Basic information

2012/0061(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Posting of workers in the framework of the provision of services: enforcement of Directive 96/71/EC Amending Regulation (EU) No 1024/2012 2011/0226(COD) See also Directive 96/71/EC 1991/0346(COD) See also 2017/0121(COD) **Subject** 2.40 Free movement of services, freedom to provide 2.80 Cooperation between administrations 4.10.10 Social protection, social security 4.15.04 Workforce, occupational mobility, job conversion, working conditions 4.15.12 Workers protection and rights, labour law	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
EMPL Employment and Social Affairs	JAZŁOWIECKA Danuta (PPE)	16/02/2012
	Shadow rapporteur HUGHES Stephen (S&D) HIRSCH Nadja (ALDE) BENNION Phil (ALDE) SCHROEDTER Elisabeth (Verts/ALE) CABRNOCH Milan (ECR) HÄNDEL Thomas (GUE/NGL) CYMAŃSKI Tadeusz (EFD)	

Committee for opinion	Rapporteur for opinion	Appointed
IMCO Internal Market and Consumer Protection	HARBOUR Malcolm (ECR)	08/05/2012
JURI Legal Affairs	LEHNE Klaus-Heiner (PPE)	26/11/2012

Council of the

Council configuration	Meetings	Date

European Union	General Affairs	3313	2014-05-13
	Employment, Social Policy, Health and Consumer Affairs	3206	2012-12-06
	Employment, Social Policy, Health and Consumer Affairs	3177	2012-06-21
	Employment, Social Policy, Health and Consumer Affairs	3263	2013-10-15
	Employment, Social Policy, Health and Consumer Affairs	3280	2013-12-09
	Employment, Social Policy, Health and Consumer Affairs	3247	2013-06-20

	Commission DG	Commissioner
European Commission	Employment, Social Affairs and Inclusion	ANDOR László

European Economic and Social Committee

European Committee of the Regions

Key events

Date	Event	Reference	Summary
21/03/2012	Legislative proposal published	COM(2012)0131	Summary
18/04/2012	Committee referral announced in Parliament, 1st reading		
21/06/2012	Debate in Council		Summary
06/12/2012	Debate in Council		Summary
20/06/2013	Debate in Council		
20/06/2013	Vote in committee, 1st reading		
04/07/2013	Committee report tabled for plenary, 1st reading	A7-0249/2013	Summary
15/10/2013	Debate in Council		Summary
09/12/2013	Debate in Council		Summary
15/04/2014	Debate in Parliament		
16/04/2014	Decision by Parliament, 1st reading	T7-0415/2014	Summary
16/04/2014	Results of vote in Parliament		
13/05/2014	Act adopted by Council after Parliament's 1st reading		
15/05/2014	Final act signed		
15/05/2014	End of procedure in Parliament		
28/05/2014	Final act published in Official Journal		

Technical information

Procedure reference	2012/0061(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)

Procedure subtype	Legislation
Legislative instrument	Directive
Amendments and repeals	Amending Regulation (EU) No 1024/2012 2011/0226(COD) See also Directive 96/71/EC 1991/0346(COD) See also 2017/0121(COD)
Legal basis	Treaty on the Functioning of the European Union TFEU 062 Treaty on the Functioning of the European Union TFEU 053-p1
Mandatory consultation of other institutions	European Economic and Social Committee European Committee of the Regions
Stage reached in procedure	Procedure completed
Committee dossier	EMPL/7/09227

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE498.030	08/11/2012	
Amendments tabled in committee		PE500.574	17/01/2013	
Amendments tabled in committee		PE504.077	21/01/2013	
Amendments tabled in committee		PE504.094	21/01/2013	
Amendments tabled in committee		PE504.078	22/01/2013	
Committee opinion	IMCO	PE496.470	12/03/2013	
Committee opinion	JURI	PE502.130	15/05/2013	
Committee report tabled for plenary, 1st reading/single reading		A7-0249/2013	04/07/2013	Summary
Text adopted by Parliament, 1st reading/single reading		T7-0415/2014	16/04/2014	Summary

Council of the EU

Document type	Reference	Date	Summary
Draft final act	00019/2014/LEX	15/05/2014	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2012)0131	21/03/2012	Summary
Document attached to the procedure	SWD(2012)0063	21/03/2012	
Document attached to the procedure	SWD(2012)0064	21/03/2012	
Commission response to text adopted in plenary	SP(2014)471	09/07/2014	
	COM(2019)0426		

Follow-up document		25/09/2019	Summary
Follow-up document	SWD(2019)0337	25/09/2019	Summary

National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	IT_SENATE	COM(2012)0131	11/05/2012	
Contribution	PT_PARLIAMENT	COM(2012)0131	21/05/2012	
Contribution	CZ_SENATE	COM(2012)0131	20/06/2012	
Contribution	DE_BUNDESRAT	COM(2012)0131	20/06/2012	

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EDPS	Document attached to the procedure	N7-0046/2013 OJ C 027 29.01.2013, p. 0004	09/07/2012	Summary
CofR	Committee of the Regions: opinion	CDR1185/2012	29/11/2012	

Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	
European Commission	EUR-Lex	

Final act

Directive 2014/0067
OJ L 159 28.05.2014, p. 0011 Summary

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/EC42, 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);
- 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.

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

2012/0061(COD) - 21/06/2012

The Council took **note of a progress report** regarding enforcement of the posting of workers directive and the right to collective action regulation.

From the discussions in the Council's working party, it seems that delegations recognise the added value of the proposal for an enforcement directive and have positive views on its overall objectives.

Except for the issue of **cross-border enforcement of administrative fines and penalties** (chapter VI), substantive discussions have taken place on most parts of the proposal and considerable progress has been made in the discussions on some of the issues.

There is a need for further examination of chapter VI, and for further in-depth discussion on :

- the issues of national control measures,
- the length of the deadlines,
- as well as the proposed system of joint and several liability.

As regards the other main outstanding articles, many aspects have been dealt with in detail and there therefore seems to be a sufficient basis for making substantive progress on some of these issues in the near future also with a view to implementation of the Single Market Act.

The delegations' positions may be summarised as follows:

Definition of "posted worker" : this shall mean, for the purposes of the Directive, a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the Member State in which he or she normally works. A worker qualifies as posted by virtue of his or her factual situation and the circumstances in which he or she is expected to carry out his or her activities, including:

- the temporary nature of the activities to be performed;
- the existence of a direct employment relationship between the undertaking making the posting and the worker during the whole period of posting;
- the country in which the worker normally works, and
- the existence of a genuine link between the employer and the worker's country of origin.

However, Directive 96/71/EC does not contain any further indication as to how to determine whether the employer is established in a Member State, nor does it contain more specific criteria as to how to determine the temporary nature of the work to be performed by the posted workers of the Member State in which the workers concerned normally work. To avoid circumvention of rules and combat abuse of the application of Directive 96/71 EC, Article 3 provides for an indicative, non-exhaustive list of qualitative criteria characterising both the temporary nature inherent to the notion of posting as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.

Most delegations are in favour of an indicative and non-exhaustive list of criteria which would allow taking national circumstances into account while a few delegations are in favour of an exhaustive list as they are concerned that a non-exhaustive list might give rise to disproportionate requests for information. A number of delegations see the list as sufficient, whereas others point to **the need for further clarification on some criteria and/or need to coordinate the criteria with the ones applied in the area of social security**.

Whereas a few delegations have raised concerns that the provisions could lead to legal uncertainty, others have expressed doubts about whether Article 3 would help in preventing abuse and stressed the importance of strengthening controls. The Commission suggests that a possible solution could be adding a recital stating that in case the criteria are not fulfilled, national legislation applies without prejudice to the applicable obligations under the Union acquis. This Article should be seen in conjunction with Articles 6, 7, 10 and 11. In its views, a clearer, more easily enforceable indicative description of the constituent elements of the notion of posting for the provision of services, as well as the criteria relating to what constitutes a genuine establishment of the service provider in a Member State, are crucial to avoid the use of Directive 96/71/EC for situations that are not proper postings in the sense of the Directive. The list would provide clarity, not only for public authorities but also for service providers and posted workers and should be open ended as it would be impossible to cover all possible situations.

Improved 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. Article 5 therefore contains a number of important 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 (paragraph 4).

While most delegations welcome this Article, questions have been put as to how many languages the information to be made available to workers and service providers. A large majority of delegations, as well as the Commission, agree with the Presidency's suggested option to specify that translation should be in the most relevant languages. A broad number of these delegations are of the view that the choice should be left to the hosting Member State account being taken of the country of origin of the posted workers.

Mutual assistance: the Commission proposal provides for the general principles, rules and procedures necessary for effective administrative cooperation.

A large number of delegations are of the view that the deadlines laid down in Article 6(5) are too short. Most delegations support a Presidency's compromise suggestion to introduce the

following three different deadline categories:

- a very short deadline for requests that are very urgent and relate to proof of establishment and can be answered by simple means such as consulting a business register or checking a VAT number;
- a deadline for other requests that do not require an on the spot control;
- a longer deadline for other requests that do require an on the spot control.

The Commission stresses the importance of having ambitious deadlines and considers that the terms "as soon as possible" in the current text with deadlines together with Article 6(4) should already bring a sufficient degree of flexibility to take account of the complexity of requests and of the need for inspections. It could go along with the principle of differentiated deadlines as suggested by the Presidency and has made it clear that it is not in favour of setting any concrete deadlines.

Role of the host Member State: a number of delegations are of the opinion that the respective competences of the host Member State and of the Member State of establishment should be clarified further, including the inter-linkage of these provisions with the provisions on national control measures and inspections (Articles 9 and 10). The Commission stresses that Article 7 clearly states that the Member State responsible is not only the host Member State but also the Member State of establishment. Although the main part of checks and controls would normally be carried out by the authorities of the host Member State, there are important elements that could better be checked in the Member State of establishment (i.e whether the company is genuinely established there).

A number of delegations support a compromise Presidency's text proposal for Article 7(4), as set out in doc.10487/12, to make clear that the provision is part of the administrative cooperation mentioned in Article 6 and is without prejudice to rights and obligations of the authorities of the host Member States.

National control measures: Article 9 contains an exhaustive list of control measures or administrative formalities that may be imposed on undertakings posting workers for the provision of services in order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected.

A number of delegations welcome that Article 9 contains an exhaustive list of allowed control measures in order to establish legal certainty while a group of other delegations are in favour of a non-exhaustive list as they consider the current list represents a too restrictive interpretation of the ECJ case-law. Other delegations call for more flexibility on the issue.

Subcontracting-joint and several liability: specific provisions concerning contractors' obligations and (joint and several) liability are provided with respect to compliance with the applicable minimum wages of posted workers by direct subcontractors in the construction sector. Member States which so wish may maintain or implement more farreaching systems of joint and several or chain liability and extend them to other sectors.

A number of delegations have taken a positive stance towards these provisions, or are in agreement with the principle of joint liability subject to further discussions. Some of these delegations consider that they **should not be limited to construction activities but should cover all sectors**.

Border enforcement of administrative fines and penalties: Chapter VI (Articles 13-16) sets out a system for the cross-border enforcement of administrative fines and penalties. While a number of delegations have expressed interest in this Chapter and indicated elements for further discussion for the purposes of clarification, the text as a whole, in view of its complexity, still has to be examined in detail with participation of experts in the field of Justice and Home affairs, if need be.

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

2012/0061(COD) - 25/09/2019 - Follow-up document

This report from the Commission concerns the application and implementation of 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) 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation').

The Enforcement Directive 2014/67/EU requires the Commission to review the application and implementation of this Directive to present a report and propose, where appropriate, the necessary amendments no later than 18 June 2019.

It specifies certain provisions of the Directive that have to be assessed in particular, namely those regarding identification of a genuine posting and prevention of abuse and circumvention, mutual assistance, administrative requirements and control measures and cross-border enforcement of financial administrative penalties and/or fines.

Transposition process

The Member States had to transpose the Directive by 18 June 2016. All Member States have by now transposed the Directive.

To that effect, all Member States, but Germany, which considered its legislation to be in line with the Directive, passed new laws or administrative acts or amended existing acts. By the deadline of 18 June 2016, in ten Member States (Denmark, Finland, France, Hungary, Malta, the Netherlands, Poland, Slovakia, Slovenia and the UK) laws transposing the Directive entered into force.

Later in 2016, after the deadline, in another six Member States (Belgium, Estonia, Greece, Ireland, Italy, Latvia) relevant legislation entered into force. In 2017, new legislation came into force in Austria, Bulgaria, Croatia, the Czech Republic, Cyprus, Lithuania, Luxembourg, Portugal, Romania, Spain and Sweden.

All Member States have implemented a system of sanctions applicable in the event of administrative violations.

Bilateral agreements

Most Member States (Austria, Belgium, Bulgaria, Czech Republic, Germany, Spain, Finland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Estonia, Denmark, Croatia, France, the Netherlands) have bilateral agreements or joint statements in place with other Member States covering the area of posting of workers when it comes to administrative cooperation between different authorities. A majority of these Member States has reported that they have made use of these agreements instead of or in addition to the Internal Market Information System, and this for various reasons. According to Member States replies, in Croatia and Netherlands the first contact is made bilaterally, to collect more information, and after that the Internal Market Information System is used for exchanges. In Estonia, information exchange is considered to be faster over the phone and e-mail.

However, there is also a large number of Member States (Czech Republic, Germany, Hungary, Ireland, Italy, Lithuania, Latvia, Malta, Portugal, Sweden, Slovakia, Cyprus and the Netherlands) who use only the Internal Market Information System for the administrative cooperation because it is considered more convenient or in the absence of any applicable bilateral agreements.

Possible amendments

There are some areas that have been brought to the attention of the Commission by different stakeholders and where improvements could be necessary. These include the simplification of the administrative control systems by, for example, introducing a single EU-wide declaration system or a common template for websites. These issues could be solved by common work in the Expert Committee on Posting of Workers or in the framework of the European Labour Authority, once it becomes operational and thus do not require amending of the Directive.

In the light of the above and taking into account the limited period of time the Directive has been in force and the fact that no further problems were indicated that would require amendments to the Directive the Commission does not consider it necessary to propose any amendments to the Directive at this stage.

Conclusions and follow-up

The Commission notes that the transposition by all Member States of the Directive has improved the enforcement of the Posting of Workers Directive in the Member States, in particular through administrative cooperation through the Internal Market Information System. By introducing administrative requirements and control measures, Member States are in a better position to monitor compliance with the rules and ensure that the rights of posted workers are guaranteed.

The Commission will continue working with the Member States to ensure that the Directive continues to be correctly transposed and applied, in particular as regards the administrative requirements and control measures and subcontracting liability.

Furthermore, to ensure a greater coherence in the interpretation and application of the posting rules throughout the EU, the Commission has also published the Practical Guide on Posting, after consulting the Member States representatives and the European level social partners organisations. The document aims at assisting employers, workers and national authorities in understanding the rules on posting of workers. It will be regularly updated to take into account new developments. This will be the case in particular concerning the application of posting rules to mobile international transport workers to integrate the changes in the legal framework.

The Commission will also continue to provide support, together with the European Labour Authority, as soon as it becomes operational, to all actors involved. In particular, it will promote cooperation between the authorities in charge of the administrative cooperation and mutual assistance in order to ensure synergies between all information and assistance services and to facilitate compliance with administrative requirements and support cross-border enforcement procedures relating to penalties and fines.

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

2012/0061(COD) - 25/09/2019 - Follow-up document

This Commission staff working document accompanies the report from the Commission on the application and implementation of 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').

The working document includes several detailed annexes which concern, *inter alia*:

- Member States' transposition measures of administrative requirements and control measures,

- subcontracting liability,

- the Internal Market Information System's statistics on the use of the posting module,

- the module concerning the administrative cooperation in the area of cross-border enforcement of penalties and fines,

- the collection of data from national declaration tools for the year 2017 drafted by the Network Statistics of the Free Movement of Workers, Social Security Coordination and Fraud and Error.

The report concluded that this report provides additional quantitative information on the phenomenon of posting of workers from a receiving perspective. In most Member States, incoming posting undertakings are required to fill in a declaration before providing services. This declaration obligation opens up a wealth of information on the size and profile of incoming posted workers. Such data is now collected and reported for the first time and is a useful complement to the main source of information coming from the PD A1 forms.

However, the image presented is incomplete due to missing data from Member States which have a declaration tool in place and to the voluntary nature of a system for previous declaration. It can therefore be expected that the main fully comparable dataset will continue to be the PD A1 forms. Nevertheless, in the coming years more Member States will probably be able to provide data coming from the declaration tools, thus giving us a better image of intra-EU posting in terms of size and characteristics.

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

2012/0061(COD) - 06/12/2012

The Council discussed a proposed Directive intended to improve implementation and enforcement of the 1996 Directive on the posting of workers for the provision of services in another Member State. The aim of the proposed Directive is to guarantee the protection of workers' rights, clarify the regulatory framework and ensure fair competition. Such an enforcement Directive is necessary because experience has shown that the rules of the 1996 Directive are not always properly enforced and that posting is also being abused by letter-box companies artificially established abroad to benefit from lower levels of labour protection or social security obligations.

Ministers took note of **progress** made in the ongoing work on the proposal and held a debate on **two key issues of the proposal** on the basis of a **presidency steering note** (see Council doc 16637/12):

(1) under Article 9 of the proposal, in order to monitor compliance with the rules, Member States may **impose national administrative requirements and control measures** on undertakings posting workers. While a group of delegations voiced support for an exhaustive list of such measures on the grounds of transparency and legal certainty, another group advocated an open list in order to give Member States more flexibility and to allow them to maintain the current levels of national controls;

(2) the proposal provides for **joint and several liability of contractors in respect of subcontractors** for compliance with applicable minimum wages, as far as the construction sector is concerned (Article 12). Several delegations would prefer to remove this provision, arguing that only a small number of Member States currently have such a system of liability and that its EU-wide introduction could create barriers to the trans-frontier provision of services. A significant number of delegations, however, stressed the importance of having such a system in order to **protect workers' rights and fight fraud**. Some Member States would favour a gradual introduction in order to avoid possible distortions in the internal market for the provision of services, whilst others could accept a provision which would make it optional for each Member State to apply a joint and several liability system.

Some Member States stressed the need to strike the right balance on these two issues and that compromise solutions should be sought for ensuring the protection of workers' rights while, at the same time, avoiding hampering the freedom of provision of services and the single market.

Progress under the Cypriot Presidency: the progress report presented by the Presidency to the ministers points out that in the discussions held within the Council and its preparatory bodies under the Cypriot Presidency, **considerable progress** has been achieved on various issues of the proposed directive, such as:

- a clearer definition of the notion of "posting" through criteria for assessing the genuineness of posting cases;
- better information of workers and companies concerning their rights and obligations;
- enhanced cooperation between national authorities;
- cross-border enforcement of administrative fines and penalties imposed for non-compliance by introducing a system of mutual assistance and recognition.

However, further work will be needed on some of these issues as well as on a number of other issues, including **inspections to be carried out by Member States** and the provisions on **handling of complaints and back-payments**.

Main discussions: extensive in-depth discussions were held in the Working Group on Chapters I, II, III, VI and VII.

- Chapter I (General Provisions): Chapter I sets out the general provisions, including a framework for preventing abuse and circumvention of the rules on posted workers under Council Directive 96/71/EC. Discussions on this Chapter highlighted the need to clarify: (i) the definition of "competent authority" as this would provide Member States with flexibility in choosing their competent authorities, including the choice to designate social partners. A number of delegations retain reservations on the Presidency's proposal as they consider that the definition should only refer to "public authorities" or "public bodies".

As regards the **criteria for assessing whether a given service provider genuinely performs substantial activities in a given Member State, as well as whether a worker is indeed a posted one**, a large group of delegations still maintain scrutiny reservations on the question of the consequences of a negative assessment of the indicative list of qualitative criteria/constituent elements provided for in Article 4 of the amended proposal. In particular, questions have been raised in relation to the terms and conditions of employment which would apply for workers falling outside the scope of this Directive and the relation of this Directive with Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the Rome I Regulation). In relation to this issue, the Presidency has proposed modifications to recital 5 indicating that, in principle, **the law of the host Member State should apply (where the work is performed by the posted worker)**, without prejudice to the Rome I Regulation. Some delegations explicitly wish this law to apply, notwithstanding the Rome I Regulation. Certain delegations wish the inclusion of a provision laying down the principle of equal treatment for workers performing temporary work with nationals in the Member State where the work is carried out. Views still diverge among delegations on whether the **list of criteria should be indicative**, on the basis of the Commission proposal, or **exhaustive**.

- **Chapter II (Access to information)**: in order to improve access to information for workers and service providers in relation to their rights and obligations under the Directive, Chapter II lays down detailed requirements that need to be satisfied in relation to the availability, accessibility and clarity of this information. To this end, with a view to achieving consensus between delegations, the Presidency has proposed amendments to the Commission's proposal, namely, in respect to the languages in which the information must be provided and on ensuring information for workers and service providers in respect of terms and conditions that are laid down in collective agreements. All delegations are in agreement with the text of this Chapter as modified by the Presidency.

- **Chapter III (Administrative cooperation)**: this Chapter contains provisions on cooperation between the national authorities responsible for the implementation of the proposed Directive. Views amongst delegations still differ on the need for a provision stating that the cooperation of the Member States may also include **the sending and service of documents of the requesting authority**, as suggested by the Presidency. However, a large number of delegations have raised scrutiny reservations on this provision.

- **Chapter VI (Cross-border enforcement of administrative fines and penalties)**: the objective of this Chapter is to set up a system for the mutual recognition and enforcement of administrative fines/penalties imposed on a service provider established in a Member State for failure to comply with the applicable rules on the posting of workers in another Member State. In view of its particularly complex nature, especially as regards its legal dimension, this Chapter has been the object of extensive discussions with a view to clarifying its legal implications and modalities for implementation. It should be noted that, currently, noncompliance with the obligations under Directive 96/71/EC is sanctioned differently across Member States (such sanctions being of a penal or criminal nature or governed by administrative law or being a combination of the two). Stressing the importance of creating effective enforcement mechanisms at EU level to tackle unlawful behaviour, most delegations welcome the general purpose of this Chapter. During the discussions the delegations had the chance to clarify, amongst others, **practical implementation issues** and thoroughly analyse the interaction of the provisions of this Chapter with those of the Council Framework Decision 2005/214/JHA and other EU instruments. As a result of these discussions, the Presidency made drafting suggestions in order to improve the content of the proposal, to reflect on the delegations' requests for enhancing clarity and **legal certainty** and to seek a compromise on controversial issues.

In particular, these aim to:

- limit the scope to financial **administrative penalties/fines** as they would be easier to practically apply than other administrative penalties;
- **lay down clear information requirements** that must accompany requests for notification and requests for recovery;
- fix a **threshold for the amount of financial penalty/fine**;
- stipulate the principle according to which the requested competent authority retains the amounts recovered and also bears the costs of recovery;
- introduce a specific **review clause** for this Chapter, given its importance;
- enhance the interaction with the Council Framework Decision 2005/214/JHA and the Brussels I Regulation.

- Chapter VII (Final Provisions): the remaining substantive issues on this Chapter mainly concern Article 18 (Internal Market Information System), in particular with regard to the application of bilateral arrangements, where a small number of delegations maintain scrutiny reservations.

- **Other issues**: Articles 9 (national control measures) and 12 (joint and several liability) were discussed. **With respect to Article 9**, a number of delegations would prefer an exhaustive list of administrative measures, as per the Commission's proposal. One of the concerns in this respect is to ensure legal certainty and sufficient transparency for the service providers. At the same time, another group of delegations prefer a non-exhaustive list. A consideration, in this respect, is the need for adequate flexibility in imposing control measures in order to ensure proper compliance with the applicable rules, as the case law on posting cases has not been exhaustive and there should be adequate space for reflecting future developments. **Blocking minorities exist on both sides**.

On Article 12, there is also divergence amongst delegations, some of which favour this provision, while others wish for it to be removed. Additionally, there are reservations on the provision for the concept of "**due diligence**" which is laid down in this Article and could exempt service providers from liability. Furthermore, some delegations would wish the principle of joint and several liability to **extend beyond the construction sector**, as well as to all of the levels of the liability chain.

Lastly, there was a request by the French delegation with regard to the transport sector. Stressing that the effective implementation of the Directive 96 /71/EC, notably its provisions regarding wages, is a key element for fair competition between road transport undertakings within the EU, France

requests a new text in Article 9(1)(a) thereby, in situations under the scope of the Directive 96/71/EC, road drivers should be informed about the wage levels they are entitled to through a specific mention on the documents that have to be carried for any international transport coming under the scope of the Directive and cabotage. The Commission recalls that the current Directive does not provide for such an obligation and questions its practical implications.

Conclusion: the level of progress that has been achieved on the dossier should facilitate future discussions and pave the way for further progress with a view to reaching agreement on the overall text. At the same time, it is recognised that detailed discussions still need to be held on a number of issues, namely on national control measures (Article 9), inspections (Article 10), defence of rights, facilitation of complaints and back payments (Article 11) and subcontracting and joint and several liability (Article 12). The intention was to provide a solid basis for the future work under the incoming Irish Presidency, thereby paving the way for the Council to reach a **general approach on this proposal**.

It should be noted that AT, CZ, DE, EE, IE, LT, LV, MT, PL, PT, SI, SK and UK maintain general scrutiny reservations. IT maintains a reservation on the legal basis, requesting that the proposal be additionally based on Title X Social Policy of the Treaty (Article 153 TFEU). In addition, DK, FR, MT, SI and UK have entered parliamentary scrutiny reservations.

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

2012/0061(COD) - 09/07/2012 - Document attached to the procedure

OPINION OF THE EUROPEAN DATA PROTECTION SUPERVISOR

on the Commission proposal for a Directive 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 on

the Commission proposal for a Council Regulation on the exercise of the right to take collective action

within the context of the freedom of establishment and the freedom to provide services

The EDPS recalls that the proposal concerning the Posting of Workers requires the processing of a significant amount of personal data. These personal data may relate to the posted workers as well as to individuals acting on behalf of the posting undertakings such as their corporate officers, management, company representatives, or employees.

From the data protection perspective, **the three most relevant provision**s of the Posting of Workers proposal are those

- which allow bilateral information exchanges (consisting of '(replies) to reasoned requests for information'),
- which require Member States to ensure that registers of service providers may be consulted by competent authorities of the other Member States 'in accordance with the same conditions', and
- which require the Member State of establishment, on its own initiative, to communicate to the Member State to which the posting takes place relevant information regarding possible irregularities.

The EDPS welcomes that the Posting of Workers proposal addresses data protection concerns. The EDPS also welcomes the fact that **the use of an existing information system, IMI**, is proposed for the administrative cooperation, which already offers, at the practical level, a number of data protection safeguards.

To address any remaining data protection concerns, the EDPS provides the following recommendations:

- the reference to the applicable data protection framework should be set forth in a **substantive provision** rather than in a recital;
- on **bilateral information exchanges** under the Posting of Workers proposal, the permissible purposes of information exchange should be more clearly specified in the proposal;
- on **access to registers of service providers** by competent authorities of other Member States, the proposal should more clearly specify what registers are actually concerned;
- lastly, **if and when interconnection of registers is planned as a common European project** in this area as well, data protection safeguards must be carefully considered at the European level.

With regard to the **alert system on possible irregularities**, the EDPS recommends that the proposal:

- unambiguously specifies that alerts can only be sent in case of a 'reasonable suspicion' of possible irregularities,
- should require closure of cases automatically upon receipt of an alert, to help ensure that the alert system will function as a warning mechanism, rather than as a long-term blacklist, and
- ensures that alerts are only sent to competent authorities in Member States and that these authorities shall keep the alert information received confidential and not further distribute or publish it.

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

2012/0061(COD) - 04/07/2013 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Employment and Social Affairs adopted the report by Danuta JAZLOWIECKA (EPP, PL) on the proposal for a directive 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.

The committee recommended that Parliament's position in first reading following the ordinary legislative procedure should amend the Commission proposal as follows:

Objective: Members emphasised that the Directive aims to ensure that the **enforcement of the terms and conditions of employment that apply in the place where the service is to be performed** in accordance with Article 3 of Directive 96/71/EC and to support the functioning of the internal market while facilitating the exercise of the freedom to provide services.

Set of enforcement provisions to prevent abuse and circumvention: the report stated that for the purpose of enforcing Directive 96/71/EC, the competent authorities must make an overall assessment of **all factual elements** that are deemed to be necessary, including, including:

- 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 the undertaking performs its business activity the assessment of which, in a wider time-frame, is **not limited to purely internal management** and/or administrative activities, where it employs administrative staff and in which sector the posted worker is employed;
- 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, as well as the differences in the purchasing power of currencies in different Member States;
- possession of a **valid A1 form**, issued in respect of the posted worker.

Those elements were intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71/EC. These elements were **indicative factors in the overall assessment to be made and should not be considered in isolation**, but should be adapted to each specific case. Whilst failure to satisfy one or more of these elements should not automatically preclude a situation from being a posting, it might be used by competent authorities to assist them when assessing whether the posting is genuine.

Member States **may apply additional elements** to be verified by the competent authority provided that they are justified, proportionate and non-discriminatory, and they must inform the Commission of such elements.

If the competent authority concluded, on the basis of the factual elements mentioned above, that there was no genuine posting situation, the terms and conditions of employment applicable to the worker would be those established by the law determined in accordance with the rules of Regulation (EC) No 593/2008 on the law applicable to contractual obligations **(Rome I Regulation).**

Three years after entry into force of the directive, the **necessity and appropriateness** of the elements referred to above must be reviewed in the light of defining possible new elements to be taken into account in order to **determine whether the undertaking is genuine** and a posted worker temporarily carries out his or her work.

The text stressed that **posted workers must not falsely be declared as self- employed**. The following elements must be taken into account when verifying self-employed status:

- fulfilment of business requirements in the Member State of establishment such as registration as self- employed, maintenance of an office, payment of taxes, possession of a VAT number, registration with chambers of commerce;
- remuneration, the existence of a relationship of subordination between a self- employed person and an undertaking and the existence of financial responsibility for the undertaking's results;
- self- employment activities before moving to the host Member State.

Member States that discover that workers are being recruited to work, falsely, as self-employed persons shall **inform the competent authorities** in the host Member State without delay.

National control measures: the report gives Member States the **power to impose any administrative requirements and control measures that they deem to benecessary** for the effective enforcement of Directive 96/71/EC and this Directive (the Commission proposal listed a restricted set of measures), including in particular:

- an obligation to designate a contact person in the host Member State, acting as the mandated representative of the posting company, who can be contacted by the competent authorities of the host Member State, who is authorised to receive any official notices and documents and who is also authorised to negotiate and conclude binding agreements;
- measures aiming at combating undeclared labour;
- an obligation throughout the period of posting to keep, in an accessible and clearly identified place such as the workplace or the building site, copies in paper or electronic form of documents including proof of identity, the employment contract, payslips, time-sheets and social security documentation.

Joint and several liability in subcontracting chain: whilst the Commission proposal had limited joint and several liability to construction activities, the committee felt that abuse of subcontracting chains was not unique to the construction sector and that **joint and several liability should be extended to all sectors.** Requirements for **due diligence were deleted**.

Furthermore, the Commission proposal referred to the liability only of the direct subcontractor but the report **ensured responsibility from the entire chain of subcontractors**.

The text simply stated that Member States must take measures on a non–discriminatory basis, to ensure that a company that instructs another company directly or indirectly to provide services on its behalf could be held liable in addition to or in place of any subcontractor for due entitlements to employees and/or due social security contributions to common funds or institutions of social partners. Liability would be limited to workers' rights acquired during the contractual relationship between the contractor and his subcontractors.

Member States may provide for more stringent liability rules.

Improved access to information: the committee proposed the creation of a **single national website** for each Member State with all the necessary information on binding terms and conditions of employment.

In addition, Member States must **establish contact points** or indicate other bodies or authorities to which workers and undertakings could turn for information, advice and support concerning their rights and obligations. This applied both to the host Member States and Member States of establishment. Member States must indicate a **contact person at the liaison office** in charge of dealing with requests for information and take measures to make necessary information available for the posting companies and posted workers, and keep the information in the country fiches up to date.

In addition, information must be made available **free of charge in English and the national language of the Member State of origin of the worker** and service provider or upon request in other official languages of the Union, and not only in the national language(s) of the country in which the services are provided. It must describe the procedures for lodging complaints and judicial proceedings as well as sanctions applicable in case of non-compliance.

Administrative cooperation: the report strengthened the provisions on mutual assistance. It specified that in the event of any persisting problems between Member States in the exchange of information or a permanent refusal to supply information, the Commission shall be informed and, where it considered it to be justified, it shall **initiate an infringement proceeding**. Cases of long-term refusal to provide requested information shall be recorded by the Commission, with a view inter alia to creating a publicly accessible list of authorities reported to have permanently refused to provide information.

It also clarified the role of Member States, and stated that the inspection of the terms and conditions of employment that were to be complied with according to Directive 96/71/EC was the **responsibility of the authorities of the host Member State** in cooperation with the Member State of establishment. The host Member State shall therefore control, monitor and take all the necessary supervisory or enforcement measures with respect to workers posted to its territory. Checks and controls shall be carried out by the authorities of the host Member State on their own initiative or at the request of the competent authorities of the Member State of establishment.

Within three years after entry into force of the directive, the Commission should **review the application of provisions on cooperation**, in particular in the light of the experiences with and effectiveness of the system of cross-border enforcement of administrative penalties and/or fines with a view to proposing, where appropriate, any necessary amendments or modifications.

The administrative cooperation and mutual assistance between the competent authorities of Member States should be implemented **as far as possible through the Internal Market Information System (IMI),** and other established means of cooperation such as bilateral agreements.

Data protection: Member States should remain ultimately responsible for safeguarding data and the legal rights of affected persons and put in place appropriate protection mechanisms in this respect.

The competent authorities in the host Member State and in the Member State of establishment should be encouraged to collect data specific to the posting process and evaluate it, while respecting Union and national law on data protection. Member States were equally encouraged to forward the collected data to the Commission for summaries.

Lastly, the report stated that all measures introduced by this Directive should be justified, proportionate and non-discriminatory, so as not to create administrative burdens or to limit the potential that companies, in particular small and medium enterprises, had to create new jobs, while protecting posted workers.

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

2012/0061(COD) - 15/10/2013

The Council was **not able to arrive at a general approach** on the 'posting of workers' directive.

While several alternative proposals were tabled for discussion by delegations, no agreement could be found on the key articles of the directive, which a number of delegations considered as a package deal. They concern:

- **Article 9** on national control measures that allows Member States to impose national administrative requirements and control measures on undertakings posting workers;
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- **Article 12** on subcontractors' liability as regards compliance with applicable minimum wages.

All ministers agreed on the need to:

- reach on overall agreement as soon as possible so as to address a wide range of cases of fraud and abuses in a number of Member States,
- ensure better protection of posted workers' rights as well as more transparency of national rules for service providers.

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

2012/0061(COD) - 09/12/2013

The Council reached a **general approach** on the posting of workers enforcement directive so that negotiations can start with the European Parliament with a view to reaching an agreement at first reading.

Ministers reached an overall compromise agreement on the two outstanding issues of the directive:

(1) National control measures (Article 9): they agreed that Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this directive and in the posting of workers directive of 1996 **provided these measures are justified and proportionate**.

These measures will have to be **notified to the Commission** and service providers will have to be informed through a single national website.

(2) Joint and several liability in subcontracting chain (Article 12): the agreed text provides that, as regards the activities relating to building work relating to the construction, Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor, of which the employer is a direct subcontractor, liable, in addition to or in place of the employer, for the respect of posted workers' rights regarding any outstanding net remuneration corresponding to the minimum rates of pay.

Instead of these liability rules, Member States may take other **appropriate enforcement measures**, in accordance with EU and national law and/or practice, which enable in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud and abuse, in situations where workers have difficulties in obtaining their rights.

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 andliaison 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 with held 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.

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.

TRANSPOSITION: 18.06.2016.