Basic information

2006/2038(INI) INI - Own-initiative procedure	Procedure completed
Application of Directive 96/71/EC on the posting of workers **Subject** 2.40 Free movement of services, freedom to provide 4.15.12 Workers protection and rights, labour law	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
EMPL Employment and Social Affairs	SCHROEDTER Elisabeth (Verts/ALE)	27/10/2005

Committee for opinion	Rapporteur for opinion	Appointed
IMCO Internal Market and Consumer Protection	HANDZLIK Małgorzata (PPE-DE)	21/02/2006

Council of the European Union

Council configuration	Meetings	Date
Employment, Social Policy, Health and Consumer Affairs	2733	2006-06-01

European Commission

Commission DG	Commissioner
Employment, Social Affairs and Inclusion	ŠPIDLA Vladimír

Key events

Date	Event	Reference	Summary
16/02/2006	Committee referral announced in Parliament		
04/04/2006	Non-legislative basic document published	COM(2006)0159	Summary
04/04/2006	Debate in Parliament		
01/06/2006	Debate in Council		
13/09/2006	Vote in committee		Summary
28/09/2006	Committee report tabled for plenary	A6-0308/2006	
18/10/2006	Debate in Parliament		

26/10/2006	Decision by Parliament	T6-0463/2006	Summary
26/10/2006	Results of vote in Parliament		
26/10/2006	End of procedure in Parliament		

Technical information	
Procedure reference	2006/2038(INI)
Procedure type	INI - Own-initiative procedure
Procedure subtype	Initiative
Legal basis	Rules of Procedure EP 55
Stage reached in procedure	Procedure completed
Committee dossier	EMPL/6/32452

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Amendments tabled in committee		PE374.181	18/05/2006	
Committee opinion	IMCO	PE372.060	21/06/2006	
Committee report tabled for plenary, single reading		A6-0308/2006	28/09/2006	
Text adopted by Parliament, single reading		T6-0463/2006	26/10/2006	Summary

European Commission

Document type	Reference	Date	Summary
Non-legislative basic document	COM(2006)0159	04/04/2006	Summary
Follow-up document	COM(2007)0304	13/06/2007	Summary
Follow-up document	SEC(2008)0379	03/04/2008	Summary

Application of Directive 96/71/EC on the posting of workers

2006/2038(INI) - 04/04/2006 - Non-legislative basic document

PURPOSE : to lay down guidelines on the posting of workers in the framework of the provision of services.

CONTENT : Article 49 of the EC Treaty establishes the principle that Member States should ensure the freedom to provide services within the Community. This fundamental freedom includes the right of a service provider established in a Member State to temporarily post workers to another Member State in order to provide a service. Under the case law, the free provision of services, a fundamental principle of the Treaty, may only be restricted by rules justified on one of the grounds listed in Article 46 EC and by overriding reasons based on the general interest, in accordance with the principles of non-discrimination

and proportionality.

Directive 96/71/EC identifies the mandatory rules in force in the host country that are to be applied to posted workers by establishing a hard core of terms and conditions of work and employment and making them binding on undertakings posting workers to a Member State other than the State in whose territory these workers habitually work. The Directive has a clear social objective: that posted workers are guaranteed during the period of posting the respect by their employer of certain protective rules of the Member State to which they are posted.

Following the adoption by the European Parliament on 16 February 2006 of a legislative resolution on the proposal for a directive on services in the internal market (so-called Bolkestein Directive **COD/2004/0001**), the Commission presented an amended proposal, in which Articles 24 and 25 of the initial proposal setting out specific provisions on the posting of workers are deleted. In these Articles, the Commission proposed the scrapping of certain administrative obligations concerning the posting of workers, accompanied by measures to reinforce administrative cooperation between Member States.

The Commission undertook to draw up **guidelines** to clarify the prevailing Community law on the administrative procedures dealt with in Articles 24 and 25. This Communication tells the Member States how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC and how to achieve the results required by the Directive in a more effective manner. The evidence gathered in the Commission's report SEC(2006)0439, which is annexed to the present Communication, shows that there is considerable scope for improving access to information, administrative cooperation and monitoring of compliance, *inter alia* by identifying and disseminating best practices.

This Communication does not affect the Commission's prerogative provided for under the Treaty to ensure Member States' compliance with Community law, nor does it affect general rules on visa requirements.

Questions relating to control measures: in its case law, the Court accepted that Member States could verify that no abuses of the freedom to provide services had taken place, for example the use of workers from third countries on the labour market of the host Member State. It also accepted the justification for

the inspection measures necessary to monitor the observance of obligations justified under the general interest. However, the Commission would like to point out that, when performing inspections as part of the implementation of the Directive, Member States must abide by Article 49 EC and refrain from creating or upholding unjustified and disproportionate restrictions to the free provision of services within the Community. The Court has underlined several times that these inspections must be suitable for achieving the objectives pursued without restricting this freedom any more than necessary.

Of the measures implemented by certain Member States, the following urgently require clarification on the basis of the case law of the Court of Justice based on Article 49 EC:

The requirement to have a representative established on the territory of the host Member State: the Commission states that the requirement made by a Member State that companies posting workers on its territory must have a representative domiciled in that host Member State is disproportionate for monitoring the working conditions of these workers. The appointment of a person from among the posted workers, for example a foreman, to act as the link between the foreign company the labour inspectorate, should suffice.

The requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation: the Commission concludes that that any rules which make the posting of workers subject to systematic prior control, including by way of compulsory and systematic prior authorisation or registration, would be disproportionate.

Requirement to make a declaration : the Commission considers that the host Member State, in order to be able to monitor compliance with the conditions of employment laid down in the Directive, should be able to demand, in accordance with the principle of proportionality, that the service provider submit a declaration, by the time the work starts, at the latest, which contains information on the workers who have been posted, the type of service they will provide, where, and how long the work will take. The declaration could mention that posted workers from third countries are in a lawful situation in the country in which the service provider is established, including with regard to the visa requirements, and legally employed in that country.

The requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory: according to the Commission, the host Member State must be able to demand, in accordance with the principle of proportionality, that documents be kept in the workplace which are, by their nature, created there, such as time sheets or documents on conditions of health and safety in the workplace. The host Member State cannot demand a second set of documents if the documents required under the legislation of the Member State of establishment, taken as a whole, already provide sufficient information, to allow the host Member State to carry out the checks required.

Measures which apply to posted workers who are nationals of third countries: the Commission states that the host Member State may not impose administrative formalities or additional conditions on posted workers from third countries when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host Member State to check that these conditions are complied with in the Member State where the service provider is established.

Access to information: Member States are asked to redouble their efforts to enhance, and improve access to, the information on the terms and conditions of employment that must be applied by service providers, and to ensure that their liaison offices are in a position to carry out their tasks effectively. The Commission will continue to support the Member States in this area, especially through the expert group, and will monitor their efforts in order to make sure that they contribute to progress towards best practices.

Cooperation between Member States: Member States are asked to take the necessary measures to ensure that their liaison offices and/or monitoring authorities have the necessary equipment and resources to respond effectively to requests for information and cross-border cooperation from the competent authorities of the other Member States. The Commission will continue to support the Member States in this area, especially by making more appropriate electronic systems available, and will monitor their progress closely.

Conclusion: the Commission concludes by stating that there is an urgent need to clarify the control measures which Member States can use, in the light of Article 49 EC as interpreted by the Court's judgments, and to improve access to information and administrative cooperation. Member States should act to ensure that the guidance provided in this Communication gives rise to concrete results as soon as possible. In order to assess progress, the Commission will adopt within 12 months a report which will examine the situation in all Member States with regard to all aspects covered by this Communication.

Application of Directive 96/71/EC on the posting of workers

2006/2038(INI) - 13/06/2007 - Follow-up document

PURPOSE: to present a Communication to assess the application of Directive 96/71/EC on the posting of workers in the framework of the provision of services.

CONTENT: on 4 April 2006 the Commission adopted the Communication 'Guidance on the posting of

workers in the framework of the provision of services' which aimed to assist Member States in achieving the results required by the Directive and in particular as regards administrative requirements and control measures imposed on service providers.

The present Communication responds to the commitment taken by the Commission in its Communication to monitor developments in the Member States4 with respect to all matters addressed in that Communication.

The present Communication is based on a detailed examination of the situation in the Member States and also takes into account the information provided and the concerns expressed by the European Parliament in its Resolution of 26 October 2006 on the application of the Directive.

There are no precise figures or estimates of posted workers in the EU. However, the overall number of posted workers is estimated to be just under 1 million or about 0.4% of the EU working age population in 2005. They represent significant numbers in some Member States (Germany, France, Luxembourg, Belgium or Poland) but the phenomenon is increasingly widespread and affects now all Member States as sending and/or as receiving countries. 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, transport). On the other hand, employment conditions, wages in particular, offered to posted workers, if not subject to proper control and enforcement, may diverge from the minimal conditions established by law or negotiated under generally applicable collective agreements. If such divergence takes place on a large scale this might undermine the organization and functioning of local labour markets. At the same time, on a more general level, restrictions on labour market access may exacerbate resort to undeclared work. When accompanied by lacunae in enforcement of Community legislation already in place, this phenomenon leads to undesirable social consequences both for undeclared workers and the regular labour force.

Guidelines provided for in the Commission's Communication of April 2006

In its Communication of April 2006, the Commission explained and clarified how the Community acquis, and in particular Article 49 EC as interpreted by the ECJ, had to be observed and how the results required by the Directive could be achieved in a more effective manner. Among the control measures applied by Member States in the context of supervising the posting of workers, it explicitly focussed upon the following types of administrative requirements:

- to have a representative established on the territory of the host Member State ;
- to obtain a prior authorisation in the host Member State or to be registered with them, or any other equivalent obligation;
- to make a prior declaration to the authorities of the host Member State;
- to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory;
- measures which apply specifically to posted workers who are nationals of third countries.

Control measures applied by the Member States: in the light of the available information and pending further assessment, a number of control measures applied by Member States do not seem to be in conformity with Article 49 EC as interpreted by the ECJ. A final assessment of the situation will, however, depend on an assessment as to whether certain legitimate monitoring needs can be fulfilled by improved access to information and/or more effective administrative cooperation between the host Member State and the Member State of origin.

Control measures used: the main categories of control measures used by the Member States are as follows:

- the requirement imposed on the posting undertaking to have a representative in the host country is explicitly made in 6 Member States (and implicitly in 3 others);
- a specific authorisation/registration regime for posting of workers exists in two Member States;
- the requirement to make a declaration prior to the commencement of the work by the service provider exists in 16 Member States19; whereas one Member State imposes such an obligation on the recipient of the service;
- requirements to keep and maintain certain social documents on the territory of the host country and/or under the conditions which apply in its territory are imposed in 14 Member States in varying ways and concerning different types of documents.

Member States and Social Partners have divergent views as to whether certain control measures are needed as well as to whether these are compatible with Community law. In October 2006, the European Parliament adopted a Resolution which alleges the right of the host Member State to impose certain formalities to employers that post workers so as to make it possible for the authorities of that country to ensure compliance with the terms and conditions of employment. For a number of Member States this constitutes a highly sensitive issue, touching upon key characteristics of their social model. Control measures imposed by Member States are embedded in their legal and institutional frameworks, and in some Social Partners can also be entrusted with control and monitoring tasks of terms and conditions of employment. Lack of information on the identity and/or legitimacy of

service providers, the temporary and often very short-term nature of posting operations, the perceived risks of "social dumping" or distortion of competition, as well as the cultural and physical distance between controlling authorities, are mentioned as justification for the use of certain control measures by host country authorities. On the other hand, these are often perceived as excessive by service providers and authorities in sending countries, and pursuing goals that go beyond the protection of posted workers' rights.

Assessment: the inventory of control measures used by Member States shows their striking diversity. As a matter of principle, the Commission does not intended to put into question the different social models chosen by Member States nor the way they organise their system of labour relations and collective bargaining, provided that it is implemented and applied in a way which is fully compatible with the obligations under the Treaty.

Furthermore, the necessity for preventive actions and appropriate sanctions aimed at countering illegal employment and undeclared work, including in the form of disguised self-employment, as well as combating unlawful activities by fictitious foreign temporary employment agencies, is indisputable. In this context, Member States need to strike the right balance between, on one side, the necessity to provide and safeguard the effective protection of workers and, on the other, the need to ensure that the formal requirements and control measures used or imposed in order to guarantee the respect of overriding reasons of general interest (such as protection of posted workers), including the way these are effectively applied, exercised or performed in practice, are justified and proportionate in view of the objectives pursued and aims to be achieved. This situation may well be related to, if not caused by, the virtual absence of administrative cooperation, the still unsatisfactory access to information as well as cross-border enforcement problems. These problems cannot be solved unless Member States improve the way they cooperate with each other and, in particular comply with their obligations regarding administrative cooperation and access to information as stipulated in the Directive. In complying with their obligations, Member States would substantially contribute to a reduction of administrative burdens in line with the objectives set by the European Council. Improved administrative cooperation could also constitute an important element when aiming to improve and increase effective compliance with and enforcement of Community law. Adequate and effective implementation and enforcement are key elements in the protection of posted workers rights.

Future measures: the Commission considers that urgent action is required and envisages the following measures:

1. adopt a Commission Recommendation (on the basis of Article 211 EC), to be endorsed by Council conclusions in order to reinforce administrative cooperation amongst Member States through the use of the Internal Market Information System (IMI)43 and to clarify the role of liaison offices;
2. adopt a Commission Decision setting up a high level Committee, in order to support and assist the Member States in identifying and exchanging good practices, to institutionalise the current, informal Group of Government Experts by identifying with greater precision its role, tasks and responsibilities, and to formally involve social partners regularly;
3. ensure effective compliance with the fundamental freedoms of the EC-Treaty, as interpreted by the ECJ, by those Member States which impose administrative requirements and control measures considered incompatible with prevailing Community law (such as the requirement to have a representative established in the host Member State, or an obligation to keep certain social documents on its territory, without any exception and/or time limitation, when information can be obtained via the employer or the authorities in the Member State of origin within a reasonable delay) on a case by case basis, including, if necessary, launching infringement proceedings under Article 226 EC;
4. ensure the conformity with Community law, as interpreted by the ECJ notably in the judgement "Vander Elst", with respect to those Member States which still require work permits and other conditions to posted third country nationals who are legally staying and are legally employed in another Member State, by launching infringement procedures under Article 226 EC;
5. continue monitoring the Member States' national transposition measures and their application on all other matters not dealt with in this Communication, including those situations where, contrary to Article 4(3), accessibility and transparency of information remains a problem, and, if necessary, take the appropriate measures, including launching infringement procedures under Article 226 EC;
6. engage, for example in the above-mentioned high level Committee, with the Member States and Social Partners in an in-depth examination of cross-border enforcement problems (sanctions, fines, joint and several liability).

On the basis of this examination, the Commission will take appropriate action.

Application of Directive 96/71/EC on the posting of workers

2006/2038(INI) - 03/04/2008 - Follow-up document

This recommendation proposed by the European Commission presents a draft recommendation on improving administrative cooperation in the context of the posting of workers in the framework of the provision of services.

It recalls that Directive 96/71/EC of the European Parliament and of the Council on the posting of workers in the framework of the provision of services imposes clear obligations regarding cooperation between national administrations and makes it the responsibility of the Member States to create the necessary conditions for such cooperation. This obligation includes the designation, in accordance with national legislation and/or practice, of one or more monitoring authorities organised and equipped in such a way as to function effectively and to be able to deal promptly with requests of information regarding terms and conditions of employment covered by Directive 96/71/EC.

Furthermore, Directive 96/71/EC compels Member States to take appropriate measures to ensure that information on conditions of work and employment is generally made available, not only to foreign service providers but also to posted workers.

Notwithstanding improvements in terms of access to information, there are still justified concerns as to the way the Member States have implemented and/or apply in practice the rules on administrative cooperation as provided for by the Directive. Satisfactory implementation, correct application and effective compliance with and enforcement in practice of the Directive do not seem possible unless this situation is corrected.

The monitoring exercise launched by the Commission on the basis of its Communication "Guidance on the posting of workers in the framework of the provision of services" (see the summary of the initial non-legislative document of 04/04/2006 in this procedure file) furthermore showed that many Member States tend to rely solely on their own national measures and instruments to monitor the compliance with the terms and conditions of

employment applicable to posted workers by service providers. This situation may well be related to, if not caused by, the virtual absence of administrative cooperation, the still unsatisfactory access to information as well as cross-border enforcement problems

To ensure adequate implementation of the legislation and effective monitoring of its application, close cooperation between the Commission and the Member States must be clearly established, without neglecting the important role of labour inspectorates and social partners.

To facilitate the establishment of this cooperation, the Commission considers that a well-functioning electronic information system, designed to facilitate mutual assistance and the exchange of information between Member States, would be an effective tool to overcome the problem of information exchange. Such a system would enable the competent authorities and social partners to identify easily their relevant interlocutors in other Member States and to communicate in an efficient way. Furthermore, it should help in creating a climate of mutual trust and confidence, fundamental for administrative cooperation to function effectively.

It is in this context that the Commission recommends the following measures:

- **the establishment of an information exchange system**: Member States should take the necessary measures to put in place an electronic information exchange system, such as the Internal Market Information System ('IMI'), and in particular to develop, in close cooperation with Commission services, a – specific - application to support the administrative cooperation necessary to improve the practical implementation of Directive 96/71/EC. Member States should also assess and decide, in cooperation with Commission services, whether IMI provides the most suitable support for the information exchange as set out in Article 4 of Directive 96/71/EC. In this context, the Commission will provide assistance to the Member States that undertake to work very closely with them in order to achieve the necessary progress;
- **access to information**: Member States should increase their efforts to enhance access to the information on the terms and conditions of employment that must be applied by service providers, and to ensure that their liaison offices are in a position to carry out their tasks effectively. In this respect, a series of measures have been proposed, including more intensive use of the internet to improve the accessibility of information on applicable national legislation;
- **exchange of good practice**: lastly, Member States should participate actively in a systematic and formal process of identification and exchange of good practice in the field of posting of workers through any forums of cooperation established by the Commission to that end, such as the envisaged High-Level Committee whose tasks and responsibilities are proposed in the annex to the draft recommendation.

Application of Directive 96/71/EC on the posting of workers

2006/2038(INI) - 26/10/2006 - Text adopted by Parliament, single reading

The European Parliament adopted a resolution based on the own-initiative report by Elisabeth **SCHROEDTER** (Greens/EFA, DE) on the application of Directive 96/7/EC on the posting of workers. (Please refer to the summary of 13/09/2006.) The report was adopted by 295 votes in favour to 72 against with 20 abstentions.