



Brussels,
D(2016)

Opinion

Title: DG EMPL - Impact Assessment on amending Directive 96/71/EC concerning posting of workers in the framework of provision of services

(draft version submitted 18 December 2015)*

(A) Context

Posting of workers plays an important role in cross border trade in services in the internal market. In 2014, there were over 1.45 million postings in the EU, up by 37.5% since 2010.

The 1996 Posting of Workers Directive aims to promote and facilitate the cross-border provision of services, provide protection to posted workers and ensure a level-playing field between foreign and local competitors. It stipulates a 'core set' of terms and conditions of employment of the host Member State, which are mandatory to be applied by cross-border service providers. However, after the enlargement, wage differentials between Member States have increased and with increasing numbers of posted workers, the social balance as well as the level playing field for businesses have been brought into question.

The 2014 Enforcement Directive provides for new and strengthened instruments to fight and sanction circumventions, fraud and abuses of posting of workers and lays down provisions to improve administrative cooperation between national authorities. Member States have until 18 June 2016 to transpose the Directive. In addition, there have been developments in the case law of the European Court of Justice.

This impact assessment concerns options for a targeted review of the 1996 Posting of Workers Directive.

(B) Overall opinion: NEGATIVE

The Board gives a negative opinion due to a number of shortcomings in the report that require improvement:

1) The report should clearly identify how and under which circumstances the problem of excessive wage gaps can lead to problems for competition and the internal market. The baseline scenario should be further elaborated to more clearly reflect the implementation of the Enforcement Directive and developments in case law.

2) The report should substantiate its argumentation on the principle of subsidiarity and proportionality. It should justify why alternative 'intermediary' options have

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted

not been included in the analysis and clarify how concerns of SMEs in relation to burdensome administrative procedures have been addressed.

3) The report should clarify the objectives of the initiative, in particular in relation to the internal market and wages for posted workers (equal pay versus fair wage conditions).

4) The analysis of impacts should be substantially improved. In particular, the report should estimate how many posted workers will be affected and how their salaries are likely to change. By clearly stating the underlying evidence and/or assumptions the report should then elaborate on the likely impacts on supply, demand and competition conditions for services provided by posting companies and local companies in the same market. As the construction sector is essentially a domestic sector, the impact of the foreseen initiative on the sector should be better assessed, including the overall impact on competition, competitiveness, efficiency and productivity.

Once revised, the IA must be resubmitted to the Board which will issue a new opinion on the revised draft.

(C) Main recommendations for improvements

1) Problem analysis. The report should identify more clearly how and under which circumstances the problem of excessive wage gaps between posted and local workers can lead to problems for competition and for the internal market as currently stated. For instance, it should be considered to what extent local and posting companies are competing in the same market. The claim that wage gaps lead to downward pressure on wage-setting in hosting countries should be substantiated with arguments and evidence. The problem description and baseline scenario should also be more precisely specified and outlined vis-a-vis the implementation of the Enforcement Directive as well as the developments in case law in order to better assess the 'do nothing' option. The report should better explain what issues raised in the preparation of the Enforcement Directive (such as the definition of posted workers based on the duration of the posting) will be tackled by the proposed measures and why they were not addressed at the time. Finally, the report should clarify whether most services provided by posting companies are location dependent and if delocalisation issues are therefore not a concern here.

2) Subsidiarity proportionality and policy options. The report should further substantiate the argumentation on subsidiarity given the link of the initiative to wage setting at national level. In line with the proportionality principle, the report should justify why alternative options such as sectorial approaches, voluntary arrangements by Member States/social partners, stepwise convergence, wage gaps ceilings or exemptions for short-term posting are not included in the analysis. The report should also clarify how the concerns raised by SMEs related to burdensome administrative procedures for posting of workers have been addressed by the policy options.

3) Objectives. The report should clarify what the initiative is supposed to achieve, in particular in relation to the internal market and wages for posted workers. In particular, it should clarify whether the objective is equal pay or to ensure that posted and local workers are subject to the same set of rules as far as salary is concerned. It should also specify what this means in practice - for instance, whether unequal pay can continue to exist?

4) Analysis of impacts. The impacts of the proposal should be further elaborated and clarified. First, it should be estimated how many posted workers will be affected and how much their salaries are likely to change. This estimation should then be translated -

applying economic reasoning – into likely impacts on competition, supply and demand conditions for services provided by posting companies (and by local companies in the market). As the construction sector is essentially a domestic service sector, the possible impact of creating a more level playing field should be weighed against the potential impact on the sector of a possible reduction in market integration (due to less competitive posting companies). It should then consider the overall impact on competition, efficiency and productivity of the sector. In addition, the report should clarify possible effects on employment. The report should also discuss whether – with equal treatment of nominal pay – possible gaps in after-tax income between local and posted workers would be an issue vis-à-vis the objective of fair wage conditions. Budget impacts should be elaborated on for posting and hosting countries. Finally, the report should make clear in which specific areas of wage gaps, where the preferred option (or parts thereof) will not apply (i.e. SE, DK and specific sectors in other countries), and assess the impacts thereof.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated into the final version of the impact assessment report.

(D) Procedure and presentation

The report will need to be reviewed to give charts, tables and graphs proper labels and source indication. The report should also state that no evaluation or designated public stakeholder consultation has taken place.

(E) RSB scrutiny process

Reference number	2015/EMPL/010
External expertise used	No
Date of RSB meeting	20 January 2016