

# EUROPEAN PARLIAMENT

2004



2009

---

*Committee on Employment and Social Affairs*

PROVISIONAL  
**2006/2038(INI)**

10.4.2006

## **DRAFT REPORT**

on the application of Directive 96/7/EC on the posting of workers  
(2006/2038(INI))

Committee on Employment and Social Affairs

Rapporteur: Elisabeth Schroedter

**CONTENTS**

	<b>Page</b>
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION .....	3
EXPLANATORY STATEMENT .....	8

## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI))

*The European Parliament,*

- having regard to 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<sup>1</sup> (the Posting of Workers Directive),
  - having regard to the communication from the Commission on the implementation of Directive 96/71/EC in the Member States (COM(2003)0458),
  - having regard to its resolution of 15 January 2004 on the implementation of Directive 96/71/EC in the Member States<sup>2</sup>,
  - having regard to the communication from the Commission: Guidance on the posting of workers in the framework of the provision of services (SEC(2006)0439),
  - having regard to the communication from the Commission on the implementation of Directive 96/71/EC in the Member States (SEC(2006)0439/2),
  - having regard to Articles 27 and 34 of the Charter of Fundamental Rights of the European Union,
  - having regard to Convention No. 143 of the International Labour Organisation (ILO) on Migrant Workers,
  - having regard to Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties<sup>3</sup>,
  - having regard to the judgments of the Court of Justice of the European Communities (ECJ) of 12 October 2004<sup>4</sup>, 23 November 1999<sup>5</sup> and 25 October 2001<sup>6</sup>,
  - having regard to Rule 45 of its Rules of Procedure,
  - having regard to the report of the Committee on Employment and Social Affairs and the opinion of the Committee on the Internal Market and Consumer Protection (A6-0000/2006),
- A. whereas the Posting of Workers Directive has a clearly defined social objective; whereas the host country is responsible for ensuring that posted employees are guaranteed respect for the industrial safety standards and working conditions set out in Article 3 of the Posting of Workers Directive, according to which the ECJ, in its above-mentioned

---

<sup>1</sup> OJ L 18, 21.1.1997, p. 1.

<sup>2</sup> OJ C 92 E, 16.4.2004, p. 404.

<sup>3</sup> OJ L 76, 22.3.2005, p. 16.

<sup>4</sup> Case C-60/03, Wolff & Müller, OJ C 300, 4.12.2004, p. 18.

<sup>5</sup> Joined cases C-369/96 and C-376/96, Arblade, ECR 1999, I-8453.

<sup>6</sup> Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, Finalarte, ECR 2001, I-7831.

judgment in the *Arblade* case, recognised social protection for employees as an overriding reason, based on the public interest, justifying the imposition of corresponding obligations on an employer and, in its above-mentioned judgment in the *Finalarte* case, held such measures to be proportionate,

- B. whereas under Article 2(2) of the Posting of Workers Directive it is incumbent on the host country to define what constitutes an employee; whereas the above-mentioned Commission report confirms that the *de facto* labour situation in the host country is the decisive criterion in this connection,
- C. whereas the Court of Justice, in its above-mentioned judgement in the *Wolff & Müller* case, held that the host country's measures to prevent unfair competition, which guarantee that posted employees benefit from the minimum standards set out in Article 3 of the Posting of Workers Directive, are justified, and that such targeted protection measures constitute a justified restriction on the freedom to provide services,
- D. whereas the equal treatment principle in the Posting of Workers Directive cuts both ways, guaranteeing on the one hand the equal treatment of undertakings in the context of the freedom to provide services, and on the other hand, under Article 3 of the Posting of Workers Directive, the equal treatment of posted employees under the locally applicable minimum terms and conditions of employment,
- E. whereas the above-mentioned Commission report calls for measures to prevent the minimum protection standards and rights from being circumvented, e.g. by means of dummy companies,
- F. whereas the parties to collective wage agreements have a major role to play in the successful implementation of the Posting of Workers Directive, and whereas boosting the role of the social partners across the board would accordingly represent a decisive step towards achieving the desired equality,
- G. whereas, in cases where bi- and trilateral agreements among Member States, and among the parties to collective agreements, accord mutual recognition to national industrial safety standards and working conditions, the circumventing of national standards has successfully been prevented, and whereas this situation has also been improved thanks to cooperation between liaison offices and the exchange of information between trade unions,
- H. whereas the Member States of the EU-15 undertook, in a preferential clause in the Accession Treaty, not to accord less favourable treatment as regards the freedoms of the Internal Market to nationals of the ten new Member States than to nationals of third countries; whereas this is only possible if the residence of the third-country nationals is known,
  1. Notes that the Commission, in its above-mentioned guidance document, recognises both the social objective of the Posting of Workers Directive and the full responsibility of the host country to put that objective into practice by guaranteeing the protection and rights of employees during their stay;
  2. Notes with concern that the Commission, in the conclusions of its guidance document,

seeks to significantly restrict the minimum requirements imposed on undertakings by the Member States, even when these serve to prevent non-observance of obligations under Article 3 of the Posting of Workers Directive, and thus to prevent unfair competition;

### **Employment relationships and the definition of “employee”**

3. Concludes from reports based on actual practice that "sham self-employment" is the strategy most commonly used by undertakings to circumvent the minimum standards of Article 3(1) of the Posting of Workers Directive; calls on the Member States, with reference to the Perulli study<sup>1</sup>, to adjust their legal definition of “employee” so that the decisive criterion is whether the person actually works in an organisationally and economically dependent manner, under supervision and for remuneration;
4. Disagrees, therefore, with the Commission’s view that social security documents and other social documents regarding the employment relationship do not constitute important evidence making it possible to carry out checks on the employee's de facto situation in the place of work; notes, furthermore, that complying with the Commission's requirement could lead to a situation whereby, during the time it takes to obtain the documents in the country of origin, the worker has employee status but his rights cannot be guaranteed;
5. Criticises the Commission for failing to heed the calls made by the European Parliament in its above-mentioned resolution, and for not addressing the problem of how to prevent unfair competition and social dumping as a result of Article 3(9) of the Posting of Workers Directive – indeed, for assuming on the contrary that where no special collective agreements exist for temporary agency workers, there is no requirement to pay the minimum wage; considers that Article 3(9) of the Posting of Workers Directive merely prohibits discrimination against posting undertakings in favour of undertakings established in the host country; notes that collective agreements within the meaning of Article 3(8) may also apply to temporary agency workers where this accords with the principle of equal treatment of undertakings;

### **Securing terms and conditions of work pursuant to Article 3 of the Posting of Workers Directive**

6. Notes that in many Member States the trade unions have their own role as partners in collective negotiations, and that the Commission has stated in proceedings before the ECJ<sup>2</sup> that the specific form of the Swedish collective negotiations is in accordance with the EC Treaty and with the Posting of Workers Directive; disagrees therefore with the Commission's view that the requirement to have in the host country a responsible legal representative of the posting undertaking, entitled to participate in collective negotiations, is disproportionate; notes that the need for a partner with legal status in collective negotiations is justified by the objective of the direct social protection of the employees;
7. Notes that all measures which inform workers about their rights and support them in the assertion of those rights contribute to the successful implementation of the Directive;

---

<sup>1</sup> PE 324 303 (Prof. Adalberto Perulli, study on economically dependent work/ parasubordinate (quasi-subordinate) work, 2003.

<sup>2</sup> Case C-341/05, Laval.

8. Notes that participation in holiday pay funds under general collective agreements constitutes additional protection for posted workers in some Member States and that direct payment to workers is proportionate in accordance with the ECJ's above-mentioned judgment in the Finalarte case: in other words, posting undertakings may be required to pay contributions into holiday pay funds;
9. Notes that the public authorities can make a significant contribution to stemming unfair competition by awarding public building contracts only to those firms which comply with all the provisions applicable in the host country in respect of Article 3 of the Posting of Workers Directive; refers in this connection to Article 55 of the Public Procurement Directive<sup>1</sup>, under the terms of which contracting entities may demand details relating to employment protection and working conditions if tenders appear to be abnormally low in relation to the goods, works or services;
10. Criticises the Commission's reluctance to take action in connection with general contractor liability and refers to the above-mentioned judgment in the Wolff & Müller case, in which the ECJ held that the legal system of general liability of contractors contributes to ensuring the protection of workers and is therefore an overriding reason in the general interest; calls on those Member States which do not yet possess any such national legislation to close this loophole without delay;

### **Guaranteeing effective supervision**

11. Disagrees, in the light of reports based on actual practice, with the Commission's view that declaration by undertakings prior to posting is disproportionate; notes that in the interests of effective supervision by the Member States it is not enough for an undertaking to declare a worker only on the day he begins work, since this does not permit the Member State in question to ensure that posted employees are genuinely benefitting, with effect from their first day at work, from the rights of protection to which they are entitled under Article 3 of the Posting of Workers Directive; considers that the requirement for undertakings to register their activities in the host country in advance is proportionate if it can be plausibly shown by the Member State to be a measure within the meaning of Article 5 of the Posting of Workers Directive, since it would then be in the public interest under the terms of the above-mentioned ECJ judgment in the Arblade case;
12. Notes that measures pursuant to Article 5 of the Posting of Workers Directive are only effective if penalties can be enforced; notes that, in order for this to happen, it must be possible for fines to be served on an authorised representative of the undertaking recognised as such under national law, since in accordance with the principle of the mutual recognition of penalties, procedures for the collection of fines can only be pursued if a prosecution has been duly initiated in the host country, hence the need for an authorised representative established in the host country; calls on the Commission to assist the collection of fines by means of a European register of companies;

o

o o

---

<sup>1</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

13. Instructs its President to forward this resolution to the Council, the Commission, the Member States and the European Economic and Social Committee.

## EXPLANATORY STATEMENT

The Posting of Workers Directive<sup>1</sup> sets out the minimum standards for industrial safety and working conditions (Article 3) for various kinds of employees (Article 1) who are temporarily posted to another Member State (the host country) in the framework of the provision of services. Such posting does not affect the employment contract the employees have concluded in their country of origin, which must cover the entire period of the posting. The principles of the Directive make it easier for undertakings to provide services in the free internal market on a non-discriminatory basis, since the minimum standards required must correspond to those which also apply to undertakings established in the host country. Under the Directive, posted employees have the right to the same treatment as workers in the host country in respect of the minimum standards set out in Article 3 of the Directive.

The Posting of Workers Directive covers all sectors and several types of posting. Ships' crews and the merchant navy are exempted. Under Article 3, it is the legal provisions or collective agreements of the host country which determine the minimum standards of industrial safety and conditions of employment. The host country also bears full responsibility for ensuring that the protection of the posted workers is guaranteed and their rights respected. It is required to take measures (Article 5) to prevent the minimum standards from being circumvented resulting in social dumping and unfair competition.

In view of the significant failings of the Commission's report on the implementation of the Posting of Workers Directive in the Member States, and its lack of any substantial observations<sup>2</sup>, the European Parliament called on the Commission to issue a second report by the end of 2004. In spite of all Parliament's subsequent requests, that report<sup>3</sup> was not submitted until April 2006.

At the same time the Commission decided, in Articles 24 and 25 of the Services Directive<sup>4</sup>, to place restrictions on the national measures which may be imposed on the service provider in connection with the implementation of the Posting of Workers Directive. These include the requirement to be registered, to have a legal representative in the host country, and to keep employment documents in its territory, and, in the case of third country nationals, to require a residence permit. The European Parliament considers that this deprives the host country of key tools which it needs in order to monitor compliance with the minimum standards set out in Article 3. Accordingly Parliament deleted Articles 24 and 25 of the Services Directive. In its amended draft of the Services Directive,<sup>5</sup> the Commission reacted to this deletion by producing a guidance document<sup>6</sup> which takes over the substance of Articles 24 and 25 and attempts to restrict the Member States' core supervision instruments at a level below that of legislation.

The report which was called for<sup>7</sup> also deals only superficially with Parliament's calls for examination of the significant failings in the implementation and monitoring of the Posting of

---

<sup>1</sup> 96/71/EC.

<sup>2</sup> COM(2003)0458.

<sup>3</sup> COM(2006)0439/2.

<sup>4</sup> COM(2004)0002.

<sup>5</sup> COM(2006)0160.

<sup>6</sup> COM(2006)0159.

<sup>7</sup> COM(2006)0439/2.

Workers Directive, though it reinstates the central elements of the manual for the restriction of the monitoring instruments.