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# The reform of the posted workers directive

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**Abstract:** On 8th March 2016 twenty years after the adoption of the directive on posted workers, the European Commission presented a revised targeted version of the facility designed to take into account the consequences of an increasing use of this practice and to cancel out its adverse effects. This new text follows on from the implementing directive adopted in May 2014 that aims to counter fraud. At the time debate underscored the deep divergence in opinion between the countries sending posted workers and the host/receiving countries. The European Commission's intervention focused on the principle of equal salary in the same place of work, which led to tension and finally to the adoption of a "yellow card" by 11 national parliaments who denounced the infringement of the principle of subsidiarity.

Less than two years after the adoption of an implementing directive that was designed to define the means of implementing directive 96/71 regarding posted workers<sup>1</sup>, the European Commission presented a new draft directive on this issue on 8th March 2016. This targeted reform is designed to avert the risk of unfair competition and fraud in a context marked by the increased use of posted workers<sup>2</sup>.

The figures put forward by the European Commission in the impact assessment which support its proposal are speak for themselves. The number of posted workers in the European Union increased by nearly 45% between 2010 and 2014, rising from 1.3 million people to 1.9 million<sup>3</sup>. There were only 600 000 in 2007. Half of the postings are directed towards countries where incomes are higher. 81% of high level income postings are concentrated in five countries: Germany, Austria, Belgium, France and the Netherlands. The Commission also notes that differences in salaries in the European Union ranges from 1 to 10, in comparison to 1 to 3 before enlargement in 2004.

According to the European Commission's impact assessment Germany (410,000 posted workers, ie 1% of the local workforce), France (190, 850) and Belgium (159, 750) are the three main receiving countries<sup>4</sup>. Poland (266 700 posted workers per year), Germany (232 800) and France (119 700) are also the main sending

countries. These figures are based on the number of declarations attesting the posted worker's affiliation to a social security regime of the country where his/her company is established (form A1). But as the European Commission points out the data collected by other means highlights an even stronger dynamic. Hence Belgium registered 499,840 posting operations in 2014 and 205, 279 posted workers in its territory. France estimated the number of posted workers at 228,650 people in 2014 (144, 500 in 2011). The short duration of some postings might explain this discrepancy, between the number of A1 forms registered and the number of postings noted. In effect the average yearly duration of a posting is set by the European Commission at 103 days, but this differs from one Member State to another, reaching 257 days for an Irish worker against 33 for a French worker.

The building industry is the main sector involved with 43.7% of posted workers. The use of posted workers has increased by 44% over four years. The manufacturing industry (21.8%), education, healthcare related services and social action (13,5%) as well as corporate services (10,3%) are the other areas which recruit the most posted workers<sup>5</sup>.

The explosion in posting operations is due to several factors, whether this concerns enlargement and free movement or the economic and financial crisis, which has hit some sending countries, or the lack of labour in some

1. Directive 2014/67/UE 15th May 2014 on the implementing directive 96/71/CE on posted workers having provided a service, thereby modifying regulation (EU) n°1024/2012 on administrative cooperation via an internal market information system. cf. Sébastien Richard, *The implementing directive on posted workers : and what now?*, Robert Schuman Foundation – European Issues n°383, 29th February 2016.

2. On posting fraud, cf. Sébastien Richard, *The management of posted workers in the European Union*, Robert Schuman Foundation – European Issues n°300, 27th January 2014.

3. Impact assessment on the reform of the directive on posted workers – SWD(2016)52

4. 9% of the workforce in Luxembourg and 2.5% of those operating in the Netherlands are posted workers.

5. Services (6.9%), transports (2.2%) agriculture (1.6%) seem to be affected less on a European level.

6. Germany, Austria, Belgium, France, Luxembourg, the Netherlands and Sweden.

7. This principle is also the core of the Economic, Social and Environmental Council report delivered to the Prime Minister on 22nd September 2015 : *Les travailleurs détachés, Opinion presented by Jean Grosset, rapporteur with the support of Bernard Cieutat, Sept. 2015.*

8. A Commission Communication: *the Commission's Work Programme 2015 – A New Start (COM (2014) 910 final)*

9. Bulgaria, Estonia, Hungary, Lithuania, Latvia, Poland, Romania, Slovakia and Czech Republic.

10. ECJ Decision 12th February 2015, case C-396/13, *Sähköalojen ammattiliittöry vs Elektrobudowa Spółka Akcyjna.*

11. ECJ Decision 17th November 2015 *RegioPost GmbH & Co. KG vs Stadt Landau in der Pfalz.*

12. *If the UK had decided to remain in the EU the agreement of 19th February 2016 would have to have been included. This provided that the payment of work related social benefits for European migrant workers who had just arrived in the UK would have been conditioned over a period of 7 years. The British authorities could have deprived migrant workers of social benefits that are automatically linked to the wage (in-work benefits) for up to four years over this 7 year period. A progressive return over these four years to the benefits was planned depending on the degree of connection the worker had with the British labour market. The level of family allowance was to be indexed, as of 2020 to the living standards and benefit levels of the country of residence of the migrant worker. This measure was only to be applied to new arrivals. All of the Member States could have implemented this option.*

13. *Regarding the social norms applicable in terms of cabotage, cf Sébastien Richard, The implementing directive on posted workers : and what now? Robert Schuman Foundation – European Issues n°383, 29th February 2016.*

areas of activity. The question of cost is also at the heart of this dynamic. We should remember at this stage that a posted worker remains affiliated to the social security system of the sending country, which contributes to a certain remuneration differential with the local employee. The applicable wage can also vary. The 1996 directive provides for the implementation of the minimum rate of pay to posted workers, regardless of their qualifications or the technicality of their job. In these circumstances it is not surprising that the European Commission noted in its assessment report that a substitution effect was occurring to the detriment of local unskilled workers and to the benefit of the posted worker in three EU countries: Austria, Belgium and Luxembourg.

## 1. INEVITABLE REFORM

The increased use of posting noted in some Member States and the cases of unfair competition or fraud detected, led seven governments to advocate a reform of the whole 1996 directive before the end of the transposition of the 2014 implementing directive planned for 18th June 2016. It was in this sense that a joint letter by some Employment Ministers was addressed to the European Commissioner for Employment and Social Affairs on 5th June 2015<sup>6</sup>. In this document they insisted on the principle of equal salary in the same place of work<sup>7</sup>. As they did this the governments mirrored the concerns of the recently appointed European Commission. The latter had indicated in its work programme for 2015 that it intended to put forward a package on workers' mobility<sup>8</sup>. In a context marked by the negotiations with the UK prior to the referendum on 23rd June last, the presentation of this was finally postponed.

Conversely 9 governments expressed their opposition to any reform project in a letter also addressed to the European Commissioner<sup>9</sup>. They stressed that full transposition of the implementing directive had not occurred and believed that any reform might challenge the freedom of service and weaken the internal market. They also recalled their attachment to maintaining affiliation to the social security system of the sending country insisting on the consequences for the members of the posted workers' family if there were to be a regular change of regime.

In addition to the political wish for the facility's reform, there has also been developments in jurisprudence at the European Court of Justice, which define the conditions of the 1996 directive's implementation. Hence in a decision given on 12th February 2015, it stipulates the factors that have to be included in a person's remuneration<sup>10</sup>. It deems that the method used to calculate the minimum rate pay is the responsibility of the receiving Member State and that if there are pay bands based on transparent, binding rules, these must apply, since the minimum wage cannot substitute these. Moreover the daily subsistence allowance is qualified as one that is specific to the posting and is part of the minimum wage, like the daily travel time allowance. The minimum wage must also include an annual period of paid holiday. Spending linked to housing as well as food vouchers cannot be included as part of the minimum wage and cannot be included in the calculation of this. These remain, in these conditions, the responsibility of the employers. The Court thereby endorses the principle of equal pay and leaves it in the hands of the national judge to check whether remuneration rules are binding and transparent. In another decision delivered on 17th November 2015 it then stipulated that participation in public procurement might be subordinated to the pledge to pay a minimum wage, notably when there is a question of the use of subcontracting<sup>11</sup>. The Court thereby targets subcontracting chains, particularly those involved in posting fraud.

## 2. THE EUROPEAN COMMISSION'S PROJECT

On 8th March the European Commission presented a draft directive reforming the 1996 facility. Initially it was due to be included in a wider package, also including a communication on the mobility of labour and a reform of the 2004 regulation on the coordination of social security regimes. Negotiations with the UK prior to the referendum meant that the Commission had to focus on the reform of the posting text and postpone issues regarding social security regimes until the end of the year<sup>12</sup>. The question of posting in road haulage and the related issue of cabotage should be addressed individually in a particular legislative package, planned for the end of 2016<sup>13</sup>.

The European Commission's proposal targets four points: remuneration, the duration of the posting, subcontracting chains and the use of temping agencies.

*a. Remuneration*

Taking up the Court of Justice's decision of February 2015, the Commission would like to replace the idea of "minimum rates of pay" by "remuneration". This would embrace all of the factors made obligatory by:

- National legislative, regulatory or administrative provisions;
- Collective agreements or arbitration awards declared to be universally applicable;
- Collective agreements or arbitration awards that would generally affect all similar businesses belonging to the sector or profession in question;
- Collective agreements concluded by the most representative national social partners.

The Commission is also proposing to extend the implementation of collective agreements beyond the building industry. Under the 1996 directive the implementation of universal agreements in other areas of activity is left to the discretion of the Member States<sup>14</sup>.

The constituent elements of remuneration should also be published on the single official national website provided for in the implementing directive of 2014. This site is designed for service providers so that they can become acquainted with the labour law applicable in each Member State.

The Commission believes that this development in legislation should prevent unfair competition as it increases the cost of posting. It believes that the application of a minimum rate of pay can create a difference ranging between 30 and 70% in contrast to the average applicable wage in the receiving State, which makes posting more attractive than local recruitment. In its opinion, under the new facility, the

monthly wage cost of a Polish worker in the building industry posted in France could rise from 1,587€ to 1,960€, with the cost of a French worker still being higher given the differential in social charges (2 146 €)<sup>15</sup>.

Agreements of a limited nature (regional or established at company level) are not quoted in the proposal of the reformed directive. As stressed in a report by the French Senate this might prove to be a loophole in the facility, since company agreements are taking an increasingly significant place in the hierarchy of social norms<sup>16</sup>. This type of agreement, which can take account of the means of paying overtime or holiday period, might not be advantageous to the posted workers but would make their recruitment more attractive.

*b. The Duration of Posting*

The duration of posting is limited to 24 months under the 2004 regulation on the coordination of social security systems<sup>17</sup>. Beyond that period the worker integrates the host country's regime. The 1996 directive provides nothing in terms of labour law, unlike regulation Rome I of 2008<sup>18</sup>. The Commission would therefore like to adapt the directive as a result of this.

The 2 year duration is considered to be anticipated or effective. It applies therefore from the first day that it becomes apparent that the posting will last more than twenty four months. The period is not individualised: in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, with regard to workers that are posted for an effective duration of at least six months<sup>19</sup>. Finally the labour applies if the posted worker has undertaken several missions in the same State and that the cumulative duration is over 24 months<sup>20</sup>.

Although the restriction on the posting duration makes it possible to limit its use, the text allows a posted worker to provide services 23 months out of 24 in the same country without him being affected by the total application of the labour law. The cumulative duration should therefore be considered over a longer period.

**14.** Austria, Belgium, Spain, Finland, France, Greece, Italy, the Netherlands, Portugal and Slovenia already use this option. Germany, Ireland and Luxembourg have extended the application of universal collective agreements to certain sectors beyond the building industry.

**15.** Impact Assessment regarding the reform of the posted workers directive – SWD(2016)52

**16.** Localiser les droits des travailleurs détachés dans le pays d'accueil, report n°645 (2015-2016) by *Éric Bocquet*, on behalf of the French Senate's European Affairs Committee.

**17.** Regulation (EC) n°883/2004 of 29th April 2004 on the coordination of social security systems.

**18.** The Rome Convention defines the law applicable to employees who are working outside of their country of residence or that of the establishment of their company. According to regulation (EC) n°593/2008 of 17th June 2008 on the law applicable to contractual obligations (Rome I), which transpose this agreement into European law, an employee cannot be deprived of the obligatory facilities granted to him by the Member State in which or from which he usually undertakes his work. Since the professional and political environment influences his activity directly the respect of labour protection rules provided for by this country's legislation applies.

**19.** This threshold of 6 months can however be circumvented.

**20.** The average duration of a posting in France is 47 days.

*b. Subcontracting Chains*

Building on the ECJ's decision of November 2015 the European Commission suggests that a Member State be able to impose the same remuneration rules as those that bind the main contractor to the entire subcontracting chain. If national law provides that the contractor can only subcontract to companies that respect the remuneration agreement, the host State can apply the same rule to the subcontractor from another Member State, whatever its place in the subcontracting chain. The measure is not limited to public procurement but can be applied to private contractual relations.

*c. Temping Agencies*

The European Commission want to guarantee the equality of treatment of local temporary workers and workers posted by a temping agency of another Member State. 12 Member States do not apply this principle for the time being<sup>21</sup>. The most favourable law should prevail for posted temporary workers within a company that is bound by non-universal collective agreements.

*d. A contested text*

The first discussions at the Council revealed opposition to the new text by most sending States. The Commission's proposal was deemed contrary to the free provision of service and irrelevant as long as the transposition of the implementing directive was not complete. The 2014 text was supposed to have been integrated into national law by 18th June 2016. 12 countries have still not transposed the directive<sup>22</sup>.

Opposition continued in various parliaments in the weeks that followed the presentation of the European Commission's proposal. The parliaments of 11 countries (Bulgaria, Croatia, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Czech Republic), in other words more than one third of the national parliaments deemed that the text was contrary to the principle of subsidiarity and they addressed motivated opinions to the European Commission<sup>23</sup>.

The issue of wage setting was also at the core of the national parliaments' reasoning. The positions adopted highlight that the text might lead to the belief that remuneration setting is no longer a national competence. It was this risk that encouraged Denmark, which is not specifically a sending country, to adopt a motivated opinion. The argument was rejected by the European Commission which recalled on 20th July last that its text was in line with the principles of subsidiarity and proportionality. In its opinion this concerned cross-border services which involved a European position. This is not a total novelty since legislation in this matter dates back to 1996. The European Commission believes that the "yellow card" was more to do with political considerations than legal arguments. In these conditions the proposal presented on 8th March 2016 has not been modified.

At the same time the Slovakian Presidency of the Council, which is not really supportive of the text, addressed a detailed questionnaire regarding the Commission's proposal to the Member States. Five areas were addressed:

- The limit of 24 months posting duration;
- The replacement of the "minimum rate of pay" by the idea of "remuneration";
- The application of universal collective agreements to general economic sectors;
- The possibility given to the States to force businesses to subcontract only to businesses that grant the working conditions of the contractor;
- The introduction of the principle of equal treatment between temporary workers.

In each area the Member States have to indicate whether they support the European Commission's project or whether they want it changed. The governments had until 9th September to answer these questions. The UK and Estonia indicated that they wanted to give in their answers later. Although British uncertainties justify this delay, the Estonian position can be explained by the

21. Austria, Cyprus, Croatia, Estonia, Finland, Greece, Hungary, Ireland, Latvia Portugal, Slovakia and Slovenia.

22. Germany, Belgium, Bulgaria, Cyprus, Croatia, Estonia, Greece, Hungary, Luxembourg, Portugal, Slovenia and the Czech Republic.

23. According to article 7 of the protocol on the application of the principles of subsidiarity and proportionality annexed to the Lisbon Treaty, if the motivated opinions regarding the non-respect by a draft legislative act of the principle of subsidiarity represents at least one third of all of the national parliaments the draft has to be reviewed (the so-called "yellow card" procedure). The Commission can decide either to maintain the draft as it is or to modify it, or withdraw it giving reasons for this decision.

opposition between the government, which supports the Commission's proposal and the parliament which is against the text.

In all events the attitude of the Slovakian Presidency augurs for difficult negotiations over this text which will probably not be finalised before 2017. Debate in the European Parliament has still not started<sup>24</sup>. The examination of the initiative report on the fight to counter social dumping in the European Union on 14th September last, which matches a certain number of goals pursued by the European Commission as part of the reform of the 1996 directive, has already revealed deep splits in the European Parliament over these issues<sup>25</sup>.

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The response given to the national parliaments was also an opportunity for the European Commission to argue against an upward alignment of posted workers' social contributions, called for by the French Prime Minister on 3rd July. This kind of move is deemed to be contrary to the free provision of services and just as complicated to implement. Beyond the

polemic over rates of pay, the issue of affiliation to the regime of the sending country is still one of the keys to understanding the use of posting over the last 10 years and correlatively of the increasing number of cases of fraud. More than a hypothetical harmonisation of labour costs, the announced reform of the 2004 regulation on the coordination of social security regimes should lead to real thought about the use of posting forms – A1 declarations – which legalise posting to a certain degree. Making them secure, likewise their collection and possible disqualification by the receiving State<sup>26</sup> should be addressed, otherwise the implementing directive of 2014 and the reform of the 1996 directive might be made inoperative. Germany and France have already said they want to go further in this area by announcing on 3rd October last the introduction of a database identifying the A1 forms that have been delivered. Although the project is bilateral for the time being, it merits extension across the entire European Union.

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24. [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0070\(COD\)&I=EN](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0070(COD)&I=EN)  
[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL\\_STU%282016%29579001\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU%282016%29579001_EN.pdf)

25. Report on social dumping in the European Union presented by Guillaume Balas, on behalf of the European Parliament's Employment and Social Affairs Committee (2015/2255(INI)).

26. According to the regulation (CE) n°987/2009 of 16th September 2009 setting the means to implement the regulation (CE) n° 883/2004 on the coordination of social security systems which codifies the jurisprudence of the ECJ (decision of 26th January 2006 – Case C 2/05 Rijkdienst voor Sociale Zekerheid vs Herbosch Kiere NV), the certificate established by the sending State is the one which prevails in the institutions of the other Member States as long as they are not withdrawn or declared invalid by the Member State where it was established. The Court might review its position over the next few months regarding the issue of applicability following a preliminary ruling by the French Court of Cassation in

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