Liberté • Égalité • Fraternité
RÉPUBLIQUE FRANÇAISE

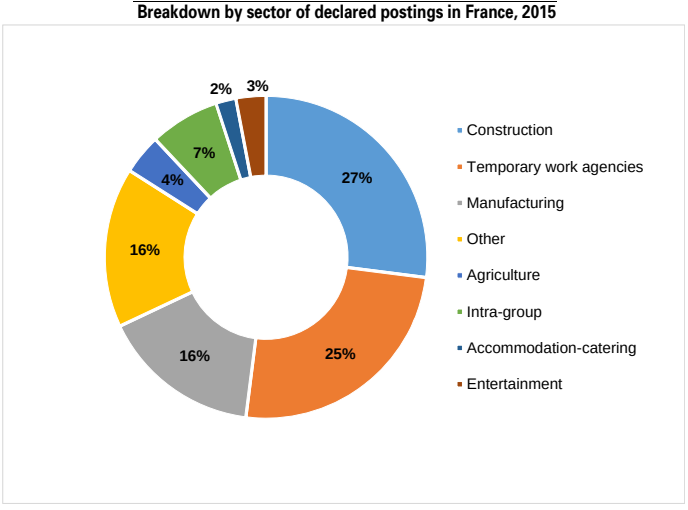
No. 171
June 2016

TRÉSOR-ECONOMICS

Social competition from posted workers in France: misconceptions and realities

- A posted worker is an employee assigned temporarily by his or her employer to the territory of a Member State of the European Union other than the State in which he normally works and in which the employer is established. Unlike migrant workers-to whom the Community principle of free movement of persons applies-the posting of workers rests on the principle of free provision of services.
- France is the second host country in Europe after Germany, with 229,000 posted workers in 2014, or less than 1% of the French labour force. France is also one of the three countries that post the largest number of workers after Poland and Germany. The typical profile of a posted worker in France is a Polish, Portuguese, Spanish or Romanian manual worker in the construction industry.
- Postings raise the issue of potential tax and social competition between Member States. The cost of posted workers may prove lower than the cost of non-posted workers depending on whether or not the host country applies minimum wages (as posted workers may accept lower pay if wage levels in their home countries are lower), differentials in employers' social contribution rates, and the contribution assessment base.
- In France, the existence of minimum wages limits competition from posted workers vis-à-vis non-posted workers and acts as a protection mechanism. The official minimum wage, known as Salaire Minimum Interprofessionnel de Croissance (SMIC), applies to all employees including posted workers, as do most collective agreements, which apply to all employees of a specific sector owing to the near-systematic extension of industry agreements.
- At SMIC level, the labour cost for a worker posted in France by a Spanish, Polish, Portuguese or Romanian firm is broadly equivalent to that of a local worker for a French firm. Differentials might be observed at higher wage levels.
- However, some firms seeking to minimise labour costs take advantage of grey areas in EU legislation that may encourage optimisation strategies and abuse.
- France and the European Commission have put forward proposals to combat these trends. The Commission has submitted to the Member States a proposed revision of the Directive on posting of workers, which is currently under discussion.

Breakdown by sector of declared postings in France, 2015



Source: French Directorate-General for Labour (Direction Générale du Travail) (2016), dossier for French national commission to combat illegal work.

MINISTÈRE DES FINANCES ET DES COMPTES PUBLICS

MINISTÈRE DE L'ÉCONOMIE DE L'INDUSTRIE ET DU NUMÉRIQUE

1. Posting of workers in France: what does the term cover?

1.1 Temporary mobility based on the Community principle of free provision of services

Unlike migrant workers–to whom the free movement of persons applies–**the status of posted workers[1] is determined by the Community principle of free provision of services[2]:** posted workers normally work in their Member State of origin, but their employer can send them temporarily–and for a period that is not supposed to exceed 24 months[3]–to another Member State of the European Union in order to provide a service.

Directive 96/71/EC (1996) specified three types of postings available to firms:

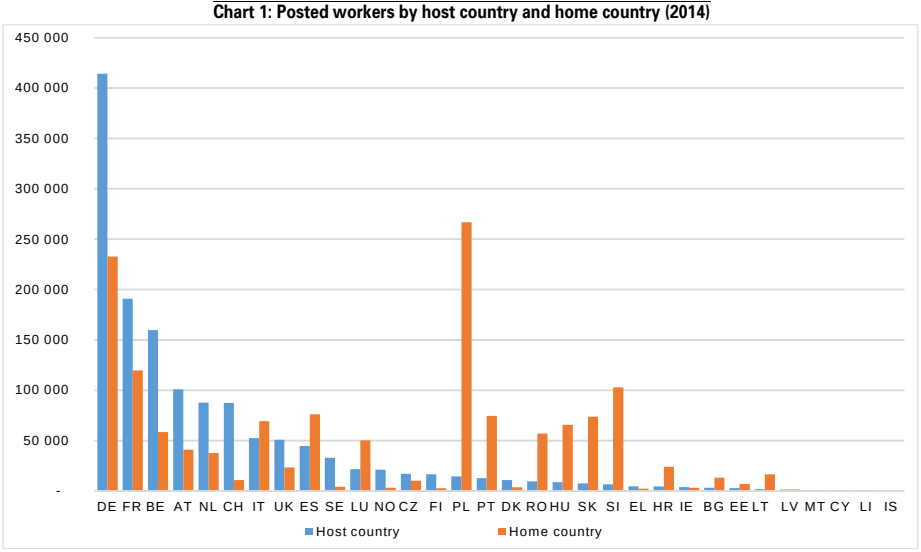
- posting, in its standard sense, consists in a firm established in a Member State sending employees to another Member State to provide a service there (under a business contract or subcontracting contract);
- posting may concern workers employed and posted by a temporary employment agency or placement agency;
- posting may also be carried out within an enterprise group, to allow the temporary transfer of employees between firms or local units of the same group established in different Member States.

1.2 A phenomenon that is spreading in some sectors but remains limited in overall scope

The number of posted workers in the EU is estimated at 1.9 million[4], i.e., only 0.7% of total jobs in the EU. While postings rose by nearly 45% between 2010 and 2014, **they are heavily concentrated in certain economic sectors**. The construction industry alone accounts for 43.7% of the total, although the percentages are also significant in manufacturing (21.8%), education, health and social services (13.5%) and business services (10.3%).

In terms of host countries, over 80% of postings are to the longest-standing Member States of the EU[5]. According to the European Commission, the main host countries in 2014 were Germany (414,220 posted workers), France (190,848[6]) and Belgium (159,753) (see Chart 1).

Chart 1: Posted workers by host country and home country (2014)



Source: Pacolet, J. and de Wispelaere, F. (2015), Posting of workers, Report on A1 portable documents issued in 2014, European Commission.

(1) Governed by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(2) Article 56 of the Treaty on the Functioning of the European Union.

(3) Regulation (EC) No 883/2004 on the coordination of social security systems, setting the maximum duration of postings at 24 months. In the interest of certain categories of employees or certain individual employees, the posting may be exceptionally extended beyond 24 months, subject to the joint agreement of the competent organisations of each Member State. In the event that the organisations turn down the request, the employee is subject to the legislation of the country where the provision of services is performed, and social contributions must be paid in that country. The Directive, however, does not specify the 24-month maximum posting duration. Because of this absence of limitation, employers extend postings in an undue manner.

(4) Pacolet, J. and de Wispelaere, F. (2015), "Posting of workers, Report on A1 portable documents issued in 2014", European Commission.

(5) EU-15 (Europe of Fifteen): Belgium, France, Italy, Germany, Luxembourg, Netherlands, Denmark, Ireland, United Kingdom, Greece, Spain, Portugal, Austria, Finland and Sweden.

(6) The statistics published by the European Commission are prepared from the A1 forms. They differ from the data published by the French Directorate-General for Labour (DGT), prepared from the declarations of provisions of services filed with local labour inspectorates.

In terms of home countries, firms in the EU-15 post more workers than firms in Member States that joined the EU in 2004/2007/2013 or the European Free Trade Association (EFTA)[7] (55% versus 45%) but the share of the latter is rising steadily. In absolute terms, the three countries that posted the largest number of workers in 2014 (see Chart 1) were Poland (266,745 workers), Germany (232,776) and, to a lesser degree, France (119,727), which posts workers mainly to cross-border countries (Belgium, Germany, United Kingdom, Spain and Italy).

1.3 In France, the typical profile of a posted worker is a Polish, Portuguese, Spanish or Romanian manual worker in the construction industry

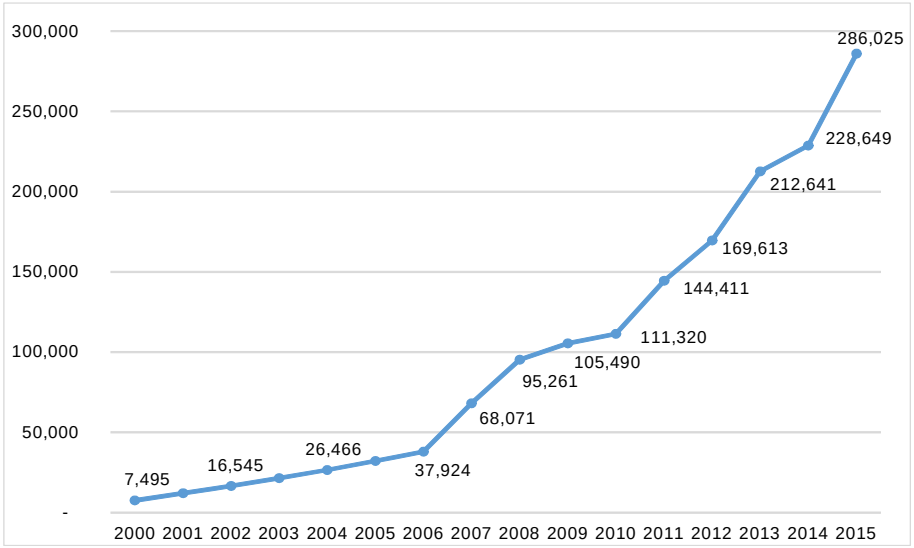
According to France's Directorate-General for Labour (Direction Générale du Travail: DGT), the number of posted workers exceeded 286,000 in 2015, compared with under 10,000 in 2000[8]. Despite the rapid growth in their number[9] (see Chart 2), posted workers represent only 1% or so of the French labour force.

In 2015, 75% of posting declarations were filed in seven Member States of the EU-15[10]. However, because of the "cascaded" provision of services between firms, the breakdown of declarations by home country needs to be nuanced. An analysis by nationality shows that Poland was the main source of posted workers in France (46,816), ahead of Portugal (44,456). In 2015, Spain became the third largest supplier of posted workers to France (35,231), ahead of Romania (30,594).

In terms of skills, 83% of posted workers in France are manual workers. Managerial staff account for only 5%. By sector, the heaviest users of posted workers are the construction industry, the temporary work sector and manufacturing (see chart on p. 1).

However, most declarations of postings in the construction industry-the leading activity sector for posted workers from Member States that joined the EU in 2004/2007/2013-are filed by the 15 older EU Member States, who reported 62% of postings in 2014. The construction industry is experiencing significant hiring problems: employers report difficulties in filling vacancies in 45.4% of hiring plans, versus 32.4% for all economic sectors combined[11]. The lack of skilled labour to meet construction job requirements is thus an argument for the use of posted workers.

Chart 2: Posted workers in France, 2000-2015



Source: Direction Générale du Travail (2016), dossier for French national commission to combat illegal work.

1.4 In principle, the applicable social legislation is that of the home country and, as an exception, that of the host country

The 1996 Directive on posting of workers sought to promote competition while guaranteeing social protection for posted workers.

The posted worker is a paid employee. Therefore, a direct link must exist between the worker and the firm that posts the worker. The employee continues to work under the employment contract signed with the firm that assigns him or her abroad and under the firm's responsibility. Legally speaking, posted workers are therefore governed by the social legislation of the Member State in which their employer is located. This rule is fully applicable for social protection law, particularly concerning unemployment, retirement and accidents at work[12] (posted workers do, however, have

(7) European Free Trade Association: Iceland, Liechtenstein, Norway and Switzerland.
(8) DGT (2016), dossier for the National Commission to Combat Illegal Work, 30 May 2016.
(9) This growth is partly due to improved efficiency in statistical coverage and greater compliance with regulations on the filing of declarations.
(10) Spain, Poland, Portugal, Germany, Romania, Luxembourg and Italy.
(11) Rodriguez, O. (2015), "Le secteur de la construction et ses métiers", Statistiques et indicateurs no. 15.03, Pôle Emploi.
(12) Regulation (EC) No 883/2004 of 29 April 2004 on coordination of social security systems.

access to the host country's healthcare system thanks to the European health insurance card). **Employers' and employees' social contributions are thus paid in the home country where the employer is established**[13].

However, regarding labour law, the directive stipulates that posted workers shall be covered by a nucleus of mandatory rules in the host country, particularly minimum wage rules including overtime rates. This nucleus also covers maximum work periods and minimum rest periods, minimum paid annual holidays, health, safety and hygiene at work, protective measures with regards to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination[14].

The French Labour Code (Code du Travail)[15] also spells out the provisions of French labour law that apply to posted workers. It accordingly incorporates the previous terms and conditions listed in the Directive. But it adds other rules such as those on individual and collective freedoms in the work relationship, decent accommodation conditions and the right to strike.

As a result, provisions in French labour law on terminations and breaches of employment contracts, worker representation, occupational training and insurance plans are not applicable to posted workers. In these areas, the legislation of their home country applies.

2. The French institutional framework restricts social competition from legal postings

The public debate on posting often confuses two issues: illegal postings (see §3 below) and legal postings that comply with the framework defined by Directive 96/71/EC and Regulation 883/2004/EC. As posted workers keep their home country's social protection, and given the diversity of social protection systems in the EU, the potential for tax and social competition between Member States is indeed a real issue. The cost of posted workers may prove lower than that of local workers depending on the existence of minimum wages in the host country (§2.1) and on differentials in employers' social contributions (§2.2) and their assessment base (§2.3).

2.1 The existence of a minimum wage limits competition from posted workers vis-à-vis non-posted (i.e., local) workers and acts as a protection mechanism

The posted worker must be paid at the gross minimum wage rate of the host country, excluding posting-related expenses. In France, posted workers must be paid a wage at least equal to the gross SMIC (see Box 1) or the gross minimum wage stipulated by the applicable extended collective agreement when that wage exceeds the SMIC (see Box 2).

Posted workers' pay may include three components:

- **A basic wage:** this may be set at a relatively low level, as the reference wage for posted workers is the minimum wage in their home country; posted workers may therefore accept a lower wage than that of local workers whose reservation wages[16] are higher.
- **A posting allowance,** which supplements the basic wage (bonus or expatriation allowance) and enables the worker to match the host country's gross minimum wage stipulated by law or by collective agreement.
- **Coverage by the employer in the form of reimbursements to workers of posting-related expenditures and expenditures** paid directly by the employer (travel, accommodation and food). This coverage offsets the charges that the employee would not have incurred without a posting, or if (s)he had carried out the assignment in his or her home country (these charges represent the excess costs due to posting).

Under the French Labour Code[17] and consistently with EU jurisprudence[18], posting allowances are taken into account to assess compliance with the host country's minimum wage, but the assessment excludes the allowances covering only the posting-related excess costs that cannot be charged to the posted worker[19]. In practice, it may prove highly complicated for a firm to determine which pay components need to be taken into account in order to comply with legal or contractual provisions (see Box 1).

In the absence of minimum wage set at national level or in a collective agreement generally applicable in the host country, no minimum wage can be imposed for posted workers. For the Court of Justice of the European Union, which has had to rule on several cases concerning Germany and Scan-

(13) In compliance with Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004.
(14) According to the interpretation of the Court of Justice of the European Union (CJEU), this nucleus should be understood in a restrictive sense, and therefore cannot be expanded by a Member State for its own purposes. See Box 1.
(15) Art. L. 1262-4 of the French Labour Code (Code du Travail).
(16) The reservation wage is defined as the minimum wage below which an unemployed person will turn down a job offer. The tensions over hiring observed in various sectors, particularly the construction industry, may have driven up the reservation wage. Differentials in purchasing power parity and taxation between Member States also influence the supply of foreign labour.
(17) Art. R. 1262-8 of the French Labour Code (Code du Travail).
(18) CJEU, 12 February 2015, no. C-396/13.
(19) CJEU, 12 February 2015, no. C-396/13.

dinavian countries (see Box 2), a foreign firm employing posted workers cannot be required to pay a minimum wage set by a collective agreement that is not declared to be generally applicable. In other words, EU judges placed the countries concerned in a dilemma: they would either have to give up attempts to impose a minimum wage for posted workers, or have to change their social model by introducing a minimum wage at national level or through generally applicable collective agreements. This is one of the reasons why Germany began to introduce industry-specific minimum wages (see Box 3). Indeed, postings of workers in countries that do not apply a minimum wage can generate distortions in competition between EU Member States.

In France, such competition from posted workers against local workers in French firms is legally impossible. The SMIC is a legal minimum wage that applies to all workers including posted workers. Similarly, most collective agreements are generally applicable owing to the nearly systematic procedure for extending industry-specific agreements: more than 90% of French employees are covered by an extended industry-specific agreement.

Box 1: **Calculating the minimum wage for a posted worker**

Directive 96/71/EC stipulates that Member States shall ensure that workers are paid "the minimum rates of pay, including overtime rates" and that "the concept of minimum rates of pay is defined by the national law and/or practice of the Member State to whose territory the worker is posted." In France, the minimum rate of pay is the gross hourly SMIC (€9.67) or–when it exceeds the SMIC–the minimum wage defined by the applicable extended collective agreement. It is not always easy, however, to determine which pay components must be included to verify compliance with minimum wage rules.

1/ The pay components taken into account to assess compliance with minimum wage requirements have been spelled out by the French Court of Cassation and the European Union Court of Justice (CJEU)

The CJEU ruled that the task of defining the minimum wage components for the enforcement of Directive 96/71/EC was a matter for the law of each Member State, provided that this definition does not hinder the free provision of services between Member States[a]. The CJEU thus controls the components of the minimum wage defined at national level. The CJEU accordingly found that certain bonuses, such as the 13th month of pay, form part of the minimum wage, as they do not alter the relationship between a worker's provision of services and his or her remuneration[b]. More specifically, the CJEU[c] stated that a daily travel allowance and a holiday allowance formed part of the daily wage. By contrast, coverage of housing expenses and food vouchers are not included in the minimum wage.

To determine if the basic pay is at least equal to the SMIC, the French Court of Cassation takes into account all the components of the remuneration paid to employees for their work. Accordingly, the Court regards holiday, 13th month, and inventory bonuses as remuneration for work performed. Benefits in kind such as a company car or lodging may also be treated as components of basic pay. Lastly, tips should be included in the determination of SMIC compliance.

Pay components not directly tied to the provision of work are not part of basic pay and are therefore excluded from SMIC compliance tests. Examples include: bonuses for employee attendance or seniority; performance bonuses if they are awarded not for each employee's personal performance but for the firm's financial results or overall production; bonuses linked to geographic location (islands, dams, construction sites) or special working conditions (such as hazards, cold, or unsanitary conditions); and employee share-ownership or profit-sharing plans.

2/ The difficulty of complying with the minimum wage stipulated in a collective agreement

Extended collective agreements provide for various types of remuneration (industry-specific bonuses and benefits) to complement basic pay, all of which constitute the standard minimum wages defined in collective agreements. The complexity of these components makes it hard for a firm to determine compliance with the minimum wage applicable to a posted worker in France[d]. A clarification would be all the more necessary as Directive 2014/67/EU[e]spells out an obligation to report: information on the minimum wage and its components must be accessible and transparent for service providers from other Member States and for posted workers.

a. CJEU, 7 November 2013, case C-522/12, Isbir.
b. CJEU, 14 April 2005, case C-341/02, Commission of the European Communities vs. Germany.
c. CJEU, 12 February 2015, case C-396/13, Sahkoalojen ammattiliitto ry vs. Elektrobudowa Spolka Akcyjna (ESA).
d. Lhernoud, J.-P. (2015), "Détachement transnational vers la France: comment calculer le salaire minimal dû au salarié détaché?", *Droit social*.
e. Article 5 para. 4 of Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC: "Where, in accordance with national law, traditions and practice, including respect for the autonomy of social partners, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3(1) and (8) of that Directive, Member States shall ensure that those terms and conditions are made available in an accessible and transparent way to service providers from other Member States and to posted workers, and shall seek the involvement of the social partners in that respect. The relevant information should, in particular, cover the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and, where relevant, the qualifying criteria for classification in the different wage categories."

Box 2: **Three rulings by the European Union Court of Justice have specified the rules concerning posted workers**

The facts:

In the Laval case[a], a Latvian firm, after winning a bid in Sweden to build a school, posted Latvian workers there. Despite negotiations with Swedish labour unions, the Latvian firm refused to sign the Swedish construction industry's collective agreement imposing minimum wages. The Swedish union responded with collective action by blockading all of Laval's building sites in Sweden. After work had been interrupted for a certain period of time, Laval was declared bankrupt.

In the Ruffert case[b], a German Land had awarded a contract for the construction of a prison to a German firm. The contract required the firm to abide by the minimum wage stipulated in the collective agreement. The German firm hired the services of a subcontractor based in Poland, who posted Polish workers without complying with the minimum wage defined in the collective agreement. In response, the Land cancelled the contract.

In both cases, the European Union Court of Justice ruled in favour of the firms that used posted workers.

In what is known as the Luxembourg case[c], the Commission brought action against Luxembourg for failure to transpose Directive 96/71/EC. In particular, the Commission found that the obligation to appoint a representative residing in Luxembourg for firms posting workers without permanent establishment in Luxembourg constituted a restriction on the free provision of services.

Legal impact of these three cases:

1/ A collective agreement that is not generally applicable does not apply to posted workers

In the Laval and Ruffert rulings, the Court found that the provisions of the collective agreements did not apply, as the agreements were not generally applicable. Only the provisions of a law or generally applicable collective agreement can apply to firms established in another Member State.

2/ The right to strike may be subject to restrictions in the name of the free provision of services

In the Laval ruling, the Court recognized that the right to take collective action–for example, to strike–is a basic right that must be reconciled with the other basic freedoms guaranteed by the Treaties, such as the free provision of services. The exercise of that right may thus be subject to restrictions. The Court found that the collective action was not justified in the name of worker protection. In support of this argument, it stated that the lack of minimum wages at national level or through generally applicable collective agreements showed that the State did not deem the enforcement of these minimum wages to be of sufficient general interest, as these wages did not apply to all employers established in that State.

3/ The Court determines if the additional administrative rules imposed by Member States on firms posting workers are justified and proportionate to the principle of free provision of services

In the Luxembourg ruling, the Court examined if the administrative requirements imposed on firms using posted workers, insofar as they interfere with the principle of free provision of services, were justified and proportionate to the desired objective. The Court found that the additional administrative rules on the appointment of a representative residing in Luxembourg in the name of combating abuses–as well as in the name of exercising efficient control–were disproportionate.

a. C-341/05 Laval un Partneri Ltd vs. Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundets avdelning 1, Byggettan and Svenska Elektrikerforbundet, ruling of 18 December 2007.
b. C-346/06 Dirk Ruffert, acting as receiver for Objekt und Bauregie GmbH & Co. KG vs. Land Niedersachsen, ruling of 3 April 2008.
c. C-319/06, Commission of the European Communities vs. Luxembourg, ruling of 19 June 2008.

Box 3: **The example of competition from the German pork industry**

The food industry-specifically, in this instance, pork cutting-is highly labour-intensive. The main EU member countries are pork producers. This makes the pork industry a particularly relevant example of the tensions between competition and social rights in the EU.

Within the past decade or so, Germany has become the EU's leading pork producer, accounting for one-fifth of total production[a]in 2010. It has achieved this status thanks to an offensive industrial strategy based on reducing production costs and improving competitiveness. While the increase in German competitiveness is due to several factors such as the concentration of pig-farming facilities, the strategy has relied strongly on lowering labour costs through a massive use of posted workers. Coming from Poland, Romania and Bulgaria, posted workers account for as many as 90% of employees in certain German slaughterhouses. The German Food Workers' Union (NGG) puts the proportion at 75% of the total workforce of German slaughterhouses.

The absence of a minimum wage in the industry made it possible to pay posted workers at a lower rate than non-posted workers. Moreover, Germany has experienced several scandals involving abuses in posted workers' status-to the point that the German press has described Mafia-like arrangements[b] including exorbitant withholdings from wages for accommodation and food, as well as appalling living conditions. Motivated by the perception of distortions in competition due to German practices that it regarded as incompatible with EU rules, Belgium took its case to the European Commission in March 2013.

Amid these scandals on pay and living conditions in the slaughtering and meat cutting sector, the situation of posted workers featured in the debate over the minimum wage in Germany in late 2014. The outcome was the introduction of a gross minimum hourly wage of €8.50 on 1 January 2015 applicable to all employees not covered by collective agreements. In the meat industry, for instance, the German Food Workers' Union (NGG) and the employers' federation (ANG) signed a wage agreement in early 2014 introducing a (gross) minimum hourly wage of €7.75 in the industry on 1 July 2014, with stepped increases to €8.75 by 1 December 2016. This level, close to the French SMIC at €9.67, should partly narrow the competitiveness gap. The agreement was made mandatory by a decree of the Federal Labour Ministry extending it to all industry employees: the decision affected approximately 100,000 people, including employees working under contracts for individual assignments.

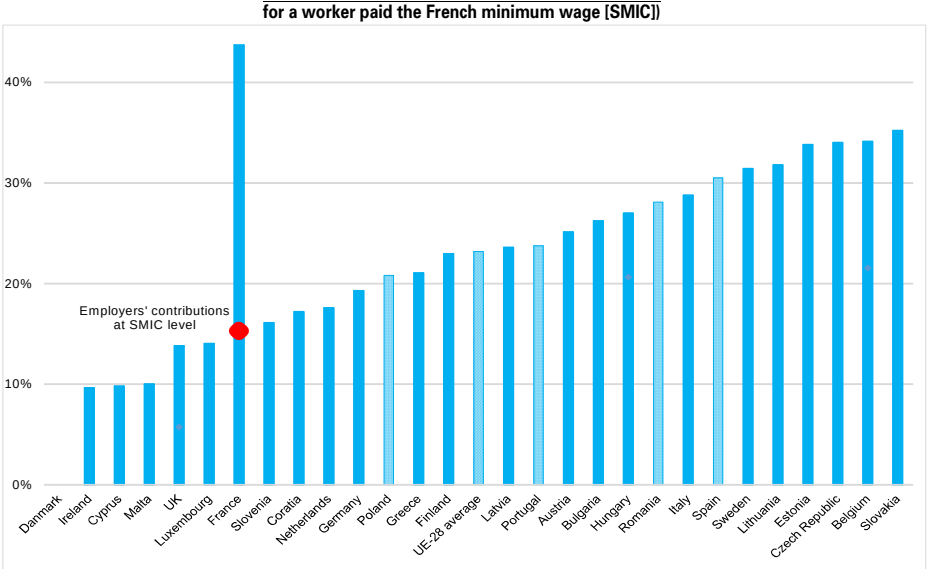
a. Roguet, C. and Rieu, M. (2012), "Essor et mutation de la production porcine dans le bassin nord-européen: émergence d'un modèle d'élevage transfrontalier inédit" (http://agriculture.gouv.fr/essor-et-mutation-de-la-production-porcine-dans-le-bassin-nord-europeen-emergence-dun-modele).
b. "Die Fleisch-Mafia" (The Meat Mafia), report on Das Erste ("The First"), the German public television network operated by ARD, 2015.

2.2 Exemptions from social contributions on low wages restrict the economic advantage of using posted workers

The gaps in employers' contribution rates between countries contribute to the gaps in labour costs between posted and non-posted workers at an equivalent remuneration level. As the social protection system applying to posted workers is that of the posting firm's home country, social contributions are paid in the home country based on prevailing rules and rates applied to the gross wage defined under the host country's rules. While employees' contributions are deducted from gross wages, employers' contributions are added to them: employees' contributions impact the net wage paid to the posted worker, whereas employers' contributions affect the labour cost for the employer.

The rate of employers' contributions in France is, on average, among the highest in Europe. At minimum-wage level, however, it ranks slightly below the EU average owing to targeted exemptions (the United Kingdom, the Netherlands, Belgium and Hungary implement similar policies but on a lesser scale[20]). According to a European Commission study, posted workers are often at the bottom of pay scales in collective agreements[21]. In the absence of detailed information, we assume that, given their low skills and seniority, a large proportion of posted workers in France are paid at close to the minimum wage (SMIC). Since 2015, however, the rate of employers' social contributions on minimum wages in France is lower than the EU-28 average owing to reductions in contributions on low wages implemented in such initiatives as the Responsibility and Solidarity Pact and a programme of across-the-board cuts in charges (see Chart 3). At this wage level, employers' social contributions for firms established in Poland, Portugal and Romania[22] exceeded those for French-based firms in 2015.

Chart 3: Rates of employers' contributions at 1 January 2015 (the red dot shows employers' contributions for a worker paid the French minimum wage [SMIC])



Source: Centre des Liaisons Européennes et Internationales de Sécurité Sociale (CLEISS). Chart: DG Trésor.

2.3 Strategies for minimising the employers' contribution base do not suffice to make labour costs for posted workers from Spain, Poland, Portugal and Romania paid at minimum-wage level lower than for employees of French-based firms

Each Member State is free to set the social contribution base and can therefore decide to partly or totally exclude posting allowances from the employers' contribution base. For example, the allowance is not subject to contributions for firms based in Spain, Portugal and Romania.

Assuming a firm seeks to minimise labour costs, it will pay the posted worker a basic wage equal to the home country minimum wage (€757 in Spain, €589 in Portugal and €218 in Romania at 1 January 2015), on which employers' contributions are based, plus a posting allowance that will bring the total wage up to the host country's minimum wage. In Poland, contributions are calculated on a notional wage equivalent to the average wage. In 2015, this notional base was set at approximately €955–more than double the €410 minimum wage[23]. In France, the social contribution

(20) OECD (2015), Employment outlook.

(21) Lhernould, J.-P., Coucheir, M., Fisker, S., Madsen, P.-G. and Voss, E. (2016), "Study on wage-setting mechanisms and minimum rates of pay applicable to posted workers in accordance with Dir. 96/71/EC in a selected number of Member States and sectors" European Commission.

(22) See §1.3.

(23) This regulation seeks to avoid a situation where posting allowances would have entailed an excessive reduction in the minimum base for assessing social contributions and thus the corresponding receipts.

base is the gross minimum wage (SMIC), or €1,458 at 1 January 2015.

But this strategy of minimising the social contribution base is partly offset by:

- enforcement of the official French minimum wage (or the minimum set by collective agreements) and employer coverage of posting-related expenses[24] (see §2.1);
- the low rate of employers' social contributions at SMIC level for workers in French-based firms (see §2.2).

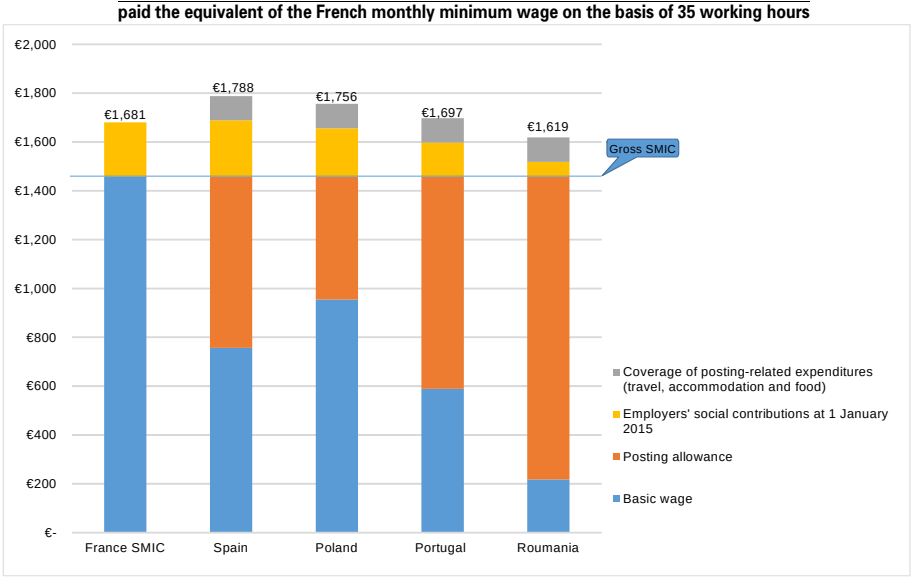
Overall, in terms of labour costs, for a worker paid the minimum wage (SMIC), the legal use of a worker posted in France by a firm based in Portugal, Romania, Poland or Spain is equivalent to using the workforce of a French-based firm, for a coverage of posting-related expenditures of only €100/month (which seems a conservative assumption) (see Table 1 and Chart 4).

Table 1: Comparison of labour costs in France between local workers and posted workers from Spain, Poland, Portugal and Romania paid the equivalent of the French monthly minimum wage on the basis of 35 working hours

		France SMIC	Spain	Poland	Portugal	Roumania
Basic wage	(1)	€1,458	€757	€955	€589	€218
Gross minimum wage at 1 January 2015 (source: Eurostat)		€1,458	€757	€410	€589	€218
Posting allowance	(2)		€701	€503	€868	€1,240
Gross pay excluding coverage of posting-related expenditures	**(3)=(1)+(2)**	€1,458	€1,458	€1,458	€1,458	€1,458
Coverage of posting-related expenditures (travel, accommodation and food)	(4)		€100	€100	€100	€100
Gross total pay	(5)=(3)+(4)	€1,458	€1,558	€1,558	€1,558	€1,558
Social contribution base	(6)=(1)	€1,458	€757	€955	€589	€218
Employers' social contributions at 1 January 2015 (t.e. = employers' contribution rate)	(7)=(6) x te	€223	€231	€199	€140	€61
Employers' contribution rate (%) (source: CLEISS)	te	15%	31%	21%	24%	28%
Labour cost	**(8)=(5)+(7)**	**€1,681**	**€1,788**	**€1,756**	**€1,697**	**€1,619**

DG Trésor calculations.
Étude de cas élaborée à partir du questionnaire Cese/Dares, DAEI (2015), « Le travail détaché : synthèse des contributions en 30 questions », Contributions des services économiques .

Chart 4: Comparison of labour cost in France between local workers and posted workers from Spain, Poland, Portugal and Romania paid the equivalent of the French monthly minimum wage on the basis of 35 working hours



DG Trésor calculations (see table 1),
Case study prepared from CESE/DARES questionnaire, DAEI (2015), Le travail détaché: synthèse des contributions en 30 questions, Contributions from economic affairs departments in French embassies.

The estimated labour cost for French workers could be even lower if the calculation included the "Competitiveness and Employment Tax Credit" (Crédit d'Impôt Compétitivité Emploi: CICE), for which employers of posted workers are not eligible. It is equal to 6% of gross pay for wages not exceeding 2.5 times the minimum wage (SMIC).

The findings could, however, be different if we examined higher pay levels[25]:

- For pay rates above the SMIC, but identical for pos-

(24) Art. R. 1262-8 of the French Labour Code, transposing the provisions of Article 3 of Directive 96/71/EC to French law.

ted and local workers, the employers' contribution rate in France is less advantageous.

- At an equal skill level, local workers' pay probably exceeds that of posted workers, who are ineligible for bonuses and pay supplements, or for seniority-based promotion as stipulated in company agreements.

3. This system has grey areas that can encourage abuses and invite forms of social dumping[26]

As the status of posted workers is shrouded, to a certain degree, in legal uncertainty, it may foster sometimes abusive or even fraudulent labour-cost optimisation strategies aimed at lowering labour costs as far as possible[27] [28]. These irregularities can widen the labour-cost gap far more than would be the case with a legal posting. Initial criticism came from trade unions, which denounced the exploitation of posted workers. The criticisms were then taken up by employers, who denounced unfair competition[29].

3.1 A system adrift between labour-cost optimisation, abuse and fraud[30]

A recent report by the French High Council for the Funding of Social Protection[31] distinguishes between three types of irregularities:

(1) **Improper classification of assignments as postings.** This is particularly the case with employers who choose to operate from countries where social contributions are low. They can thus benefit from legislation on postings, which gives them a sometimes substantial competitive advantage over local firms. Because of these firms' minimal activity in their "home" countries, they are known as "letterbox" or "empty shell" companies.

(2) **Non-compliance with home country regulations on payment of social security contributions.** The distance generated by posting between the social security administration and the workplace can make it hard to verify that contributions have actually been paid in full. Moreover, the lack of legal provisions for posting allowances and expenditure allowances in certain Member States– and of harmonisation at EU level–allows firms to minimise their social contribution base and therefore their social security payments. For instance, Romania's National Tax Administration Agency accused local temporary employment agencies of fraud in calculating social security payments by lowering the wages stipulated in contracts (and thus the social contribution base) and paying substantial allowances to posted temporary workers so as to match minimum pay levels in the host countries[32] .

(3) **Non-compliance with host country regulations.** Employment contracts that seem legal may conceal many illegal provisions enabling posted workers to be paid below the minimum levels set by law and collective agreements. Examples include: number of hours worked exceeding the number of hours paid; no extra rate for overtime, if paid; non-compliance with maximum working periods; and deduction of posting-related expenditures (such as transport and accommodation) from the minimum pay. A European Commission study found that, in certain sectors, particularly road transport, posted workers were paid up to 50% less than local workers[33]. Sub-standard living and working conditions allowing employers to reduce labour costs have also been observed, such as cheap accommodation with inadequate or even unacceptable conditions, and hiring of posted workers who have used their freedom of movement to travel at their own expense to the host country for postings.

(25) See annex IV of the impact study on the proposed revision of Directive 96/71/EC, which finds labour cost differentials of approximately 20-30% in favour of Polish, Romanian and Portuguese posted workers in the construction sector. The calculation incorporates the assumption that posted workers are paid at the minimum wage stipulated in collective agreements, whereas French workers are paid at the average wage; moreover, the estimated labour cost does not include employers' coverage of posting-related expenditures.

(26) In 2006, France's Economic, Social and Environmental Council (CESE) defined social dumping as "a practice consisting in violating, circumventing or restricting legal social rights and using these differentials to obtain an advantage that resembles unfair competition". Marteau, D. (2006), « *Enjeux et concurrence internationale: du dumping social au mieux-disant social* », Avis du CESE [CESE opinion], brochure no. 20.

(27) Grosset, J. and Cieutat, B. (2015), « *Les travailleurs détachés* », Avis du CESE [CESE opinion].

(28) Maslauskaite, K. (2014), « *Travailleurs détachés dans l'UE: état des lieux et évolution réglementaire* », Policy Paper no 107, Notre Europe-Institut Jacques Delors.

(29) Freyssinet, J. (2014), « *La directive européenne sur les travailleurs détachés* », Note Lasaire no 42.

(30) Pataut, E. (2014), « *Détachement et fraude à la loi. Retour sur le détachement des travailleurs salariés en Europe* », *Revue de droit du travail*.

(31) Cytermann, L. (2014), « *Le détachement des travailleurs au sein de l'Union européenne* », Éclairage II, 3rd report by the Haut Conseil du Financement de la Protection Sociale.

(32) DAEI (2015), CESE/DARES questionnaire, *Le travail détaché : synthèse des contributions en 30 questions* [Posted work: summary of contributions in 30 questions], Contributions by regional economic affairs departments of French embassies in Portugal, Poland and Romania. These practices violate the Romanian tax code, which caps the allowances that can be paid to an employee at 2.5 times his or her wages; above this limit, the allowances are treated as supplementary wages and added back to the base for assessing social contributions and taxes.

(33) See note 23 op. cit.

3.2 Controls are made difficult by the complexity of situations in the field

Irregularities and social dumping are all the more common as labour inspectors face many obstacles when carrying out their work.

First, controls by labour inspectors can be hampered by the lack of cooperation between the parties involved in posting. Directive 96/71/EC requires the establishment of liaison offices in each Member State for the purpose of exchanging information on problematic postings. Community law does not, however, set mandatory response times. Cases may therefore take too long to process compared with the duration of certain construction projects or the posted worker's brief assignment. Labour inspectors may also have to contend with language barriers and a vulnerable and not always cooperative workforce.

Second, increasingly sophisticated arrangements that rely on "cascaded" subcontracting enable firms to circumvent posting regulations. These complex subcontracting chains involving local and foreign firms can obscure contractual relationships-to the point that the posted workers' legal employer is sometimes very hard to identify.

Third, the Directive on posted workers provides no guarantee of protection in terms of collective representation of posted workers. This does not facilitate compliance with the relevant legislation and social regulations.

4. Postings of workers must be better supervised and made more transparent

4.1 The French transposition of the 2014 Implementation Directive strengthens the fight against fraud and offers posted workers better protection

At EU level, France supported the enactment of **a new directive**[34] **called the "implementation directive", which strengthens the fight against fraud and offers posted workers better protection, particularly in cases of cascaded subcontracting.** Adopted in 2014, Directive 2014/67/EU aims to combat "social dumping" and contains major advances.

It clarifies posting criteria: a non-exhaustive list of evaluation criteria is submitted to the competent authorities to determine if posting conditions are met in terms of the firm's **actual activity** in the State where it is established[35] (fight against "letterbox" companies) and the **temporary nature** of the posting. It asks Member States to make **clear, full and accessible information** (in particular through translations in several languages) available to the parties involved in posting via an official national website. **It strengthens cooperation and control** of compliance with the obligations between Member States set out in Directive 96/71/EC. It allows posted workers to exercise their rights more effectively.

The 2014 Directive establishes a mechanism for joint liability of contractors vis-à-vis their direct subcontractor in the construction industry when the subcontractor has failed to meet its obligations with respect to worker remuneration.

France rapidly transposed this Directive[36] in the "Savary" and "Macron" Acts[37]. The new provisions go beyond the Directive to toughen penalties for firms that circumvent posting regulations:

- **posting formalities are strengthened and expanded** to facilitate control of firms that post workers, in particular by creating the obligation to declare postings "electronically";
- **the contractor's liability is extended to the entire subcontracting chain** (1) with regard to posting declaration requirements, (2) in the event of non-payment of the minimum wage and (3) in the event of a breach of labour law and of living-condition requirements concerning collective accommodation;
- **the provision of services can now be suspended** for a month if work inspectors find serious violations of posted workers' "fundamental rights", without prejudice to the workers (for example, without loss of pay);
- **trade unions can now take action** in defence of posted workers "without having to produce an authority to act on behalf of the interested party".

4.2 The "El Khomri" Act[38] completes the array of measures against illegal postings of workers

The French Government is continuing the fight against illegal postings with the "El Khomri" Act.

The law extends the "electronic" declaration requirement to contractors with respect to all approved direct or indirect subcontractors if the service provider employing posted workers has not filed the declaration.

The scope for suspending the international provision of services is extended to situations where postings have not been declared, after expiration of the 48-hour period granted to the contractor for filing a substitute declaration.

A final provision establishes a **contribution** to cover the administrative costs generated by postings. The

(34) Directive 2014/67/EU of 15 May 2014 on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
(35) Article L. 1262-3 of the French Labour Code and Conseil d'État ruling 398782 of 21 April 2016.
(36) Member States have until 18 June 2016 to transpose the Directive.
(37) Act no. 2014-790 of 10 July 2014 to combat unfair social competition, supplemented by Decree no. 2015-364 of 30 March 2015, and consolidated by Act no. 2015-990 on growth, activity, and equal economic opportunity of 7 August 2015.
(38) Law no. 2016-1058 of 8 August 2016.

amount will be set by a Council of State (Conseil d'État) decree.

4.3 The European Commission is promoting the notion of "the same pay for the same job in the same place" by proposing a revision of the 1996 EU Directive

At the request of seven Member States (Austria, Belgium, France, Germany, Luxembourg, Netherlands and Sweden), the European Commission submitted a proposal for revising the Directive on posted workers on 8 March 2016. The aim is to guarantee fair pay conditions and equal competition conditions for firms posting workers and local firms in the host country. The proposed reform could introduce changes in three major areas:

(1) Remuneration of posted workers. The reference to the "minimum wage rate" is replaced by the broader concept of "remuneration, including higher rates for overtime". Employers of posted workers would therefore be required to pay universally applicable bonuses and allowances, whether laid down by law or collective agreements. Member States would also be allowed to require firms to restrict subcontracting to companies that comply with specific rules of remuneration, including those resulting from collective agreements that are not universally applicable. The aim is to enforce the "equal pay for equal work" principle in subcontracting chains.

(2) Rules applying to temporary work agencies. In the proposed revision, workers posted by a temporary work agency would enjoy the same guarantees as temporary workers seconded by a firm established in the Member State in whose territory the work is performed.

(3) Duration of posting. Postings would be limited to two years under labour law, as is already the case in regard to social security for payment of contributions in the home country. For postings exceeding 24 months, the labour law of host Member States would apply.

Discussions between Member States and the Commission have begun and the initial draft will be presented at the Employment and Social Affairs Council in June.

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Comment...

Jacques Freyssinet

The issue of posted workers offers an opportunity to examine the relations that develop between legal standards and the economic phenomena to which they apply.

First, recall that the Treaty of Rome aimed to establish the free movement of workers, goods and capital. In the first area, the principle is equal treatment, in each Member State of the European Community, of workers from other Member States. From the standpoint of economic analysis, the posting of workers is unquestionably an instance of movement of workers. However, Community Law places it under the heading of free provision of services, thus exempting it from the equal treatment rule. The latter is totally suspended for social protection. Its application is restricted to a limited list of exceptions regarding labour law. This opens up a broad avenue for circumventing the founding principle.

Second, it should be noted that the 1996 Directive, still in force, was prepared in a twelve-State Community and adopted immediately after the 1995 enlargement to fifteen. This membership gave credibility to the promise of an upward harmonisation that stood at the core of the European message from the outset. The prospect of competition based on wage costs was not a widespread concern at the time, or was merely viewed as a temporary problem. Today, the same rules apply to a Union of twenty-eight where the Court of Justice, in the name of the free provision of services, protects the right of certain States to use wage-cost differentials as a competitive advantage.

A final question we can raise is the relevance of a single set of rules for three heterogeneous approaches to labour management. The Directive applies, first, to the movement of highly skilled workers in multinational firms; as a rule, these employees are better off maintaining their status in the country of origin. The second group covered by the Directive consists of workers from countries with low wages and weak social protection, most of whom perform unskilled jobs; they would be better off under the status applicable in the host country. Thirdly, the Directive is used by temporary work agencies to their advantage in a tax and/or labour-cost optimisation strategy.

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Publisher:
Ministère des Finances et des Comptes Publics
Ministère de l'Économie de l'Industrie et du Numérique

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English translation:
Centre de traduction des ministères économique et financier

Layout:
Maryse Dos Santos

ISSN 1962-400X
eISSN 2417-9698

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