

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

2012/0061(COD) - 16/04/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 474 to 158 votes, with 39 abstentions, a legislative proposal for a Directive of the European Parliament and the Council on the enforcement of directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

Parliament adopted its position at first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of a negotiated agreement between the European Parliament and the Council. They amend the proposal as follows:

Purpose: the Directive would aim to establish a common framework of provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC on the posting of workers. It essentially aims to guarantee respect for an **appropriate level of protection of the rights of posted workers** for the cross-border provision of services, especially the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be performed.

Competent authorities and liaison offices: new provisions have been introduced so that Member States shall designate one or more competent authorities, which may include the liaison office(s) referred to in Directive 96/71/EC. When they designate their competent authorities, Member States should take into account the need to ensure the protection of the data contained in the information exchanged and the recognised legal rights of the physical and moral persons concerned. **Member States would remain ultimately responsible for safeguarding data and the legal rights of affected persons and put in place appropriate protection mechanisms in this respect.** The contact details of the competent authorities and liaison offices would be communicated to the Commission and the other Member States.

Set of enforcement provisions to prevent abuse and circumvention: the competent authorities should make an overall assessment of **all factual elements** that are deemed necessary in support of the legal verification of the document, including in particular:

- the place where the undertaking has its registered office and administration, uses office space, **pays taxes and social security contributions** and where it has a professional licence or is registered with professional bodies;
- the place where posted workers are recruited and **from which they are posted**;
- the place where the undertaking performs most of its business activity and where it employs administrative staff;
- the **number of contracts performed and/or the size of the turnover realised in the Member State of establishment**, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

These elements were intended to assist competent authorities when carrying out checks and controls. They were **indicative factors in the overall assessment to be made and should not be considered in isolation**. The assessment of these elements should be adapted to **each specific case** and taking into account the particular situation. In particular, failure to satisfy **all of these elements** should not automatically preclude a situation from being a posting.

Member States could also apply **additional elements** (date of posting for example, the nature of activities) to be verified by the competent authority provided that they are justified, proportionate and non-discriminatory.

Access to information: Member States should provide easy access to information on the conditions of work and employment of posted workers and those which should be applied and respected by service providers. This access to information should be wide and free, transparent and easily accessible at a distance and by electronic means.

It is in particular intended to introduce a **single national website per Member State** with all the necessary information on binding terms and conditions of employment. The relevant information should be made available **free of charge in the national language of the host Member State and in the languages most appropriate to the labour market needs**, the choice being left to the host Member State. The relevant information should also describe the procedures for lodging complaints and judicial proceedings as well as sanctions applicable in case of non-compliance.

Administrative cooperation between Member States: it is foreseen that the cooperation of the Member States will concentrate on replying to requests for information from competent authorities and to carry out **checks, inspections and investigations** with respect to the situations of posting, including infringement of the applicable rules. Requests for information should include information relating to the **possible recovery of a penalty and/or an administrative charge** or the notification of a decision inflicting a penalty and/or a fine.

In the case of persistent problems in the exchange of information or of outright refusal to supply information, the Commission, having been informed by the IMI, could take appropriate measures.

Provisions have been added to specify the deadlines for the transmission of some data.

Role of Member States in the framework of administrative cooperation: inspections of the conditions of work and employment could be organised, during the period of a worker being posted in another Member State, under the jurisdiction of the host Member State, where appropriate, with the home Member State.

Administrative requirements and control measures: Member States may impose any administrative requirements and control measures that they deem to be necessary for the effective enforcement of Directive 96/71/EC and this Directive, so long as they are justified and proportionate. A set of new measures have been introduced to this effect, including in particular:

- the obligation for a service provider established in another Member State to make a **simple declaration to the responsible national competent authorities**, at the latest at the commencement of the service provision, in the official language or one of the official languages of the host Member State, containing a set of information specified in the amended text of the Directive on posted workers and the services justifying the posting;
- the obligation to provide the documents referred to above, after the period of secondment, at the demand of the authorities of the host State;
- the obligation to designate, for the duration of the provision of services, **a contact person** acting as the representative through which the social partners concerned may engage with the service provider so that it engages in collective bargaining in the host Member State.

In addition, it is foreseen that Member States impose other administrative charges and control measures in case of emerging circumstances or new elements **if control measures prove insufficient or ineffective**. In any case, the procedures and formalities linked to the posting of workers should be carried out in a **user-friendly way by the companies**, in so far as possible at a **distance and by electronic means**.

The Commission would be required to closely monitor the application of administrative measures foreseen and to assess compliance with the law of the Union in taking, where appropriate, the necessary measures in line with the treaty. In addition, it must regularly report to the Council **on the measures notified by the Member States**, and of the state of progress on its evaluation and/or analysis.

Inspections: Member States should ensure that appropriate and effective checks and monitoring mechanisms are put in place and that effective and adequate inspections are carried out **on their territory** in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, so as to guarantee their proper application and enforcement. Random checks may also take place based on a risk assessment. The risk assessment may **identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated** on their territory. In particular, this risk assessment could take account of the realisation of big infrastructural projects, the existence **of long chains of sub-contractors**, the **geographic proximity**, the special problems and needs of **specific sectors**, the past record of infringement, as well as the **vulnerability of certain groups of workers** may be taken into particular account.

Appeal and complaints: it is foreseen that if the posted workers undertake judicial or administrative procedures, these last are protected against bad treatment on the part of their employer. This last should fulfil any right arising from the contractual relationship between the employer and the posted worker so that the latter can, for example, recover **any outstanding net remuneration** or any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary.

Chain of responsibility in the case of subcontracting: to tackle fraud and abuse, Member States should have the possibility of taking additional measures, so that in the subcontracting chains, the contractor of which the employer/service provider under Directive 96/71/EC is a direct subcontractor, and in addition to or in place of the employer, **can be held liable to pay to posted workers the net minimum rates of pay due**.

Member States may take other appropriate enforcement measures, which enable in a direct subcontracting relationship, effective and proportionate sanctions against the contractor

Penalties: without prejudice to the means which are or may be provided for in Union legislation, the principles of mutual assistance and recognition shall apply to the cross-border enforcement of **financial administrative penalties and/or fines imposed** on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State. The new measures have been introduced to regulate the level of financial penalty (including fees and mark-ups) to be imposed by the competent authorities or confirmed by administrative or judicial bodies.

Designation of competent enforcement authorities: each Member State should inform the Commission, through the IMI, the name of the authority which, under its national law, is competent to ensure the application of sanctions. These measures have been introduced to determine the mechanism for the implementation of applicable penalties.

The competent authority which would be asked to impose a penalty or administrative charge should recognise the decision without any other formality being required and take all the necessary measures for its implementation without delay. For the purposes of the execution of the sanction, the requested

authority should act in accordance with the laws, the regulation and administrative practices in force of the requested Member State.

Grounds for refusal to impose a penalty: among the grounds that may be invoked against imposing a penalty, the competent authorities may invoke the following circumstances: i) the cost or the resources required to carry out the penalty and/or administrative charge are disproportionate to the amount to be recovered; ii) the penalty or monetary fine is less than EUR350 or its equivalent; iii) the fundamental rights and freedoms of the defence and the legal principles enshrined in the Constitution of the requested Member State are not respected.

Review: lastly, provisions have been introduced to provide for review of the Directive in order to assess in particular:

- the need and the appropriateness of factual elements to determine whether the posting is genuine, including the opportunities to change any existing elements or to define new elements to take into account;
- the validity of data relating to posting of workers;
- the possibility and the merits of applying national control measures in the light of experience gained;
- the measures of responsibility and/or implementation put in place to ensure compliance with the applicable rules and the effective protection of the rights of workers in the subcontracting chains;
- the implementation of the provisions on cross-border enforcement of penalties and pecuniary administrative charges.