Handbook

Rules on the supply of work or services in relation to the EU freedom of services and establishment
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On 1 May 2004, the following countries became members of the European Union: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. This means that these countries are now subject to European law. EU law states that workers in general can move freely between the individual EU member states to look for and accept paid employment. Citizens and companies from EU member states can provide cross-border services within the EU; they are also free to set up companies in other member states. However, certain transitional arrangements were agreed in the accession treaty allowing the old member states to restrict for up to seven years the free movement of workers from the new member states – with the exception of Malta and Cyprus. In addition, Germany can restrict the freedom of services in certain industry sectors (construction, building maintenance, interior design). Germany will make use of the transitional arrangements up until at least 2009, and possibly until they expire in 2011. There will also be transitional arrangements in relation to Bulgaria and Romania when they join the EU.

Since the accession of the new member states, there have been some indications that rules on the cross-border freedom of services and establishment are being circumvented in certain cases by means of fictitious self-employment or staged postings and that employees have been posted illegally and wage dumping practiced. This is damaging not only for the state institutions such as the tax authorities and the social security funds, but also for the workers employed at social levels below those provided for and denied insurance protection. It also has a detrimental effect on the national economy, which cannot possibly keep up when the competition ignores existing regulations.

In response to these developments, the German government set up a task force in March 2005 designed to combat the abuse of the freedom of services and establishment. Under the joint leadership of the Federal Ministry of Finance and the Federal Ministry of Labour and Social Affairs, appropriate measures are to be taken to ensure that existing Community provisions on the freedom of services and establishment are adhered to.
This handbook was drawn up by the task force to provide an introductory overview of the complicated legal issues relating to the cross-border provision of services and the right to establishment. It also indicates where more detailed material may be found.

The handbook is intended as a reference, especially for those actively involved in the economy. Its purpose is to help avoid uncertainties with regard to the legal issues for citizens and companies of the new EU member states who wish to live, work or do business in Germany. In addition, it describes the legal consequences of breaching the provisions.

In this manner, the handbook has an important role to play in terms of the correct legal approach when providing cross-border services or in relation to cross-border establishments. Our hope is that you will find it a useful guide in your daily course of business. It goes without saying that the handbook should not and cannot be seen as a replacement for professional advice in case of doubt.

Dr Barbara Hendricks
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Parliamentary State Secretary at the Federal Ministry of Labour and Social Affairs
1. General comments

1.1 Introduction

Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia all became members of the European Union on 1 May 2004. This means that they are now subject to the provisions of EU law. Citizens of Malta and Cyprus have been able to enjoy the full range of fundamental freedoms enshrined in the EC Treaty (ECT) from the moment they joined. In contrast, transitional arrangements apply for the other eight new EU member states. There will also be transitional arrangements in relation to Bulgaria and Romania when they join the EU.

1.2 Definition of the fundamental freedoms

1.2.1 Freedom of movement for workers

The freedom of movement for workers pursuant to Article 39 et seqq. of the ECT means, firstly, that workers have the right to travel to and remain in the country of employment and, secondly, that these workers must be treated equally to the national citizens, in particular as regards employment, remuneration and other conditions of work and employment.

The decisive difference to the freedom of services and establishment, which relates to independent activity, is that the worker must be subject to instruction, dependently employed and remunerated for the work.

The principle of equal treatment means that workers from other EU member states have the same right of access to the German labour market as German citizens. However, certain conditions apply for citizens of the new member states. The accession treaty was equipped with transitional arrangements under which the Federal Republic of Germany can suspend the freedom of movement of workers. This it has done, initially for two years (until 30 April 2006) and now for a further three years (until 30 April 2009).

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1) To the extent that for reasons of improved legibility descriptions relating to natural persons are used in masculine form only, they apply in equal measure to men and women.

2) Any mention of the new EU member states in the following is understood to refer solely to those new members in relation to which transitional arrangements apply in Germany.
Germany can further extend this period for a final two years, making seven years (until 30 April 2011) the maximum possible transition period (this is known as the 2+3+2 rule).

Because of this suspension, special provisions apply with regard to labour market access. In particular, certain workers must have a work permit. The substantive provisions on labour market access for citizens of the new member states correspond to those in force for citizens of non-EU countries. However, there are areas where citizens of the new member states are entitled to privileges not enjoyed by citizens of non-EU states. For example, citizens of the new member states are accorded priority over those from non-EU states when it comes to accessing the German labour market. Furthermore, they receive a work permit where they have been entitled to work uninterrupted in the German federal territory for at least 12 months (section 12a ArGV). Finally, there are other provisions from bilateral agreements which must be respected.

1.2.2 Free movement of services

The freedom of movement of services means that persons providing a service may, for that purpose, temporarily pursue their activities in another member state under the same conditions as apply for citizens of this other member state.

This freedom applies to the provisional exercise of self-employment in another member state. Services within the meaning of Article 49 et seqq. of the ECT are those which are provided across borders and usually for a fee. In contrast to the freedom of establishment, the freedom to provide services relates to temporary and occasional activity, i.e., for a fixed period of time and for the purpose of carrying out a specific task. The company providing the service has its registered office in its home country or maintains a branch office there.

The free movement of services allows, in addition to the performance of contracts for services (Dienstvertrag), contracts for work (Werkvertrag) within the meaning of German civil law to be performed.

> In a contract for services, an agreement is reached to provide a certain service only, i.e., there is no obligation to achieve a specific result (for example, contract with medical doctor).

> In contracts for work, an agreement is reached that the service provided must produce a specific outcome (e.g., cutting and packaging X tonnes of meat, constructing a specific building).
The Federal Republic of Germany has, on the basis of the accession treaty, introduced restrictions on the freedom of citizens of the new member states to provide services. Originally imposed for a transitional period of 2 years (until 30 April 2006), these have since been extended for three further years (until 30 April 2009). Germany can further extend this period for a final two years, making seven years (until 30 April 2011) the maximum possible transition period (this is known as the 2+3+2 rule).

Currently, there are transitional restrictions in force in the following industry sectors:

- Construction, including related branches;
- Cleaning industry for buildings, stock and modes of transport;
- Interior decoration.

Services in these sectors may not be provided by personnel from the new member states unless work permit requirements are observed and the work is based on bilateral government agreements in which the arrangements relating to contracts for work are set out. These agreements allow a certain number of workers, agreed beforehand for the countries involved, to be posted to Germany. A work contract within the meaning of sections 631 et seqq. of the German Civil Code (Bürgerliches Gesetzbuch, BGB) must have been concluded between a company which is significantly active in the country of origin of the worker(s) and the German company concerned before the work can be carried out.

Citizens of the new member states are free to provide cross-border services in all other industrial sectors without having first to obtain a work permit. For information on proof of professional qualification, see 1.2.3 below. Section 2.1.4 contains information on the commercial leasing of workers.

1.2.3 The freedom of establishment

Freedom of establishment, as set out in Articles 43 et seqq. of the ECT, includes the right within the sovereign territory of one member state of a citizen of another member state to take up and pursue activities as a self-employed person and to set up and manage undertakings, branches or subsidiaries.

Thus, people involved in trades and crafts, freelancers, traders and merchants in particular can set up and operate business in Germany. However, the professional and trading regulations which apply to domestic citizens must also be observed.

These regulations include the obligation of the person concerned to provide evidence of his/her professional qualification where legal or administrative provisions so require. With regard to the exercise of a craft, proof of qualification must only be furnished when wishing to carry out the trades listed in Appendix A of the German Trade and Crafts Code (Annex B), which are subject to licence provisions. The person concerned must apply with the competent authority in Germany to have the qualification gained in the other member state recognised, which it then is pursuant to the Community provisions in force (EC Directives on recognising professional qualifications).
The European Court of Justice defines establishment as the actual pursuit of an economic activity through a fixed establishment in another member state for an indefinite period.

> It must involve a long-term (economic) activity in another member state (in contrast to the temporary activity with respect to services). In other words, the activity must be pursued for an unlimited period of time and may not be of a temporary nature. In this regard, it is not only the duration of the activity which is important, but also the frequency, regularity or continuity.

> The economic activity must be actually performed through a fixed establishment (e. g. production facilities, store rooms or offices). This is to make it clear that what is required is more than just the mere registration of the operations with, for example, trades organisations, crafts and trades officials, registration offices or tax offices, and premises which are more accurately described as sleeping quarters.

The freedom of establishment has applied since 1 May 2004 to citizens of the new member states, without transitional arrangements.
II. The cross-border provision of services

2.1 Legal setting

2.1.1 Social insurance law

The Federal Republic of Germany has a structured system of social security. The individual types of insurance are statutory health, old-age care, accident, unemployment and pension insurance. The employer must register workers subject to insurance contributions with the health insurance institutions, as these are the collecting bodies. He must then also pay the overall social insurance contribution over to these bodies (sections 28a, 28e, 28h and 28i SGB IV). He must generate notifications and evidence of payments using his fully-automated system-proofed remuneration programme or using an automated support programme.

Where an employee is posted to Germany by his permanent employer, who is resident in another member state, for the purpose of carrying out work for the account of the latter, the employee continues to remain subject to social insurance provisions of the other member state where the expected duration of this work does not exceed 12 months and where he does not replace another employee whose posting has come to an end (posting within the meaning of social insurance legislation).

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The competent social insurance providers are the health insurance institutions (sections 21, 21a, 21b SGB I), the accident insurance institutions (section 22), the Bundesagentur für Arbeit (Federal Employment Agency, sections 19, 19a, 19b) and the pension insurance institutions (section 23).

See www.itsg.de/svnet.
In its Decision No 181 of 13 December 2000, the European Commission’s Administrative Commission on the Social Security of Migrant Workers set out a binding interpretation of Article 14 of Regulation (EEC) No 1408/71 and drew up a practical guide in this regard.\(^5\)

According to the guide, the following must be observed:

a. Characteristics for a posting:

> Worker is normally attached to the sending employer before or after the posting;

It is immaterial if someone is recruited for the purposes of being posted (without have been employed at the company before) where the company habitually carries on significant activity in the territory of the state from which the posting occurs (posting state). The criteria to determine whether a posting company carries on significant activity include:

- The number of contracts with clients concluded by the posting company in the posting state.
- The law on which the contracts are based. Where German law is applicable to the contracts, this would indicate that there is no posting.
- Turnover:
  It can be assumed that significant activities are carried on where 25% of total turnover is generated in the posting state. Where this share lies below 25%, each case must be looked at on its own merits.
- Genuine business activity in the posting state, generally for at least four months.

The service provider must remain associated with the economy of its state of origin. The purpose of the company cannot be solely to provide services in a member state other than its own. “Letterbox companies”, i.e. those which carry on no entrepreneurial activity at their (would-be) registered office in the posting state and which are very often merely temporary employment offices cannot provide cross-border services and therefore cannot post workers.

> Limitations on the posting:

Generally no longer than 12 months, with a possible extension of a further 12 months.

> Must not represent a replacement for a worker whose posting is at an end.

\(^5\)See No. 10 of Decision No. 181 of 13 December 2000 by the Administrative Commission of the European Communities on Social Security for Migrant Workers; for the guide please visit: www.europa.eu.int en > Institutions > European Commission > Employment and Social Affairs > Coordination of Social Security Schemes > Key Documents > Posting Guide [en].
> A direct relationship must continue to exist between the posted worker and the posting company:

- Employment contract with the posting company;
- Posting company must retain the power to determine the nature of the activity to be carried out by the posted worker;
- The posting company must be responsible for remuneration, irrespective of who actually (technically) carries out the payment.

b. The posting provisions do not apply in the following cases:

> Chain hire:
Company X posts the worker to company Y, which in turn places the worker at company Z’s disposal; the member state in which Z has its registered office is immaterial.

> Recruitment from a third country:
The worker is recruited in member state A, in order to be posted by a company with registered office in member state B to a company in member state C.

> Employment of local staff:
The worker is recruited in member state A by a company, whose registered office is in member state B, to carry on activity in member state A.

c. Documents relating to the posting:

The E 101 form, declaring that the social security provisions of the posting state will continue to apply throughout the duration of the posting of the worker to Germany, thereby excluding the application of German social security provisions on the principle of avoiding double insurance, should generally be filled out ahead of the posting period. A sample E 101 form can be found in Annex A, Appendix 1 to this handbook.

The social security institutions of the posting state are obliged to check whether the conditions for issuing an E 101 are met.

Where an E 101 has been issued, the worker is not obliged to pay social insurance in Germany. By the same token, he is not entitled to claim German social insurance benefits.

The situation of workers from other member states and who are not in possession of an E101 must be assessed under the German provisions governing social insurance.
2.1.2 The right of residence

Section 2(4) of the German Freedom of Movement Act/EU (Gesetz über die allgemeine Freizügigkeit von Unionbürgern, FreizügG/EU) stipulates that citizens of the European Union require no residence permits for their entry and stay in Germany. This also applies unconditionally for citizens of the new member states.

There is an obligation for citizens of the Union to register with the authorities, just as there is for German citizens under state laws. The registration authorities send the details filled in when registering on the persons right to move freely to the authority responsible for the affairs of non-nationals\(^6\), which then officially issues a certificate on Community residency provisions, section 5(1) FreizügG/EU. When issued to a citizen of the “new” member states, this certificate draws reference to the need for a work permit. Citizens of the “old” states receive the certification without any such reference. Annex A contains a sample residence permit (EU) (Appendix 2), which since 1 January 2005 is issued only to family members of Union citizens who themselves are not Union citizens. The documents issued before this time to citizens of the Union remain valid (residence permit (EC)).

2.1.3 The law relating to work permits

As a result of the freedom of movement for workers, workers from EU member states do not generally need work permits. However, certain conditions do apply for citizens of the new member states during the transitional period. In principle, these may only exercise employment with a work permit (EU) issued by the Bundesagentur für Arbeit (Federal Employment Agency), and may only be employed by employers when they possess such certification (section 284 SGB III). The Ordinance on work permits (Arbeitsgenehmigungsverordnung, ArGV) and the Ordinance on exceptions to the ban on the recruitment of foreign labour (Anwerbestoppausnahmeverordnung, AßAV) thus continue to apply to the extent that the Residence Act (Aufenthaltsgesetz, AufenthG) and the corresponding statutory instruments do not contain more favourable provisions. The recruitment ban on citizens of the new member states has been suspended since 1 January 2005 for activities which require specialised professional qualification (AufenthG, section 39(6)). Such workers as issued with authorisation in the form of the work permit (EU) (section 284(2) SGB III).

\(^6\)These are the local offices for the affairs of non-nationals, generally at the level of rural or urban district.
Work permits are also required for workers posted to branches in which the freedom to provide services of citizens of the new member states is restricted (see 1.2.2 above). This work may only be performed on the basis of the bilateral agreements signed by Germany on work contracts. In contrast, no work permit is required for workers posted to a branch in which no restrictions apply.

In the field of transport, companies from Slovenia have (along with those from Malta and Cyprus) been entitled to the freedom of cabotage in the road haulage sector from the very beginning of its membership. This means that Slovenian drivers of Slovenian HGVs employed by Slovenian companies need no work permit even for trips starting and ending within Germany (cabotage).

The authority is generally granted by the employment offices in the form of a work permit (EU) on yellow paper. Annex A contains a sample application form as well as the permit itself (Appendix 3).

The agreements on work contracts continue to apply even after the new member states have joined the Union, although some changes have been made, for example with regard to the amount of workers, to bring them in line with the accession treaty. The Bundesagentur für Arbeit is responsible for the process of granting permission to and licensing workers under contracts for work. It should be noted that the assurance granted to the foreign company which is party to the work contract merely covers the basic right to post workers to Germany and to deploy these for the purposes of executing the contract for work signed with the client. In order to actually take up the work, citizens of the new member states also need the work permit (EU) mentioned above.

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7For a more precise definition of activity subject and not subject to work permit obligations please see the Bundesagentur für Arbeit’s fact sheet entitled “Beschäftigung ausländischer Arbeitnehmer im Rahmen von Werkverträgen – EU-Dienstleistungs­freheit ab Mai 2004”. This may be called up by visiting www.arbeitsagentur.de > Informationen für Arbeitgeber > Internationales > Ausländerbeschäftigung > Werkvertragsarbeitnehmer > Links und Dateiliste.

8Further information on employing foreign workers may be found in Merkblatt 7 of the Bundesagentur für Arbeit by visiting: www.arbeitsagentur.de > Service von A-Z > Vermittlung > Ausländerbeschäftigung > Link und Dateiliste. The link also contains information on further important groups of foreign workers.

9For more information on the process regarding contracts for work, in particular on the competent offices of the Bundesagentur für Arbeit, please consult (in German only): www.arbeitsagentur.de > Service von A-Z > Vermittlung > Werkverträge > Link und Dateiliste > Merkblatt 16A.
2.1.4 The legal leasing of employees

Under section 1(1), first sentence of the Act regulating the commercial lease of employees (Arbeitnehmerüberlassungsgesetz, AÜG), the leasing of an employee is where an employer (lessee) leases an employee (leased worker) to a third party (lessee) on a commercial basis for the purposes of carrying out work.

Section 1 AÜG also states that such activity requires permission. The lessee can claim a right to be issued with permission if he is reliable. The regional offices of the Bundesagentur für Arbeit are responsible for issuing leasing permissions. Annex A contains a sample permit to lease employees on a commercial basis (Appendix 4).

The leasing of workers is a service within the meaning of Article 49 of the ECT. The leasing of workers by employers with a registered office in another member state to companies in Germany is thus permissible in principle. This also applies to providers from the new member states. These also require permission, even where they are authorised in their state of domicile and only provide services within the context of the freedom of cross-border services.

A further condition must be met if the leasing of workers is to be legal, namely that the workers are deployed in a manner commensurate with work permit rules. Citizens of an “old” member state can be employed without any further requirements as leased workers (Article 39 et seq. of the ECT in conjunction with the provisions of the FreizügG/EU). The restrictions imposed under section 6(1)(2) ArGV continue to apply during the transitional period for citizens of the new member states. These cannot receive work permits to perform activity as leased workers. Leasing is allowed in individual cases only, where the workers from the new member states are also citizens of an old member state (dual-citizenship) or have otherwise gained the right to work in Germany (e.g. by way of a work permit (EU)). Furthermore, in order for the leasing of workers to be legal, section 7(1)(4) of the German Posting of Workers Act (Arbeitnehmer-Entsendegesetz, AEntG) states that the working conditions for leased workers must be those stipulated in the AÜG, in other words, for example, the principle of equal treatment under section 3(1)(3) AÜG applies.

Whereas the conditions described above apply with respect to the cross-border leasing of workers, a prior leasing in the state of origin may be arranged without any of these requirements. Thus, a provider of services may deploy across borders not only its own staff but also that which it itself has leased earlier in its own country. These cases do not invoke the transitional rules on the free movement of workers as the posted workers can be attributed to the German partner neither by way of a work relationship nor by way of a lease.
2.1.5 Ensuring minimum working standards as set out in the Posting of Workers Act (Arbeitnehmer-Entsendegesetz, AEntG) are met

2.1.5.1 Adhering to the working conditions collectively agreed in the construction industry\footnote{Currently, that part of the AEntG which relates to collectively agreed working standards is restricted to the construction industry and shipping assistance. A government bill on a first amending act to the AEntG is currently making its way through Parliament and provides for the extension of the Act to the building cleaning trade.}

Where an employer with registered office abroad uses with his employees chiefly to provide construction services within the meaning of section 211(1) SGB III in Germany, he must guarantee these employees the working standards defined in the AEntG and set out in the collective bargaining agreements of the building industry proper and its ancillary branches.\footnote{Sections 1 and 2 of the Ordinance on construction businesses (Baubetriebeverordnung).} This means paying the minimum gross wage (including overtime), adhering to holiday provisions and paying into the holiday fund system.

Whether the criteria relating to mainly providing construction services are met is decided by looking at what most of the time was spent doing. In contrast, economic considerations such as turnover or profit, or criteria under trade and crafts legislation are wholly irrelevant.

Where businesses involved in the building trade proper are concerned, the entirety of the workers posted to a project is decisive, as these represent an independent business division (see section 1(VI), second and third sentences of the BRTV). The fact, for example, that the majority of working hours at the registered office abroad are spent carrying on other activities and construction services is thus immaterial.

The employer need only meet those working standards of collective agreements which also apply to those not signed up to a collective agreement, either through by having been declared universally binding under section 5 of the Collective Agreement Act (Tarifvertragsgesetz, TVG) or through the statutory instrument provided for in section 1(3a) AEntG. Furthermore, the collective agreements must obey the so-called workplace principle. This means, where the collective agreement does not already prescribe uniform working standards to be applied across the federation as a whole, that the working conditions of the place where the work is carried out are decisive. The registered office of the employer is irrelevant in this regard.

a. Minimum wage

The following applies in calculating the minimum wage:

Wage allowances or supplements paid by the employer are to be regarded as part of the minimum wage where their payment is not contingent upon the worker providing a service not covered in the collective agreement.
Consequently, those allowances or supplements paid to compensate for particular difficulties and burdens associated with performing certain work and provided for in the collective agreements as additional payments to the actual hourly rate are not considered part of the minimum wage.

Thus, the following payments cannot be included for minimum wage purposes:

- Allowances for carrying out work at certain times (e.g. night shift allowance, allowances for working on Sundays and public holidays);
- Allowances for performing work under difficult or dangerous conditions (e.g. dirt money, danger money, working under high temperatures, in tight passages or in tunnel, wearing protective clothing);
- Piece-work bonuses (more work per unit of time) and quality bonuses (above average quality results);
- General one-off payments such as holiday allowances, Christmas bonus, special annual bonus, loyalty bonus. However, these payments are considered part of the minimum wage when the employee does not receive them once a year, but rather receives an actual and irreversible payment each month in addition to his normal wage, representing a proportionate amount of these one-off payments divided for each of the months of his posting.

Thus, overtime is subject to special rules. Allowances paid here must be treated as bonuses for carrying out work at certain times and are therefore part of the minimum wage if the employer is obliged to remunerate overtime at the place of work.

The following must always be included in calculating minimum wage:

- Construction supplement: Section 2(1) of the TVMB expressly states that this is a constituent element of the minimum wage. This supplement is a generalised part of the overall contractual wage. It must be paid to every worker covered by the collective agreement, irrespective of whether this worker is actually subject to the burdens named in section 2(1) of the TVMB.

- The so-called posting allowances where these represent an allowance paid to the worker to make up the difference between the wage that he can earn in the posting state and the wage that he is entitled to under section 1(1) of the AEntG together with the respective collective agreement.

In terms of allowances paid to workers for sustenance and lodging, the following are not considered part of the minimum wage:

- The value of reimbursements of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging (see Article 3(7)(2) of Directive 96/71/EC on the posting of workers in the framework of the provision of services, otherwise known as the posting of workers directive);
- The monetary value of benefits in kind granted by the employer in addition to the wage (provision of board, sustenance).
Furthermore:
Where the employer pays the employee a total amount which includes amounts with which the employee is to cover his costs for lodging and/or sustenance, this total amount must be reduced by the lowest amount quoted in the Ordinance on remuneration in kind for lodging and sustenance payments, respectively. Where the employer only pays a wage net of the benefits he provides (e.g. board, sustenance), only this wage actually paid is taken into account for minimum wage purposes.

Minimum wage collective agreements pursuant to the AEntG exist for the:

> Construction industry (proper)
> Roofing trade
> Painting and varnishing trade
> Demolition trade.

b. Obligatory participation in the holiday fund system

Under section 1[3] AEntG, a foreign employer active in the construction industry is obliged, just like his domestic counterpart, to pay contributions into the ULAK, the construction industry’s fund for pooling and settling wage and holiday claims.\(^{14}\)

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12\text{This is known in German as the Sachbezugsverordnung. Remunerations in kind are benefits with a monetary value provided by the employer to the employee in addition to or in the place of a cash wage. These generally include the rent-free or low-rent provision of a place to stay or of goods. Remuneration in kind is seen as income for wage tax purposes and must be included in social insurance. The Ordinance gives the value of remunerations in kind for tax purposes and may be downloaded at www.bmas.bund.de > Service > Gesetze > Sachbezugsverordnung.}\)

13\text{The constantly updated minimum wage collective agreements can be downloaded at www.zoll.de > Entsendung von Arbeitnehmern > Arbeitgeber > Gesetzliche Regelungen und Tarifverträge.}\)

14\text{The holiday fund system was established in light of the following: Some 40\% of construction workers work for more than one company over an entire year. Without the holiday fund system, these workers would not be entitled to a vacation, since this only arises once a person has worked six months with a single employer. To this end, the ULAK maintains for each construction worker an employee account in which holiday and remuneration credits can be accumulated. The worker applies for leave with his current employer, who then approves the application and disburses the holiday pay. This employer then receives a refund for this money from the ULAK. Because the collective pay agreements in the construction industry have been declared universally applicable, German employers are obliged to participate in the holiday fund system. For further information please see www.soka-bau.de > Urlaubskassenverfahren. SOKA-BAU is the joint name for the Zusatzversorgungskasse des Baugewerbes (ZVK), a supplementary pension scheme for the construction industry in the form of a mutual insurance company, and the Urlaub- und Lohnausgleichskasse der Bauwirtschaft (ULAK), which together operate as a single undertaking.}\)
In order to avoid a foreign employer having to pay twice, this provision does not apply when he pays his contributions to a similar institution in his home state, including for the duration of the posting. To this end, the ULAK and the respective competent German ministries have signed framework agreements with their foreign counterparts on the mutual exemption of employers who are based in other countries. To date, such agreements have been concluded with Austria, Belgium, Denmark, France, Netherlands and Switzerland. The holiday fund can also provide information as to whether or not the employer is obliged to pay contributions.

The ULAK maintains for each construction worker an employee account in which holiday and remuneration credits can be accumulated. The employer who has granted the holiday receives a refund from the ULAK of the holiday pay disbursed to the employer.

c. Ensuring at least minimum work standards

Section 2(1) AEntG states that the authorities of the customs administration (Hauptzollämter) are responsible for verifying that the work standards set out in section 1 of this law are being met. Section 3(1) obliges the foreign employer to register every worker intended for employment on a building site in the Federal Republic of Germany before the employment period has begun. This registration must be submitted in writing and in German to the Regional Finance Office of Cologne’s specialist department for the financial investigation of illegal work (Abteilung Finanzkontrolle Schwarzarbeit bei der Oberfinanzdirektion Köln), and must contain the details set out in section 3(1) AEntG.

In addition, the employer must attach a pledge that he adheres to the agreed work conditions, section 3(3).

As soon as the financial investigation department has received such notification, it forwards a copy to the Hauptzollamt responsible, to the ULAK and to the tax office responsible for VAT.

Furthermore, the employer must ensure that he has in store the documents in German needed to verify that he is adhering to his statutory obligations (section 2(3) AEntG). These include in general: the employment contract or a document pursuant to section 2 of the Act on proof of an employment relationship (Nachweigesetz, NachwG) or a similar foreign statute, proof of time worked, proof of wage, and receipts for the wage payments. The employer is also obliged to submit other documents which may be needed to establish whether the agreed work conditions are being adhered to should the authority charged with such verification so require.

The obligation to maintain documents in German extends beyond the actual duration of the individual worker’s stay in Germany and applies for at least as long as the construction work is being carried out but for no longer than two years.

Moreover, the employer is obliged to record when work starts and ends, and the duration of the work, for each employee on a daily basis and to retain these records for at least two years, section 2(2a) of the AEntG.
2.1.5.2 Minimum work standards for all branches

Section 7(l) AEntG obliges employers with registered office abroad to adhere to certain work standards set out in German legal and administrative statutes. In contrast to section 1 AEntG, this provision is not restricted to the construction industry, but applies instead to all branches. In contrast to the case with social insurance, it makes no difference here whether these employees have been posted; all that counts is that they are employed in Germany. The provision applies to all legal rules, statutory instruments and administrative provisions, but generally not to collective agreements – even where these are universally binding – and works agreements.15

The competent authorities are responsible for ensuring that at least the minimum standards listed in section 7(l) are implemented and adhered to. Their supervisory competence is based on the specific laws concerned. For example, the competent regional authorities (e.g. factory inspectorates, occupational health and safety offices) are responsible for ensuring that legal provisions relating to security and safety in the workplace – including provisions relating to working hours – are adhered to.

2.1.5.3 International cooperation between the respective liaisons offices and monitoring authorities

The AEntG is designed to implement Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. In order to ensure that it is actually implemented, Article 4 of the Directive provides for cooperation between member states in terms of the exchange of information. To this end, the member states have designated liaison offices and competent national monitoring bodies. These are to act as points of contact and information for the authorities of the other member states as well as for undertakings posting employees and for posted employees.16

Cooperation standards which are meant to ensure that the liaison offices reply to requests from other member states within a four week period have been in force since April 2005.

15A LIST OF THE LEGAL AND ADMINISTRATIVE PROVISIONS TO WHICH SECTION 7(l) APPLIES CAN BE FOUND BY CONSULTING WWW. ZOLL.DE > ENTSENDUNGEN VON ARBEITNEHMERN > ARBEITGEBER > GESETZLICHE REGELUNGEN UND TARIFVERTRÄGE > AUFLISTUNG DER NACH § 7 ABS. 1 AENTG IN ENTSENDENFÄLLEN ANWENDUNG FINDENDE RECHTS- UND VERWALTUNGSVORSCHRIFTEN.

16A LIST OF THE LIASION OFFICES AND MONITORING BODIES MAY BE HAD BY FOLLOWING WWW.ZOLL.DE > ENTSENDUNGEN VON ARBEITNEHMERN > RICHTLINIE ÜBER DIE ENTSENDUNG VON ARBEITNEHMERN IM RAHMEN DER ERBRINGUNG VON DIENSTLEISTUNGEN > VERBINDUNGSBÜROS.
2.1.6 Tax legislation

2.1.6.1 The obligation to pay wages tax in Germany

Generally, every working wage paid by a German employer for activity carried out on the basis of an employment arrangement is subject in Germany to wages tax (income from dependent employment). A domestic employer as defined by tax legislation is anyone who has a domicile, habitual abode, place of management, registered office, permanent establishment or permanent representative in Germany.

Where workers have been posted, the company resident in Germany accepting the workers and bearing the economic burden of the wages paid for work done for it is a domestic employer. This must be assumed in particular if the wage bill paid by the other company is passed on to the Germany company, e.g. a foreign parent company posts a worker to a subsidiary in Germany in return for having the wages it pays refunded. It does not require in order for employer obligations to be met that the German company pays out the wage in its own name and for its own account. The wages tax liability arises as soon as the worker is paid his wage where the agreement is such that the German company can expect to be billed for this wage; the German company must impose the wage tax at this instant.

From the perspective of tax legislation, a domestic employer is also anyone who leases a worker to a third party (lessee) on a commercial basis for the purposes of carrying out work in Germany, without actually being a domestic employer (foreign lessor). The classification as employer does not require the existence of the legal leasing of workers pursuant to the AÜG. The leasing of workers is deemed commercial where the company (lessor) leases workers out on a continual basis for commercial gain. Workers transferred as an ancillary service to another service e.g. where, when equipment is hired and operators leased out, the economic value of the equipment hire is greater, does not constitute a case of leasing workers. The AÜG also does not apply where the conditions listed under the second sentence of section 1(1) and section 1(3) AÜG are met.

In order to determine from a legal perspective whether a situation constitutes the leasing of workers or whether it is a case of a contract for work, the overall context must be looked at. The term given to the actual legal transaction is not decisive.

Possible signs indicating the leasing of workers include:

> The owner of the third party company (lessee company) essentially exercises an employer’s right of instruction.

> The tools to be used are supplied chiefly by the third party company.
2.1.6.2 Wages tax and liability for wages tax

Wage tax liability arises as soon as the wage is paid to the worker. In this regard, the form of wage or the frequency of its payment is immaterial. Wages tax must also be deducted from wages paid by a third party as part of the employment relationship where the employer is aware of and can validate the payment of such remuneration.

The wages tax is owed by the worker, even where net wages have been agreed. The employer is generally obliged to withhold the wages tax irrespective of whether or not the worker is assessed from income tax. The worker’s citizenship is unimportant. The employer bears the liability for the wages tax which he has to withhold and pay on and for income tax (wages tax) underpaid as a result of incorrect entries in the wage account or the certificate of wage tax deduction.

Where labour is leased, the lessee and the employer both bear liability for the tax, except where labour has been leased under the conditions described in section 1(3) AÜG. Furthermore, the lessee is also exempt from liability when, through no fault of his own, he has been mistaken with respect to the existence of the leasing of workers. Liability is limited to wages tax for the period in which the worker was leased to him.

2.1.6.3 The obligations of the employer and his employer

In order to enable wages tax to be deducted, the worker subject to unlimited income tax liability must submit to his employee a wages tax card either before the beginning of the calendar year or before his employment commences. Where the worker is subject to limited income tax liability, he must for the purposes of wage tax deduction present to his employer certification by the tax office responsible for his employer’s permanent establishment. The employer must store the wages tax card or the certification.

The employer must maintain a wage account at the permanent establishment for every worker and for every calendar year. The wages account must display the details necessary for the deduction of wages tax. These details can be taken from the wages tax card or from the certification issued by the tax office in whose district the permanent establishment is located. The wage account must record the type and amount of each wage payment including the tax-free payments and the wages tax withheld or assumed.
The employer must no later than the tenth day of every wages tax declaration period submit to the tax office of the permanent establishment a tax return showing the amount of wages tax to be withheld and assumed during the period and to pay over to the tax office the wages tax actually withheld and assumed. The period for declaring wages tax is generally each calendar month; it can however be each quarter or each calendar year.

2.1.6.4 VAT

All entrepreneurs resident and generating turnover in Germany irrespective of citizenship must register for the purposes of VAT with their competent tax office and submit provisional VAT returns or VAT declarations for the calendar year.

An entrepreneur is deemed resident in Germany when he maintains in Germany, on the island of Heligoland, or in any other the territories listed in section I(3) of the Turnover Tax Law (Umsatzsteuergesetz, UStG) a domicile, registered office, place of management or branch office.

All entrepreneurs resident abroad and generating turnover in Germany for which they owe VAT must register with the central tax office responsible for them and submit provisional VAT returns or VAT declarations for the calendar year there.

2.1.6.5 Registration for tax purposes

The following reporting obligations must be observed where companies with registered office in a member state provide work or services in Germany:

> Taxpayers who are not natural persons are obliged under section 137 of the German Fiscal Code (Abgabenordnung, AO) to notify the competent tax office and the local authorities responsible for collecting impersonal taxes of any circumstances of relevance with respect to registration for tax purposes. This includes, in particular, the setting-up of a company, the attainment of legal capacity, any changes to the legal form of the company, the transfer of the place of management or registered office and the winding up of the company. Notice of these events must be given within one month of their occurrence. The tax office in whose jurisdiction the company's place of management is located is responsible. Where the place of management is located in an area not covered by the scope of the law or where the location of the place of management cannot be determined, the tax office in whose jurisdiction the taxpayer has its registered office is responsible.

> Anyone who opens a commercial undertaking or a permanent establishment must under section 138 AO notify the local authority in which this undertaking or permanent establishment is located of such by way of an officially prescribed form. The local authority will then immediately inform the competent tax office of the content of the notification.
II. THE CROSS-BORDER PROVISION OF SERVICES

2.1.7 Trading legislation

The provision of cross-border services has no implications in trading legislation, and thus must not be notified to the authorities where it is merely a one-off service of limited duration. However, section 14 of the German Trade Regulation Code (Gewerbeordnung, GewO) states that it may be necessary to notify the authorities of such activity where services are provided, albeit for a short period of time, on a repeated basis and concentrated in one location or various locations.

Permission is needed to provide cross-border services where the services are those of a trade or craft which require a licence. Permission from the state of origin is also recognised where it provides a similar level of protection.

The competent authorities are those in whose jurisdictions the transaction (whether subject to notification or licence requirements) is carried out. The actual authority responsible is determined by the legislation of the individual federal states. This can be a local authority, administrative district, trades offices, office for public order, town hall, etc.

2.1.8 Trades and crafts legislation

In addition to the requirements under trading law, special conditions stipulated by trades and crafts legislation must be met where the service is to be carried out across borders from a fixed place of business in a particular trade or craft which is subject to licensing provisions. The trades and crafts which require a licence are listed in Appendix A to the German Trades and Crafts Code (Handwerksordnung, HwO), which is included as Annex B to this guide.

2.1.8.1 The cross-border provision of services by a trades and crafts business

Any citizen of the EU or EEA wishing to exercise across the border a trade or craft listed in Appendix A to the HwO will not be entered into the German register of craftsmen and tradesmen (Handwerksrolle). Nevertheless, section 9(2) HwO together with section 4 of the German Trades and Crafts Code for the EU/EEA (EU/EWR-Handwerk-Verordnung, EU/EWR-HwV) states that he needs certification from the relevant authority confirming that he meets the conditions that apply in Germany before such a trade or craft may be exercised.

In contrast, anyone wishing to set up an establishment in Germany to exercise such craft or trade will require special dispensation to have their name entered in the aforementioned register (section 9(1) HwO together with EU/EWR-HwV - see 3.1.3).
2.1.8.2 Requirements for the issue of special dispensation or certification

Before special dispensation or certification can be issued, citizens of the EU or the EEA must submit certification by the competent authorities of their home state showing the nature and duration of the activity in question in the home state. This applies to all trades and crafts, except those of numbers 12 and 33 to 37 in Appendix A to the HwO (Annex B to this guide).

Where this certification from the home state shows that the applicant has carried out the activity

> uninterrupted for at least six years in an independent capacity or in a management position, or
> uninterrupted for at least three years in an independent capacity or as a manager, having first trained for the profession for at least three years, or
> uninterrupted for at least three years in an independent capacity and at least five years in a dependent capacity, or
> uninterrupted for at least five years in an executive position, three years of which were spent working with technical duties and with responsibility for at least one division of the company, having also completed a least three years of training for the profession, and that this activity entails at least to a significant degree the exercise of the trade or craft for which the application is being made, section 9 HwO together with the EU/EWR-HwV states that the applicant has the right to be issued by the German authorities with special dispensation or certification.

Professional experience is not necessary where the applicant can submit evidence of formal education which must be recognised pursuant to the European Directive on recognising qualifications (e.g. diploma or certificate). Evidence of formal education is always needed before any of the trades or crafts listed from No. 33 to No. 37 of Appendix A to the HwO (health industry) may be exercised. Professional experience by itself is not enough.
2.2 Legal implications of non-compliance

Where the conditions necessary for an orderly posting are not met, the situation may constitute an employee-employer relationship in Germany.

2.2.1 Social insurance law

Where a posting within the meaning of Regulation (EEC) No 1048/71 is not concerned, the employee-employer relationship in Germany triggers certain social security reporting, contribution and recording obligations, non-compliance with which is deemed to constitute illegal work under section 1[2][1] of the German Law to combat illegal work (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG).

In this regard, failure to report for illegal work under section 1[2][1] of the German Law to combat illegal work is not enough. The personal conduct of the citizen must constitute a genuine, present and sufficiently serious threat to public order and security affecting one of the fundamental interests of society. A criminal record in itself is not enough. The personal conduct underlying the crime must be verified by the competent authority in light of the basic principles established by the European Court of Justice. A present danger within the meaning of European Court of Justice case law can only be affirmed where a threat assessment drawn up by the authority responsible for the affairs of non-nationals shows that a further breach of public order and security can be expected in future.

Deeds associated with the improper posting of workers are generally seen as an administrative offence rather than a crime (see the comments above and below on criminal and administrative offences).

The would-be client must be aware that he can become an employer and, as such, would be obliged to meet the obligations imposed on an employer by social insurance law. Furthermore, section III SGB IV provides for administrative fines for breaches of the reporting, contribution and recording obligations.

2.2.2 Right of residence

It is very rare for a citizen of the Union to lose his or her right of residence as a result of an improper posting of workers.

The barriers against Union citizens losing their right to residence on grounds of public order and security are extraordinarily high (see section 6 FreizügG/EU). The personal conduct of the citizen must constitute a genuine, present and sufficiently serious threat to public order and security affecting one of the fundamental interests of society. A criminal record in itself is not enough. The personal conduct underlying the crime must be verified by the competent authority in light of the basic principles established by the European Court of Justice. A present danger within the meaning of European Court of Justice case law can only be affirmed where a threat assessment drawn up by the authority responsible for the affairs of non-nationals shows that a further breach of public order and security can be expected in future.

Deeds associated with the improper posting of workers are generally seen as an administrative offence rather than a crime (see the comments above and below on criminal and administrative offences).
Where citizens of the Union are prosecuted, the competent body responsible for the affairs of non-nationals would have to check whether on the basis of the criteria drawn up by the European Court of Justice the person concerned should forfeit their right to move freely within the Union.

2.2.3 The law relating to work permits

Anyone who employs foreign workers without the requisite residence permit allowing labour market access or without the necessary work permit pursuant to section 284(I) SGB III is committing an administrative offence under section 404(2)(3) SGB III. Where this action is carried out wilfully and where large amounts of foreign workers are being employed and/or their conditions of work are conspicuously worse than those of similar German workers, this can be treated as a criminal offence under sections 10 and 11 SchwarzArbG.

Section 284(I) SGB III also states that any foreign worker who takes on work without having prior to this secured the requisite residence permit or work permit is committing an administrative offence pursuant to section 404(2)(4) SGB III.

Anyone who persistently repeats the wilful behaviour described in no. 3 or 4 of section 404(2) SGB III is committing a criminal offence pursuant to section 11 SchwarzArbG.

Sanctions are also provided for in addition to this in the bilateral agreements on contracts for work. Companies which have signed a contract for work but which then proceed to breach one or more of the conditions listed in the contract (e. g. paying the agreed wage, breaching the prohibition on the leasing of workers) are excluded from the execution of future contracts for work.

2.2.4 Illegal leasing of workers

Situations where workers are improperly posted may constitute the illegal leasing of labour where they are leased without the requisite permission. In such cases, an employee-employer relationship between the lessee company and the leased worker is deemed to have come into effect in Germany, including all the social insurance reporting, payment and recording obligations that this entails, Section 10(I) AÜG (assumption). Section 9(I) AÜG states that the contracts between the lessor company and the lessee company as well as between the lessor company and the leased worker are null and void if the lessor company does not have the permission required by section 1 of the same law. The lessee company and the lessor company are liable as joint and several debtors for any social security contributions due, section 28e(2), fourth sentence, SGB IV.

The unauthorised leasing of workers is generally punishable with an administrative fine (section 16 AÜG), whereas the unauthorised leasing out (by the lessor company) of foreign workers without a work permit is punishable as a criminal offence (section 15 AÜG).
Where the unauthorised leasing by the lessee company of a foreign worker without the requisite work permit is concerned, the assumption under section 10 AÜG means that the worker is to be seen as an employee of the lessee company, and thus it is seen as an administrative offence pursuant to 404(2)(3) SGB III. However, section 10 SchwarzArbG states that it is a criminal offence where the would-be lessee subjects the worker to unfavourable working conditions. Whoever concurrently employs more than five foreigners without permission or persistently, wilfully and repeatedly employs foreigners without the necessary permission is guilty of criminal behaviour pursuant to section 11 SchwarzArbG.

A lessee who possess the necessary permission pursuant to section 1 AÜG but who employs leased foreigners without the necessary work permit and under unfavourable conditions commits a crime pursuant to 15a AÜG.

2.2.5 Posting of Workers Act (AEntG)

2.2.5.1 Administrative offences pursuant to section 5 AEntG

Section 5 AEntG states that any breaches of the obligations set out in sections 1 to 3 of the same act can be punishable as administrative offences.

Section 5(1) sets out when employers with registered office abroad commit such offences, namely when they

> fail to meet the obligations to cooperate arising from section 2(2), first sentence, of the AEntG in conjunction with the SchwarzArbG;

> are in breach of the obligation under section 2(3) AEntG to keep certain documents at the ready;

> are in breach of the recording and filing obligations under section 2(2a) AEntG;

> are in breach of the reporting obligation under section 3(1) and (2), or the duty to submit assurances as set out in section 3(3) AEntG.

The same applies to employers with registered office in Germany where they do not meet the payment obligations as set out in section 1 or the obligation to cooperate as set out in section 2.

Furthermore, under section 5(2) AEntG, an administrative offence is committed by anyone who acting as an entrepreneur commissions another entrepreneur with construction work knowing, or negligently not knowing, that the latter in carrying out the commission is in breach of section 1 AEntG, or that he uses a subcontractor who is in breach of this section.
2.2.5.2 Exploitative wages

Regardless of the obligation to pay a minimum wage agreed by collective bargaining – and thus also relevant for areas outside the construction industry – any employer paying very low wages may run the risk of being charged with usury as a result of exploitative wages pursuant to section 291[1][3] StGB.

To constitute such a crime, there must first be a noticeable disproportion between the performance of the worker and the consideration paid in return for this by the employer. To determine whether this is the case, the value of the performance must be assessed against the value of the compensation. The usual rate of remuneration for such work is used as a gauge to measure the value of the performance. To arrive at this rate, the wages set out in collective agreements in the respective branches as well as the normal local rates in the corresponding branches must be looked at. The wage paid is deemed to be disproportionate when it is two thirds or less of the wage under collective agreements. This collectively agreed wage does not need to have been declared universally applicable. Any benefits which the injured party in the transaction derives are immaterial (e.g. the purchasing power in his country of origin of the wage paid to the worker).

Furthermore, the perpetrator must have exploited a weakness of the injured party. This could include the victim’s predicament or inexperience. A predicament in this instance is economic distress which threatens the existence of the person concerned or which is accompanied by economic disadvantages, whether present or to be expected. Inexperience can be assumed when the victim’s knowledge and experience of commercial matters is so deficient as to lie well below that of an average person. An inability to fully understand or speak the language can be relevant here as this may make it more difficult for the injured party to read the situation correctly.

2.2.5.3 Breaches of other provisions which apply in accordance with section 7 AEntG

The AEntG contains no provisions on criminal or administrative proceedings for breaches by the employer of his duty under section 7 of the law to provide workers with certain minimum work standards contained in legal and administrative provisions. Sanctions in this regard are based solely on the respective laws. In addition, every worker concerned has the option of bringing an action before a labour court to ensure that the conditions described in section 7 are met.
2.2.6 Tax legislation

Where the situation constitutes a work relationship in Germany because the conditions for a posting (in tax terms) have not been met, the remuneration paid for the work is subject in its entirety to wages tax (see 2.1.6 above).

Assuming that the liability under substantive law to pay taxes exists, tax evasion within the meaning of section 370 AO is deemed to have been committed where a person knowingly furnishes the tax authorities or other authorities with false or incomplete information, or allows them to remain in ignorance, with regard to matters of substantial significance for taxation and, as a result, the tax bill is lower than it should be or a tax advantage has been unjustly attained for this person or a third party. Where this occurs as a result of due care not being taken, the offence is deemed tax evasion by negligence and is punishable by a fine of up to fifty thousand euros.

2.2.7 Trading legislation

Whoever, whether in a premeditated fashion or through negligence, fails to submit or submits incorrect, incomplete, or late notification pursuant to section 14 GewO is deemed under 1462(1) of this Code to have committed an administrative offence.

Under sections 144[1](1) or 145 (1)(1) GewO, anyone who operates a trade requiring permission who has failed, whether knowingly or negligently to obtain the required permission, is guilty of an administrative offence.

Section 148 states that whoever persistently repeats the latter offence or who, by committing this offence, poses a threat to the life or health of a third party or to a thing of substantial value is committing a criminal offence.

In addition, section 1(2)(4) SchwarzArbG states that anyone failing to meet his obligation under section 14 GewO to notify the authorities of the commencement of independent business activities is guilty of illegal work. This person then commits an administrative offence under section 8(1)[1](d) SchwarzArbG where he provides a services or work in considerable measure.

2.2.8 Trades and crafts legislation

Under section 117[1] GewO, anyone who carries on with a fixed place of business the independent operation of a trade listed in Appendix A to the Code without being registered in the crafts and trades register is committing an administrative offence. The same is true with respect to the provision of cross-border services where the provider is not in possession of the certification required under section 9(2) and section 4 EU/EWR-HwV.

Moreover, whoever commits the first mentioned offence is also guilty of illegal work under section 1(2)(5) SchwarzArbG. This person commits an administrative offence under section 8(1)[1](e) of this statute where he provides services or work in considerable measure.
2.2.9 Exclusion from the awarding of public contracts

Section 21(1) SchwarzArbG states that any person found breaching the provisions on unlawful employment and illegal work will be excluded from the awarding of public construction contracts.

This is, however, dependent upon the entrepreneur or the authorised representative having been sentenced to a term of imprisonment of more than three months or a penalty of more than 90 daily rates or a fine of at least 2,500 euros.

Section 6 AEntG also requires persons who have been fined at least 2,500 euros under section 5 of the same act to be excluded from participating in relevant competitions until such a time as they can be shown to have regained their reliability.

Section 21(1) SchwarzArbG and section 6 AEntG both state that this exclusion will commence even before criminal or administrative proceedings have been opened where the evidence leaves no reasonable doubt as to the existence of the offences stated above.

Both of these provisions also entitle the authorities responsible for investigating and prosecuting them to pass on the required information directly to the bodies awarding the contracts.

The decisions, findings and facts to be registered in the German Central Register of Trade and Industry (Gewerbezentralregister) are listed in section 149(2) GewO.\textsuperscript{17} Section 153a GewO and relevant provisions from other statutes (e.g. section 5(6) AEntG, section 12(4) SchwarzArbG, section 405(5) SGB III) provide for the obligation of the authorities and courts to forward this information to the central register.

The bodies awarding the contracts, i.e. the public customers named in section 98 of the Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), are obliged both under section 21(1) SchwarzArbG and section 6 AEntG to keep up to date on the information in the register, either by applying for information themselves or having candidates present them with such. Further rules on the exclusion from public tender competitions can be found in the state-specific tendering provisions of the various federal states.\textsuperscript{18}

\textsuperscript{17}The German Central Register of Trade and Industry (Gewerbezentralregister) is maintained by the Federal Public Prosecutor General (Generalbundesanwalt) at the Federal Court of Justice (Bundesgerichtshof). See www.bundezentralregister.de \textgreater GZR for more information.

\textsuperscript{18}See, for example, in Bavaria the Bayerisches Bauaufträge-Vergabegesetz (BayBauVG), and in Hamburg the Hamburgisches Vergabegesetz.
III. The freedom of establishment

3.1 Legal setting

3.1.1 Tax legislation

Section 2(1), second sentence, of the SchwarzArbG states that the regional revenue authorities are responsible for checking that tax obligations have been met (see 2.1.6 with regard to wages tax and VAT). Section 2(1), third sentence, entitles the customs administration (Hauptzollämter) to participate in these checks. In keeping with the provisions of section 6(1), first sentence, together with section 6(3)(4) SchwarzArbG, the customs authorities also investigate whether there are reasons to suspect that tax obligations arising from contracts for work and services are not being met.

3.1.2 Trading legislation

Under the ECT, the same rules apply to independent persons operating a business as to native citizens when setting up a commercial branch in Germany.

Notice must be given to the competent authorities of the commencement of the independent operation of a fixed place of business, of a branch office or of a dependent branch office (notification of trade pursuant to section 14 GewO). Notice must also be given of any transfer of operations, or change to or broadening of the object of the trade or purpose of the business. Annex A contains a sample official form for posting notice of a business (Appendix 5). This form contains all the important data such as the operator’s name and address, the object of the business, and the date on which operations commenced.

Additional requirements must be met if the business requires a permit. In such cases, a German permit must have been issued. The procedure involved here generally helps to establish the reliability of the applicant. Evidence of a relevant qualification is required for some commercial undertakings.

The competent authorities are those in whose jurisdictions the transaction (whether subject to notification or licence requirements) is carried out. The actual authority responsible is determined by the legislation of the individual federal states. This can be a local authority, administrative district, trades offices, office for public order, town hall, etc.
3.1.3 Trades and crafts legislation

In addition to the requirements of trading law, special conditions stipulated by trades and crafts legislation must be met where the service is to be carried out across borders from a fixed place of business in a particular trade or craft which is subject to licensing provisions.

The trades and crafts which require a licence are listed in Appendix A of the HwO, which is included as Annex B to this guide.

Any citizen of the EU or EEA wishing to set up in Germany a fixed place of business operating a trade or craft listed in Appendix A of the Trades and Crafts Code requires special dispensation to be entered in the German register of trades and crafts people (section 9(l) HwO together with EU/EWR-HwV). See 2.1.8.2 for information on how to attain this.

Amendments to the HwO which came into force on 13 September 2005 have granted the trades organisations more powers to conduct investigations to combat fictitious self-employment.

3.2 Fictitious self-employment

3.2.1 Criteria for distinguishing between independent and dependent employment

Case law in Germany has established, in order to distinguish between independent activity and dependent employment, that a person can be deemed self-employed if the determination of their form of activity and working hours is chiefly at their own discretion. Further features of independent activity are that the person concerned bears the entrepreneurial risk, acts in his own name and for own account, and is free to take entrepreneurial decisions at his own discretion. The standard for distinguishing between dependent and independent activity is almost identical in social legislation, tax legislation and employment law. Section 7(l) SGB IV defines employment as dependent work, especially in the context of a work relationship. This provision sees as an employee anyone who under instruction delivers a contractually agreed performance within the context of a working environment determined by his employer. The decisive distinguishing criterion here is the degree of personal dependency of the employee on the employer, i. e. the scope of the employer’s right to instruct the employee in terms of the nature, commencement, duration, and location of the work. The term “employer-employee relationship” means more than that of “work relationship”.
It also includes cases in which there is no work relationship because the employment contract is null and void.19

How the relationship is described in the contract has no bearing on how the distinction is made. It is rather a question of the exact nature of the work and how it is actually carried out.

The following criteria may indicate dependent employment:

> Personal dependency:

Subject to instruction with regard to

- **Location**: Duty to appear regularly at the place of work or the premises;

- **Hours**: Inclusion in the roster/staff timetable. Freedom to choose hours is assumed when person concerned can choose when to begin and when to terminate work;

- **Nature of the work**;

> Obligation to be constantly prepared to work;

> Fixed salary; overtime; hourly wage;

> Right to holiday; paid sick leave;

> Right to other social benefits;

> Included in the business:

- Inclusion of worker in a working environment determined by person other than worker;

- Use of operational facilities (work equipment);

- Inclusion of the employee in the organisation and hierarchy of the customer;

> Close, constant cooperation with other employees of the customer;

> Labour rather than result of labour is owed (contract for services vs. contract for work);

> Work cannot be independently organised or carried out;

> Simple tasks carried out, generally characterised by worker being subject to instruction;

> Similar activities for the customer are regularly carried out by his employees;

> The activity appears to correspond to that which the employee previously carried out for the same customer on an employer-employee basis;

> Activity is on a long-term basis and mainly for one customer only;

> Where the worker is active to an insubstantial degree for another customer or several other customers, this does not automatically mean that he is not employed by the main customer;

> A person is deemed to be active to a substantial degree for one customer only where this person derives at least 5/6 of his entire income from this one activity;

19More information in German on the distinction under social insurance legislation as well as on the individual professions may be found in a joint circular of the umbrella group of social insurance organisations dated 5 July 2000 and dealing with the German law promoting independent personal services, www.deutscherentenversicherung.de > ANGEBOTE FÜR SPEZIELLE ZIELGRUPPEN > ARBEITGEBER & STEUERBERATER > PUBLIKATIONEN > RUNDSCHREIBEN > GEMEINSAME RUNDSCHREIBEN FÜR DAS JAHRE 2005 > GESETZ ZUR FÖRDERUNG DER SELBSTSTÄNDIGKEIT.
> There are no typical indicators of entrepreneurial behaviour recognisable:
- No entrepreneurial risk, no entrepreneurial initiative and no discretion to take entrepreneurial decisions;
- Not active on market in entrepreneurial capacity;
- Does not have own permanent establishment;
- Does not dispose of own labour;
- Not obliged to procure work materials;
- No capital deployed;
- No autonomous decision-making in terms of acquiring goods, recruiting staff, deploying capital and equipment;

> Can only provide service in personal capacity (legal and actual person): In contrast to the self-employed, those in dependent personal services are generally required to provide the work agreed personally rather than being allowed to delegate this duty to a third party.

The authority to decide whether, from a social insurance perspective, an activity is carried on independently or not resides solely with the competent social insurance provider. To this end, the decision is taken either by the competent health insurance institutions as the collecting bodies for general social insurance contributions (section 28h SGB IV), by the pension insurance organisations as part of the regular inspection of employers (section 28p SGB IV), or by the clearing office of the Deutsche Rentenversicherung Bund within the context of a procedure to determine status (section 7a SGB IV).²⁰ Where judicial proceedings are involved, the matter is decided by a social court. Annex A (Appendix 6) contains a sample application form to determine the social insurance status.

The decision from a taxation perspective is a matter for the regional fiscal authorities and the fiscal courts.

### 3.2.2 Self-employed persons

The criteria listed above are also used to determine whether a person acting as a contractor is indeed self-employed or whether he is actually in a dependent employer-employee relationship with his would-be customer, who is his de facto employer.

The contractor’s mere registration of a trade or entry in the trade register is not enough to validate the assumption of independent activity.

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²⁰[Please see www.deutsche-rentenversicherung.de > Rente > Vor der Rente > Statusfeststellungsverfahren for further information.](#)
3.2.3 Companies

Even in connection with situations in which companies present themselves as contractors or where certain constellations within a company are to be evaluated, the question of whether it is a case of independent activity may arise.

The following constellations should be noted in relation to fictitious self-employment where companies present themselves as contractors:

> Citizens of the new EU member states come together to form a *Gesellschaft bürgerlichen Rechts* (GbR) in Germany or a similar civil law company abroad in order to fill orders commissioned by a customer. However, the would-be company partners should actually be classified as employees of the customer. The criteria set out in 3.2.1 above are decisive in classifying the person involved as partner or person in dependent employment.

> Furthermore, there are increasing examples of cases in which a "head" and numerous unskilled or poorly skilled citizens of new member states present themselves as a GbR or similar foreign company without the necessary preconditions for the formation of such a company being met. In such cases, it must be assessed whether the employees do actually enjoy partner status or whether there exists a de facto employer-employee relationship between the persons concerned and the German or foreign "head" of the company. One of the preconditions which have to be met in forming a GbR is that the partners all pursue the same objective and are aware of such. A dependent employer-employee relationship in contrast is characterised by the fact that the parties to the contract each follow their own objectives and provide reciprocal services. Here, once again, the cases have to be assessed using the criteria set out in 3.2.1 above.

> Even where the preconditions for a GbR are met, an employer-employee relationship subject to social insurance or work permit obligations can still exist between the GbR or "head" and the individual partner where the nature of the occupation corresponds to that of a typical worker. Further indications can include that the person concerned has invested only relatively minor amounts of own capital in the company or is subject to prescribed working hours.

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20More information on the assessment of various company forms for insurance legislation purposes may be found under 3.4 (from page 18) of the Joint Circular of the Umbrella Group of Social Insurance Organisations dated 5 July 2005 and dealing with the German law promoting independent personal services, www.duehrenreitversicherung.de > Angebote für spezielle Zielgruppen > Arbeitgeber & Steuerberater > Publikationen > Rundschreiben > Gemeinsame Rundschreiben für das Jahr 2005 > Gesetz zur Förderung der Selbstständigkeit.
3.3 The legal consequences of fictitious self-employment

3.3.1 Employees

3.3.1.1 Social insurance law
Since those in fictitious self-employment exercise an occupation with the meaning of section 7(l) SGB IV, they are obliged to pay contributions to all social insurance types.

3.3.1.2 Right of residence
Given the extent of the obstacles in European law (see 2.2.2), persons in fictitious self-employment will not lose their right of residence, since the errant behaviour by workers in this regard is merely deemed an administrative offence.

3.3.1.3 The law relating to work permits
The activity of a citizen of the new member states who is to be classified under the criteria set out above as being in fictitious self-employment is not covered by the freedom of establishment. This activity is rather to be seen as dependent employment, which - in light of the restrictions imposed by section 284(1) SGB III on the free movement of workers - is subject to work permit provisions.

Section 404(2)(4) SGB III states that a foreign worker who does not acquire a work permit (EU) before commencing work subject to work permit requirements commits an administrative offence.

3.3.1.4 Posting of Workers Act (AEntG)
The employee has a right to certain minimum work standards within the scope of the AEntG (see 2.1.5).

3.3.1.5 Tax legislation
If, in application of the aforementioned criteria, the person in fictitious self-employment is deemed to be in an employer-employee relationship with an employer in Germany, this generally also implies an employment arrangement for tax law purposes, so that the wage paid to him is in principle subject to wages tax (see 2.1.6 above). To this end, it is immaterial what form the wage took, what it was called (e.g. fee) and whether it constitutes a one-off or recurring payment.

As the question of the self-employment of natural persons is to be assessed for VAT, income tax and trade tax on the same principles (Part 17(2) of the Turnover Tax Regulations, Umsatzsteuer-Richtlinien, UStrR), a person in self-employment cannot at the same time be an entrepreneur within the meaning of section 2 of the UStG. The person in self-employment owes any VAT amounts indicated separately in invoices, section 14c (2) UStG. The VAT amount indicated does not entitle the recipient of the invoice to deduct input tax (Part 190d (7) together with Part 192(1) UStrR).
3.3.2 Employers

Depending on the individual case, employers for the purposes of the following are either:
> the domestic customers, or
> the "heads" of the GbRs or similar foreign companies.

3.3.2.1 Social insurance law

Where fictitious self-employment is determined, anyone employing the person in fictitious self-employment is deemed to be an employer with all the social insurance obligations this entails. Firstly, he must calculate and pay on the monthly overall social insurance contributions to the collecting office. Furthermore, he is obliged to pay on the overall social insurance contributions and any late-payment penalties for previous employment periods. The underlying remuneration paid for the work includes pursuant to section 14 SGB IV all recurring or one-off income from one occupation irrespective of what name was given to this remuneration or what form it took. This includes payments made within the context of a would-be customer-contractor relationship as well as withdrawals by a partner from the company funds. In this context, it is assumed that a net remuneration has been agreed between the parties (section 14(2), second sentence, SGB IV). The employer is the sole liable debtor of the overall social insurance amount.

It is also possible that the would-be customer or the employer is punishable under section 266a (1) and (2) StGB (see 2.2.1 above).

Breaches of the social insurance obligations borne by the employer are punishable by administrative fines, section III SGB III.

3.3.2.2 Consequences with regard to the right of residence

Only in exceptional cases can the loss of the right of residence be considered for citizens of a member state of the EU as a result of fictitious self-employment (see 2.2.2 above for necessary conditions).

Once a citizen of the Union has been penalised under the provisions described here, the corresponding criteria set out by the European Court of Justice must be used to determine whether the right to freedom of movement should be withdrawn.

3.3.2.3 The law relating to work permits

Anyone who employs foreign workers without the requisite residence permit or without the necessary work permit pursuant to section 284(1) SGB III is committing an administrative offence under section 404(2)(3) SGB III. This may also constitute a criminal offence pursuant to sections 10, 11 SchwarzArbG.
3.3.2.4 Illegal leasing of labour

Where the contractor is a GbR and the purported partners actually dependent employees (see 3.2.3), it is possible that the situation constitutes the illegal leasing out of workers by the head of the GbR to the would-be contractor. In assessing whether a case of worker leasing is involved, the primary criteria to be used are the contract concluded between the GbR and the company and how the worker is actually included in the organisation of the business.

Where the lessor (head of the GbR) is not in possession of the permit required by section 1 AÜG, the leasing relationship between lessor and lessee and the contract between lessor and leased worker are null and void (section 9(1) AÜG). Section 10(1) AÜG states that a work relationship will be deemed to have come into effect between lessee and leased worker in such cases.

Despite this assumption, both the lessor and the lessee-employer are jointly and severally liable for the payment of the social insurance contributions, section 10(3) AÜG and section 28e(2) SGB IV.

The unauthorised leasing of workers is punishable under section 16 AÜG with an administrative fine. The unauthorised leasing out of foreign workers without work permits or relevant residence permits is a crime under section 15 AÜG (for more details, see 2.2.4 above).

3.3.2.5 Posting of Workers Act (AEntG)

Where it is ascertained that the would-be self-employed person is to be more correctly deemed a worker under the criteria outlined, the employment relationship is subject to the provisions of the AEntG where the other requisite conditions are also met. Under section 1(1)(1) AEntG this employer-employee relationship is also subject to the provisions on collectively bargained minimum wages.

Even where it involves the unauthorised leasing of labour, the lessor and the lessee must pay the worker the minimum wage. Both are thus considered employer in this case (see section 10(1) and section 10(3), second sentence, AÜG). Furthermore, this may also constitute an administrative offence under section 5(2) of the AEntG (engaging a sub-contractor who does not pay the minimum wage).

3.3.2.6 Tax legislation

The employer for tax purposes is generally that person for whom the worker is obliged to work and who pays the wage.

An employer is also anyone who leases out a worker (leased worker) to a third party (lessee) for the purposes of carrying out work. The classification as employer does not require the existence of the legal leasing of workers pursuant to the AEntG. Where in the case of the unauthorised leasing of labour the lessee pays the wage to the worker in place of the lessor, the lessee is deemed the regular employer for tax purposes.

It is immaterial whether the person to whom the work is owed pays the wage or whether this is done by a third party (see 2.1.6 above).
**Important:**

Any doubts as to whether a particular case constitutes employment subject to social insurance and taxation obligations, whether a trade needs to be registered, etc. may be clarified by contacting the competent authority. Legal advice may only be provided by public authorities permitted to do so. This equally applies to the federal ministries. Advice relating to legal affairs and tax matters is available in individual cases from professional consultants (in particular solicitors and tax advisors). Furthermore, the German Act on legal advice and representation (Beratungshilfegesetz) allows legal advice and representation to be sought from an attorney, legal advisor or consultancy set up by an individual federal state of Germany; however, entitlement is dependent upon the existence of restricted financial means.
Annexes

Annex A Sample documents

Appendix 1: E 101 certificate
Appendix 2: Residence permit (EU)
Appendix 3: Application for work permit (EU)
Appendix 4: Permit to commercially lease workers
Appendix 5: Registration of trade
Appendix 6: Application to determine social insurance status

Annex B Appendix A to the Handwerksordnung
CERTIFICATE CONCERNING THE LEGISLATION APPLICABLE

Regulation (EEC) No 1408/71: Article 13(2)(d); Article 14(1)(a), (2)(a) and (2)(b); Article 14a(1)(a), (2) and (4); Article 14b(1), (2) and (4); Article 14c(a); Article 14e; Article 17
Regulation (EEC) No 574/72: Article 11(1); Article 11a(1); Article 12a(2)(a), (5)(c) and (7)(a); Article 12b

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4.1 The employer referred to in point 2

4.2 The firm referred to in point 3.4

4.3 Other □ if so, give the name ...............................................................

5. The insured person remains subject to the legislation of the country: □

5.1 in accordance with Article:

- □ 13(2)(d)
- □ 14(1)(a) □ 14(2)(a) □ 14(2)(b) □ 14a(1)(a) □ 14a(2) □ 14a(4)
- □ 14b(1) □ 14b(2) □ 14b(4) □ 14c(a) □ 14e □ 17

of Regulation (EEC) No 1408/71

5.2 □ from ...............................................................

5.3 □ for the duration of the activity (see the letter from the competent authority or designated body in the country of employment which entitles the insured person to remain subject to the legislation of the Sending State)

6. Competent institution whose legislation is applicable

6.1 Name: .................................................................................................

6.2 Identification number of the institution: .....................................................

6.3 Address

- Telephone: .............................................. Fax: .............................................. E-mail: .................................................................
- Street: ............................................................. No: ............................................ PO Box: .................................................................
- Town: .......................................................... Postal code: ....................................... Country: .................................................................

6.4 Stamp

6.5 Date: ........................................................................................................

6.6 Signature: ..............................................................................................
Annex A Appendix 1

INSTRUCTIONS

The designated institution of the Member State to whose legislation the worker is subject should fill in the form at the request of the worker or his employer and return it to the applicant. If the worker is posted to Belgium, Denmark, Germany, France, the Netherlands, Austria, Finland, Sweden, or Iceland, the institution should also send a copy to: in Belgium, to the Regional branch of the national Social Security Fund, Brussels; in the case of employed persons to the ‘Office national de sécurité sociale/Rijksdienst voor Sociale Zekerheid’ (National Social Security Office), Brussels; in the case of self-employed persons to the ‘Institut national d’assurances sociales pour travailleurs indépendants/ Rijksinstituut voor sociale verzekerder de zelfstandigen’ (National Social Security Institute for the Self-Employed), Brussels; in the case of seamen, to the ‘Caisse de secours et de prévoyance en faveur des marins: de Hulp- en Voorzorgskas voor Zeevarenden ’ (Relief and Welfare Fund for Mariners), Antwerp; or, in the case of civil servants, to the ‘Service des Relations internationales du S.P.F. Sécurité sociale’ (International Relations Department, Social Affairs Ministry); in Denmark, to ‘Den Sociale Sikringsstyrelse’ (The National Social Security Agency); in Germany, to the Deutsche Rentenversicherung-Bund (German Federal Pension Insurance), 97041 Würzburg; in France, to the ‘Centre des liaisons européennes et internationales de sécurité sociale (Cleiss)’ (Centre for European and International Liaison on Social Security), Paris; in the Netherlands, to the ‘Sociale Verzekeringsbank’ (Social Insurance Bank), Amstelveen; in Austria, to the ‘Hauptverband der österreichischen Sozialversicherungssträger’ (Main Association of Austrian Social Insurance Institutions); in Finland, to the ‘Elaketurvakeskus’ (Finnish centre for Pensions), Helsinki; in Sweden, to Försäkringskassan, Huvudkontoret (Swedish Social Insurance Agency, Head Office), Stockholm; in Iceland, to the ‘Tryggingstofnun ríkisins’ (The State Social Security Institute), Reykjavík.

Information for the insured person

Before you leave the country where you are insured to go to another Member State to work, make sure you have the document which entitles you to receive the necessary benefits in kind (e.g. medical care, medication, treatment in hospital, etc.) in the country where you are working. If you are going to be living in the country in which you are working, ask your sickness insurance institution for an E 106 form and submit it as soon as possible to the competent sickness insurance institution of the place where you are going to work. If you are staying temporarily in the country in which you are going to work, ask your sickness insurance institution for the European health insurance card. You must show this card to your care provider if you need benefits in kind during your stay.

Information for employers

A Member State which receives a request for the application of the aforementioned Article 14(1), Article 14b(1) or Article 17 of Regulation (EEC) No 1408/71 shall duly inform the employer and the worker concerned of the conditions under which the posted worker may continue to be subject to its legislation. The employer shall be informed of the possibility of checks throughout the period of posting so as to ascertain that this period has not come to an end. Such checks may relate, in particular, to the payment of contributions and the maintenance of the direct relationship. Moreover, the employer of the posted worker shall inform the competent institution of the sending State of any change that has occurred during the period of posting, in particular:

– if the posting applied for has not taken place or if the extension of the posting applied for has not taken place,

– if the posting has been interrupted, unless this interruption of the worker’s activities on behalf of the undertaking in the country of employment is of a purely temporary nature,

– if the posted worker has been assigned by his employer to another undertaking in the State of employment.

In the first two cases, he/she shall return this form to the competent institution of the sending State.

Information for the institution of the place of stay

If the person involved produces the proper document (European health insurance card or form E 106), the insurance institution in the country of stay will also provide him provisionally with benefits in the event of an accident at work or an occupational disease. If in such a case the institution requires form E 123, it should apply as soon as possible:

- in Belgium, for employed persons and as regards an occupational disease, to the ‘Fonds des maladies professionnelles/Fonds voor Beroepsziekten’ (Occupational Diseases Fund), Brussels, and, as regards accidents at work, to the insurance company designated by the employer;

- in the Czech Republic, to the sickness insurance fund with which the person concerned is insured;

- in Denmark, to ‘Arbejdskassaterna’ (National Board of Industrial Injuries), Copenhagen;

- in Germany, to the competent ‘Berufsgenossenschaft’ (Accident Insurance Institution);

- in Estonia, to the ‘Sotsiaalkindlustusamet’ (Social Insurance Board), Tallinn;

- in Spain, to the ‘Dirección Provincial del Instituto Nacional de Seguridad Social’ ( Provincial Directorate of the National Social Security Institution);

- in Ireland, to the Department of Health, Planning Unit, Dublin 2;

- in Italy, to the competent provincial office of the ‘Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro’ (INAIL) (National Institute for Insurance against Accidents at Work);

- in Latvia, to the ‘Valsts socīālās apdrošināšanas aģentūra’ (State Social Insurance Agency), Riga;

- in Lithuania, to the ‘Teritorinė ligoniu kasa’ (Regional Sickness Insurance Fund);

- in Luxembourg, to the ‘Association d’assurance contre les accidents’ (Accident Insurance Association);

- in Malta, to the ‘Diviżjoni tas-Saħa’, Triq il-Merki, Valletta CMR 01;

- in the Netherlands, to the competent sickness insurance institution;

- in Austria, to the competent accident insurance institution;

- in Poland, to the national branch of the ‘Narodowy Fundusz Zdrowia’ (National Health Fund);

- in Portugal, to the ‘Centro Nacional de Protecção contra os Riscos Profissionais’ (National Centre for Protection against Occupational Risks), Lisbon;

- in Slovakia, to the health insurance company of the insured person or the Social Insurance agency, Bratislava;

- in Finland, to the ‘Tapaturmavakuutuslaitosten Liitto’ (Federation of Accident Insurance Institutions), Bulevardi 28, 00120 Helsinki;

- in Sweden, to the ‘Forsakringsskassan’ (Local Social Insurance Office);

- in all other Member States, to the competent sickness insurance institution;

- in Iceland, to the ‘Tryggingstofnun ríkisins’ ( The State Social Security Institute), Reykjavik;

- in Liechtenstein, to the ‘Amt fur Volkswirtschaft’ (Office of National Economy), Vaduz;

- in Norway, to the ‘Folketrygdkontoret for Utenlandssaker’ (National Office for Social Insurance Abroad), Oslo;
in **Switzerland**, for employed persons, to the employer’s accident insurance institution; for self-employed persons, to the accident insurance institution of the person concerned.

Where the worker is covered by the French social security scheme, the fund which is competent to recognise entitlement to benefits is his insurance fund, which may not be the one appearing on form E 101. It will be necessary, where appropriate, to request the European health insurance card or form E 123 from the fund of the worker’s place of habitual residence.

Where a self-employed person is covered by a Finnish or Icelandic social security scheme it will always be necessary to request form E 123.

Where a worker covered by an Icelandic social security scheme suffers an accident at work or contracts an occupational disease, the employer must always duly notify the competent institution.

**NOTES**

(1) Symbol of the country to which the institution completing the form belongs: **BE** = Belgium; **CZ** = Czech Republic; **DK** = Denmark; **DE** = Germany; **EE** = Estonia; **GR** = Greece; **ES** = Spain; **FR** = France; **IE** = Ireland; **IT** = Italy; **CY** = Cyprus; **LV** = Latvia; **LT** = Lithuania; **LU** = Luxembourg; **HU** = Hungary; **MT** = Malta; **NL** = Netherlands; **AT** = Austria; **PL** = Poland; **PT** = Portugal; **SI** = Slovenia; **SK** = Slovakia; **FI** = Finland; **SE** = Sweden; **UK** = United Kingdom; **IS** = Iceland; **LI** = Liechtenstein; **NO** = Norway; **CH** = Switzerland.

(2) Give all surnames in the order of civil status.

(3) Give all forenames in the order of civil status.

(4) For workers subject to Spanish law, indicate the social security number. For the purpose of Maltese institutions, give the Identity Card number in case of Maltese nationals, or the Maltese Social security number in case of a non-Maltese national. In the case of persons being subject to Polish legislation, please indicate the PESEL and NIP numbers or, failing that, the series and the number of the identity card or passport. For the purpose of Slovak institutions, give the Slovak birth number if applicable.

(5) Please give as much information as possible to facilitate identification of the employer or the firm of the self-employed person. In the case of a ship, indicate its name and its registration number.

**Belgium**: indicate, in the case of employed persons, the business number (numéro d’entreprise/ondernemingsnummer/Unternehmensnummer) and, in the case of self-employed persons, the VAT number.

**Czech Republic**: indicate the identification number (IČ).

**Germany**: indicate the ‘Betriebsnummer des Arbeitgebers’.

**Spain**: indicate the ‘Código de Cuenta de Cotización del Empresario CCC’ (employer’s contribution account number).

**France**: indicate the SIRET number.

**Italy**: indicate the company’s registration number where possible.

**Luxembourg**: indicate the employer’s social security registration number and, for self-employed persons, the social security number (CCSS).

**Hungary**: indicate the employer’s social security registration number or, for self-employed persons, the identification number of the private company.

**Poland**: indicate the NUSP number, where there is one, or the NIP and REGON numbers.

**Slovakia**: indicate the identification number (IČO).

**Slovenia**: indicate the registration number of the employer or self-employed person.

For workers subject to **Finnish** legislation on occupational accidents, please indicate the name of the competent accident insurance institution.

**Norway**: indicate the organisation number.
Annex A Appendix 3

Vordruck: Antrag auf Arbeitserlaubnis-EU

Antrag auf Arbeitserlaubnis-EU
für Werkvertragsarbeiter/innen oder ausländischen EU-Mitgliedsstaaten

<table>
<thead>
<tr>
<th>Angaben zum ausländischen Arbeitnehmer:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Name</td>
</tr>
<tr>
<td>2. ggf. Geburtsname</td>
</tr>
<tr>
<td>Vorname</td>
</tr>
<tr>
<td>4. Staatangehörigkeit</td>
</tr>
<tr>
<td>3. Geburtsdatum</td>
</tr>
<tr>
<td>5. Geschlecht</td>
</tr>
<tr>
<td>6. Name und Anschrift des entsendenden Unternehmens bzw. der Niederlassung im Bundesgebiet</td>
</tr>
<tr>
<td>7. Wohnung im Bundesgebiet</td>
</tr>
<tr>
<td>- soweit nicht nebenstehend -</td>
</tr>
<tr>
<td>8. Pass-/Personalausweis gültig bis</td>
</tr>
</tbody>
</table>

Arbeitserlaubnis - EU wird beantragt

<table>
<thead>
<tr>
<th>9. von</th>
<th>bis</th>
</tr>
</thead>
<tbody>
<tr>
<td>10. als Art der ausübenden Beschäftigung</td>
<td></td>
</tr>
<tr>
<td>11. im Rahmen des Werkvertrages vom:</td>
<td></td>
</tr>
<tr>
<td>12. Auftragsnummer</td>
<td></td>
</tr>
<tr>
<td>13. ausländisches Unternehmen</td>
<td></td>
</tr>
<tr>
<td>14. deutsches Unternehmen</td>
<td></td>
</tr>
<tr>
<td>15. Stellensitzungsstelle (Anschrift Straße, Nr., PLZ, Ort)</td>
<td></td>
</tr>
</tbody>
</table>

16. Es wird bestätigt, dass der Arbeitnehmer entsprechend dem Antrag beschäftigt werden soll:

<table>
<thead>
<tr>
<th>17. Unterschrift des Arbeitnehmers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Datum</td>
</tr>
</tbody>
</table>

Wird von der Agentur für Arbeit ausgefüllt

<table>
<thead>
<tr>
<th>Bundesagentur für Arbeit</th>
<th>Arbeitserlaubnis - EU</th>
</tr>
</thead>
</table>

Den oben genannten Arbeitnehmer, der auf der Grundlage eines ausländischen Vertrages über die Entsendung und Beschäftigung von Werkvertragsarbeitern entstandenes Vom § 5 Abs. 1, 2 und § 7 Abs. 3 Satz 1, 2 und § 8 Abs. 1 und § 9 Abs. 1 Satz 1, 2 Satz 2 RMS gilt, in Verbindung mit § 3 Abs. 1, 2, 3 und § 7 Abs. 1, 2 RMS, unter Anlage 11 genannten Arbeitsvertragsstelle.

Geltungsdauer

<table>
<thead>
<tr>
<th>von</th>
<th>bis</th>
</tr>
</thead>
</table>

Agentur für Arbeit

<table>
<thead>
<tr>
<th>Im Auftrag</th>
<th>Dienststempel</th>
</tr>
</thead>
</table>

Datum

Auskunft für den Arbeitnehmer

<table>
<thead>
<tr>
<th>Musterblatt 1a Stand: März 2006</th>
<th>- 1 -</th>
</tr>
</thead>
</table>
ERLAUBNIS
zur gewerbsmäßigen Arbeitnehmerüberlassung

Nach den §§ 1 und 2 des Gesetzes zur Regelung der gewerbsmäßigen Arbeitnehmerüberlassung (AÜG) vom 7. August 1972 - BGBI. I S. 1393 - wird der Firma

Zeitarbeit GmbH
Bahnhofstr. 15
19225 Musterstadt

vertreten durch den Geschäftsführer

Klaus Mustermann


Im Auftrag

(Unterschrift)


Diese Erlaubnisurkunde ist Eigentum der Bundesagentur für Arbeit und auf Verlangen zurückzugeben.
Antrag auf Feststellung des sozialversicherungsrechtlichen Status

Hinweis: Das Statusfeststellungsverfahren dient der Klärung der Frage, ob ein Auftragnehmer seine Tätigkeit für einen Auftraggeber im Einzelfall selbständig oder als abhängig Beschäftigter ausübt. Bei Vertragsverhältnissen, die im Zeitpunkt der Antragstellung bereits bestanden sind, ist ein Statusfeststellungsverfahren ausgeschlossen.

Um über diese Frage entscheiden zu können, benötigen wir aufgrund des Vierter Buches des Sozialgesetzbuches - Gemeinsame Vorschriften für die Sozialversicherung (SVG-V) - von Ihnen einige wichtige Informationen und Unterlagen. Wir möchten Sie deshalb bitten, die gestellten Fragen vollständig zu beantworten und uns die erbetenen Unterlagen möglichst umgehend zu überlassen. Ihre Mithilfe erleichtert uns eine rasche Erledigung Ihrer Angelegenheit.

In welchem Umfang Ihre Mithilfe benötigt wird, ergibt sich aus § 26b Abs. 2 SGB IV, § 196 Abs. 1 SGB VI und § 98 Abs. 1 SGB X. Danach sind Sie verpflichtet, alle Tatsachen anzugeben und uns die notwendigen Urkunden und sonstigen Beweismittel zur Verfügung zu stellen. Weitere Informationen können Sie den Erläuterungen zum Antrag auf Feststellung des sozialversicherungsrechtlichen Status entnehmen.

1 Angaben zur Person des Auftragnehmers und zur letzten Beitragszahlung

1.1 Name, Vorname, ggf. Geburtsname (Ruhename bitte unterstreichen)

<table>
<thead>
<tr>
<th>Name</th>
<th>Vorname</th>
<th>Geburtsname</th>
</tr>
</thead>
</table>

Geburtsdatum

Frühere Namen

Geburtsort (Kreis, Land)

Staatsangehörigkeit (ggf. frühere Staatsangehörigkeit bis)

Geschlecht

Telefonschulter über zu erreichen

Telefax

1.2 Wurden Sie bereits Beiträge zur gesetzlichen Rentenversicherung gezahlt?

| nein | ja |

1.3 Bei welcher Krankenkasse sind Sie zurzeit versichert?

Bitte Namen und Anschrift der Krankenkasse angeben

1.4 Sofern Sie zurzeit nicht gesetzlich krankenversichert sind: Bei welcher gesetzlichen Krankenkasse hat zuletzt eine Krankenversiche-

rung bestanden?

Bitte Namen und Anschrift der Krankenkasse angeben

2 Angaben zur Tätigkeit des Auftragnehmers, für die der sozialversicherungsrechtliche Status festgestellt werden soll

2.1 Ausgeübte Tätigkeit

Bezeichnung der Tätigkeit für den Auftraggeber, für den ein Statusfeststellungsverfahren durchgeführt werden soll

Beginn

2.2 Beschreiben Sie bitte die von Ihnen ausgebüte Tätigkeit.

2.3 Für welche Auftraggeber sind Sie tätig?

Bitte Namen, Adressen der Auftraggeber angeben, den Auftraggeber unterstreichen, für den ein Statusfeststellungsverfahren durchgeführt werden soll, und die aktuellen Verträge beim

2.4 Schwäger / Verschwägerte, sonstige Familienangehörige?

Handelt es sich bei einem Auftraggeber um einen Angehörigen von Ihnen: Ehegattin / Ehegatte, Verloste / Verlobter, Lebenspartnerin / Lebenspartnerin / Lebensgefährtin / Lebensgefährte, geschiedene Ehegattin / geschiedener Ehegatte, Verwandte / Verwandter, Ver-

| nein | ja |

Sofern Sie für mehrere Auftraggeber tätig sind: Erhalten Sie mindestens fünf Sechstel Ihrer gesamten Einkünfte aus dieser Tätigkeit von einem dieser Auftraggeber?

| nein | ja |

Wurden bereits durch eine Krankenkasse / einen Rentenversicherungsträger oder die Künstlersozialkasse für diese Tätigkeit festge-

stellen, dass Sie selbständig sind bzw. in einem abhängigen Beschäftigungsverhältnis zu Ihrem Auftraggeber stehen?

| nein | ja |

Beziehen Sie für diese Tätigkeit Überbrückungsgeld / einen Existenzgründungszuschuss von der Agentur für Arbeit oder haben Sie dieses / diesen bezogen?

| nein | ja |

Bitte Bescheid der Krankenkasse / des Rentenversicherungs trägers bzw. der Künstlersozialkasse bezogen.
2.8 Waren Sie vor Ihrer jetzigen Tätigkeit für einen der unter Ziffer 2.3 angegebenen Auftraggeber als Arbeitnehmer tätig?
nein ja Bitte den Unterschied zur vorherigen Tätigkeit auf einem gesonderten Blatt beschreiben.

Wird Ihr Unternehmen in der Rechtsform einer Gesellschaft (z. B. GmbH, Limited, KG, Praxisgemeinschaft, Partnerschaftsgesellschaft, GbR) geführt?

nein ja Wenn ja: Bitte Namen und Art der Gesellschaft angeben und Gesellschaftsvertrag in Kopie beifügen.

2.10 Beschäftigen Sie mindestens einen Arbeitnehmer / Auszubildenden mit einem monatlichen Arbeitsentgelt von mehr als 400,- EUR?

nein ja

3 Grundlagen und Ausgestaltung der Tätigkeit des Auftragnehmers

3.1 Arbeiten Sie am Betriebssitz Ihres Auftraggebers?

nein ja

3.2 Haben Sie regelmäßige Arbeits- oder Anwesenheitszeiten einzuhalten?

nein ja Std. tgl. wö. mtl.

Wenn ja: Bitte Anzahl der Stunden angeben.

3.3 Werden Ihnen Weisungen hinsichtlich der Ausführung (Art und Weise) Ihrer Tätigkeit erteilt?

nein ja

3.4 Kann Ihr Auftraggeber Ihr Einsatzgebiet auch ohne Ihre Zustimmung verändern?

nein ja

3.5 Ist die Einstellung von Vertretern bzw. Hilfskräften durch Sie von der Zustimmung Ihres Auftraggebers abhängig?

nein ja Beschreiben Sie bitte Ihr unternehmerisches Handeln bezüglich eigenen Kapitaleinsatzes, eigener Kalkulation, Preisgestaltung, Werbung und Ablehnung von Aufträgen.

4 Antrag / Erklärung des Auftragnehmers

Hiermit beantrage ich nach § 7a Abs. 1 SGB IV festzustellen, dass ein versicherungspflichtiges Beschäftigungsverhältnis nach § 7 Abs. 1 SGB IV

[] nicht vorliegt [ ] vorliegt

Ich versichere, dass meine Angaben der Wahrheit und die Vereinbarungen in den übersandten Verträgen den tatsächlichen Verhältnissen entsprechen.

Für den Fall, dass Krankenversicherungspflicht als Arbeitnehmer festgestellt wird, wähle ich folgende gesetzl. Krankenkasse: Bitte Namen und Anschrift der Krankenkasse angeben

(Eine Krankenkassenwahl ist nur möglich, wenn in den letzten 18 Monaten keine Mitgliedschaft bei einer gesetzlichen Krankenkasse bestanden hat.)

Ort, Datum

Unterschrift der Auftragnehmerin / des Auftragnehmers

5 Antrag / Erklärung des Auftraggebers

Hiermit beantrage ich nach § 7a Abs. 1 SGB IV festzustellen, dass ein versicherungspflichtiges Beschäftigungsverhältnis nach § 7 Abs. 1 SGB IV

[] nicht vorliegt [ ] vorliegt

Ich versichere, dass die Angaben der Wahrheit und die Vereinbarungen in den übersandten Verträgen den tatsächlichen Verhältnissen entsprechen.

Wenn der Auftragnehmer nicht krankenversicherungspflichtig ist und keine letzte Krankenkasse vorhanden ist: Welche gesetzliche Krankenkasse wählen Sie als Einzugsstelle?

Bitte Namen und Anschrift der Krankenkasse angeben

Ort, Datum

Betriebs-Nr. der Auftraggeberin / des Auftraggebers

Unterschrift, Firmenstempel der Auftraggeberin / des Auftraggebers

Anlagen
### Annex B

**Appendix A**

of the *Handwerksordnung*

“List of trades which require permission (section 1(2))

<table>
<thead>
<tr>
<th>No.</th>
<th>Trade Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bricklayer and concrete worker (<em>Maurer und Betonbauer</em>)</td>
</tr>
<tr>
<td>2</td>
<td>Stove and air-heating constructor (<em>Ofen- und Luftheizungsbauer</em>)</td>
</tr>
<tr>
<td>3</td>
<td>Carpenter (<em>Zimmerer</em>)</td>
</tr>
<tr>
<td>4</td>
<td>Roofer (<em>Dachdecker</em>)</td>
</tr>
<tr>
<td>5</td>
<td>Road builder (<em>Straßenbauer</em>)</td>
</tr>
<tr>
<td>6</td>
<td>Thermal and noise insulation fitter (<em>Wärme-, Kälte- und Schallschutzisolierer</em>)</td>
</tr>
<tr>
<td>7</td>
<td>Well builder (<em>Brunnenbauer</em>)</td>
</tr>
<tr>
<td>8</td>
<td>Stonemason and sculptor (<em>Steinmetzen und Steinbildhauer</em>)</td>
</tr>
<tr>
<td>9</td>
<td>Stuccoist (<em>Stukkateure</em>)</td>
</tr>
<tr>
<td>10</td>
<td>Painter and varnisher (<em>Maler und Lackierer</em>)</td>
</tr>
<tr>
<td>11</td>
<td>Scaffoldor (<em>Gerüstbauer</em>)</td>
</tr>
<tr>
<td>12</td>
<td>Chimney sweep (<em>Schornsteinfeger</em>)</td>
</tr>
<tr>
<td>13</td>
<td>Metalworker (<em>Metallbauer</em>)</td>
</tr>
<tr>
<td>14</td>
<td>Maker of surgical instruments (<em>Chirurgiemechaniker</em>)</td>
</tr>
<tr>
<td>15</td>
<td>Motor vehicle and body constructor (<em>Karosserie- und Fahrzeugbauer</em>)</td>
</tr>
<tr>
<td>16</td>
<td>Precision machinist (<em>Feinwerkmechaniker</em>)</td>
</tr>
<tr>
<td>17</td>
<td>Cycle mechanic (<em>Zweiradmechaniker</em>)</td>
</tr>
<tr>
<td>18</td>
<td>Refrigeration engineer (<em>Kälteanlagenbauer</em>)</td>
</tr>
<tr>
<td>19</td>
<td>IT engineer (<em>Informationstechniker</em>)</td>
</tr>
<tr>
<td>20</td>
<td>Automotive engineer (<em>Kraftfahrzeugtechniker</em>)</td>
</tr>
<tr>
<td>21</td>
<td>Mechanic for agricultural equipment (<em>Landmaschinenmechaniker</em>)</td>
</tr>
<tr>
<td>22</td>
<td>Gunsmith (<em>Büchsenmacher</em>)</td>
</tr>
<tr>
<td>23</td>
<td>Plumber (<em>Klempner</em>)</td>
</tr>
<tr>
<td>24</td>
<td>Installation and heating engineer (<em>Installateur und Heizungsbauer</em>)</td>
</tr>
<tr>
<td>25</td>
<td>Electrical technician (<em>Elektrotechniker</em>)</td>
</tr>
<tr>
<td>26</td>
<td>Electronic mechanical technician (<em>Elektromaschinenbauer</em>)</td>
</tr>
<tr>
<td>27</td>
<td>Joiner (<em>Tischler</em>)</td>
</tr>
<tr>
<td>28</td>
<td>Boat and ship builder (<em>Boots- und Schiffsbauer</em>)</td>
</tr>
<tr>
<td>29</td>
<td>Ropemaker (<em>Seiler</em>)</td>
</tr>
<tr>
<td>30</td>
<td>Baker (<em>Bäcker</em>)</td>
</tr>
<tr>
<td>31</td>
<td>Pastry cook (<em>Konditoren</em>)</td>
</tr>
<tr>
<td>32</td>
<td>Butcher (<em>Fleischer</em>)</td>
</tr>
<tr>
<td>33</td>
<td>Optician (<em>Augenoptiker</em>)</td>
</tr>
<tr>
<td>34</td>
<td>Hearing aid audiologist (<em>Hörgeräteakustiker</em>)</td>
</tr>
<tr>
<td>35</td>
<td>Orthopaedic technician (<em>Orthopädietechniker</em>)</td>
</tr>
<tr>
<td>36</td>
<td>Maker of orthopaedic shoes (<em>Orthopädischuhmacher</em>)</td>
</tr>
<tr>
<td>37</td>
<td>Dental technician (<em>Zahntechniker</em>)</td>
</tr>
<tr>
<td>38</td>
<td>Hairdresser (<em>Friseure</em>)</td>
</tr>
<tr>
<td>39</td>
<td>Glazier (<em>Glaser</em>)</td>
</tr>
<tr>
<td>40</td>
<td>Glass blower and maker of glass apparatus (<em>Glasläser und Glasapparatebauer</em>)</td>
</tr>
<tr>
<td>41</td>
<td>Vulcaniser and tyre mechanic (<em>Vulkaniseure und Reifenmechaniker</em>)</td>
</tr>
</tbody>
</table>
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