

# Posting of workers in the framework of the provision of services: enforcement of Directive 96/71/EC

2012/0061(COD) - 21/03/2012 - Legislative proposal

**PURPOSE:** to establish a general common framework of provisions for better enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules.

**PROPOSED ACT:** Directive of the European Parliament and of the Council.

**BACKGROUND:** it can be estimated that around one million workers are posted each year by their employers from one Member State to another. Posting thus concerns 0.4% of the active population of EU-15 sending countries and 0.7% of the active population of EU-12 sending countries. In terms of labour mobility within the EU, the number of postings represented 18.5% of non-national EU-27 citizens in the labour force in 2007. The economic importance of posting exceeds by far its quantitative size, as it can play a crucial economic role in filling temporary shortfalls in the labour supply in certain professions or sectors (e.g. construction and transport). Furthermore, the posting of workers enhances international trade in services with all advantages linked to the Single Market such as higher competition, and efficiency gains.

Posted workers are covered by [Directive 96/71/EC](#) (the Posting of Workers Directive).

The Directive aims to reconcile the freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose. It sets out mandatory rules at EU level that must be applied to posted workers in the host country, and establishes a core set of clearly defined terms and conditions of work and employment that must be complied with by the service provider in the host country to ensure the minimum protection of workers. The Directive thus provides a significant level of protection for workers and also plays a key role in **promoting a climate of fair competition** between all service providers by guaranteeing both a level playing field and legal certainty for service providers, service recipients, and workers posted for the provision of services.

However, the [Commission's evaluation of the Directive](#) in 2003 identified several deficiencies and problems of incorrect implementation. [Guidelines](#) adopted in 2006 aimed at clarifying the extent to which certain national control measures could be justified in view of the Court of Justice's jurisprudence. In its [Communication](#) of 2007 the Commission highlighted several shortcomings as regards the way controls were carried out in some Member States and the poor quality of administrative cooperation and access to information.

The **judgments of the European Court of Justice in the Viking-Line, Laval, Rüffert and Commission v Luxembourg cases** triggered an intense debate among EU institutions, academics and social partners. This focused on two major issues:

- how to set the right balance between the exercise by trade unions of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the TFEU, in particular the freedom of establishment and the freedom to provide services;

- how to interpret some key provisions in Directive 96/71/EC, such as the concept of public policy, the material scope of the terms and conditions of employment imposed by the Directive and the nature of mandatory rules, in particular the minimum wage.

In October 2008, the European Parliament adopted a [resolution](#), calling on all Member States **properly to enforce the Posting of Workers Directive** and emphasised that the freedom to provide services as one of the cornerstones of the European project should be balanced, on the one hand, against fundamental rights and the social objectives of the Treaties and on the other hand, against the right of the public and social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions.

By facilitating the cross-border provision of services and improving the climate of fair competition, this initiative will allow the potential for growth offered by the posting of workers and jobs for posted workers to be tapped as a key element in the provision of services in the internal market.

**IMPACT ASSESSMENT:** the Commission conducted an impact assessment of policy alternatives based on an external study. All options were analysed against the following specific objectives:

- better protection of the rights of posted workers;
- facilitating the cross-border provision of services and improving the climate of fair competition;
- improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers.

The preferred option is a combination of different measures. A package of regulatory measures to deal with the implementation, monitoring and enforcement of the minimum working conditions and **with the abuse of posted worker status in order to evade or circumvent legislation, combined with non-regulatory measures to deal with controversial or unclear interpretation of the terms and conditions of employment** required by Directive 96/71/EC, is considered to be overall the most effective and efficient solution to address the specific objectives.

Furthermore, a positive impact on SMEs and especially micro-businesses can be expected thanks to the improved and clearer regulatory environment. **Micro-businesses will not be excluded from the of the proposal scope** because this would undermine one of the proposal's key objectives - the fight against letter box companies - and it would create considerable new loopholes.

**LEGAL BASIS:** Article 53(1) and 62 of the Treaty on the Functioning of the EU.

**CONTENT:** **without re-opening Directive 96/71/EC**, this proposal aims to improve, enhance and reinforce the way in which the latter Directive is applied and enforced in practice across the EU. It aims to establish a general common framework of appropriate provisions and measures for better and more uniform implementation, application and enforcement of the Directive, including measures to prevent any circumvention or abuse of the rules. It ensures at the same time guarantees for the protection of posted workers' rights and the removal of unjustified obstacles to the free provision of services. The proposal is closely linked to the [proposal](#) for a Regulation clarifying the exercise of the right to take collective action within the context of the economic freedoms of the Single Market.

**Preventing abuse and circumvention - elements improving implementation and better monitoring of application of the notion of posting:** the proposal:

- clarifies the definition of ‘posted worker’ laid down in Directive 96/71/EC<sup>42</sup>, since it has often been difficult to determine whether there is a posting within the meaning of the Directive. Abuses have also been committed by employers exploring insufficient clarity of the legal provisions in order to circumvent the applicable rules;
- the role of the Member State from which the posting takes place is further clarified in the context of administrative cooperation.

**Access to information:** access to advance information about the terms and conditions of employment applicable in the host country is a prerequisite for interested parties to be able to provide services in compliance with Directive 96/71/EC. The proposal contains a number of more detailed measures to help ensure easily accessible and generally available information on the terms and conditions to be respected, including where these are laid down in collective agreements.

**Administrative cooperation and mutual assistance:** the proposal lays down:

- the general principles, rules and procedures necessary for effective administrative cooperation and assistance;
- the role of the Member State from which the posting takes place;
- an appropriate legal basis for the use of the separate and specific application of the Internal Market Information System (‘IMI’) as the electronic information exchange system to facilitate administrative cooperation on the posting of workers;
- accompanying measures to develop, facilitate, support, promote and further improve administrative cooperation and to increase mutual trust, including through financial support.

**Monitoring compliance:** these provisions cover national control measures, including those which may be applied to legally resident and lawfully employed third-country nationals who are posted within the EU by their employer, as well as inspections.

A review clause has been included in order to evaluate the situation further, in particular to examine the necessity and appropriateness of the application of national control measures in the light of the experiences with the functioning of the system of administrative cooperation as well as technological developments.

In its case law, the ECJ has further clarified the **compatibility of certain national control measures with EU law**. The Commission discusses the relevant case law and states that it is considered appropriate to **clarify this case law by codifying it in the proposal**, indicating clearly which requirements are compatible with obligations under EU law and which are not. By complying with their obligations, Member States would substantially contribute to reducing administrative burdens and SMEs would benefit from better enforcement of the existing Directive, a more level playing field and fairer competition. Improved administrative cooperation and effective and adequate inspections based on risk assessment would make inspections more effective and reduce costs for companies in non-risk sectors or situations and thus contribute to less burdensome controls.

Furthermore, **effective and adequate inspections**, primarily based on regular risk assessment by the competent authorities, should be carried out in order to control and monitor compliance with the applicable rules. In order to reflect the different industrial relations systems and diversity of systems of control in the Member States, other actors and/or bodies may also monitor certain terms and conditions of employment of posted workers, such as the minimum rates of pay and working time.

**Enforcement:** the proposal sets out provisions on the enforcement and defence of rights, which in itself concerns a fundamental right: the Charter of Fundamental Rights of the European Union confirms the right to effective remedy for everyone whose rights and freedoms guaranteed by the law of the EU are not respected.

**Complaint mechanisms:** the proposal sets out provisions on effective mechanisms for posted workers to lodge complaints directly or through designated third parties, such as trade unions, subject to their approval.

**Joint and several liabilities:** the protection of workers rights is a matter of particular concern in subcontracting chains, which are particularly widespread in the construction sector in the EU. There is evidence that, in a number of cases, posted workers are exploited and left without payment of wages or part of the wages they are entitled to under the Directive 96/71/EC.

The European Parliament has adopted several resolutions on this issue, calling upon the Commission to establish a legislative instrument on joint and several liability at EU level, in particular for long subcontracting chains (see [2011/2147\(INI\)](#)). However, a cautious approach is required in this respect in order to take due account of the variety of legal systems in place in the Member States, as well as the impact such a system may have on cross-border service provision within the Internal Market.

The proposal contains **specific provisions concerning contractors' obligations and (joint and several) liability** with respect to compliance with the relevant terms and conditions of employment of posted workers by subcontractors. The focus is on preventive measures, combined with the possibility for Member States who so wish to implement more far-reaching systems of joint and several or chain liability.

The provisions are **limited to the construction sector**, as defined by the list of activities included in the Annex to the Directive. Posting by temporary work agencies is included provided it is aimed at activities in the construction sector. However, Member States may, if they so wish, extend these provisions to other sectors.

This balanced package of measures should reflect sufficiently the diversity of existing systems at national level, while at the same time avoiding adding unnecessary or unjustified administrative burden for companies. Joint and several liability is a mechanism of self-regulation between private actors and a far less restrictive and more proportionate system than possible alternative systems such as pure state intervention by inspections and sanctions.

**Cross-border enforcement of administrative fines and penalties:** the absence of a common mutual recognition and enforcement instrument has been identified as causing major practical enforcement problems and difficulties. In a number of Member States the sanctions imposed are of a penal or criminal nature, whereas in others they are governed by administrative law, and a combination of the two can also be found. Existing EU instruments, such as [Council Framework Decision 2005/214/JHA](#) and the [Brussels I Regulation](#), govern to a certain extent some of the fines and penalties imposed.

With respect to fines and penalties of an administrative nature, which can be appealed to courts other than penal courts, similar instruments do not exist. Therefore, the proposal **sets out a system for the cross-border enforcement of such administrative fines and penalties**.

**FINANCIAL IMPLICATIONS:** the proposal is expected to have implications for the EU budget:

- costs for grants (projects, seminars, exchange of good practice etc) of EUR 2 million as well as for the Expert Committee on the Posting of Workers of EUR 0. 264 million per year will be covered by PROGRESS (2013) and the Programme for Social Change and Innovation (2014-2020);
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costs of EUR 0.5 million for an ex-post evaluation study in 2016 will be covered by the Programme for Social Change and Innovation;

- costs for human resources of EUR 0.232 million and other administrative expenditure (travel costs EUR 0.01 million; stakeholder conferences every second year EUR 0.36 million) will be covered under heading 5 of the Multiannual Financial Framework.