



EUROPEAN COMMISSION  
IMPACT ASSESSMENT BOARD

Brussels,  
D(2011)

## Opinion

**Title**                    **DG EMPL - Impact Assessment on the revision of the legislative framework on the posting of workers in the context of the provision of services**

**(Resubmitted draft version of 5 December 2011)**

### **(A) Context**

The freedom to provide services is a fundamental right enshrined in the Treaty. It 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. Directive 96/71/EC facilitates the cross-border provision of services, while ensuring an adequate level of protection of workers' rights. It does so by defining the core working conditions of the host country that are guaranteed to workers posted to its territory whenever they are more favourable to the worker than the provisions of the sending country. Since 2006, the Commission has adopted several Communications and a Recommendation addressing problems of implementation and enforcement of the Directive. In 2007, the decisions of the Court of Justice brought about a debate on the balance between the exercise of the right of collective bargaining and action on the one hand, and the freedom to provide services on the other. The present report accompanies two legislative initiatives aiming at resolving these problems.

### **(B) Overall assessment**

**The evidence base to demonstrate the necessity and proportionality of further EU regulatory action remains very weak; for the right of collective bargaining and action it remains entirely absent. The assessment of the magnitude of the problems and the reasons for the failure of previous Commission initiatives should be better substantiated. Furthermore, the report should clearly present the overall compliance costs for economic actors and public authorities in particular, and describe their distribution among Member States, in order to allow for an informed assessment of the efficiency and proportionality of the preferred policy solution. Finally, the report should systematically reflect the diverging views of stakeholders throughout the text.**

### **(C) Main recommendations for improvements**

**(1) Demonstrate the magnitude of the problems and be more transparent about the lack of robust evidence.** The revised report makes it clearer that the implementation and enforcement problems stem primarily from vague, unclear or missing provisions in the Directive. However, it still does not explain why the core terms and conditions of employment of posted workers (Article 3) are treated as a problem. The report should provide further details on the failure of previous Commission initiatives to reach their objectives (going beyond the statement that "it is possibly because most drivers are linked to the absence of legislative provisions"). Problems added to the problem definition should be better described. Despite a better description of the effects of posting on the actors involved, the magnitude of the problems remains largely unclear, which renders largely unsubstantiated the conclusions on the proportionality of the response (e.g. "regarding the magnitude of the problem the introduction of a system of joint and several liability would be proportionate", despite the fact that "almost all wage claims have been enforced"). Finally, the Board notes that the problems are supported primarily by anecdotal evidence, which should be made clearer in the report. The overview of relevant administrative and judicial elements in Member States has not been provided.

**(2) Demonstrate the necessity of EU action as regards the right of collective bargaining and action.** While the revised report presents the problem related to the right of collective bargaining and action separately, and designs alternative policy options, it does not fully separate the set of corresponding objectives for this issue. The report still does not clearly explain why this problem is being addressed at the same time as revising the Directive on posting of workers, and fails to clearly demonstrate the necessity and proportionality of legislative EU action in this matter (beyond stating that "action is necessary and proportionate in order to better achieve the objectives of the Treaty"). More specifically, the added problems (related to the absence of an alert mechanism, and the Courts' competence applying the proportionality test to the exercise of the right to strike) should be better described, and an alternative regulatory option focusing on these two elements should be further considered.

**(3) Further strengthen the intervention logic and demonstrate the proportionality of proposed measures.** The Board notes that the specific and operational objectives have not changed, correspond neither to the identified problem drivers nor to the policy options, and are not defined in SMART terms (i.e. Specific, Measurable, Achievable, Realistic and Time-dependent). This prevents the presentation of a clear intervention logic. While the design of policy options has been significantly improved, the readability of the report should be further improved by presenting the discarded options upfront and separating them clearly from options retained for further analysis. While better describing the content of policy options, the report still fails to demonstrate the proportionality of the proposed regulatory measures, particularly of the option providing for the possibility of a more favourable treatment of the posted worker in the host Member State (beyond Article 3) or introducing an obligation of equal treatment in comparison to a local worker.

**(4) Better assess and present impacts.** While the revised report provides key estimates of administrative costs stemming from new translation and leaflet obligations, the overall compliance costs for economic actors and public authorities in particular, and the efficiency of the preferred policy solution, should be presented in a more transparent manner. The statement that "the preferred option is proportionate since the costs are relatively small, while the benefits are significant" needs to be substantiated. The Board

notes that the report does not conclude anymore on a need for additional staff in Member States, stemming from the implementation of the preferred policy solution. This reassessment should be better explained and substantiated with evidence. The revised report fails to describe the distribution of costs and benefits across Member States, despite having acknowledged that "specific regions and sectors will be more affected than others", and that "the amount of information to be provided would increase substantially, at least for some Member States". Finally, the revised report has not explained how sector competitiveness will be affected by the proposed changes, and has not justified the conclusion that consumers would benefit from lower prices.

**(D) Procedure and presentation**

The revised report partly reflects the different views of stakeholders throughout the text but should do so more systematically and always reflect the views of all three main groups of stakeholders (i.e. Member States, employers and workers' representatives). Given the diversity of views on the problem definitions, as well as on possible solutions, the report should explain why a particular solution has been chosen, despite the diverging views of stakeholders. The scores on efficiency in the comparison tables should be aligned with the main text, and the comparison table should reflect the fact that neither of the policy packages presented is supposed to address the objective related to the right of collective bargaining and action. The executive summary still does not reflect the views of stakeholders.

**(E) IAB scrutiny process**

Reference number	2011/EMPL/001
External expertise used	No
Date of Board Meeting	Written procedure The present opinion concerns a resubmitted draft IA report. The first opinion was issued on 11 November 2011