

May 2016

Revision of the Posting of Workers Directive

Impact Assessment (SWD (2016) 52 final, SWD (2016) 53 final (summary)) of a Commission proposal for a directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [Impact Assessment](#) (IA) accompanying the above [proposal](#)¹, submitted on 8 March 2016 and referred to Parliament's Committee on Employment and Social Affairs. The Juncker Commission defined as one of its ten priorities a deeper and fairer internal market that included the objective of a targeted revision of the 1996 Posting of Workers' Directive² (hereafter PWD), which has been subject of numerous CJEU cases³. Indeed, the initiative was included in the Commission's 2015 and 2016 Work Programmes as part of the Labour Mobility Package. An enhancement of the European Employment Services (EURES) was the first aspect of this package to be presented to Parliament in June 2015 and a revision of the social security regulations⁴ is envisaged in 2016.

In 2014, there were over 1.92 million posted workers in the EU (0.7% of the EU's total employment), representing a surge of 44.4% from 2010 (IA, p.6). In stipulating a core set of terms and conditions⁵ of employment which foreign service providers must respect, the PWD is essential for the functioning of the internal market, specifically for facilitating the cross-border provision of services through fair competition, and for protecting workers (IA, p.9). The PWD regulates three variants of posting: the direct provision of services between two companies under a service contract, posting in the context of an establishment or company belonging to the same group ('intra-group posting'), and posting through hiring out a worker via a temporary work agency established in another Member State (IA, pp.5-6). The revision of the PWD is also part of a wider regulatory framework regarding the issue: in 2014, Parliament approved the Enforcement Directive⁶, which aims to provide 'new and strengthened instruments' for Member States to address frauds, such as letter-box companies, and increase their ability to monitor and enforce rules regarding the posting of workers (IA, p.9). It should be transposed by 18 June 2016.

Problem definition

The IA defines the general problems to be **(1) inconsistent playing field for companies grounded on differentiated wage rules** and **(2) unclear rules to be applied in specific situations**. For each, the drivers are:

¹ For information, see M. Kiss, *Posting of Workers Directive*, Legislation in Progress, EPRS, European Parliament, May 2016.

² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

³ See M. Remáč, *Posting of workers - part of the expected Labour Mobility Package*, Implementation Appraisal, EPRS, European Parliament, September 2015.

⁴ In particular Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

⁵ See Article 3(1) of the PWD.

⁶ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 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.

Drivers for problem (1)	Drivers for problem (2)
<p>1.1. <i>Reference to 'minimum rates of pay' is unclear both in the absence of and under non-universally applicable collective agreements:</i> posted workers are paid the statutory minimum wage or the lowest pay group (i.e. not in accordance with workers' tasks, educational level, and seniority)⁷;</p> <p>1.2. <i>Unclear and varied composition of minimum rates of pay:</i> posted workers are paid different rates depending on whether Member States include, for example, bonuses or allowances in 'minimum rates of pay';</p>	<p>2.1. <i>Inadequate applications to subcontracting:</i> the PWD does not provide specific conditions for this, meaning that there are no clear wages for subcontracted posted workers and compression of production costs leads to downward wage pressure and displacement of local workers;</p> <p>2.2. <i>Mismatch between the Temporary Agency Work Directive (TAWD)⁸ and the PWD leads to unequal treatment of posted agency workers:</i> Article 3(9) of the PWD only grants them minimum rates of pay but not equal treatment unless the Member State has ruled so, unlike the TAWD;</p>
<p>1.3. <i>Uncertainties concerning the effectiveness of the PWD in DK and SE:</i> here minimum rates of pay integrate company-level agreements in line with productivity and skill requirements. While both Member States have clarified the application of their wage-setting systems to the PWD after the <i>Laval Case</i>⁹, the number of general collective agreements with cross-border services providers appears to be low.</p>	<p>2.3. <i>Mismatch between Regulation No 883/2004 on the coordination of social security systems and the PWD on the temporary nature of posting leads to unfair competition between posting and local companies:</i> under the former, posted workers are compulsorily integrated in the host Member State's social security regime after 24 months, but this is not the case under the PWD because the temporary nature of posting is not defined;</p> <p>2.4. <i>The PWD's ineffective coverage of the issue of intra-corporate posting leads to a distortion of competition and difference in treatment:</i> this occurs between companies having (or not) subsidiaries in different Member States as well as between EU and third-country nationals (as third-country nationals are entitled to the same remuneration under Directive 2014/66/EU¹⁰).</p>

Authors' reworking (IA, pp.10-17)

Overall, the problem definition is clear. This is particularly true for problem **(1)**, where, according to the IA, wage differentiation results in a 'competitive advantage for posting companies over local companies in receiving countries' (IA, p.13). As the former can adhere to lower wages, downward wage pressure is exerted on 'overall labour cost competition on local companies and workers in high-wage Member States' (IA, p.14), thus creating the potential displacement of local workers. Specifically, in labour-intensive and price-sensitive sectors (e.g. construction and road transport) that are not driven by skills shortages and where workers have lower skills, posted workers are more likely to receive the minimum pay rates than in high-end service sectors (e.g. finance and insurance). However, the discussion of problem **(2)** is not as cogently structured. It is unclear what the driver(s) pertaining to subcontracting issues are and whether they contribute to unclear rules or also to wage differentiation as with problem **(1)**. In addition, the IA mentions that 'changing economic and labour market

⁷ Minimum rates of pay are defined by law or by universally applicable collective agreements. Non-universal collective agreements are based on 'similar undertakings in the geographical area'/profession or industry concerned/nation-wide collective agreements concluded nationally by social partners (IA, pp.10-11).

⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. NB: Temporary workers are posted temporarily in another Member State, where 'the movement of the worker to the host Member State constitutes the very purpose of the provision of services and the posted worker carries out his tasks under the control and direction of the user undertaking' (IA, p.15).

⁹ The *Laval un Partneri* (C-341/05) challenged the applicability of company-level agreements to the PWD, such that DK and SE have thus introduced general agreements that set basic wage floors in some relevant sectors (IA, pp.11-12).

¹⁰ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

conditions' necessitate a revision of the PWD but it does not explain what these conditions entail. The structure of the problem tree (IA, p. 10) and its relation to the identified problems do not seem to be fully aligned with the text of the IA. Finally, more evidence of unfair competition would have been welcome to properly understand when this is an issue, especially since it is said that posted workers sometimes complement rather than substitute workers (IA, p.35).

Objectives of the legislative proposal

The *general* objective of the Commission's proposal is 'to ensure the smooth functioning of the internal market by adapting the terms and conditions set by the PWD to the new economic and labour market conditions' (IA, p.20). The IA presents two *specific* objectives, which are clear and consistent with the manner in which the problem definition is presented. These are:

- To create a 'level playing field [understood as the same set of rules applying for remuneration] for the cross-border provision of services through equal rules on wages applicable to posted and local workers';
- To 'improve the clarity of EU rules on posting by improving the consistency between different pieces of EU legislation' (IA, p.20).

Range of options considered

The IA presents four policy options, including five sub-options (which are meant to be understood holistically for the relevant option). All options are compared to the baseline scenario (IA, p.21). Four policy options¹¹ were discarded at an early stage for being either ineffective or disproportionate (IA, pp.27-28).

Option 1 - No policy change: baseline scenario

This option would retain the PWD as it stands: the Commission would continue to monitor and evaluate the transposition of the Enforcement Directive and CJEU rulings could continue contributing to the clarification of the concept of 'minimum rates of pay' (see Annex III)¹². To the extent that 'wage differentiation and unfair competition practices are a matter of poor enforcement at national level' (IA, p.18) and in clarifying the concept, these two factors will affect the regulatory framework. 'If postings continue to grow at the annual growth rate of 11.1% showed between 2010 and 2014, the total number of postings may reach up to 3 million workers by 2018' (IA, p.18). The CJEU rulings are, however, 'unpredictable since [they depend] on the number and nature of the cases brought before the Court' (IA, p.19). This option received stakeholder support from nine Member States¹³, BusinessEurope, UAPME, CEEMET, Eurociett, and CEC.

Option 2 - Clarification of the composition of minimum rates of pay to codify the rulings of the CJEU

This option revises the PWD by codifying EU case law, with particular reference to Case C-396/13 *Sähköalojen ammattiliitto ry*, to clarify the notion of 'minimum rates of pay'. Option 2 'would not create any additional effect on the pay conditions applicable to posted workers with respect to the status quo' (IA, p.23).

Option 3 - Changes to the provisions of the Directive regarding pay

- 3a: *Application of the same mandatory rules on remuneration for posted and local workers*

Option 3a would remove the reference to 'minimum rates of pay' to encompass all the elements of remuneration (e.g. 13th month bonus - see Annex V, p.86) that are paid to local workers if they are laid down by law or any collective agreement (whether applicable to geographical area, profession or industry, or concluded by social partners at national level). To ensure proportionality and the continued provision of services, only

¹¹ These were: (i) a communication to clarify the elements of remuneration; (ii) introduction of equal pay for equal work with respect to a reference undertaking; (iii) clarification of the application of the PWD to the road transport sector; and (iv) intra-group posting.

¹² e.g. *Sähköalojen ammattiliitto ry* (C-396/13) 'established that a host Member State can require sending companies' to pay posted workers 'holiday allowances, daily flat-rate allowances [...] and compensation for travelling time, on equal terms as local workers', as well as considered different pay levels according to the categorisation of employees into pay groups by universally binding collective agreements as valid (IA, p.19).

¹³ BG, CZ, EE, HU, LT, LV, PL, SK, RO (IA, p.22, footnote 33).

those elements of remuneration rendered mandatory¹⁴ are applicable. This option would respect different wage-systems. Member States using law or non-universal collective agreements and Member States with any universally applicable collective agreement would have to render applicable elements of remuneration that are so far not considered part of minimum rates of pay (IA, p.23).

- 3b: *Extension to all sectors of the reference to erga omnes collective agreements*

Posted workers would be granted the rates of pay laid down by law or by universally applicable collective agreements in all economic sectors, which at the moment is only obligatory for the construction sector. Only Member States which extend collectively agreed pay rates in some sectors or professions would be affected¹⁵. The European Trade Union Confederation (ETUC), the European Builders' Confederation (EBC) and seven Member States support this action¹⁶.

Option 4 - Adapted rules for specific situations of posting

- 4a: *Long-term postings*

This would include a provision to ensure that the labour law of a Member State applies to the employment contract of workers posted for longer than 24 months from day one of posting. In case of replacement of a posted worker, 'the cumulative duration of the posting is taken into account with regard to workers who were posted for at least six months' (IA, p.25). This provision aligns itself with Regulation No 883/2004, thus eliminating legal inconsistencies, and tackles unfair competition caused by the 'application of lower-standard wage rules by posting companies in host Member States in the event of long-term postings' (IA, p.25). All Member States would be affected, provided the duration of posting is 24 months or longer. The option has the support of seven Member States¹⁷, the Economic, Social and Environmental Council of France (ESECF), the Socio-Economic Council of the Netherlands, and the EBC.

- 4b: *Sub-contracting relations*

The option would give Member States the possibility, but not the obligation, to provide subcontracted workers with the same remuneration as workers of the contractor, including non-universally applicable collective agreements, such as company-level agreements (which are binding for the contractor). The option would have to be applicable to both national and cross-border service providers in order to avoid discriminating against the latter. This has the potential to affect all Member States, but especially those where collective agreements are not universally applicable or where wage-bargaining is done largely through company-level agreements (i.e. DK, SE and the UK).

- 4c: *Temporary agency workers*

This option would render mandatory the 'application to cross-border temporary agency workers of the principle of equal treatment of temporary agency workers with respect to comparable workers in the user undertaking' (IA, p.26). It would improve legislative consistency with the TAWD, as it is currently up to the Member States to decide to apply equal rules or national rules to these workers. This would require legislative amendments in 13 Member States¹⁸. Stakeholder support was not explicit, although Eurociett has expressed support of equal pay for equal work for agency workers and general support was also received by the ETUC, the EBC, and the ESECF.

The **preferred option is a combination of the whole of Options 3 and 4**. Not all options appear to have been analysed in a balanced way. The baseline scenario (Option 1) was not developed significantly enough to warrant consideration, even though it is understandable that the developments of the status quo as they were presented are difficult to hypothesise. The suggestion in Option 1 that the Enforcement Directive can contribute to tackling the identified problems seemingly contradicts an earlier statement that 'the current initiative does not address any issue touched upon by the Enforcement Directive' (IA, p.9). It is also clear, given the manner in which CJEU

¹⁴ Mandatory by 'national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or', in the absence of the latter two, mandatory by 'other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph' (IA, p.23).

¹⁵ DE, IE, LU, CY. No impact on Member States that (a) already extend collective agreements to all sectors and (b) do not make collective agreements universally applicable (IA, p.24).

¹⁶ AT, BE, FR, DE, LU, NL, SE (IA, p.24, footnote 35).

¹⁷ The IA does not indicate which Member States support this option (IA, p.25).

¹⁸ AT, CT, EE, EL, FI, HR, HU, IE, LV, PL, PT, SI, and SK (IA, p.26).

rulings have been discussed under Option 1, that Option 2 would not go far enough. The IA thus presents the options in such a way that Options 3 and 4 are presented as the only ones able to solve the problem: the former revises the regulatory framework, while the latter tackles specific problems (IA, p.46).

Scope of the Impact Assessment

In sections 5 and 6, the IA presents its analysis of impacts and comparison of the policy options. The IA has assessed the effectiveness, economic and social impacts of each policy option against the specific objectives ('no environmental impact has been identified' (IA, p.29)). There is no mention of how these aspects relate to the overall objective. Due to the 'scarce availability of data', which the Commission openly acknowledges, the impacts are assessed in terms of: qualitative evidence (based on stakeholders' assessment of the situation); national data to complement EU data where possible; and proxies 'to simulate the impact of the proposed provisions on remuneration levels, as well as on the economic value of posting' (IA, p.29). Thus, quantification is very limited.

The effectiveness section is useful in terms of linking the options to the objectives. However, the IA's statements are at times vague; for example, under Options 1 and 2 it suggests that unfair competition would persist whereas Option 3 would achieve the 'utmost degree of effectiveness in attaining the objective of levelling the playing field as regards wage rules' (IA, p.30). The economic impacts analysis for each option is preceded by a presentation of background data (IA, pp.32-36). The Commission has attempted to quantify the number of workers that would be affected by the various options (IA, p.37, p.39, and p.40) and has discussed the impact on competitiveness, the consumer (through price changes), and wages. However, these remain vague; there is, for example, little elaboration to qualify statements such as 'local companies in high-wage Member States [...] would benefit from a more balanced level playing field' or that the impact on labour-intensive services in low value chains 'will remain limited' (IA, p.37). Introducing the simulations carried out in Annex IV in the core text to show the impact of tax differentials on competitiveness would have strengthened the economic considerations (IA, p.38). Moreover, the IA would have benefited from analysing potential operational costs for businesses.

The section on social impacts discusses the enhancement of social protection and equal treatment through the reduction of wage differentials and potential unintended consequences (such as inflow into self-employment (IA, p.43)). There is some quantitative evidence of current wage differentials between posted and local workers under the baseline scenario (IA, p.41). Although the analysis is mostly qualitative, the IA indicates what the options entail in practice as they relate to social impacts: it is therefore to some extent able to make the convincing case that the social impacts would be overall positive. Nonetheless, the IA would have benefited from a further analysis of employment and working conditions, such as potential loss of jobs and the effects of persistent wage differentials in countries where the preferred options do not apply due to different wage-setting mechanisms (namely DK, SE, and in specific sectors in other countries). In the comparison of options (section 6), the IA identifies the main stakeholders that will be affected and compares the options against the objectives and social and economic criteria in two tables (IA, p.45 and p.46, respectively). The usefulness of both tables would have been enhanced by an accompanying explanation of the methodology used.

Subsidiarity / proportionality

Since this proposal amends the original PWD, it is based on the same legal basis, Articles 53(1) and 62 TFEU. It would have been helpful had the IA introduced a more explanatory assessment of why EU action is necessary to solve the new problems (IA, pp.19-20). According to the IA, EU intervention would facilitate the cross-border provision of services (as stipulated in Article 56 TFEU) through posting as it would improve the clarity of rules, ensure a level playing field for competition and workers' protection (IA.19). EU action is supported by the EU Charter of Fundamental Rights (Article 21) in order to further 'equal treatment' (IA, p.20). Both the principles of subsidiarity and proportionality would be respected as Member States and social partners are responsible for 'their labour legislation, organising wage-setting systems and determining the level of remuneration and its constituent elements' (IA, p.20). Proportionality is one of the factors against which the policy options were discarded (IA, pp.27-28) and assessed: for example, the applicable rules on remuneration would be in accordance with national practices and law (Option 3a), thus respecting different wage-setting systems, and Option 4b would be optional in order to not be disproportionate for service providers. The proportionality aspect could perhaps have been better articulated for Options 3b and 4c.

Reasoned opinions were submitted by the national parliaments of Romania, the Czech Republic, Poland, Lithuania, Croatia, Estonia, Bulgaria, Denmark, Hungary, Latvia, and Slovakia as well as by the senates of the Czech Republic, Poland and Romania.¹⁹ They expressed concerns over compliance with the principles of subsidiarity and freedom of services and the need to wait until the implementation of the Enforcement Directive before amending the PWD. As 14 Member States' parliaments and senates have issued a reasoned opinion (representing more than one-third of the votes assigned to national parliaments as stipulated by Protocol No 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaties), the 'yellow card' procedure has been triggered.²⁰ The Commission must now, therefore, justify any further action.

Budgetary or public finance implications

The IA notes that 'no extra budgetary impact is envisaged for the implementation' of the revised PWD. Although the IA notes that the Enforcement Directive will not be affected by the proposal, it then says that transposition of the Enforcement Directive 'should comprehend all implementation costs' (IA, p.44). The IA specifies that the proposal may positively affect the public budgets of sending Member States in the form of extra social security revenues due to an increase in wages (IA, pp.44-45).

SME test / Competitiveness

The IA includes an SME test and states that administrative burdens and costs would not increase as a result of the proposed initiative beyond what was envisaged by the Enforcement Directive (IA, p.43). Further clarification on this would have been welcome in order to position the proposal and its impact on SMEs in the context of the broader legislation surrounding posted workers. SMEs in high-wage countries would especially benefit from the initiative, 'as a level-playing field would enhance their capacity to compete on non-wage factors' (IA, p.43). Moreover, Option 3a would facilitate the application of collective agreements for SMEs and overcome the current problems of identifying the components of 'minimum rates of pay' (IA, p.44). The costs of access to information on the conditions of remuneration in receiving Member States would not be 'substantially modified' with respect to the status quo. Regarding competitiveness, there is no qualification of the statement that the 'increase in wage costs may have some adverse effects especially on SMEs basing competitiveness on wage costs' (IA, pp.43-44), which would have helped to give a sense of scale. Overall, the vagueness of the section is surprising given that, as the EBC noted in its open letter (which is quoted by the Commission: IA, p.43), SMEs represent 99% of enterprises in the construction sector²¹, a fact further evidenced by one of the external studies.²² It is difficult to deduce whether a quantitative or qualitative analysis of the distribution of costs and benefits was conducted.

Simplification and other regulatory implications

The proposal is part of the Commission's Labour Mobility Package, which also includes the regulations on the coordination of social security systems. As the latter has not been presented yet, it is difficult to assess how the laws might complement each other in practice; yet, the IA notes that 'a source of inconsistency in the EU regulatory framework' (IA, p.25) will be eliminated. This can also be said of the relationship between the TAWD and the PWD. As mentioned above, the proposal also interacts with the Enforcement Directive, although the IA does not clarify how the two would be mutually reinforcing in practice.

Quality of data, research and analysis

The research that underpins the IA seems to be as wide-ranging and up-to-date as possible. The Commission had recourse to external experts²³. The Commission has been transparent about the 'scarce availability of data' (IA,

¹⁹ See website on the Platform for EU Interparliamentary Exchange (IPEX).

²⁰ See M. Kiss, *Posting of Workers Directive*, Legislation in Progress, EPRS, May 2016.

²¹ European Builders' Confederation, 'Open letter on issue of posting of workers', 5 October 2015, p.3.

²² Fondazione Giacomo Brodolini (FGB), *Study on the wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors*, January 2016, pp. 50-52. It used data from nine Member States (both receiving and sending) across four economic sectors (FGB, pp.10-11).

²³ De Wispelaere, F. and Pacolet, J., 'An ad hoc statistical analysis on short term mobility - economic value of the posting of workers, HIVA KU Leuven, February 2016. It focused particularly on the construction sector.

p.28) regarding the posting of workers throughout the IA, highlighting the unreliability of the information obtained in the Portable Documents (PD) A1 (IA, p.8)²⁴. Much of the data that the Commission has gathered can be found in Annex II and IV. Given the acknowledged lack of data, it is surprising that the Commission has not made more substantial use of the studies, which appear to be based on wide-ranging research²⁵, in the core text of the IA report.

In general, the IA could have presented the data more cogently to better support its analysis. As previously mentioned, the section preceding the economic impacts analysis in the IA presents useful data on the economic impact on sending or receiving countries (IA, p.33 and Annex II, figure 11), the difference between the impact of the PWD in high versus low-value chains (IA, pp.33-34, Annex 11, figures 12 and 13), and the impact on substitution of local workers (IA, p.35-36). This data, which is based on the studies as well as on DG EMPL's calculations using recent data (presented in Annex II), would have been useful in the problem definition to give evidence on the scale and nature of the issue. This is also true of Annex IV; the issue of social security differentials could have been better represented throughout the core text of the IA in order to show that cost competitiveness would not be wholly eliminated (IA, p.39). Overall, these would have strengthened the quality of the analysis of the IA. Finally, the methodology could have been better explained, notably the tables in the assessment of impacts section (IA, pp. 45-46) and the assumptions used for the graphs in the annexes (specifically Annex IV, p.77).

Stakeholder consultation

The stakeholder consultation undertaken (see IA, p.4 and Annex I, p.50) seems to have been broad and, generally, the Commission has identified stakeholders affected by the problem, as well as their positions, in a transparent manner throughout the text. A 12 week public consultation was launched on 15 July 2015, as part of the Labour Mobility Package, which included 'a chapter on the social security rules applicable to posted workers' (IA, p.4). Of the 307 respondents, 232 (of whom 138 individuals and 94 organisations) responded to the said chapter. The Commission also conducted a roundtable consultation with European social partners on 10 June 2015 (though there appears to be a discrepancy in date in the Annex, which states 22 July 2015, (IA, p.50)), followed by a meeting with civil society on 17 June 2015, to discuss a targeted revision of the Directive. There was also a meeting with Member States' representatives within the Expert Committee on Posting of Workers (ECPW) on 7 September 2015. Finally, the IA notes that it received numerous written contributions by European and national social partners, NGOs, as well as Member States (see IA, pp.4-5).

However, the 12 week public consultation does not seem to be reflected in Annex I, which rather appears to reflect position papers and written contributions of the various stakeholders. It merely notes that stakeholders at the roundtable addressed the main issues of the PWD in a general way (IA, p.50). The 138 individuals who responded to the public consultation do not appear to be mentioned. It would also have been helpful if the Commission had incorporated reference to calls, sent on 2 March 2016 in the form of a joint letter by BusinessEurope, ETUC, UAPME and CEEP, for further consultation, in particular in light of the fact that Annex I does not explain in which ways stakeholders were consulted. Despite this, the IA generally attempts to incorporate the views of the stakeholders in the report by naming the organisations and Member States concerned, although this was not the case for certain policy options (Options 2, 3a, and 4b). Finally, it is regrettable that the IA does not justify more convincingly why the 'baseline scenario' policy option (Option 1) was ruled out despite the fact that it enjoyed such broad support amongst various stakeholders (see IA, p.22).

Monitoring and evaluation

The IA presents monitoring and evaluation arrangements in section 7 (IA, pp.48-9). Regarding monitoring, the IA indicates that the ECPW will continue to scrutinise problems related to the PWD and that the Commission will promote independent studies (with social partners and EU sectoral dialogue) on the subject matter. On the basis of the improved information provided by the PD A1 forms, the Commission will produce yearly reports on the

²⁴ PD A1 indicates whether a posted worker employed in more than one Member State pays social contributions in another country. These documents are inaccurate and incomplete as they lack formal controls by authorities (IA, p.8).

²⁵ FGB, for example, conducted around 130 interviews with stakeholders at national and EU level, collected data pertaining to country-level information complemented by further interviews, and qualitatively reviewed academic and case law journals (FGB, p.12). HIVA gives evidence of reduced competitiveness of local companies (HKL, pp. 17-22).

flow of posted workers. Despite the Commission admitting that the ECPW is not 'a proper monitoring committee' (IA, pp.48-9), it does not elaborate on the role of national authorities. The Commission's implementation reports on the Enforcement Directive will in future include aspects related to the revised PWD. The newly established European Platform to enhance cooperation in tackling undeclared work and the Enforcement Directive will also facilitate monitoring. The IA mentions rather vaguely a 'fully-fledged' evaluation of the 'impact of the revised Directive five years after the deadline for transposition' (IA, p.49) without identifying any indicators to be used for this process. The evaluation report will particularly focus on the impact on 'the application of "equal pay for equal work" principle, its economic effects on the competitiveness of sending enterprises and flow of posted workers, and sector-specific issues in the temporary agency work industry and road transport sector, among others' (IA, p.49). The IA mentions 'operational objectives' here without indicating what they are (IA, p.49).

Commission Regulatory Scrutiny Board

The IA states that the Commission's Regulatory Scrutiny Board (RSB) issued a [negative opinion](#) on a first draft of the IA on 22 January 2016 followed by a [positive opinion](#) on 24 February 2016 after resubmission (IA, p.5). Although required under the Better Regulation Guidelines, neither the final IA nor the explanatory memorandum to the proposal presented how the RSB's comments on the first draft of the IA were taken into consideration. The IA addresses some points that the RSB raised, but other points might have merited some further attention. For example, the IA seems to have taken on board the RSB's comment regarding clarification of presentation of the preferred options and of the principle of subsidiarity. However, as it stands, the IA could have further elaborated on competition problems substantiated with evidence and stakeholder views, persistence of wage gaps and impact on SMEs. It is also strange that both opinions indicate that the IA 'should state that no evaluation or designated public stakeholder consultation has taken place'.

Coherence between the Commission's legislative proposal and IA

Generally speaking, the legislative proposal appears to be in line with the preferred options identified in the IA. However, it does not contain any monitoring and evaluation provisions. Moreover, the proposal includes a new subparagraph to Article 3 of the PWD which imposes 'on Member States an obligation to publish in the website referred to in Article 5 of [the Enforcement Directive] the constituent elements of remuneration applicable to posted workers'²⁶. Article 5 is mentioned on p.44 of the IA, under 'Impact on SMEs', but not in the policy options.

Conclusions

Overall, the Commission has attempted to provide information as clearly and transparently as possible in the IA based on external expertise and wide consultation. Nonetheless, the limited availability of data suggests that the qualitative and quantitative evidence used to support the problem definition and the assessment of impacts might require further exploration. Moreover, the IA would have benefited from a clearer explanation on the interaction with, and impact on, the Enforcement Directive. Finally, the IA could have better explained why EU action is necessary to solve the new problems and why Option 1 was ruled out despite broad stakeholder support.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Employment and Social Affairs (EMPL), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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²⁶ COM(2016) 128 final, p. 4 and p.12.