

# The revision of the Posting of Workers Directive

## BACKGROUND

For decades, the posting of workers has been a prominent topic of the public and political debate. In the last few years, several factors have intensified the debate and the posting of workers for some has become a metaphor of 'social dumping'. Firstly, since the latest enlargement round 2007, labour cost differentials between Member States with the highest and the lowest wage level have increased from a factor of 1:3 to 1:10. Secondly, an increase in the number of postings has impacted heavily in specific labour-intensive sectors such as construction. Thirdly, there has been a growth in 'creative' abusive and fraudulent practices such as letter-box companies or bogus self-employment. Fourthly, numerous rulings of the Court of Justice of the European Union have raised as yet unsolved questions for interpreting the 1996 Directive.

The 2014 Enforcement Directive focussed mainly on improving rules to better apply and enforce the provisions of the Posting of Workers Directive and has left untouched more fundamental questions relating to the framework of posting.

In view of the limited scope of the Enforcement Directive and the existing challenges, the European Commission in March 2016 proceeded to a targeted review of the Posting of Workers Directive.

This briefing provides an update on the revision of the posting of workers directive in the European Parliament, and thus a follow up to the June 2016 study prepared for the EMPL Committee '**Posting of Workers Directive - current situation and challenges**', the May 2016 EPRS appraisal of the Commission Impact Assessment '**Revision of the Posting of Workers Directive**', and the March 2017 EPRS briefing '**Posting of Workers Directive**'. It has been prepared by the European Parliament's Policy Department A on Economic and Scientific Policy (covering the ECON - ENVI - EMPL - IMCO - ITRE - PANA committees).



## Defining the posting of workers

Workers move across borders in different situations: When they are moving abroad on their own accord and are employed in the new Member State, the rules on free movement of workers (Art. 45-48 TFEU) apply. Conversely, when they keep their employment relationship in the country of origin and their employer sends them abroad e.g. for the duration of a specific project (“posting of workers”), they do not enter the labour market of the receiving country and the rules on freedom to provide services apply.

## Regulating the posting of workers

The discussion about regulating the posting of workers dates back to the last century. It was overshadowed by fear that jobs in higher wage countries could be in danger during the Southern Enlargement of the EU to Spain and Portugal in 1986. Only when Austria, Finland and Sweden joined the EU in 1995, were the Member States able in 1996 to overcome the gridlock through adopting Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (PWD), which found a regulatory balance between two principles:

- on the one hand, granting a level playing field of cross-border service provision in a way that is as unrestricted as possible; and
- on the other hand, the principle of social cohesion in the sense of protecting the rights of posted workers by guaranteeing a common set of social rights in order to avoid unfair treatment and to avoid creating a low-cost workforce which takes away local jobs.



In balancing these principles, the PWD establishes a set of 'hard core' minimum terms of employment and working conditions (such as maximum work periods, minimum paid annual holidays, minimum rates of pay, health and safety at work etc.) which must be respected according to the host state principle; for the rest of the employment relationship, the labour law rules of the sending country continue to apply.

As regards **social security**, posted workers remain insured in the social security system in their home country provided the posting lasts - in general - for less than two years. As far as **taxation** is concerned, the competence to levy income tax stays with the sending country for 183 days and only then moves to the receiving country.

Accordingly, labour cost differentials between local and posted workers, who are on average posted between 3-4 months, can be considerable, depending on wage level, social security contributions and income tax to be paid.

Savings made by companies through posting to the Netherlands (€), assuming the same net salary

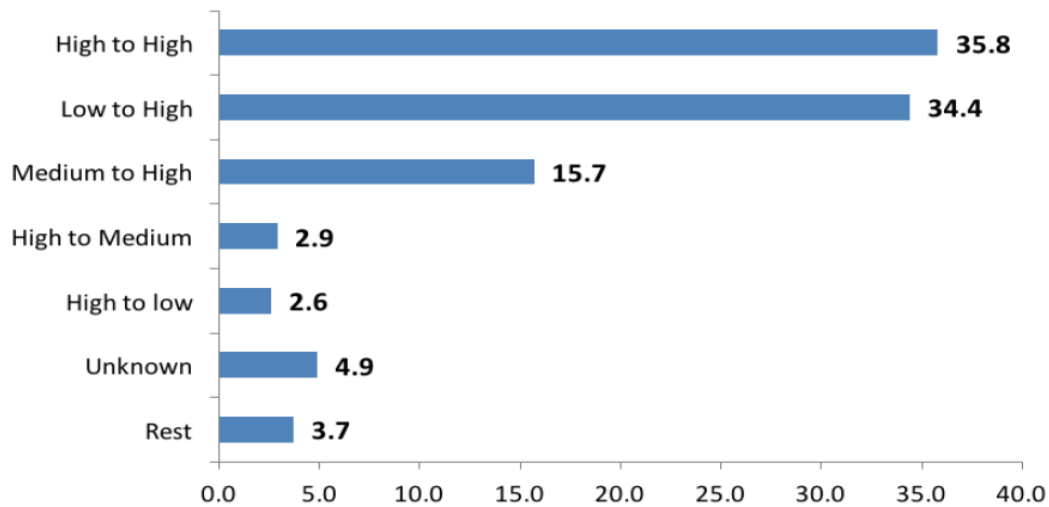
	Dutch worker	Posted worker from Portugal	Posted worker from Poland
<b>Net salary</b>	1,600	1,600	1,600
<b>-/- social security</b> (paid in the sending country)	496	81	350
<b>-/- taxes</b> (paid in the receiving country, i.e. after the 183-day period)	81	81	81
<b>Gross salary</b>	<b>2,177</b>	<b>1,762</b>	<b>2,032</b>
<b>Percentage saving as compared to a Dutch worker</b>	-	<b>19.1%</b>	<b>6.7%</b>

**Source:** Voss, Posting of Workers Directive - current situation and challenges, 2016, p. 27, based on Berntsen, L. 2015: Social dumping at work: uses and abuses of the posted work framework in the EU, ETUI Policy Brief, Brussels, p. 3.

## Facts on posting of workers

- Germany, France and Belgium are the three most important receiving countries (around 50% of all postings).
- Poland is by far (before Germany and France) the most important sending country;
- The majority (52%) of posted workers are sent to a neighbouring state;
- The average duration of posting is less than 4 months with significant differences between countries (not longer than 33 days in France, Belgium and Luxembourg, but more than 230 days in Estonia, Hungary and Ireland).
- The sector is the most important target sector of posting, followed by the manufacturing industry and the education/health/social work sector.

Flow of postings between EU Member States divided by wage groups, % of total posting, 2014



**Source:** Voss, Posting of Workers Directive - current situation and challenges, 2016, p. 16-19. Figure based on EU Commission 2016, Impact Assessment, p. 34.

## The Commission proposal - content and obstacles encountered

### Content of the Commission proposal

The 2014 Enforcement Directive (2014/67/EU) is conceived to better enforce compliance with the substantial rules, improve legal certainty and to strengthen administrative cooperation. It aims, in particular, at identifying whether a posting is genuine, i.e. whether it is temporary and whether an undertaking performs substantial activities in the Member State of establishment. Thus, it has not changed the PWD as such and has left untouched more fundamental questions relating to the framework of posting - like an update of the 'hard core' of working and employment conditions, or existing inconsistencies between the Posting of Workers Directive and regulations in the field of social security coordination.

In view of the limited scope of the Enforcement Directive and the existing challenges, the European Commission in March 2016 published a proposal to revise the PWD. Among other changes, the Commission proposal of 8 March 2016 entails the following changes:

- including presumptions on long-term posting: Workers posted for longer than 2 years would have the host Member State's labour law conditions applied to them, if no other choice of laws was made by the parties;
- including a proposed change from 'minimum rates of pay' to 'remuneration' in order "to promote the principle that the same work in the same place should be rewarded in the same manner";
- rendering applicable to all sectors, not just to the construction sector, rules regarding terms and conditions of employment, such as remuneration, set by universally applicable collective agreements;

- giving Member States the option to oblige companies to subcontract only to providers (national or foreign) that respect the applicable conditions of remuneration;
- introducing a mandatory equal treatment clause for posted temporary agency workers: the conditions to be applied to cross-border agencies hiring out workers must be those that are applied to national agencies hiring out workers, see Article 5 of Directive 2008/104/EC on Temporary Agency Work (TAW).

## The yellow-card procedure - the subsidiarity check

11 Member States' parliamentary chambers submitted a reasoned opinion, thereby triggering a subsidiarity check, the so-called yellow-card procedure. Most reasoned opinions deplored that the principle of 'equal work for equal pay' would cause competitive disadvantage for their workers, that the applicability of collective agreements would then apply to all sectors instead of the construction sector only, and that Member States would lose their right to decide on the basic working and employment conditions of posted temporary agency workers as foreseen in the 2008 TAW Directive.

The Commission, after carrying out a subsidiarity review, in June 2016 decided that its proposal did not breach the subsidiarity principle and therefore maintained the proposal unchanged.

## The discussions in the EMPL Committee

### The December 2016 draft report

The draft report proposes to extend the legal base of the proposal from free movement of services to Artt. 151, 153 (1) a), b) on workers' rights. It introduces targeted amendments including:

- the introduction of a "Monti clause" (the freedom to strike and to collective bargaining is not touched),
- the introduction of a wider notion of "collective agreements", extending to those representative in a specific geographic area or profession,
- the clarification that Member States have the autonomy to determine the concept of "remuneration",
- special rules aiming at equal treatment of posted temporary agency workers with local workers, and
- the proposal to retain the possibility for Member States to apply "public policy provisions" for the protection of workers.

## Issues discussed in the EMPL Committee

There was consensus on specific issues to be tackled, such as avoiding lowering social standards in Europe, circumvention of rules or bogus self-employment, and that simple and clear rules are needed in this respect, in particular for SMEs. However, Members widely diverged on how to proceed, i.e. from not having a posting Directive at all to adapting the posting Directive to today's needs.



Discussions centred on main elements, such as

- the duration of posting after which the labour law conditions of the host Member State should apply in their entirety to the posted worker - opinions varied from 6 months to the 24 months the draft report had maintained from the COM proposal, as well as the proposal to differentiate maximum durations according to sectors;
- the notion of “remuneration” versus the current “minimum rates of pay”, avoidance of double payment and on parts not to be deducted from pay (such as travel, boarding, training, equipment). The Commission’s representative clarified that it falls upon Member States to define on national level the notion of remuneration, which the Commission deems a clearer notion to be applied on national level than the current notion of minimum rates of pay;
- which kinds of collective agreements should be applicable to posted workers (only 'collective agreements which have been declared universally applicable' as proposed by the Commission, or also collective agreements at sectoral or regional level);
- whether the transport sector should continue to be included in the proposal or dealt with in sector-specific legislation;
- whether Art. 153 (legal basis for social measures) should be added to the Internal Market legal bases;
- whether a national obligation on subcontractors to pay the same wages as the main contractor should be extended to subcontractors with posted workers.

## Further progression of the Commission proposal

### The negotiating mandate for the EMPL Committee

Negotiations with other institutions aimed at reaching an agreement in the first reading on the Commission proposal may only be entered into following an explicit decision of either the EMPL Committee with a confirmation by the plenary, or by a plenary mandate.

Following the adoption of the report in the EMPL Committee with simple majority, the rapporteur has the option of asking the committee for a mandate to enter into negotiations with the Council, with a view to trying to reach a first-reading agreement.

**If, at Committee stage, an absolute majority of members composing the EMPL Committee (28 Members) is reached for opening negotiations:**

Even if such an absolute majority of EMPL members supports the rapporteur's request for a mandate, negotiations with the Council can only begin if plenary has confirmed this decision.

For this goal, the EMPL Committee's decision to open negotiations is announced at the beginning of the next part-session, which for this report, is on Monday 23 October. If 76 Members by Tuesday, 24 October at midnight request that the EMPL Committee's decision be put to the vote, on Thursday 26 October, plenary:

- either approves the EMPL Committee's decision to start negotiations (in which case the EMPL Committee can enter into negotiations on the basis of its own mandate), or
- refuses to authorise the negotiation mandate, thereby tabling the draft legislative act and the report of the EMPL Committee on the agenda of the following part-session, where they follow the same procedural rules as if the EMPL Committee had refused the negotiating mandate in the first place, described below.

**If the EMPL Committee refuses to grant such a negotiating mandate (fewer than 28 Members support the rapporteur's request):**

In such a case, the report is tabled to Parliament's plenary, which for the posting of workers could be either during the October II or November 2017 session for a normal first reading. If, just before the conclusion of the first reading, the Chair, the rapporteur of the EMPL committee, a political group or 38 Members ask the plenary to refer the file back to the EMPL committee for interinstitutional negotiations, this request is put to the vote. If plenary approves this request, the Committee can enter into negotiations on the basis of a plenary mandate.



If the request is not approved, the report is adopted at first reading and sent to Council so the ordinary legislative procedure follows its course.

## Trilogues between the European Parliament and the Council



Tripartite legislative negotiations (between Parliament and the Council, with the participation of the Commission) are known as 'trilogues'. Trilogues are usually led by the committee chair, with the rapporteur playing a crucial role.

The composition of Parliament's negotiating team is defined at the same time as the negotiation mandate on the decision to open negotiations, and includes the shadow rapporteurs of the other political groups. Administrative arrangements for

trilogues are the responsibility of the EMPL secretariat.

If an agreement is reached in trilogue, the text is submitted to the committee for consideration and approval prior to referral to plenary.

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