posted TCNs

In some countries the labour inspectorates lack information on where to find posted workers, or where to find posted TCN workers. The lack of a notification system in Norway makes it difficult for the Norwegian Labour Inspectorate to target posted workers in general: 'You only notice when you realize they speak another language. We use 'Detect language' through google translate' (inspector, Norway). It has been discussed whether the inspectorates should ask for nationality of the workers. This is not mentioned in the enforcement directive, and there have been some discussions on the legality of requiring this. Nationality is however required as part of the notification procedure in several countries with such systems.

One problem related to this is that some companies may give up the wrong nationality of the workers they post. This has been an issue in Iceland where workers have been declared as Polish, but when the inspectors ask for IDs during the inspections, they had a Belarusian passport. In such cases the inspectorate can impose administrative fines, as the companies have sent the wrong information. Whether this is done on purpose or not does not matter in this regard.

Wrongful nationality can also make the inspections more complicated when translators are needed.

Sometimes we meet workers who say they are from Romania. And we get a Romanian translator, and then they cannot understand each other. Typically, [they are] from Moldova or Belarus and then we need to get another interpreter (inspector, Finland).

Even though nationality is notified, this is not always used by the inspectorates to target inspections. In Estonia this information is handled by the police and cannot be used by the labour inspectorate. In Norway the assignor is obliged to give information concerning the nationality of the employees to the tax authorities. However, this information seems not to be easily accessible for the labour inspectors. Lithuania has other strategies for targeting their inspections.

During inspections, we don't use the data in the notification system so much because we choose the inspection places where we expect to find TCNs. We use drones, check where new construction sites are established, and there we suspect to find foreigners. When finding TCNs, firstly, we must identify the person by his ID-card/passport. Then, we check if he is staying in Lithuania legally. If he does not have a visa/visa free regime/residence permit, he is an illegal worker (inspector, Lithuania).

Identifying genuine posting

The greatest challenge for many inspectors is to decide whether there is a genuine posting situation. This is not only the case for posting of TCNs but posting in general. However, as there are some additional requirements to posting of TCNs, this assessment can be even more difficult. This regards the conditions of lawful and habitual

employment in the sending country being fulfilled. The approaches among the labour inspectorates vary.

For the condition of the employment to be lawful, it is mainly done by checking the work permit of the worker. One inspector mentioned that it is hard to find out whether the work permit is valid and whether a residence permit is required. The reason for this is that they do not have any information on when the 90-day period starts. The problem can also be related to the basis of the work permit. For instance, as Poland gives work permits to some TCNs for a period of 90 days, it will be important to clarify whether the worker has been working in another country before they came to this receiving state. In Iceland this is solved through the notification process, the date of when the work permit is valid. As all posted workers to Iceland have to arrive by plane, the Labour Inspectorate can request copies of the boarding cards in order to check for how long they have been in Iceland.

The conditions for legal posting of TCNs are, however, not known by all inspectors, and some find it difficult to understand what the conditions are when it comes to lawful and habitual employment. This can result in inspectors not really wanting to dig into these issues and enforcement becoming insufficient.

One issue is related to transnational cooperation, and problems with getting work permits validated. This seems especially to be the case where the sending country is among the important posting corridors for TCNs, as is Poland. These varied requirements-some of which are the competence of other national authorities- may explain common difficulties in verifying lawful and habitual employment. For the requesting countries enforcement of these conditions becomes impossible when it takes long to get a reply from the sending country.

You might send a question through the IMI. We have done it but not too often ... If we are lucky, we get an answer within 2-4 days, but then it is too late. We need to be able to decide when we are there (labour inspector, Norway).

The problem is partly related to the lack of clarity in different situations. Workers do not necessarily fit into the categories laid down in the regulations, or actors might deliberately try to cover up the actual situation. As an example, a worker gets a work permit in Estonia, and the next week he can be found in a construction site in Finland. For the inspectorates it could be hard to find out whether the person is posted or not. Quite often the Finnish labour inspectorate discovers that the person does not have the right to work in Finland, as he is not posted and as a Schengen visa does not give the person a right to work.

Some inspectors state that they have come across workers posted through countries that the workers have never been to but are sent directly from a third country. Others find it hard to check whether the worker actually lived in the sending state before they were posted; They may lack an address, or all workers from that sender have the same address in the sending country.

It goes quite smoothly, but we have an issue of workers being posted, maybe having a residence permit in Latvia, being posted from a Lithuanian company. This poses an issue of whether they are posted. What is their residence status in Lithuania in relation to the residence in Latvia? If their residence permit is in Latvia, but they are sent from Lithuania, I check that they are permitted to work in Lithuania as well. In the employer's register or something like that. This was not a huge issue before the war, [there were] not too many TCNs in Iceland; But it has increased. I don't know why. Probably because they recruit workers from Belarus and Ukraine and send them directly (inspector, Iceland).

I tried an IMI request for a Swedish company. The company had no activity in Sweden. The workers had been posted to Sweden before from Slovakia. I asked Slovakia, but the workers had never been posted from Slovakia, so they just move around and are not registered anywhere. I think most inspectors find it too complicated (inspector, Norway).

Another way of avoiding regulations related to posted workers is to register workers as self-employed. The Finnish informants pointed out that the problem with bogus self-employed was increasing. While this is a general problem, immigration law could mean that this is a way for TCNs to get access to the EU labour market. Regulation of the right for self-employed to residence and deliver services is left to the national competence, and regulations may differ from country to country, making it easier to get access to the labour market in some countries than others.

3.7 How to improve enforcement of TCN posting

In order to improve the enforcement of regulations related to TCN posting in the Nordic and the Baltic countries, a variety of measures can be implemented. In this chapter we point at measures that have been discussed as part of this project, as well as measures already found in other countries. We have grouped these under different headlines.

Notification systems

While all countries, except Norway, have a notification system, there is a great variety in what kind of information and documentation that are requested by national law. Such registers seem to be valuable when it comes to target posted TCNs during inspections. One suggestion would therefore be to establish registers where such do not exist (Norway), and to explore related possibilities including useful information and documents. The Belgian LIMOSA system could be an inspiration in this case (see Part 1 in this working paper).

In relation to posted TCNs, including the nationality of the workers and a copy of their employment contract and their work/residence permit in the sending country would be one suggestion. This would help enforcement both when it comes to target these employees and to make the assessment of whether they lawfully and habitually work in the sending state. One might also look further, to assess whether the worker habitually worked in the sending state. Many of the challenges reported by the labour inspectorates are related to fake posting and workers being sent from a Member State where they never have been.

Documents to be stored

National regulations may also request that certain documents are kept on the working place or can be made available within short time. France, for example, require the employer to keep documents related to the exercise of a real and substantive activity in the sending state, including the employer contract. In the Netherlands documents like the employment contracts, copy of ID-cards etc. should be kept at the workplace. Other documents that could be useful to better assess the posting situation are copies of residence cards and work permits.

Training

Some inspectors have little knowledge of TCN posting and what they should look for when talking to posted TCNs and their employers. Therefore, it seems there is a need for training the inspectors in this field, including the conditions for TCN posting, what they could ask for and what documents to require. One inspector has doubts when it comes to how far they can go when checking whether the worker is habitually employed in the sending country. Some express that they do not know what to do even if they find examples of fake posting.

Cooperation with other authorities

One issue that has been raised is the shared competence between the labour inspectorate and the police in some countries. As there are many factors that need to be assessed in order to find out whether a TCN is legally posted to another Member State, one possibility is to give the labour inspectorates a competence in this field instead of—or in addition to—other authorities like the police. If so, the labour inspectorates would be able to assess whether the posting of TCNs to the country is lawful. Even though some labour inspectorates express that they lack knowledge in this field, their more general experience when it comes to understanding employment relationships could contribute to the assessment of whether the worker is lawfully and habitually employed in sending country.

Inspections

None of the countries covered by this project do targeted inspections of posted TCNs. Both in Germany and Belgium the authorities do a number of inspections where they target posted TCNs. In Belgium they have so-called 'flash inspections' in sectors where TCNs can be found. This includes construction, road transport, catering, agricultural work and meat-processing. Flash inspections are announced up-front and are mostly informative and preventive in nature.²⁴ Within a month they do a minimum of 400 inspections on TCN posting, as well as raise awareness and spread information about the regulations.

Enforcement can also be improved by giving labour inspectors the possibility to access information during their inspections and do real-time checks by using a tablet. In ELA (2023) a list of five issues that could be part of inspections of TCN posting is proposed:

- 1 The identity of the worker
- 2 Whether the worker has the right to reside in the sending country
- 3 The length of the worker's residence and work in the sending state prior to posting
- 4 Applicable social security regime
- 5 Proof of professional qualifications

Except for more general training, there is also a possibility to set up a template that inspectors can make use of when assessing the situation of TCNs. This could include what they should be aware of, what questions to ask and what documentation to request, as well as information about the national regulation in the sending state. If the competence is by the police, this information could also be of help to them. One of

²⁴ https://www.pwclegal.be/en/news/social-inspections-update----2022-action-plan-to-combat-social-.html

the inspectors advocated for a clear protocol in this situation for all countries to follow.

Access to databases

Inspections could also be improved by granting inspectors access to the relevant databases. This could include PD A1 documents and a validation tool for these documents, and electronical records of what services companies are providing by the use of posted workers.

Responsibility of assignor

The problem with companies and workers leaving the country before the labour inspectorates have the possibility to react is a general problem for mobile work but could be solved by giving more responsibility to the assignor, as is the case for instance in Finland and Iceland. This could include that the assignor is responsible for valid work permits, and non-compliance can be fined. As in Denmark and Latvia, the notification system could be used to forward information to the assignor that the posting company has registered. In Iceland, if a company has not registered and have TCNs, they must stop the work immediately, and can only continue after the labour inspectorate has received the evidence that the workers are allowed to work there.

Make better use of the IMI

The Internal Market Information System (IMI) is the main tool for labour inspectors when they need to get information about posted companies and their workers. The IMI-system covers many pre-set questions directed at TCN posting, that could be used to get more information about whether the conditions of lawful and habitual employment in the sending country is fulfilled.²⁵ This includes:

- Do the posted workers habitually carry out work in your Member State?
- Are the posted worker(s) expected to return and resume working in your Member State on completion of the work or provision of services concerned?
- What type of work/tasks do the workers usually perform in your Member State?
- Do the (third country national) posted workers hold valid work permits?
- Are the (third country national) posted workers legally employed or does he/she/they have an employment relationship in your Member State?
- Was there an employment relationship between the workers and the service provider before the posting?
- Were the posted workers working in your Member State before the posting?
- What is the place (country) of work stated in the employment contract?
- Was the employment contract concluded in your country?
- Has the Portable Document A1 (PD A1) been issued for the worker?
- Are the posted workers lawfully employed in your Member State?

As the IMI is designed to use the pre-set questions, problems may be related to the existing questions. From the examples provided above, it seems like some of the questions overlap and it can therefore be difficult for the person asking the questions to decide which one to use. For instance, whether to ask if 'the posted worker

²⁵ See IMI Report Number: 26803.1. PW – Posting of workers – request for information regarding a posting. https://ec.europa.eu/internal_market/imi-net/_docs/library/question-sets/posting-of-workers/information-req/sample_en.pdf

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habitually carry out work in your Member State' and/or the posted workers were 'working in your Member State before the posting'. It can also be difficult to understand how the replying authority assesses 'habitually', indicating that the question could be rephrased. There are also questions that seem to be lacking. For posting of TCNs, a broader range of information is required compared to posting of EU citizens. One example is information that could be important in order to assess the validity of the work permit, for instance to be able to know if it has expired or if the worker is in need of a residence permit.

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Labour Inspections' strategies and tools used in enforcement of posting

The EU regulatory framework for posted work has a different impact in The Member States because it is applied in a variety of national industrial relations and collective bargaining systems. In this working paper, we look into the enforcement of regulations for posted work, bringing together experiences from the Nordic (except Sweden) and the Baltic states. Competences of the national labour inspectorates and cooperation with other authorities constitutes the basis for enforcement. Moreover, it is vital for the inspectorates to have contact and cooperate across borders. Enforcement related to posting of third-country nationals is also part of the picture.



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