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PARTIE I

**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  
(Text with EEA relevance)**

**and**

**Proposal for a  
COUNCIL REGULATION**

**on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services  
(Text with EEA relevance)**

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## **1. INTRODUCTION**

### **1.1. What is posting of workers in the context of the provision of services?**

The free movement of workers is a fundamental principle of the European Union enshrined in the Treaty. The freedom to provide services includes the right of a service provider established in a Member State to temporarily post its workers to another Member State in order to provide a service. There are three different posting situations for the purpose of the Directive 96/71/EC<sup>1</sup> (hereafter: 'the Directive') defined in Article 1:

(1) Contracting/Subcontracting: Undertakings "post workers to the territory of another Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting."

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<sup>1</sup> 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.

Example: An undertaking established in Portugal specializing in construction works, enters into a subcontract with a French undertaking for the carrying out of works for the construction of a railway line in the west of France. For that purpose it brings its employees from Portugal.

(2) Intra-corporate transfers: Undertakings "post workers to an establishment or to an undertaking owned by the group in the territory of [another] Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting."

Example: A bank established in Austria sends an employee from the headquarters to its branch in Slovenia for one year.

(3) Assignment of temporary agency workers: Undertakings, "being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of [another] Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting."

Example: A temporary work agency established in Luxembourg hires out workers to a company in France.

## **1.2. The legal framework for the Posting of Workers**

### *1.2.1. Primary law*

The EU establishes an internal market which is based on a highly competitive social market economy, aiming at full employment and social progress (Article 3(3) TEU).

The Treaty establishes the right for companies to provide their services in other Member States. It provides that 'restrictions on the freedom to provide services in 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 to whom the services are intended' (Article 56 TFEU). The freedom to provide services may be limited only by rules which are justified by overriding reasons of general interest, provided that these apply without distinction, and insofar as that interest is not already protected by the rules to which the service provider is subject in the Member State in which he is established.

The Treaty attributes to the Union shared competences to promote employment, improved living and working conditions, proper social protection, and the development of human resources with a view to lasting high employment and the combating of exclusion. The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It facilitates dialogue between the social partners, respecting their autonomy. (Articles 151 and 152 TFEU)

The Charter of Fundamental Rights of the EU has become legally binding with the Lisbon Treaty. When preparing EU legislation, implications on a number of fundamental rights have to be taken into consideration: in particular protection of personal data (Article 8), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), non-discrimination (Article 21), workers' right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article 28), protection in the event of unjustified dismissal (Article 30), fair and just



working conditions (Article 31), family and professional life (Article 33), the right to an effective remedy and to a fair trial (Article 47). There is no obligation under the Charter for the EU legislator to provide for the conditions of exercise of a right. According to its Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

EU legislation must comply with the Charter and Member States, when implementing Union law, must also respect the Charter<sup>2</sup>. According to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Such limitations should respect the principle of proportionality and may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

### *1.2.2. Secondary law*

The Directive facilitates the cross-border provision of services while ensuring an adequate level of protection of workers' rights. It is based on an internal market legal basis (Article 53(1) and 62 TFEU). The Directive defines the core of mandatory working conditions which have to be respected by companies in the host country. This facilitates the cross-border provision of services considerably as the service provider does not have to know and apply the entire body of employment rules of the host country. At the same time, the directive provides for a significant level of protection of posted workers and avoids that working conditions in the host country are undermined as an effect of competition.

The Directive aims at promoting the necessary climate of fair competition between all service providers in the Internal Market by seeking to lay the conditions for a level playing field, as well as legal certainty for service providers, service recipients, and workers posted within the context of the provision of services.

The 'hard core' of terms and conditions of work and employment, as defined in Article 3.1 of the Directive, includes:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

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<sup>2</sup> With some restrictions in the case of the UK and Poland.

- equality of treatment between men and women and other provisions on non-discrimination.

As far as these terms and conditions of employment are laid down by law, regulation or administrative provision, Member States must apply them to workers posted to their territory<sup>3</sup>. Member States must equally apply them to posted workers if they are laid down by collective agreements or arbitration awards which have been declared universally applicable within the meaning of Article 3(8), insofar as they concern the activities referred to in the Annex of the Directive (building work). Member States may apply terms and conditions of employment laid down by such collective agreements or arbitration awards with regard to other activities than building work (Article 3(10) second indent) and on matters other than those referred to in Article 3(1) in the case of public policy provisions (Article 3(10) first indent) in accordance with primary law.

While the Directive does not apply directly to undertakings established in third countries, according to Article 1(4) Member States must not provide undertakings established in a third country with a more advantageous competitive position in comparison to undertakings established in a Member State, in particular with regard to working conditions and wage costs. Consequently, this implies that the Directive indirectly sets the minimum level of protection for these workers, and at least the nucleus of mandatory rules needs to be applied.

Moreover, the Directive includes in Articles 4, 5 and 6 provisions on information, administrative cooperation, enforcement and jurisdiction.

The concept of posted workers is also known in the field of coordination of social security systems. The applicable legal framework in this field is provided by Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009, adopted on the basis of Article 48 TFEU.

### **1.3. Developments since the adoption of the Directive in 1996**

The Commission evaluated the implementation and application of the Directive and adopted a report in 2003.<sup>4</sup> This report identified several problems of deficient or incorrect implementation and application of the Directive in specific Member States.

Furthermore, the Commission adopted in 2006<sup>5</sup> several guidelines aimed at clarifying the extent to which certain national control measures could be justified and proportionate in view of prevailing Union law as interpreted in the Court's jurisprudence. In a second Communication in 2007<sup>6</sup> the Commission, after having carried out an inquiry, concluded that

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<sup>3</sup> The Directive does not entail an obligation for Member States to set minimum wages. This is made explicit in a Declaration by the Council and the Commission. See Council doc. 10048/96 ADD1 of 20 September 1996.

<sup>4</sup> Report from the Commission services on the implementation of 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, 2003. Available on the website: <http://www.ec.europa.eu/social/posted-workers>

<sup>5</sup> Communication from the Commission - Guidance on the posting of workers in the framework of the provision of services, COM(2006)159 final; Commission staff working document, SEC(2006) 439.

<sup>6</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers, COM(2007)304 final; Commission staff working document, SEC(2007) 747.

some Member States carried out forms of control that were not justified or proportionate and that the quality of administrative cooperation and access to information as provided by Member States was often insufficient.

In 2008, the Commission adopted a Recommendation<sup>7</sup> calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations, for more effective exchange of information between Member States and better access to information and exchange of best practice. It also established in 2008 an Expert Committee on Posting of Workers, composed by Member States and social partners, with the aim of discussing and clarifying problems of implementation of the Directive.

Starting at the end of 2007, the judgments of the European Court of Justice in the Viking-Line, Laval, Rüffert and Commission vs Luxembourg cases<sup>8</sup> (a summary of the judgments is provided in Annex 10) triggered an intense debate among EU Institutions, academics and social partners which focused on two major issues:

Firstly, how to set the right balance between the exercise of the right to take collective action by trade unions, including the right to strike, and the economic freedoms enshrined in the TFEU, in particular the freedom of establishment and the freedom to provide services. Secondly, how to interpret some key provisions in the Directive concerning the posting of workers in the framework of the provision of services, such as the concept of public policy, the material scope of the terms and conditions of employment governed by the Directive and the nature of mandatory rules, in particular the minimum wage.

At the presentation of his political priorities before the European Parliament on 15 September 2009, President Barroso recognised the need to address the concerns and issues raised by several stakeholders during such debate and announced a legislative initiative to resolve the problems of implementation and interpretation of the posting of workers Directive.

The report that Prof. Monti submitted on 9th May 2010 on the relaunching of the Single market<sup>9</sup> addressed such concerns. He recognized that the controversy fuelled by the rulings "has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration". He further added that "the Court's cases have exposed the fault lines that run between the single market and the social dimension at national level".

## **2. GATHERING INFORMATION AND CONSULTING STAKEHOLDERS**

### **2.1. Gathering information**

#### *2.1.1. Studies*

Since 2009, the Commission launched four ex-post evaluation studies:

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<sup>7</sup> Commission Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, OJ C 85, 4.4.2008, p. 1–4.

<sup>8</sup> CJEU cases of 11 December 2007, *Viking* (C-438/05), of 18 December 2007, *Laval* (C-341/05), of 3 April 2008, *Rüffert* (C-346/06), of 19 June 2008, *Commission v Luxembourg* (C-319/06).

<sup>9</sup> A new strategy for the single market – at the service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

- Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union<sup>10</sup>
- Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 12 Member States)<sup>11</sup>
- Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 15 Member States)<sup>12</sup>
- Study on the protection of workers' rights in subcontracting processes in the European Union<sup>13</sup>

In order to prepare the Impact Assessment an ex-ante evaluation study has been carried out by an external consultant in 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<sup>14</sup>

Following two calls for proposals in 2009 and 2010<sup>15</sup> the Commission financed several pilot projects concerning the working and living conditions of posted workers. One of the projects is the study Information provided on the posting of workers<sup>16</sup> which assessed in particular the information provided via Internet on the applicable working conditions to posted workers of seven Member States. Further projects concern the transport sector, the agricultural sector and the bilateral administrative cooperation between labour inspectorates. These latter projects are currently ongoing.

Furthermore, the Impact Assessment builds on information gathered on previous occasions such as the implementation report of 2003, the Communications of 2006 and 2007, as well as the Recommendation of 2008.

### 2.1.2. *Expert Committee on the Posting of Workers (ECPW)*

The main thrust of the work of the ECPW has been the discussion of several provisions of the Directive, in particular the concept of minimum rates of pay as well as the notion of 'public policy provisions' in Article 3(10) of the Directive (see below section 3.2.3). The ECPW is currently finalising several detailed notes on these issues.

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<sup>10</sup> Idea Consult and Ecorys Netherlands, Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union, Brussels, 2011. Available on the website: <http://www.ec.europa.eu/social/posted-workers>

<sup>11</sup> Aukje van Hoek and Mijke Houwerzijl, Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011. Available on the website: <http://www.ec.europa.eu/social/posted-workers>

<sup>12</sup> The final report of this study has been taken into account for this Impact Assessment.

<sup>13</sup> The draft final report of this study has been taken into account for this Impact Assessment.

<sup>14</sup> The draft final report of this study has been taken into account for this Impact Assessment.

<sup>15</sup> Pilot Project - Working and Living Conditions of Posted Workers, VP/2009/015 and VP/2010/011.

<sup>16</sup> Fabienne Muller, Information provided on the posting of workers, Strasbourg, 2010. Available on the website: <http://www.ec.europa.eu/social/posted-workers>

A sub-group of the ECPW assessed the possibilities to facilitate the exchange of information between the responsible national authorities by electronic means. As a result of this work and related Council Conclusions of 7 March 2011<sup>17</sup> a pilot project on electronic information exchange using a separate and specific application of the Internal Market Information System (IMI) in the area of posting of workers started on 16 May 2011. Its aim is to test an IMI module used for the implementation of the administrative cooperation provisions of the Directive. The Commission will report to the Council on the results of the use of the module at the latest within one year after the launching of the pilot project.

The ongoing pilot project of IMI indicates that working cooperation between national administrations is needed in order to obtain data on the ownership or representation of the posting company as well as on the activity of posted workers (lawfulness and duration of the activity, record of hours worked or of wages paid for work, employment contracts). First statistics as well as user feedback of the pilot project are provided in Annex 4.

## **2.2. Consultation**

### *2.2.1. Public consultations – Positions of stakeholders*

On 27 October 2010, the Commission issued a Communication "Towards a Single Market Act"<sup>18</sup> putting forward for debate 50 proposals to re-launch the single market, including the following two proposals:

- Proposal 29: "Pursuant to its new strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission will ensure that the rights guaranteed in the Charter, including the right to take collective action, are taken into account. The Commission will first of all conduct an in-depth analysis of the social impact of all proposed legislation concerning the single market."

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<sup>17</sup> Council Conclusions on further development of an electronic exchange system facilitating the administrative cooperation in the framework of the posting of workers Directive (st7395/11).

<sup>18</sup> Communication, Towards a Single Market Act, For a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another, COM(2010) 608 final/2; Commission staff working paper, Overview of responses to the public consultation on the Communication 'Towards a Single Market Act', SEC(2011) 467 final; Replies to the public consultation are published on the website: [http://ec.europa.eu/internal\\_market/smact/consultations/2011/debate/index\\_en.htm](http://ec.europa.eu/internal_market/smact/consultations/2011/debate/index_en.htm) Proposal 29 and 30 partially endorse two recommendations made in the Monti report on this matter. The report distinguishes two sets of issues. Firstly, there are those "strains to which the current regulatory framework for posting of workers is subject, in a context of divergent social and employment conditions among Member States and acute sensitivity about the perceived risks of social dumping and unfair competition". Secondly, "the Court's decisions showed that the reach of the EU law extends to collective labour disputes. This has brought social partners and collective action straight into the heart of the economic constitution of the single market. (...) Both national systems of industrial relations and the exercise of the right to strike might have to adjust to fit with the economic freedoms established by the Treaty". The report makes two recommendations in this context: (1) Clarify the implementation of the Posting of Workers Directive and strengthen dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of free movement of persons and cross-border provision of services; (2) If measures are adopted to clarify the interpretation and application of the Posting of Workers Directive, introduce a provision to guarantee the right to strike modelled on Art. 2 of Council Regulation (EC) No 2679/98 and a mechanism for the informal solutions of labour disputes concerning the application of the directive.

- Proposal 30: "In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market."

These two proposals were amongst those which received the largest number of suggestions and comments from respondents (particularly unions, citizens and civil society organizations). The main cross-industry European social partners replied to this consultation in line with the positions held during the debate triggered by the Court rulings.<sup>19</sup> The replies are summarised in Annex 9.

According to ETUC the Court rulings may have as a consequence that industrial actions launched in situations where cross-border aspects are involved are screened and judged by EU or national tribunals as contrary to fundamental economic freedoms, and therefore illegal. ETUC perceives therefore the rulings in question as establishing a jurisprudence that gives primacy to internal market objectives.

They propose to thoroughly amend the legislation in two key aspects:

1. To revise the Posting of Workers Directive (Directive 96/71/EC) by including a reference to the principle of 'equal pay for equal work' and allowing the host Member State to apply more favourable 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;
2. To introduce 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.

In response to the consultation on the re-launch of the Single Market, ETUC and several trade unions 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.

BUSINESSEUROPE (BE) and employers' organizations have welcomed the Court rulings which they consider as an important contribution to the clarification of the legislation and the consolidation of the Single Market. They support the Commission's approach for better implementation and enforcement of the existing Directive, and recognize 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.

The Council has not expressed so far any formal position during the debate triggered off by the rulings. Apart from Luxembourg in 2008, no Member State has explicitly demanded the

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<sup>19</sup> On a joint invitation by the Commission and the acting French Presidency of the EU, ETUC and Business Europe have delivered a report on the consequences of the ECJ rulings in the Viking, Laval, Ruffert and Luxembourg cases for workers' mobility and workers' rights. The document, while expressing a number of common concerns and objectives, exposes their divergences on the fundamentals. Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Ruffert and Luxembourg cases of 19 March 2010, <http://www.etuc.org/a/7110> or <http://www.bussinesseurope.eu>.

reopening of the Directive. An informal debate took place in 2010 in the Council Working Group under Belgian Presidency. On this and other occasions, government representatives have expressed a negative view about a revision of the Directive. Furthermore, individual Member States directly or indirectly affected by the rulings amended their legislation - Denmark, Sweden, Luxembourg, Germany (several Länder) in order to comply with the rulings. Several Member States (FI, FR, DE, SE, PT, PL, LT, IE, AT) support the Commission's approach on the Directive, except UK (against any new legislation); UK, CZ and LT were also against proposal 29. Debates about the issues raised by the implementation of the Directive have also taken place in the European Parliament which has adopted several resolutions<sup>20</sup>. In a resolution dealing specifically with posting of workers that was adopted in 2008<sup>21</sup>, after intense internal debate, the EP called on the Commission to continue examining the implementation, correct application and enforcement of the Directive and suggested that this 'should not exclude a partial revision of the Directive' after assessing in depth the problems with its implementation, and propose modifications, if appropriate. In its resolution on the Single Market Act from April 2011, the EP welcomed the announcement made by the Commission to adopt rules improving the implementation, application and enforcement of the Directive, but did not express a call for a revision of the Directive 96/71.

The European Economic and Social Committee adopted in 2010 an Opinion on the "Social Dimension of the Single Market"<sup>22</sup> asking for more effective implementation of the Directive and expressing support for a Commission initiative which clarifies the legal obligations for national authorities, business and workers, including a partial revision of the Directive. The opinion further encourages the Commission to exempt the right to strike from the internal market and to explore the idea of a "European Social Interpol", supporting the activities of labour inspectorates of the various Member States.

The Commission organised a Conference on fundamental social rights and the posting of workers in the framework of the provision of services on 27/28 June 2011 in Brussels gathering key stakeholders (Member States, social partners at EU and national level, EU institutions and international organisations as well as academics and researchers). On this occasion stakeholders and key political actors had an additional opportunity to express their views on Commission ideas regarding the possible content of the legislative initiatives announced in the Single Market Act: a so-called 'Monti II Regulation' and an Enforcement Directive (see sections 5 and 8).

At the Conference, BE was open-minded with regard to the so-called 'Monti II Regulation' provided that it helps removing unjustified obstacles to the freedom to provide services. It puts emphasis on the need for alternative ways of dispute resolution in order to avoid strikes, and on the respect of the exclusion of the right to strike from EU's competence (Article 153 (5) TFEU); the application of the concept of proportionality in the case of strikes should be left to the national level in full respect of the diversity of the industrial relation systems in

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<sup>20</sup> European Parliament resolution on the implementation of Directive in the Member States (2003/2168(INI), OJ C 92E, 16.4.2004, p. 404-407; Resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)), OJ C 313E, 20.12.2006, p. 452-457; Resolution of 11 July 2007 on the Commission Communication on the Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers (P6\_TA(2007)0340).

<sup>21</sup> European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

<sup>22</sup> Opinion 2011/C 44/15.

Europe. With regard to the posting of workers BE asked for legislative action to focus on administrative cooperation between the responsible national authorities, and proposed to address the existing deficiencies in a Regulation based on Article 197 TFEU (see below sections 3.2.1.4 and 8.2.1.1).

At the Conference, ETUC supported to the idea of a 'Monti II Regulation' and welcomed the initiative to propose an enforcement Directive which would help to define more clearly the scope of the Directive so as to ensure the temporary nature of posting and prevent abuses of the use by letter box companies. Such an enforcement Directive should allow Member States and social partners to use effective monitoring instruments and introduce joint and several liability mechanisms. Without prejudice to the 'Monti II Regulation', the enforcement Directive should also contain provisions ensuring the respect of the fundamental right to collective bargaining and collective action. For ETUC its preferred option was a comprehensive revision of the Directive (described below as package D including in particular sub-option 3c) and a Social Progress Protocol.<sup>23</sup>

### 2.2.2. *General context – the Single Market Act*

The Single Market Act of 13 April 2011 includes among the 12 'levers to boost growth and strengthen confidence' under the social cohesion chapter 'legislation aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, which will include measures to prevent and sanction any abuse and circumvention of the applicable rules, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights'.<sup>24</sup>

On 30 May 2011 the Competitiveness Council adopted its priorities for re-launching the Single Market<sup>25</sup>, considering "that proper implementation and enforcement of the Posting of Workers Directive can contribute to a better protection of posted workers' rights and ensure more clarity regarding the rights and obligations of service providing businesses as well as national authorities and can help to prevent circumvention of the applicable rules". It also stated "that more clarity in the exercise of the freedom of establishment and the freedom to provide services alongside fundamental social rights is necessary".

### 2.2.3. *Inter-Service Steering Group (ISSG)*

An ISSG composed of SG, SJ, MARKT, ENTR, ECFIN, JUST, HOME, MOVE and EMPL met four times between November 2010 and 29 September 2011. The ISSG was consulted on the terms of reference, the inception, the interim and the draft final report of the external Impact Assessment Study. In the final meeting the ISSG was consulted on the first draft of this Impact Assessment.

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<sup>23</sup> Positions expressed in a letter addressed to Commissioner Andor by the newly elected Secretary General of ETUC on 27/10/2011.

<sup>24</sup> Communication from the Commission of 13 April 2011, Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth", COM(2011)206 final.

<sup>25</sup> Council conclusions on the priorities for relaunching the Single Market of 30 May 2011.



#### 2.2.4. *Impact Assessment Board (IAB)*

The IAB examined this Impact Assessment and issued an opinion on 11 November 2011. The recommendations for improvement have been taken into consideration. The main problems have been better explained, supported with further anecdotal evidence and stakeholder's views have been included (section 3). The problem related to the 'tensions between the freedom to provide services and of establishment and national industrial relation systems' (problem 4) is now presented separately (section 3.2.4) and further respective policy options have been included (section 5.2.5, 5.2.6 and 5.2.7). The intervention logic has been strengthened by designing packages of sub-options which address the full set of problem drivers and correspond to the specific and operational objectives (section 4 and 5). On that basis the assessment of the impacts and proportionality of the policy options (including packages of sub-options) has been improved, particularly with respect to compliance costs and impact on SMEs (section 6). Monitoring indicators and more concrete evaluation arrangements have been identified (section 9).

The IAB issued a second opinion on the revised Impact Assessment on 21 December 2011. As far as justified, the recommendations for improvement have been taken into account. The evidence base has been further strengthened. The analysis of costs resulting from the policy options has been improved. A new Annex on the distribution of costs and benefits across Member States has been included. The alert mechanism and the necessity and proportionality of EU action with regard to the problem of tensions between national industrial relation systems and the right to strike have been better explained. The intervention logic of corresponding problem drivers, objectives and policy options has been illustrated in a chart. It has been better explained to what extent the objectives are not only specific, achievable and realistic but also measurable and time-dependent. A new Annex on competitiveness proofing has been added. The possible general impacts on consumers have been removed from the text. Further stakeholder's views have been added in the Impact Assessment and the executive summary.

### **3. PROBLEM DEFINITION**

#### **3.1. The phenomenon of posting**

##### *3.1.1. Extent of the phenomenon*

The analysis of posting as an economic and social phenomenon, as distinct from anecdotal evidence, is hampered by poor quality data. There are no standardised data at EU level. At national level, sources of data exist in a limited number of countries (e.g. SOKA-BAU data in Germany, declarations collected by the French Labour Inspectorate, LIMOSA in Belgium or RUT in Denmark). However, these sources respond to different aims and contain data which are not directly comparable.<sup>26</sup>

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<sup>26</sup> Comparison of national data with the number of data on E101 certificates shows significant variability. In the case of Denmark and France, the postings declared through national monitoring systems are systematically lower than E101 certificates. This can be due to the start-up phase in Denmark and to a narrower definition of the cases which must be declared in France. In Belgium, LIMOSA data are remarkably higher than E101 (almost double). This can be linked to differences in coverage, but also to

The only available data source at EU-level is based on the systematic data collection of E101 certificates (2005-2009) in the field of social security, carried out by DG EMPL in cooperation with national authorities<sup>27</sup>. However, this data base has several limitations. It measures the number of postings, not the number of posted persons (the same person can be posted several times). Furthermore, the E101 social security form is not issued to all posted workers, either because it is not required (postings of over 12 months are not considered for social security purposes) or because some companies do not apply for E101 forms when workers are posted, especially in the cases of very short-term postings.

With these caveats, it can be estimated that around one million workers are posted each year by their employers from one Member State to another. Table 1 in Annex 1 shows the number of postings from every EU-27 or EFTA country to another EU-27 or EFTA country as well as the number of postings received by each country of the EU-27 or EFTA from another EU-27 or EFTA country<sup>28</sup>.

In relation to labour mobility within the EU, the number of postings represented 18.5% of non-national EU-27 citizens in the labour force in 2007. However, posting concerns only a small share of the total 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). Therefore, it can be concluded that, while posting is a significant phenomenon in terms of labour mobility, especially in some countries and sectors, it remains a relatively small observable phenomenon in the EU labour market.<sup>29</sup>

Over time, a trend analysis is made difficult by the increasing size of the country coverage of the data set. However, this seems to have been stabilised after 2007, which allows the conclusion that posting tends to vary strongly with the economic cycle. Figure 1 in Annex 1 suggests that the number of postings has declined in 2008 in line with economic activity but has recovered in 2009.

### 3.1.2. *Flows of postings*

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) (see Table 6 in Annex 1).

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a higher effectiveness and comprehensiveness of LIMOSA, which is a centralised mandatory system, reinforced by sanctions in case of non-compliance.

<sup>27</sup> European Commission (2011), "Posting of workers in the European Union and EFTA countries: Report on E101 certificates issued in 2008 and 2009"; European Commission (2011), "Administrative data collection on E101 certificates issued in 2007".

<sup>28</sup> These data are not broken down by nationalities but it should be noted that not only EU citizens but also third-country nationals legally residing and working in a Member State can be and are subject to posting.

<sup>29</sup> Cf. Idea Consult (see footnote 10), executive summary. The percentage provides only a rough indication of the weight of postings on non-nationals EU-27 citizens in the labour force (it is likely to be an overestimation). On the one hand, a E101 certificate does not represent a full-time one-year equivalent worker, on the other, the Labour force survey which provides the data on non-nationals EU-27 citizens in the labour force does not cover posted workers.

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. (See Figure 1.2 in Annex 1)

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 a certain relevance in terms of employment (between 1.5% and 4%). Information regarding the duration of postings is only available for Belgium (construction) and France based on national data. In the construction sector in Belgium posting seems to be mainly used for short term projects. The average sending duration per project is 65 days (decrease from 140 since 2002) whereas the average receiving duration is 23 days (decrease from 32 since 2007). These data are collected with regard to concrete work projects, and not to the duration of time a posted worker spends in Belgium or abroad. The estimated average duration of postings to France was 44 days in 2008 varying significantly from sector to sector (e.g. construction: 34 days; HORECA: 99 days).<sup>30</sup>

### *3.1.3. Sector-specific breakdown*

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 important among these sectors is the construction sector which 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%) (see Table 7 in Annex 1). Agriculture represented only 0.7% on average.

It should be highlighted that in the construction sector there is a strong presence of SMEs in posting, mainly as subcontractors in sometimes extended subcontracting chains.<sup>31</sup> As a consequence, in a sending perspective, the benefits of posting may be enjoyed especially by SMEs.

### *3.1.4. Relevant factors for posting*

The findings of two studies<sup>32</sup> which assessed the relevant factors/drivers for posting, based on country by country data (2007-2009) (see Annex 1, Tables 2-4) suggest that the following factors can be considered as the most relevant:

- 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;
- Labour costs for receiving countries;

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<sup>30</sup> Data were equally collected for posting per project. See Idea Consult (footnote 10) on case studies on Belgium and France.

<sup>31</sup> Idea Consult (footnote 10) on case study on the construction sector, p. 164. This is also confirmed by the findings of Ismeri (footnote 14): Although existing evidence is very fragmented, data on the number of posted workers per posting available for France and Denmark (3-4 posted workers per posting) indicate that small companies are often involved in the posting of workers.

<sup>32</sup> Ismeri (footnote 14), Idea Consult (footnote 10).

- Labour and skill shortages as well as specialisation: in particular for posting from high labour cost countries to other Member States;
- Unemployment rate for sending countries (in particular in low labour cost countries);
- Level of market integration (however less relevant).

### 3.1.5. *Effects of posting*

#### 3.1.5.1. Economic and social effects

Despite its small size as compared to the overall workforce, the posting of workers plays an important role in the cross-border provision of services, in particular sectors. The possibility to provide services internationally represents an opportunity for business expansion across Europe, particularly for SMEs. Posting provides business and job opportunities, and is a source of additional income in sending countries; it contributes to the improvement of competitiveness and efficiency in receiving countries.

Posting has implications for the labour markets of both sending and receiving countries. It offers job opportunities in sending countries and fills skill and labour shortages in the receiving countries. Therefore, posting contributes to a more efficient allocation of labour across boundaries. However, it can have ‘displacement’ effects in the receiving labour markets, whereby local workers are substituted by posted ones. The strength of this effect will depend on the existence of an oversupply of labour in particular sectors and professions. At the same time, it should be underlined that, since employment creation in the EU relies heavily on the development of an integrated market for services, posting may effectively contribute to support job creation.

In labour-intensive sectors, such as construction, low-labour cost countries tend to hold a comparative advantage which can be problematic for SMEs in receiving high labour countries. Small firms in the construction industry, but also in the temporary employment sector, complain that foreign undertakings often exert a strong competitive pressure only by virtue of using posted workers with lower wages and social security contributions<sup>33</sup>. Whereas SMEs tend to feel more directly the cost pressure from competition with foreign service providers, large firms in receiving countries are advantaged by their use of posted workers since they can reduce costs and fill up labour and skill gaps.

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 – EUR 17,11 (Federal Statistical Office) – 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.<sup>34</sup>

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<sup>33</sup> This has been documented in France and Denmark. Cf. Annex 3.

<sup>34</sup> Cf. Annex 3.

The actual pay differences can be even higher, as suggested by the reports about common infringements of minimum wage rules in the German construction industry.<sup>35</sup>

Actual differences in wages between local and posted workers depend on national systems of setting minimum rates of pay. While some Member States only set one general minimum wage, other Member States apply several levels of minimum wages according to skill and/or occupation of the worker. In the latter case wage differences between posted and local workers tend to be less significant. Where no minimum wage is set by law or universally applicable collective agreement this favours a 'race to the bottom' of wages. The meat processing sector in Germany is a prominent example in this respect.

In high unemployment sending countries, posting may contribute to reduce joblessness although to a limited extent. As the applicable minimum wage in host countries is often higher than the wages normally paid in low wage sending countries, posting creates additional income in such countries and may, in certain cases contribute with learning new skills.

Conflicts with local workers and trade unions have arisen in the past. Some cases attracted strong public attention (e.g. Laval, Lindsey, 'Struik Foods' or Flamanville). There does not seem to be a single origin for such conflicts. In some cases, it is the difference in treatment between posted and local workers which is at stake; in other cases, it is the abusive practices by employers operating at the margins of the law; conflicts can also be due to more or less justified fears of job displacement. Some cases also exposed the risk of protectionism and xenophobia.<sup>36</sup>

Findings in the literature and anecdotal evidence from case studies suggest that minimum employment and working conditions set by law in the host Member State are not respected in a number of cases, particularly with regard to wages, working hours and health and safety regulations. Disproportionate wage deductions for poor housing facilities have been reported. Given the total number of posting operations per year (close to 1 million) such situations as described in the literature have little statistical significance. However, they illustrate the most frequent problems of abuse and breach of posted worker's rights, more prevalent with low skilled workers and in labour intensive sectors.

Example 1 – construction sector: The European Migrant Worker Union (EMWU) has information on 39 cases on its website concerning more than 900 posted workers from Rumania and Poland in the construction sector in Germany which have not been paid according to German minimum wage provisions (2005-2011). EMWU supported these workers in order to enforce their wage claims against their employers or the main contractor. EMWU enforced about 1.5 million Euro mainly against the main contractor in judicial proceedings or by settlement out of Court. The cases represent only a small part of the cases dealt with by the EMWU. According to the case handler for Rumanian posted workers, there have been cases concerning approximately 4.000 to 5.000 posted workers since 2007. None of these workers have been paid the German minimum wage. (See Annex 8)

Example 2 – road haulage sector: In France, several cases have been reported of the establishment of 'fake' foreign subsidiaries or transnational contractual relationships with the sole aim to provide 'low-cost' labour. Such practices recently acquired prominence in the public debate due to media reports on the activities of the Norbert Dentressangle group. In one case a French transport operator set up a

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<sup>35</sup> Cf. Annex 8.

<sup>36</sup> European social partners are concerned about the rise of protectionism and xenophobia observed in Europe recently. See footnote 19.

subsidiary in Poland which recruited one hundred drivers to perform road haulage in France. The usual schedule of Polish drivers included six weeks of work in France and one week of rest in Poland. The Polish drivers were working six days per week and, during their stay in France, they stayed in flats provided by the French company. The vehicles were owned by the French mother company; the Polish subsidiary rented the trucks from the mother company and then it rented them back while providing the posted drivers. The French courts established that a proper but disguised employment relationship existed between the French company and the Polish drivers, as the former organised and directed in detail the work of the latter. A similar case involved another French company which established a subsidiary in Slovakia. Slovak drivers were actually working for up to 15 weeks in France and were part of the mother company workforce. In particular, the French company entrusted the Slovak subsidiary to carry out its own transport contracts, while the foreign firm did not have any independent activity in Slovakia and all of its trailers were provided by the mother company. Again the foreign subsidiary did not show any independent entrepreneurial activity and was established with the only purpose to provide drivers at a lower cost to the French mother company. In other cases, the provision of drivers for on-going operations in France is organised through agencies. (See Annex 3)

Example 3 – temporary agency work: The construction of a nuclear site in Flamanville involved Polish workers posted from a Cypriot subsidiary of an Irish temporary work agency specialised in construction engineering and related trades. The workers were found to have wages around half of those of French workers. The company was also accused of covering 38 undeclared accidents out of the 112 declared accidents. The investigation of the case by the French authorities is currently on-going. (See Annex 3)

Example 4 – meat processing industry: Trade union reports about this industry in Germany point to a situation where a significant part of direct employment has been replaced by a variable combination of subcontractor posted workers, temporary agency posted workers, and self-employed foreign subcontractors. In practice, abattoirs and meat processing plants employ directly a minority of the overall workforce while the majority of workers on site are part of the transnational provision of services. Long working hours, increased workload, deteriorating working conditions, including growing MSDs, are reported as emerging features of the sector in Germany. Wages of posted workers are much lower than for domestic workers (allegedly down to EUR 3 per hour). As a result Germany has become a low-wage location in the meat processing industry. Competitors in neighbouring countries such as France and Belgium complain about unfair competition from German-located firms.<sup>37</sup> The use of posted workers in order to reduce labour and social costs seems also to be common in French slaughterhouses, including illegal practices such as deductions for housing and travel costs from the minimum wage by agencies involved.<sup>38</sup>

### 3.1.5.2. Effects on actors and characterisation of patterns across Member States

The findings of an impact assessment study<sup>39</sup> suggest that posting has the following effects on the actors involved:

Actors	Benefits	Costs
MS 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

<sup>37</sup> Cf. Annex 3.

<sup>38</sup> Cf. *Le monde diplomatique*, Bouchers roumains pour abattoirs bretons, November 2011.

<sup>39</sup> Cf. Ismeri, footnote 14.

MS 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

The findings of the same study suggest that the following patterns can be discerned across Member States:

- Specialised receiving countries with relatively low labour costs (MT, CY, EL): Posting generally concerns skilled workers to fill supply shortages.
- Specialised receiving countries with high labour costs (FI, NL, SE, BE, DK, IT, AT, IE, ES): Posting is typically used in labour intensive and low skilled sectors. Reduced labour costs can increase competitiveness of utilising firms. However, this puts pressure on local labour markets and working conditions in particular in high unemployment regions. Compared to other phenomena such as migration and undeclared work, however, impact seems to be limited. Local conflicts may arise and posting may acquire a negative public image often associated to undeclared work.
- Specialised sending countries with low labour costs (PL, PT, HU, EE, SI, SK): Postings usually concern unskilled or medium skilled workers. Posting has positive effects on local employment, business development and local wages. In general posting does not seem to be a source of conflict in these countries, however, if posted workers are exploited abroad by unscrupulous employers this throws a bad public image on posting.
- Due to its size and geographical specificity Luxembourg is a highly specialised sending country: Mainly skilled workers are posted in the financial or business services sector with positive effects on employment and business development.
- Non-specialised countries with high labour costs (FR, DE, UK): These countries have a broad labour market and large in- and outflows of posting. From a sending perspective

impacts are close to Luxembourg. From a receiving perspective impacts are close to specialised receiving countries with high labour costs.

- Non-specialised countries with low labour costs (BG, CZ, LT, LV, RO): From a sending perspective impacts are similar to specialised sending countries with low labour costs; from a receiving perspective impacts are similar to specialised receiving countries with low labour costs.



Specialisation	Labour costs	Examples	Most relevant drivers	Most relevant sectors	Main social and economic impacts	Legal and administrative problems	Main social and economic issues
<i>Specialised receiving</i>	<i>Low</i>	CY, MT, GR	Skill and labour shortage	Bank Finance Transport Construction	Positive on job matching Economic integration	Weak monitoring and enforcement	Integration and development of the single market of services
<i>Specialised receiving</i>	<i>High</i>	SE, FI, NL, BE, DK, IT, AT, IE, ES	Reduction in labour cost Labour shortage	Construction HORECA Food processing Transport Health Social work Cleaning	Positive on job matching Economic integration Higher competitiveness Higher productivity (advantages for consumers) Potential downward pressure on wages and salaries Potential job displacement	Ambiguities in the definition of posting Ambiguities in the definition of conditions applicable to posted workers Protectionist extension of national legislation Administrative barriers Weak monitoring and enforcement	Integration and development of the single market of services Employment and labour market Industrial relations Protection of workers' rights
<i>Specialised sending</i>	<i>Low</i>	PL, SI, SK, HU, EE, PT	Economic integration Business opportunit. Job opportunit.	Construction HORECA Food process Transport Health Social work Cleaning	Positive effects on employment, Economic integration Business development Potential upward pressure on wages and salaries	Weak monitoring and enforcement	Integration and development of the single market of services Protection of workers' rights
<i>Specialised sending</i>	<i>High</i>	LU	Economic integration Job opportunit.	Banking Finance Business services	Positive effects on employment Economic integration Business development	Protectionist extension of national legislation Administrative barriers Weak monitoring and enforcement	Integration and development of the single market of services

Specialisation	Labour costs	Examples	Most relevant drivers	Most relevant sectors	Main social and economic impacts	Legal and administrative problems	Main economic and social issues
<i>Unspecialised</i>	<i>High</i>	DE, FR, UK	<i>Receiving</i> Reduction in labour cost	Construction HORECA Food processing Transport Health Social work Cleaning	Higher competitiveness Higher productivity (advantages for consumers) Potential downward pressure on wages and salaries Potential job displacement	Ambiguities in the definition of posting Ambiguities in the definition of conditions applicable to posted workers Protectionist extension of national legislation Administrative barriers Weak monitoring and enforcement	Integration and development of the single market of services Employment and labour market Industrial relations Protection of workers' rights
			<i>Sending</i> Economic integration	Manufacturing Banking Finance Business services	Positive effects on employment, economic integration, business development		Integration and development of the single market of services
<i>Unspecialised</i>	<i>Low</i>	BG, CZ, LT, LV, RO	<i>Receiving</i> Skill shortage	Banking Finance Business services	Positive job matching Economic integration		Integration and development of the single market of services
			<i>Sending</i> Economic integration Job opportunit.	Construction HORECA Food process. Transport Health Social work Cleaning	Positive effects on employment, Economic integration Business development Potential upward pressure on wages and salaries	Weak monitoring and enforcement	Integration and development of the single market of services Protection of workers' rights

### 3.2. The problems to be addressed

The problems are grouped under four headings:

- Problems related to the implementation, monitoring and enforcement of the applicable working conditions, including the protection of posted worker's rights
- Problems related to the abuse of the posted workers status in order to evade or circumvent legislation
- Problems related to the controversial or unclear interpretation of the terms and conditions of employment of the Directive
- Tensions between the freedom to provide services/establishment and national industrial relation systems

The problems grouped under the 1<sup>st</sup> heading share a common main driver: Articles 4 and 5 of the Directive are formulated in a rather general manner and do not state precisely enough Member States' obligations with respect to the implementation, monitoring and enforcement of the Directive. With regard to some aspects (national control measures and the mechanisms to protect worker's rights) the respective provisions are missing in the Directive or they are not sufficient (Article 6).

The main driver of the problems grouped under the 2<sup>nd</sup> heading is the lack of legal clarity with regard to the notion of posting, in particular the two key aspects of temporariness and the existence of a genuine link of the employer with the sending Member State. There are no indicative criteria in order to enable the responsible authorities in the Member States to identify real posting situations and distinguish them from other situations (self-employment, migration). As a result frequent cases of abuse of the posted workers status occur, with the aim of evading or circumventing legislation. Legal clarity is therefore a precondition for effective monitoring and enforcement activities.

Problems under 3 are related to the interpretation of Article 3 of the Directive. With regard to problem 3a the case law of the ECJ has clarified a number of important aspects of Article 3, but this interpretation is not shared by stakeholders. With regard to problem 3b the notion of minimum rates of pay is still not clear. Respective jurisprudence did not bring sufficient clarity.

Problem 4 concerns the exercise of the right to strike in the context of the freedom to provide services and of establishment. Therefore this problem is linked to the Directive but goes beyond The ECJ tried to bring clarity to this problem, in two cases, dealing respectively with the freedom to provide services and the freedom of establishment - Laval and Viking.

3.2.1. *Problems related to the implementation, monitoring and enforcement of the applicable working conditions of posted workers, including the protection of worker's rights*

3.2.1.1. Problem 1a: Deficiencies with respect to information for employers and posted workers

Article 4 (3) of the Directive obliges Member States to take the appropriate measures to make the information on the terms and conditions of employment in the host State generally available. Despite this obligation, information concerning the applicable working conditions in the host Member State is often difficult to obtain, uneven, and of insufficient quality. However, this information is crucial for service providers in order to guarantee the minimum working conditions and for posted workers in order to claim their rights.

Previous attempts to solve this problem by non-legislative means have not reached their objectives. The issue has been addressed by interpretative guidelines in 2006. The monitoring exercise in 2007 showed that there were a number of deficiencies in this respect. The respective Communication provided further clarifications for Member States.<sup>40</sup> Recent studies analysing the situation in 2010 and 2011 confirmed that deficiencies still exist.<sup>41</sup>

The driver of this problem is composed of the following elements:

- Provisions of the Directive are rather general and not detailed enough.
- Information is in particular missing concerning working conditions set by collective agreements. Responsible authorities often focus on working conditions laid down by law or regulation. As far as collective agreements are concerned, social partners are involved at national level. Their role in this respect is however not specified in the Directive.
- Insufficient quality of information: A number of Member States provide only general information with regard to minimum working conditions which is not focused on posted workers. Websites in all seven Member States analysed, with the exception of Germany, merely enumerate the rules applicable by virtue of the transposition of the Directive in the host Member State.<sup>42</sup>
- Untargeted dissemination of information: A detailed analysis of websites in seven Member States showed that information is split over 14 websites. Moreover, not all posted workers have access to the internet. Therefore, information on paper (leaflets) and awareness raising campaigns remain necessary. Less than half of the Member States provide information on paper and awareness raising campaigns have only been reported from Belgium, the Netherlands and Germany.<sup>43</sup>
- Information in the sending country: Only part of the Member States as well as trade unions target information on workers/service providers in the country of origin (LU, BE,

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<sup>40</sup> COM(2007)304 (footnote 6) and respective services report SEC(2007)747.

<sup>41</sup> Legal study (footnote 11), p. 105-112, p. 204-206 and recommendations 33-35; Complementary legal study (footnote 12); Fabienne Muller (footnote 16).

<sup>42</sup> Fabienne Muller (footnote 16).

<sup>43</sup> Complementary Legal study (footnote 12)

NL, SE, DE, RO, CY) with regard to their own nationals. Information of posted workers about their rights should be provided as early as possible.

- Inaccessible language: Information is not always provided in a language understood by the service provider and/or worker. Information is mostly available in the language(s) of the host Member State and English.

SMEs are in particular affected by this problem since they have little capacity to investigate the applicable working and employment conditions in the host Member State themselves. Both ETUC and employers' organizations agree that the improvement of information on posting would facilitate the implementation of the legal rules.

### 3.2.1.2. Problem 1b: Deficiencies in control, monitoring and enforcement action

According to Article 5 of the Directive, Member States have to ensure compliance with the provisions of the Directive by taking appropriate measures, in particular to ensure adequate procedures for enforcement of the core working conditions under the Directive. The 'how' of monitoring and enforcement of the rights conveyed in the Directive is left to the national level.

Previous attempts to solve this problem by non-legislative means have not reached their objectives. The issue has been addressed by interpretative guidelines in 2006. The monitoring exercise in 2007 showed that there were a number of deficiencies in this respect. The respective Communication provided further clarifications for Member States.<sup>44</sup> Recent studies analysing the situation in 2010 and 2011 confirmed that deficiencies continue to exist.<sup>45</sup>

The driver of this problem is composed of the following elements:

- the provisions of the Directive are not detailed enough;
- the involvement of multiple authorities without appropriate coordination or the absence of responsible authorities in some Member States;
- the unclear role of social partners in this respect;
- relying on private law enforcement only;
- low frequency of controls;
- monitoring activities are often not focused on the specific legal and factual situation of posted workers;
- absence of notification systems in a number of Member States and therefore a lack of reliable data about the presence of posted workers;
- absence of sufficiently dissuasive administrative and/or penal sanctions;

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<sup>44</sup> Cf. footnote 6.

<sup>45</sup> Legal study (footnote 11), p. 199-202, recommendations 26, 28, 30-32; p. 206-207, recommendation 38; Complementary legal study (footnote 12).

- lack of cross-border enforcement of sanctions due to missing legal framework at the EU level;
- the application of the terms and conditions of employment in certain sectors in the host Member State is alleged to be difficult (e.g. cabotage activities). There are no specific provisions tackling these difficulties;
- difficulties in identifying bogus self-employment.

These deficiencies in control, monitoring and enforcement action cause a serious risk that minimum working conditions in the host state are not respected, in particular with respect to wages, working time and health and safety conditions. They may also facilitate anti-competitive behaviour. Such gaps are compounded by the short-term nature of much of the posting taking place, which makes the task of controlling authorities more difficult. The existence of these deficiencies is supported by anecdotal evidence (see the examples from the construction, road haulage, temporary work agency, and meat processing sectors in section 3.1.5.1).

ETUC recognizes the importance of these deficiencies and considers action on EU level necessary in order to allow Member States and social partners to use effective monitoring and enforcement mechanisms.<sup>46</sup> BUSINESSEUROPE also considers action in this domain necessary in order to ensure a climate of fair competition between national and foreign companies. However, the main responsibility for such mechanisms would belong to Member States in accordance with their national judicial and administrative practices.

**Example 5 – lack of cross-border enforcement:** The Spanish labour inspectorate imposes a fine on a German service provider for violation of the Spanish health and safety at work regulation. It is not possible for the Spanish authorities to enforce the fine against the service provider that returned to Germany. Framework Decision 2005/214/JHA<sup>47</sup> is not applicable since the Spanish fine cannot be appealed to a penal Court. There is no other legislative framework which would allow for the cross-border enforcement of such a fine.<sup>48</sup>

### 3.2.1.3. Problem 1c: Unnecessary administrative requirements and control measures imposed on service providers

Member States should comply with the obligation inscribed in Article 5 of the Directive in line with prevailing EU law, in particular the freedom to provide services as interpreted by the Court of Justice. The guidelines adopted by the Commission in 2006 tried to introduce clarity, by non-binding means, with regard to the compatibility of administrative requirements and control measures imposed by host State authorities on service providers.

<sup>46</sup> ETUC, A revision of the Posting of Workers Directive: Eight proposals for improvement, 31 May 2010, proposal 8; letter of ETUC of 27 September 2011 to Commissioner Andor.

<sup>47</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

<sup>48</sup> In a reply of 12 August 2011 to a Parliamentary Question in the Netherlands the Dutch Minister for Social Affairs and Employment indicated difficulties regarding the cross-border enforcement of fines against foreign service providers. The reply indicates that in 2010 administrative fines of about 2.1 million Euro have been imposed on foreign service providers. About 15% of these fines have been paid on a voluntary basis. It would not have been possible to enforce the rest due to missing legal means.

The monitoring exercise in 2007 showed that several Member States impose administrative requirements and control measures on service providers which are incompatible with prevailing EU law.<sup>49</sup> Examples are the obligations to have a representative established on the territory of the host Member State; to obtain a prior authorisation in the host Member State; or to obtain a work permit for posted workers who are nationals of third countries.

The driver of this problem is composed of the following elements:

- insufficiently detailed and precise provisions in EU secondary law in respect of administrative requirements and control measures which are in conformity with prevailing EU law;
- lack of knowledge, or insufficient awareness, of EU law protecting the rights of cross-border service providers;
- excessive reliance on national control measures instead of administrative cooperation, considered as too cumbersome and/or unreliable;
- absence of uniform documents on EU level regarding information duties.<sup>50</sup>

Previous attempts to solve this problem by non-legislative means have not reached their objectives. The current situation still leads to different obligations for service providers in different Member States. A level playing field is not sufficiently achieved. Service providers face unnecessary administrative burden in some Member States due to the use of disproportionate national control measures.

SMEs are especially affected by types of administrative controls that create excessively onerous obligations for foreign undertakings and may discourage the posting of workers abroad.

ETUC considers certain national control measures and respective administrative requirements indispensable to effectively monitor and enforce the working conditions applicable to posted workers.

#### 3.2.1.4. Problem 1d: Deficiencies with regard to administrative cooperation

Article 4(1) and (2) of the Directive imposes obligations as regards cooperation between national administrations, and makes it the responsibility of Member States to create the necessary conditions for such cooperation. The proper functioning of administrative cooperation among Member States is an essential instrument for compliance control; its virtual absence referred to in COM(2007) 304 undermines the operation of the Directive and may at least partly explain other problems like disproportionate national control measures.

Previous attempts to solve this problem by non-legislative means have not reached their objectives. The issue has been addressed by interpretative guidelines in 2006. The monitoring

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<sup>49</sup> COM(2007)304 (footnote 6).

<sup>50</sup> Legal Study (footnote 11), p. 112-115.

exercise in 2007 found justified concerns regarding insufficient administrative cooperation<sup>51</sup> and the Legal Studies in 2011 still confirmed 'serious shortcomings' in this respect.<sup>52</sup>

The driver of this problem is composed of the following elements:

- the provisions of the Directive are not detailed enough;
- the lack of mutual trust and understanding between the very different national actors involved;
- insufficient resources committed by some national authorities to administrative cooperation<sup>53</sup>;

Another important driver of the problem is the absence of an effective cooperation tool, in particular regarding the information exchange through electronic means. Following the Recommendation of 2008<sup>54</sup> and the work of the Expert Committee on Posting of Workers (ECPW) a pilot project for the use of a separate and specific application of the Internal Market Information System (IMI) was launched in May 2011. However, the Directive does neither provide for the use of IMI nor for the rules on the exchange of information (e.g. deadlines for replies). For further details on IMI see Annex 4.

According to **BUSINESSEUROPE** and **ETUC** insufficient administrative cooperation is an important problem which needs to be addressed at EU level.

### 3.2.1.5. Problem 1e: Posted workers are not adequately protected in disputes concerning individual employment conditions

Article 6 of the Directive contains a jurisdiction clause allowing the posted worker to enforce his rights granted by the Directive in the host state. However, anecdotal evidence indicates that posted workers are not adequately protected in disputes concerning individual employment conditions (see examples 1-4 in section 3.1.5.1 and Annexes 3 and 8).

A number of drivers contribute to this problem:

- Since no further detailed provisions are included in the Directive, the jurisdiction clause alone does not enable posted workers to enforce their rights in practice when disputes about individual employment conditions arise during the posting.<sup>55</sup>
- There is no specific complaint mechanism regarding the non-respect of working conditions for posted workers.<sup>56</sup> There is no legal obligation for service providers and/or recipients to inform posted workers about the existing (non-targeted) complaint mechanisms.<sup>57</sup>

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<sup>51</sup> COM(2007)304 (footnote 6).

<sup>52</sup> Legal Study (footnote 11), p.209; Complementary legal study (footnote 12).

<sup>53</sup> Confirmed by Legal Studies (footnote 11 and 12).

<sup>54</sup> Recommendation of 3 April 2008 (footnote 7).

<sup>55</sup> Legal Study (footnote 11), p. 140.

<sup>56</sup> Legal Study (footnote 11), p. 150.

<sup>57</sup> Ibid.



- Posting of workers in the context of subcontracting causes particular problems. Violations of minimum working conditions established by the Directive have been reported in cases where e.g. the posting subcontractor has defaulted on its contractual obligations.<sup>58</sup>
- The fear of losing their jobs and their vulnerable situation during the posting prevents posted workers from acting against their employers and enforcing their rights. This structural obstacle resulting from the economic imbalance between the employer and the employee can only be challenged by the involvement of third parties who also have an interest in enforcing the application of minimum working conditions, in particular trade unions. In many Member States such third parties do not have an independent right to bring cases before the Courts.<sup>59</sup>
- Absence of mechanisms that allow posted workers to recover excessive costs for accommodation.
- Many posted workers do not see the host Member State public authorities as their natural allies because they feel that these authorities are more interested in protecting their labour market than in helping workers from abroad.

As a result there is a lack of enforcement of posted workers' rights stemming from the Directive. This may contribute to deteriorate working conditions particularly among the most vulnerable categories of workers, and may lead to unfair competition.

Anecdotal evidence supports these findings. In particular the analysis of the information provided by EMWU (Annex 8) suggests that the right of third parties to intervene in Court proceedings is important to enforce posted workers rights and that the role of trade unions and joint bodies of social partners is crucial in this respect. In all cases presented on the EMWU website subcontractors have been involved. Almost all wage claims have been enforced against the main contractor. In the few cases in which enforcement against subcontractors was successful the main contractor was involved in the negotiations. A system of joint and several liability seems to be an effective and appropriate tool in order to enable posted workers to enforce their rights in the host Member State. Regarding the magnitude of the problem the introduction of such a tool would be proportionate.

Example 6 – enforcement of minimum wage against the main contractor: 120 Romanian workers were employed by a Rumanian subcontractor on a construction site in Germany. The subcontractor ran out of money and stopped paying his workers who subsequently reported that they were asked by their employer to work for less than the German minimum wage. Some of the same workers indicated that they encountered the same situation three times in the last twelve months. With the help of EMWU the workers reached an agreement with the main contractor who paid around 173.000 Euro for wages in arrears.

ETUC agrees that the Directive is not precise enough as to the judicial and extra-judicial means allowing posted workers to defend their rights, and considers joint and several liability

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<sup>58</sup> Idea Consult (footnote 10), p. 154.

<sup>59</sup> Legal Study (footnote 11), p. 211.

indispensable to deal with the specific problems arising in the context of subcontracting chains. BUSINESSSEUROPE opposes a system of joint and several liability.<sup>60</sup>

### 3.2.2. *Abuse of the posted workers status in order to evade or circumvent legislation*

In many situations, the difference in labour costs (including social security contributions) caused by the different status of migrant and posted workers is sufficiently important to encourage less scrupulous employers to use the posted workers status improperly with the only purpose to evade the law and reduce costs.

Posted workers and migrant workers are in a different situation and are governed by a different legal regime in the EU. Posted workers are temporarily present in another Member State in the context of the provision of services whereby their respective employer provides services therein. Posted workers as such do not seek access to the labour market in the host Member State and are supposed to return to the sending Member State once the service has been provided.

In contrast, migrant workers move on their own to another Member State for the purpose of finding or carrying out work there. They have full access to the labour market in this country. The right to live and work there derives from the free movement of workers granted in Article 45 TFEU.<sup>61</sup> Therefore, the situation of these two categories of workers is different. The Court of Justice stated this fact on several occasions.<sup>62</sup>

Migrant workers enjoy full equal treatment with nationals, with regard to working conditions and social security, in the Member State in which they are employed. Posted workers are normally working in the sending country and enjoy full equal treatment with nationals while they work there. During their posting they are protected by the mandatory hard core provisions fixed by Article 3 of the Directive, in line with the law or the universally applicable collective agreements of the host country, as far as they are more favourable to the worker than the provisions of the sending country. They remain covered by social security provisions in the sending country (provided the duration of posting does not exceed two years).

#### 3.2.2.1. Problem 2a: Posting is no longer of a temporary nature or has a rotational character

In order to justify the difference in treatment between posted workers (core protection) and migrant workers (equal treatment) the posting has to be of temporary nature. If the duration of the posting is excessive the presumption behind the difference in legal status between these two categories of workers is no longer valid. The same situation occurs if the same or different employees are repeatedly recruited by an undertaking with the purpose of being posted to another Member State for carrying out the same job (rotational postings).

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<sup>60</sup> Cf. speech of Philippe de Buck at the Conference on Fundamental Social Rights and the Posting of Workers in the Framework of the Single Market of 27/28 June 2011 and letter of ETUC of 27 September 2011 to Commissioner Andor.

<sup>61</sup> Certain type of third-country nationals can also reside and work in another Member State under EU law based on Article 79 of TFEU (Directive 2003/109/EC on long-term residents and Directive 2009/50 on Highly Skilled Employment). The access to the labour market of these workers can be limited by Member States but in any event their situation also differs from that of posted workers.

<sup>62</sup> CJEU, judgment of 27 March 1990, C-113/89, *Rush Portuguesa*, pt. 12-17.

The problem is mainly driven by the absence of criteria which would enable Member States authorities to determine if a posting is of temporary nature.

The Directive defines the posted worker as a worker who, for a *limited period of time* carries out his work in the territory of a Member State other than the State in which he normally works. There is no indication as to the temporary nature of the posting.<sup>63</sup> The Directive neither provides for a fixed time limit<sup>64</sup> nor other criteria to determine the temporary character of the stay in the host State<sup>65</sup>. There is no reference either to the possibility of repeated posting for the same job.

The Rome I Regulation<sup>66</sup> which would be applicable if the Directive did not apply does not clarify the notion 'temporary' either. It only states that work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after having carried out his tasks abroad.

According to the case law of the Court the temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the service but also of its regularity, periodical nature or continuity. An activity carried out on a permanent basis, or at least without foreseeable limit to its duration, does not fall within the freedom to provide services.<sup>67</sup>

In contrast, social security rules (Regulation 883/2004) set a limit of two years, which if exceeded obliges the employee to be covered by the social security regime of the host country. They also exclude the possibility of repeated postings for the same job.

ETUC is in favour of a strict time limit for posting. BUSINESSEUROPE opposes such a time limit considering that the specific circumstances of each case may determine the need for longer posting periods.

Example 7 – rotational posting: An Irish temporary work agency posted 93 Polish workers with Irish E101 certificates, stating that they were covered by Irish social security law, to work on a big infrastructure project in Sweden. The certificates indicated that the workers had been living in Ireland two months before the posting. However, it was discovered that 45 of them have earlier been posted from Poland to Sweden to work for the same Swedish company. 38 of them had moved to Ireland during the same period in which they had been working in Sweden and had been posted from Poland. The 93 workers were residing at six addresses in Ireland – 46 of them at one single address, which was

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<sup>63</sup> CJEU, judgment of 11 December 2003, case C-215/01, *Schnitzer*; Legal study (footnote 11), p. 46-48, 187-189 (recommendations 1, 11, 12).

<sup>64</sup> Contrary to Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

<sup>65</sup> Requested periods of previous employment in the sending Member State in the context of posting of third country nationals of 6 or 12 months were considered as incompatible with Article 56 TFEU by the CJEU (cases C-445/03, *Commission v Luxembourg*; C-168/04, *Commission v Austria*; C-244/04, *Commission v Germany*). See also Legal study (footnote 11) recommendation 12 (reimbursement of expenditure for travel).

<sup>66</sup> Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>67</sup> CJEU judgments of 11 December 2003, case C-215/01, *Schnitzer*; of 30 November 1995, case C-55/94, *Gebhard*; of 7 September 2004, case C-456/02, *Trojani*.

not an apartment block. Swedish authorities called into question the certificates before the Irish authorities. In the meantime the same workers received new E101 certificates from Cyprus.<sup>68</sup>

Example 8 – replacement of permanently employed workers by 'posted' workers: A Belgium food-processing undertaking dismissed its workers and concluded a service contract with a Dutch 'posting agency', which posted a considerable number of German-Polish workers to the Belgium undertaking. They were paid on average 10 Euros less than the company's dismissed Belgium workers before. Trade unions called for strike because of the dismissal.<sup>69</sup>

### 3.2.2.2. Problem 2b: The employer has no genuine link with the sending Member State

The Directive provides that the posting undertaking has to be 'established' in a Member State. This requires the existence of a genuine link between the undertaking and the sending Member State. However, the Directive does not set the criteria in order to determine if there is a genuine link.

The social security legislation applying to posting is more explicit, as it establishes criteria that allow a more precise definition of posting: an undertaking must ordinarily carry out substantial activities in the territory of the Member State in which it is established in order to be authorised to post its workers to another Member State.<sup>70</sup>

In order to evade or circumvent employment or social security legislation, unscrupulous employers may direct their posting operations exclusively towards the market of another Member State without having in fact any relevant economic activity in the country where they are formally registered.

The use of 'letter-box' companies is particularly problematic in this respect. These companies are opened in the sending country only for the purpose of evading social security and labour legislation of often one specific host Member State. Sometimes workers already reside in the host Member State before they are recruited. The worker might actually be made to work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. The absence of genuine activities in the country of origin may be combined with repeated postings, in which the 'posted' worker is working in a specific Member State on an (almost) permanent basis. This is a problem that is jointly recognized by the European Social Partners.<sup>71</sup>

The temporary work agency sector seems to be particularly susceptible to such abusive practices. This is confirmed by the two legal studies. A significant number of cases of abuse of the posting rules was found.<sup>72</sup> However, the Directive does not contain any provision to prevent or sanction such abuses.

ETUC and BUSINESSSEUROPE agree that the phenomenon of letter-box companies needs to be tackled.

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<sup>68</sup> Legal Study (footnote 11), p. 57

<sup>69</sup> Legal Study (footnote 11), p. 58

<sup>70</sup> Article 12 of Regulation (EC) 883/2004 in conjunction with Article 14(2) of Regulation (EC) 987/2009 and Decision A2.

<sup>71</sup> See footnote 19. In the joint paper by the social partners produced in 2010, BusinessEurope recognized the need for EU action in order to restrain the scope of activities of such letter-box companies.

<sup>72</sup> Legal study (footnote 11), p. 54-60, Annexes I and II.

Example 9 – letter-box companies: A company has its office which basically consists of a letterbox in Ireland and its registered office in Cyprus. The company has neither economic activity in Ireland nor in Cyprus. Workers are recruited in Poland and receive an Irish employment contract. They work on a construction site in France and receive their orders from the foreman of another company working on the construction site as well. After having terminated the work on the construction site they move on to other sites in France. Afterwards the employment contract is terminated and the workers return to Poland.

Example 10 – no connection with sending country, case of 'les sexeurs de poussins': Seven Chinese nationals holding a German visa as 'independent' chicken sexers were sent by a German company to a related French company. The company claimed that this would have been an intra-company posting. Work was directed and housing was organised by the French company. The work was carried out at the site of a second French company. There was no proof of any payment of wages. Social security contributions were neither paid in France nor in Germany.<sup>73</sup>

### 3.2.3. *Problems related to the unclear or controversial interpretation of the terms and conditions of employment of the Directive*

#### 3.2.3.1. Problem 3a: The scope and level of the terms and conditions of employment

The 'hard core' of mandatory terms and conditions of employment (Article 3) as well as the legal instruments in which these are laid down represent the heart of the political compromise struck at the time of the adoption of the Directive. The case law of the CJEU in *Laval*, *Rueffert* and *Commission vs Luxembourg*<sup>74</sup> clarified a number of important questions regarding the interpretation of certain key provisions of Article 3, in particular Article 3(1), 3(7), 3(8) and 3(10) (for further detail on the case law see Annex 10). The case law has contributed to improve legal certainty for service providers and Member States. However, the diversity of industrial relations systems across the EU still poses problems in implementing the rules set by the Directive and continues to feed divergent views between social partners and sometimes Member States themselves.

The driver of this problem is composed of the following elements:

- While in countries where minimum wages are set by law or by universally applicable collective agreements, their application to posted workers is straightforward, in countries where no such tools exist, an uncertain situation is created for undertakings and workers;
- The authorities of the countries deprived of statutory or conventional minimum wages have not, by the time of the transposition of the Directive, recognized the full scale of the consequences of the absence of provisions regarding posted workers' wages, or were eager to maintain their traditional industrial relations systems unaffected by the application of the Directive<sup>75</sup>.

Furthermore, the Court's interpretation of Article 3(7) in *Rueffert* as well as Article 3(8) raises questions with regard to the compatibility of ILO Convention No. 94 concerning the use of social clauses in public procurement with prevailing EU law. ILO Convention No. 94 is

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<sup>73</sup> Cour de Cassation de la France du 8 juin 2010.

<sup>74</sup> CJEU cases (footnote 8)

<sup>75</sup> For instance, in Sweden, the national legislation transposing the Directive had not made it clear which mechanisms would be used for the determination of the minimum wage for posted workers.

classified as an up-to-date Convention by the responsible ILO bodies.<sup>76</sup> In 2008, the Commission called upon its Member States to ratify and implement the ILO up-to-date Conventions (COM(2008)412 final). However, if the incompatibility of the Convention with EU law was established Member States might be required to denounce the Convention in order to comply with EU law.<sup>77</sup>

As stated above (see section on stakeholders' positions) part of stakeholders welcomed the clarifications brought by the Court's jurisprudence: parts of European Parliament, in particular EPP, BUSINESSEUROPE and several Member States. Especially trade unions in high-wage receiving countries, ETUC and parts of European Parliament, in particular S&D, disputed the Court's interpretation of Article 3. The latter see the rulings as a 'licence for social dumping'. They criticize what they perceive as being a too narrow interpretation of the Directive, which leaves little room for host Member states or trade unions to improve workers' rights in cross-border situations. The most problematic aspects of the rulings in their view are:

- The Court's interpretation of the concept of universally applicable collective agreements in Article 3(8) excluding the Swedish and Danish system of de facto generally binding collective agreements from the scope of this provision, at least, as far as such collective agreements do not clearly define the applicable minimum wage.<sup>78</sup>
- The Court's narrow interpretation of the public policy provisions (Article 3(10)) limiting Member States possibility to apply a number of employment conditions beyond the conditions enumerated in Article 3(1) to posted workers.
- The Court's interpretation of 'terms of employment more favourable to workers' (Article 3(7)) limiting the application to more favourable conditions in the sending state and preventing the host Member States from applying more favourable provisions to posted workers beyond and above the conditions set in accordance with Article 3(1).

Other aspects of the Directive that may call for clarification are:

- The implications of Article 1(4) of the Directive on the working conditions of workers posted by undertakings established in third countries . Even if the Commission has a clear view on the issue (see section 1.2.2) the European Parliament requested clarity with regard

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<sup>76</sup> In a recent resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)) the European Parliament called for an explicit statement in the public procurement Directives that they do not prevent any country from complying with ILO Convention No. 94.

<sup>77</sup> It follows from the case law of the Court (see, inter alia, case C-203/03, *Commission v. Austria*, paragraph 57-65) that Member States might be required to denounce from international agreements, including ILO Conventions, if this is necessary to comply with their obligations under Article 351 TFEU. However, in case C-203/03 Austria was explicitly allowed to continue to apply the ILO Convention No. 45, and therefore not to comply with EU law, for a transitional period until there was the next possibility to denounce from this Convention (every ten years in this case). According to paragraph 62 of the judgment the transitional period only starts if the incompatibility of the Convention with EU law has been clearly established.

<sup>78</sup> Cf. judgment in the Laval case (footnote 8), paragraph 68.

to these implications during the negotiations of the proposal for a so-called single permit Directive<sup>79</sup>.

- The link with the recent Directive on temporary agency work (Directive 2008/104/EC). The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, is among the core terms and conditions of employment in Article 3(1) lit. d of Directive 96/71/EC. This allows Member States also to apply restrictions to the use of temporary agency workers. According to Article 4 of Directive 2008/104/EC prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary. A review of these provisions is foreseen. Article 3(9) of Directive 96/71/EC could have become redundant since Article 5 of Directive 2008/104/EC provides for the applicable working conditions of temporary agency workers.

### 3.2.3.2. Problem 3b: Unclear level of protection with regard to the notion of 'minimum rates of pay'

The driver of this problem is composed of the following elements:

- It is legally unclear which components of the wage paid form part of the minimum rate of pay in the host Member State. The Directive leaves the concept of the minimum rate of pay to the host Member State.
- The Directive does not specify the method of comparison between the minimum rate of pay in the sending and the host Member State.

The definition of the concept of minimum rates of pay is in principle a matter for the host Member State, which is explicitly referred to in the last sentence of Article 3 (1), however, within the limits of the jurisprudence of the Court of Justice (see in this respect: case C-341/05, *Laval*, in particular points 60 and 68). The definition may thus vary from one Member State to another. Member States may determine the various allowances and bonuses which are included in the minimum pay applicable. Some Member States restrict it to the minimum wage as such others include different kinds of bonuses, allowances or contributions to funds.

In the case *Commission v. Germany* (C-341/02) the Court decided that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of the Directive, be treated as being elements of that kind. In particular quality bonuses and bonuses for dirty, heavy or dangerous work were not considered to be part of the minimum wage. While the judgement gave indications with respect to several allowances it left a number of questions open.

The Legal study identified the following issues as problematic: contribution to funds; exchangeability of special benefits; special payments related to the posting and the distinction

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<sup>79</sup> Proposal for a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final.

between pay and reimbursements of costs; complications caused by taxes and premiums (the gross/net problem); withholding of costs from the wages due to the worker; the possibility to combine benefits from different systems, leading to a level of protection that is higher than that envisaged under either the home state or the host state law.<sup>80</sup>

#### 3.2.4. *Problem 4: Tensions between the freedom to provide services/establishment and national industrial relation systems*

The rulings of the Court, interpreting the Directive and Treaty provisions, exposed underlying tensions between the freedoms to provide services and of establishment, on one hand, and the exercise of fundamental social rights such as the right of collective bargaining and the right to industrial action (see also section 2.2.1).

Example 11 – the Viking Line case: The case concerned a dispute between Viking Line, a Finnish ferry company and the International Transport Workers Federation (ITF). It centres on the attempt by Viking Line to reflag one of its ferries, the Rosella, which was operating at a loss on a route between Tallinn and Helsinki. Viking Line intended to register it in Estonia in order to employ an Estonian crew at a lower level of pay than in Finland. Following a request from the Finnish Seaman’s Union (FSU), ITF sent a circular to all its affiliates requiring them to refrain from entering into negotiations with Viking Line. Viking Line brought an action against ITF and FSU before a Court in the UK which referred several questions concerning the freedom of establishment and the right to the CJEU. (see also Annex 10)

In the Viking case the Court for the first time recognised that the protection of social rights should be put on an equal footing with the protection of economic freedoms. However, it also recognised the direct effect of the provisions in the Treaty safeguarding fundamental economic freedoms vis-à-vis trade unions, despite these being private actors. Hence the need to carry out a proportionality test by the pertinent jurisdiction, to determine in each particular situation whether the action engaged by the unions is proportionate to the purpose of defending the collective interests of workers. The fact that the case could be brought to a UK Court whereas the conflict at stake was in Finland lead to legal uncertainty for trade unions.<sup>81</sup>

Example 12 – the Laval case: Laval un Parteri Ltd, a Latvian company, was hiring out labour from Latvia to an affiliated company in Sweden. The company hired out building workers to construction sites in Vaxholm and Danderyd in the Stockholm area where L&P Bygg AB (L&P Baltic Construction Ltd, a subsidiary) is in charge. Laval had signed collective agreements in Latvia with the Latvian building-sector trade union previously/shortly before and refused to sign any collective agreement on working conditions and remuneration in Sweden, so the Swedish Builders’ Union had been blockading the construction site. The Swedish Electricians’ Union started action in sympathy, blocking all electric-related work and services until the company signed a collective agreement with the Swedish Builders’ Union. Laval initiated proceedings against the Construction Trade Union before the Swedish Labour Court, seeking a declaration that the trade unions’ industrial actions (both the blockading and the sympathy action) were unlawful, and an order for compensation for the damages suffered. Wishing to ascertain whether Article 49 EC and Directive 96/71/EC preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to sign and

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<sup>80</sup> Legal study (footnote 11), p. 192.

<sup>81</sup> Apart from the Viking-Line case (in which the matter of the UK court's jurisdiction was never raised in the request for a preliminary ruling see also the judgment in case C-18/02, DFS/D Torline in which a Swedish trade union was sued for damages under Danish law in a Danish court in a conflict concerning the lawfulness of an industrial action that had been called against a Danish shipping company in Sweden.



apply a Swedish collective agreement, the Swedish Labour Court referred the matter to the Court of Justice for a preliminary ruling. (see also Annex 10)

In the Laval case the Court applied the proportionality test to the exercise of the right to strike under the specific conditions created by the state of transposition of the Directive in Sweden and decided on the incompatibility of collective action such as launched by the construction union and the freedom to provide services.

The perceptions of the implications of the Laval-Viking jurisprudence among social partners and economic agents led in the recent past to negative "spill-over" effects as illustrated by two industrial disputes.

Example 13 – The Lindsey oil refinery dispute in the early Spring/Summer of 2009<sup>82</sup>. At the genesis of the dispute was the award of a contract to IREM, an Italian company, following a competitive tendering procedure in the context of the completion works for a new de-sulphurisation unit of the Lindsey oil refinery in Lincolnshire. IREM announced its intention to use its own Italian and Portuguese workforce to fulfil the contract by means of posting and accepted on a voluntary basis that it would apply to all of its workers the terms and conditions laid down in the National Agreement for the Engineering Construction Industry. As a consequence it decided not to use any local (British) labour, despite the fact that, according to the union, they had the relevant skills and experience. It was in particular this decision that prompted workers at the Lindsey refinery to stage a series of 'wildcat' strikes. According to press reports the disputes was resolved only with an agreement to hire at least 100 'British' workers at the site.

This case illustrates the current debate on the need to reconcile the social with the economic dimension of the EU<sup>83</sup>, and highlights the need for clarifying the relationship between the Treaty provisions on the economic freedoms and the social provisions of the Charter.

Example 14 – BALPA (British Airline Pilots Association): This industrial dispute arose out of a proposal from British Airways to launch a wholly owned subsidiary airline operating from Paris to operate between various European airports and the USA under the Open Skies Treaty concluded between the EU and the USA. A vote by the BALPA trade union members indicated an overwhelming support to go on strike. The latter was however effectively hindered by BA's decision to request a preventive injunction if it called for any industrial action pursuant to the ballot alleging that any strike action would be unlawful by virtue of Viking-Line and Laval and threatened to sue the Pilots Association for its losses, which, had there been a one-day strike of pilots, would, according to BA, amount to £100 million. Faced with such a claim for damages, the union dropped its threat of strike action. The BALPA case<sup>84</sup> is an example of the possible negative "spill-over" effects of the judgment in the Viking-Line case on the possibilities and practical limitations on the effective exercise of collective action by trade unions.

<sup>82</sup> See for further details: C. Barnard, 'British Jobs for British Workers': the Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market", *Industrial Law Journal*, Vol. 38, no. 3, September 2009, page 245 – 277.

<sup>83</sup> See also for instance: 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*', C. Joerges and F. Rödl, *European Law Journal*, vol. 15, Jan. 2009, p. 1-19.

<sup>84</sup> See for further details the report issued by the ILO Committee of Experts on tis case, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---elconf/documents/meetingdocument/wcms\\_123424.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---elconf/documents/meetingdocument/wcms_123424.pdf) as well as 'The dramatic implications of Demir and Baykara', K. Ewing and J. Hendy QC, *Industrial Law Journal*, Vol. 39, no. 1, March 2010, p. 2-51, in particular pages 44-47.

The importance of this problem has been highlighted in the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations which expressed ‘serious concern’ about the practical limitations on the effective exercise of the right to strike imposed by the ECJ rulings in the cases Viking and Laval (p. 208 f.). The right to strike being considered as enshrined in ILO Convention No. 87, it is part of the core labour standards on freedom of association and recognized by all Member States. Furthermore it has been argued that the limitations to the right of strike as embedded in the Viking-Laval jurisprudence run against the constant interpretation by the European Court of Human Rights (ECHR) of Article 11 of the European Convention of Human Rights<sup>85</sup>.

The problem is driven by the following factors:

- Trade unions allege that the case law establishes a primacy of economic freedoms over fundamental rights and fear that, as a result of the rulings, they will not be able to defend workers' rights in case of cross-border conflicts effectively.
- Article 153(5) TFEU explicitly excludes the right to strike from the field of competence of EU Law. For this reason there is no EU legislation setting the conditions for the exercise of this right in situations where eventually it could lead to a conflict with the fundamental economic freedoms.
- The conditions of the exercise of the right to strike differ from one Member State to another. The possibility of being sued for damages in a Member State following collective action in another Member State creates legal uncertainty.<sup>86</sup>
- The risk of damage claims could prevent trade unions from exercising their right to strike.
- There is no information and notification obligation (alert mechanism) for situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned. Such a mechanism was introduced in the so called Monti (or 'strawberries') Regulation<sup>87</sup> in order to provide for an early warning system intended to alleviate to the extent possible negative consequences of serious breaches or obstacles to the free movement of goods.

For ETUC, this is a major problem, that would justify adding a Social Protocol to the Treaty with the aim of stating unambiguously that the respect of fundamental social rights should prevail in all circumstances over the exercise of economic freedoms. They also see the need for legislative action designed to reverse ECJ jurisprudence<sup>88</sup>. BUSINESSEUROPE is against reversing the case law. Both consider that this issue, while related to the Directive, is wider since it also concerns the freedom of establishment.

Providing more legal certainty could ease existing tensions and reinforce stakeholders' confidence in the single market.

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<sup>85</sup> Demir and Baykara Application 34530/97 and Enerij Yapi-Yol Application 68959/01.

<sup>86</sup> In the *Viking* case trade unions have been taken to Court in the UK while a Finish trade union was at the origin of the case. See in this respect Draft opinion of Evelyn Regner, EP Employment Committee, 30 August 2011, COM(2011)748, PE469.974v01-00 (recast Brussels I Regulation).

<sup>87</sup> Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L 337/8, 12.12.98.

<sup>88</sup> ETUC resolution of 9-10 March 2010, The Posting of Workers Directive: proposals for revision.

### **3.3. Does the EU have the right to act?**

The problems identified (section 3.2) are linked to the objectives set out by Article 3(3) TEU and Articles 56 and 151 TFEU (see also section 1.2.1). Lack of clarity of the existing legal framework on EU level is at the origin of the problems identified.

The existing Directive leaving Member States wide margin with regard to implementation, application and enforcement in practice as well as previous attempts to address existing problems by the way of non-binding measures have not been sufficient to solve the identified problems. Therefore, it is necessary to address problems 1, 2 and 3 at EU level in order to better achieve the objectives of the Treaty.

Problem 4 is related to the interpretation of the current EU legal framework. The freedom to provide services and the freedom of establishment are fundamental principles of the Treaty. The right to strike is protected by Article 28 of the Charter. It is also protected by international conventions that are signed by all Member States and to which the EU will become a contracting party (in the case of the ECHR). Action to be taken by providing further guidance is justified under a precautionary approach with the aim of avoiding that EU law is used as an unconditional justification for making industrial action illegitimate in the case of future major social conflicts with a strong transnational dimension. Such action is necessary and proportionate in order to better achieve the objectives of the Treaty.

## **4. OBJECTIVES**

### **4.1. General objectives**

The initiative should contribute to the following Treaty-based policy objectives:

- The sustainable development of the internal market, based on a highly competitive social market economy (Article 3 TEU);
- The freedom to provide services across borders and the promotion of a level playing field (Article 56 TFEU);
- The improvement of living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (Article 151 TFEU);
- The respect for the diversity of industrial relation systems in the Member States and the promotion of dialogue between management and labour (Article 152 TFEU).

### **4.2. Specific and operational objectives**

#### *4.2.1. Better protecting the rights of posted workers*

Provide for a high level of protection of posted workers, for fair and just working conditions and proper enforcement of their rights.

The following operational objectives are related to this specific objective:

- Improving information regarding the applicable working conditions for posted workers

- Enabling posted workers to better defend their rights, including in subcontracting chains
- Clarifying the role of social partners in enforcement activities
- Improving monitoring and enforcement of working conditions
- Providing for more clarity regarding the interpretation of the terms and condition of employment of the Directive

#### 4.2.2. *Facilitating cross-border provision of services and improving climate of fair competition*

Provide for clarity and legal certainty for firms and administrations, reducing circumventions of the applicable rules and contributing to a more level playing field.

The following operational objectives are related to this specific objective:

- Providing for a more precise definition of posting
- Improving information regarding the obligations of undertakings in respect of applicable working conditions for posted workers
- Providing for clarity regarding administrative requirements and national control measures
- Improving administrative cooperation between the responsible national authorities
- Improving monitoring and enforcement of the applicable working conditions
- Providing for more clarity regarding the interpretation of the provisions concerning the terms and conditions of employment of the Directive

#### 4.2.3. *Improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers*

The following operational objectives are related to this specific objective:

- Clarifying that no primacy exists between the freedom to provide services/freedom of establishment and the right to take collective action, including the right to strike.
- Clarifying that worker's rights may continue to be defended either individually or collectively through trade union action in cross-border situations.

All operational objectives are defined as specific, achievable and realistic. According to the nature of the objectives some are also measurable and time-dependent, in particular the objectives regarding better information and improved administrative cooperation. Evaluation (section 9.2) will assess if the objectives have been reached, using the indicators identified (section 9.1).

### 4.3. Are these objectives consistent with other EU policies?

The objectives are consistent with the EU's fundamental rights strategy.<sup>89</sup> The objective of the Commission's policy following the entry into force of the Lisbon Treaty is to make the fundamental rights provided for in the Charter as effective as possible. The objectives of this initiative aim at improving the respect of the fundamental rights set out in the Charter<sup>90</sup>.

In particular through facilitating cross-border provision of services and improving the climate of fair competition this initiative allows for untapping the potential of growth of posting of workers as a key element of the provision of services in the Internal market. In addition, it may contribute to mitigate the social and political tensions raised by controversies around the Court rulings and their perceived effects on industrial relations systems. It is therefore one key component of the Single Market Act.

To the extent that most undertakings posting workers are SMEs, and that the present initiative envisages facilitating the provision of services by harmonising the implementation and enforcement of the Directive, thereby creating favourable opportunities for business across borders, it is in line with the Small Business Act.<sup>91</sup>

These objectives are also in line with the Smart Regulation agenda, designed to achieve regulation which is of the highest quality possible, in full respect of the principles of subsidiarity and proportionality. The present proposals are based on a full evaluation of existing legislation and policies, covering legal, economic and social aspects. They aim at making legislation clearer and more accessible and drive Member States and social partners' efforts to ensure more effective and coherent enforcement of legislation. It takes into account the outcome of consultation with stakeholders, especially the European social partners.

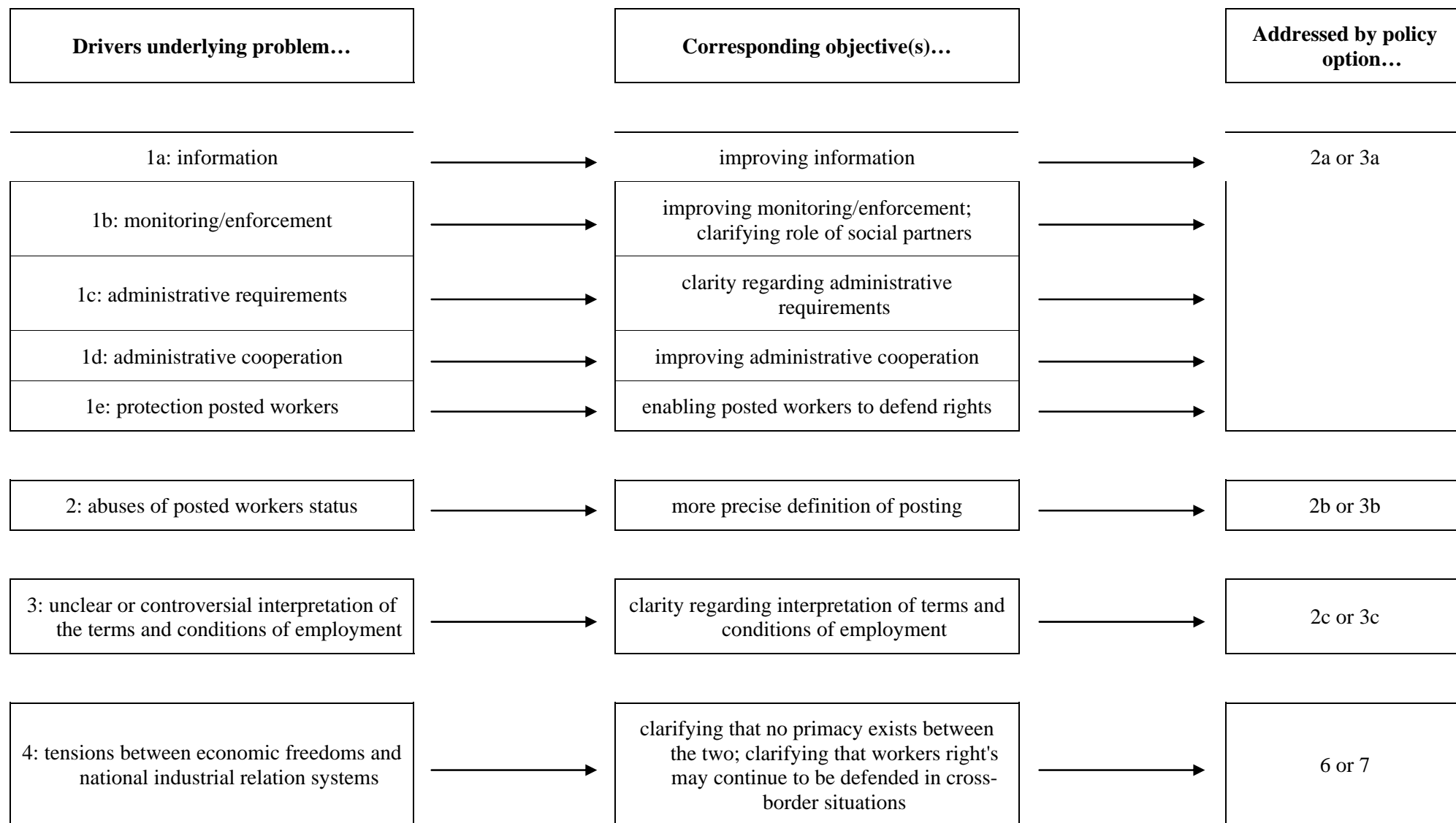
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<sup>89</sup> Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final.

<sup>90</sup> For a reference to the relevant articles of the Charter, see above section 1.2.1

<sup>91</sup> Communication, "Think Small First" A "Small Business Act" for Europe, COM(2008) 394 final.

**Chart on intervention logic illustrating the correspondence of problem drivers, objectives and policy options**



## **5. POLICY OPTIONS**

### **5.1. Overview of the policy options**

#### *5.1.1. Options and sub-options related to problems 1, 2 and 3*

**Option 1:** No policy change (baseline scenario)

**Option 2:** Non-regulatory intervention

- Sub-option 2a: Clarifying Member States' obligations with regard to implementation, monitoring and enforcement of the Directive, including the protection of posted worker's rights (addressing the drivers underlying problems under heading 1)
- Sub-option 2b: Clarifying the constituent elements of the notion of 'posting' to better fight circumvention and abuses of the rules (addressing the drivers underlying problems under heading 2)
- Sub-option 2c: Clarifying certain issues related to the interpretation of different aspects of the terms and conditions of employment of the Directive (addressing the drivers underlying problems under heading 3)

**Option 3:** Regulatory intervention

- Sub-option 3a: Introducing more precise provisions regarding the implementation, monitoring and enforcement of the Directive, including the protection of posted worker's rights (addressing the drivers underlying problems under heading 1)
- Sub-option 3b: Introducing further criteria by legislative means to clarify the constituent elements of the notion of posting by so as to better fight circumvention and abuses of the rules (addressing the drivers underlying problems under heading 2)
- Sub-option 3c: Modifying the scope and level of terms and conditions of employment under the Directive (addressing the drivers underlying problems under heading 3)

**Option 4:** Repealing the existing regulatory intervention (the Directive)

#### *5.1.2. Options related to problem 4*

**Option 5:** No policy change (baseline scenario)

**Option 6:** Non-regulatory intervention

- Clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights by the way of a Communication

**Option 7:** Regulatory intervention

- Introducing by legislative means rules designed to clarify how the exercise of the fundamental social right to collective action can be made compatible with the freedom of establishment and the freedom to provide services

### 5.1.3. Packages of options

The sub-options of options 2 and 3 can be combined to form packages that address simultaneously the underlying drivers of problems under headings 1, 2 and 3. The packages vary with regard to the nature of the means used to intervene (legislative or non-legislative). All packages could be combined with options 6 or 7 in order to address the drivers underlying problem 4 (tension between economic freedoms and the right to strike). The packages are further explained in section 6 (Assessment of the policy options).

	<i>Sub-option addressing drivers underlying problems under heading 1</i>	<i>Sub-option addressing drivers underlying problems under heading 2</i>	<i>Sub-option addressing drivers underlying problems under heading 3</i>
<i>Package 1</i>	<i>2a</i>	<i>2b</i>	<i>2c</i>
<i>Package 2</i>	<i>3a</i>	<i>2b</i>	<i>2c</i>
<i>Package 3</i>	<i>2a</i>	<i>3b</i>	<i>2c</i>
<i>Package 4</i>	<i>2a</i>	<i>2b</i>	<i>3c</i>
<i>Package 5</i>	<i>3a</i>	<i>3b</i>	<i>2c</i>
<i>Package 6</i>	<i>3a</i>	<i>2b</i>	<i>3c</i>
<i>Package 7</i>	<i>2a</i>	<i>3b</i>	<i>3c</i>
<i>Package 8</i>	<i>3a</i>	<i>3b</i>	<i>3c</i>

*intervention by non-legislative means; intervention by legislative means*

## 5.2. Description of the policy options

### 5.2.1. Option 1: Baseline related to the posting of workers (problems 1, 2 and 3)

Under the current setting, posting is expected to increase slightly in the medium term (next 5 years). This assumption is based on a simulation which is explained in detail in Annex 2. The main results of the simulation are the following:

- Posting will increase following the economic cycle. It keeps similar features in terms of level, drivers and structure.
- A likely convergence of labour cost will reduce the motivation for the posting of low skilled workers. This leads to a slower growth rate of posting and an increase in the relative weight of postings driven by skill and labour shortages, job opportunities, internationalisation and market integration.
- Irrespective of labour cost convergence, postings will tend to grow, but at a slow pace (slightly lower than GDP growth), and remains an economic phenomenon of limited significance at aggregate level (see Figure 1 in Annex 2).



- The country breakdown of the simulation carried out for this Impact Assessment shows that Germany, France, Poland, Portugal, Belgium and Luxembourg will continue to be the countries which post most workers and Germany, France, Belgium, Spain, Italy and the Netherlands will remain the most relevant recipients of postings (see Figure 2 Table B3 in Annex 2).
- The simulation on detailed country by country inflows and outflows (see Table B4 and Table B5 in Annex 2) confirms that posting will not change substantially in terms of relative extent and features. Therefore, we can conclude that the critical issues related to the posting of workers continue to characterise a restricted number of high labour cost countries which receive a relatively high number of posted workers driven by the differences in labour costs.
- Other significant drivers of posting such as geographic proximity (frontier areas) are unlikely to change.
- The end of transitional measures specifically geared to posting on 1 May 2011 (only practiced by DE and AT) may trigger an increase in posting flows to these countries. However, the end of transitional measures for free movement of workers may also make less appealing the use of posting as an alternative to normal migration flows.

In the absence of any initiative to address the problems as identified, the Commission would continue to have the option of launching infringement procedures against Member States who are failing their obligations under the Directive and/or the freedom to provide services (Article 56 TFEU). However, as we saw above in Section 3, Articles 4 and 5 of the Directive, related to implementation, monitoring and enforcement are formulated in a rather general manner resulting in obligations that are not sufficiently clear. Therefore, on the basis of the existing provisions, it is difficult to see how the Commission would gather sufficient arguments to steer Member states towards a more harmonised implementation and enforcement of the Directive. Infringement procedures could only be envisaged in cases of very obvious violation of the Directive.

The situation is different with respect to problem 1c (unnecessary administrative requirements). The Commission could address this problem to a certain extent by infringement procedures on the basis of Article 56 TFEU by identifying unnecessary or non-proportionate restrictions to the freedom to provide services. It is then up to the Member State to justify why a certain national measure is justified by overriding reasons of general interest. However, this solution creates legal clarity and certainty only on a case by case basis.

One of the main drivers of problem 2 (abuses) is that the notion of posting lacks legal clarity. This driver cannot be addressed by infringement procedures. Continuing lack of clarity on the question 'what is posting and what is not posting' will provoke further complaints and Parliamentary Questions.

The underlying drivers of problem 3a (implications of case law on national industrial relation systems and ILO Convention No. 94) and problem 3b (unclear legal provision regarding the notion 'minimum rates of pay') can not be addressed by infringement procedures.

The Expert Committee on the Posting of Workers will continue to exchange good practices between Member States as well as to work on a more common understanding of the Directive.

### 5.2.2. Option 2: Non-regulatory intervention re problems 1, 2 and 3

The different sub-options would not touch on the existing legislative framework and operate with non-binding measures.

#### 5.2.2.1. Sub-option 2a (monitoring and enforcement)

Sub-option 2a would aim at addressing the drivers underlying problems grouped under heading 1 by non-legislative means. The drivers underlying problem 1a (information), 1b (deficiencies in controls and monitoring), 1c (national control measures) and 1d (administrative cooperation) have already been addressed by Communications in 2006 and 2007<sup>92</sup> and a Recommendation in 2008. This approach has not been effective since the identified problems continue to exist, as confirmed by the legal studies reporting on the situation in 2010 and 2011 (see section 3.2.1). This is probably due to the fact that most of the drivers are linked to the absence of legislative provisions. The drivers underlying problem 1e (protection of worker's rights) have not yet been addressed by the Communications or the Recommendation. A Communication could identify best practices in order to encourage Member States to adopt national provisions to address these drivers on a voluntary basis. This could be complemented by a Recommendation setting out more precise orientations.

#### 5.2.2.2. Sub-option 2b (abuses)

Sub-option 2b would aim at addressing one of the main drivers underlying problem 2 by non-legislative means: the lack of legal clarity about the constituent elements of the notion of posting. A Communication could indicate and explain these elements building upon the existing case law of the CJEU<sup>93</sup> in this respect, as well as the criteria currently applied in social security coordination. These criteria would however not be legally binding.

#### 5.2.2.3. Sub-option 2c (terms and conditions of employment)

Sub-option 2c would address the drivers underlying problem 3 by non-legislative means. With regard to the drivers of problem 3a, interpretative guidelines could provide more clarity regarding the Court's interpretation of the different aspects of the terms and conditions of employment applicable to posted workers (Article 3). This would in particular include the interpretation of the notion of 'public policy provisions' in Article 3(10) concerning Member State's competence to apply other terms and conditions of employment than those listed in Article 3(1). However, such guidelines could not address the drivers related to the transposition of the Directive into national law and possible difficulties to reconcile it with the respective national industrial relation systems, where these do not contemplate the setting of minimum wages.

With regard to the drivers of problem 3b, interpretative guidelines could provide more clarity regarding the constituent elements of the minimum rates of pay, taking into account the existing jurisprudence. However, such guidelines could not change the fact that the concept of the minimum rates of pay is left to the host Member State and that the Directive does not explicitly establish a method of comparison between the pay received in the sending Member State and the minimum rates of pay to be due in the host Member State. Furthermore, it could be clarified that there is no conflict between ILO Convention No. 94 and EU law.

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<sup>92</sup> Cf. footnote 5 and 6.

<sup>93</sup> See footnote 67.

This sub-option could also clarify the effect of the non-favourable clause of the Directive (Article 1(4)) to workers posted by undertakings established in a non-Member State.<sup>94</sup>

### 5.2.3. Option 3: Regulatory intervention re problems 1, 2 and 3

#### 5.2.3.1. Sub-option 3a (monitoring and enforcement)

Sub-option 3a would address the drivers underlying problems listed under heading 1 by legislative means through the following measures:

- Problem 1a (deficiencies with respect to information)
  - Clarify the rules on access to information on the terms and conditions of employment to be respected in the host Member State not only for foreign companies and workers but also service recipients in the host Member State;
  - Request Member States to provide this information by internet and in a summarised leaflet as well as to provide it in other languages than the national language;
- Problem 1b (deficiencies with respect to controls, monitoring and enforcement)
  - Prescribe effective and adequate inspections<sup>95</sup> to verify compliance in accordance with national law and/or practice, including the requirement to base inspections on a risk assessment;
  - Clarify how the respect of the rules applicable to postings in certain sectors/activities (e.g. cabotage activities in the transport sector and mobile staff in civil aviation) can be improved and/or monitored;
  - Provide solutions for existing cross-border enforcement problems of fines;
  - Introduce standard provisions regarding administrative sanctions in case of failure to comply or non respect of the provisions of the Directive;
- Problem 1c (unnecessary administrative requirements and national control measures)

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<sup>94</sup> In relation to the provision of Article 1(4) of the Directive which stipulates that undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State. This implies that Member States must not provide undertakings established in a third country with competitive advantage in comparison to undertakings established in a Member State, in particular with regard to working conditions and wage costs. Consequently, the Directive indirectly sets the minimum level of protection for these workers (see also section 1 b (2)).

<sup>95</sup> Along the lines of provisions used in other policy areas of Community law, such as the environment, transport or labour migration policy. See in this respect for instance Recommendation (2001/331/EC, OJ 2001 L 118/41) providing for minimum criteria for environmental inspections in the Member States, as well as the communication of 14 November 2007 (COM(2007)0707), in which the Commission announced that it would further develop and improve the minimum rules included in the recommendation. Another example can be found in the Common Position on the Proposal for a Regulation on common rules and standards for ship inspection and survey organisations (recast), June 2008, Doc Council 5726/2/08 REV 2. See also Article 14 of the recently adopted Directive 2009/52 (employers' sanctions).

- Establish more clearly the possibilities of the host Member State acknowledged by the CJEU to require a simple prior declaration before the posting, the documents that should be kept for inspection purposes as well as the requirement to designate a representative or contact person with legal capacity to present and negotiate (if need be) with relevant social partners in accordance with national law/practice;
- Problem 1d (administrative cooperation)
  - Prescribe in more detail the rules on administrative cooperation and exchange of information, including its operational rules, cooperation standards etc. (describing its role, importance and main responsibilities and tasks). This includes prescribing deadlines for replies to information requests;
  - Provide for a proper legal basis for the use of a separate and specific application of the Internal Market Information System (IMI);<sup>96</sup>
  - Provide for a possibility to deal with questions of interpretation arising from the Directive and to facilitate the uniform application of the rules applicable by promoting exchange of experience and best administrative practices (cf. the tasks of the Administrative Commission for the Coordination of Social Security Systems under Regulation 883/2004 which may also issue decisions and recommendations<sup>97</sup>);
  - Provide for the possibility to file or facilitate complaints;
  - Allow trade unions and other third parties having a legitimate interest to engage in judicial or administrative proceedings on behalf or in support of the posted worker with his/her approval;
  - Provide for mechanisms that allow posted workers to recover excessive costs for accommodation;
  - Introduce a system of joint and several liability of contractor and subcontractor with respect to the minimum rates of pay<sup>98</sup>;

#### 5.2.3.2. Sub-option 3b (abuses)

Sub-option 3b would address the drivers underlying problems listed under heading 2 by legislative means through the following measures:

- Indicate the conditions to be verified for posting to take place (such as the temporary nature of services to be provided and establishment of the undertaking);

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<sup>96</sup> A pilot project on the use of IMI is currently ongoing (see section 1). This pilot project will be evaluated after one year in May 2012. On the basis of first statistics and user-feedback (see Annex 4) the Commission will provide for a respective legal base in its proposal for revising the legislative framework on the posting of workers in case of policy option 4a, b or 5. However, this is not prejudging the result of the pilot project. The outcome of the pilot project will be reported to the Council in May 2012 and can be taken into consideration during the negotiations of the proposal.

<sup>97</sup> Article 72 of Regulation (EC) 883/2004.

<sup>98</sup> Cf. Article 8 of Directive 2009/52 (employers' sanction in case of illegal employment); see also the CJEU judgments of 12.10.2004, C-60/03, *Wolff & Müller*, of 9.11.2006, C-433/04, *Commission v Belgium* and of 22.12.2010, C-245/09, *Omalet*.

- Provisions aiming at better preventing abuses or disrespect of law such as the use of *letterbox companies* to post workers abroad<sup>99</sup>;
- Aligning certain provisions of the Directive with the set of rules in force for posted workers in the field of social security, particularly as regards duration and respect of conditions in the home State;

#### 5.2.3.3. Sub-option 3c (terms and conditions of employment)

Sub-option 3c would address the drivers underlying problem 3 by legislative means through the following measures:

- Problem 3a (scope and level of employment conditions of posted workers)
  - Modifying the core of terms and conditions of employment laid down in Article 3 (1);
  - Modifying Article 3 (7) in order to provide for the possibility of a more favourable treatment of the posted worker in the host Member State (beyond Article 3(1)) or even introduce an obligation of equal treatment in comparison to a local worker;
  - Modifying the instruments to be used in imposing terms and conditions of employment (Article 3(8)) and limits to be respected (Article 3(10)).
  - Indicating more explicitly the objective of guaranteeing the protection of workers in the Directive and adding Article 153 of TFEU as a legal base of the Directive, in addition to Articles 53 and 62 (or instead of). However, in view of the case law of the Court of Justice, it is doubtful that a revised Directive could be based on such a combination of Treaty provisions.<sup>100</sup>
  - The monitoring of the terms and conditions of employment in certain sectors, such as cabotage activities, is alleged to be difficult (see problem 1b). Instead of tackling the issue by specific monitoring arrangements (see policy sub-option 3a) it would also be possible to modify the scope of the Directive in order to exclude these sectors from the application of the Directive.<sup>101</sup>
  - Clarifying the link with the recent Directive on interim agency work (Directive 2008/104/EC).
- Problem 3b (notion of minimum rates of pay)
  - Indicating the different constituent elements of the notion of minimum rates of pay;

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<sup>99</sup> Such provisions could draw inspiration from Articles 8, 13 and 14 of Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals, as well as from other pieces of EU legislation.

<sup>100</sup> See for instance case C-338/01, *Commission v. Council*, paras. 55 – 57.

<sup>101</sup> The current regime is limiting road freight cabotage to 3 times a week and with view of a possible full liberalisation when a "social code" is applied. See in this respect "Roadmap to a Single European Transport Area". COM (2011) 144 of 28.3.2011 (Measure 8).

- Clarifying the method of comparison between the pay received in the sending Member State and the minimum rates of pay to be due in the host Member State.

#### 5.2.4. *Option 4: Repealing the Directive*

Repeal of the existing Directive would imply that there would be no more mandatory protection of posted workers by law and/or collective agreements in the host Member State provided by EU law. The law applicable to the employment contract would be determined by the Rome I Regulation. The applicable law would be assessed on a case by case basis, leading to an increase in legal uncertainty. In principle the law of sending Member State would apply. Host Member States could provide for additional protection of posted workers by mandatory rules under national law. However, the burden of proof regarding the applicable law would be with the posted worker in case of dispute with his employer or with the service provider in case of dispute with national authorities in the host Member State. The case law of the Court of Justice predating the adoption of the Directive would again become applicable.<sup>102</sup> The boundaries of the level of protection to be respected with regard to posted workers would be set on a case by case basis by the Court.

This option would increase legal uncertainty. It would create more ground for conflicts and tensions between management and workers and also between posted and domestic workers in host countries. It would negatively affect the protection of posted workers sent from low labour cost countries to high labour cost countries and disrupt competition in the host Member State as well as between Member States. Therefore, this option can be excluded from further assessment at this stage.

#### 5.2.5. *Option 5: Baseline related to the tensions between the freedom to provide services/ establishment and national industrial relation systems (problem 4)*

The Court rulings triggered a wide ranging, intense debate on their consequences for the protection of rights of posted workers, and more generally the extent to which trade unions would continue to be able to protect workers' rights in cross-border situations through collective action, including strike. The rulings have been perceived by unions as acknowledging a primacy of economic freedoms over the exercise of fundamental rights leading to a risk of unfair competition and possibly 'social dumping'.

According to Prof. Monti<sup>103</sup> the Court rulings in 2007 and 2008<sup>104</sup> have exposed the fault lines that run between the single market and the social dimension at national level. They "revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level". He equally pointed out that "the revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration".

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<sup>102</sup> See ECJ judgments in cases C-164/99 (Portugaia); C-165/98 (Mazzoleni); C-49/98, C-50/98, C-52/98 - 54/98, 68/98, 71/98 (Finalarte); C-366/96 and C-369/96 (Arblade); C-272/94 (Guiot). In all these rulings the facts of the case date from the period that the PWD was not adopted yet or still subject to implementation and thus not (fully) applicable.

<sup>103</sup> Report 'A new strategy for the single market' to the President of the Commission, 9 May 2010, page 68.

<sup>104</sup> Cf. footnote 8.

As illustrated by the examples given in section 3.2.4, not addressing the underlying drivers of this problem implies continuing legal uncertainty when new strikes occur. The risk of damage claims could prevent workers and trade unions to exercise their right to strike in situations involving the delocalisation of production units or the provision of services across the borders. This could be considered as running against ILO Convention 87, at least in accordance with ILO Committee of experts' opinion, Article 11 of the ECHR and Article 28 of the EU Charter of Fundamental Rights.

The impact of the baseline scenario goes far beyond purely legal questions related to the right to strike. The Commission's envisaged re-launch of the Single Market is of utmost importance to reach the EU2020 goals for growth and employment. It requires broad support among all important stakeholders. Not acting on this issue would endanger the support for this strategic project from an important part of stakeholders.

#### 5.2.6. *Option 6: Non-regulatory intervention re problem 4*

Option 6 would address the drivers underlying problem 4 by the way of a Communication which would clarify the balance between the use of the right to strike in cross-border situations and the freedom to provide services or establishment. It would draw inspiration from the so-called Monti clause in Regulation 2679/98.<sup>105</sup>

This option could:

- explicitly state that there is no inherent conflict between the exercise of the right to take industrial action, including the right or freedom to strike, and the freedoms of establishment and to provide services, or primacy of one over the other;
- recognise the key role of social partners to take action to protect workers and workers' rights, including through industrial actions;
- stress the important role of national courts<sup>106</sup> in applying the proportionality test on a case-by-case basis, while reconciling the exercise of fundamental social rights and economic freedoms;
- confirm the role and contribution of established alternative dispute resolution mechanisms (such as mediation, conciliation and/or arbitration) at national level, also in case of disputes in trans-national situations.

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<sup>105</sup> The purpose of this Regulation was to renew the commitment to the free movement of goods while excluding any negative impact on the exercise of the right to strike. It sets out a prohibition of actions that "cause grave disruption to the proper functioning of the internal market and inflict serious losses on the individuals affected" whilst recognising that the right to strike is unaffected by that prohibition. A system of early warning about obstacles to free movement of goods and exchange of information between the concerned Member States is set up to build mutual confidence. The Commission plays an arbitration role, as it can request the Member State concerned to remove the identified obstacles to free movement of goods by a given deadline.

<sup>106</sup> As an illustration of the politically sensitive nature of this question, the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations expresses serious concern about the practical limitations on the effective exercise of the right to strike imposed by the ECJ rulings in the cases Viking and Laval. This right is part of the core labour standards recognized by all Member States.

### 5.2.7. Option 7: Regulatory intervention re problem 4

Option 7 would address the drivers underlying problem 4 by legislative means. It would include all the measures mentioned in option 6 and in addition it would contain a clause establishing an information and notification obligation (an alert mechanism) for situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned.

Such an initiative would not establish rules regarding the exercise of the right to strike which should continue to be regulated at national level.

## 6. ANALYSIS OF THE IMPACT OF THE POLICY OPTIONS

### 6.1. Overview

With regard to the policy options concerning the posting of workers the impact of different packages (combinations of sub-options) is assessed against the baseline scenario (option 1). The packages address all drivers underlying problems listed under headings 1, 2 and 3 either by legislative or non-legislative means in order to ensure comparability. Packages which address the drivers underlying problems grouped under 1 by non-legislative means (see section 5.1.1) will not be considered for further analysis since previous attempts to address such problems by non-legislative means have not reached their objectives. Therefore, the following packages will be taken into consideration.

	<i>Sub-option addressing drivers underlying problem 1</i>	<i>Sub-option addressing drivers underlying problem 2</i>	<i>Sub-option addressing drivers underlying problem 3</i>
<i>Package A</i>	<i>3a</i>	<i>2b</i>	<i>2c</i>
<i>Package B</i>	<i>3a</i>	<i>3b</i>	<i>2c</i>
<i>Package C</i>	<i>3a</i>	<i>2b</i>	<i>3c</i>
<i>Package D</i>	<i>3a</i>	<i>3b</i>	<i>3c</i>

*intervention by non-legislative means; intervention by legislative means*

With regard to the policy options concerning the tensions between the freedom to provide services/establishment and national industrial relation systems (problem 4) option 6 (intervention by non-legislative means) and option 7 (legislative intervention) are assessed against the baseline scenario (option 5).

The analysis focuses on economic impacts, including impacts on SMEs and administrative burden, and social impacts, including the impact on fundamental rights. However, there is no significant impact on the environment. The impact on consumers is not measurable and would only take place if the different options would bring more competition among service suppliers. Option 4 (repealing the Directive) has been excluded from further assessment since the expected impact is clearly negative.



## 6.2. Option 1: Baseline posting of workers

### 6.2.1. Economic Impact

Functioning of the internal market: Posting is expected to slightly increase over the next 5 years mainly following the economic cycle. Through exchange of best practice between Member States there might be slight improvement in administrative cooperation with positive effects on enforcement. However, the identified problems will in principle remain. Continuing deficiencies regarding information, monitoring and enforcement as well as abuses and circumvention of the applicable rules will continue to have negative effects on fair competition and the functioning of the single market. Some aspects of the problems may increase since they are interconnected and might mutually reinforce each other. Unnecessary, non-proportionate administrative requirements could be addressed by infringement procedures with slight positive impact on the single market.

Impact on SMEs: SMEs are in particular sensitive to unfair competition on labour costs. This is confirmed by anecdotal evidence.<sup>107</sup> Therefore, continuing deficiencies with respect to fair competition will in particular affect SMEs. SMEs will benefit from infringement procedures leading to less administrative requirements. However, the impact is less significant than in packages A, B, C and D since infringements can only provide legal clarity on a case by case basis.

### 6.2.2. Social impact

Employment and labour market: Negative impact on fair competition will indirectly affect labour markets and job opportunities in sectors and regions where posting is concentrated in receiving countries. Due to wage convergence this effect will slightly decrease.

Worker's rights and job quality: Negative impact on fair competition will indirectly affect working conditions and job quality in sectors and regions where posting is concentrated in sending and receiving countries. Due to wage convergence this effect will slightly decrease.

Participation/industrial relations: Continuing problems regarding abuses, monitoring and enforcement as well as insufficient protection of posted workers in case of conflicts with their employers will reinforce tensions between workers and management or even between posted and local workers, and decrease the acceptance of posting and the single market as such.

Fundamental rights: Article 31 is indirectly affected by the non-respect of the applicable working conditions, in particular in case of abuses and circumvention, the existing gaps in monitoring and enforcement as well as in the protection of posted workers in case of conflict concerning the individual employment conditions.

### 6.2.3. Positions of stakeholders

The baseline option is not supported by any of the EU social partners. Most member States agree that the current legal framework for posting needs to be improved. However, the UK has shown reservations to the idea of introducing new regulation.

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<sup>107</sup> Cf. Annex 3: Summary of case studies, section 1.2.

### **6.3. Package A (Regulatory measures to deal with problem 1, combined with non-regulatory measures to deal with problems 2 and 3)**

#### *6.3.1. Economic Impact*

Functioning of the internal market: Package A (sub-option 3a) will contribute to fair competition and a more level playing field by providing for more clarity regarding monitoring, controls, enforcement (including joint and several liability), and administrative cooperation. It will facilitate the cross border provision of services by clarifying the administrative requirements Member States may impose on service providers. Increased regulatory certainty and cooperation between Member States will reduce barriers to the provision of services and create positive effects on the development of the single market. Facilitated cross border provision of services will increase competition in the internal market for services. Additional costs for cooperation and enforcement measures do not imply relevant barriers to the development of the transnational provision of services since these additional costs are limited (see below and Annexes 5 and 6 on costs and administrative burden).

Package A (sub-option 2b) would positively impact on the functioning of the single market and fair competition by providing for more clarity regarding the notion of posting by non-legislative means in order to fight abuses. Clarifications would support Member States monitoring and enforcement activities. However, these clarifications would not be legally binding and therefore not guarantee the uniform application of the notion. It would not include specific provisions aiming at reducing abuses. Therefore, the impact on reducing abuses will be less significant than in packages B and D (including sub-option 3b) compared to the baseline scenario.

Interpretative guidelines regarding the interpretation of the terms and conditions of employment (sub-option 2c) including the interpretation of Article 3(10) and the notion of minimum rates of pay would have a positive impact on facilitating service provisions and indirectly contribute to a more integrated market for services.

Public authorities: This package will increase involvement of public authorities in providing information, monitoring and control activities as well as administrative cooperation.

Specific regions and sectors: As posting is concentrated in specific regions (e.g. border areas) and sectors (e.g. construction, temporary agency work) these will be more affected than others. (See in this respect country taxonomy in section 3.1.5.2 and evidence on posting flows in section 3.1.2)

Costs/administrative burden: Improving information regarding the applicable working conditions will increase costs for Member States. The current Directive does not specify how information on terms and conditions of employment should be made generally available. Therefore, information via websites in the national language can be considered the status quo (business as usual). Additional costs for required translation and a leaflet are about 90,000 EUR (one-off costs) and 180,000 EUR (repetitive costs per year) in total for 27 Member States.<sup>108</sup> Translation and leaflets are necessary since not all posted workers/companies speak the language of the host Member State and not all posted workers/companies are used to find information on the internet (i.e. SMEs). Transparent and easy accessible information will

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<sup>108</sup> with respect to the situation in Member States in 2007 cf. Annex 2 of Commission staff working document, SEC(2007) 747.

reduce costs for service providers. Posted workers will be better informed about their rights and Member States will benefit from better compliance with the applicable working conditions. Across Member States, one-off costs vary within a very close range (3,000 – 5,000 EUR). The maximum amount per year is estimated to occur in Germany (33,000 EUR). 18 Member States have very low annual costs (less than 5,000 EUR).

Clarifying that only some administrative requirements may be imposed by Member States on service providers (prior notification, obligation to keep certain documents for inspections or obligation to designate a responsible person in order to negotiate with social partners) will limit Member States possibilities for imposing administrative requirements and should reduce administrative burden for service providers.

Providing for more effective and adequate inspections does not imply necessarily an increase in the number of controls and visits. Therefore, resource costs may not increase compared to the status quo. It depends very much on the specific situation of each Member State and on how effective and adequate inspections can be ensured (organisation of labour inspectorates, priority of tasks etc.).<sup>109</sup> Basing inspections on a risk assessment will make inspections more effective and reduce costs for companies in non-risk sectors/situations. Reinforced controls under risk assessment might increase compliance costs for firms in problematic sectors or with a bad record. Derogations are foreseen in accordance with national law and practice as far as national labour inspectorates may not be responsible for the controls in some Member States. Such Member States should establish or maintain (alternative) arrangements (e.g. in collaboration with social partners) which guarantee the respect of working conditions of posted workers.

The use of an IT tool such as IMI could have a significant cost-reducing impact, facilitating direct contacts between competent administrations and reducing the need for translation of correspondence and documents. In addition, if it is decided to use IMI, the benefits could be reaped without additional up-front development cost. Better administrative cooperation may replace controls to a certain extent and hence equally reduce costs. Furthermore, Member States will benefit from the possibility to enforce fines in the sending Member State.

Introducing a system of joint and several liability will not create information obligations and therefore not create administrative burden for firms. However, such a system may encourage companies to adopt preventive measures aimed at a risk selection of subcontractors. Companies might wish, for instance, to carry out a more detailed market research in order to reduce the risk of engaging a subcontractor that will not comply with its minimum wage obligations in the host Member State. Possible change in behaviour of companies while selecting subcontractors, in those Member States that have no joint and several liability system in place, may lead to additional indirect compliance costs of 2 million EUR per year for the whole EU. Such costs can amount to more than 100,000 EUR in five Member States (Belgium, Denmark, Luxembourg, Sweden and United Kingdom). These costs may be mitigated however by the fact that all Member states, while implementing Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally resident immigrants, introduced or will (have to) introduce a joint and several liability mechanism. The introduction of a system of joint and several liability may equally

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<sup>109</sup> With regard to concepts, competences and methods used by labour inspectorates cf. Commission staff working document, SEC(2006) 439, p.25.

have a preventive or deterrent effect on the non respect of workers' rights and thus further increase the positive impact on the creation of a fair level playing field.<sup>110</sup>

For further details see Annexes 5 and 6 on costs and administrative burden. For details on the distribution of costs and cost-related benefits across Member States see Annex 7.

Impact on SMEs: SMEs are in particular sensitive to unfair competition. Therefore, they will benefit from better enforcement of the existing Directive, a more level playing field and fairer competition. With regard to unfair competition on labour costs the positive impact on SMEs in receiving countries will be even more significant. Effective and adequate inspections including risk assessment, improved administrative cooperation, cross-border execution of fines and joint and several liability will contribute to better enforcement of the Directive. However, the positive impact will be less significant than in packages B and D since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses.

SMEs especially in sending countries will benefit from improved information regarding the applicable working conditions and legal clarity regarding administrative requirements in the host Member State. They will particularly benefit from the removal of some disproportionate forms of control measures which imply extra costs.

SMEs that so far benefitted from subcontractors not abiding to the applicable working conditions or e.g. the use of letter-box companies will have to find new business models.

Impact on competitiveness: There is a positive impact on cost and price competitiveness, international competitiveness and competitiveness of SMEs and micro-SMEs (for details see Annex 11).

### 6.3.2. *Social impact*

Employment and labour market: Reducing non-respect of the applicable working conditions and better enforcement of posted workers rights will have a positive impact on existing tensions in receiving high labour cost countries with regard to posting. However, the impact will be less significant than in packages B and D since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses. Transparent information and clarity regarding administrative requirements will positively affect market opportunities for sending firms.

Worker's rights and job quality: Working and employment conditions of posted workers will improve due to better information, monitoring and enforcement. At the same time downward pressure on working condition of local workers in receiving countries will decrease. However, these effects will be less significant than in packages B and D since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses.

Protection of particular groups: Posted workers are vulnerable given their particular situation: temporary employment in a foreign country, difficulty to obtain proper representation, lack of knowledge of local laws, institutions and language. Their protection will improve due to

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<sup>110</sup> Cf. draft final report of the Study on the protection of workers' rights in subcontracting processes in the European Union, in particular chapter 5 conclusions and recommendations, Gent University 2012.

better information, monitoring and enforcement and due to better protection of their right in case of conflicts about their employment relationship.

Participation: Clarification of the role of social partners in providing information, monitoring, enforcement and administrative cooperation will strengthen their involvement. The explicit right for third parties to intervene in Court proceedings concerning the rights of posted workers will improve social partner's involvement.

Access to justice: This package will improve access to justice and relations with responsible public authorities by providing more detailed provisions with regard to the jurisdiction clause in the Directive and a complaint mechanism for posted workers.

Fundamental rights: Freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights) and freedom to conduct a business (Article 16): Transparent information regarding the applicable working conditions for posted workers in the host Member State and legal certainty regarding administrative requirements for foreign service providers will have a positive effect on these rights. In general, better enforcement of the law can be considered as favourable to the development of business and as impacting favourably on the freedoms protected under Article 15.

Fair and just working conditions (Article 31): This option has a positive impact on Article 31 by providing for better information, monitoring and enforcement of the applicable working conditions of posted workers. Better protection of posted workers in case of disputes about individual employment condition will also positively affect Article 31. Better protection and enforcement of working conditions of posted workers indirectly contributes to better protection of local workers and reduces downward pressure on working conditions in high labour cost receiving countries.

Right to an effective remedy and to a fair trial (Article 47): Better protection of posted workers in case of disputes about individual employment condition has a positive impact on rights protected under Article 47.

Non-discrimination (Article 21) and equality between women and men (Article 23): This option has a positive impact on non-discrimination and equality between women and men by providing for better information, monitoring and enforcement of the applicable working conditions of posted workers. Better protection of posted workers in case of disputes about individual employment condition will also positively affect these rights.

Prohibition of child labour and protection of young people at work (Article 32): As above, better information, monitoring and enforcement has a positive impact on the protection of children and young people.

However, the positive impact on Articles 15, 16, 21, 23, 31 and 32 will be less significant than in package B since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses.

### 6.3.3. *Positions of stakeholders*

ETUC welcome the regulatory measures included in this package, but finds insufficient the "soft law" approach for dealing with the issues of interpretation of the current Directive. Employer organizations favour measures leading to improved information and administrative cooperation but do not support the introduction of any form of several and joint liability. They

approve the approach consisting in keeping with the Court jurisprudence on Article 3. Most Member states will welcome the greater transparency brought with the clarification of rules on the definition of posting. In general they will be willing to reinforce administrative cooperation, but most Member States will wish to maintain their capacity to enforce national forms of control. Some Member states may find excessive the measures required for the protection of posted workers' rights to the extent that they may not be easily transposed, or require extra costs.

#### **6.4. Package B (Regulatory measures to deal with problems 1 and 2, combined with non-regulatory measures to deal with problem 3)**

Package B provides for binding rules regarding the definition of posting and additional provisions aiming at reducing abuses and circumvention of the applicable working conditions. Therefore, even if impacts are similar to those of package A (i.e. no changes in costs) they are more significant regarding certain aspects.

##### *6.4.1. Economic Impact*

Functioning of the internal market: The positive impact on fair competition and a more level playing field is more significant against the baseline scenario than in package A since package B will reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses. It gives more leeway for the Commission in its role to control EU law.

Impact on SMEs: SMEs in receiving countries are sensitive to unfair competition on labour costs. Therefore, they will in particular benefit from the positive impact on fair competition and a more level playing field. The positive impact in this respect is more significant against the baseline scenario than in package A since package B will reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses.

Impact on competitiveness: The positive impact on competitiveness is more significant than in package A since package B will reduce abuses and circumvention of the applicable rules more effectively (for details see Annex 11).

##### *6.4.2. Social impact*

Employment and labour market: Reducing abuses and circumvention of the applicable working conditions and better enforcement of posted workers rights will have a positive impact on existing tensions in receiving high labour cost countries with regard to posting.

Worker's rights and job quality: The positive impact on worker's rights and job quality as well as reducing potential downward pressure on local wages is more significant against the baseline scenario than in package A since package B will better reduce abuses and circumvention of the applicable rules by providing for respective provisions and binding legal clarity regarding the definition of posting.

Fundamental rights: The positive impact on Articles 15, 16, 21, 23, 31, 32 and 47 of the Charter is more significant against the baseline scenario than in package A since package B will reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and the prevention of abuse in the provision of cross-border services.

### 6.4.3. *Positions of stakeholders*

While ETUC is in favour of more binding rules, employers' organisations may adopt a more nuanced position. Binding rules on the definition of posting may favour competing undertakings in receiving countries, but will limit the activity of some companies in sending countries. For Member States, the fact that similar criteria are already applied in the context of social security coordination will act as a facilitating factor in implementation. Host Member States will tend to favour stricter criteria for the definition of posting.

## **6.5. Package C (Regulatory measures to deal with problems 1 and 3, combined with non-regulatory measures to deal with problem 2)**

The impact of package C regarding problems 1 and 2 is close to package A. However, the overall impact is fundamentally different since package C includes sub-option 3c.

### 6.5.1. *Economic Impact*

Package C (sub-option 3c) would give the host Member State the possibility to impose a wider set of employment conditions to foreign undertakings than currently foreseen in Article 3 of the Directive. It would also allow for establishing wages for posted workers in excess of the minimum wage rate set by law or collective agreement.

Functioning of the internal market: Like package A and B this sub-option will facilitate the cross border provision of services by clarifying the administrative requirements Member States may impose on service providers. Increased regulatory certainty and cooperation between Member States will reduce barriers to the provision of services and create positive effects on the development of the single market. However, the economic incentive for posting and therefore for cross-border provision of services would be greatly reduced in this package. Foreign undertakings would have to know in detail the entire body of labour law of all Member States they intended to post workers to. Equal treatment of posted workers as regards wages would suppress the wage cost difference that is an incentive for posting. Indeed, it would create a disincentive given the extra costs incurred by posting (transport, accommodation, administrative formalities). Therefore, this option will decrease competition in the internal market for services in some sectors and regions. Local firms in high labour cost countries will benefit from reduced competition on labour costs. However, firms in sending countries would lose business opportunities.

Public authorities: Raising significantly the level of protection of posted workers may encourage abuses and circumvention of the applicable rules as well as undeclared work with negative impact on fair competition. Therefore, in order to maintain similar positive impacts with regard to fair competition as package A, package C would need additional efforts regarding monitoring, controls and enforcement. Therefore this option will increase involvement of public authorities in providing information, monitoring and control activities as well as administrative cooperation. This impact will be more significant than in package A and B in order to compensate the more complex structure of applicable working conditions. In particular, the information to be provided via internet or leaflet would have to cover the entire employment legislation.

Specific regions and sectors: Beyond the impact in package A, this sub-option will particularly affect sectors and regions where postings from low to high labour cost countries

are concentrated. (See in this respect country taxonomy in section 3.1.5.2 and evidence on posting flows in section 3.1.2)

Costs/administrative burden: Beyond the impact described in package A, additional compliance costs for service providers will be caused by less transparency of the applicable working conditions. They will have for instance to hire legal experts in order to give advice on the obligations imposed by the full employment legislation of the host country. Or they will have to face obligations for which they were not prepared, after contracts have been concluded.

Impact on SMEs: SMEs are in particular sensitive to competition on labour costs. Therefore, sending SMEs in low labour cost countries will be negatively affected by this package. The effect on local SMEs in high labour cost countries is less clear: while they would in principle benefited due to reduced (legal) competition, they might be affected negatively by an upsurge in undeclared work and other illegal practices.

As SMEs in sending countries are in particular sensitive to administrative burden, they will be particularly affected by increased costs regarding better monitoring and enforcement. At the same time, such SMEs will benefit from improved information regarding the applicable working conditions and legal clarity regarding administrative requirements in the host Member State.

#### 6.5.2. *Social impact*

Employment and labour market: Extending the protection of posted workers beyond the core of mandatory working and employment conditions and/or providing for equal pay with local workers might reduce posting flows and have a negative impact on job opportunities for workers in low labour cost countries. Local firms and workers in receiving high labour cost countries will in principle benefit from less competition on labour costs. Better enforcement of posted workers rights will have a positive impact on fair competition in receiving high labour cost countries with regard to posting. However, the positive impact on fair competition is less significant against the baseline scenario than in package B or D since package C will not reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses. The impact in this respect is similar to package A.

At the same time, raising significantly the level of protection of posted workers may increase abuses and circumvention of the applicable rules as well as undeclared work if not compensated by additional efforts regarding monitoring, controls and enforcement. Equal working conditions for local and posted workers will greatly reduce the flows of legal posting.

Worker's rights and job quality: There will be a positive impact on worker's rights and job quality of posted workers, to the extent that legal posting continues to take place. Potential downward pressure on local wages in high labour cost countries could be reduced.

Protection of particular groups: Beyond the positive impact of package A and B this sub-option will raise the level of protection of posted workers.

Participation: Beyond the positive impact of package A and B this package would strengthen the role of unions in setting working conditions trough collective agreements by providing for equal treatment on local level.



Fundamental rights: Fair and just working conditions (Article 31): compared to package A and B, this option would raise the level of protection of posted workers with regard to working conditions. A higher level of protection of posted workers would have a positive impact on Article 31 of the Charter, as it would contribute to better protection of local workers and reduce downward pressure on working conditions in high labour cost receiving countries.

#### 6.5.3. *Positions of stakeholders*

Packages C and D would deserve support by ETUC, as sub-option 3c corresponds to the solution long advocated by this organisation. They would be strongly opposed however by employers' organisations. Member States have not shown to favour this approach either, and especially sending Member states will strongly oppose sub-option 3c.

### **6.6. Package D (Regulatory measures to deal with problems 1, 2 and 3)**

The impact of package D is close to the impact of package C. However, the positive impact of package D on fair competition and a more level playing field is more significant against the baseline scenario than in package C since package D will reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses. In this respect impacts are similar to package B.

### **6.7. Option 5: Baseline tensions between the freedom to provide services/establishment and national industrial relation systems (problem 4)**

#### 6.7.1. *Economic Impact*

Functioning of the internal market: Regulatory uncertainty in case of conflicts will negatively impact on the functioning of the internal market. Possible loss of support for the single market of an important part of stakeholders would have a significant negative impact. It would create an unfriendly environment for service providers and could include protectionist behaviour.

#### 6.7.2. *Social impact*

Worker's rights and job quality: Regulatory uncertainty in case of conflict between the right to strike and fundamental economic freedoms creates a risk of damage claims; doubts regarding the jurisdiction and the role of national courts with regard to the exercise of the proportionality test concerning strikes in cross-border conflicts may prevent trade unions from playing their role in protecting worker's rights. This creates a negative impact on the protection of worker's rights.

Participation: As above. There will also be an indirect negative effect on the functioning of national industrial relation systems.

Fundamental rights: Fair and just working conditions (Article 31): There is an indirect negative effect on Article 31, since regulatory uncertainty in the present context may prevent trade unions from playing their role in protecting worker's rights in case of cross-border social conflict.

Right of collective bargaining and action (Article 28): There is a direct negative impact on Article 28 since regulatory uncertainty in this context will weaken trade union involvement in protecting worker's rights.

## **6.8. Option 6: Non-legislative intervention**

### *6.8.1. Economic Impact*

Functioning of the internal market: Clarifying the extent to which trade unions can make use of the right to strike in cross-border situations involving the freedom to provide services and the freedom of establishment would have a positive impact on the functioning of the single market, to the extent that it would reduce the scope for legal uncertainty.

### *6.8.2. Social impact*

Worker's rights and job quality: There is an indirect positive effect on the protection of worker's rights, since this option would clarify social partner's role in protecting worker's rights in case of cross-border social conflict as well as providing for more legal clarity in case of conflict between the right to strike and fundamental economic freedoms.

Participation: This option will imply trade union involvement in protecting worker's rights by providing more legal clarity in case of conflict between the right to strike and fundamental economic freedoms. There might be an indirect positive effect on the functioning of national industrial relation systems. Since the material content of the right to strike differs between the Member States, stressing the important role of national courts in applying the proportionality test on a case-by-case basis while reconciling the exercise of fundamental social rights and economic freedoms, should positively affect national industrial relation systems.

### *6.8.3. Positions of stakeholders*

An interpretative Communication may not tackle the perceived lack of social dimension of the single market in an entirely satisfactory way. It would not satisfy major stakeholders and certain parties in the European Parliament (see also section 6.9.3).

Moreover, the contents of the interpretative Communication could equally continue to be the source of criticism (such as that the Commission did not correctly reflect the contents and/or consequences of the case law of the Court) as happened with respect to the 2006 Communication (see also under 1.3 above) which provided guidance on the compatibility with Union law, as interpreted in the Court's jurisprudence, of national control measures but remained the object of continued criticism by a number of Member States.

## **6.9. Option 7: Legislative intervention**

Option 7 has the same positive impacts as option 6, to the extent that it pursues the same objective of clarifying the jurisprudence of the Court of Justice. Impacts should be more significant since a Regulation provides for more legal certainty than a soft law approach (option 6). An alert mechanism would have additional positive impacts. A legislative intervention would express a more committed political approach by the Commission to respond to a problem that is seen with great concern by the unions and parts of the European Parliament.

### *6.9.1. Economic Impact*

Functioning of the internal market: Establishing an alert mechanism for situations causing serious damage or grave disruption, or creating social unrest will have an indirect positive impact, to the extent that it would increase transparency and provide timely information to

Commission, national authorities and stakeholders of concerned Member states allowing them to intervene in a more coordinated way if necessary.

Public authorities: Providing for an alert mechanism Member States and the Commission would be involved. However, there are no significant costs and/or administrative burden.

### 6.9.2. *Social impact*

Fundamental rights: There is an indirect positive effect on Article 31 (Fair and just working conditions), since this option will underline the key role of social partners in protecting worker's rights as well as providing for more legal certainty in case of conflict between the right to strike and fundamental economic freedoms. This option will have a positive impact on Article 28 (Right of collective bargaining and action) clarifying the jurisprudence of the Court of Justice that there is no inherent conflict between the exercise of the right to take industrial action, including the right or freedom to strike, and the freedoms of establishment and to provide services, or primacy of one over the other. Recognising the key role of social partners to take action to protect workers' rights, including through industrial actions will positively affect Article 28.

### 6.9.3. *Positions of stakeholders*

A legislative intervention is the favoured option of ETUC. However, this organization has expressed the view that the principle of primacy of social rights over economic freedoms should be explicitly stated in primary or secondary law. The envisaged initiative would not go as far and would instead re-state the principle of "equal footing" with no primacy of one right over the other.

Employers' organizations will insist on the role of national institutions. Member states show in general a reserved position towards a legislative intervention and will analyse carefully the extent to which the competences established by the Treaty have been respected. Some national Parliaments may evoke the subsidiarity aspect and take a negative stand.

## 7. COMPARISON OF THE OPTIONS

The options have been compared with regard to their effectiveness in achieving the specific objectives of the initiative, their efficiency (cost-effectiveness) in achieving these objectives and coherence with the general objectives of the EU.

### 7.1. Effectiveness with regard to the specific objectives

#### 7.1.1. *Option 1*

(a) Better protecting the rights of posted workers: Option 1 is not effective in achieving this objective. Since the existing problems remain unaddressed better protection will not be achieved.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 1 is not effective in achieving this objective. There will be a slight positive impact resulting from slight improvement in administrative cooperation, with regard to unnecessary administrative requirements and wage convergence. However, most of the existing problems remain unaddressed.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 1 does not address the existing tensions and is therefore not effective in this respect.

#### *7.1.2. Package A*

(a) Better protecting the rights of posted workers: Package A is effective in achieving this objective. Better information, monitoring, enforcement and protection of posted workers in case of conflict with their employers increase the protection of posted workers. However, package A is less effective than package B, C and D since these options provide for additional protection.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package A is effective in achieving this objective by improving information, clarifying administrative requirements as well as providing for better respect of the applicable working conditions. However, it is less effective than package B since B provides for anti abuse provisions as well as for binding legal clarity regarding the definition of posting. It is more effective than package C and D since they make the cross-border provision of services more complex.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package A does not address the existing tensions and is therefore not effective in this respect.

#### *7.1.3. Package B*

(a) Better protecting the rights of posted workers: Package B is effective in achieving this objective. Better information, monitoring, enforcement and protection of posted workers in case of conflict with their employers increase the protection of posted workers. A clearer definition of posting and preventing abuses and circumvention of the applicable rules provides for additional protection compared to package A. However, it is less effective than packages C and D since this option would provide for a higher level of applicable working conditions.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package B is effective in achieving this objective by improving information, clarifying administrative requirements, providing for better respect of the applicable working conditions as well as for anti abuse provisions as well as for binding legal clarity regarding the definition of posting. It is more effective than packages A, C and D.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package B would not address the existing tensions and is therefore not effective in this respect.

#### *7.1.4. Package C*

(a) Better protecting the rights of posted workers: Package C looks more effective than packages A and B in achieving this objective since it provides for a higher level of applicable working conditions (equal pay for equal work). However, its effects are very uncertain to the extent that the economic disincentive created for legal posting may seriously reduce the flow of posting, job opportunities or encourage undeclared work. It is less effective than package D

since it does not provide for anti abuse provisions as well as for a binding legal clarity regarding the definition of posting.

(b) Facilitating cross-border provision of services and improving climate of fair competition: With regard to facilitating cross-border provision of services package C is less effective, since service providers would have to respect the full body of employment legislation in the host country and provide for a higher level of working conditions. This clearly would reduce the economic incentive for posting in many situations. The existing problems concerning information and administrative requirements would be addressed.

With regard to improving fair competition package C is effective. However, it would give more weight to the interests of service providers in (high labour cost) receiving countries relatively to competitors in (low labour cost) sending countries. Regarding abuses C is less effective than B and D.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package C does not address the existing tensions and is therefore not effective in this respect.

#### *7.1.5. Package D*

(a) Better protecting the rights of posted workers: Package D is apparently more effective in achieving this objective. It looks more effective than packages A and B in achieving this objective since it provides for a higher level of applicable working conditions (equal pay for equal work). However, its effects are very uncertain to the extent that the economic disincentive created for legal posting may seriously reduce the flow of posting, job opportunities or encourage undeclared work. It is more effective than C since it provides for anti abuse provisions as well as for a binding legal clarity regarding the definition of posting.

(b) Facilitating cross-border provision of services and improving climate of fair competition: With regard to facilitating cross-border provision of services package D is less effective, since service providers would have to respect a higher level of protection with regard to working conditions in the host Member State, and as a result many would be discouraged from posting workers abroad in accordance legal with rules. The existing problems concerning information and administrative requirements would be addressed. However, the amount of information to be provided would increase substantially at least for some Member States

With regard to improving fair competition package D is effective to the same extent than package B. However, it would weight interests of service providers in particular in (low labour cost) sending and (high labour cost) receiving countries differently. With regard to abuses it is more effective than package C.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package D does not address the existing tensions and is therefore not effective in this respect.

#### *7.1.6. Option 5*

(a) Better protecting the rights of posted workers: Option 5 does not address the existing tensions and is therefore not effective in this respect.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 5 does not address the existing tensions and is therefore not effective in this respect.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 5 does not address the existing tensions and is therefore not effective in this respect.

#### *7.1.7. Option 6*

(a) Better protecting the rights of posted workers: Option 6 is effective in achieving this objective, since it clarifies that trade unions may continue to defend worker's rights in cross-border situations through collective action, including the right to strike.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 6 indirectly contributes to fair competition. However, compared to option 7 this indirect effect is weaker and the option less effective since it falls short from establishing an early alert system.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 6 is effective, however, less effective than option 7.

#### *7.1.8. Option 7*

(a) Better protecting the rights of posted workers: Option 7 is effective in achieving this objective, since it clarifies that trade unions may continue to defend worker's rights in cross-border situations through collective action, including the right to strike. It is more effective than option 6 since a legal text provides for more legal certainty than a interpretative documents from the Commission.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 7 indirectly contributes to fair competition. It is more effective than option 6 since it creates an alert mechanism in cases of grave disruption of the single market.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 7 is most effective option in this respect.

### **7.2. Efficiency (cost-effectiveness) with regard to the specific objectives**

#### *7.2.1. Option 1*

Option 1 is not efficient since it is not effective.

#### *7.2.2. Package A*

(a) Better protecting the rights of posted workers: Package A is efficient in achieving this objective. However, it is less efficient than package B since costs are the same while package B is more effective.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package A is efficient in achieving this objective. However, it is less efficient than Package B since costs are the same while package B is more effective.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package A is not efficient since it is not effective in this respect.

### 7.2.3. *Package B*

(a) Better protecting the rights of posted workers: Package B is efficient in achieving this objective. It is more efficient than package A. However, it is not clear if it is more or less efficient than packages C and D. On the one hand, packages C and D provide apparently for a higher level of protection of posted workers; on the other hand, packages C and D produce higher compliance costs and create disincentives that may reduce the flow of posting, job opportunities or encourage undeclared work. Due to the lack of data regarding these costs and the degree of disincentive thereby created, but also due to the difficulty to put these costs in relation to a higher level of protection, it is impossible to decide which option would be more efficient.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package B is efficient in improving climate of fair competition. It is more efficient than package A since costs are the same while package B is more effective. It is also more efficient than packages D since effectiveness is the same while package D produces higher costs. Package C produces higher costs and is less effective than B.

Package B is efficient in facilitating cross-border provision of services to the same extent than package A. Package B is more efficient than package C and D, since C and D are less effective and produce higher costs.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package B is not efficient since it is not effective in this respect.

### 7.2.4. *Package C*

(a) Better protecting the rights of posted workers: Package C is efficient in achieving this objective. However, it is not clear if it is more or less efficient than package B. On the one hand, package C provides for a higher level of protection and achieves more effectively this objective, on the other hand, option 5 produces higher compliance costs. Due to the lack of data regarding these costs but also due to the difficulty to put these costs in relation to a higher level of protection, it is impossible to decide which package would be more efficient.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package C is efficient in improving climate of fair competition. It is less efficient than option package B since package C produces higher costs.

With regard to facilitating the cross-border provision of services packages A and B are more efficient than package C since package C is less effective and produces higher costs.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package C is not efficient since it is not effective in this respect.

#### 7.2.5. *Package D*

(a) Better protecting the rights of posted workers: Package D is efficient in achieving this objective. However, it is not clear if it is more or less efficient than package B. On the one hand, package D provides for a higher level of protection and achieves most effectively this objective, on the other hand, package D produces higher compliance costs. Due to the lack of data regarding these costs but also due to the difficulty to put these costs in relation to a higher level of protection, it is impossible to decide which option would be more efficient. Package D is more efficient than package C since costs are the same and it is more effective.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Package D is efficient in improving climate of fair competition. It is less efficient than package B since effectiveness is the same while package D produces higher costs.

With regard to facilitating the cross-border provision of services package A and B are more efficient than package D since package D is less effective and produces higher costs.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Package D is not efficient since it is not effective in this respect.

#### 7.2.6. *Option 5*

(a) Better protecting the rights of posted workers: Option 5 is not efficient in achieving this objective since it is not effective.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 5 is not efficient in achieving this objective since it is not effective.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 5 is not efficient in achieving this objective since it is not effective.

#### 7.2.7. *Option 6*

(a) Better protecting the rights of posted workers: Option 6 is efficient in achieving this objective. It is less efficient than option 7 since option 7 is more effective and additional costs are not significant.

(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 6 is efficient in achieving this objective. It is less efficient than option 7 since option 7 is more effective and additional costs are not significant.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 6 is efficient in achieving this objective. It is less efficient than option 7 since option 7 is more effective and additional costs are not significant.

#### 7.2.8. *Option 7*

(a) Better protecting the rights of posted workers: Option 7 is most efficient in achieving this objective.



(b) Facilitating cross-border provision of services and improving climate of fair competition: Option 7 is most efficient in achieving this objective.

(c) Reducing tensions between national industrial relation systems and the freedom to provide services/freedom of establishment: Option 7 is most efficient in achieving this objective.

### 7.3. Coherence with the general objectives

Option 1 and 5 are not coherent with the general objectives, since they are not effective regarding the specific objectives.

All the packages are coherent with the general objectives. Package B better achieves the objectives than package A. Packages C and D better contributes to the social side of the general objective than packages A and B. D contributes more than C. However, packages C and D are less coherent with regard to the economic side of the general objective. Package B is most coherent with regard to the general objectives.

Option 7 is more coherent with regard to the general objectives than option 6.

### 7.4. Overview table:

	Option 1	Package A	Package B	Package C	Package D	Option 5	Option 6	Option 7
	Baseline posting	Sub-options 3a, 2b, 2c	Sub-options 3a, 3b, 2c	Sub-options 3a, 2b, 3c	Sub-options 3a, 3b, 3c	Baseline tensions	Non-regulatory	Regulatory
<b>Specific Objective 1</b> Better protecting the rights of posted workers	0	+	+/++	+/++ *	+/++ *	0	0/+	+
<b>Specific Objective 2</b> Facilitating cross-border provision of services/ Improving climate of fair competition	0	+	+/++	-	-	0	0	0
<b>Specific Objective 3</b> Reducing tensions between national industrial relations systems and the freedom to provide services/freedom of establishment	0	0	0	0/+	0/+	0	+	++
<b>Cost-effectiveness</b>	0	+	+/++	0/+	0/+	0	+	+
<b>Coherence with general objectives</b>	0	+	+/++	0/+	0/+	0	+/++	++
++ very positive; + positive; 0 neutral; - negative; n/a option is not intended to contribute to this objective * Effects are uncertain, see sections 7.1.4 and 7.1.5.								

## **8. THE PREFERRED OPTION**

### **8.1. Combination of package B and option 7**

The preferred option is a combination of package B and option 7.

Package B is overall most effective and efficient in addressing the specific objectives ‘Better protecting the rights of posted workers’, ‘Improving climate of fair competition’ and ‘Facilitating the cross-border provision of services’. It is also most coherent with regard to the general objectives.

Option 7 is most effective and efficient with regard to the specific objective ‘Reducing tensions between national industrial relation systems and the freedom to provide’. The option is most coherent with regard to the general objectives.

The preferred option is proportionate since the costs are relatively small and well-contained while the benefits are significant. The identified administrative burden for public authorities implied by improved information is very low or even meaningless for the majority of Member States. However, such action is instrumental in reducing the probability of non-compliance with national law. While not involving direct administrative burden for companies or authorities, the introduction of a system of joint and several liability may induce additional compliance costs for companies in those Member States that do not have such a system. However, such costs are mostly moderate and the additional knowledge gained by main contractors may help them taking safer decisions while reducing opportunities for non-complying subcontractors.

### **8.2. Legal form**

#### *8.2.1. Legal form of package B*

##### 8.2.1.1. Regulation

There are a priori several alternative legal forms for implementing the policy actions contained in package B. However, a closer examination excludes the possibility to use a Regulation for that purpose.

1. The applicable Treaty provisions with respect to the internal market on which the current Directive is based (Articles 53 and 62 TFEU) do not allow for Regulations but only for Directives under OLP.
2. The provisions concerning the approximation of laws allow for either Directives by unanimity (Article 115 TFEU) or Regulations or Directives under OLP (Article 114 TFEU). The latter, however, provides that the envisaged measures do not relate to the rights and interests of employed persons (Article 114 paragraph 2 TFEU). In addition, it may reveal difficult to reconcile the heterogeneous nature of control systems across Member States with the uniformity of the solutions brought forward by a Regulation.
3. Article 352 TFEU allows for the adoption of Regulations as well as Directives. However, it can only be used in those cases where the Treaty has not provided the necessary powers to implement actions. Bearing in mind the above indicated

available legal bases in the Treaty, this Article would equally be impossible to use as legal basis for a legislative proposal in the form of an enforcement Regulation.

4. Article 197 TFEU allows for the use of Regulations, provided they are limited to the objective of improving administrative cooperation between responsible national authorities, which fails to address the large policy range of Package B. In addition, even the existing problems in this area could not be adequately addressed, since such a Regulation, in view of its legal base, would have to leave open the option of individual Member States to opt out from the established scheme. This would weaken considerably the effectiveness of any such scheme. The exclusion of harmonisation also poses a problem. Even a basic requirement such as an agreed deadline for handling information requests, already entails a form of harmonisation and would not be allowed on the basis of this Article. Article 197 is only suited for accompanying measures (training, exchange programmes etc.). It could improve awareness and competence of personnel of public authorities

#### 8.2.1.2. Amending the existing Directive

Package B could be realised by amending Article 1, 2, 4, 5 and 6 of the Directive. The result would be one amended (consolidated) Directive.

#### 8.2.1.3. A separate new enforcement Directive

Package B could also be realised by a separate new enforcement Directive.<sup>111</sup> Such an enforcement Directive would express more clearly the policy objectives of the Commission – improving and reinforcing the transposition, implementation and enforcement in practice of the Directive, including measures to prevent and sanction any abuse and circumvention of the applicable rules - than a proposal amending the existing Directive. It would more clearly express the Commission's view that the key problems lie with the enforcement of the Directive and not with the established mechanism for the determination of terms of employment. The enforcement Directive would repeal Articles 4, 5 and 6 of the existing Directive and stand next to it. The enforcement Directive would be based on the same legal basis as the Directive (Articles 53 and 62 TFEU). The ordinary legislative procedure (OLP) would be applicable.

Therefore, the most appropriate legal form for package B would be a separate enforcement Directive. However, an amending Directive could also be possible. The difference is one of policy approach and message rather than legal substance.

#### 8.2.2. *Legal form of option 7*

A legislative initiative clarifying the exercise of the fundamental right to collective action within the context of the freedom of establishment and the freedom to provide services would have to be adopted on the basis of Article 352 TFEU which is reserved for those cases where the Treaty has not provided the necessary powers to implement actions which 'should prove necessary to attain one of the Treaty objectives'. Such an initiative would not establish rules regarding the exercise of the right to strike. The Court stated clearly that Article 153(5) TFEU does not give the Union the competence to regulate the right to strike, which thus should

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<sup>111</sup> Cf. Directive 1999/95 of 13 December 1999 concerning the enforcement of provisions in respect to seafarers' hours of work on board ships calling at Community ports, OJ 2000 L 14/29.

continue to be regulated at national level. However, this does not mean that this right to take industrial action falls outside the scope of EU law, or in other words, that it renders EU law inapplicable, and that the exercise of this right may be subject to certain restrictions.

Article 352 TFEU allows for the adoption of Regulations and Directives. The issue at stake requires legal clarity and legal certainty. Therefore, the legislative initiative should take the form of a Regulation.

A possible alternative could be to present option 7 and package B in the same legal instrument – be it under the form of an enforcement Directive or of an amended Directive 96/71. However, since Package B only concerns the freedom to provide services while option 7 also covers the freedom of establishment, such an option would only cover potential industrial conflict situations related to the posting of workers in the framework of the provision of services (cf. Laval case) but not situations related to envisaged restructuring and/or delocalisation involving more than one Member State (cf. Viking-Line). Moreover, due to a lack of specific provisions in Directive 96/71/EC, the inclusion of option 7 in an Enforcement Directive would raise problems of legal consistency. In particular, the establishment of an alert mechanism could be disputed by going beyond the scope of Directive 96/71/EC itself, which the former is supposed to clarify and enforce. Therefore, such a combination would have a more limited scope and less substantive element provisions.

## **9. MONITORING AND EVALUATION**

Monitoring and evaluation arrangements for the preferred option consist of several inter-related aspects.

### **9.1. Monitoring**

Monitoring has already taken place periodically via Implementation Reports issued by the Commission. This will continue in the future.

While not formally a monitoring mechanism, the ECPW expert committee has discussed regularly problems of the Directive. It should continue to play a role in the follow-up of the implementation of the Directive, as well as the new legal framework. This role should be explicitly recognized in the legal initiative.

The preferred option implies the development of a more effective information system associated with Posting of Workers. Once the substance of future action is clarified, the Commission together with ECPW will develop a strictly limited set of indicators which cover relevant aspects of the operation of the Directive. The initial proposal for a list of indicators to be tracked is the following (after each indicator the source of the information is provided): (i) the number of searches of national posting websites (provided by Member States); (ii) the number of inter-country cooperation projects on posting promoted by national authorities or social partners (Member States); (iii) the number of requests made through the special IMI application for posting (Commission); (iv) number of litigation cases in national courts (Member States); (v) percentage of inspections leading to sanctions (Member States); (vi) number of cases reported under the alert mechanism established for cross-border industrial conflicts (Commission). The Commission will also continue to collect administrative data on posting based on social security data. With regard to frequency of use, these indicators will be

regularly presented and discussed in the ECPW, and will also form part of the set of indicators to be used in the evaluation mentioned below.

## **9.2. Evaluation**

Five years after the deadline for transposition there will be a on-going evaluation. The main focus of this evaluation will be to assess the initial effectiveness of the Directive as modified. This will include an assessment if the operational objectives have been reached. Emphasis will be placed on analysis of enhanced cooperation arrangements between Member States and quality of information generated by these arrangements. This evaluation will be carried out by the Commission with the assistance of external experts. Terms of reference will be developed by Commission services. Stakeholders will be informed of and asked to comment on the terms of reference through the ECPW, and they will also be regularly informed of the progress of the evaluation and its findings. The findings will be made public.

## Annexes

Annex 1: Data on posting of workers

Annex 2: Simulation of future trends of posting

Annex 3: Summary of the case studies carried out by Ismeri Europa

Annex 4: Pilot project on the use of IMI

Annex 5: Administrative burden and other costs resulting from package B and option 7 (overview)

Annex 6: Quantification of administrative burden and other costs resulting from package B and option 7

Annex 7: Distribution of costs and cost-related benefits across Member State

Annex 8: Anecdotal evidence on the basis of information provided by European Migrant Workers Union (EMWU)

Annex 9: Summary of replies to the public consultation on the Single Market Act

Annex 10: Summary of CJEU cases: Viking Line, Laval, Rüffert and Commission v. Luxembourg

Annex 11: Expected impact on competitiveness of EU industry (Competitiveness Proofing)

Annex 12: Text of the Directive 96/71/EC

## ANNEX 1: Data on posting of workers<sup>112</sup>

**Table 1: Number of postings (E101) from and to EU27 and EFTA countries**

Country	Postings by sending country					Postings from EU27/EFTA to receiving country				
	2005	2006	2007	2008	2009	2005	2006	2007	2008	2009
AT	11,146	10,563	12,978	16,177	18,757	32,475	30,517	39,142	37,417	44,806
BE	:	51,889	46,212	51,173	50,774	123,080	127,627	112,766	109,000	95,589
BG	:	:	4,743	3,817	4,366	:	:	2,800	3,877	5,096
CY	292	584	143	76	29	3,591	3,300	2,368	2,048	1,524
CZ	14,303	22,354	15,803	16,383	17,150	:	:	16,647	15,985	12,756
DE	169,627	194,013	192,093	164,466	170,345	13,967	14,893	216,911	227,961	221,222
DK	11,872	11,188	7,071	7,920	7,063	12,281	17,609	17,666	15,031	10,928
EE	5,894	7,955	9,454	10,140	8,384	3,536	3,181	2,059	1,767	1,225
EL	1,099	958	3,179	2,717	2,265	11,151	9,683	9,652	9,247	10,489
ES	:	:	26,885	32,318	34,349	65,145	60,445	86,426	55,217	63,390
FI	5,452	4,579	2,451	5,599	4,929	13,340	16,088	18,760	10,941	16,920
FR	311,875	254,321	232,102	206,439	160,774	77,291	127,806	148,610	153,488	155,601
HU	23,795	21,131	36,178	43,204	36,403	8,271	8,512	8,264	9,009	7,438
IE	:	1,707	1,074	1,222	1,941	8,818	7,554	7,753	6,010	5,357
IT	:	1,542	3,320	24,451	29,955	50,236	46,063	55,688	50,730	50,365
LT	2,641	2,729	2,743	4,482	5,486	3,415	4,066	5,905	3,003	1,655
LU	29,065	38,005	46,827	57,264	57,276	30,242	42,537	27,969	26,718	25,042
LV	3,900	2,329	2,277	1,289	1,971	3,332	3,128	3,003	1,679	1,921
MT	:	133	101	162	112	3,017	2,750	1,634	1,628	2,976
NL	37,096	36,166	9,437	9,366	9,924	55,205	80,416	88,656	84,486	81,852
PL	136,368	195,206	238,946	228,722	204,374	13,506	13,142	14,512	13,996	14,704
PT	36,519	26,333	66,001	19,188	65,012	10,572	9,420	12,579	12,831	13,028
RO	:	:	9,030	13,096	26,116	:	:	10,752	11,781	9,320

<sup>112</sup>

Ismeri Europa, 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.

SE	8,998	9,529	5,171	2,571	5,503	21,019	21,519	20,626	20,926	20,792
SI	3,067	9,333	13,032	17,162	17,835	4,645	4,317	3,802	3,375	2,969
SK	5,471	13,093	21,213	35,693	24,688	7,648	6,686	4,417	6,162	7,193
UK	38,906	40,679	43,251	36,436	32,284	38,909	36,961	37,905	37,733	34,760
CH	:	6,717	10,496	10,751	10,990	27,779	25,875	29,243	38,618	51,987
IS	146	184	67	110	123	3,035	2,898	2,245	1,136	699
LI	24	16	39	36	64	2,063	1,291	812	871	833
NO	1,158	1,101	1,065	1,251	1,291	22,953	34,307	33,828	23,731	21,603
<b>Total</b>	<b>858,714</b>	<b>964,337</b>	<b>1,063,382</b>	<b>1,023,681</b>	<b>1,010,533</b>	<b>670,522</b>	<b>762,591</b>	<b>1,043,400</b>	<b>996,402</b>	<b>994,040</b>
EU-15	661,655	681,472	698,052	637,307	651,151	563,731	649,138	901,109	857,736	850,141
EU-12	195,731	274,847	353,663	374,226	346,914	50,961	49,082	76,163	74,310	68,777
EFTA	1,328	8,018	11,667	12,148	12,468	55,830	64,371	66,128	64,356	75,122

SOURCE: EC Reports (2009 and 2011), elaborated by Ismeri Europa.

Annual data are not perfectly comparable because EC criteria of data collection were modified in 2007.

Note that "Postings" refers to the number of E101 certificates issued for "posting according to Art. 14(1)(a), 14a(1)(A), 14b(1), 14b(2), Council reg. 1408/71, sent to EU 27 or EFTA Countries.

Differences in Total-sent and Total-received are due to the fact that in receiving countries postings are often not recorded.

Sending countries, where the certificates are issued, better reflect the number of postings.

Data for 2005 do not include postings from BE, BG, CZ, IE, ES, IT, LV, MT, RO, and CH.

Data for 2006 do not include postings from BG, ES, RO and CH.

Data for 2007, do not include postings from RO and CH, as both countries do not provide data.

Figures for posting originating in the UK relate, for 2007 data to April 2007 to March 2008, for 2008 data to April 2008 to March 2009 and for 2009 data to April 2009 to March 2010.

Figures for Germany relate, for 2008 data to 1 Jan. 2008 to 30 Nov. 2008 and for 2009 data to 1 Jan. 2009 to 30 Nov. 2009

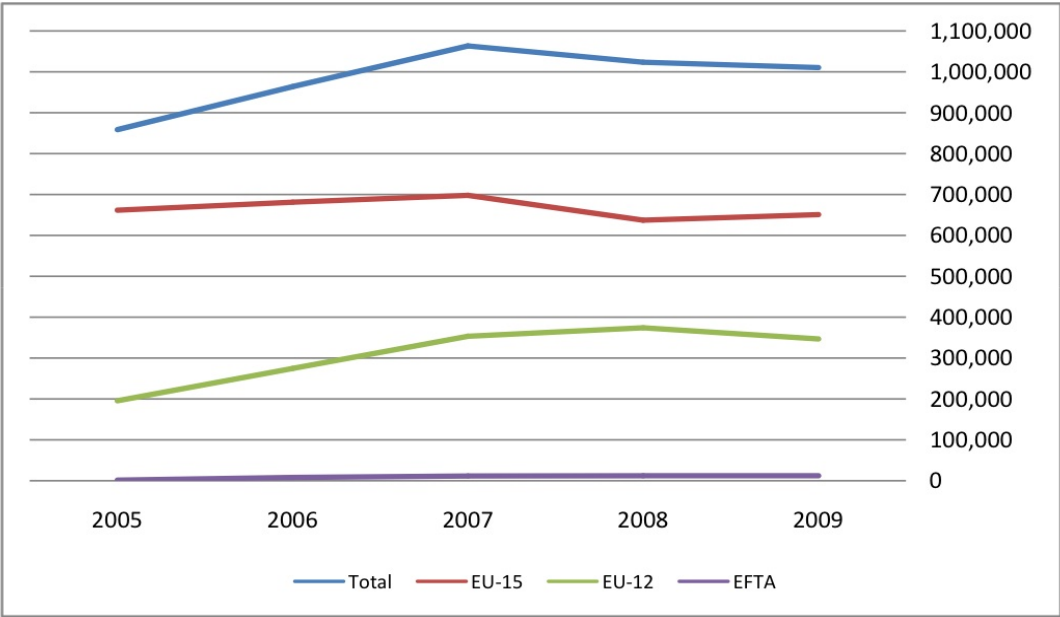
Figures for Portugal in 2008 are underestimated since only 6 of the 18 district centres of social security provided the data.

Figures for Sweden in 2008 are underestimated since they cover only the last six months of the year.

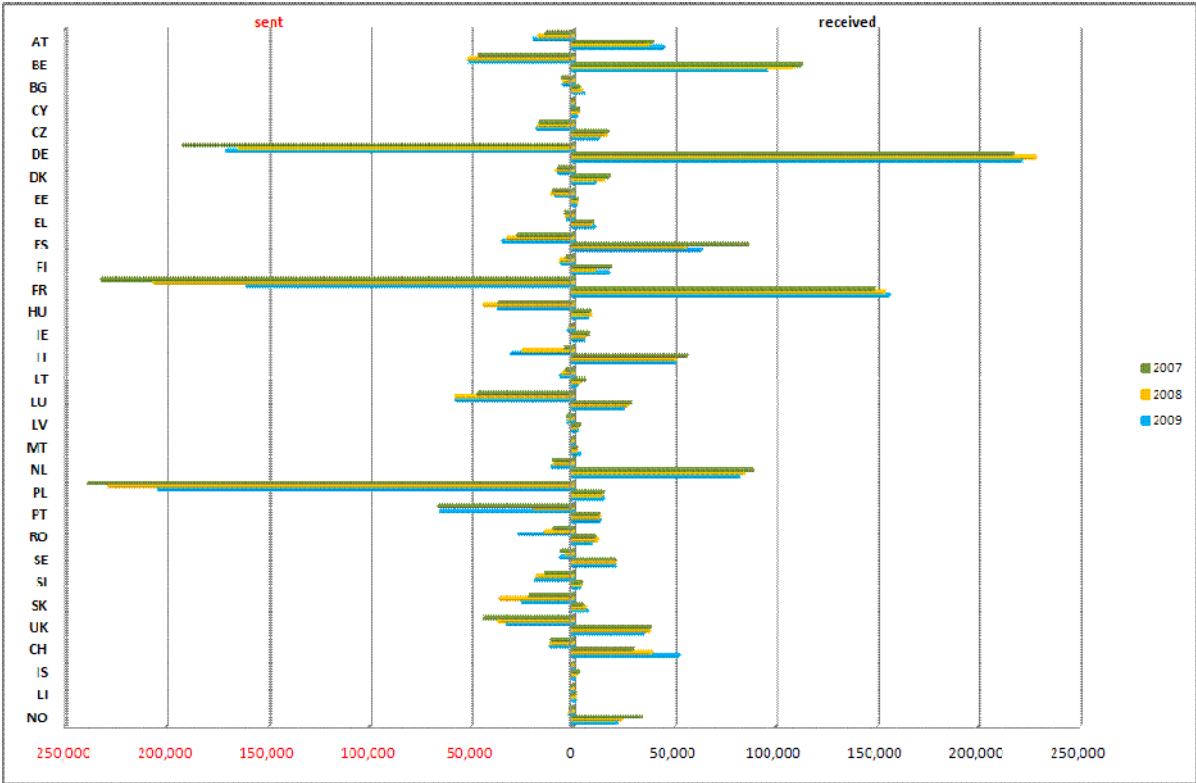
For posting originated in Italy, the 2007 figures were underestimated as they covered only the last months of the year (the electronic processing of E1010 started in the second part of 2007)



**Figure 1: Postings sent from E-15, EU-12, EFTA, and total in the period 2005-2009**



**Figure 2: Postings sent from and received by EU27 and EFTA countries in the period 2007- 2009**



**Table 2: Posting (E101 certificates) country by country 2007 (number of cases)**

TO	FROM*																											Total		
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	SE	SI	SK	UK	IS		LI	NO
AT		298	47	2	644	22,000	155	9	7	149	45	4,496	2,604	7	60	8	474	6	0	182	3,676	848	44	1,230	938	1,177	0	26	10	39,142
BE	338		432	1	658	24,746	64	94	102	1,206	137	42,129	1,720	81	144	30	7,891	50	1	3,217	19,127	5,781	220	1,667	1,422	1,443	5	0	60	112,766
BG	43	73		0	521	417	41	4	14	78	27	1,259	14	0	7	0	3	0	0	43	62	0	59	11	0	113	0	0	11	2,800
CY	6	20	8		318	33	23	0	44	52	3	1,271	0	0	4	0	5	0	5	3	5	0	72	0	35	458	0	0	3	2,368
CZ	276	227	18	21		2,716	18	1	1	387	12	3,736	285	6	35	0	28	4	0	178	3,062	38	44	107	5,257	190	0	0	0	16,647
DE	4,285	3,536	2,005	1	871		218	102	2329	3,610	366	34,142	21,823	40	266	610	3,074	482	6	1,533	119,779	2,512	494	4,889	7,478	2,288	2	0	170	216,911
DK	55	119	59	0	543	6,245		48	20	110	18	3,637	1	12	3	152	38	48	0	30	5,907	36	186	96	15	212	12	0	64	17,666
EE	18	12	0	0	432	176	3		0	2	59	1,115	102	0	1	38	6	5	0	6	57	0	13	0	0	9	0	0	5	2,059
EL	171	169	179	9	547	1,023	188	2		243	75	3,986	54	1	74	2	29	1	1	123	60	9	313	1	88	2,272	0	0	32	9,652
ES	792	1,062	404	0	599	10,390	360	12	20		168	24,392	436	8	427	121	170	25	3	641	4,440	35,558	524	613	354	4,762	5	3	137	86,426
FI	67	83	8	0	547	1,403	44	7,768	0	114		3,325	177	1	19	296	22	62	0	50	3,643	213	136	256	325	191	0	1	9	18,760
FR	412	18,612	410	0	706	22,330	783	53	251	9,554	93		1,787	160	1,031	231	32,989	58	1	1,455	29,042	11,513	496	499	2,163	13,907	19	4	51	148,610
HU	349	178	15	15	568	1,220	17	2	17	173	15	4,353		3	35	0	141	0	0	24	508	6	29	20	419	151	0	0	6	8,264
IE	52	102	3	0	522	1,293	10	2	0	393	17	2,956	135		12	0	80	0	18	41	946	283	29	19	39	797	0	0	4	7,753
IT	2,506	1,186	474	0	666	9,796	222	5	45	3,392	80	24,247	1,238	106		1	239	12	17	569	2,873	2,149	236	1,575	1,033	2,970	2	2	47	55,688
LT	22	58	3	0	335	555	30	14	0	34	10	975	9	0	6		3	16	0	9	3,813	0	6	2	3	2	0	0	0	5,905
LU	55	4,614	2	0	445	18,023	1	1	11	43	1	3,905	229	0	40	1		0	16	114	264	103	13	3	6	73	2	0	4	27,969
LV	24	7	0	0	339	139	11	44	0	100	8	1,650	157	0	2	56	8		0	12	392	0	14	15	0	23	0	0	2	3,003
MT	2	12	0	0	317	27	22	0	0	43	5	1,082	12	0	26	0	1	0		11	2	0	11	0	0	61	0	0	0	1,634
NL	326	12,646	283	11	618	33,738	100	13	258	644	22	8,563	959	176	76	44	717	16	0		15,955	4,700	121	1,109	715	6,788	2	0	56	88,656
PL	129	279	107	0	608	3,936	79	11	3	574	15	7,776	89	29	64	1	61	3	0	41		52	71	186	176	204	0	0	18	14,512
PT	30	290	15	0	525	1,191	183	1	7	2,955	37	6,451	9	4	13	0	36	0	0	27	147		112	36	2	506	0	0	2	12,579
RO	491	129	85	30	541	928	8	0	25	361	9	4,060	2,960	1	113	0	27	0	0	221	477	28	20	74	0	141	0	0	23	10,752
SE	163	292	86	0	559	4,283	682	297	1	238	759	5,660	332	116	24	23	38	62	0	82	6,070	160		80	260	270	0	0	89	20,626
SI	233	31	8	26	427	521	2	0	0	52	5	1,555	36	0	28	0	114	0	0	42	348	0	108		245	21	0	0	0	3,802
SK	218	94	7	0	662	607	7	0	0	95	6	2,158	247	4	29	0	9	1	0	9	169	0	5	22		65	0	0	3	4,417
UK	396	1,305	43	27	577	8,284	446	10	24	1,696	104	18,955	532	184	125	17	216	46	33	540	3,340	276	113	252	125		14	2	223	37,905
CH	1,223	621	0	0	560	11,295	43	31	0	406	22	11,418	91	26	605	8	350	22	0	172	693	154	201	100	4	1,169	0	1	28	29,243
IS	9	11	0	0	314	427	26	3	0	10	2	547	0	0	29	15	3	0	0	2	276	482	11	52	7	11		0	8	2,245
LI	40	1	0	0	307	161	0	0	0	0	2	264	0	0	0	0	1	0	0	0	36	0	0	0	0	0	0	0	0	812
NO	247	145	42	0	527	4,190	3,285	927	0	171	329	2,039	140	109	22	1,089	54	1,358	0	60	13,777	1,100	1,470	118	104	2,521	4	0	0	33,828
Tot	12,978	46,212	4,743	143	15,803	192,093	7,071	9,454	3,179	26,885	2,451	232,102	36,178	1,074	3,320	2,743	46,827	2,277	101	9,437	238,946	66,001	5,171	13,032	21,213	43,251	67	39	1,065	

Source: EC Reports (2009), elaborated by Iseri Europa. Administrative data on E101 forms issued according to Council Regulation (EC) No 1408/71.

RO and CH do not provide data of sent postings by receiving country.

\* Posting according to Art. 14(1)(a), 14a(1)(a), 14b(1), 14b(2), Council Reg. 1408/71 - E101 certificates are issued in the sending countries.

**Table 3: Postings (E101 certificates) country by country 2008 (number of cases)**

TO	FROM*																									Total			
	AT	BE	CY	CZ	DE	DK	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SI	SK	UK	IS		LI	NO	
AT		276	0	1203	19230	188	13	236	71	4222	2551	5	721	10	77	5	2	253	3282	259	129	1813	1795	1055	0	14	7	37,417	
BE	417		3	1086	17446	108	95	1001	244	40480	2289	98	1448	83	11046	24	6	3139	21304	1375	786	1804	3338	1295	17	1	67	109,000	
BG	177	39	0	135	821	38	28	126	21	1085	68	0	242	0	20	0	0	16	701	1	20	84	134	115	0	0	6	3,877	
CY	90	93		22	119	20	158	34	15	821	10	0	149	0	5	6	16	10	12	0	29	0	50	381	0	0	8	2,048	
CZ	501	282	1		2217	31	0	387	26	3358	157	2	283	2	14	2	0	29	1859	0	145	198	6362	124	0	0	5	15,985	
DE	6476	3899	1	4069		305	1711	3523	473	30384	26952	39	1603	784	5048	435	14	1536	1E+05	1927	6019	6806	10769	2888	10	2	145	227,961	
DK	18	122	1	156	4983		8	124	157	2633	395	16	198	184	28	42	0	84	5269	1	9	67	228	229	4	0	75	15,031	
EE	27	34	0	11	74	18	0	6	227	794	113	0	142	52	9	0	0	2	247	0	0	0	0	8	0	0	3	1,767	
EL	178	117	4	241	870	195		327	98	3693	30	1	385	10	17	9	0	191	236	5	130	47	140	2290	1	0	32	9,247	
ES	609	1210	2	579	10318	594	243		507	21991	573	18	2873	241	150	50	7	577	4118	4544	872	734	276	4004	12	11	104	55,217	
FI	85	107	0	379	1314	63	49	106		2998	139	13	210	485	31	308	0	44	3661	17	9	387	363	159	0	0	14	10,941	
FR	646	19604	1	1694	17267	909	97	11097	381		1772	161	4401	301	38314	110	3	1560	31365	5738	1200	547	4027	12171	28	4	90	153,488	
HU	677	275	1	209	1304	7	13	229	77	3432		1	326	1	63	0	1	25	397	5	245	195	1368	139	0	0	19	9,009	
IE	128	194	1	79	1010	14	1	495	11	2237	73		207	2	46	0	10	34	622	45		10	156	595	0	0	40	6,010	
IT	2129	1208	1	1305	8340	212	42	3230	271	19448	743	50		20	805	0	18	645	3067	1153	2496	1445	1315	2712	16	0	59	50,730	
LT	15	3	0	120	455	12	1	40	29	724	22	0	153		12	1	1	4	1326	0	0	0	74	7	0	0	4	3,003	
LU	147	5609	1	72	15728	3	1	71	11	3732	217	5	244	0		0	17	47	652	21	5	0	56	75	0	0	4	26,718	
LV	34	5	0	85	204	9	1	129	25	676	0	0	145	28	10		0	7	191	0	88	14	20	3	0	0	5	1,679	
MT	2	10	0	57	240	0	2	148	12	886	3	0	182	0	3	0		8	5	4	0	3	0	60	0	0	3	1,628	
NL	446	14797	31	704	28662	101	136	813	67	6796	1296	191	527	203	829	9	24		16781	3604	426	1826	1811	4343	8	0	55	84,486	
PL	120	273	0	723	4305	54	3	553	106	6427	77	80	422	6	135	1	1	77		46	83	108	241	135	0	0	20	13,996	
PT	96	166	0	90	1382	191	24	3979	124	5240	33	1	346	0	26	0	0	87	360		11	152	12	499	0	0	12	12,831	
RO	412	101	11	211	986	7	8	601	24	4635	3370	2	594	12	21	0	4	49	467	65		47	89	55	0	0	10	11,781	
SE	247	204	8	352	2850	850	2	161	1052	4529	271	173	250	60	24	109	1	56	7955	36	70	259	1118	218	0	0	71	20,926	
SI	280	47	0	25	479	2	0	38	7	1232	53	0	207	0	20	0	0	8	245	0	0		704	28	0	0	0	3,375	
SK	378	84	0	1181	840	9	1	107	19	1979	741	8	238	0	20	0	0	13	428	0	1	79		35	0	0	1	6,162	
UK	419	1453	6	605	5307	458	61	4021	376	17192	706	221	933	37	163	7	36	630	3984	223	45	284	205		11	0	350	37,733	
CH	1061	808	2	603	13625	33	16	562	425	12325	304	12	6158	4	301	0	1	139	907	20	0	161	192	921	0	4	34	38,618	
IS	1	3	0	40	264	21	0	3	3	320	6	0	282	62	1	0	0	0	78	2	14	21	6	1		0	8	1,136	
LI	43	2	0	8	315	0	0	0	0	240	0	0	263	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	871
NO	318	148	1	339	3511	3468	3	171	740	1930	240	125	319	1895	26	171	0	96	7060	97	264	71	844	1891	3	0		23,731	
Tot	16177	51173	76	16383	2E+05	7920	2717	32318	5599	2E+05	43204	1222	24451	4482	57264	1289	162	9366	2E+05	19188	13096	17162	35693	36436	110	36	1251		

Source: EC Reports (2009), elaborated by Iseri Europa. Administrative data on E101 forms issued according to Council Regulation (EC) No 1408/71. BG, EE, SE and CH do not provide data of sent postings by receiving country.  
 \* Posting according to Art. 14(1)(a), 14a(1)(a), 14b(1), 14b(2), Council Reg. 1408/71 - E101 certificates are issued in the sending countries.

**Table 4: Postings (E101 certificates) country by country 2009 (number of cases)**

TO	FROM*																											Total		
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SI	SK	UK	IS		LI	NO
AT		337	69	0	1289	26017	158	6	14	159	68	3167	2514	7	1111	0	74	13	2	266	3570	938	290	2090	1596	1028	1	19	3	44,806
BE	622		370	0	969	17630	69	84	35	983	292	29498	1458	213	1526	180	10618	37	2	3352	18547	3198	1439	1173	2069	1185	1	7	32	95,589
BG	203	22		0	136	958	13	0	33	181	17	1037	296	0	112	9	7	0	0	7	1325	3	183	217	256	74	0	0	7	5,096
CY	66	54	2		17	77	39	7	67	24	5	715	2	0	34	3	2	2	7	5	25	0	10	0	2	352	0	0	7	1,524
CZ	486	199	28	0		2239	6	1	0	249	37	2813	262	2	212	3	137	2	1	78	1284	5	122	34	4462	93	0	1	0	12,756
DE	7817	4068	2412	0	4414		325	63	1267	3616	560	22813	23537	77	2187	858	4238	729	6	1950	107014	4858	11898	6555	7953	1880	6	3	118	221,222
DK	69	80	20	0	58	3504		3	5	176	87	2410	158	2	98	212	15	17	0	99	2786	621	28	15	46	266	20	0	133	10,928
EE	34	18	1	0	7	91	21		0	9	174	596	0	0	18	64	1	58	0	3	110	4	0	0	3	10	0	0	3	1,225
EL	233	101	176	22	203	904	149	27		454	84	3001	25	2	795	33	17	0	0	90	166	1773	307	14	35	1855	1	0	22	10,489
ES	521	910	80	0	303	8530	361	23	48		355	16115	340	13	3360	207	210	18	2	753	2559	23854	776	209	324	3431	3	4	81	63,390
FI	97	105	6	0	297	1252	27	7037	1	125		2473	155	12	164	652	27	125	0	32	3376	35	42	408	243	216	0	0	13	16,920
FR	770	19081	214	0	1843	18326	1028	143	174	11685	210		1275	207	5445	438	40489	275	2	1197	22579	12694	2903	662	2575	11267	15	2	102	155,601
HU	740	165	7	5	135	1447	7	2	10	286	47	2490		4	278	14	45	0	0	37	481	2	563	109	422	130	1	1	10	7,438
IE	36	125	3	0	41	828	17	2	18	555	11	2077	41		69	0	28	0	1	59	448	469	0	6	17	499	0	0	7	5,357
IT	2046	1032	299	0	1274	9254	226	18	201	3535	206	15934	910	73		89	260	2	4	741	2858	1036	5419	1789	645	2445	12	0	57	50,365
LT	9	30	0	0	33	223	8	27	0	13	24	400	15	4	15		0	93	0	1	732	1	4	6	9	2	0	0	6	1,655
LU	299	5043	0	0	54	13800	2	0	4	70	13	3998	132	2	154	1		0	3	56	1191	83	22	18	21	69	0	0	7	25,042
LV	11	14	1	0	110	257	9	20	1	7	16	732	10	1	14	25	7		0	3	74	0	531	0	70	4	1	0	3	1,921
MT	8	6	0	0	48	337	14	0	0	17	7	912	19	1	79	0	4	0		12	14	1442	0	5	5	46	0	0	0	2,976
NL	698	16312	392	0	657	25546	112	121	276	1589	74	5553	1160	339	1106	180	329	37	69		14671	4087	959	1849	1683	3918	7	1	127	81,852
PL	170	317	7	0	861	4982	208	11	6	622	148	5326	168	16	488	114	110	25	0	139		258	9	74	471	153	0	0	21	14,704
PT	95	168	0	0	59	1542	144	0	13	4877	269	4407	77	1	212	0	28	0	0	79	263		7	312	20	420	25	1	9	13,028
RO	415	197	167	0	151	1762	19	2	29	599	16	2959	1562	0	397	2	17	0	0	49	523	46		197	138	57	0	0	16	9,320
SE	271	156	16	0	291	2824	781	185	2	283	1172	3531	287	444	229	706	54	291	0	83	6912	827	138	363	485	257	1	0	203	20,792
SI	248	28	1	0	16	520	1	1	1	52	5	1090	397	0	165	0	4	0	0	15	321	0	0		90	14	0	0	0	2,969
SK	662	66	5	0	2116	1085	4	0	2	120	15	1221	494	0	164	0	55	0	0	37	935	56	10	96		42	0	6	2	7,193
UK	505	1414	57	2	817	5352	399	9	43	3356	285	13648	647	244	1165	34	164	4	12	394	4362	121	49	880	510		7	9	271	34,760
CH	1137	621	1	0	699	16761	22	22	12	504	283	9511	289	23	10279	8	304	8	1	158	1158	8302	17	501	250	1087	0	10	19	51,987
IS	1	7	0	0	15	206	10	0	0	9	9	319	0	0	3	15	1	0	0	0	28	10	35	11	6	2		0	12	699
LI	47	0	1	0	14	396	0	0	0	0	0	276	0	0	1	0	3	0	0	0	0	95	0	0	0	0	0		0	833
NO	441	98	31	0	223	3695	2884	570	3	194	440	1752	173	254	75	1639	28	235	0	229	6062	194	355	242	282	1482	22	0		21,603
Total	18,757	50,774	4,366	29	17,150	170,345	7,063	8,384	2,265	34,349	4,929	160,774	36,403	1,941	29,955	5,486	57,276	1,971	112	9,924	204,374	65,012	26,116	17,835	24,688	32,284	123	64	1,291	
houtEF	17,131	50,048	4,333	29	16,199	149,287	4,147	7,792	2,250	33,642	4,197	148,916	35,941	1,664	19,597	3,824	56,940	1,728	111	9,537	197,126	56,411	25,709	17,081	24,150	29,713	101	54	1,260	

Source: EC Reports (2009), elaborated by Iseri Europa. Administrative data on E101 forms issued according to Council Regulation (EC) No 1408/71. SE and CH do not provide data of sent postings by receiving country.

\* Posting according to Art. 14(1)(a), 14a(1)(a), 14b(1), 14b(2), Council Reg. 1408/71 - E101 certificates are issued in the sending countries.

**Table 5: Evidence on the direction of flows of postings (based on 2009 data)**

<b>From</b>	<b>To</b>
France	Belgium, Germany, Italy, Spain, UK, Switzerland
Poland, Czech Republic, Hungary, Slovakia, Slovenia and Bulgaria	Germany, France Belgium, the Netherlands, Austria and Italy
Portugal	Spain
Germany	Austria, the Netherlands, France, Belgium and Switzerland
Belgium	France and, the Netherlands
Luxembourg	France and, Belgium
Estonia	Finland
Latvia and Lithuania	Norway, Germany and Sweden
The Netherlands	Belgium, Germany
UK	France, the Netherlands, Spain

**Table 6: Posting specialisation index and relevance of posting in terms of employment**

Country	Spec. index* average 07-09	Sent postings as% of employment in private sector average 07-09	Received postings as % of employment in private sector average 07-09
AT	43.6	0.6%	1.5%
BE	36.2	1.9%	4.0%
BG	-5.8	0.2%	0.2%
CY	92.6	0.0%	0.8%
CZ	-4.4	0.5%	0.4%
DE	11.7	0.7%	0.9%
DK	31.8	0.5%	0.9%
EE	-69.7	2.2%	0.4%
EL	56.5	0.1%	0.4%
ES	36.1	0.2%	0.5%
FI	54.7	0.3%	1.0%
FR	-12.8	1.3%	1.0%
HU	-64.8	1.5%	0.3%
IE	62.9	0.1%	0.5%
IT	49.7	0.1%	0.3%
LT	-12.3	0.5%	0.4%
LU	-33.6	46.1%	21.8%
LV	8.5	0.3%	0.3%
MT	87.7	0.1%	1.9%
NL	79.7	0.2%	1.8%
PL	-87.9	2.3%	0.2%
PT	-51.5	1.6%	0.4%
RO	-14.7	0.3%	0.2%
SE	65.4	0.2%	0.8%
SI	-64.5	2.4%	0.5%
SK	-63.7	1.6%	0.3%
UK	-0.4	0.2%	0.2%
EU-27		0.75%**	0.70%**
EU-15	14	0.6%	0.8%
EU-12	-66	1.6%	0.3%

SOURCE: EC Reports (2009 and 2011) and Eurostat, elaborated by Ismeri Europa.

Note that "Postings" refers to the number of E101 certificates issued for "posting according to Art. 14(1)(a), 14a(1)(A), 14b(1),14b(2), Council reg. 1408/71, sent to EU 27 or EFTA Countries

\*The "posting specialisation index" is calculated as the net flow (received - sent) on total flows (received + sent). It moves from -100 (max in sending) to +100 (max in receiving).

In the table, averages are calculated for the period 2007-2009.

\*\* Data on received postings underestimate the total number of received postings because of limits in recording postings in receiving countries. For this reason there is a small discrepancy between the Totals in the second and third column.

**Table 7: Sectoral breakdown of postings (years 2007 and 2009)**

FROM	Sectors of economic activity (in % of total) - year 2007									
	Agriculture, hunting and fishing NACE A, B	Industry NACE C to F		Services Total	Services NACE G to P					
		Industry Total	of which		Wholesale and retail trade NACE G	Hotel and restaurants NACE H	Transport, storage and communication NACE I	Financial, business activities, ect. NACE J and K	Health and social work NACE MNO	
			Construction NACE F							
BE	0.1%	56.1%	32.9%	43.8%	4.4%	1.1%	1.0%	1.6%	35.7%	
CZ	0.5%	31.0%	22.5%	68.5%	0.8%	0.2%	66.3%	1.2%	0.0%	
EE	4.2%	88.7%	64.3%	7.1%	0.1%	0.1%	2.3%	3.3%	1.3%	
IE	0.1%	50.6%	41.4%	49.3%	3.1%	2.7%	8.4%	35.1%	0.1%	
EL		20.4%	20.4%	79.6%	0.4%	0.2%	4.2%	74.8%		
CY		3.0%	2.7%	97.0%	0.1%	9.3%	67.5%	19.8%	0.3%	
LV	1.9%	27.5%	6.1%	70.6%	2.0%	0.9%	48.0%	12.7%	6.9%	
LT		79.1%	16.3%	20.9%	0.2%		0.2%	20.5%	0.1%	
LU	0.2%	20.8%	13.9%	79.0%	1.7%	0.1%	17.8%	57.8%	1.6%	
HU	0.2%	78.0%	29.3%	21.8%	7.5%	11.4%	0.8%	2.0%	0.1%	
MT		5.9%	3.0%	94.1%		1.0%	3.0%	89.1%	1.0%	
AT	0.7%	66.6%	29.9%	32.7%	5.5%	4.6%	8.2%	8.1%	6.4%	
PT	1.0%	96.6%	57.2%	2.4%	0.2%	0.0%	1.8%	0.4%	0.0%	
RO	0.2%	88.1%	26.3%	11.7%	0.0%	2.3%	7.4%	1.9%	0.2%	
FI	5.4%	52.7%	8.4%	41.9%	1.5%	5.5%	22.1%	4.0%	8.7%	
UK		0.7%	0.0%	99.3%						
IS	58.0%	1.8%	25.9%	40.2%			10.7%	28.6%	0.9%	
LI		76.9%	0.0%	23.1%	10.3%		12.8%			
Sum	0.5%	45.6%	26.3%	53.9%	1.6%	1.2%	25.0%	10.3%	4.0%	

FROM	Sectors of economic activity (in % of total) - year 2009									
	Agriculture, hunting and fishing NACE A, B	Industry NACE C to F		Services Total	Services NACE G to P					
		Industry Total	of which		Wholesale and retail trade NACE G	Hotel and restaurants NACE H	Transport, storage and communication NACE I	Financial, business activities, ect. NACE J and K	Health and social work NACE MNO	
			Construction NACE F							
BE	1.4%	50.2%	25.1%	48.4%	4.0%	1.5%	2.0%	29.0%	11.9%	
CZ	1.7%	55.7%	38.6%	42.6%	3.1%	2.7%	19.3%	3.2%	14.4%	
EE	3.0%	86.4%	74.4%	10.6%	0.6%	2.9%	0.1%	0.6%	3.6%	
IE	0.1%	28.9%	0.0%	71.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
EL	0.0%	66.3%	17.3%	33.7%	0.0%	0.0%	0.0%	0.0%	0.0%	
CY	0.0%	12.7%	1.2%	87.3%	1.0%	0.0%	10.8%	73.8%	1.7%	
LV	2.6%	77.4%	27.9%	20.0%	3.9%	7.0%	0.6%	3.7%	4.9%	
LT	0.9%	69.8%	20.9%	29.3%	0.4%	0.0%	1.1%	21.4%	0.0%	
LU	0.1%	29.0%	1.3%	70.9%	0.5%	0.0%	18.5%	47.9%	1.4%	
HU	0.2%	75.9%	27.9%	23.9%	0.5%	0.1%	1.0%	0.2%	0.6%	
MT	0.9%	66.1%	49.1%	33.0%	4.5%	1.8%	0.9%	24.1%	1.8%	
PT	0.8%	95.0%	53.1%	4.2%	0.6%	0.0%	0.3%	0.1%	0.0%	
RO	1.1%	83.9%	19.5%	15.0%	0.2%	1.1%	7.9%	1.1%	4.8%	
FI	2.4%	70.2%	10.7%	27.3%	1.6%	1.8%	22.2%	1.2%	0.5%	
UK	0.0%	0.5%	0.0%	99.5%	0.0%	0.0%	0.0%	0.0%	0.0%	
IS	25.9%	41.8%	41.8%	32.3%	0.0%	1.5%	14.4%	14.9%	1.5%	
LI	0.0%	95.3%	0.0%	4.7%	3.1%	0.0%	0.0%	1.6%	0.0%	
Sum	0.7%	54.9%	23.6%	44.3%	1.1%	0.6%	6.7%	15.9%	3.6%	

Source: Source: EC Reports (2009 and 2011 ), elaborated by Ismeri Europa.

Notes: For missing countries no sectoral breakdown of E101 certificates available

The shares are calculated among the total of the three main sectors (Agric., Industry, Services)

and the E101 certificates for which the sector was not mentioned were therefore excluded from the total.