

EU COMMISSION PROPOSAL COM(2016) 128 AMENDING THE POSTING OF WORKERS DIRECTIVE (96/71/EC)

Posting of agency workers and the cross-border provision of services: Focus should be laid on better enforcement of existing rules

General Assessment of the Commission Proposal:

Labour mobility and the provision of services, including the posting of agency workers, are key pillars of European integration and the EU single market. The posting of workers offers opportunities for companies to meet economic needs and for workers to explore new professional opportunities.

The World Employment Confederation-Europe (formerly Eurociett) is convinced that there is no need to revise the Posting of Workers Directive (96/71/EC), but that focus should be laid on its better implementation, using existing provisions and the 2014 enforcement Directive to ensure work mobility and the provision of services.

Action at EU and national level is required with regard to two dimensions:

On the Commission Proposal (COM 2016/128) to revise the Posting of Workers Directive

- The World Employment Confederation–Europe supports the principle of equal treatment for **posted agency workers** (as defined in Article 5 of the Directive on temporary agency work and implemented at national level; **thus including the derogations provided under that Article**). Applying this principle is already possible today based on the current text of the Posting of Workers Directive.
- At the same time, the World Employment Confederation-Europe calls for maintaining a level-playing field between posted and non-posted agency workers in the country of destination.

This implies that it should be possible to apply the main terms and conditions which apply to **agency workers** may also be applied in the context of the posting of an agency worker, as long as these are proportionate, non-discriminatory and objectively justified. **The most suitable approach to establish such a level-playing field is to maintain Article 3, paragraph 9, which allows Member States to apply further conditions in the context of the posting of agency workers.**

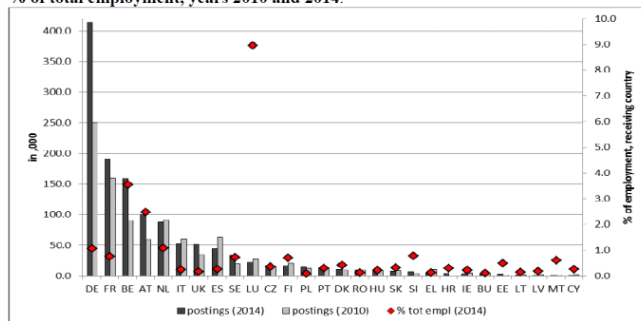
Using opportunities of the 2014 Posting of Workers enforcement Directive (2014/67/EU)F

- There is a **need to further improve access to information** on the conditions for providing cross-border agency work services and the employment conditions for posted agency workers.
- There is a need for **proportionate, effective, non-discriminatory and (where needed) more controls to ensure regulatory compliance.**
- **Administrative cooperation between EU Member States needs to be enhanced, including harmonised and efficient delivery of A1 forms.**

1. The benefits of work mobility and the posting of workers in the EU single market

1.1. Labour mobility is a key pillar of European integration granted by the EU treaty, which contributes substantially to better functioning and more inclusive labour markets. Work mobility and the posting of

Figure 1. Posted workers, breakdown by receiving country, absolute numbers and % of total employment, years 2010 and 2014.



Source: EMPL elaboration on Pacolet and De Wispelaere (2015). Note: data on received posted workers are only available with respect to postings to single Member States (art. 12 of Reg. 883/2004).

Other sectors include services, financial and business sectors, transport and communication and agriculture. The number of posted workers in the EU is estimated to be 1.2 million (corresponding to less than 1% of the EU working age population). As part of the business services sectors, posting of workers also plays a significant role in the agency work industry.¹

1.2. Work mobility and the posting of workers affects the EU Member States in different ways, with Germany, France, Belgium and Austria being mainly receiving countries, whereas the most important sending countries are Estonia, Hungary, Luxembourg, Poland, Slovenia and Slovakia (based on most recent data published by the EU Commission in the impact assessment to the Commission proposal on the revision of the Posting of Workers Directive).

1.3. Work mobility and the posting of workers are at the centre of the EU employment and social policy agenda. In 2014, Directive 2014/67/EU on the enforcement of the Posting of Workers Directive was adopted,² which aims at addressing existing weakness and challenges linked to the posting of workers, especially in the areas of access to information, administrative cooperation and controls.

However, despite the changes agreed with regard to EU rules on the posting of workers, political discussions and controversies have intensified. EU Commission President Juncker and Commissioner Thyssen have identified work mobility and the posting of workers as one of the core priorities of the current EU Commission. On 8th March 2016, The European Commission published a proposal to revise the Posting of Workers Directive of 1996. This proposal was launched at the same time as the EU Consultation on an EU Pillar of Social Rights and the Commission proposal for the Europe 2020 Country-Specific Recommendations of 2016.³

¹ In France, there have for example been 212 000 posted workers in 2014 with 19 % of them working through agency work. In Poland 26,006 agency workers have been posted in 2014 to 4517 companies in other EU Member States.

² In further parts of this position paper, this Directive is being referred to as the enforcement Directive of 2014.

³ The Commission proposal is available on the [website of DG Employment](#).

2. There is no need to revise the Directive on the Posting of Workers, which fully covers temporary agency work

- 2.1. Despite the Commission proposal of March 2016, the World Employment Confederation-Europe is convinced that there is no need to revise or amend the Posting of Workers Directive of 1996. The focus should be laid on the implementation and enforcement of current EU rules on the posting of workers at national level. Current challenges linked to the posting of workers are not inappropriate EU legislation, but a lack of application and enforcement of the existing rules. The Posting of Workers Directive requires Member States to put in place a range of minimum employment and working conditions and offering a framework for providing services in the single market.
- 2.2. Reopening the Posting of Workers Directive of 1996 would lead to legal uncertainty on the (future) rules to that will have to be complied with. Furthermore, the proposed revision of the Posting of Workers Directive will most certainly delay or stop the implementation efforts of EU Member States of the 2014 enforcement Directive which should be swiftly implemented at national level and help to prevent abuses and irregularities. Also administrative cooperation between Member States shall be strengthened based on the enforcement Directive. The World Employment Confederation-Europe calls for an evaluation of the Posting of Workers enforcement Directive and its effect in practice, as foreseen for (no later than) 2019 under Article 24 of the enforcement Directive.
- 2.3. The World Employment Confederation-Europe furthermore is deeply convinced that revising the Posting of Workers Directive does not correspond to the European Commission Better Regulation Agenda. In the light of this agenda, EU Directives should only be proposed, if current challenges cannot be solved by the enforcement of existing rules and if these absolutely require a regulatory intervention at EU level. The World Employment Confederation-Europe believes that these requirements for better regulation are not met in the case of the proposed revision of the Posting of Workers Directive.
- 2.4. Furthermore, it needs to be taken into account that the legal basis of the Posting of Workers Directive is the EU Single Market and therefore the related, overall policy objective to create a more competitive Europe, which drives economic growth and job creation. The proposals put forward by the European Commission in March 2016 do not match these policy objectives, as they will make the cross-border provision of services more difficult, increase legal risks for companies and enlarge costs related to regulatory compliance. Against this background, the World Employment Confederation-Europe considers the proposed approach of amending the Posting of Workers Directive to be neither appropriate nor proportionate.
- 2.5. Additionally and closely linked to the proposed revision of the Posting of Workers Directive, the World Employment Confederation-Europe would have much preferred if EU Social Partners had been formally consulted on the concrete elements covered in the revision of the Posting of Workers Directive. While the EU Commission organised a consultation seminar and held several meetings with stakeholders and EU Social Partners concerned, a formal consultation was not carried out prior to the launch of the proposal. The World Employment Confederation-Europe is fully aware of the fact that such a consultation is not formally required, as the Posting of Workers Directive does not have a social policy legal basis. However, as the Directive regulates important elements of employment and social policy, a formal consultation of EU Social Partners would have been appropriate and needed.

- 2.6. The opposition to a revision of the Posting of Workers Directive has also been expressed by several EU Member States, who raised concerns in the so-called “yellow-card procedure”. Arguments have been raised that the Commission proposal does not respect the principles of subsidiarity and proportionality. The EU Commission has over-ruled and rejected these concerns on 20th July,⁴ stating that it does not see any need to amend or withdraw its proposal following the concerns expressed by several EU Member States.
- 2.7. The World Employment Confederation-Europe fully supports the fact that temporary agency work is covered under the scope of the Posting of Workers Directive, as stipulated by Article 3, paragraph 1 (d). Also in that respect, there is therefore no need to revise the Posting of Workers Directive of 1996. Excluding temporary agency work from the scope of the Posting of Workers Directive will not solve any of the current challenges discussed at EU level regarding the posting of agency workers, but on the contrary weaken the protection of agency workers and create legal uncertainty for companies, who aim to post an agency worker to another country. Excluding temporary agency work from the scope of the Posting of Workers Directive is furthermore not legally possible under the EU treaty and based on existing case law. The World Employment Confederation-Europe welcomes that the European Commission has not proposed amendments to formally change or limit the scope of the Posting of Workers Directive.

3. Working conditions for posted agency workers: Assessment of the Commission proposal to amend the Posting of Workers Directive

- 3.1. **Equal Treatment for posted agency workers as defined in Article 5 of the Directive on temporary agency work:** The World Employment Confederation-Europe aims to highlight that achieving “equal pay for equal work” for posted agency workers as defined by the Directive on temporary agency work and implemented in the country of destination can be implemented via Article 3 paragraph 9 or collective labour agreements (based on Article 3, paragraph 1 d). It does not require any revision of the Posting of Workers Directive. The political intention of Commission President Juncker can thus be implemented for posted agency workers without changing the text of the original Posting of Workers Directive.

The EU Commission proposal goes beyond the approach of equal pay for equal work for posted agency workers by applying all elements of Article 5 of the Directive on temporary agency work to posted agency workers, thus establishing the principle of equal treatment as defined in the Directive on temporary agency work. The World Employment Confederation-Europe aims to highlight that the Directive on temporary agency work is based on a European definition of equal treatment, covering (in line with Article 3 I f of the Directive on temporary agency work) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays as well as pay. Article 5 of the Directive on temporary agency work furthermore refers to the protection of pregnant women and nursing mothers, the protection of children and young people as well as the equal treatment for men and women (non discrimination based on sex, race, ethnic origin, beliefs, age, or sexual orientation). Taking into account this narrow definition of equal treatment at EU level, the World Employment Confederation-Europe supports the principle of equal treatment for posted workers. At the same time,

⁴ For further information, please consult the European Commission [website](#).

it should be clearly recognised that there are other elements of remuneration for agency workers, such as access to training and supplementary pension rights, which are not covered by the EU Directives and shall therefore not be obligatorily applied to posted agency workers.

The deletion of Article 3, paragraph 9 of the Posting of Workers Directive is not appropriate and not supported by the World Employment Confederation-Europe: Article 3, paragraph 9 at present allows Member States to impose the same “terms and conditions which apply to temporary agency workers” in the country where the work is carried out. This approach is broader than new reference to Article 5 of the Directive on temporary agency work, as more conditions can be covered under Article 3, paragraph 9. The World Employment Confederation-Europe would prefer if Article 3, paragraph 9 is maintained. In the current, legal framework, the Article 3, paragraph 9 has been used by 15 EU Member States, mostly to establish the principles of equal pay and/or equal treatment for posted agency workers.⁵ The World Employment Confederation-Europe would welcome a level playing field between posted and non-posted agency workers in the country of destination.

4. Better enforcement of existing regulation, using the 2014 enforcement Directive on the posting of workers

- 4.1. **Improved access to information:** An important challenge in the context of the posting of agency workers is the insufficient access to information for both companies and workers. Information on the posting of agency workers needs to cover the requirements, conditions and restrictions for posting agency workers, but also information on the applicable employment and working conditions for posted agency workers. There is also a need for better data collection and statistics on the number of posted agency workers in Europe.

Based on the 2014 enforcement Directive, the information should be made available by electronic means via a single national website and be made available free of charge in the official language of the host Member States and the most relevant languages taking into account demands in the labour market. It is in this context that the World Employment Confederation-Europe calls for a swift and effective implementation of Article 5 of the enforcement Directive of 2014. The 2016 proposal for the revision of the Posting of Workers Directive further accelerates the information requirements, as information on remuneration for (posted) workers shall be made available via national websites on posting of workers, which in fact raises significant questions linked to data-protection.

Complementary to these national websites, Initiatives of European and/or national social partners to improve access to information on the terms and conditions of the posting of agency workers, such as the World Employment Confederation-Europe/Uni-Europa Observatory⁶ on cross-border activities within the temporary agency work sector should be encouraged and supported. National information and awareness raising campaigns should include public and private information sources on the posting of workers.

⁵ See also: Commission Staff Working Document – Impact Assessment. Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, p. 16

⁶ The observatory of the World Employment Confederation-Europe and UNI Europa on cross-border activities was established in 2009 by the EU Sectoral Social Partners of the temporary agency work sector. An important activity of the sectoral social partners is the preparation of factsheets on the posting of workers, which are made available [online](#).

4.2. Effective, proportionate and efficient controls: The World Employment Confederation-Europe fully agrees that proportionate, effective and non-discriminatory controls are essential to secure compliance with existing regulation and prevent abuses linked to the posting of workers. Controls in the context of the posting of workers have been adequately addressed in the enforcement Directive of 2014, which addresses administrative cooperation, controls and inspections in the Articles 9 and 10. Against this background, there is no need for changing the EU norms on national controls on the posting of workers. Priority should be given to a fully and adequate implementation of the enforcement Directive of 2014. The World Employment Confederation-Europe aims to underline that there are large differences in the actual practice of national controls and the administrative capacities of the control authorities.

In Belgium, an effective approach of control and enforcement has been established based on the Limosa system of prior declaration and authorisation. However, some problems linked to controls and enforcement still need to be addressed. The Belgian member federation of the World Employment Confederation-Europe is actively engaged in addressing these. In France, a prior declaration scheme exists since 1994, which purpose is to improve supervision and compliance. Given the heterogeneity of national practice, there might be in some cases the need for more controls, for making them more effective and for improving the cooperation between labour inspectorates, control authorities and other administrations, while other countries have already established appropriate systems. In the Netherlands a private enforcement body has been set up by the agency work industry ("CLA police")⁷ to ensure compliance with the collective labour agreements applicable to agency workers. The CLA police plays a central role in ensuring regulatory compliance and preventing abusive practices, given the fact that agency work in the Netherlands is largely regulated by collective labour agreements. The CLA for the agency work sector also covers specific provisions on the posting of agency workers.

The World Employment Confederation-Europe is convinced that there is a need to differentiate clearly between the established, well-organised and recognised actors on the labour market and certain mala fide companies, who are at the centre of cases of non-compliance and abuses. The agency work industry represented by the World Employment Confederation is bound by the confederation's Code of Conduct, which aims at promote fair and ethical recruitment and employment practices and includes a clear commitment on the respect for the worker's rights and the compliance with regulation.

4.3. Administrative cooperation between EU Member States must be strengthened: To facilitate controls and the provision of cross-border services, administrative cooperation between EU Member States, especially between sending and receiving countries needs to be enhanced in line with the Articles 16 and 17 of the 2014 enforcement Directive. A special focus should be laid in the context of enhanced administrative cooperation on improved and efficient A1 forms, which should be handed out directly after the posting, if the posting of workers only lasts for a couple of days and in a unified way to the requesting service provider. A1 forms should also clearly specify whether the posted worker is an agency worker.

4.4. Action should be taken to better differentiate between the legitimate posting of workers and undeclared work: In some occasions of the public debate, the posting of workers is not distinguished properly from a broader occurrence of intra-EU labour mobility and illegal activities in the form of non-compliance, exploitation and bogus self-employment. The prevention of undeclared work is a common challenge for many EU countries, as reflected in the recently established EU platform on the prevention and deterrence of undeclared work. Evidence from the EU Member States shows that

⁷ For further information, please consult the "CLA police" (SNCU) website: www.sncu.nl

undeclared work is frequently wrongly associated and linked to the posting of workers. At the same, cases of non-compliance and illegal cross-border activities, which have nothing in common with regular cases of posting of workers, must be prevented. Against this background, the World Employment Confederation-Europe calls for action to prevent and deter undeclared work in the context of the posting of works, through exchange of good practices at EU level via the European platform on the prevention and deterrence of undeclared work and by improving the efficiency and effectiveness of labour inspectorates. However, actions against undeclared work and illegal activities should not in consequence make legitimate posting of workers more burdensome.

- 4.5. **Need to fight abusive practices linked to letterbox companies:** Experience in the EU Member States and also gathered in the context of the EU Committee of Experts on the Posting of Workers, in which the World Employment Confederation-Europe has an observer status, shows that abusive practices are often linked to so-called letterbox companies. This was for example the case with regard to the company Atlanco Rimec, which used a letterbox construct to circumvent regulation on the protection of agency workers. Against the background of these limited, but well-documented cases, the World Employment Confederation-Europe supports action at national level to prevent letterbox companies and abusive practices linked to them. We support a regulatory approach that a company aiming to post agency workers to other EU countries needs to be an employer ordinarily performing substantial activities in the territory of the Member State in which he/she is established. Corresponding, proportionate actions against letterbox companies will help to prevent abusive practices in the context of the posting of workers.

About the World Employment Confederation-Europe: The World Employment Confederation-Europe is the voice of the employment industry at European level, representing labour market enablers.

With 29 countries and 7 of the largest international workforce solutions companies as members, the World Employment Confederation-Europe is fully representative of the industry, both in size and diversity. It brings a unique access to and engagement with European policymakers (EU Commission, European Parliament, and Council) and stakeholders (trade unions, academic world, think tanks).

The World Employment Confederation-Europe strives for a recognition of the economic and social role played by the industry in enabling work, adaptation, security and prosperity in our societies. Its members provide access to the labour market and meaningful work to more than 11,6 millions of people in Europe and serve around 1,5 millions organisations on a yearly basis.

**LEADING
IN A CHANGING
WORLD OF WORK**