



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

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## Written Opinion

**COM (2016)128**

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL amending 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**

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**PART I - INTRODUCTORY NOTE**

In accordance with the terms of Article 7 of Law No 43/2006 of 25 August 2006, on monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union, as amended by Law No 21/2012 of 17 May 2012, and in accordance with the procedures for the scrutiny of European draft acts approved on 08 January 2013, the European Affairs Committee received the **Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending 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** [COM(2016)128].

**PART II – RECITALS**

**i. Objective**

The objective of the initiative in question is the amendment of Directive 96/71/EC on the posting of workers in the framework of the provision of services in order to combat the unfair practices that exist in the European employment market which misrepresent the objectives of the Treaty, inter alia, the provisions of Article 3(3) of the TEU which stipulates that the internal market must be ‘based on a highly competitive social market economy, aiming at full employment and social progress’. The principle underlying this Directive, therefore, is that the same work done in the same place must be paid equally.



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#### ii. Background

The posting of workers supports the transnational provision of services in the internal market, particularly in the construction sector (43.7% of total postings). In 2014 there were about 1.9 million workers posted in the EU (about 0.7% of the EU employment market), and the mean duration of postings was 4 months.

Directive 96/71/EC created the regulatory framework in order to establish a balance of objectives between encouraging and facilitating the provision of cross-border services, ensuring due protection of posted workers and guaranteeing a level playing field between domestic and foreign applicants. The Directive establishes a set of terms and conditions for employment in the host Member State that are mandatory for service providers. These terms and conditions include:

- Maximum work periods and minimum rest periods;
- Minimum rates of pay, including overtime rates;
- Minimum paid annual holidays;
- Health, safety and hygiene at work;
- Protective measures with regard to pregnant women or women who have recently given birth, children and young people;
- Equality of treatment.

Directive 2014/67/EU, known as the Enforcement Directive as it establishes provisions for effective and more efficient implementation of Directive 96/71/EC, adopted in 2014, has established new enhanced tools to combat fraud, abuse and circumvention of the rules which remained beyond the application of the standards. The Enforcement Directive shall mainly combat 'front companies' to improve the capacity of States to monitor working conditions and to apply the appropriate rules, and also strengthen administrative cooperation between the authorities of the Member States responsible for posting workers. The Directive must be transposed into national law by 18 June.



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This proposal does not relate to the issues covered by the Enforcement Directive, but on issues relating to the regulatory framework established by Directive 96/71/EC and is therefore complementary to it.

#### iii. Content

Since the objective of the Directive is to ensure fair remuneration for posted workers and equal treatment between local companies and those posting workers in the host Member State, the amendments proposed are substantially the following:

- **Duration of posting (Article 1(1)):** whenever the anticipated or the effective duration of posting exceeds 24 months, the posted worker is deemed to be carrying out his tasks habitually in the host Member State.

Therefore, and in accordance with the rules of the Rome I Regulation, **the employment law of the Member State where the work is carried out shall apply, if no other jurisdiction has been agreed in the employment contract.** However, in the event that another jurisdiction has been chosen, this may not deprive employees of the protection due to them by the employment law of the host Member State.

Similarly, it is expected that in the event of replacing employees performing the same function in the same place, the cumulative duration of the deployment must be taken into account for workers posted for a minimum of 6 months.

- **Working conditions, including subcontracting (Article 1(2)):** Collective agreements shall now be universally applied to posted workers in all sectors of the economy.



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**Thus, the same remuneration rules under national law or collective agreements shall be applied to posted workers.**

In order to ensure transparency and enforcement, Member States shall publish online all details of remuneration applicable to posted workers (holiday pay, etc.).

On this point, the Commission also wants to ensure that **subcontracting respects the remuneration conditions applicable to the contractor**. By the nature of this provision, it shall be mandatory for Member States to apply this to all national subcontractors.

- **Rules for temporary employment agencies (Article 1(2)(c)):** A new provision is included to introduce equal treatment for workers hired by employment agencies. Working conditions should be the same for transnational agencies and national agencies.

Mindful of the provisions of this proposal, the following issues should be raised:

#### ***a) Legal Basis***

The legal basis applied is the same as that for Directive 96/71/EC, i.e. Article 53(1), and Article 62 of the TFEU.

#### ***b) Principle of Subsidiarity***

Whereas this proposal has as its primary objective **the application within the internal market of the principle according to which the same work in the same place should be treated equally, and given that the observance of this principle in the domestic market involves establishing a core of minimum rules in the EU**, and these do not interfere with the competence of each member State to define its employment laws with more or less protection, **it is concluded that this goal can be better achieved by this instrument** - which introduces changes to a Directive that created minimum harmonisation on the matter in question - so that **it is concluded that the principle of subsidiarity is respected**.



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Indeed, if the objectives of the Directive now under review may only be achieved through European action - since it is considered that the Member States are not in a position to achieve the objectives of this initiative - it must conclude that compliance with the principle of subsidiarity is upheld in this Proposal to review the Directive therefore, from a formal point of view, it is considered that the principle of subsidiarity is respected.

### **PART III - PERSONAL VIEW OF THE RAPPORTEUR**

According to the data presented by the Committee the amendments contained in the Proposal were not accepted favourably or unanimously, either by the Member States or by the stakeholders, including the trade unions and employers' confederations from several sectors of the economy. In light of this disagreement in positions, which immediately indicates the relevance of the initiative concerned, it is important to present some considerations.

In fact, this is a **principle that aims to ensure equal and fair treatment of European workers without jeopardising the freedom to provide services**, which are basic principles in the construction of the European single market. However, we believe that certain provisions may be more painful for some Member States, since they will bring changes to competitive conditions in the market. In other words they may counteract any competitive advantages of certain employment markets, which will impact on the competitiveness of less robust economies in the EU, as is the case of our country. On the other hand, it is clear that the current situation that allows the proliferation of 'social dumping' in Europe is neither sustainable nor compatible with the objectives and principles of the Union.

During the 20 years that Directive 96/71/EC has been in force, obvious gaps, problems and legal uncertainties have arisen that the attempt at minimum harmonisation for the protection and non-discrimination of posted workers did not solve. Indeed, such uncertainties and problems in implementation lead to the adoption in 2014 of the Enforcement Directive, which must be transposed into national law by 18 June 2016. For this reason, without calling into question the relevance of a review of Directive 96/71/EC, **the review process could have benefited from an extended period of time to allow**



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**the outcome of the implementation of the Enforcement Directive to be evaluated, in order also to identify any persistent problems or other changes, both in the functioning of markets and in the regulatory frameworks of the Member States themselves, that might have entailed a review and substantial amendments to the Directive different from those which are now being considered.** In other words, it would have been more prudent to wait for the results of the transposition and implementation of the Enforcement Directive before proposing a revision, even though the Commission considers that the amendments tabled in the proposal under consideration include and are complementary to those.

From the point of view of the content itself, this gives it **an important boost in establishing specific definitions**, notably with the introduction of the two-year limit, after which a posted worker must come under the employment law of the country where he is posted. There is also the issue of 'remuneration' which then encompasses all aspects of remuneration (including holiday pay and others). However, **there could still be room for further clarification of the definitions by, for example, determining more precisely the minimum and maximum time for the purpose of posting** and, consequently, implementation of the appropriate rules.

As shown in the data provided by the European Commission, Portugal is the country with the fourth largest number of posted workers. **Since this is a phenomenon that significantly affects our human capital in the European context, it is fundamental that the government takes the necessary steps to adopt a negotiating position that offers a solid and coherent defence of the principles at stake here, taking into account the specific circumstances of the Portuguese economy**, during the legislative negotiations among European legislators: the Council, where it has a voice, and the European Parliament.



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Thus, we consider that, in view of the objective described above, and similar to what has been achieved so far on this issue, the Government should continue to **promote greater consultation with social partners**, to ensure a comprehensive consideration of the concerns of our workers and companies.

#### **PART IV – CONCLUSIONS**

1. Taking into account its object, the initiative in question was referred to the Committee on Social Security and Labour
2. The principle of subsidiarity is respected, since the Member States are unable to achieve the objectives of the Directive which are transnational in scope, and therefore would require minimum harmonisation and concerted action by the European Union.
3. In view of the above, we suggest a careful and detailed monitoring of the co-decision procedure in the European institutions, which has now started in the European Parliament and the Council. In particular, it is suggested that the European Affairs Committee monitor the progress of the legislative process within the institutions.





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**PART V – OPINION**

In view of these recitals, the European Affairs Committee is of the opinion that:

1. The initiative in question does not violate the principle of subsidiarity.
2. The European Affairs Committee hereby terminates the scrutiny process in question.

São Bento Palace, 05 May 2016

**Rapporteur**

**Committee Chairman**

**(Francisca Parreira)**

**(Regina Bastos)**

**PART VI – ANNEXES**

1. Report from the Committee on Labour and Social Security.
2. Report from the Legislative Assembly of the Autonomous Region of the Azores.