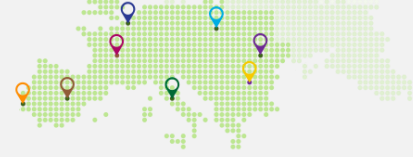


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Sharing Agreements.
Building Eu agreements
for the posting
of workers in the
construction sector
VS/2018/0458



Guidelines

Transnational bilateral agreements between the Italian CNCE and sectoral funds active in other EU countries

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Risks or concerns addressed by the agreement

Since the early 2000s, the number of foreign companies winning public or private construction work contracts in Italy has been on the rise. The areas most affected are the North-West, facing an influx of French and Spanish companies, and the North-East, where companies from Austria, Germany and Eastern Europe are active.

At the same time, Italian companies have been working more and more in neighbouring countries, especially Germany and France.

These trends have brought about an increase in workers' mobility, especially through posting, with significant consequences for the management of remuneration and payrolls, which can be particularly burdensome especially for SMEs.

In fact, Italy and neighbouring countries like Austria, Germany and France have developed a system of intermediation of construction workers' wages by means of sectoral funds, thought to guarantee income stability despite the temporariness of contracts in the sector or sudden interruption of work due to adverse weather conditions.

Notwithstanding some differences in their territorial organisation, ownership model and benefits, these sectoral funds handle about 30% of workers' gross wages by means of 'contributions' paid by the employer to the fund, which, in turn, entitle workers to a set of benefits (e.g. holiday pay, bad weather pay, seniority pay, access to vocational training...).

This means, whenever a worker is sent abroad, the employer shall notify the competent fund in the sending and host country in order to suspend payment in the previous and contribute to the latter.

In turn, workers would gain entitlement to benefits towards foreign sectoral funds, that they shall claim back abroad, realistically once the posting ends.

In order to simplify rules while protecting workers' entitlements, starting from 2008 sectoral funds from Italy (CNCE)¹, Germany (ULAK), France (UCF) and Austria (BUAK) underwrote agreements devising a process similar to rules applying in the field of social security coordination, that is allowing sending undertakings to remain attached to the funds of the sending country in case of posting.

¹ CNCE and UCF are actually coordinating and supervisory bodies at national level of sectoral funds established at local level throughout Italy and France respectively.

Objectives

The agreements pursue the following objectives:

- a) to prevent posting of workers to work as a driver of social dumping;
- b) to protect construction workers ensuring continuity of enrolment in their sectoral funds, access to related benefits and an overall pay comparable with remuneration applicable in the host country;
- c) to make it easier for construction companies to provide their services abroad;
- d) to share information between social partners and sectoral funds in the involved countries on the terms and conditions of employment entailed in the different countries, especially concerning the structure of remuneration and the role of sectoral funds;
- e) to tackle undeclared work and to supervise the correct application of collective bargaining provisions.

'Business case' for adopting the agreement from the standpoint of stakeholders

Workers:	In the absence of the agreements, posted workers would have their contributions fragmented across different funds, risking losing some wage elements in the host country or losing continuity necessary to accrue some entitlements in the sending country (e.g. the seniority pay granted by the Italian sectoral funds).
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Companies:	The agreements prevent risks of double payment while reducing the administrative burden for employers, who interact only with their fund in the sending country and in their own language.
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Unions:	Provided the overall labour costs between the involved countries is similar, unions benefit from a tool which incentivizes compliance with collective agreements by construction companies.
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Employers' organisations:	Employers' organisations benefit from a tool which simplifies administrative requirements in case of posting for their companies, ensure the possibility for companies to rectify possible mistakes, and ensures a level playing field for businesses at international level. Once again, the similarity in the remuneration levels in the covered countries is a key precondition for simplification to go hand in hand with fair competition.
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Sectoral funds:	The funds benefit from an easy tool to guarantee continued affiliation and payment by companies, while offering a service appreciated by their affiliates.
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Public institutions:	Public institutions (especially social security institutions) benefit from a higher certainty on the regularity of undertakings, especially whenever parallel agreements are in place to share information with sectoral funds. In this respect, it shall be noted, compared to the A1 form, on the top of affiliation in the sending country, the funds certificate also regularity with payments of contributions before and during the posting period, a condition which is not required, instead, under procedures for certifying the correct affiliation of posted workers to the social security institution of the sending country pursuant to Article 12 of the Regulation EC 883/2004.
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Main features

The agreement enables the sending company to contribute the sectoral fund of the sending country rather than to the one of the host country for posted workers.

In order to do so, the company must prepare a declaration including: registration number or identifying code, place of posting, kind of activity, name of the client, starting and ending date of posting, workers to be posted.

In order for the exemption to be granted, the company shall be in compliance with contribution duties towards the sectoral fund in the sending country and remain compliant during the posting period.

In particular, taking the example of the CNCE-ULAK agreement, the text is structured as follows:

- The Premises states the objective to set out procedures concerning the exemption from contribution charges towards the sectoral fund in the host country in case of posting;
- Section 2(1) summarises German legislation on posting at the time of the agreement, including the application of collective agreements covering the construction sector, in particular for what concerns minimum wages and the 14.70% levy on gross wage to fund holiday pay through ULAK. The section also remarks the presence of declaration duties in case of posting to ULAK and to the Tax Agency.
- Section 2(2) displays levies on wage applying in Germany to the employer as contributions to sectoral funds or to remunerate leaves and other statutory or collectively agreed bonuses applicable in the construction sector (see table below);
- Section 3(1) summarises Italian legislation on posting at the time of the agreement, including the application of the same law and collective bargaining provisions applicable to workers in the territory where they are posted, the requirement to affiliate posted construction workers to the Italian sectoral fund, and further obligations concerning certification of compliance with payment of social security contributions;
- Section 3(2) displays levies on wage applying in Italy to the employer as contributions to sectoral funds or to remunerate leaves and other statutory or collectively agreed bonuses applicable in the construction sector (see table below);
- Section (4) exonerates sending undertakings from paying the above described levies in the host country, provided they continue to pay the equivalent levies in the sending country;
- Section 5 provides definitions and section 6 specifies CNCE is the Italian organisation in charge of implementing the information sharing entailed by the agreement, despite information and related payments in Italy takes place through sectoral funds established at local level (i.e. *Casse Edili*);
- Section 7 describes the process for the exemption as follows:
 1. Sending undertakings mandate their sectoral fund in the sending country to submit the declaration on posting on their behalf;
 2. The sectoral fund verifies that the sending undertaking is in compliance with contribution duties, receives a declaration certifying its will to prosecute paying levies for posted workers in the sending country and notify the information to the sectoral fund in the host country together with a list of posted workers;

3. The sectoral fund in the host country exempts the sending undertakings from contributions, whilst the sectoral fund in the sending country commits to monitor the payment of contributions in the sending country, to sanction irregularities and inform the sectoral fund in the sending country should they occur;
 4. Should the sectoral fund in the host country detect posted workers not previously declared, the sectoral fund in the sending country shall check if they are/shall be affiliated in the sending country. As long as the employer cannot demonstrate that conditions for the exemptions are met, the sectoral fund of the host country can impose payment of contributions and activate enforcement procedures;
 5. Final provisions entail: the duty to declare changes affecting posting, affiliation to sectoral funds in the host country as a rule in the absence of an exemption request by the employer, commitment by the parties to implement checks and ensure a wide and reciprocal information sharing, commitment by the parties to develop jointly templates for declarations and to bear the administrative costs each for its side;
- Section 8 gives equal value to the Italian and German language versions of the agreement and requires change to be made in writing;
 - Section 9 entails an experimental length of two years and its tacit annual prorogation. Each party can decide to discontinue the agreement sending a communication at the latest six months before the expiration. The agreement ceases also in case contributions to sectoral funds in one of the countries are abrogated.

Table 1. Cost comparison as per Section 2(2) and 3(2) of the CNCE-ULAK agreement

Levies on gross wage - Germany -Section 2(2)	Share on gross wage	Levies on gross wage – Italy - Section 3(2)	Share on gross wage
<i>Holiday pay</i>	14.70%	<i>Holiday pay</i>	8.5%
<i>Vocational training allowance</i>	2.50%	<i>Thirteen month pay</i>	10%
<i>Complementary pension</i>	2.60%	<i>Minimum level of contributions for seniority pay, vocational training and for the prevention of accidents at work (varying depending on the local fund):</i>	6.5%
Bad weather pay	2%		
Total intermediated by ULAK	21.80%	Total intermediated by Casse edili	25%
Thirteen month pay (paid directly to the worker)	7.18%		
		Maximum amount of the 'annual leave' allowance, covering additional holidays (paid directly to the worker)	4.95%
Total	28.98%	Total	29.95%

Process of adoption and role of different involved stakeholders

Necessary requisites for the agreements to apply were: (i) the recognition of contributions to sectoral funds and of other levies as part of the minimum rates of pay posted workers have right to; (ii) the recognition of the similar features of contributions and levies across the covered countries.

In particular, for Italy, several guidelines released by the Ministry of Labour stressed the obligation upon companies operating in the construction sector to contribute to sectoral funds, an obligation applying pursuant to the national transposition of the Posting of Workers Directive also to foreign undertaking, unless similar prescriptions apply in the sending country.

This principle was made clear especially with the opinion 24/2007 of 23 September 2007 and, later, with the Memorandum of understanding signed on 9 April 2013 by the Ministry of Labour and social partners.

The memorandum acknowledged the duty for foreign companies operating construction works in Italy to register their workers to the sectoral fund and contribute to the latter while recognising the authority of CNCE to sign agreements with foreign sectoral funds exempting companies from such duty provided: (i) the exemption is reciprocal and (ii) workers benefit from similar protection in the sending country. Interestingly, the memorandum set out also that sending companies shall submit to CNCE documents certifying the regular payment of social security contributions in the sending country, a measure equivalent to certification on the regular payment of social security contributions required to companies established in Italy to carry out construction works. In a view to ease monitoring activities, a process of information sharing between CNCE and local branches of the Ministry of Labour is also envisaged.

The agreements signed by CNCE devotes therefore a special attention to the share of contributions to sectoral funds and other levies on gross wages in the covered countries.

As posting faces the legislation of two countries at a time, this comparison was implemented in pairs, leading to a set of bilateral transnational agreements.

The first comparison was made between CNCE and ULAK, paving the way for the similar exercises involving other pairs of sectoral funds and for the signature of related agreements (lastly covering Italy and San Marino). The collaboration was also eased by the intermediation of European social partners in the construction sector.

EU level and national level legal aspects smoothing or hampering the agreement

The legal basis for the agreements are the national acts transposing the Posting of Workers Directive, in particular for what concerns the right of posted workers to receive remuneration and minimum annual paid leave in line with law or collective bargaining provisions in force in the host country.

As explained in the 'process' section, in Italy the legitimacy of the agreements is acknowledged also by relevant guidance developed by the Ministry of Labour and, eventually, by a memorandum of understanding signed by the Ministry of Labour and social partners.

The documents rely both on the Italian acts transposing the Posting of workers Directive and of relevant legislation and case law confirming the applicability of the duty to pay contributions to sectoral funds over all companies performing construction works.

Once acknowledged the obligation to register and contribute to the Italian sectoral funds as a rule in case of posting, the Ministry of Labour refers to case law by the Court of Justice of the European Union on the freedom to provide services to stress administrative requirements capable of rendering the provision of services less attractive shall be avoided. Whilst restrictions are allowed in the light of 'reasons of public interests', like the protection of workers, they should not go beyond what is necessary to achieve the pursued aim (the Ministry in particular referred to judgements in Cases C-55/94 and on C-60/03)².

Departing from these considerations, exemptions from the affiliation to the sectoral fund of the host country are considered as legitimate whenever workers enjoy a comparable level of protection in the sending country. Agreements between sectoral funds appear as a particularly appropriate tool to identify these situations as they guarantee reciprocal understanding of the similarity of protection across borders, reducing risks of conflict of laws. While granting a continuity

² See the above mentioned opinion 24/2007.

in contributions to funds of the sending country, the agreements maintain all wage elements considered as mandatory at national level.

Actions implemented to address hampers

The signatory parties maintain constant relationships to check companies and declarations. This cooperative dialogue enables to solve cases of irregularities.

Outcomes of the agreement

There are about 1,000 companies posting workers each year from Italy (each posting at least 2-3 workers) and CNCE can certify that these are in compliance with the due payments, both before and during the posting period.

The number of companies using the exemption appears to be increasing over time.

ABOUT

The objectives of the ISA Project are to promote and reinforce transnational cooperation between authorities and stakeholders involved in the posting of workers in the construction sector, by promoting the establishment of information sharing agreements meant to monitor and ease the posting of workers.

The project will build on practices in place between sectoral funds in Italy, in Germany, Austria and France, where sectoral funds, backed by the governments, negotiated and successfully concluded agreements simplifying procedures necessary to post workers abroad, while making sure employers posting workers abroad are in compliance with the payment of due wage elements (like the holiday pay), and easily allowing to check relevant information in the sending country if the need arises.

www.isaproject.eu



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