

EMPLOYMENT AND SOCIAL AFFAIRS

POSTING OF WORKERS DIRECTIVE – CURRENT SITUATION AND CHALLENGES

BACKGROUND

For decades, the posting of workers has been a prominent topic of the public and political debate. However, in the last few years, several factors have intensified the debate. Firstly, an increase in the number of postings, which has impacted heavily in specific labour-intensive sectors. Secondly, there has been a growth in 'creative' abusive and fraudulent practices such as letter-box companies or bogus self-employment. Thirdly, in view of the social policy provisions introduced into the European Treaties since the Lisbon Treaty revision, it is questionable whether the 1996 Posting of Workers Directive (PWD) provides a sufficient legal instrument for ensuring a level-playing field for free cross-border service provision whilst at the same time delivering a sufficient foundation for the social protection of workers. 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 PWD and has let untouched more fundamental questions relating to the framework of posting - like a better definition 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, it entails a significantly altered perspective on the rights of posted workers, by including a proposed change on remuneration in so far that *'the same work in the same place is rewarded by the same pay'*.

FOCUS OF THE STUDY

Against this background, the **Employment and Social Affairs Committee** in 2015 requested a literature review on how the Posting of Workers Directive is working in practice, in view of the upcoming mobility package. The study focuses on the current situation and major patterns and challenges regarding the posting of workers in the EU. It also covers the political and jurisdictional debates on these current challenges and addresses the March 2016 Commission proposal to revise the PWD. The study aims to provide the EMPL Committee with an assessment of how the proposals address these challenges, also in view of previous resolutions and requests made by the European Parliament.

KEY FINDINGS

1. There is a significant lack of reliable data on posting within the EU, which makes evidence-based policy making extremely difficult.

Existing appraisals of the patterns of posting are based on an analysis of the number of portable social security documents A1, which does not reflect the real picture as to posting as such. According to this not very reliable statistical data, posting has increased by over 40% between 2010 and 2014; however, recent studies indicate that real figures might be up to five times higher.

2. Although in terms of employment share, the overall impact of posting is limited (less than 1% of total employment), it can have a quite significant role and effect for specific sectors, regions and countries.

Posting is roughly concentrated on a dozen EU countries. One main model for posting are labour cost differentials, while the other model is driven by the shortage and demand for skilled and highly professional workers. Sectors most strongly affected (also in the sending country through brain drain) are the construction and manufacturing sector, but a serious impact has also been recorded in the road transport sector.

3. While the legal base for posting workers is the provision on the freedom to provide services, the Posting of Workers Directive contains a complex construction of 'hard core rights' of posted workers, which are constituted by a combination of home and host country provisions.

This already complex construction has been rendered even more complex by last decade's rulings of the Court of Justice of the European Union and the significant national variations in the application of the PWD in the Member States, who are allowed flexibility in deferring some implementation to collective agreements or in extending protection to specific sectors.

4. Most problems and shortcomings related to the implementation of existing rules have been addressed by the 2014 Enforcement Directive.

Notably through establishing a common framework of competent authorities for a more uniform implementation; introduction of factual elements for identifying 'genuine posting'; making information generally available on terms and conditions of posting; improving administrative information exchange; strengthened complaint possibilities also for trade unions; and more possibilities for foreseeing subcontracting liability.

5. Other substantive problems of the Posting of Workers Directive as regularly raised in the resolutions of the European Parliament have not been addressed by the Enforcement Directive. Only some of them have been addressed by the Commission March 2016 proposal for revising the Posting of Workers Directive.

Open problems remaining are the unclear provisions of the PWD on terms and conditions of employment and on minimum rates of pay, the still missing definition of the 'temporary' character of posting, as well as the inconsistencies between the PWD and the social security regulations. Other issues regularly raised in European Parliament resolutions include the discussion whether the PWD provides a minimum or a maximum protection to posted workers, equal treatment and pay, and the tackling of social dumping. The Commission proposal, which has met hugely diverging opinions including the trigger of the yellow-card procedure, aims to introduce the principle of *'equal pay for equal work at the same place'* as well as extending the posting rules to all sectors, introducing equal treatment of posted temporary agency workers and rules applying to long-term posting, but does not address the European Parliament's concerns comprehensively.

RECOMMENDATIONS

- **Any future policy action presupposes a joint understanding on what constitutes 'fair posting'**, considering the perspectives of both sending and receiving countries, **and a shared understanding and common diagnostics regarding forms of malpractice and misuse** that still persist and need to be addressed.
- From the study conducted, the following **recommendations** can be made:
 - Any future regulation should provide a simplification of rules and clarification of key terms, while avoiding new inconsistencies and unequal treatment between some posted workers and others;
 - Future policy action should harmonise different concepts of posting between the PWD and the social security regulations;
 - The effects of the planned policy action must be assessed as to its impact on the implementation of the Enforcement Directive.
- **Questions** to be addressed include
 - whether the PWD should be revised comprehensively, or only technical changes should be made;
 - to what extent the PWD should acknowledge the variety of industrial relations and collective bargaining.
- When regulating future posting, a **number of 'essentials' should be taken into account**:
 - Social partners need to be involved much more closely in the political and legislative discussion;
 - The debate must be based on solid data with quantitative and qualitative information;
- To ensure the effective implementation of the Enforcement Directive, **sufficient and additional resources should be provided for labour inspections.**
- Finally, **policy action should not be overloaded**: only the phenomena directly related to posting should be addressed in the context of the PWD revision, and other problems and challenges (social dumping, unfair competition, tax evasion) should rather be addressed by separate legislative instruments.

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