

25 May 2012

Enforcement of the Posting of Workers Directive

KEY MESSAGES

- 1 BUSINESSSEUROPE opposes some of the core elements of the draft Directive on the enforcement of the Posting of Workers Directive. Instead of making it easier for companies and workers to access opportunities offered by the single market, the proposed Directive will increase bureaucracy and hamper cross-border provision of services. At the same time, some provisions may render some existing national control measures less effective.
- 2 Imposing an EU system of joint and several liability for minimum wages, social security contributions and taxes would entail high costs for companies while not being an effective way to enforce the rules of the Posting of Workers Directive.
- 3 Strengthening administrative cooperation between Member States and better information for companies and workers about their responsibilities and rights with respect to posting are the key to improve compliance with the Posting of Workers Directive in practice.

WHAT DOES BUSINESSSEUROPE AIM FOR?

- The provisions of the Posting of Workers Directive (96/71/EC) remain valid and there is no need to revise the Directive. However, its implementation, application and enforcement can be improved in practice.
- National authorities and social partners need to ensure better availability and accessibility of information, in order for companies to be able to apply the correct terms and conditions of employment of posted workers.
- BUSINESSSEUROPE urges the Council and the Parliament to delete Article 12 of the proposal, which obliges Member States to introduce a system of joint and several liability for posted workers' wages.

KEY FACTS AND FIGURES

<p>In 2007, a total of approximately 1 million E101 certificates related to posting were recorded across the EU-27 and EFTA countries. Posting concerns less than 1% of EU active population.</p>	<p>Around 50% of postings were issued for activities in the industry sector, particularly the construction sector (26%).</p>	<p>Only 8 Member States (AT, BE, DE, ES, FIN, FR, IT, NL) and Norway have introduced in their national legal systems some form of contractor's liability for wages and/or other labour conditions. There is a wide diversity among the existing systems.</p>
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Commission's proposal for the Directive on the enforcement of the Posting of Workers Directive

I. Introduction

1. On 21 March the European Commission adopted a proposal for the Directive on the enforcement of the Posting of Workers Directive [COM(2012)131]. The stated objective of the proposed Directive is to improve the way in which the Posting of Workers Directive is implemented and enforced in practice across the European Union. The proposal is based on Articles 53(1) and 62 of the TFEU, which are identical to those on which the Posting of Workers Directive is based.

II. General comments

2. With a market comprising 30 countries and 500 million citizens, annual cross-border investment flows of 430 billion Euros and 70% of Member States' exports being destined for other EU countries, the benefits of further strengthening the EU market integration are undeniable. Over the period 1992-2006 the Single Market increased the EU's prosperity by 2.15% of GDP and 2.75 million additional jobs were created¹. Crucial to this was enhancing the cross-border provision of services.
3. Despite being a limited labour market phenomenon², posted workers play an important economic role in the operation of the Single Market. As well as facilitating cross-border activity, they provide specialist expertise, improve business efficiency and help deal with temporary gaps in labour supply and skills shortages in certain sectors e.g. in construction, transport, engineering, IT, financial services.
4. In 1996, the Posting of Workers Directive (PWD) was adopted to facilitate cross-border provision of services, while ensuring a climate of fair competition and safeguarding adequate working conditions for posted workers.
5. BUSINESSEUROPE underlines the importance of correct implementation of the PWD by Member States. The fact that several Member States apply the entire national labour law framework to posted workers does not respect the spirit of the Directive. The Commission should encourage Member States to take necessary actions in this domain.
6. BUSINESSEUROPE agrees with the Commission that the provisions of the Posting of Workers Directive remain valid and that there is no need to revise them. At the same time, there is scope for a discussion on the application and enforcement of the PWD and how this can be improved in practice. We welcome a reflection on these issues, and broadly support the aim of the proposed Directive on the enforcement of the Posting of Workers Directive. However, given that the legal basis of the proposal is related to single market rather than social policy, the objective should be first and foremost to facilitate cross-border service provision. This should be made clear in its Preamble as well as in Article 1.

¹ http://ec.europa.eu/internal_market/benefits_en.htm

² According to the EC estimates posted workers accounts for 1 million people or about 0.4% of EU active population



7. For BUSINESSEUROPE the key action at the EU level to improve enforcement of the PWD lays in strengthening the administrative cooperation between Member States, as this will facilitate controls and cross-border enforcement of fines and penalties. It is also important to provide better information for companies and workers about their responsibilities and rights with regard to posting, as knowledge is a precondition of compliance. BUSINESSEUROPE welcomes the Commission proposals in these areas.
8. In contrast, the proposed obligatory EU joint and several liability scheme for minimum wages in subcontracting in the construction sector will not improve enforcement of posted workers' rights. The proposal shifts the duty to enforce law from public authorities to companies, which are equipped with neither detailed knowledge nor the authority to perform this task. At the same time, making a contractor joint and severally liable will impose substantial costs on businesses – in particular SMEs – by generating layers of complex red tape. Moreover, in a European context, a liability limited to cross-border subcontracting will be a disincentive to engage subcontractors established in other Member States, and may constitute an unjustified barrier to cross-border service provision.
9. BUSINESSEUROPE is convinced the decision to introduce a joint and several liability for wages and/or other labour conditions should remain at the discretion of Member States given the costs and uncertainties involved. It has to be noted that only 8 Member States have introduced such a system, and available evidence raises doubts over whether these mechanisms are effective, especially in cross-border situations³.
10. Rather than being obliged to introduce a specific liability system in subcontracting, Member States could instead evaluate their systems of enforcement of posted workers' rights and consider a number of options to strengthen them, if deemed necessary. The options could include e.g. joint and several liability, other forms of liability, a "reliability check" based on the Finnish model⁴, a helpline for posted workers through which they could alert public authorities to their problems. Member States should be allowed to decide what is appropriate for them, given their labour market context and the nature and scale of the problems encountered. Such a solution would be more proportionate and more in line with subsidiarity principle.
11. More generally, BUSINESSEUROPE would like to underline the crucial role played by companies in contributing to job creation and prosperity in the EU. This positive contribution of business activity should be acknowledged. BUSINESSEUROPE also underlines that subcontracting is a widespread and legally sound business practice, which brings significant economic benefits. The use of subcontractors helps companies improve business efficiency, access new markets, deal with lack of in-house capacity or need for external expertise or technology. It also provides opportunities for growth of SMEs. About 3.7 million, or 17% of SMEs in the European Union are engaged as subcontractors.⁵

³ 'Liability in subcontracting processes in the European construction sector' European Foundation for the Improvement of Living and Working Conditions, 2008.

⁴ In Finland, a contractor can never be held liable for the obligations of its subcontractor but it must check the background of a direct subcontractor before signing a contract. If this is not done, a contractor may be obliged to pay a negligence fee

⁵ 'EU SMEs and subcontracting', EIM Business & Policy Research for European Commission, 2009.



III. Specific comments

Preamble

12. In line with the original Posting of Workers Directive and in view of the legal basis, the preamble of the Enforcement Directive should state more clearly that the abolition of obstacles to the free movement of persons and services between Member States constitutes one of the objectives of the EU.
13. Moreover, rather than referring to the role of “trade unions” in the context of determining minimum rates of pay applicable to posted workers, *Recital 8* should acknowledge the role of “social partners”.

Article 1 Subject matter

14. The Article states that the “*Directive aims to guarantee respect for an appropriate level of minimum protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers*”. BUSINESSEUROPE believes this order should be reversed. Given the legal basis (Articles 53(1) and 62 TFEU), the Directive should first of all facilitate cross-border service provision.

Article 3 Preventing abuse and circumvention

15. BUSINESSEUROPE agrees it is important to address any instances of abuse and circumvention of the rules on posting of workers e.g. through the so-called letter-box companies.
16. To that end, it might indeed be useful to list a number of *qualitative* criteria that Member States may use to determine whether a company genuinely performs substantial activities in a Member State where it claims to be established, and whether a posted worker carries out his or her work temporarily. However, it is important these criteria remain indicative, and do not lead to a legalistic interpretation. For example, as ECJ case law on service provision testifies, a reasonable definition of “temporary” depends on the specific circumstances of each situation and should be determined on a case-by-case basis.
17. Furthermore, it should be clarified what consequences it has if the criteria laid down in Article 3 lead to the conclusion that there is no posting situation in the sense of the PWD. Any solution to close this gap must ensure that the aim of the PWD is achieved and abuse is avoided.
18. Information that Member States already exchange to comply with the EU rules on social protection (e.g. in connection with A1 forms) could be used more effectively to prevent abuse and circumvention of rules applicable to posted workers.

Article 5 Improved access to information

19. We fully support the Commission’s aim to improve the information for companies and workers on their obligations and rights with respect to posting. Knowledge of the applicable law and/or collective agreements is a precondition for compliance. Given the complexity of labour markets in some Member States, some companies find it difficult to ascertain what their responsibilities are.



20. With respect to translations, information in English should always be provided.
21. We acknowledge social partners play an important role in provision of information and our national members are committed to work with public authorities to ensure necessary information is disseminated effectively. Moreover, it is worth noting that the sectoral social partners are actively engaged in disseminating information about the terms and conditions of employment applicable to posted workers in their sectors, including through websites (e.g. www.posting-workers.eu prepared by social partners in the construction sector, and European Observatory on Cross-Border Activities in case of temporary agency work sector). We believe such initiatives should be further developed and supported.

Article 9 National control measures

22. BUSINESSEUROPE appreciates the Commission's intention to clarify what administrative formalities and/or control measures Member States may impose on undertakings posting workers. In line with ECJ case law such measures can only be imposed if they are necessary to carry out inspections or supervisory tasks, and proportionate. Otherwise, service providers could be prevented from accessing other EU markets due to excessive administrative requirements.
23. In principle, BUSINESSEUROPE would welcome an exhaustive list of allowed national control measures. At the same time, we are concerned that in practice an attempt to draw up such a list may be difficult, given the diversity of existing national control measures. Member States need to be in a position to carry out control duties effectively. Any list must be thus sufficient for allowing effective controls and enforcement of the provisions of the PWD. Moreover, some provisions of Article 9.1 are unclear and may lead to misunderstandings (e.g. it is not clear what the term *identifiable* posted workers means, there could be difficulties in defining "*anticipated*" numbers of posted workers, it is not clear whether the changes in the numbers of posted workers shall also be notified)
24. Article 9.1d) allows Member States to impose *an obligation to designate a contact person to negotiate, if necessary, on behalf of the employer with the relevant social partners in the Member State to which the posting takes place*. Firstly, it is important to clarify the role of such a contact person, as the term "to negotiate" is broad and allows for various interpretations which will differ between Member States. In many, a contact person is currently a point of contact and a source of information, but not someone engaging in negotiation. Secondly, Member States should be allowed to require a service provider to designate a contact person for the national authorities who can act as responsible representative of the employer and who can be considered as "authorized recipient", for example to receive administrative and legally binding documents.
25. Article 9.3. refers to *the "development of more uniform, standardised documents"* and to *the "establishment of common principles or standards for inspections in the field of the posting of workers"*. While such proposals might be contemplated at the moment, no decision has so far been taken with regards to pursuing such



initiatives. Both references should be thus deleted. BUSINESSEUROPE is against creating standardised EU payslips, time sheets, etc.

Article 10 Inspections

26. BUSINESSEUROPE agrees that effective and adequate inspections are an important means to ensure compliance with the PWD and detect abuses. It has to be noted that there is a wide diversity among Member States in terms of how inspections and controls are organised. Member States should retain the necessary flexibility with regards to the criteria on which they base their inspections and controls, including how and to what extent they use risk assessments. In any case, it must be clear that the risk assessment referred to in Article 10.1 should not lead to a delay of control measures. Efficient control requires national control authorities reacting quickly and spontaneously.

Article 11 Defence of rights

27. BUSINESSEUROPE is concerned with the proposal to oblige Member States to ensure trade unions and other third parties with “a legitimate interest in ensuring that the provisions of the Directive are complied with” can engage on behalf or in support of the posted workers in judicial or administrative proceedings related to implementing or enforcing the Directive.

28. We believe this possibility should be left to the appreciation of Member States, in accordance with their industrial relations systems. Firstly, in some Member States trade unions do not have legal personality. If this is the case, it would be difficult for an employer to start a procedure against the trade unions for damage to the reputation of the company, in case the judicial procedure trade unions engaged in was unfounded. Secondly, in other Member States social partners have prerogatives that can be challenged by this proposal.

Article 12 Subcontracting - Joint and several liability

29. BUSINESSEUROPE is against establishing an obligatory EU joint and several liability scheme for minimum wages in subcontracting in the construction sector and would like Article 12 to be deleted.

30. Businesses are opposed to the principle of joint and several liability:

- Companies should not have to assume responsibilities of public authorities to enforce the application of employment terms and conditions by other companies. It is the role of public authorities to enforce law, as they are the only body with the necessary powers to do so effectively. It is questionable whether a private party will be able to secure information, especially in a cross-border context, which administrative, police and inspection services fail to obtain. Furthermore, by blurring the lines of accountability for workers’ rights the result will be confusion for individuals as to who they should be contacting in the event of a problem. As a consequence, such a shift of responsibilities is unlikely to lead to better protection of posted workers.
- Instead, this measure is likely to lead to unintended consequences, which are at odds with the Directive’s objective to sanction companies which do not respect



obligations arising from the Posting of Workers Directive. For example, contractors may be reluctant to report unscrupulous business practice for fear of their liability, while subcontractors that do not comply with legislation could do so safe in the knowledge that liability, and payment, will not solely rest with them. Moreover, joint and several liability may create an incentive for companies to rely on bogus self-employment.

31. Moreover, the Commission's Impact Assessment has underestimated the costs entailed by this proposal. New annual compliance costs for companies are assessed by the Commission at EUR 2 million. This is based on the assumption that a contractor will spend 15 minutes per posting per year to scrutinise subcontractors (i.e. perform "due diligence").
32. This is an unrealistic estimate especially given the wide scope of liability (minimum rates of pay, unduly withheld social security contributions and taxes on wages) and the fact that it will concern cross-border situations, thus may require communication in different languages. Also, the Impact Assessment seems to ignore potential costs for subcontractors which may be required, say, to obtain certificates of payments from social insurance institutions or tax authorities. Moreover, in majority of Member States there will be one-off costs for companies of getting acquainted with the new rules, as well as direct costs for public administration which will have to introduce new legislation.
33. Impact of introducing joint and several liability will fall disproportionately on small and medium enterprises, which may lack administrative capacities to deal with new obligations. As a consequence, they will lose out on business, and they will be more likely to be in breach of the rules. SMEs will also be less able than large companies to avoid the risk by performing tasks in-house instead of contracting them out.
34. In the EU context, an obligation to establish a joint and several liability system for minimum wages of posted workers runs counter to the goal of strengthening the single market. In fact, the proposal contradicts one of the Directive's objectives, which is to "facilitate the exercise of the freedom to provide services for service providers". As the Directive will in principle apply only to posting situations, it will impose additional risks and administrative costs only for companies that engage foreign contractors and/or national contractors who are using intra-corporate posted workers. Undoubtedly, this will limit cross-border service provision, especially for SMEs.
35. At the same time, BUSINESSEUROPE has serious doubts about whether the proposed EU joint and several liability system could be lawfully limited to posting situations. Available evidence suggests that such a limitation would be difficult to defend as it could be seen as an impediment to the free movement of services and a discriminatory measure. It is worth noting that in 1998 the Commission pursued an infringement procedure against Austria, whose liability rules at the time were limited to cross-border subcontracting. In 1999 Austrian law was amended and now

covers both domestic and foreign companies and is not limited to posting.⁶ BUSINESSEUROPE believes the Commission proposal, if approved in its current form, is likely to be legally challenged and could lead to Member States being obliged to introduce joint and several liability for wages in *all* subcontracting situations. This would be unjustifiable, given the objectives of the Directive and its legal basis.

36. It is also worth noting that only 8 Member States (AT, BE, DE, ES, FI, FR, IT, NL) and Norway have introduced in their national legal systems some form of contractor liability for wages and/or other working conditions. In many cases the introduction of these systems was unrelated to the implementation of the Posting of Workers Directive. Available evidence raises doubts over whether such mechanisms are effective, especially in cross-border situations⁷.
37. Against this background, BUSINESSEUROPE concludes the Commission proposal to introduce an EU joint and several liability system is not supported by evidence. The decision to introduce any form of liability in subcontracting for wages and/or other labour conditions should remain at the discretion of Member States as they are best placed to assess how such a system would work with the other rules and institutions in their labour markets.

IV. Concluding remarks

38. BUSINESSEUROPE fully supports proper implementation and enforcement of the Posting of Workers Directive. In our view, improving access to information about terms and conditions of employment applicable to posted workers as well as facilitating administrative cooperation are the key elements in improving compliance. The proposed Enforcement Directive should concentrate on these two areas.
39. On the contrary, the imposition of joint and several liability scheme in subcontracting at EU level is not justified by evidence. Such a scheme would entail high costs for companies, especially SMEs, and would act as a barrier in the single market, while not bringing benefits for posted workers. We thus urge the European Council and the European Parliament to delete Article 12.

⁶ Liability in subcontracting processes in the European construction sector: Austria, European Foundation for the Improvement of Living and Working Conditions, p.1-2

⁷ 'Liability in subcontracting processes in the European construction sector' European Foundation for the Improvement of Living and Working Conditions, 2008.