

Temporary work agencies and other recruitment intermediaries

Cross-border issues

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Part I – Overview of the temporary work agencies ("TWAs") and other recruitment intermediaries ("RI") cross-border activities

Training objectives

Clarify in each practical case which rules are applicable in the field of labour, social security and immigration law

1. From which country is the worker coming (EU / Non-EU)?
2. What is the worker's nationality (EU / Non-EU)?
 1. If non-EU citizen, what kind of stay permit / work permit does he hold?
3. Does the worker have a "formal" employed/self-employed status?
 1. If he is employed, is he declared (in which country)?
 2. If he is self-employed, does he have evidence of self-employment registration?
4. Is the worker coming through an entity?
 1. if so, which type of entity (TWA/RI)?
 2. Does the entity have a legal existence? Does it have the right to perform recruitment activities? Is it registered as recruitment intermediary in sending/receiving country? What's the entity's history? Does it need/have a banking guarantee?
 3. Does the entity have substantial activity in country of establishment? In country where worker is sent?

Training objectives

Clarify in each practical case which rules are applicable in the field of labour, social security and immigration law

5. Which entity is the “formal employer”? Which entity acts in practice as the real employer?
6. Does the worker have a habitual country of work?
7. If the worker is employed, does the employment contract refer to a law applicable?
8. Does the worker hold a PD A1?
 1. If so, are social contributions actually paid in the sending country?

Key definitions

- Temporary Work Agency (TWA)
 - **Entity which employs a worker and then place him or her to work in one or more ‘user companies’**
 - **The worker concludes a contract with the TWA and the TWA concludes a contract with the user company**
- Other recruitment intermediaries (RI)
 - **Entities, often performing online (using social networks), which help find labour force on behalf of a company.**
Often unregistered and unlicensed, working informally through social media channels to provide labour intermediation services
 - **RI acts as recruitment agencies, they are not the workers’ employer**

Key definitions

- Cross-border seasonal workers
 - **EU/third country citizens who go to work on a seasonal basis on fixed-term contracts in a Member State other than that of their citizenship, in one of the key sectors of seasonal work – agriculture or accommodation and food services**
- Third-country citizen
 - **a person who does not have citizenship of one of the 27 EU Member States or of an EEA country (Lichtenstein, Norway, Iceland) or of Switzerland**

Under which patterns are TWAs and RI involved in cross-border labour activities?

Option 1: cross-border posting

Option 2: final recruitment by local employer

Option 3: cross-border self-employment (cross-border provision of service)



Option 1 – Posting by TWAs/RI and labour law

- Example #1: A plumber is employed by a TWA established in country A. He is assigned to a user undertaking located in country B
 - ‘posted worker’ means a **worker who, for a limited period**, carries out his work in the territory of a Member State other than the State **in which he normally works**
 - If there is an **employment relationship** between the temporary employment undertaking or placement agency and the worker **during the period of posting**
 - If TWA **genuinely performs substantial activities**, other than purely internal management and/or administrative activities in the country of establishment



TWAs are eligible to posting activities. The majority of posted workers work in the construction and transport sector

Option 1 – Posting by TWAs/RI and labour law

- How to assess “**substantial activity**” by a TWA/RI in the country of establishment?
 - **overall assessment of all factual elements:** place where the TWA has its registered office and administration, uses office space, pays taxes and social security contributions; place where posted workers are recruited and from which they are posted; law applicable to the contracts concluded by the TWA with its workers and with its clients; place where the undertaking performs its substantial business activity and where it employs administrative staff; number of contracts performed and/or the size of the turnover realised in the Member State of establishment
 - TWA must “**carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State [of establishment]**” (CJEU, 3 2021, Team Power Europe).

Option 1 – Posting by TWAs/RI and labour law

Can a TWA established in country A post workers to country B whereas user undertaking is established in country C?

- Example #2: an Italian company concludes a service contract with a French building user undertaking. For the performance of this service in France, the Italian company posts its own employees and calls upon 3 temporary workers of a Polish TWA.
 - Temp workers will be considered as posted in France by the Polish TWA (and not by the French user undertaking)...if the user undertaking does not act as the workers' employee
 - French labour will be applicable to the Polish interim workers
 - Hard-core measures (posting directive)
 - **Equality of treatment with “regular” user undertaking employees**: working time, night shift, periods of leave, bank holiday...

Option 1 – Posting by TWAs/RI and labour law

Are successive missions in various countries classified as “posting”?

- Example #3: A Polish national residing in Poland, worked for a TWA registered in Poland, under a fixed-term employment contract for the period from October 2016 to December 2019. He completed **successive short-term missions in Member States** (in France from Oct. 2016, in the UK from Nov. 2017 to Jan. 2018, then again in France from Jan. 2018)
- Not posting if:
 - TWA does not habitually perform significant activities in the Member State in which it is established
 - Poland is not country of “normal work” for workers
 - Missions exceed 12 months (CJEU, 20 May 2021, Format II)

Option 1 – Posting by TWAs/RI and labour law

Which employment rules apply to posted workers?

- Employment rules of the **law of the country chosen by parties** (usually, law of the country where TWA is established)
- **Hard core rules of the law** (and collective agreements declared universally applicable) **of the country of posting**
 - **maximum workperiods and minimum rest periods;**
 - **minimum paid annual leave;**
 - **remuneration**, including overtime rates
 - pension schemes;
 - the **conditions of hiring-out of workers**, in particular the supply of workers by temporary employment undertakings;
 - **health, safety and hygiene at work;**
 - protective measures with regard to maternity
 - equality of treatment between men and women and other provisions on non-discrimination;
 - the conditions of **workers' accommodation**
 - **allowances or reimbursement of expenditure to cover travel, board and lodging expenses**

Option 1 – Posting by TWAs/RI and labour law

Specific rule for TWAs' workers: full equality of treatment

a) Compliance with conditions under which interim work is permitted in country of posting

If country where posting is envisaged provides that interim is allowed for limited objective reasons, cross-border posting must correspond to one of these objective reasons

b) Interim worker must be treated like any “regular” employee of the user company

Ex.: P is employed by a TWA established in Luxembourg. He is hired out to a final user in Belgium. The hiring out is possible only if TWA rules of Belgium are complied with + P must be treated like an employee of the Belgian company with same qualification and same post

Option 1 – Posting by TWAs/RI and labour law

Do PD A1 mean workers are posted under labour law rules?

- Example #4: A Romanian national is employed by a TWA established in Bucharest. He is hired out to user undertakings in France and in Belgium. He never works in Romania.
- **Romanian authorities issued a PD A1** establishing that the worker is affiliated in Romania for social security
 - PD A1 has **no impact on employment matters** (“A 1 Certificates have binding effects, those effects are limited solely to the obligations imposed by national legislation in the area of social security”, CJEU, 14 May 2020, Bouygues TP)
 - From a labour law perspective, the worker may not be considered as posted (for instance, if he does not normally work in Romania)

Option 1 – Posting and social security

- Example #5: A plumber is employed by a TWA established in country A. He is assigned to a user undertaking in country B
 - A person who pursues an activity as an employed person in a Member State **on behalf of an employer which normally carries out its activities there** and who is posted by that employer to another Member State **to perform work on that employer's behalf** shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work **does not exceed 24 months** and that **he/she is not sent to replace another posted person**
 - TWA must **carry out in country of establishment, to a significant extent, the activities of assigning those workers** for the benefit of user undertakings established and performing their **activities in the same Member State**.
 - **Direct relationship** between TWA and worker **must remain** throughout posting
 - Rules on posting of workers can include a person who is **recruited with a view to be posted** to another Member State (if affiliation in that country before recruitment)

Option 1 – Posting and social security

- **Affiliation in the country where TWA is established**

- Contributions have to be paid **only** in that country
- Impossible to request payment contributions (or damages) in the country of posting
- **PD A1** makes it impossible to challenge the social security affiliation by national administration or courts

Ex. P is employed by a TWA established in Lithuania. A PD A1 has been issued by this country. He is hired out in Austria. A local labour inspector has doubts concerning the reality of posting

- The Austrian labour inspector **cannot challenge the affiliation** in Lithuania
- He may only try to have the **PD A1 withdrawn** (using internal administrative procedure)
- If PD A1 is not withdrawn, **no administrative fine, no criminal penalty, no civil liability action** can be envisaged in Austria even if the labour inspector has good reason to believe

Option 1 – Posting (intra-EU) of a third country worker

Are there specific rules for intra-EU posting of third country citizens?

- Example #6: A TWA established in Spain hires out a **Ukraine national who resides in Spain** to a French user undertaking in the farming sector
 - The host Member State **may not impose administrative formalities or additional conditions** on posted workers who are third-country nationals **when they are lawfully employed by a service provider established in another Member State**
 - Right to stay in France (for max. 3 months) if worker resides legally in Spain (no need for an “entry visa”)
 - No need to get a work permit (“Van Der Elst visa”)
 - For social security, affiliation in Spain (habitual place of work: Reg. 883/2004)



Third-country citizens constitute an important group of (posted or not) seasonal workers in some EU Member States, mainly in the agricultural sector

Option 1 – Posting (from outside EU) of a third country worker

If a TWA hires out a third-country citizen coming directly from a third country, is it posting?

- Example #7: A TWA established in Spain hires out **a national from Ukraine who resides in that country** to a Lithuanian user undertaking in the farming sector for a 6 months period
 - Worker needs an authorisation (visa or permit) to stay and work in the EU (see “Seasonal Workers Directive”)
subject to a valid work contract or a binding job offer to work as a seasonal worker in the Member State concerned with an employer established in that Member State
 - Application of Lithuanian labour & social security law
concept of the same pay for the same work in the same workplace,

Option 1 - Posting (from outside EU) of a third country worker

Are there specific rules for intra-group posting from a third country to an EU country?

Example #8: An international group plans to post to an entity of the group located in Dublin a marketing manager normally working in Brazil

- S/he must apply for an "**ICT**" (Intra-Corporate Transferees) permit
 - if stay is **longer than 3 months** (and less than 3 years)
 - in order to hold a **senior management position** or to provide expertise,
 - if s/he can prove at least **6 months of professional seniority** in the employing group.
- all labour conditions applicable to posted workers in a similar situation must apply to assignees under the ICT scheme

Option 2 – Employment by a “local employer”

- Example #9: A Polish worker is contacted by an **online RI** who seeks workers on behalf of French clients for the harvest season in France.
 - A fixed-term employment contract is concluded between the French company and the Polish worker
 - Full application of French employment/social security law
- Example #10: A Czech worker is contacted by **an online RI** who seeks workers on behalf of slaughter houses in Germany
 - A first job contract is signed between the online agency and the worker
 - Upon workers’ arrival in Germany, a fixed-term employment contract between a local TWA and the Czech worker

Option 2 – Employment by a “local employer”

- In examples #9 and #10, work relationships are lawful if:
 - a) worker has the **right to stay** in the country of actual work (= check nationality),
 - b) if he has the **right to work** there,
 - c) if he is **declared** by the employer,
 - d) if **domestic labour/social security law** is complied with.

Employment contract is subject to the law where work is performed + worker is affiliated to the social security of that country

Option 3 – “self-employment” through RI

Example #11: A plumber, registered as self-employed worker in Poland, is contacted by a Maltese RI who seeks highly-qualified plumbers for the renovation of a nuclear plant in France.

- The plumber concludes a service contract with a Belgian sub-contractor. He will perform his activity in France for 4 months.
 - **As a service provider, the plumber remains subject to the law of the country of establishment (Poland)**
French Labour rules are not applicable
 - **As a “self-posted” worker under social security rules, he will remain subject to the Polish social security**
If “normally” self-employed in Poland (habitually carries out substantial activities in Poland) + similar activities + 12 months max)
PD A1 issued by Poland

Part II – Risks and challenges from the perspective of cross-border labour inspections

Risk #1: Undeclared work - no registration / licensing of TWAs

Undeclared work is a central multi-faceted issue

- TWAs/RI have no legal existence in the country where they claim to be established: **ghost company**
- Member States may require TWAs/RI to register/license in order to perform services on their territory
 - **Hosting Member States may additionally require registration by foreign TWAs**
- Undeclared work occurs both when:
 - **the agencies are ghost companies/unregistered / unlicensed**
 - **registered TWAs under-report the economic activity and hours worked**

Risk #1: Undeclared work: third country citizens

Third country citizens coming through TWAs/RI are often concerned by undeclared work

- Third country citizens may be **illegal immigrants**
- Third country citizens may also **stay in the EU under ill-adapted conditions** (e.g. tourist visas, asylum seekers, higher education students) which do not allow them to work as seasonal worker

- **Undeclared work**

Law of the country where they perform seasonal work should be applicable

an estimate of 135 000 undeclared seasonal workers in agriculture and accommodation and food services in the EU

Risk #2: Violation of local employment rules

Work relationship arranged by TWAs/RI with an employer on-site seems lawful, but...

- Agreed wage below minimum required (salary basis: country of origin)
- Salary looks fine, but back payments
- Unpaid overtime
- Performance-based pay mechanism
 - **“Payment of seasonal workers has been reported to undercut the applicable minimum wage; means to do so are the (excessive) deduction of costs for transport or accommodation from the salary, unpaid over-hours or performance related based pay schemes” (Intra-EU Mobility of Seasonal Workers, March 2021)**
- **+ Under-undeclared work (see further)**

Risk #2: Violation of local employment rules

Work relationship arranged by TWAs/RI with an employer on-site seems lawful, but...

- TWAs + chain of subcontractors: **who is the employer??**
- **At the cross-border level it is often unclear who in the chain of employment is responsible for compliance with the labour law regulations, and the end user often lacks the duty of care to enforce such rules on the TWA workers**

Risk #3: Violation of substantial posting criteria

The worker is apparently posted by existing/registered TWA, but...

- **No substantial activity** in the country of establishment by TWA (letter-box company)
- **Permanent and stable activity** in the host country
- Some legal requirements of host country are not met
 - **Failure to provide financial guarantee**
 - **No right to perform hiring out activities according to the law of establishment/posting**
 - **Fake PD A1**

Risk #3: violation of substantial posting criteria

- Case 1: A cook is employed by a TWA established in country A. He is assigned for the summer season to a user undertaking located in country B. **The TWA is a letter-box company.**
 - Impact: **Posting rules do not apply**, the cook is subject to labour rules and social security of country B.
- Case 2: A cook is employed by a TWA established in country A. He is assigned for the summer season to a user undertaking located in country B. **The TWA did not provide any financial guarantee** such as requested by country B.
 - Impact: **administrative/criminal sanction, but posting rules should apply if substantial posting conditions are met**

Risk #3: Violation of substantial posting criteria

Posting seems regular at first glance, but...

- **Double posting** The undertaking to which the worker has been posted by TWA places him/her at the disposal of another undertaking in the Member State in which it is situated;
- **Double posting** The undertaking to which the worker is posted by TWA places him/her at the disposal of an undertaking situated in another Member State;
- **Bogus posting** The worker is recruited by TWA in one Member State by an undertaking situated in a second Member State in order to work in the first Member State;
- **Bogus posting** The worker has concluded a labour contract with the undertaking to which s/he is posted.
- **Successive postings** The worker is being posted by TWA to replace another posted person

Risk #3: violation of substantial posting criteria

- Case 1: A cook is hired by a TWA established in country A. He is assigned for the summer season to a user undertaking located in country B, where he resides.
 - **Impact: since country B is the normal place of work, there is no posting**
- Case 2: Recruitment by TWA, established in country A, of a worker posted to a slaughter house business in country B. When posting period is over, another TWA, also established in country A, posts a new worker.

Impact: the second worker is not posted and should be affiliated for social security in country B. If it is demonstrated that the TWA has no substantial activity in country A, or that the real employer is the end user, or that the worker has not a normal place of activity in country A, he should be subject to the employment law of country B.

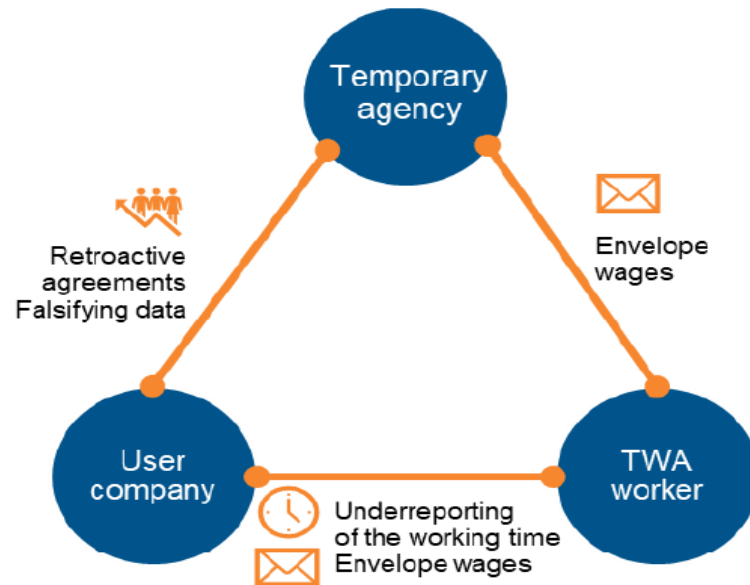
Risk #4: Violation of posting administrative duties

Irrespective of substantial posting rules...

- **No prior posting declaration** made pursuant to law where work will be performed
- No **contact person** appointed
- Employment contract not available in **national language**...
- User undertaking, established in country A and providing a service in country B, omitted to inform TWA established in country C, that the service would be performed in country B

In those cases, suspicion that, in fact, substantial posting rules are not met

Risk #5: Under-undeclared work (posting)



Source: Pavlovaite et al (2020).

- **Between the worker and the agency** – where the agency pays envelope wages to the worker to save tax and social security costs, without the explicit involvement or knowledge of the user undertaking;
- **Between the worker and the user company** – where the latter under-reports the working time to the agency to save on fees and may choose to pay envelope wages to the worker for the remaining time worked; and
- **Between the user company and agency** – where the TWA, in secret agreement with the user employer, covers up undeclared work by the employer, by making an agreement for TAW with retroactive effect or by using falsified data.

Risk #5: Under-undeclared work (not posting)

- “Even where formal contracts are signed that conform with national legislation, it happens that e.g. the **number of hours worked and/or the salary that has been declared does not correspond to reality**”
 - E.g. allows the employer to remain in a category of contract where he/she has to pay fewer social security contributions

Risk #6: Violation of employment rules (posting)

- Violation of posting rules on **equal remuneration**
 - Agreed wage below minimum required (salary basis: country of origin)
 - Salary is paid, but with **back payments by employee** to the end user/ TWA
 - TWA/RI offer “**package posting**” where **living/travel costs are deducted from wage**
 - **Unpaid overtime**
 - **Performance-based pay scheme**
 - “**Payment of seasonal workers has been reported to undercut the applicable minimum wage; means to do so are the (excessive) deduction of costs for transport or accommodation from the salary, unpaid over-hours or performance related based pay schemes**” (Intra-EU Mobility of Seasonal Workers, March 2021)
- Violation of other “hardcore” posting rules
 - **Working time, health & safety...**
- Violation of “fundamental” rules of the host country
 - **Right to strike, union rights, criminal law (undeclared work, working conditions)...**

Risk #7: Violation of social security rules (posting)

All substantial and administrative rules on posting seem complied with, but...

- **PD A1 has been issued, but no / not all social security contributions are paid** in the country of establishment
 - If substantial posting conditions are met, the social security institutions of the country of establishment can claim them
 - If substantial posting conditions are not met, the social security institutions of the country where work was actually performed can claim them

Risk #8: Violation of other work / living conditions (posting / not posting)

- “short-term stay in the country of work means that seasonal workers often rely on accommodation provided by the employer or an intermediary. The **quality of the accommodation is frequently poor**” (Report March 2021)
- **COVID-19 pandemic** has aggravated situation
 - many seasonal workers not being able to carry out their work
 - sub-standard living conditions being particularly **dangerous** in times of a pandemic;
 - non-resident seasonal workers being **trapped in countries of work** and not able to return home

Risk #9 Bogus self-employment

- A plumber, registered as self-employed worker in Poland, is contacted by a Maltese RI who seeks highly-qualified plumbers for the renovation of a nuclear plant in France.
- The plumber concludes a service contract with a Belgian sub-contractor. He will perform his activity in France for 4 months.
- In practice, **he works under the authority of the Belgian sub-contractor who acts as the employer**
 - **The relationship may be reclassified as “employed”**
 - Undeclared work in France
 - Payment of French social security

Challenges

- **Access to key cross-border information on TWA/RI**

- Does TWA/RI exist? Did it change name (with same owners)?

- Is it registered?

- Does it pay social security contributions?

- Does it have a substantial activity in the country of establishment? Does it have a doubtful history?

- Tax/Banking information

- **Access to key information on workers, some of them requiring cross-border cooperation**

- Are they known under this name? Is nationality sure?

- What does employment contract say? (is there one...?)

- Which remuneration did they actually receive?

- How long have they been on the national territory? Do they ever work in the country from where they come?

- Where do they stay? Who is covering housing costs?

- Are they really self-employed? Registered as such?

- Do they have a residence/work permit? (third-country citizens)

- Are they affiliated to the local social security?...

Challenges

- Awareness of other countries' regulation
 - On substantial rules applicable
 - On data exchange rules
 - On labour inspection processes
 - On sanctions applicable
 - On cross-border cooperation process

Challenges

- **National registration** systems enable effective **data exchange and mining** between public authorities to detect and sanction undeclared agency work
 - **Some countries require a registration of the TWA with the authorities, alongside a range of accompanying conditions (such as a permanent representative in the country of registration)**
 - **Registration systems can also prompt evasion resulting in fraudulent activity happening through other forms which are harder to detect (through social media channels, e.g. not TWAs but RI/labour intermediaries)**

Challenges

- **Data sharing and mining** is not fully exploited currently
 - **Partly due to the challenges posed by ensuring compliance with data protection requirements and the rules governing the roles of different institutions**
- **Measures against fraudulent agency work prompting undeclared work are undertaken within a broader approach to tackling social fraud and other violations and fraudulent behaviours encountered in temporary agency work**
 - **e.g. disrespect for equal treatment of temporary agency workers in comparison to permanent employees, non-payment of minimum wages, or disregard for occupational health and safety rules.**

Challenges

- Ensuring **cooperation with social partners**
 - Actions of social partners, both as self-regulation and in conjunction with the enforcement authorities
 - Social partners in several Member States have negotiated collective bargaining agreements intended to prevent and protect workers from the risk of becoming involved in undeclared work through a TWA