

**Assessment of the current legislation and  
the possible impact of Posting of Workers  
Directive on local and regional authorities**

**The file note was written by t33, Srl, OIR and SWECO.  
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# 1. Introduction

This document is the final report of the study ‘**Assessment of the current legal situation and the possible impact of Posting of Workers Directive on local and regional authorities**’.

Posting of workers is an issue mainly related on two principles:

- The free movement of workers, that gives every citizen the right to move freely to another Member State to work and reside there without discrimination as regards employment, remuneration and other working conditions in comparison to nationals of that Member State.
- The freedom for businesses to provide services in another Member State. To that end, they may send (‘post’) their own workers temporarily to the other Member State to carry out the work necessary to provide the services.

The current Directive<sup>1</sup> intends to reconcile the exercise of these two principles by setting out mandatory rules at EU level that must be applied to posted workers in the host country. It aims to create a climate of fair competition between all service providers and to assure legal certainty for service providers, service recipients, and workers posted for the provision of services.

Since the current Directive has been object of several critics, the European Commission proposed a revision in March 2012<sup>2</sup> in order to improve, enhance and reinforce the effectiveness and the applicability of the Directive itself by facilitating the cross-border provision of services and improving the climate of fair competition. The initiative, therefore, intends to enhance the potential for growth and employment offered by the posting of workers in the internal market. In line with the objectives and priorities of the Europe 2020 strategy, it thus contributes to smart, sustainable and inclusive growth.

The scope of the present study is to seek insight into how local and regional authorities may be affected by the proposed changes and in what way they could benefit from the new provisions. The aim is to assess the proposed measures from the perspective of local and regional authorities and make recommendations concerning the expected positive and negative impact.

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<sup>1</sup> European Commission, Directive 96/71/EC.

<sup>2</sup> COM(2012) 131 Final.

The report will have the following structure:

**Chapter 2** focuses on the weakness of the current legislation and analyzes the effects of the Directive on the European Regions and stakeholders' demand.

**Chapter 3** discusses positive and negative aspects of the proposed new directive with regard to (a) administrative burden of regional and local authorities, (b) the functioning of regional and local labour markets, and (c) regional and local authorities as receivers or senders of posted workers.

**Chapter 4** contains the subsidiary and proportionality assessment.

The **main sources of information** of the study are the studies launched by the Commission in preparing the proposal of the directive:

- Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union (Idea Consult and Ecorys Netherlands 2011);
- Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (Aukje van Hoek and Mijke Houwerzij 2011);
- Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Draft final report.( Ismeri Europa);

## 1.1 Facts and Figures<sup>3</sup>

- Around one million workers are posted each year by their employers from one Member State to another.
- Posting workers thus concerns only a small share of the active population: 0.4 % of the active population of EU-15 sending countries and 0.7 % of the active population of EU-12 sending countries.
- In terms of labour mobility within the EU, the number of postings represented 18.5 % of non-national EU-27 citizens in the labour force in 2007. Therefore while posting is a significant phenomenon in terms of labour mobility, especially in some countries and sectors, it remains a relatively small phenomenon in the EU labour market.

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<sup>3</sup> Sourced from official EC documents (see, for example, documents mentioned in footnotes 2, 4 and 5).

- The number of postings has declined in 2008 in line with economic activity but has recovered in 2009.
- Regarding flows of posted workers different groups of countries can be distinguished: some Member States seem to be 'specialised' in sending (PL, SI, SK, HU, EE, PT, LU), some in receiving (CY, MT, EL, SE, FI, NL, BE, DK, IT, AT, IE, ES) and others seem to be equally sending and receiving countries and therefore 'not specialised' (DE, FR, UK, BG, CZ, LT, LV, RO). The available data regarding the absolute numbers of postings in 2008 and 2009 suggest that the main sending countries are Poland, France, Germany, Luxembourg, Belgium and Portugal (in declining order). The most important receiving countries are Germany, France, Belgium, the Netherlands, Spain and Italy.
- In relative terms, postings represent a very small part of the employment in the private sector (except in LU). However, for some countries such as Poland, Slovakia, Slovenia, Estonia, Portugal, France and Hungary, as sending countries, and Belgium, Netherlands and Malta, as receiving countries, the phenomenon has certain relevance in terms of employment (between 1.5% and 4%).
- The average sending duration per project is 65 days (decreased from 140 since 2002) whereas the average receiving duration is 23 days (decreased from 32 since 2007).
- The available data suggest that on average, in 2009, around 55% of posted workers were sent to the industrial sector (NACE C to F). Most importantly, among these sectors the construction sector represented 24% of overall postings. The service sector (NACE G to P) represented on average 44% of postings of which the most important is financial and business activities (NACE J and K) (16%) as well as transport, storage and communication (NACE I) (7%). Agriculture represented only 0.7% on average.
- Geographical proximity seems to be the most relevant factor able to explain the distribution of flows of posting (the direction and the extent of the phenomenon), as it is also associated to business and historical links.
- Wage differentials between local and posted workers seem to be quite substantive. In France, a report delivered by the French Senate in 2006 estimated wage differences between foreign posted workers and French workers to be around 50%. In Denmark, a study of the construction sector indicated that, in the mid-2000s, workers from Eastern European countries were paid on average 25-28% less than Danish building workers. A similar difference has been estimated for Germany by comparing the minimum wage levels with the actual wage levels in the construction sector. The average hourly gross salary in the building sector is in fact 32% higher than the minimum wage for skilled workers and as much as 56% for the minimum wage of unskilled workers in West Germany.





## 2. Rationale for Revision

### 2.1 Weaknesses of current legislation

Within the EU about one million workers (0.4% of the EU workforce) are temporarily sent abroad by their employers each year, most of them either based in Poland, Germany, France, Luxembourg, Belgium or Portugal. These posted workers compensate regional labour and skills shortages mainly in the construction, agriculture and transport sector. The Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers determines that for these employment relationships the legislation of the sending country is applicable. Thus, the posted workers do not enter the host country's labour market, but they remain employed in the sending Member State<sup>4</sup>.

Therefore on the one hand side this regulation shall facilitate the participation of European companies in the single market, hence contribute to greater effectiveness and stimulate economic growth. On the other side worker's rights shall be adequately protected by guaranteeing core employment conditions in terms of minimum wage rates, maximum working hours and minimum rest periods, paid annual holidays as well as healthy, safety and hygienic working environments. (Directive 96/71/EC (3); European Commission 2012).

Nevertheless, since its establishment, the Posted Working Directive (PWD) has been increasingly criticised, especially by different stakeholders and, in particular, by trade unions. Furthermore, a series of ECJ (European Court of Justice) judgements shows the difficulties in adopting the directive, especially the **'famous four'** cases: Viking (Case C-438/05<sup>5</sup>), Laval (Case C-341/05<sup>6</sup>), Rüffert (Case C-346/06<sup>7</sup>) and Luxembourg (Case C-319/06<sup>8</sup>) (ETUC 2010).

The four ECJ cases show the limits and the weaknesses of the current EU legal framework. The ECJ interpreted the Posting Directive in a very restrictive way, limiting the action to 'social dumping' and to the safeguard of protection and equal treatment of local and migrant workers in the host country. This interpretation is based on the hierarchy of principles, with market freedoms highest and the fundamental social rights of collective bargaining and action in second place.

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<sup>4</sup> European Commission (2012) *Commission to boost protection for posted workers*, IP/12/267

<sup>5</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0438:EN:HTML>

<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0341:EN:HTML>

<sup>7</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0346:EN:HTML>

<sup>8</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0319:EN:HTML>

Furthermore, a number of issues have emerged both from a legal and administrative perspective and from the economic and social points of view. The study prepared for an impact assessment for the revision of the legislative framework, realized by IsmeriEuropa in March 2012<sup>9</sup>, identified the following problems:

- 1) Ambiguities in the definition of posting: according to the posted workers directive, a posted worker is an employee that is sent ‘temporary’ to a Member State other than the employee normally works to provide a ‘temporarily’ service. The term ‘temporary’ is not further specified. Therefore it is unclear whether a service is still a temporary provision of service or already the establishment of a stable business in the host member state. Further a special problem in this context are so called ‘letter box offices’ where companies virtually open a branch in a different country with lower labour protection to ‘post’ their workers from this country to the original country.
- 2) Ambiguities in the conditions applicable to posted workers: the ambiguities in the applicability to the posted workers of the collective agreements according to the PWD create room for abuse. There is no clear definition to what extent collective agreements in hosting Member States are binding for posted workers and Member States interpret this in a different way. The most important condition in this context is the minimum rate of pay, which can be identified by collective agreements. The directive guarantees a ‘minimum rate of pay’ as of the host country but identifying this minimum rate of pay, according to the collectively agreed minimum wages, is difficult.
- 3) Administrative barriers: the Directive includes the establishment of a liaison offices and monitoring institutions by providing information on terms and conditions of posting. However, ECJ criticizes unjustified administrative requirements and the lack of clear and easy accessible information on the terms and conditions to be guaranteed in host Member States since they can create serious obstacles to the free movement of services.

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<sup>9</sup> Ismeri Europa (2012) *Preparatory Study for an Impact Assessment Concerning the Possible Revision of the Legislative Framework on the Posting of Workers in the Context of the Provision of Services*, Final Report, March 2012

- 4) Monitoring and enforcement: there are many difficulties in assuring monitoring and enforcement of the PWD:
- the short time of being posted to another country,
  - the difficult transnational enforcement of sanctions,
  - language barriers and problems with foreign documents,
  - checking the actual establishment of firms in foreign Member States to qualify the grounds of posting,
  - lack of information on conditions applicable in the sending country and slow cooperation by corresponding authorities in the sending country.

More important, if a worker wants to bring a problem concerning his/her posting and the PWD to court, it is not always clear at which country he/she can do this.

- 5) Employment and labour market: the PWD's implications on employment have ambivalent effects and are therefore difficult to track down. Although it can lead to the creation of new jobs, it remains contested because of possible displacement effects in the receiving labour market, which means the substitution of domestic workers by posted ones. This is strongly connected with the issue of social dumping manifested in undercutting national standards of employment and working conditions. Subsequently this practise evokes displacement as well as unfair conditions of competition, discriminating domestic firms.
- 6) Protection of worker rights: the PWD's definition concerning worker's rights is ambiguous thus the provision of minimum standards of employment and working conditions for posted workers remains rather problematic. Especially the extension of weekly working hours as well as bogus self-employment pose challenges to effectively protect them, whereby abuse is mainly reported from the construction sector, meat processing industry and the road haulage sector. Transnational employment offers business expansion opportunities but it is sometimes exploited by companies whose main objective is to merely post workers abroad, hence circumventing national labour regulations in the host country through social dumping. As a result the general working environment, also for local workers, may be worsened.
- 7) Industrial relations: posting creates a precarious space, which is often free from union's representation. Furthermore it could strengthen the position of the employer as it enhances competition based on terms of employment. In combination with the inherent different treatment of domestic and posted

workers on basis of the PWD, this situation gives reason to trade unions to strive for the inclusion of the latter in collective bargaining<sup>10</sup>.

## 2.2 Stakeholders' demands

The above listed problems give an overview of the issues occurring for the European Union during the adoption of the PWD. The legislative proposal of improving the implementation of the PWD adopted by the Commission has received a large number of suggestions and comments from different stakeholders<sup>11</sup>. This paragraph provides a synthesis of the main stakeholder representatives of labour and business:

- **The European Trade Union Confederation (ETUC)** explicitly welcomed the intention to clarify the exercise of fundamental social rights within the context of the economic freedoms of the single market, but considered insufficient the measures envisaged to review the legal framework on posting of workers. In particular, they proposed to revise the Directive by including a reference to the principle of 'equal pay for equal work' and allowing the host Member State to apply more favorable conditions (in particular beyond the minimum rates of pay) or to extend the applicable conditions beyond the nucleus of terms and conditions of employment that is established in Article 3(1) of the Directive. Moreover, they ask for the introduction of a "social progress clause/Monti clause" in the legislation or a 'Social Progress Protocol' in the Treaty with the aim of giving priority to fundamental social rights over economic freedoms.
- **The European Federation of Trade Unions in the Food, Agriculture and Tourism (EFFAT)** calls for a complete revision of the Directive towards an effective implementation of the fundamental ILO Conventions and the EU Charter of Fundamental Rights. For the EFFAT the Directive must include specific tools to avoid human trafficking and must clearly and unambiguously allow workers to join unions, bargain collectively and take industrial action. Moreover, the EFFAT supports the principle of equal treatment and same working conditions regardless the location of work.
- **The European Service Workers' Union** argues that a legal act improving implementation of the Directive is not sufficient, and that the EU should guarantee equal treatment of local and migrant workers and avoid unfair competition on wages and working conditions.

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<sup>10</sup> For an investigation on positive and negatives aspects of these attempts cf. Ismeri Europa 2012: 36.

<sup>11</sup> See Annex 9 of European Commission, SWD(2012) 63 Final for more detail.

- **BusinessEurope (BE)** supports the Commission's approach for better implementation and enforcement of the existing Directive, and recognizes that several aspects can be improved by legislative action. Furthermore, BE indicated that the exclusion of the right to strike from EU's competence should not be touched.
- **Eurocommerce** argues that there is no need to revise the Directive, but rather to improve its reinforcement and implementation.
- **The Council of European Employers of the Metal, Engineering and Technology-based Industries** sustains that a proper and efficient national application of the Directive can contribute to complementing the European Single Market.



### 3. From the regional and local perspective

Findings of an impact assessment study conducted by Ismeri Europa (2012)<sup>12</sup> suggest that posting has the following effects for the actors involved:

Actors	Benefits	Costs
Region sending	Business opportunities and job creation (through market integration) Upgrading of skills and know-how Higher income (in low wage countries)	Costs of monitoring and enforcement related to the PWD, especially coordination with receiving MSs Upward wage pressures; occasional shortage of skills
Region receiving	Competitiveness (through productive efficiency induced by reduction in labour costs) Allocative efficiency related to reduction of labour and skill shortages	Conflicts between different groups of workers Institutional and legal disputes Costs of monitoring and enforcement related to the PWD Risk of unfair competition related to abuse and distortions
Firm sending	Business development; international contacts Entry foreign markets	Organisational, administrative, and compliance costs related to posting
Firm receiving	Competitiveness (through productive efficiency induced by reduction in labour costs) Upgrading of skills and know-how (through improved skill and specialisation matching)	Organisational, administrative, and compliance costs related to posting Conflicts with local workers and trade unions
Workers receiving	Job creation (through economic growth and competitiveness)	Potential job displacement Potential downward wage pressures Social dumping related to abuse and distortions
Workers sending	Employment Upward employment and working conditions Upgrading of skills and know-how	Mobility costs (monetary and non-monetary) Exploitation related to abuse and distortions
Trade unions sending	Spill-over on trade union membership and practices	No significant costs
Trade union receiving	Extension to posted workers of union representation	Weakening of trade union role in setting employment conditions

(Source: SWD(2012) 63 final, pp. 22-23)

<sup>12</sup> Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Ismeri Europa (2012)

The following sections will shortly discuss the positive and negative aspects of the proposed new Directive with regard to (a) administrative burden of regional and local authorities, (b) the functioning of regional and local labour markets, and (c) regional and local authorities as receivers or senders of posted workers.

### **3.1 Administrative burden for regional and local authorities**

The proposed new Directive has direct implications on various administrative routines within the Member States. Indeed the shortcomings of the present Directive and the abuse of the possibility to post workers, shall mainly be solved by information, controls and better cooperation between relevant authorities.

The proposed Directive shall be implemented in the Member States in accordance with national laws and administrative procedures. Consequently, the proposal mentions only the tasks of Member States but depending on the situation in the Member States these new tasks and obligations may be transferred to regional and local authorities. In particular the following fields may imply additional administrative work or changes in administrative routines: (a) information provision, (b) control and inspections, (c) improved administrative cooperation, (d) cross-border execution of fines, and (e) balanced liability schemes.

#### **Information provision**

Interested parties need easy access to information about the terms and conditions of employment applicable in the host country in order to be compliant with EU rules. Art. 5(2) of the proposed new Directive provides a number of measures to ensure information which shall be easily accessible and containing also the conditions laid down in collective agreements.

Furthermore, the proposal envisages the establishment of an Internal Market Information System (IMI) to improve the cooperation between competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers (see art. 18).



**Pros and cons with regard to information provision**

<b>Positive aspects</b>	<b>Negative aspects</b>
<p>National user-friendly information provision following the requirements laid down in art. 5, may also allow local and regional authorities to better inform about the terms and conditions for posting and posted workers.</p>	<p>In decentralised countries, the terms and conditions of employment and/or which parts of their legislation have to be applied to workers posted in a region will not only depend on national, but also on sub-national (read regional) legislation. In these cases the regional authorities will be responsible to providing the requested information in accordance with art 5. In a short term with will imply additional information obligation and work.</p>
<p>The introduction of an Internal Market Information System on posted workers can facilitate the access to monitoring data.</p>	<p>Depending on the national settings, the introduction of an Internal Market Information System may imply additional administrative tasks for responsible regional authorities.</p>

**Control and inspections**

Chapter IV of the proposed new Directive covers national control measures. Member States shall ensure that appropriate checks and monitoring mechanisms are put in place and that effective adequate inspections are carried out on their territory in order to control and monitor compliance with the provision and rules for the employment of posted workers / for posting workers.

The control and inspections regards not only Member States receiving posted workers. Art. 7 outlines that the Member State of establishment of the service provider shall continue to control, monitor and take the necessary supervisory of enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted in an other Member State.

## Pros and cons with regard to control and inspections

Positive aspects	Negative aspects
Overall the improved controls and inspections are expected to reduce the abuse and circumvention of the rules regarding posted workers and are therefore positive for the labour market situation in the concerned areas.	In decentralised countries where the controls and inspections are delegated to regional authorities, the obligation may imply an additional administrative workload.

## Improved administrative cooperation

For an effective implementation of the Directive, cooperation is needed especially regarding the information exchange but also for controls and monitoring. Art. 6 stresses that Member States shall work in close cooperation and provide each other mutual assistance in order to facilitate the implementation, application and enforcement in practice of the posted workers Directive. The cooperation of the Member States shall in particular consist in replying to reasoned requests for information and to carry out checks.

Art. 8 provides for accompanying measures to develop, facilitate, support, promote and further improve administrative cooperation and to increase mutual trust.

## Pros and cons with regard to improved administrative cooperation

Positive aspects	Negative aspects
<p>Overall the improved cooperation is expected to reduce the abuse and circumvention of the rules regarding posted workers and is thus positive for the labour market situation in the concerned areas.</p> <p>The availability of information regarding posted workers and companies posting workers will be improved substantially. This offers also local and regional authorities better access to information of relevant actors in their region.</p>	

In decentralised countries where the monitoring and control is delegated to regional authorities, especially the access to information from the sending or hosting country can imply an substantial increase of efficiency in the monitoring and control tasks.	In decentralised countries where the monitoring and control is delegated to regional authorities, the obligation to react to requests from other Member States may imply additional administrative workload.
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**Cross-border execution of fines**

Currently there is not any enforcement instrument on place, and this results to be an obstacle to imposing practically fines and penalties. Therefore, the proposed Directive (art. 13-16) establishes a system for the cross-border enforcement of administrative fines and penalties inspired by the system for the recovery of social security claims and for tax claims.

Art. 13 explicitly envisages that the authority may request the competent authority in another Member State to recover a penalty for fine or notify a decision imposing a penalty or fine.

**Pros and cons with regard to the cross-border execution of fines**

<b>Positive aspects</b>	<b>Negative aspects</b>
In decentralised countries where the issuing or execution of fines is delegated to regional authorities, the work of executing fines with regard to posted workers to actors in other EU Member States will become substantially easier and save a substantial amount of administrative tasks and costs.	In decentralised countries where the issuing or execution of fines is delegated to regional authorities, the authorities can be asked to execute fines or penalties (related to posted workers) on behalf of authorities in other Member States, which may imply and additional workload.

**Balanced liability schemes**

The new Directive focuses on the issue of the contractors’ obligations and (joint and several) liability with respect to compliance in the construction sector where the protection of workers’ rights concerns especially because of subcontracting chains. The proposed new Directive adopts a comprehensive approach to enforcement, including awareness raising (better information), state enforcement mechanisms (inspections and sanctions) and private law enforcement mechanisms (joint and several liability).

## Pros and cons with regard to the balanced liability schemes

<b>Positive aspects</b>	<b>Negative aspects</b>
Over all the introduction of balanced liability schemes should help to reduce the abuse of posted workers and thus unfair competition affecting the regional labour markets.	In decentralised countries where the work related to the implementation of balanced liability schemes is delegated to – or involving – regional authorities, this may imply an additional workload.

## 3.2 Functioning of local and regional labour markets

Despite the small number of posted workers (less than 1% of the EU active population), the posting of workers plays an important role in the cross-border provision of services, in particular sectors (e.g. building sector). The possibility to provide services internationally represents an opportunity for business expansions across Europe, particularly for SMEs. Posting provides business and job opportunities, and is a source for additional income in sending regions. It contributes to the improvement of competitiveness and efficiency in the receiving regions.

The new Directive aims at strengthening the positive sides of posting workers, while reducing the circumvention of rules and abuse of the application of the posted workers Directive. Overall this should imply an improvement with regard to the functioning of the local and regional labour markets.

## Pros and cons with regard to the functioning of labour markets

<b>Positive aspects</b>	<b>Negative aspects</b>
The new Directive will reduce the abuse of posted workers leading to unfair competition and price dumping damaging enterprises in the receiving regions.	Better information provision may increase the trust and in the long run also the use of posted workers and thereby contribute to a better functioning of the Single European Market as well as local and regional labour markets.

Possibly regional differentiations of the effects can be made as regards e.g. depending on whether a region (A) is receiving or sending posted workers, (B) has high or low labour costs. To a certain degree it can also matter whether the region is a specialised economy or not.

**Regional variations of the impacts and effects of posting**

	<b>Receiving</b>	<b>Sending</b>
<b>High labour costs</b>	posting is typically used in labour intense and low skilled sectors – reduced labour costs can increase the competitiveness of firms, but it puts also pressure on local labour markets and working conditions, especially in areas with high unemployment.	Mainly skilled workers are posted with positive effects with positive effects on employment and business development.
<b>Low labour costs</b>	posting concerns generally skilled workers to fill supply shortage.	posting usually concerns unskilled and medium skilled workers – it has a positive effect on local employment, business and development and local wages – however, there is a risk of brain drain.

(based on SWD(2012) 63 final, p. 23)

**3.3 Regional or local authorities as receivers or senders of posted workers**

Regional and local authorities may be affected by the administrative consequences deriving from the proposed new Directive, and those regions with a considerable number of posted workers will hopefully benefit from the expected improvements on the labour market, i.e. fair competition. This regards in particular regions receiving posted workers, but also regions sending posted workers.

In addition regional and local authorities themselves can also send or receive posted workers. This is e.g. the case when sending staff to regional or local authorities in other countries to tighten the cooperation, or when outsourcing particular administrative tasks which are conducted by posted workers.

In these cases the authorities will benefit from the proposed new Directive as the information provided shall be improved.

## Pros and cons with regard to sending or receiving posted workers

<b>Positive aspects</b>	<b>Negative aspects</b>
Better information on the actual rules in the sending and hosting countries, both for the authorities and the posted workers.	

# 4. Subsidiarity and Proportionality

## 4.1 Type of Competence / Legal Basis

The legal basis for EU action derives from:

- **Articles 3(3) TEU:** “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability (...). It shall combat social exclusion and discrimination, and shall promote social justice and protection(...)”.
- **Article 45(1-2) TFEU:** “Freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”.
- **Article 56 TFEU:** “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”.
- **Articles 151(1) TFEU:** “The Union and the Member States, (...) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion (...)”.

These articles authorise the adoption of measures with the objective of the establishment and functioning of the internal market, securing the freedom of movement of services and workers, promoting the fully employment and social progress. Therefore the competence is a **shared** one(Art. 4(2) TFEU) and the subsidiarity principle applies, as stated by Article 5(3).

## 4.2 Subsidiarity issues

The subsidiarity principle can be summarised as: ‘the EU should act only if its action is deemed to be **necessary** and to provide a **clear benefit**’.

Hence, there are two steps in the subsidiarity analysis: first to ascertain if action is necessary at EU level, and then if it is necessary, what clear benefits it provides. In this section the main aspects of the proposed new directive are assessed.

## A) Access to information

Art. 5 envisages that Member States shall make generally available on internet national websites terms and conditions of employment in languages other than the national language(s).

- a) **Necessity of action:** the EU action is justified to some extent by the lesson learnt from the difficulties in the implementation of Directive 97/71/EC. Private business and especially SMEs have difficult to find transparent information on the national working conditions and rules of the host country.
- b) **Clear benefit:** legal certainty for SMEs.

## B) Administrative cooperation

Art. 6 and art. 8 aim to enforce mutual assistance and cooperation between different national administrations also supported by specific assistance provided by the Commission. Furthermore, Art. 18 identifies the Internal Market Information System (IMI) as a tool to implement administrative cooperation among Member States.

- a) **Necessity of action:** EU level action in this field is debatable at least regarding for the requirement of a “general administrative cooperation”. The principle of “of sincere cooperation” is already in the treaties: Art. 4(3) TEU and more specifically in the field of free movement of persons – Art. 46(a)TEUF and social policy – Art. 153(2a)TEUF, Art. 156 TEUF. Thus this requirement could be seen as redundant, especially regarding art. 6.
- b) **Clear benefit:** a support from the Commission by means of technical assistance and guidance might be useful at both level national and regional.

## C) Monitoring compliance

The proposal for a new Directive envisages that Member States ensure administrative controls and put in place appropriate checks and monitoring mechanisms in no discriminatory and/or disproportionate manner (Art. 9 and Art. 10).

- a) **Necessity of action:** the ECJ justified controls and inspections in order to protect the rights of worker (es. 21.10.2004, Commission v Luxembourg, case C-445/03, paragraph 40, and 19.1.2006). At the same time, those controls might be not always justified and disproportionate. This was one



of the findings from the monitoring exercise done by the Commission in 2007. Thus having a rule at European level might balance the need of controls and monitoring with the protection of foreign business from discriminatory or/and not adequate administrative burdens.

- b) Clear benefit:** homogeneity across Member States and equality of treatment for private business.

## **D) Enforcement and defence of rights**

The new proposal promotes the enforcement of Directive 97/71/EC by:

- effective mechanisms to lodge complains by posted workers (Art. 11);
- specific provisions concerning contractors' obligations and(joint and several) liability by subcontractors limited to the construction sector (Article 12);
- Cross border execution of fines and penalties.

**a) Necessity of action:** the action is justified by several reasons:

- there is a common agreement among the stakeholders that the enforcement was the weakest point of the application of the present Directive. This opinion is confirmed by all the preparatory studies of the Commission about this topic.

- since the nature of posting is by definition “transnational”, the mutual recognition and enforcement of fines and penalties cannot effectively take place without the involvement of two Member States: the country of establishment of the company posting the workers and the host country. In this context, conflict of interest is likely to happen.

- In the specific case of joint and/or several liability for parties other than the direct employer with regard to social security, only a limited number of Member States (8) have a legislation covering contributions, taxes and/or (minimum) wages. Furthermore substantial differences exist between the various national systems for several and joint liability.

- b) Clear benefit:** better protection of worker rights coherently with the Charter of Fundamental Rights of the European Union.

## 4.3 Proportionality

From the experience of the implementation of the current directive on posting workers and from the studied accompanying the legislative process of drafting of the proposal, it is evident that an action shall be taken by EU in order to make effective its implementation and enforcement. This section analyzes further whether the actions proposed are compliant with the proportionality principle, which implies that ‘the means proposed by the EU must be **appropriate** and **no more than is essential to achieve the intended objective(s)**).

### A) Access to information

As established in the previous section, actions in this field can be justified in order to create more legal certainty. A private business operating in a foreign country needs to have a set of accessible and understandable information. This is crucial in the case of SMEs which most probably find difficult to receive information and to interpret them properly. Art. 5 of the new proposal indicates to Member States which information (terms and conditions of employment from national regulations) and how to provide them (by websites, in different languages, and regularly updated). This assures the necessary homogeneity across the Europe minimising the cost for the enterprises and providing clear instructions to public authorities. For this reason, the action is appropriate.

### B) Administrative cooperation

The art. 6 deals with the general principle of “administrative cooperation”. As already assessed in the subsidiarity assessment, this article appears to be not essential since the Treaties fix the principle in the same policy fields of intervention. Moreover, art. Art. 18 envisages the Internal Market Information System (IMI) as a tool to implement administrative cooperation among Member States for several activities. Although this tool is suitable for large and medium administrations, but not necessary with small authorities. Especially during initial adoption, for most of Local and Regional Authorities, it is more likely to produce an increased administrative workload. More over the proposed directive does not clear indicate when / how the national authorities have to use IMI. While the articles concerning exchange of information (6-8-10) and monitoring and enforcement (13-14-15) do not explicitly mention IMI, its utilisation is envisaged in the last articles (18 - 19). This can confound national authorities and lead to have two parallel systems of information exchange, which might increase administrative burdens and uncertainty about the information flows.

The difficulty in using IMI is showed by the results of the IMI Pilot test<sup>13</sup> reported by the impact assessment. After four and half months, the 75% out of 228 request sent trough IMI comes only from 3 countries (Belgium; Austria, France). Replies took more than 4 weeks for the 60% of all requests.

### **C) Monitoring compliance**

On the one hand the action is desirable to protect foreign private business from disproportionate national regulations, and, on the other, the proposal of a new Directive imposes a “standard” of controls and monitoring across the Member States to better protect the rights of posted workers. It is important to recall that the control information requirement of the proposal (Art. 9) seems to be no too burdensome since the followings are required: a simple declaration about the identity of the service provider, a copy of the contract translated (if no too long) and a contact person. Thus the action in this field is to be considered “proportionate”.

### **D) Enforcement and defence of rights**

The proposal provides a number of measures to make effective the defence of posted worker’ rights. The facilitation of complaints (art. 9) and the cross-border enforcement of administrative fines and penalties (Chapter VI) provide clear instructions to national authority. However, they leave to Member States the necessary degree of flexibility for their implementation. Moreover, on subcontracting — joint and several liability, art. 12 limits its scope to construction sector where subcontracting is more relevant. According to this, the measures appear to be appropriate.

## **4.4 The role of EU**

It is beyond any doubt that action is required at the EU level to successfully tackle some of the most important problems regarding posting of workers. Directive is indeed a positive outcome for all of Europe in terms of increasing effectiveness, especially in defending the posted worker’ rights and provide legal certainty to SMEs. On an overall level, it must be stated that in general the

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<sup>13</sup> P 117, annex 4 COMMISSION STAFF WORKING DOCUMENT, IMPACT ASSESSMENT

Revision of the legislative framework on the posting of workers in the context of provision of services *Accompanying the document* Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services {COM(2012) 131 final} - {SWD(2012) 64 final}

actions proposed by the EC are largely satisfactory, i.e. action at EU level is required and is expected to be only to the extent necessary.

However, there is a potential increase of administrative burdens for Regional and Local Authorities especially in federal – regional countries where the competences on worker protection are decentralised. The result of the assessment of principles of subsidiarity and proportionality are illustrated by the table below.

**Table 1: Summary of potential S&P issues**

	<b>SUBSIDIARITY</b>	<b>PROPORTIONALITY</b>	
<b>Potential Issues</b>	<b>Necessity / Added value</b>	<b>Appropriate -ness</b>	<b>Impact of action: Admin burdens</b>
Access to information	<b>Yes</b>	<i>yes</i>	Increase
Administrative cooperation	<b>yes/no</b>	<i>yes/not</i>	Increase
Monitoring compliance	<b>Yes</b>	<i>yes</i>	Increase
Enforcement and defence of rights	<b>Yes</b>	<i>yes</i>	Increase

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