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

2012/0061(COD) - 15/05/2014 - Final act

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.

LEGISLATIVE ACT: Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

CONTENT: this Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, including measures to prevent and sanction any abuse and circumvention of the applicable rules.

It aims to guarantee respect for an **appropriate level of protection of the rights of posted workers** for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided.

This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States.

Competent authorities and liaison offices: Member States shall designate one or more competent authorities, which may include the liaison office(s) as referred to in Directive 96/71/EC. When designating their competent authorities Member States shall have due regard for the need to ensure data protection of exchanged information and the legal rights of natural and legal persons that may be affected. **Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons** and shall put in place appropriate mechanisms in this respect. Member States shall communicate the contact details of the competent authorities to the Commission and to the other Member States.

Identification of a genuine posting and prevention of 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.

The failure to satisfy one or more of the factual elements shall **not automatically** preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation.

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.

In order to bring about further improvements with respect to access to information, Member States shall:

- set up a **single official national website** to make generally available information on which collective agreements are applicable and to whom they are applicable, and which terms and conditions of employment are to be applied by service providers from other Member States;
- make the information available to workers and service providers **free of charge** in the official language(s) of the host Member State and in the most relevant languages taking into account demands in its labour market, the choice being left to the host Member State (that information shall be made available if possible in summarised leaflet form indicating the main labour conditions applicable);
- include the description of the procedures to lodge complaints;
- indicate a contact person at the liaison office in charge of dealing with requests for information.

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.

Internal Market Information System: the administrative cooperation and mutual assistance between the competent authorities of the Member States provided for in Articles 6 and 7, Article 10(3), and Articles 14 to 18 shall be implemented through the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012.

In the event of any persisting problems in the exchange of information or a permanent refusal to supply information, the Commission being informed, where relevant by means of IMI, shall take the appropriate measures.

Further provisions are provided laying down the time limits for the transmission of data (e.g. in electronic form or in urgent cases).

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.

Where there are facts that indicate possible irregularities, a Member State shall, on its own initiative, communicate to the Member State concerned any relevant information without undue delay. Competent authorities of the host Member State may also ask the competent authorities of the Member State of establishment, in respect of each instance where services are provided or each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules.

The obligations laid down shall not give rise to a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State in which the service is provided.

Accompanying measures are provided seeking to develop, facilitate and promote the exchange between officials in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring the compliance with, and enforcement of, the applicable rules.

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 shall ensure that appropriate and effective checks and monitoring mechanisms provided in accordance with national law and practice are put in place and that the authorities designated under national law carry out effective and adequate inspections **on their territory** in order to

control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC, taking into account the relevant provisions of this Directive and thus guarantee their proper application and enforcement.

Inspections shall be based primarily on a risk assessment by the competent authorities. 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**. When making such a risk assessment, the carrying out of large infrastructural projects, the existence of long chains of subcontractors, 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 in particular be taken into account**.

Defence of rights and complaints: Member States shall ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted.

Member States shall ensure that trade unions and other third parties may engage in any judicial or administrative proceedings.

Posted workers bringing judicial or administrative proceedings shall be protected against any unfavourable treatment by their employer.

The employer of the posted worker shall be liable for any due entitlements resulting from the contractual relationship between the employer and that posted worker.

Member States shall ensure that the necessary mechanisms are in place to ensure that the posted workers are able to **receive any outstanding net remuneration would have been due or any back-payments** or refund of taxes or social security contributions unduly withheld from their salaries.

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 to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights.

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. 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.

Provisions have been laid down as regards the grounds for refusal to impose a penalty (for example if the penalty or monetary fine is less than EUR 350).

Review: no later than 18 June 2019, the Commission shall present a report on its application and implementation and propose, where appropriate, necessary amendments and modifications.

ENTRY INTO FORCE: 17.06.2014.

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