

ACCESS TO INFORMATION ON THE POSTING OF WORKERS

Construction Companies' Practices and Challenges



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ACCESS TO INFORMATION ON THE POSTING OF WORKERS: CONSTRUCTION COMPANIES' PRACTICES AND CHALLENGES

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ACCESS TO INFORMATION ON THE POSTING OF WORKERS: COMPANY PRACTICES AND CHALLENGES IN THE CASE OF BELGIUM

Lynn De Smedt and Frederic De Wispelaere

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Introduction

Some key principles are defined at the EU level regarding the employment and social security rules applicable to workers when they are temporarily sent (i.e., “posted”) to another Member State. For instance, from day one, the posted worker is entitled to all the elements of remuneration of the receiving Member State (also covering other advantages such as bonuses and allowances) rendered mandatory by law or by a collective agreement made universally applicable. Moreover, s/he remains subject to the social security system of the sending Member State for a period of 24 months. These posting rules accompany several administrative obligations, such as applying for a Portable Document A1 (PD A1) in the sending Member State and making a prior declaration in the receiving Member State. Information provided through different information providers and information channels should ensure that posting companies, posted workers, and receiving companies (i.e., clients) have sufficient knowledge about the posting rules put in place. In the provision of information regarding the posting of workers, there are several public and private information providers involved (e.g., public authorities, labour inspectorates, employers’ organisations, trade unions, NGOs, consultants, business partners, etc.) who communicate with posting companies, posted workers, and receiving companies through various online and offline information channels (e.g., website, event, training, manual, guidelines, video, contact person, local office, etc.).

In that regard, the main aim of this chapter is to identify and assess the challenges and needs of posting and receiving companies active in the construction sector in accessing and using relevant information regarding the posting of workers from and to Belgium.⁶ The specific focus on posting in the construction sector certainly makes sense from a Belgian perspective. First, this form of intra-EU labour mobility by providing services has become an important source of employment in the Belgian construction sector.⁷ Consequently, many posting and receiving companies may have information needs and thus seek useful information channels. Second, it appears that the Belgian labour inspectorates frequently detect infringements to the posting rules in the Belgian construction sector. This is another reason why the provision of information is of great importance. The Belgian construction sector does not only receive posted workers, but Belgian construction companies also send workers to other Member States to provide temporary services. However, this number is relatively limited, especially compared to the incoming perspective. In that regard, the Belgian construction sector is mainly a net-receiver of posted workers.⁸

First, we give an overview of the information providers and channels Belgian construction companies (may) consult when sending and/or receiving posted workers. We then analyse the needs and challenges of these companies regarding access to information on the posting of workers. Subsequently, we list the challenges for information providers in Belgium and how, according to them, access to information can be further improved. Finally, some conclusions and recommendations are made.

6 Mainly based on the results reported in the INFO-POW country report for Belgium (De Smedt & De Wispelaere, 2023).

7 Figures for 2022 show that about 87,000 posted workers were temporarily active in the Belgian construction sector (at the Belgian level, data on the number of incoming postings to Belgium are collected via the Limosa declaration (<http://www.limosa.be/>)). As a result, roughly one out of three workers posted to Belgium is active in the construction sector. This group of workers represents roughly one-fifth of the workforce in the Belgian construction sector.

8 In 2021, about 15,700 PDs A1 out of the 66,000 PDs A1 issued by the competent Belgian authority were granted to workers active in the construction sector. These workers were mainly active in Belgium's neighbouring countries: France (7,888 PDs A1), the Netherlands (6,831 PDs A1), Luxembourg (4,806 PDs A1), and Germany (2,029 PDs A1).

The chapter builds on three types of data sources. First, relevant information channels in Belgium were identified through desk research.⁹ Second, five semi-structured online interviews were conducted with Belgian information providers. Two interviews were held with representatives of the Belgian trade unions ABVV (General Labour Federation of Belgium) and ACV (Confederation of Christian Trade Unions of Belgium), one with the National Social Security Office (RSZ – ONSS), one with an employers’ organisation in the construction sector (Bouwunie), and finally, one with a payroll consultant. Third, an online survey was conducted, supported by the employers’ organisations Bouwunie and Embuild, targeting Belgian construction companies that post workers abroad or receive posted workers from abroad.¹⁰ An invitation to complete the survey was sent to 6,282 companies by Bouwunie, 5,049 companies by Embuild, and 675 companies by the researchers themselves. However, only 39 construction companies – 15 posting and 24 receiving – completed the survey. Due to this low response rate but also because the data cannot be weighted (there is no view on the total group of posting and receiving companies in the Belgian construction sector and their profile), the reported results are merely indicative and thus not representative for all construction companies in Belgium sending and/or receiving posted workers.

9 This data collection took place from December 2022 until March 2023, meaning that more recent information channels cannot be included in this exercise. This mapping exercise cannot be considered an exhaustive list of all the main information providers involved (both public and private actors) and the main information channels used. Indeed, it is likely that still (quite a few) other private actors, mainly social partners (our focus is the construction sector), NGOs, and consultants provide such information. Moreover, while it is relatively easy to find online information channels, it is much more difficult to list offline information channels.

10 The survey was launched on 30 March 2023, and the responses were downloaded from the online survey tool on 17 August 2023.

Access to Information: Channels and Practices

Main channels of information on the posting of workers from and to Belgium

In total, 31 relevant information channels were identified by desk research. By far, most information channels relate to postings to Belgium (25 out of 31 listed information channels), and only a limited number of channels provide information on outgoing postings (6 out of 31 listed information channels). The main information providers regarding posting to Belgium are the national public authorities and the social partners. These two main information providers clearly differ, not only in terms of the content and the scope of the information provided but also in terms of the information channels used to disseminate this information. The information provided by the national public authorities, among others via the single official Belgian national website on posting,¹¹ mostly covers a wide range of topics related to posting, mainly distributed by using websites and often directed to foreign posting companies. This while the information provided by the Belgian employers' organisations and trade unions active in the construction sector is mainly targeted to the sectoral provisions, often distributed by using leaflets, brochures, and events, and aimed at the economic actors active in the construction sector (employers' organisations target the receiving companies¹² and trade unions target the posted workers). Finally, in the case of posting from Belgium, the EU institutions and the public authorities in the receiving Member State are the main facilitators of information. However, Belgian posting companies may also obtain information through the Belgian employers' organisations and, to a lesser extent, through the national public authorities in Belgium.

11 <https://employment.belgium.be/en/themes/international/posting>

12 Information is mostly only freely available to companies which are members of these employers' organisations.

Practices of Belgian construction companies when looking for information on the posting of workers

First, knowing what information construction companies are specifically looking for is useful. The responses of the Belgian posting companies to the online survey indicate that they are looking for information on several aspects, but primarily related to the administrative obligations (i.e., information regarding making a notification in the prior declaration tool of the receiving Member State (80% of the respondents) and the request for a PD A1 (73% of the respondents)). We asked Belgian receiving companies to report on the information that foreign posting companies typically ask them. They state they primarily receive questions regarding the application for a PD A1 (67% of the respondents) and how to make a notification in the prior declaration tool (54% of the respondents).

Remarkably, information is sought mainly regarding the administrative obligations and, to a lesser extent, regarding the wages to be paid or the working conditions to be respected. One possible explanation is that several obligations regarding the terms and conditions of employment applicable to posted workers are outsourced. After all, when outsourcing such obligations, there is much less need for the company concerned to search for information. Results from the online survey show that the responding posting companies outsource the more difficult tasks, such as calculating the gross wage, the additional allowances, and the social security contributions paid to/for the posted worker. Relatively easy administrative tasks such as applying for a PD A1 or making a notification in the prior declaration tools (87% of the respondents), in turn, are mostly taken care of by the posting companies themselves. Furthermore, the extent to which tasks are outsourced varies greatly between small and large posting companies.¹³ More than half of the Belgian responding posting companies outsource one or more tasks. This percentage is much higher for small Belgian posting companies (63%)

13 Companies were categorised as “small” or “large” companies based on the question on how many employees are active in the company. Those with 0 (self-employed) to 49 employees are categorised as “small” and those with 50 employees or more are categorised as “large”. The European Commission defines the following categories of companies: micro (< 10 employees), small (< 50 employees), medium-sized (< 250 employees), and large (250 employees or more) (European Commission, 2023). Therefore, in this report, “small companies” means both micro and small companies, and “large companies” refers to both medium-sized and large companies.

than large ones (43%). On average, small posting companies outsource 2.1 elements, while large posting companies outsource 1.3 elements. After all, large (posting) companies may, much more than small (posting) companies, have the capacity and knowledge to cover these tasks themselves. Nonetheless, these results contradict both common expectations and the literature.¹⁴

Regarding the information providers used, results of the online survey show that Belgian posting and receiving companies active in the construction sector consult various information sources to obtain information on the posting of workers. National public authorities, employers' organisations and consulting/legal firms are most frequently consulted by the Belgian posting and receiving companies. Furthermore, there is a strong link between the frequency that certain information sources are consulted and the frequency that the information channels provided by these information sources are consulted. For the total group of responding Belgian posting and receiving companies, the top three consulted information channels are employer organisations/associations' websites, the single official national website on posting, and other public authorities' websites.

When it comes to the provision of information, a lot of attention is paid by the European legislator to the development of the single official national website. However, a large group of Belgian posting and receiving companies were not aware of these websites prior to responding to the online survey. Of the 39 responding Belgian posting and receiving companies, 18 companies, or 46%, were unaware of the single official national website either of the country/ies the company posted workers to (posting companies) or of Belgium (receiving companies). Specifically, 53% of the responding Belgian posting companies did not know of the single official national website of the Member State where they provide services. In addition, about four in ten of the responding Belgian receiving companies were not aware of the Belgian single official national website on posting of workers.

14 See, for instance, Vah Jevšnik & Toplak, 2023: "To be able to apply all posting rules, posting companies often need to outsource specialised services, which only large companies with sufficient financial resources can afford."

Posting and User Companies' Challenges, Barriers, and Needs

Challenges and barriers of posting and receiving companies when looking for information on the posting of workers

The online survey aimed to identify the barriers that Belgian posting and receiving companies face regarding access to information on posting. The majority of the responding Belgian companies – posting (53%) and receiving (63%) – indicate that access to information is a challenge when participating in posting. Nevertheless, it should be kept in mind that these companies have overcome this challenge as they have recently provided services abroad or received services from abroad. There is no view on the group of Belgian posting and receiving companies for which this challenge is too great, causing them not to participate in posting. A follow-up question asked about which factors create challenges for companies to access information on posting. More than 70% of the 39 responding companies indicate “understanding of the information provided” as the main reason why it is a challenge to access information on posting.

The interviews with information providers also highlight foreign companies' challenges and barriers when providing services in Belgium. The interviewees identify language barriers as one of the main challenges. As one of the interviewees mentions, “Most of the foreign service providers don't speak a foreign language, so even if the single official website is available in English, it's still a barrier for them.” This language barrier also affects the information that the companies will look up. As one of the information providers puts it, “First of all, people will enter a search term in their own language. And perhaps secondarily in English if insufficient information is available.” Moreover, this language barrier also potentially affects the information that will be found and its quality.

Another challenge reported is the complexity of the rules (incl. administrative obligations). One interviewee states: “Small businesses get lost in all administrative obligations. Large companies with an HR department find the information or find someone who can provide them with the information. Small companies are ‘illiterate’ in this regard.” ... “80%

are ‘simple’ entrepreneurs who do not know how to comply with laws even in their own country.” Moreover, distinguishing which information is correct and which is not also remains a challenge: “(Small) companies sometimes think they are following the rules, while this may not be the case.”

Moreover, according to our interviews, the information sought by posting companies might also not be specific enough. For instance, “They [the companies] search on Google: ‘minimum wage Belgium’, but then they find the general minimum wage, not knowing that there are Collective Labour Agreements (CLA) by sector. [...] Then they are surprised if the labour inspector says the wages are too low.” However, even if one finds the right CLA, mistakes are still made: “They see ‘category I’ and then they pay that amount.” Challenges exist mainly regarding the specific obligations that apply when posting workers to the Belgian construction sector. For instance, posting companies should pay the Welfare Fund for the Construction Workers a global contribution of 9.12% of the wages. One of the interviewees mentions that posting companies do not know this requirement: “For foreign companies, this is very unclear, even a mystery, what they have to do.”

Additional needs of posting and receiving companies when looking for information

Companies’ information needs mainly reflect the challenges and barriers listed above. They seek information available in their language and information channels that make the complex rules easier for them to understand. Moreover, despite the diversity of information providers and channels consulted by posting companies and receiving companies, it appears that there is still a need for additional information on various aspects related to the posting of workers. The channels through which posting and receiving companies want to receive information about posting in the future are largely the same for both groups: primarily through institutional and social partners’ websites, followed by in-person contact or events. Media, social media platforms, and audio-visual channels are not the preferred information channels. These answers show that the information channels through which posting companies and receiving companies want to be informed in the future are, to a large extent, those they already use today. Information channels such as information sessions/trainings/workshops,

which are relatively less frequently used by the Belgian posting and receiving companies, are among the ones that are viewed as the most useful by the respondents. In that regard, it is a welcome development for employers' organisations to take initiatives regarding offline training, although the Belgian public authorities could still play a more active role. However, the National Social Security Office (NSSO) recently organised a "basic training on international employment" for all those interested.¹⁵

Information Providers' Challenges and Recommendations to Improve Access to Information

Challenges of Belgian information providers in ensuring provision and access to posting information

The cost of providing information, for instance, keeping a website up to date, is considered one of the main challenges for information providers.¹⁶ For instance, national public authorities need a political willingness (and thus financial support) to provide exhaustive and correct information. This also raises the question of how far national public authorities' responsibility extends in providing information.¹⁷ Furthermore, foreign posting companies or posted workers are not members of the local employers' organisations or trade unions, which makes it difficult to justify the high costs made for them.

15 A series of trainings was organised to explain the Belgian and international legislation regarding cross-border employment. See <https://www.rsz.be/nieuws/2023/09/19/international-days-rsz-deskundigen-leggen-grensoverschrijdende-sociale-zekerheid-uit>

16 Or further developing the single official national website based on the recommendations published in a report from ELA on the lessons learnt for single national websites on the posting of workers (ELA, 2023b).

17 Article 5(1) of Directive 2014/67/EU stipulates that "Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means." However, there are no parameters that precisely define the level of "clarity", "transparency", and "completeness" required.

Belgian employer organisations face the challenge that foreign companies often come to them for information, but these companies are not members of the local employer organisation. Although they have previously held off providing information to these companies, recently, they have become more open to them. Social secretariats also do not seem to target foreign companies despite many posting companies providing services in Belgium. One of the reasons why employer organisations and social secretariats do not (or hardly) provide information/services to foreign companies might be that their Belgian members are very sceptical about this: “They see them as competitors who do not respect the rules.”

Furthermore, union representatives mention in the interviews that contacting posted workers is challenging. Posted workers do not go to trade unions as quickly as “Belgian” workers, for instance, because of a lack of trust.¹⁸ Moreover, as posting is temporary, it is difficult to provide them with information in the long term. Posted workers are often not interested in structural consultation or becoming a trade union member.

Another challenge for information providers is to present the information in a manageable, clear, and simple manner. For instance, an interviewee mentions that one reason posted workers or companies do not consult information themselves on European websites or the single official Belgian website is because the information provided is too complex and detailed.

Finally, language barriers remain a challenge for information providers. Although language is a crucial element in information provision, it is almost impossible to have all written, let alone spoken, information available in the necessary languages.

Recommendations of Belgian information providers to improve access to information on the posting of workers

An important information channel is the single official Belgian national website for posting. Interviewees agree that this website is useful and contains valuable information. Nevertheless, they raise the question of for whom this information channel is developed. According to the interviewed

¹⁸ See, for instance, also Danaj and Sippola (2015).

trade union representatives, it is doubtful that posted workers are looking for information on a single official national website. Furthermore, one states, “A website can only go so far.” Any form of written explanation is good for standard cases, but there is a great need for individual, tailor-made advice. Another interviewee observes, “There may be a big difference between what is on the website and how people interpret this information.” Therefore, all interviewees highlight personal contact and information/training sessions as important information channels concerning the posting of workers.

Furthermore, information providers (should) try to remove the existing language barriers not only by making websites and information brochures available in the main languages (for instance, Polish) but also by having an interpreter present at information sessions who speaks the language(s). The importance of language in transferring information cannot be underestimated. As already noted, companies tend to look for information in their own language. In that respect, it would be good to debate whether support should be provided by the sending Member State and what their information duty could be in this regard. One interviewee mentions, “Public administrations in the sending Member States could put more effort into raising the awareness of posting companies about the applicable posting rules and the administrative obligations.” For instance, another suggests: “When applying for a Portable Document A1, one should receive the message: ‘You have applied for a PD A1 to work in another Member State. Please be aware that different wages and working conditions apply in this Member State, so please inform yourself about this.’”

Finally, interviewees report that incoming posted workers and Belgian (construction) workers are poorly informed about the applicable wage and working conditions. Trade unions are willing to take up the role of information provider “on the ground”. Taking on such a role can also be a two-way street: trade unions should provide information not only to the posted workers but also to the national administrations to keep them updated on trends and evolutions in the field (e.g., (new) information needs/gaps). Even though trade unions are certainly open to this idea and are already trying to fulfil this role, it remains a challenge.

Conclusions and Recommendations

Recital 18 of Directive 2014/67/EU rightly states, “Difficulties in accessing information on terms and conditions of employment are very often the reason why existing rules are not applied by service providers.” However, the lack of knowledge about the fact that other terms and conditions of employment should be respected when sending workers to another Member State might be a prior reason for non-compliance. After all, if one is not aware of this, a service provider will not look for information about it either. In that regard, it is important that as many posting and receiving companies as possible know there are specific employment and social security rules when workers are posted to another Member State. Initiatives that increase knowledge about the EU rules on posting among the economic actors involved (i.e., posting companies, posted workers, posted self-employed persons, receiving companies) can only be welcomed.¹⁹

According to the mapping exercise for postings to Belgium, Belgian public authorities and social partners are the main information providers. In contrast, in the case of posting from Belgium, the EU institutions and the public authorities in the receiving Member State are the main information providers. This finding is confirmed by the survey, which revealed that the channels of information most used by posting and receiving companies are public authorities and employers’ organisations. The interviews and the survey results indicate that information/training sessions and in-person contact are paramount. Therefore, we can argue that in-person information sessions for posting companies, receiving companies, and posted workers should be organised (more frequently).²⁰ Given the important task of the European Labour Authority (ELA) in providing access to information, it can play an important supporting role in realising this recommendation.²¹

19 For instance, in October 2023, the European Labour Authority (ELA) launched an information and awareness raising campaign to workers and employers active in the construction sector about their rights and obligations in particular related to the posting of workers (<https://www.ela.europa.eu/en/news-event/newsroom/elas-eu4fairconstruction-campaign-launched-today-inspections-action-week>).

20 Recently, such session was organised by the NSSO.

21 A conference was held on 25 January 2024 as part of the Belgian presidency of the Council of the EU to promote the work of ELA and contribute to the evaluation of its functioning.

Furthermore, the information provided by Belgian information providers and the channels used seemingly complement each other. However, a fragmentation of information on posting occurs at the level of the Belgian public authorities. Therefore, pooling the information presented by one information provider would be better.

One of the most important information channels is the single official Belgian national website on posting. Even though the Belgian website is in many aspects a good practice compared to other single official national websites in the EU, some shortcomings still could be addressed. On the single official Belgian national website on posting, information is particularly missing on accommodation, travel expenses, housing expenses, and sectoral obligations. Moreover, the information on posting by temporary employment agencies is not detailed enough. Furthermore, given the complexity of the posting rules, it would be good if the information on this website were more user-friendly (the information is mainly provided through text, and little to no visuals are used).²² Finally, information on this website is available in Dutch, French, and English but not (yet) in German (one of the official languages in Belgium) or in Polish (one of the main sending Member States).

As a result of the strong focus on the single official national website in EU legislation, the responsibility regarding informing posting companies about the applicable terms and conditions of employment is largely put on the receiving Member State. However, to reduce the likelihood that existing rules on posting are not only applied by service providers because of difficulties in accessing information but also of a lack of awareness of the applicable rules, other information providers, such as the sending Member State and the receiving company could be more involved in providing information (De Wispelaere & De Smedt, 2023; ELA, 2023a). In addition, several actors are active “on the ground” who can certainly play an important role in providing information. We are thinking first and foremost of labour inspectorates, which have both a sanctioning and a proactive informatising role. Moreover, trade unions should try to reach posted workers even more

As part of this conference, a report was prepared by the Belgian presidency assessing the fulfilment of ELA's mandate, including the one related to access to information (Belgian presidency of the Council of the EU, 2024).

22 In that regard, the recent publication from ELA on lessons learnt for single national websites on the posting of workers might be useful (ELA, 2023b).

with information. Finally, there is the reality that consultants are increasingly providing services to posting companies. This, of course, is at a certain cost. However, there is a “market failure” regarding access to information for posted workers, which makes national public authorities and trade unions crucial information providers for this group.

Finally, we can make some general recommendations regarding the provision of information and its monitoring. First, the provision of information must be comprehensive in all its dimensions. This recommendation means that the information is addressed to all economic actors involved (i.e., posting companies, posted workers, posted self-employed persons, receiving companies) but also that the information provided is exhaustive in both breadth (i.e., all relevant aspects of posting, including aspects of labour law, social security law, tax law, and migration law) and depth (i.e., including specific sectoral provisions). This approach will require a multiplicity of information providers and information channels that are complementary to each other. Second, monitoring the impact of the provision of information is also needed. For instance, a baseline measurement can verify whether the economic actors are aware that EU rules on posting have been defined and to what level this knowledge reaches. After launching information and awareness-raising campaigns or other initiatives, such measurement can be done again to gain insight into the impact of the implemented policy on the provision of information.

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