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Joint FIEC-EFBWW proposed amendments on the proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [COM(2012) 131]

Created in 1905, FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”,

The EFBWW is the European trade Union Federation for the construction, wood, furniture and forestry sector. The EFBWW represents blue and white collar workers from 72 national trade unions in 31 countries

Over the last years, a proportionally large number of posted workers have been operating in the construction industry. The protection of these workers, the securing of the proper functioning of the European labour market by combatting social dumping and enforcing the obligations and rights according the “Posting” Directive (96/71/EC, “PWD” hereafter), have been, and still are, of a high priority for EFBWW and FIEC, the European social partners of the construction industry. On various occasion, the EFBWW and FIEC have expressed their joint commitment that cross-border posting should take place in a fair level playing field for companies and workers. In practical terms this implies that “social fraud” and “unfair competition” must be prevented and combated

In order to avoid risks of abuses and of circumvention of the PWD, the EFBWW and FIEC have also stressed that the correct application of the legislation, collective agreements and practices go hand in hand with (1) the availability of proper and correct information, (2) effective controls and inspections and (3) targeted dissuasive enforcement measures.

As regards to the proposed “Enforcement” Directive, the EFBWW and FIEC have some important concerns, which are explained hereafter :

I. AVAILABILITY OF AND ACCESS TO INFORMATION

Although article 4.3 of the PWD explicitly indicates that it is the Member States’ duty and obligation to “*take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available*”, the reality has clearly demonstrated that a vast majority of Member States have failed in their duty to provide accessible and transparent information and that often the sectoral social partners have taken up this task.

In a vast number of countries the applicable working conditions, including those to be applied to posted workers, are set by the sectoral social partners via collective agreements and practices. Therefore these sectoral social partners are often well placed to provide information on the applicable working conditions.

In line with the current practices, the EFBWW and FIEC demand that the proposed enforcement Directive explicitly states that :

1. the European Commission should support financially the existing “Posting” website¹, which has been jointly set-up by the European sectoral social partners, EFBWW and FIEC, with the aim of informing companies and workers of the applicable working conditions in case of cross-border posting. This financial support should allow the European social partners to keep the website up-to-date, to extend it to additional languages and to promote it on a large scale.
2. The information practices (brochures, websites, meetings,...) set-up by the national social partners to inform in an accessible and transparent manner foreign workers and employers in their mother tongue about their rights and obligations should be financially supported by the Member states or the European Commission.

Proposal for amendment 1	
	<p><u>EFBWW-FIEC</u> <i>Article 5</i> <i>Improved access to information</i></p> <p>5. The Commission and the Member States shall financially support joint initiatives of the relevant social partners, at the European and national level, to set up joint instruments which are aimed to inform undertakings and workers on the applicable terms and conditions to be respected according Directive 96/71/EC.</p>

II. NON-COMPLIANCE WITH THE PWD OR THE ENFORCEMENT DIRECTIVE

The EFBWW and FIEC urge the European legislators to provide legal clarity on which set of rules apply in case the conditions/criteria of posting are not met.

Creating a fair level playing field for services providers (companies) and workers, implies that the proposed “Enforcement” Directive should clearly state that the whole set of rules (legislation, collectives agreements and practices) of the host country are

¹ <http://www.posting-workers.eu>

applicable to the concerned undertakings and workers when the conditions/criteria for a genuine posting are not fulfilled.

In this case the most favourable conditions for the worker should apply. This is to avoid that fake posting could be (ab)used to invoke lower working conditions when workers are posted from a country with higher labour standards to countries with lower ones.

Proposal for amendment 2	
	<p style="text-align: center;"><u>EFBWW-FIEC</u></p> <p>New article (to be inserted after article 3)</p> <p>In cases of non-compliance with the criteria of Art.3 §1 and §2, the full legislation, regulations and collective agreements of the host Member State are applicable to the workers concerned.</p> <p>In this respect it must be ensured that the most favourable conditions are effectively applied to the concerned workers.</p>

III. CONTROL MEASURES AND ADMINISTRATIVE FORMALITIES

The EFBWW and FIEC jointly agree that the proposed “Enforcement” Directive should not restrict the control measures or administrative formalities that are currently applied in the various Member States. On the contrary, the proposed “Enforcement” Directive should allow them also to apply additional control measures or administrative formalities, which are deemed to be effective and necessary for that purpose. Thus, our conclusion is that the list of control measures must be kept open, in order to allow for other control mechanisms than those currently applied, in the light of possible further developments and experiences.

In order to allow labour inspectorates to conduct efficient controls, the EFBWW and FIEC agree that all the Member States should introduce a mandatory prior notification scheme. This would allow each Member State to conduct effective controls and investigations of posted workers.

Proposal for amendment 3	
<p>EUROPEAN COMMISSON</p> <p>(16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers,</p>	<p style="text-align: center;"><u>EFBWW-FIEC</u></p> <p>(16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers,</p>

<p>Member States should apply only certain control measures or administrative formalities to undertakings posting workers for the provision of services. Such measures and requirements may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and the necessary information cannot be obtained easily from the employer of posted workers or the authorities in the Member State of establishment of the service provider within a reasonable delay and/or less</p>	<p>Member States should apply any control measures or administrative formalities to undertakings posting workers for the provision of services deemed to be effective and necessary for that purpose.</p>
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Proposal for amendment 4	
<p style="text-align: center;"><u>EUROPEAN COMMISSION</u> <i>Article 9</i> <i>National control measures</i></p> <p>1. Member States may only impose the following administrative requirements and control measures:</p> <p>(a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, whereby the declaration may only cover the identity of the service provider, the presence of one or more clearly identifiable posted workers, their anticipated number, the anticipated duration and location of their presence, and the services justifying the posting;</p> <p>(b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document</p>	<p style="text-align: center;"><u>EFBWW-FIEC</u> <i>Article 9</i> <i>National control measures</i></p> <p>1. Member States shall at least impose the following requirements and control measures:</p> <p>(a) an obligation for a service provider established in another Member State to make a declaration to the responsible national competent authorities before the commencement of the service provision whereby the declaration, in one of the official language(s) of the host Member State, shall cover at least:</p> <ol style="list-style-type: none"> 1) the identity of the service provider, 2) the anticipated number and the individual identification data of the posted workers, 3) the anticipated duration of posting and location of the place where the service is to be provided, 4) the services justifying the posting; <p>(b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document</p>

<p>within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, timesheets and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;</p> <p>(c) a translation of the documents referred to under (b), may be justified provided these documents are not excessively long and standardised forms are generally used for such documents;</p> <p>[...]</p> <p>3. Within three years after the date referred to in Article 20, the necessity and appropriateness of the application of national control measures shall be reviewed in the light of the experiences with and effectiveness of the system for cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.</p>	<p>within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), A1 forms, work and residence permits for third-country nationals, payslips, timesheets and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;</p> <p>(c) a translation of the documents referred to under (b) in one of the official languages of the host Member State ;</p> <p>[...]</p> <p>3. Within three years after the date referred to in Article 20, the application of national control measures shall be reviewed in the light of the experiences with and effectiveness of the system for cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.</p>
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Proposal for amendment 5	
<p style="text-align: center;"><u>EUROPEAN COMMISSION</u> <i>Article 10</i> <i>Inspections</i></p> <p>1. Member States shall ensure that appropriate checks and monitoring mechanisms are put in place and that effective and adequate inspections are</p>	<p style="text-align: center;"><u>EFBWW-FIEC</u> <i>Article 10</i> <i>Inspections</i></p> <p>1. Member States shall ensure that effective checks and monitoring mechanisms are put in place and that effective and adequate inspections are</p>

<p>carried out on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC and to guarantee its proper application and enforcement. Such inspections shall be based primarily on a risk assessment to be drawn up regularly by the competent authorities. The risk assessment shall identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such risk assessment the realisation of big infrastructural projects, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers shall be taken into account.</p>	<p>carried out on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC and to guarantee its proper application and enforcement.</p>
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IV. CROSS-BORDER COMPLIANCE

The European social partners of the construction underline that the cross-border cooperation between Member States and public authorities is the keystone for a proper functioning of the PWD and of the proposed “Enforcement” Directive, in particular as regards the recovering of penalties or fines imposed by another Member States on undertakings or physical persons which are established on their territory. The possibility of recovering penalties or fines in another Member State must be a generally applicable principle without any preliminary conditions.

Proposal for amendment 6	
<p><u>EUROPEAN COMMISSION</u> <i>Article 13</i> <i>General principles — mutual assistance and recognition</i></p> <p>[...]</p> <p>2. The requesting authority may, in accordance with the laws, regulations and administrative practices in force in its own Member State, request the competent authority in another Member State to recover a penalty or fine or notify a decision imposing a penalty or a fine, in so far as the relevant laws, regulations and administrative practices in force in</p>	<p><u>EFBWW-FIEC</u> <i>Article 13</i> <i>General principles — mutual assistance and recognition</i></p> <p>[...]</p> <p>2. The requesting authority may, in accordance with the laws, regulations and administrative practices in force in its own Member State, request the competent authority in another Member State to recover a penalty or fine or to notify it of a decision to impose a penalty or a fine.</p>

~~the requested authority's Member State allow such action for similar claims or decisions.~~

V. FINAL REMARKS

The European social partners of the construction industry, FIEC and EFBWW, fully endorse these common amendments and urge the European Parliament and the Council to integrate them in the on-going legislative debate regarding the proposed "Enforcement" Directive.

Besides these common amendments the EFBWW and FIEC have their own proposals for amendments, which belong to the sole responsibility of the respective social partner.

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