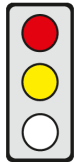


## KEY ISSUES

**Objective of the Directive:** The principle of "equal pay for equal work in the same place" will apply to both permanent employees and posted workers.

**Affected parties:** Posted workers and their employers, competing employees and employers in the host countries.



**Pro:** (1) The fact that the employment law of the host country will apply after a maximum of 24 months, prevents the long-term avoidance of national provisions by the posting of workers.

**Contra:** (1) The Directive is in breach of the freedom to provide services.

(2) The mandatory application of the legal and universally binding provisions on wage levels prevents effective, market-based wage control by way of competition from employees from other EU countries.

## CONTENT

### Title

**Proposal COM(2016) 128** of 8 March 2016 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.

### Brief Summary

#### ► Context, definitions and objectives

- The existing Posting of Workers Directive (96/71/EC) lays down the legal framework for the cross-border posting of workers in the EU. It stipulates compliance with certain terms and conditions of employment in the host country, particularly minimum wage rates (existing Art. 3 (1)). It is to be amended by way of the present Directive.
- The Enforcement Directive (2014/67/EU) supplements the Posting of Workers Directive by defining the requirements for the posting of workers. The Member States had to transpose it into national law by 18 June 2016. It is unaffected by the Commission's proposal.
- A posted worker is any worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works (existing Art. 2 (1)).
- By way of the amendment, the Commission wants to support the principle of "equal pay for equal work in the same place" (p. 2).

#### ► Relevance of the posting of workers

- In 2014, there were 1.92 million posted workers EU wide. This corresponds to an increase of 44.4% as compared with 2010. The construction and the manufacturing sectors are particularly affected [SWD (2016) 52, p. 6 et seq.].
- Only 54% of all posted workers come from the 15 western European Member States existing prior to the EU's eastward expansion. Instead these countries absorb 86% of all posted workers SWD(2016) 52, p. 7].

#### ► Scope of the Directive

- The Directive applies to companies from the EU and from third countries that post workers to another Member State to perform services (existing Art. 1 (1) and (4)).
- The Directive applies to the posting of workers (existing Art. 1 (3))
  - between two companies as part of a contract for services,
  - between two companies in the same group of companies and
  - as temporary agency workers.

#### ► Labour law in the host country to apply after a maximum of 24 months after posting

- In principle, employee and employer are free to choose which national law applies to the employment contract [Art. 8 (1) sentence 1 Rome I Regulation (593/2008/EC)].
- Where employer and employee have made no choice of law, the employment contract is governed by the law of the host country (new Art. 2a (1) in conjunction with Art. 8 (2) Rome I),
  - as from the first day of the posting, where a posting is anticipated to exceed 24 months,
  - as from the 25th month of the posting, where the effective duration of the posting exceeds 24 months.

- Insofar as employer and employee have agreed on another applicable law but the posting is anticipated to be longer than 24 months or effectively lasts longer, the mandatory employment protection provisions of the host country apply despite the choice of a different law (new Art. 2a (1) in conjunction with Art. 8 (1) sentence 2 Rome I).
  - The employment law of the host country also applies after a maximum of 24 months if the posted worker is replaced by another posted worker performing the same task and the posting has a duration of at least six months (new Art. 2a (2)).
- **Terms and conditions of employment applicable irrespective of duration of posting**
- Irrespective of the duration of the posting and the law governing the employment contract, posted workers are subject to the terms and conditions of employment of the host country relating to (new Art. 3 (1))
    - remuneration,
    - maximum work periods and minimum rest periods,
    - minimum paid annual holidays,
    - the conditions of hiring-out of temporary workers,
    - health, safety and hygiene at work,
    - protection of pregnant women and
    - equality of treatment between men and women and other bans on discrimination.
  - This applies to all terms and conditions of employment which are laid down in the host country by way of (new Art. 3 (1))
    - law or administrative provision or
    - universally applicable collective agreement.
  - For reasons of "public policy", Member States may lay down additional terms and conditions of employment which apply to both domestic and posted workers (existing Art. 3 (10)).
  - Member States can provide for exemptions to their law and administrative provisions and to provisions on remuneration contained in a universally applicable collective agreement where
    - the length of the posting does not exceed one month (existing Art. 3 (3) and (4)) or
    - the amount of work to be done is not significant (existing Art. 3 (5)).
  - Member States must publish information about "the constituent elements of remuneration" on the website which they had to set up under the Enforcement Directive (new Art. 3 (1), sub-para. 3).
- **Equal remuneration conditions for subcontracting chains**
- Where companies are obliged, by law or administrative provision or under collective agreements, to subcontract only to certain companies that guarantee compliance with certain remuneration conditions, Member States can require that this also applies to sub-contracts to companies employing posted workers (new Art. 3 (1a)).
- **Equal treatment of temporary agency workers**
- The principle of equal treatment of temporary agency workers and conventional employees (Art. 5 Temporary Agency Work Directive, 2008/104/EC) also applies to posted temporary agency workers (new Art. 3 (1b)).

### Main Changes to the Status Quo

- New: the employment contract of the posted worker is subject to the law of the host country after a maximum of 24 months provided that the employer and employee have not agreed another choice of law.
- Until now, terms and conditions of employment under collective agreements only applied to workers posted in the construction sector. Member States could include additional sectors. In future, this is required for all sectors.
- Until now, posted workers were only entitled to the statutory minimum wage in the host country. In future, all remuneration conditions under the law and administrative provisions, as well as in universally applicable collective agreements, will apply.
- New: the regulation on subcontracting chains.
- Until now, Member States were not obliged to place posted temporary agency workers on an equal footing with domestic temporary agency workers. In future they will have to do so.

### Statement on Subsidiarity by the Commission

The existing Directive can only be amended by EU law (p. 4). In addition, diverging rules in the Member States could lead to a fragmentation of the internal market. COM(2016) 505 p. 7.

### Policy Context

The Directive forms part of the "Workers' Mobility Package" with which the EU Commission wants to create a "deeper and fairer" internal market. During the consultation process, many western European Member States welcomed the Directive whereas several central and eastern European Member States (CEES) rejected it (p. 5).

National Parliaments from ten CEES and the Danish Parliament regarded the Directive as a breach of the principle of subsidiarity and raised objections based on subsidiarity ("yellow card", Art. 6 Subsidiarity Protocol). In the resulting examination procedure (Art. 7 (2) Subsidiarity Protocol) the EU Commission maintained its proposal [COM(2016) 505] after receiving encouragement from a majority of Member States' governments (Outcome of Council meeting of 16/17 June 2016, Doc. No. 10235/16, p. 6).

### Legislative Procedure

8 March 2016 Adoption by the Commission  
 10 June 2016 Debated by the Council  
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

### Options for Influencing the Political Process

Directorates General:	DG Employment and Social Affairs (leading)
Committees of the European Parliament:	Employment and Social Affairs (leading); Rapporteur: Elisabeth Morin-Chartier (EPP Group, FR) Agnes Jongerius (S&D Group, NL)
Federal Ministries:	Employment and Social Affairs (leading)
Committees of the German Bundestag:	Employment and Social Affairs (leading); Legal Affairs and Consumer Protection; Economic Affairs and Energy
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

### Formalities

Legislative competence:	Art. 53 (1) and Art. 62 TFEU (Internal Market)
Form of legislative competence:	Art. 4 (2) TFEU (Shared competence)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

## ASSESSMENT

### Economic Impact Assessment

Working conditions in the Member States are very varied. This is particularly true of wage levels resulting inter alia from the eastern expansion of the EU. These differences, combined with the EU-wide freedom to provide services, give rise to tensions especially as a result of the posting of workers. On that basis, the new provisions on the posting of workers can be assessed as follows:

**The fact that the employment law of the host country will apply after a maximum of 24 months, prevents the long-term avoidance of national employment law provisions by way of posting**, which is actually intended to be a brief period of work in another Member State.

**The mandatory application of the host country's legal and universally binding provisions on wage levels, as from the first day of the posting, is problematic because it prevents effective, market-based wage control by way of competition from employees from other EU countries.** This makes the market-based ascertainment of wages, which balances out supply and demand, even more difficult. **As a result there is a risk of losses in efficiency** because national collective agreements are generally based on a productivity level which posted employees from abroad - e.g. due to lower level of training - do not necessarily achieve. In future, however, these employees will not be permitted to be paid lower wages which means their continued employment may become unattractive for the employer. It will not then be possible to fall back on the potential of these workers. **The existing duty to pay posted employees the statutory minimum wage is sufficient** to ensure that posted workers are able to support themselves in the host country.

The mandatory application of universally binding collective agreements effectively amounts to the protectionist isolation of western European labour markets which absorb most of the posted workers. This contradicts the idea of the European internal market.

In order to be able to decide whether a posting is worthwhile, the sending companies must find out about all the components of remuneration - such as universally binding collective agreements - in the respective host country. The obligation of the Member States to publish the necessary information on the internet - as already provided for in the Enforcement Directive - is therefore appropriate.

### Legal Assessment

#### Legislative Competency

The Directive can be based on the competence of the EU to regulate the freedom to provide services (Art. 53 and 62 TFEU). The Directive lays down which national law applies to posted workers and therefore contains provisions on the conflict of laws to determine which national law applies in a cross-border matter (Art. 23 Rome I).

Since the Directive itself does not create minimum standards for working conditions, it does not have to be based on social policy provisions (Art. 153 TFEU). The Directive is not therefore in breach of Art. 153 (5) TFEU

which states that the EU cannot adopt rules to establish wage levels: it only provides that the sending employer must pay the mandatory wages of the host country and leaves it up to the host country, or the local social partners, to establish the wage levels.

#### Subsidiarity

Unproblematic; provisions on conflict of laws can only be adopted by the EU.

#### Compatibility with EU Law in other respects

**The Directive is in breach of the freedom to provide services** (Art. 56 TFEU) because it disproportionately limits this freedom: the obligation for sending companies to comply with the terms and conditions of employment in the host country may, according to the case law of the ECJ, be justified by the objective of protecting the employee, but it must be proportionate (Case C-115/14). The obligation to pay mandatory wages does not meet this requirement because it does not serve the protection of all employees. This obligation only protects national employees in the host country against price competition due to posted workers because the resulting increase in wage costs means that fewer posted workers than before will be taken on in Member States with a high wage level. These workers will be pushed out of the labour market in those Member States and will not therefore profit from the equal pay obligation and in some cases will in fact be harmed. **Protectionist measures to safeguard domestic employees at the cost of foreign workers** thus reverse the effect of the freedom to provide services; they **are** therefore **disproportionate** and cannot in any way justify the restriction of the said freedom.

The provision on the applicability of the law of the host country where no choice of law has been made, should be more clearly worded. The current wording does not make it clear when the law of the host country will start to apply, where a duration exceeding 24 months is only planned during the posting.

#### Impact on German Law

The Posting of Workers Act (AEntG) which transposes the Directive 96/71/EC must be adapted. If Germany wants to impose the equal pay conditions for subcontractors employing posted workers, the tender regulations in the Act against restraints on competition (GWB) will have to be adapted.

#### Conclusion

The fact that the employment law of the host country applies after a maximum of 24 months, prevents the long-term avoidance of national provisions by the posting of employees. The mandatory application of the legal and universally binding provisions on wage levels prevents effective, market-based wage control by way of competition from employees from other EU countries. As a result there is a risk of losses in efficiency. The duty to pay posted employees the statutory minimum wage is sufficient. The Directive is in breach of the freedom to provide services; protectionist measures to safeguard domestic employees at the cost of foreign workers are disproportionate.