

## **Transnational postings and sensitivity in Italian law**

### **The first results of the field investigation.**

*1. The complex legislation on transnational postings and the reasons for field research. 2. The impact of the 2020 epidemic on transnational postings and therefore on the investigation. 3. The first results of the investigation in relation to business sensitivity and organisational models. 4. The first results on the reactions and framework of the employers' and employees' trade-union associations. 5. The first results on information for workers. 6. The first indications from the territorial labour inspectorates.*

*1. The complex legislation on transnational postings and the reasons for field research.*

Aside from any critical evaluation of the European indications on transnational posting, there is no doubt of the complexity of the regulation. Due to its developments over time, its structure and the differences in how the directives are transposed into national legal systems, as well as the variety of business areas involved, there has been lively debate in legal literature and repeated interventions in case law. In defining the project, this led to the question of the level of widespread awareness, particularly in Emilia–Romagna and the neighbouring areas, i.e., an area with a high degree of consolidated industrialisation, advanced businesses with a clear international vocation and constant trading. The same method has been applied in other countries.

Compared to Directive 1996/71/EC, Directives 2014/67/EU and 2018/957/EU included (with a significant delay, we should add) the objective that the law on posting should avoid the low-cost transnational movement of workers leading to hazardous forms of competition among workers, in a formidable game of ‘the cheapest wins’. It is precisely the idea of preventing these strategies that qualifies the current European position. But businesses are finding this hard to accept, having for decades been used to thinking of posting in a (distorted) logic of

low-cost, (few or) no-strings staff recruitment. The recent scenario and subsequent amendments to European law have made a break with the habits of the past.

Sharing these general thoughts (inevitably influenced by the Italian experience), the starting point for this research was to check whether and to what extent the latest European regulatory strategies are in line with business behaviours. This is particularly when conflicts are created and there is a refusal of the obligations imposed by European law, with breaches that are in some cases systematic and widespread. We should not expect much from the trade union associations, at least in Italy, due to their limited awareness of the importance of Directives 2014/67/EU and 2018/957/EU, and the lack of information available, at least in the branch offices. The burden of social control over compliance with European law in Italy lies with the inspection bodies, and in particular the National Labour Inspectorate and its territorial offices. This conflict between companies that are nostalgic for a regulatory context inspired by greater freedoms and inspection bodies working to ensure compliance with European law has offered scope for investigation. The analysis starts from a systematic assessment of the directives and seeks to understand how they are applied in different countries.

We have focused above all on metal engineering industries, as, at least in Italy, in this area postings on the border of legality (and often far beyond it) are frequent, particularly for workers from Portugal and from Romania. We will then discuss the inspection services. At least in Italy, it was legitimate to expect some lack of interest from the employers' associations, as was confirmed during the first information collection phase, despite the substantial completion of at least part of the statistical samples involved in the research. The fundamental objective of the project has to be closely coordinated with the indications of the national authorities working in the inspection field, as it should be possible to identify the mechanisms of fruitful transnational cooperation between the various public bodies, in order to ensure the maximum effectiveness possible of the EU laws, in relation to the prior reconnaissance of the realistic infringements. What should derive is a model (hopefully applicable in general relations between any European country) of fruitful transnational connections, also in terms of training, in order to ensure simple, uniform cooperation in administrative practices. This is in line with the

achievement of that overall effectiveness identified as one of the purposes of Directive 2018/957/EU.

The dialogue with national inspection bodies should lead not only to the identification of the most serious forms of infringement, but also the main limits of the inspection activity today, particularly in relation to transnational cooperation and the difficulties observed. Obviously, this exploration should consider the more general Community proposals being studied to strengthen the inspection function. The research sets out to be proactive, identifying the most common issues (particularly those in the production industry identified) and drafting reasonable proposals for overcoming or reducing the difficulties. To offer a few examples, the aspects considered relate to the exchange of information, staff training needs in each Member State, the dissemination of appropriate knowledge on national laws and the operational links between bodies in different countries. Other aspects include the methods for selecting companies to be inspected and the identification of empirical indexes that may suggest plausible breaches and trigger inspections.

## *2. The impact of the 2020 epidemic on transnational postings and therefore on the investigation.*

Originally designed as an activity covering twenty-four months, and then thirty, following an extension caused by the epidemic, the project was clearly and inevitably affected by the unexpected situation in 2020, in Italy in particular, and in a highly industrial area, specifically Emilia–Romagna, where the restrictive provisions issued by the Government (from March 2020 until now, January 2021) led to a significant drop in production levels and, therefore, in turnover, in a broad segment of companies. One of the first consequences was the inevitable reduction in workers from other countries, those working on transnational postings or on contracts signed with the aim of concealing these and avoiding the application of the related laws on worker protection, with a significant reduction in the size of the phenomenon, at least in engineering companies. Perhaps this cannot be said for other business areas, such as logistics, if anything stretched due to social distancing

and the related need to transport goods to the homes of people who could not or did not want to go out.

As was inevitable (but wholly unforeseeable before March 2020), the substantial drop in industrial production affected many fields. Among these were engineering companies, hostile to increase or confirm postings of many workers, particularly from countries with a less developed entrepreneurial culture, with an indirect yet perceivable reduction in unlawful conduct, discouraged by the presence of suspended employees and, more generally, by the climate created by social distancing. This situation is partly confirmed by the selected and verified samples, i.e., businesses, trade unions and workers, who focused on events considered concluded. Above all, the “selective” memory of the interviewees considered episodes concerning only white-collar activities, and we wonder if this framework is realistic or if is the result of naturally focusing on current and urgent problems rather than past facts, even those of only a few months ago. The market is not always able to strive to give the correct importance to somewhat obsolete phenomena, above all when tackling the great challenges of the epidemic.

More generally, concerning our topic, the situation today can be approached in different ways. Faced with such a worrying health scenario and the rapid worsening of the economic conditions for both the country as a whole and the European Union, there is little to celebrate about when considering that the reduction in production in many sectors has coincided with the reduction in unlawful behaviour. However, on the other hand, tackling more dramatic problems and protecting the collective well-being, the public administration has seen a clear and inevitable decline in transnational mobility, with a kind of truce on illegal postings. If exploited rationally, it could lay the foundations for a revision of the organisational models of administrations, particularly in terms of inspections, so that, in a future characterised by more normal and significant movements, the checks on legal behaviours can be more targeted and more successful.

*3. The first results of the investigation in relation to business sensitivity and organisational models.*

On the business side, the investigations on the sample of over fifty companies, mostly engineering firms, have almost ended, with over thirty replies, particularly from some very large and important industries. The response of the companies involved is not surprising. By declaring that they have never come across the problem in their day-to-day business, they have underlined that they have not studied the legal guidelines and have no information on the matter. We can but hope that they will take advantage of the training opportunities made available by the project in 2021. Meanwhile, these positions are in line with expectations, due to the structural implications of the approach of Italian companies, which tend to focus on immediate major issues and are uninterested in investigating others, particularly those with a highly complex legal basis.

Moreover, some of the interlocutors had been identified with a certain level of precision, as, in full respect for confidentiality, it was a known fact that they had signed contracts aiming to get round the application of the European laws on protection against transnational posting. Indeed, in some cases, the inspections were so significant that they aroused the interest of the press, involving companies from particular geographical areas, with all probability due to financial and fiscal problems. And yet, some of these companies gave elusive answers, in contrast to what was known about their actual experience (there are only four or five cases, but this number is not negligible as it counts for around one tenth of the companies involved). Others, within their rights, did not reply. For those who ... didn't 'tell the truth' (without prejudice to the guarantee of confidentiality, as underlined in any case, and which will continue to be assured subsequently for the project implementation), there are two possible interpretations, without any actual possibility to clarify the doubt.

Some may not have understood the questions and, above all, may not have realised that some of them indirectly concerned posting. In particular, some small trade businesses did not understand that their presumed contracts evaded the EU protection laws, hiring foreign workers without complying with the European directives and related Italian laws. If the theory of the complete lack of understanding of the legal issues (and, in at least two cases, we believe that this is exactly what happened) is true, we may be disheartened by the actual understanding

of the impact of European law and its effect on day-to-day activities. It should also be mentioned that, in the two cases mentioned, the workers in Italy were Romanian and, if what they say is correct, they should have left Italy in 2020. We can think of remedying this phenomenon at least in part with future training, which, however structured and challenging, may only involve some engineering firms. However, the (final - if not in quantitative then at least in qualitative terms) conclusion is somewhat disheartening, although not new to Italian labour law; worker protection rules are sometimes breached unawares, due to the failure to assess the strategies of Italian law, and even more so those of the very sophisticated European laws.

In contrast, there may be another explanation for large firms that made declarations that are inconsistent with their known experience . As we may imagine, their officers have fully considered the issue, they have understood the reference to what occurred and deliberately concealed their case, for fear of negative publicity or embarrassing news, and sheltered beneath the umbrella of confidentiality. The phenomenon is inevitable in any measure (there should be four or five cases), nor should it be surprising, as the reassurance of the confidentiality of the information gathered is often not enough to lead people to tell the truth. Only two companies admitted that they had been involved in significant cases of collective posting, suggesting that they had not done so lawfully, without any direct admission but with significant incidental hints. However, the conclusion is not reliable in quantitative terms, for the reasons explained. The phenomenon of illegality is much more widespread and, above all, the fact that it is often completely unconscious is worrying.

A certain number of firms demonstrated a foreseeable and laudable knowledge of the issue, its effects, the European regulations and the consequences in terms of social security and civil law; these are mostly medium-sized or large firms (not only in the metal engineering sector), with a strong managerial structure, appropriate legal skills and a mature organisational culture. Sometimes part of transnational groups (with Italian or foreign capital, even from outside the European Union), posting is commonplace and without any substantial difficulties, aside from the occasional error, which is always possible and even understandable both in human and professional terms, due to the nature of the issues. It is feared that

precisely these interlocutors, who have least need, take advantage of the future training opportunities. At the same time, while we may take satisfaction from the skill of their managers and middle managers, it has to be noted that recourse to posting is occasional, for high-level positions, therefore for highly paid workers, able to protect themselves and not directly and immediately in need of the protection afforded by European law. These are not the cases of mass postings of large numbers of workers, but individuals with strong skills and without immediate economic urgencies.

*4. The first results on the reactions and framework of the employers' and employees' trade-union associations.*

According to the Italian understanding, employers' associations were included among the trade union associations, and many responses were given, if, in addition to the completed questionnaires, we count the various answers given in e-mail messages. The overall outcome is fairly uniform and conforming to expectations; the issue is known at a general level, above all in terms of the risk of offences, but is deemed the realm of specialists and not really a major issue today, in a phase dominated by the epidemic crisis and the related strong concerns over the duration of employment relations and business trends. Not by chance, in several situations, the persons questioned stated they were generally aware of the issue but referred to other managers in their organisation, who in turn gave generic answers. In particular, the point of greatest interest was not grasped, i.e., the fact that tenders and other forms of contract may aim to elude the European posting laws, and that the innovative dimension of the project was not even understood, due to the lost habit of reasoning on the practical importance of EU provisions.

These results were expected, and confirm how the issue is reserved for a niche group of specialists, even within associations with strong representation, which ignore it in their day-to-day activities and are not used to tackling the matter. It is hoped that some corrective measures can be implemented through the subsequent training activities. Above all, in several answers, it can be understood that posting concerns only workers in top positions, within groups with a strong

international vocation. These answers are interesting due to the inherent error in their approach. In fact, it refers to the case of postings defined clearly and transparently as such right from the outset by the companies, with the related, complete, or at least substantial, compliance with the worker protection laws. On the contrary, it is the workers' representation organisations, which should have demonstrated full interest in the matter, that have not understood how the European directives should safeguard the rights of groups of low-skilled workers hired for factory positions. These workers are involved in collective initiatives, often behind the façade of contracted works. Despite the many answers (either by completing the questionnaires or in the brief messages sent by e-mail), this aspect did not emerge and seems to be outside of the scope of trade union debate.

##### *5. The first results on information for workers.*

Obtaining answers from workers was not easy due to practical problems in meeting them, in a time of social distancing. So information had to be gathered by telematic means or video conference. In particular, this made it difficult to have contact with older workers, who are unfamiliar with completing the questionnaires and whose answers were often short e-mail messages. In any event, in line with expectations, in this area the complete lack of awareness of the very concept of transnational posting and of the European laws emerged.

If any, the answers from top managers, middle managers and medium- or high-level office workers were significant, as they show some knowledge of the matter only where directly involved or if it came up with colleagues or other people with whom they have close professional and personal relations. Even in this field, poor consideration of the issue emerged, where seen outside of specific events and, therefore, as a general cultural or significant topic, particularly among public opinion. The conclusion was taken for granted, considering the complexity of the issue and its sectoral analysis, with a low level of consideration even among trade union associations. Not by chance, the project aims, to investigate the situation further, particularly among metal engineering firms, are justified.

The conclusions of the investigations do not differ greatly from those reached by trade union organisations or firms. We talk of posting only if there is an order of the employer which defines it as such right from the start and attributes the correct qualification, so that, in similar situations, the EU regulation is often complied with, without any significant practical or legal trauma. Even top and middle managers do not question whether they constitute postings or not, leading to the corresponding protections being assured in many tenders and other contracts between companies involving the temporary transnational movement of groups of factory or other low-skilled workers. Not by chance this issue is neglected, even by people who have worked in the companies in which the phenomenon has occurred. The conclusion is not very comforting; if the fundamental guidelines are ignored and the objective misunderstood, how can the European regulations be effective? These unconscious infringements are all the more serious when, as shown in this research, they are used by individuals with significant professional competence and significant cultural awareness. The final statistical data should clearly underline this.

#### *6. The first indications from the territorial labour inspectorates.*

The first results of the investigations with the territorial labour inspectorates, not by chance the preferential recipients of the project, were very interesting. Despite the widespread effort and the involvement of the directors of two territorial labour inspectorates in the distribution of the questionnaires, few answers were received, albeit very precise and detailed. This could be due to the impact of the social distancing measures, which have forced a large majority of Italian civil servants to work from home, with clear problems in communication and coordination, which still have to be resolved. All efforts are being made to scale up the contacts, with the help of the directors, who, it is reported, also took part in the press conference in October 2020, with brief reports. On the basis of these and the formal answers given, the initial assumptions of the project were confirmed. On the other hand the issues not always understood by firms, trade unions and workers' associations, i.e. the increasing and significant number of inspections performed on

infringements of EU posting regulations, the strengthening of administrative checks following the latest provisions of the Italian legislator and the unscrupulous recourse to contracts to elude the obligations, sometimes with no awareness of the very existence of the relevant provisions.

In particular, the reports (very detailed and set out with considerable legal accuracy) underlined the growth of the phenomenon (of course, prior to the impact of the epidemic, the consequences of which cannot yet be assessed) and its widespread use among metal engineering companies, as well as in construction and transport sectors. It should be noted that there were no cases mentioned in relation to care and personal services, with the trend, confirmed by the investigation, in relation to companies. We may think that the inspectorates that have answered so far are those best equipped for the matter, and this helps to explain the statements made on the gravity of the phenomenon. Only further research will clarify whether there have been similar developments in all territories (although few answers were received, these concern three regions, Emilia–Romagna, Veneto and Lombardy). The answers can only be found in further investigation, hoping to reduce the current organisational difficulties.

To varying degrees, all public interlocutors complained of the poor awareness of companies, and, although with due caution, the position of the public administrations allows us to understand how some companies carry out significant transnational operations involving the physical movement of workers with no knowledge of the European regulations and the related obligations. Only one report refers precisely to the requests for clarification submitted by companies, a negligible number on its own account and, even more so, in relation to the complexity of the issue. As is inevitable, the inspections have mostly highlighted even severe infringements, often concerning alleged contracts, either deliberately concluded for the purpose of evading the law or established in an approximate manner.

All the reports referred to forms of cooperation with institutions of other Member States, through the ICT tools available, although with diverging assessments on their operation and suitability. In particular, contacts were far more intensive and frequent for the only inspectorate in Lombardy that submitted a (very

complete and substantiated) report. It is premature to wonder if this depends on contingent factors or the deeper roots of the business initiatives and the frequency of contacts with foreign interlocutors. As many of the requests of the authorities in other countries concerned the construction sector, we could think of specific initiatives for local Lombardy firms, particularly in this business area, also with the involvement of interlocutors from other countries.

All the reports highlighted the need for increased cooperative relations with foreign authorities, and recognised the lack of agreed inspection strategies discussed in advance within the dialogue with bodies from other Member States and, therefore, the hypothesis on which the project was based is confirmed. On the other hand, the answers demonstrate the considerable knowledge of the officials involved (as well as their great willingness to cooperate) and encourage the pursuit of the project objective, above all because, for now, the effectiveness of the EU provisions relate to initiatives to fight the phenomenon, while many of the debatable actions of the firms (those involving significant numbers of low-skilled workers) are performed with no awareness of the obligations and risks. The competence of the inspectorates and those of company groups which also resort to incoming and outgoing postings mostly for highly paid workers in managerial positions, is of little comfort.