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PARTIE II

**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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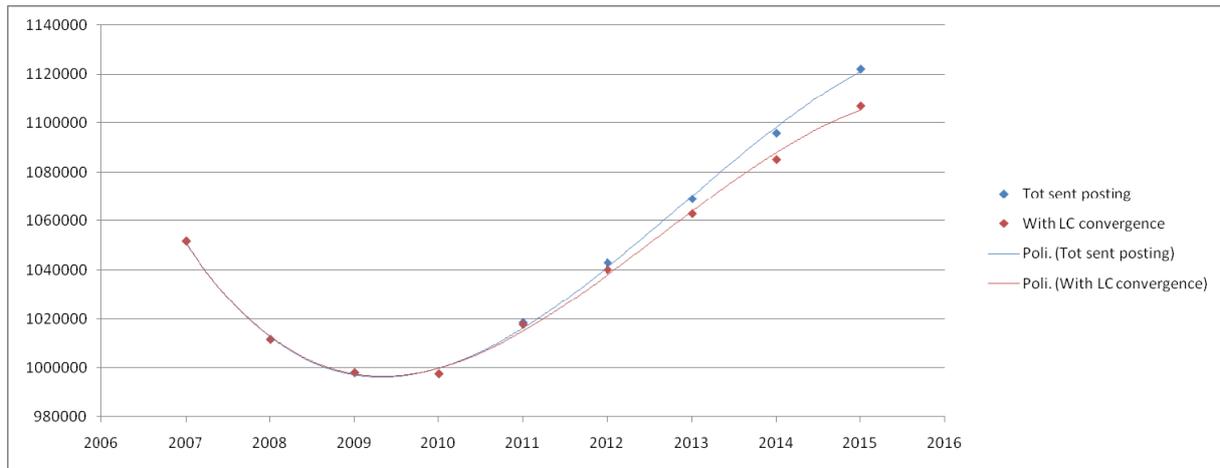
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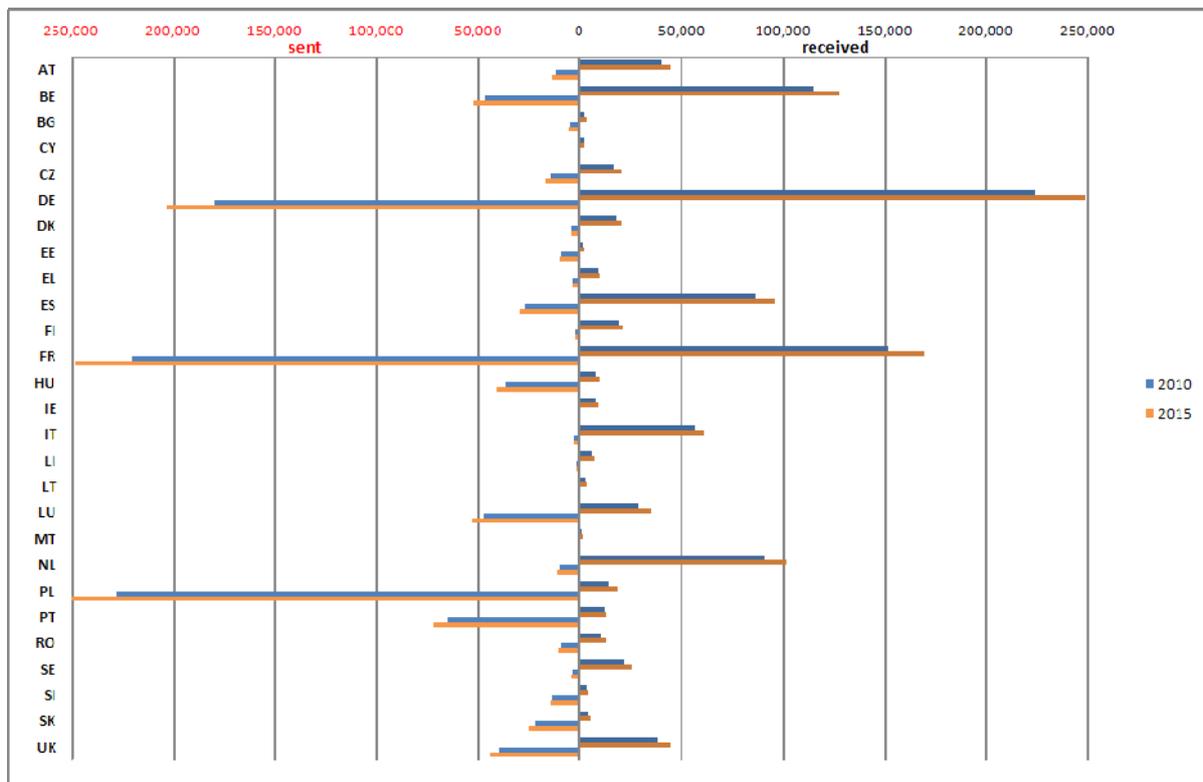
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## ANNEX 2: Simulation of future trends of posting<sup>1</sup>

**Figure 1: Simulation on postings from EU27 received in EU 27, years 2010-2015**



**Figure 2: Simulation of flows of posting in 2010 and 2015 (without labour cost convergence)**



Under the assumption that nothing changes in the regulatory framework both at EU and national level, it is possible to use a simple model to simulate the expected evolution of posting in the medium term (5 years). The model is based on the evidence that the growth of posting is strongly correlated to the growth of GDP. In addition, the main drivers of posting (unemployment, labour cost, trade union membership and market integration) are mostly

<sup>1</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.

correlated to GDP<sup>2</sup>. Therefore the growth rate of GDP (GDP\_gr) is used as variable which explains the trend of posting.

The model is built from a receiving perspective, starting from data on posting in 2007. The receiving perspective is chosen because the empirical analysis better support this perspective. The use of 2007 data is due to the fact that they seem more reliable compared to data on posting in 2008 and 2009, which have been strongly influenced by the economic crises

Two trends are simulated. The projection from 2010 to 2015 distinguishes between a hypothesis of constant labour cost differentials and a scenario of labour cost convergence (see Box B2 for a discussion of the labour cost convergence hypothesis).

In order to identify the expected trend of sent postings at country level as well as the country by country breakdown of sent and received posting, the country by country breakdown of 2007 has been replicated. This approach allows preserving the relevance of the geographical proximity in the country by country flows of posting. The aggregate level of posting at EU-level is the sum of national postings (received and sent).

The simulation is based on the model below:

$$\text{Posting}_{t+1,j} = \text{Posting}_{t,j} * [1 + (\text{GD\_gr}_{t+1,j} * \text{CF}_j)]$$

where:

- $\text{Posting}_{t+1,j}$  is the expected value of (received) postings in  $t+1$  in country  $j$ ,
- $\text{Posting}_{t,j}$  is the expected value of (received) postings in  $t$  in country  $j$ , the first year used for the simulation is the number of actual – and not expected, of course – received postings in 2007.
- $[1 + (\text{GD\_gr}_{t+1,j} * \text{CF}_j)]$  is the growth rate factor of posting in country  $j$ . This results from the GDP growth rate expected for year  $t+1$  in the country  $j$  (source: IMF) and on the corrective factor  $\text{CF}_j$  specifically calculated for the country  $j$  (see the subsection below).

Tables B3-B5 shows the resulting country by country flows of posting. Given the shortage of data, the model has some methodological limitations. In particular, the growth rate factors of posting (one for each country) are determined according to a number of hypotheses. Therefore results must be interpreted very cautiously. In particular, the extent of postings resulting from the model should be used to foresee a general trend of the phenomenon and not as a precise forecast of the future number of posted workers country by country. Finally, notice that the receiving perspective results in a prudential underestimation of the future extent of the phenomenon.

### **The corrective factor**

To calculate the CF of each country the statistic relevance of each driver (unemployment, labour costs, trade union membership and market integration) as emerging from the econometric analysis presented in Section 1 has been taken into account:

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<sup>2</sup> Box B.1 discusses the relationship between GDP and labour cost.

- Every country, for each proxy representing a driver, has been included in one of three clusters: i) cluster “high” which includes countries with a relatively high values of the proxy of the driver, ii) cluster “medium” which includes countries with medium values of the proxy, iii) cluster “low” which includes countries with relatively low values of the proxy.
- According to the cluster of inclusion, for each driver, a “driver-corrective factor” has been assigned to every country in order to represent the statistic relevance and the direction of the driver. These driver-corrective factors have been defined according to the empirical evidence:
  - The sign of weighs is based on the econometric analysis.
  - Unemployment and labour cost are the most statistically significant drivers (see previous section). Therefore, their relevance is relatively higher with respect to market integration and trade union membership.

For instance, since unemployment is a driver which hinders posting from a receiving perspective, countries with high unemployment rate receive a negative driver-corrective factor related to unemployment (-0.2). On the contrary, since high labour cost favours posting inflows, high labour cost countries receive a positive driver-corrective factor related to labour cost (+0.2). Since market integration is a driver which favours posting, a high integration corresponds to a high driver-corrective factor related to market integration. Finally, since trade union membership is a driver which hinders inflows of posting, a high trade union membership is associated a negative driver-corrective factor. Table B.1 shows the values of the driver-corrective factors (a.-d.) by driver and cluster.

**Table B1. Driver-corrective factors by driver and cluster**

Driver corrective factors	Economic drivers			Social-institutional drivers
	(a) Unemployment	Labour cost	Mkt integr.	Trade union memb.
Cluster “high”	-0.2	+0.2	+0.2	-0.1
Cluster “medium”	0	0	+0.1	0
Cluster “low”	+0.2	-0.2	0	+0.1

Given the driver-corrective factors described above, the CF is calculated by adding to 1 the sum of the drivers corrective factors (1+a+b+c+d). This means that, without any driver corrective factor, the trend of posting exactly follows the trend of GDP. Table B2 shows the CF of each country.

*Example: According to the empirical evidence, Belgium belongs to the clusters “medium” for unemployment rate and market integration while to the clusters “high” for labour cost and trade union membership. Therefore Belgium received for unemployment a.=0, for labour cost b.=+0.2, for market integration c.=+0.1, for trade union membership d.=-0.1.*

To carry out the trend simulation under the hypothesis of labour cost convergence,  $CF_j$  changes over the period 2010-2015 because the relevance of the driver of labour cost becomes smaller year by year (see Table B2). This progressively reduces the relative convenience of a number of phenomena such as posting driven by labour cost and firm delocalization.

## Results

The main results of the simulation can be summarised as follows:

- Given the current regulatory setting, posting will increase following the economic cycle. Posting continues to follow a cyclical pattern and keeps similar features in terms of level, drivers and structure.
- The potential convergence of labour cost reduces the convenience of the posting of low skilled workers resulting in a smaller growth rate of posting. In case of labour cost convergence, the reduction in the role of differentials in labour cost as a driver of posting, leads to increase the relative weigh of postings which are driven by skill and labour shortages, job opportunities, internationalisation and market integration.
- In both cases (with and without labour cost convergence), postings grows, but at a slow pace (slightly lower than GDP growth), and remains an economic phenomenon of limited significance at aggregate level.
- The country breakdown of the simulation shows that Germany, France, Poland, Portugal, Belgium and Luxembourg continue to be countries which send the most relevant number of postings and Germany, France, Belgium, Spain, Italy and the Netherland remain the most relevant recipients of postings (see Figure 4.2 and Table B.2).
- The simulation on the inflows-outflows detailed country by country (see Table B3 and Table B4) confirms that posting does not change substantially in terms of relative extent and features. Therefore, we can conclude that the limited critical issues related to the posting 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 cost. With converging labour cost, the relevance of these critical issues becomes even more limited.

**Table B2. Corrective factor, by country, with and without labour cost convergence**

	Driver corrective factors				CF without labour cost convergence 1+A.+B.	CF with labour cost convergence					
	a.	b.	c.	d.		2010	2011	2012	2013	2014	2015
BE	0	0.2	0.1	-0.1	1.2	1.2	1.15	1.1	1.05	1	1
BG	0	-0.2	0.1	0.1	1	1	1.05	1.1	1.15	1.2	1.2
CZ	0	-0.2	0.1	0.1	1	1	1.05	1.1	1.15	1.2	1.2
DK	0.2	0.2	0.1	-0.1	1.4	1.4	1.35	1.3	1.25	1.2	1.2
DE	-0.2	0.2	0	0	1	1	0.95	0.9	0.85	0.8	0.8

EE	-0.2	-0.2	0.1	0.1	0.8	0.8	0.85	0.9	0.95	1	1
IE	0	0.2	0.2	0	1.4	1.4	1.35	1.3	1.25	1.2	1.2
EL	-0.2	0	0	0.1	0.9	0.9	0.9	0.9	0.9	0.9	0.9
ES	-0.2	0	0	0.1	0.9	0.9	0.9	0.9	0.9	0.9	0.9
FR	-0.2	0.2	0	0.1	1.1	1.1	1.05	1	0.95	0.9	0.9
IT	0	0.2	0	-0.1	1.1	1.1	1.05	1	0.95	0.9	0.9
CY	0.2	0	0.2	-0.1	1.3	1.3	1.3	1.3	1.3	1.3	1.3
LV	-0.2	-0.2	0	0.1	0.7	0.7	0.75	0.8	0.85	0.9	0.9
LT	0	-0.2	0	0.1	0.9	0.9	0.95	1	1.05	1.1	1.1
LU	0.2	0.2	0.2	-0.1	1.5	1.5	1.45	1.4	1.35	1.3	1.3
HU	-0.2	-0.2	0.1	0.1	0.8	0.8	0.85	0.9	0.95	1	1
MT	0	0	0.2	-0.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
NL	0.2	0.2	0.1	0	1.5	1.5	1.45	1.4	1.35	1.3	1.3
AT	0.2	0.2	0.1	0	1.5	1.5	1.45	1.4	1.35	1.3	1.3
PL	-0.2	-0.2	0	0.1	0.7	0.7	0.75	0.8	0.85	0.9	0.9
PT	-0.2	0	0	0.1	0.9	0.9	0.9	0.9	0.9	0.9	0.9
RO	0	-0.2	0	0	0.8	0.8	0.85	0.9	0.95	1	1
SI	0	0	0.1	0	1.1	1.1	1.1	1.1	1.1	1.1	1.1
SK	-0.2	-0.2	0.1	0.1	0.8	0.8	0.85	0.9	0.95	1	1
FI	0	0.2	0	-0.1	1.1	1.1	1.05	1	0.95	0.9	0.9
SE	0	0.2	0.1	-0.1	1.2	1.2	1.15	1.1	1.05	1	1
UK	0	0	0	0	1	1	1	1	1	1	1

**Table B3. Simulation of the number of postings from and to EU27 (year 2010-2015)**

Country	Posting by sending country - Simulation						Posting by receiving country - Simulation					
	2010	2011	2012	2013	2014	2015	2010	2011	2012	2013	2014	2015
AT	11,505	11,738	12,038	12,345	12,652	12,942	40,083	40,872	41,733	42,625	43,568	44,518
BE	46,260	47,271	48,382	49,568	50,822	52,082	114,972	117,335	119,663	122,183	124,894	127,792
BG	4,739	4,830	4,943	5,061	5,179	5,289	2,800	2,867	3,005	3,149	3,338	3,538
CY	143	146	152	157	163	169	2,381	2,433	2,507	2,594	2,685	2,781
CZ	14,244	14,577	15,012	15,488	15,991	16,508	16,988	17,437	18,178	18,932	19,717	20,537
DE	179,279	183,244	187,722	192,513	197,561	202,738	224,138	229,577	235,142	240,337	245,156	248,904
DK	3,774	3,845	3,942	4,054	4,171	4,291	18,149	18,653	19,142	19,620	20,080	20,546
EE	8,723	8,931	9,141	9,357	9,579	9,795	2,088	2,176	2,264	2,354	2,445	2,536
EL	3,224	3,298	3,377	3,454	3,529	3,593	9,307	9,013	9,131	9,365	9,601	9,909
ES	26,526	27,009	27,604	28,257	28,944	29,629	86,158	86,915	88,779	91,031	93,359	95,610
FI	2,146	2,196	2,259	2,331	2,404	2,478	19,260	19,714	20,163	20,623	21,093	21,549
FR	219,795	224,245	229,859	235,909	242,168	248,457	151,168	154,158	157,493	161,216	165,269	169,353
HU	36,377	37,207	38,189	39,157	40,112	40,977	8,302	8,504	8,812	9,131	9,462	9,802
IE	957	978	1,003	1,029	1,058	1,086	7,723	7,934	8,167	8,452	8,777	9,144
IT	2,687	2,738	2,807	2,883	2,963	3,043	56,302	56,979	57,936	58,885	59,832	60,736
LI	1,657	1,696	1,738	1,780	1,823	1,863	5,974	6,197	6,388	6,643	6,928	7,223
LT	913	935	959	983	1,006	1,027	2,982	3,102	3,250	3,407	3,571	3,741
LU	47,008	47,958	48,996	50,134	51,356	52,584	29,245	30,344	31,433	32,481	33,556	34,622
MT	102	105	107	110	114	117	1,664	1,697	1,737	1,785	1,838	1,894
NL	9,299	9,484	9,705	9,940	10,186	10,432	91,082	92,912	94,774	96,779	98,931	101,180
PL	227,672	232,932	238,524	244,183	249,809	254,943	14,853	15,512	16,244	17,064	17,943	18,862
PT	64,345	65,241	66,634	68,235	69,908	71,556	12,706	12,698	12,790	12,959	13,145	13,335
RO	9,078	9,258	9,469	9,681	9,891	10,081	10,585	10,779	11,354	11,931	12,539	13,177
SE	3,503	3,557	3,640	3,734	3,830	3,926	21,724	22,391	23,197	24,171	25,157	26,184
SI	12,908	13,178	13,478	13,782	14,087	14,374	3,838	3,946	4,086	4,243	4,383	4,516
SK	21,366	21,857	22,475	23,102	23,737	24,352	4,562	4,797	5,048	5,309	5,579	5,863
UK	39,354	39,973	40,829	41,795	42,817	43,859	38,550	39,484	40,566	41,753	43,011	44,343
<b>Total</b>	<b>997,585</b>	<b>1,018,428</b>	<b>1,042,983</b>	<b>1,069,022</b>	<b>1,095,858</b>	<b>1,122,193</b>	<b>997,585</b>	<b>1,018,428</b>	<b>1,042,983</b>	<b>1,069,022</b>	<b>1,095,858</b>	<b>1,122,193</b>

Simulation elaborated by Ismeri Europa.

Simulation is carried out without assuming labour cost convergence. The receiving perspective generally underestimates the extent of the phenomenon

**Table B4. Simulation of the number of postings from and to EU27 country by country (year 2010)**

TO	FROM																										Tot.		
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK		UK	
AT	0	305	48	2	659	22497	159	9	7	152	46	4598	2663	7	61	8	485	6	0	186	3759	867	93	45	1258	959	1204	<b>40083</b>	
BE	343	0	439	1	668	25121	65	95	104	1224	139	42768	1746	82	146	30	8011	51	1	3266	19417	5869	562	223	1692	1444	1465	<b>114972</b>	
BG	43	73	0	0	520	417	41	4	14	78	27	1258	14	0	7	0	3	0	0	43	62	0	14	59	11	0	113	<b>2800</b>	
CY	6	20	8	0	317	33	23	0	44	52	3	1269	0	0	4	0	5	0	5	3	5	0	20	72	0	35	457	<b>2381</b>	
CZ	280	230	18	21	0	2755	18	1	1	393	12	3789	289	6	35	0	28	4	0	181	3106	39	103	45	109	5332	193	<b>16988</b>	
DE	4346	3587	2034	1	883	0	221	103	2362	3662	371	34630	22135	41	270	619	3118	489	6	1555	121492	2548	4301	501	4959	7585	2321	<b>224138</b>	
DK	57	123	61	0	560	6441	0	50	21	113	19	3751	1	12	3	157	39	50	0	31	6093	37	6	192	99	15	219	<b>18149</b>	
EE	18	12	0	0	439	179	3	0	0	2	60	1134	104	0	1	39	6	5	0	6	58	0	0	13	0	0	9	<b>2088</b>	
EL	164	162	172	9	524	980	180	2	0	233	72	3820	52	1	71	2	28	1	1	118	57	9	88	300	1	84	2177	<b>9307</b>	
ES	785	1053	401	0	594	10302	357	12	20	0	167	24185	432	8	423	120	169	25	3	636	4402	35256	609	520	608	351	4722	<b>86158</b>	
FI	69	85	8	0	562	1441	45	7977	0	117	0	3414	182	1	20	304	23	64	0	51	3741	219	6	140	263	334	196	<b>19260</b>	
FR	417	18835	415	0	714	22597	792	54	254	9668	94	0	1808	162	1043	234	33384	59	1	1472	29389	11651	855	502	505	2189	14073	<b>151168</b>	
HU	344	175	15	15	559	1201	17	2	17	170	15	4286	0	3	34	0	139	0	0	24	500	6	170	29	20	413	149	<b>8302</b>	
IE	52	102	3	0	520	1289	10	2	0	392	17	2946	135	0	12	0	80	0	18	41	943	282	0	29	19	39	794	<b>7723</b>	
IT	2458	1163	465	0	653	9610	218	5	44	3327	78	23785	1214	104	0	1	234	12	17	558	2818	2108	1725	232	1545	1013	2913	<b>56302</b>	
LT	22	59	3	0	339	561	30	14	0	34	10	986	9	0	6	0	3	16	0	9	3857	0	0	6	2	3	2	<b>5974</b>	
LU	58	4825	2	0	465	18847	1	1	12	45	1	4083	239	0	42	1	0	0	17	119	276	108	4	14	3	6	76	<b>29245</b>	
LV	23	7	0	0	330	135	11	43	0	97	8	1607	153	0	2	55	8	0	0	12	382	0	60	14	15	0	22	<b>2982</b>	
MT	2	12	0	0	323	27	22	0	0	44	5	1102	12	0	26	0	1	0	0	0	11	2	0	0	11	0	0	62	<b>1664</b>
NL	334	12957	290	11	633	34567	102	13	264	660	23	8773	983	180	78	45	735	16	0	0	16347	4815	307	124	1136	733	6955	<b>91082</b>	
PL	132	285	109	0	621	4017	81	11	3	586	15	7937	91	30	65	1	62	3	0	42	0	53	60	72	190	180	208	<b>14853</b>	
PT	30	293	15	0	530	1202	185	1	7	2983	37	6513	9	4	13	0	36	0	0	27	148	0	8	113	36	2	511	<b>12706</b>	
RO	484	127	84	30	534	916	8	0	25	356	9	4006	2920	1	111	0	27	0	0	218	471	28	0	20	73	0	139	<b>10585</b>	
SE	172	308	91	0	590	4520	720	313	1	251	801	5973	350	122	25	24	40	65	0	87	6405	169	52	0	84	274	285	<b>21724</b>	
SI	235	31	8	26	431	526	2	0	0	52	5	1570	36	0	28	0	115	0	0	42	351	0	0	109	0	247	21	<b>3838</b>	
SK	225	97	7	0	684	627	7	0	0	98	6	2230	255	4	30	0	9	1	0	9	175	0	1	5	23	0	67	<b>4562</b>	
UK	405	1334	44	28	590	8471	456	10	25	1734	106	19383	544	188	128	17	221	47	34	552	3415	282	33	116	258	128	0	<b>38550</b>	
<b>Tot.</b>	<b>11505</b>	<b>46260</b>	<b>4739</b>	<b>143</b>	<b>14244</b>	<b>179279</b>	<b>3774</b>	<b>8723</b>	<b>3224</b>	<b>26526</b>	<b>2146</b>	<b>219795</b>	<b>36377</b>	<b>957</b>	<b>2687</b>	<b>1657</b>	<b>47008</b>	<b>913</b>	<b>102</b>	<b>9299</b>	<b>227672</b>	<b>64345</b>	<b>9078</b>	<b>3503</b>	<b>12908</b>	<b>21366</b>	<b>39354</b>		

**Table B5. Simulation of the number of postings from and to EU27 country by country (year 2015)**

TO	FROM																										Tot	
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK		UK
AT	0	338	53	2	731	24,987	176	10	8	169	51	5,106	2,958	8	68	9	538	7	0	207	4,175	963	103	50	1,397	1,065	1,337	<b>44,518</b>
BE	381	0	487	1	742	27,922	72	106	115	1,361	155	47,537	1,941	91	162	34	8,904	56	1	3,630	21,582	6,523	625	248	1,881	1,605	1,628	<b>127,792</b>
BG	54	92	0	0	658	526	52	5	18	98	34	1,589	18	0	9	0	4	0	0	54	78	0	18	74	14	0	143	<b>3,538</b>
CY	7	23	9	0	371	38	27	0	51	61	3	1,482	0	0	5	0	6	0	6	3	6	0	23	84	0	41	534	<b>2,781</b>
CZ	338	278	22	26	0	3,330	22	1	1	475	15	4,581	349	7	43	0	34	5	0	218	3,754	47	125	54	131	6,446	233	<b>20,537</b>
DE	4,826	3,983	2,258	1	981	0	246	115	2,623	4,066	412	38,456	24,581	45	300	687	3,462	543	7	1,727	134,915	2,829	4,776	556	5,507	8,423	2,577	<b>248,904</b>
DK	64	139	69	0	634	7,292	0	56	23	128	21	4,247	1	14	4	177	44	56	0	35	6,897	42	7	217	112	18	248	<b>20,546</b>
EE	22	15	0	0	533	217	4	0	0	2	73	1,377	126	0	1	47	7	6	0	7	70	0	0	16	0	0	11	<b>2,536</b>
EL	174	172	183	9	558	1,044	192	2	0	248	77	4,067	55	1	75	2	30	1	1	125	61	9	94	319	1	90	2,318	<b>9,909</b>
ES	871	1,169	445	0	659	11,432	396	13	22	0	185	26,838	480	9	470	133	187	28	3	705	4,885	39,124	676	577	674	390	5,240	<b>95,610</b>
FI	77	95	9	0	628	1,612	51	8,925	0	131	0	3,820	203	1	22	340	25	71	0	57	4,185	245	7	156	294	373	219	<b>21,549</b>
FR	467	21,100	465	0	800	25,315	888	60	285	10,831	105	0	2,026	181	1,169	262	37,400	66	1	1,650	32,925	13,052	958	562	566	2,452	15,766	<b>169,353</b>
HU	406	207	17	17	660	1,418	20	2	20	201	17	5,061	0	3	41	0	164	0	0	28	591	7	201	34	23	487	176	<b>9,802</b>
IE	61	120	4	0	616	1,526	12	2	0	464	20	3,488	159	0	14	0	94	0	21	48	1,116	334	0	34	22	46	940	<b>9,144</b>
IT	2,652	1,255	502	0	705	10,366	235	5	48	3,589	85	25,659	1,310	112	0	1	253	13	18	602	3,040	2,274	1,860	250	1,667	1,093	3,143	<b>60,736</b>
LT	27	71	4	0	410	679	37	17	0	42	12	1,193	11	0	7	0	4	20	0	11	4,664	0	0	7	2	4	2	<b>7,223</b>
LU	68	5,712	2	0	551	22,312	1	1	14	53	1	4,834	283	0	50	1	0	0	20	141	327	128	5	16	4	7	90	<b>34,622</b>
LV	29	9	0	0	414	170	13	54	0	122	10	2,015	192	0	2	68	10	0	0	15	479	0	76	17	18	0	28	<b>3,741</b>
MT	2	14	0	0	367	31	25	0	0	50	6	1,254	14	0	30	0	1	0	0	13	2	0	0	13	0	0	71	<b>1,894</b>
NL	371	14,393	322	13	703	38,399	114	15	294	733	25	9,746	1,091	200	86	50	816	18	0	0	18,159	5,349	341	138	1,262	814	7,726	<b>101,180</b>
PL	167	362	139	0	788	5,101	102	14	4	744	19	10,078	115	38	83	1	79	4	0	53	0	67	76	92	241	228	264	<b>18,862</b>
PT	32	307	16	0	556	1,262	194	1	7	3,131	39	6,835	10	4	14	0	38	0	0	29	156	0	8	119	38	2	536	<b>13,335</b>
RO	603	158	104	37	664	1,140	10	0	31	443	11	4,986	3,635	1	139	0	33	0	0	271	586	34	0	25	91	0	173	<b>13,177</b>
SE	207	371	109	0	711	5,448	867	378	1	303	965	7,199	422	148	31	29	48	79	0	104	7,721	204	62	0	102	331	343	<b>26,184</b>
SI	277	37	10	31	507	619	2	0	0	62	6	1,847	43	0	33	0	135	0	0	50	413	0	0	128	0	291	25	<b>4,516</b>
SK	289	125	9	0	879	806	9	0	0	126	8	2,866	328	5	39	0	12	1	0	12	224	0	1	7	29	0	86	<b>5,863</b>
UK	466	1,535	51	32	679	9,744	525	12	28	1,995	122	22,296	626	216	147	20	254	54	39	635	3,929	325	38	133	296	147	0	<b>44,343</b>
<b>Tot</b>	<b>12,942</b>	<b>52,082</b>	<b>5,289</b>	<b>169</b>	<b>16,508</b>	<b>202,738</b>	<b>4,291</b>	<b>9,795</b>	<b>3,593</b>	<b>29,629</b>	<b>2,478</b>	<b>248,457</b>	<b>40,977</b>	<b>1,086</b>	<b>3,043</b>	<b>1,863</b>	<b>52,584</b>	<b>1,027</b>	<b>117</b>	<b>10,432</b>	<b>254,943</b>	<b>71,556</b>	<b>10,081</b>	<b>3,926</b>	<b>14,374</b>	<b>24,352</b>	<b>43,859</b>	

## BOX B1. The dynamics of wages, labour costs and GDP in Europe

The relation between labour costs and GDP growth stems from the interplay between product and labour markets.

Table B1.1 shows the GDP and the main indicators of labour markets in Europe.

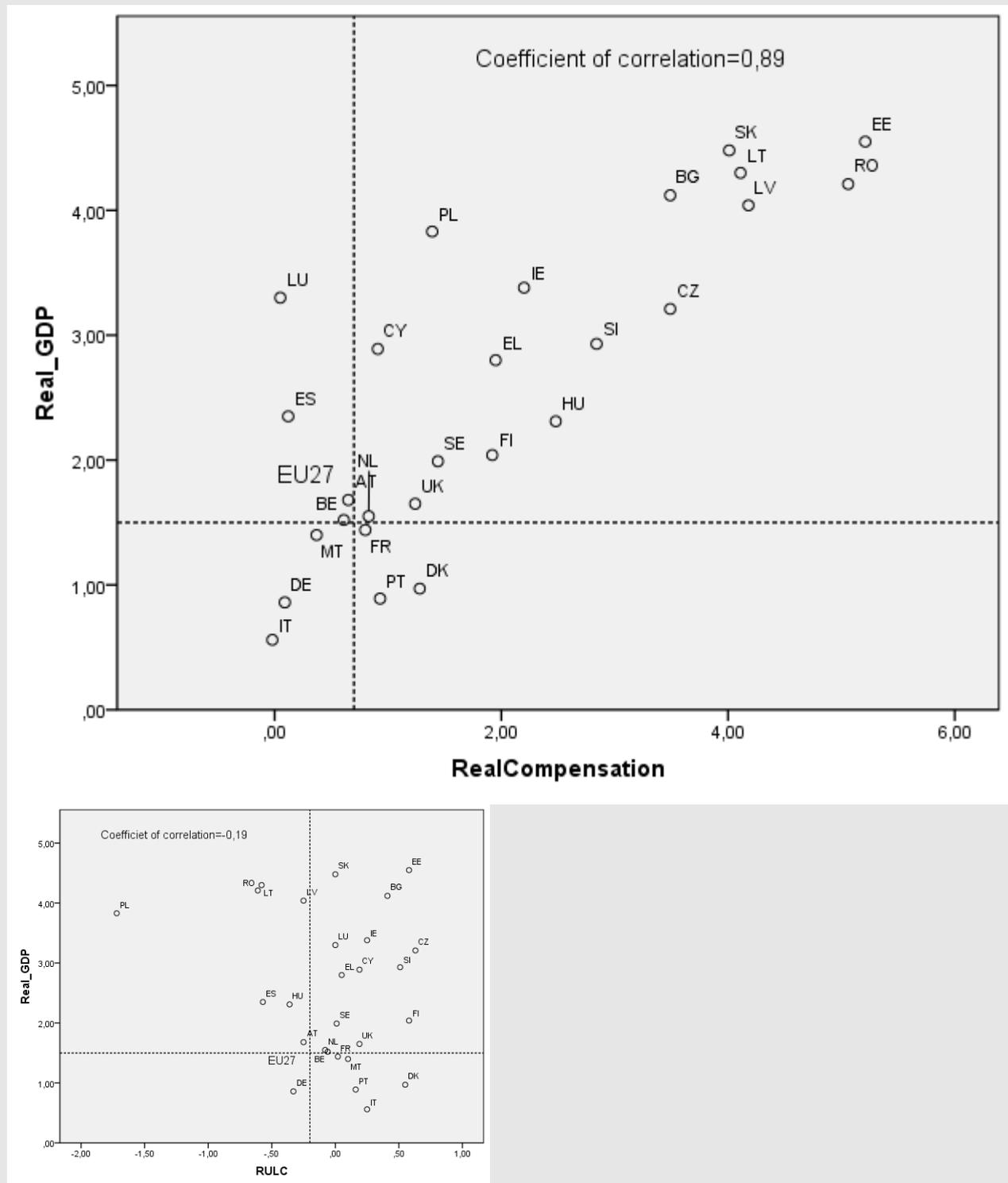
**Table B1.1. GDP and labour cost and compensation in Europe.**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>European Union (27 countries)</b>											
Real GDP	3,9	2,0	1,3	1,3	2,5	2,0	3,2	2,9	0,7	-4,2	1,0
Price deflator GDP	3,2	2,1	2,5	0,3	2,4	2,3	2,4	2,9	0,4	-1,5	1,1
Nominal compensation per employee	5,9	3,3	2,9	1,0	2,7	2,6	2,6	3,3	0,7	-1,3	2,2
Real compensation per employee (GDP deflator)	2,6	1,1	0,4	0,7	0,3	0,4	0,3	0,4	0,3	0,2	1,1
Nominal unit labour costs	3,5	2,2	2,0	0,0	0,8	1,6	1,1	2,1	0,9	1,2	0,2
Real unit labour costs	0,3	0,1	-0,4	-0,3	-1,5	-0,6	-1,2	-0,7	0,5	2,7	-0,8
<b>European Union (15 countries)</b>											
Real GDP	3,9	1,9	1,2	1,2	2,3	1,8	3,0	2,7	0,5	-4,3	0,9
Price deflator GDP	2,9	1,7	2,4	0,6	2,3	1,8	2,1	2,4	-0,3	-0,9	1,0
Nominal compensation per employee	4,9	2,4	2,6	1,0	2,9	2,1	2,7	2,9	0,0	-0,7	1,8
Real compensation per employee (GDP deflator)	2,0	0,7	0,1	0,4	0,6	0,3	0,5	0,5	0,3	0,2	0,8
Nominal unit labour costs	3,2	1,9	2,1	0,3	1,3	1,3	1,2	1,8	0,3	1,8	-0,1
Real unit labour costs	0,3	0,2	-0,3	-0,3	-1,0	-0,5	-0,9	-0,5	0,6	2,8	-1,1

Source: Macro Economic Indicators - Employment in Europe 2010

We would generally expect an inverse relationship between unit labour cost and real GDP: as national output expands and the economy heads towards full capacity, supply bottlenecks and shortages may start to appear. Workers require payment of overtime and bonuses to work longer hours and will ask wage increases, furthermore as national output expands, older less productive machinery may be used and less efficient workers hired. Higher wage rates without any compensating increases in labour productivity means that unit costs of production rise, leading businesses to produce less. The empirical evidence across the EU27 countries shows that, while the relation between real GDP growth and real unit labour cost is negative, the correlation between (real) compensation per employees and GDP is strongly positive.

**Figure B1.1. The relationship between real GDP, RULC and real compensation**



In the long run output may increase only with increases in: labour supply; labour and capital productivity; the capital stock, business efficiency; innovation. In dynamic terms the relevant variables is wage flexibility (real and nominal), i.e. the speed at which real or nominal wages adjust to real or nominal shocks (productivity shocks, or changed market conditions, including changes in the terms of trade).

In recent years intensified competitive pressures have increased the pace of structural change in many economies and required a greater capacity to rapidly adapt to structural changes including, among other things, a greater wage flexibility. Wage flexibility depends on structural features of the labour market, industrial relation systems and taxation systems:

- Factors increasing employees' bargaining power in wage setting, like high minimum wages, strict work rules or extensive employment protection, *erga omnes* provisions for mandatory collective bargaining.
- Factors improving the fall-back options of employees, as high level and duration of unemployment benefits and other welfare payments or by loosening the standards for receiving such benefits.
- The degree of centralization and coordination of wage setting is also an important factor. Very high (national) or very low (plant level) centralization of wage setting generate less wage pressure than intermediate levels (sector) (Calmfors and Driffill, 1988). Coordination induces unions and employers organisations to internalize the negative effects of higher wages and thus to moderate wage increases. Multiple bargaining levels that set floors but not caps on wage increases tend, instead, to increase wage pressure (Blanchard et al., 1995).
- High tax wedges between workers' marginal productivity and their take home pay also reduce wage flexibility.

The literature usually considers two different dimensions of wage adjustment mechanisms:

- Nominal wage and price flexibility in responding to country-specific aggregate demand shocks,
- Real wage flexibility to align real wages to productivity developments at the regional, sectoral and occupational levels.

World-wide shocks produce different effects on the labour markets on the basis of the institutional mix of each specific country. Some institutions may reduce/prolong the effects of shocks on unemployment. For example, a high level of wage bargaining coordination may lead to a faster adjustment of real wages in presence of a reduction in productivity growth. By contrast, if labour market institutions affect negatively unemployment duration, adverse shocks are more likely to increase the pool of long-term unemployed, thus reducing the pressure of unemployment on wages. Empirical evidence shows that a model that allows economic shocks and institutions to interact can explain both much of the rise and much of the heterogeneity in the evolution of unemployment in Europe (Blanchard and Wolfers, 2000).

In recent years both common macroeconomic shocks and country specific ones have tested the flexibility of the wage formation mechanism in the euro area. There is a substantial agreement in the ample literature on unemployment in Europe and on its causes: negative supply shocks were worsened by an institutional setting which amplified and protracted their negative effects.

According to most commentators, EMU has increased the need for wage flexibility and labour mobility in order to support adjustment processes among territorial areas with very different economic and social structures (Buti-Sapir, 2000). Given current large differences among member

states and regions and the still low labour mobility, both within and among member states/regions, wage flexibility is an important factor to cushion the impact of asymmetric shocks (Bertola, Boeri, Nicoletti, 2001).

Price transparency should increase both cross-country arbitrage by consumers and competitive pressures which should increase reform pressures. EMU and economic integration should also impose more discipline on wage setters (Dunthine and Hunts, 1994) and national policy makers (Bean, 1998; Burda, 1999), thus increasing the pressure for structural labour and product market reform at the national level. However, other authors (Calmfors, 1998; Sibert and Sutherland, 1997; Cukierman and Lippi, 1999) underline the risk that EMU will lower such pressures. Wage bargaining may be characterised by a “wage catching up” process due to greater wage and price transparency. Moreover, unions and national authorities may adopt a “free-rider” behaviour in a situation where it is the overall European inflation and unemployment which are considered by the ECB in defining monetary policy. Finally, the restrictive stance that the ECB has to adopt in order to assert its credibility and the Fiscal and Stabilisation Pact do not consent to create the positive macroeconomic conditions which are considered necessary in order to permit the adoption of structural reforms in the labour market without social conflict.

A stronger pressure for convergence in national wage and social policies will however be exerted by economic forces and the monetary integration process. In fact, the potential for divergent wage policies will be reduced by higher product market competition and converging prices. Moreover, spontaneous convergence will be led by multi-national firms, which will adopt common human resources management policies (Brittan, 1994), and by capital and labour mobility. This convergence process will be supported by institutional competition. Industrial relations systems are already showing signs of convergence across Europe and European integration by itself will reduce the degree of corporatism and centralisation in wage bargaining (Danthine and Hunt, 1994; from an industrial relations perspective: Streeck, 1992).

Indeed in the period ending before the current crisis, “for the euro area as a whole the overall wage discipline has been preserved with no evident signs of second round wage effects. Nominal wage growth per worker has been remarkably stable since the beginning of EMU” (Arpaia, 2007), however European countries show persistent cross-country differences in wage and labour costs developments which do not reflect differences in productivity and thus indicate insufficient degree of wage flexibility which ultimately may affect growth potential. The reaction to the 2008 crisis has shown an adjustment in the compensation per employee, led by a fall in the variable component together with an increase in nominal unit labour costs due to labour hoarding (Arpaia, Curci 2010).

### **BOX B2. Economic integration and labour cost convergence in Europe**

In open economies, labour costs and wage differentials are among the main factors firms consider in deciding to locate in or move out of regional clusters of economic activities and to employ the local workers or workers from other lower wage regions. To assess future trends in the posting of workers it is then necessary to see if we may expect a convergence in wages and labour costs across European countries and regions.

According to *neoclassical trade theory* free trade in goods and services and factor mobility should be strong drivers for factor price convergence among countries resulting in the equalization of factors returns across countries and in factor price equalization in the long run. Simply stated the

theorem says that *when the prices of the output goods are equalized between countries as they move to free trade, then the prices of the factors (capital and labour) will also be equalized between countries*. This implies that free trade will equalize the wages of workers and the rents earned on capital throughout the world. The theorem derives from the assumptions of the model, the most critical of which is the assumption that the two countries share the same production technology and that markets are perfectly competitive. The more recent models on outsourcing for cross-country wage differentials (Deardoff, 2011) have complemented this model.

The process of factor price convergence should be stronger and faster in optimum currency areas<sup>a</sup>, as the EMU<sup>b</sup>, where the elimination of barriers to free trade and factor mobility, is expected to increase pressures on labour costs of participating countries to be in line with their productivity performance and accelerate the convergence of factor prices. There is indeed empirical evidence that removing impediments to trade (as with the creation of a free trade zone, a custom union and a common market) and sharing a single is a strong driver for deeper trade and overall integration. However the empirical evidence also shows that the heterogeneity of policy preferences, institutions and economic structures diminish only gradually.

Factor price convergence in the long run is also modelled in *growth models*. Barro and Sala-i-Martin (1992; 1995) introduced the concept of  $\beta$ -convergence, occurring in any dynamic adjustment process across countries or regions. There is  $\beta$ -convergence in the cross-section of EU countries or regions if the price of labour in low-wage regions tends to grow faster than the one in high wage regions. The process of  $\beta$ -convergence thus requires a negative relation between the growth rate of a variable and its initial level. According to neoclassical growth models, in a long run perfectly competitive equilibrium growth in real labour costs should equate growth in labour productivity in every country so that growth differential in real unit labour costs should converge toward zero. Combining these models it is possible to detect the following drivers for convergence in factor prices: i) Free trade, ii) Cross-border outsourcing, iii) Interregional labour mobility.

The empirical evidence shows however a mixed picture on labour costs convergence in Europe. Abraham (2001), combining the data sets for the manufacturing sector from the OECD and the US Bureau of Labour Statistics (covering the period 1975-1998 for all OECD countries and going back to 1960 for a small group of OECD countries), detects an overall convergence between countries with higher and lower labour cost. But the process is slow and often partial, so that cost-based advantages may in specific cases survive in the short and sometimes even the medium run. Convergence is more pronounced when the gap in labour costs between countries is larger. Productivity growth is the main factor explaining labour cost convergence: to a significant extent labour costs differentials reflect productivity differentials, so that differentials in unit labour costs are lower than differential in total labour costs per worker or per hour. However, not all the labour cost differentials can be explained by productivity differential. Even if in the EU15 there is a close relation between productivity and labour costs, productivity does not offset labour cost differentials.

Using unit labour cost (ULC) data from the Lander, Dullien and Fritsche (2007) investigate inflation convergence and do not reject the hypothesis of convergence of ULC growth in the EMU, although for some countries there is evidence of relative rather than absolute convergence (Greece, Italy and Portugal present permanently higher rates of ULC increases relative to other EMU countries). Furthermore, country deviations from the rest of the currency union are more pronounced and persistent in Europe. Lebrun and Perez (2011) also show that nominal and real unit labour costs growth differentials between euro area members have persisted since the introduction of the EMU and even widened out until the crisis, because of divergent evolutions in capital-output ratios, nominal effective exchange rates and country-specific institutional features, coupled with an

increased sensitivity of real unit labour costs to fundamentals following the shift in the monetary regime. While technological factors result as the main drivers of real unit labour costs growth differentials, differences in product and labour market regulations<sup>c</sup> tend to amplify the dispersion, impairing convergence in real unit labour costs. Arpaia and Pichelmann (2007) find out that persistent cross-country differences in wages and labour cost development in the Euro area are indicative of an eventually insufficient degree of nominal and real wage flexibility in the euro area.

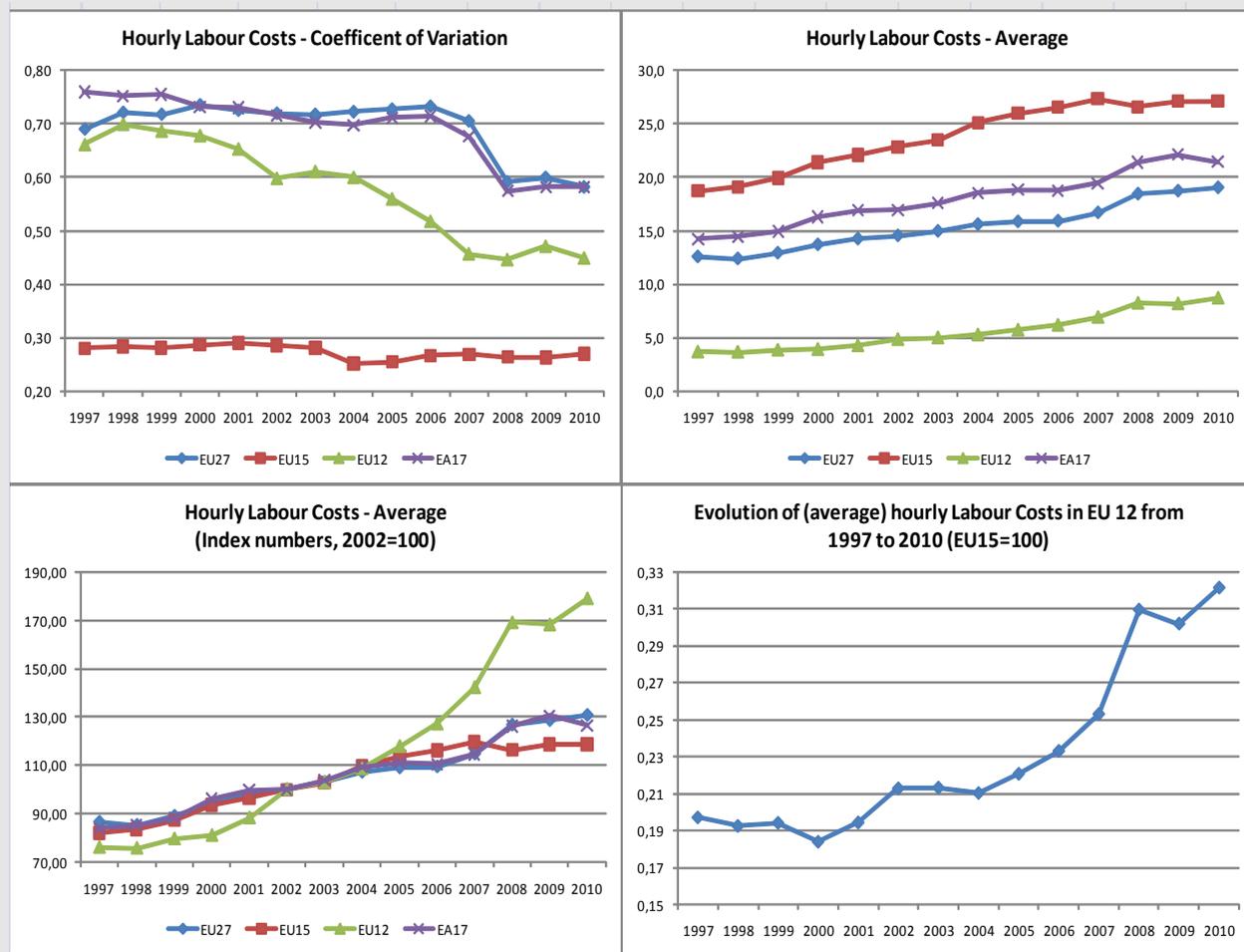
Very interesting for the purpose of this study is a recent paper by Šlander and Ogorevc (2010), examining spatial dispersion and the process of  $\beta$ -convergence of labour costs across NUTS2 EU regions in the period 1996-2006. They find absolute  $\beta$ -convergence in real labour cost across the EU regions' labour markets the period 1996-2006, with real labour costs growing faster in low-wage regions relative to high wage ones. This can be attributed to international trade, cross border outsourcing of production and interregional labour mobility. A faster pace of convergence is found in nominal labour costs, one of the main factors companies consider when deciding production location (3.3% per year relative to 1.9% per annum for real labour costs). The estimated model also reveals a conditional convergence after accounting for productivity growth and other factors: the gaps in nominal wages and real labour costs between high- and low wage regions are slowly narrowing, even after controlling for their different productivity growth rates. These results suggest that in low-wage regions labour costs increase at a higher rate than their productivity growth, and this may reduce their competitive position relative to high wage regions. Another interesting result of the model is that there is interdependency in wage growth in neighbouring regions: *“a region's wage growth directly affect the growth of wages in the neighboring region through a positive and significant lambda coefficient”* (pg.43).

Finally, using the average hourly labour costs<sup>d</sup> data related to EU Member States Eurostat it is possible to compute a measure of dispersion (i.e. the coefficient of variation<sup>e</sup>) of labour costs for (unweighted) EU27, EA17 (Euro Area), EU15 averages as well as for the EU12 (i.e. for the Member States which accessed the EU in successive phases), in the period 1997-2010, in order to verify -- in a descriptive way -- if hourly labour costs converge across Europe (Figure B2.1).

Hourly labour costs dispersion shows a decreasing trend in EU27, EA17 and EU12, more pronounced in EU12 and stable in EU15. Therefore it seems to be evidence of very slow “labour costs converging process” between the EU12 and EU15 countries.

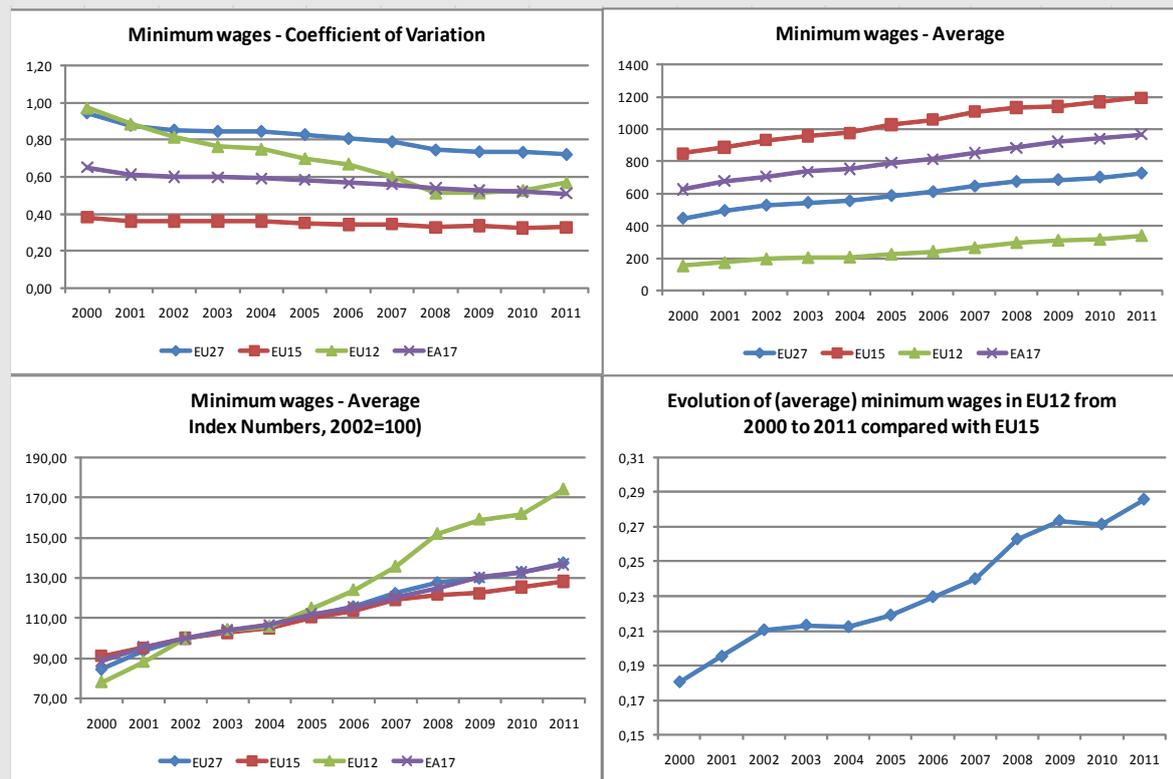
A similar pattern is found considering national minimum wages (monthly national minimum wages)<sup>f</sup>. Minimum wages are less dispersed in EU12 respect to EU27, EU15 and EA17 and the latest accession EU countries are slowly closing the gap with EU15 countries (Figure B2.2).

Figure B2.1. Average hourly labour costs in EU27, EU15, EU 12 and EA17 (1997-2010)



Not weighted average hourly labour costs are computed for EU15, EU27, EA17 and EU12. Source: 1997 - 2007 Eurostat - Labour Cost Annual Data (Average hourly labour costs, defined as total labour costs divided by the corresponding number of hours worked); 2008 Eurostat Labour Cost Survey 2008 (Labour cost per hour in the business economy); 2009 and 2010 Eurostat Estimations (Labour cost per hour in the business economy).

**Figure B2.2. Average minimum wages in EU27, EU15, EU12 and EA17 (1997-2010)**



Not weighted average minimum wages are computed for EU15, EU27, EA17 and EU12. Source: Eurostat – Minimum wages.

**Notes**

<sup>a</sup> The OCA properties include: the mobility of labour and other factors of production, price and wage flexibility, economic openness, and diversification in production and consumption, similarity in inflation rates, fiscal integration and political integration. The similarity of shock and correlation of incomes was added later.

<sup>b</sup> According to many authors the EMU cannot be considered a real OCA, as it does not comply to all the requirement for a OCA: i) The core group of EU countries are broadly similar (Germany + France + Netherlands), but peripheral countries have big structural differences ; ii) Response to interest rate changes varies across Countries; iii) there are still barriers to the mobility of labour. The recent economic and financial turmoil has exposed weaknesses in the currency union.

<sup>c</sup> The labour market indicators include indicators of workers’ bargaining strength in wage formation (bargaining centralization, the replacement of unemployment benefits and the degree of openness of the economy) and of employment protection. In addition the OECD indicator of product market regulation is considered.

<sup>d</sup> Average hourly labour costs, defined as total labour costs divided by the corresponding number of hours worked. [http://epp.eurostat.ec.europa.eu/portal/page/portal/labour\\_market/labour\\_costs/main\\_tables](http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/labour_costs/main_tables)

<sup>e</sup> The coefficient of variation (CV) is defined as the ratio of the standard deviation to the mean. The coefficient of variation is a dimensionless number ranging from zero to one.

<sup>f</sup> Minimum wage statistics published by Eurostat refer to monthly national minimum wages. In some countries the basic national minimum wage is not fixed at a monthly rate but at an hourly or weekly rate. For these countries the hourly or weekly rates are converted into monthly rates. The national minimum wage is enforced by law, often after consultation with the social partners, or directly by national inter-sectoral agreement (this is the case in Belgium and Greece). The national minimum wage usually applies to all employees, or at least to a large majority of employees in the country. Minimum wages are gross amounts, that is, before deduction of income tax and social security contributions. Such deductions vary from country to country ([http://epp.eurostat.ec.europa.eu/portal/page/portal/labour\\_market/earnings/main\\_tables](http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/earnings/main_tables)).

### **ANNEX 3: Summary of the national case studies carried out by Ismeri Europa<sup>3</sup>**

The national case studies provide substantial and useful information on the present state of posting in a number of relevant countries in terms of both the inward and outward flows of posted workers and of the regulation and monitoring of posting. In particular, the three main 'receiving' MSs have been included (Germany, France and Belgium), which alone represent almost half of all inward postings over the 2007-2009 and around 40% of all outward postings, as counted by E101 forms (EC 2009, 2011).

The other two MSs fully integrated in the study, Denmark and UK, represent significantly lower shares of posting – clearly for Denmark, also due to the relatively smaller size of the economy. For these two countries, the interest of the case studies is mainly linked to institutional factors. Both countries share a system where industrial relations are mainly self-regulated, especially in the field of collective bargaining, by the interplay of the two sides of industry, with no intervention by the state in view of making collective agreements generally binding, which is a key element in the discussion over the PWD.

Beyond this significant similarity, the two national institutional frameworks, in terms of the regulation of labour, are quite different. Denmark belongs to the Nordic model of 'coordinated market economies', whereas the UK is a prime example of 'liberal market economies' (Hall and Soskice 2001, Dølvik 2008). In terms of industrial relations, this means that in Denmark the institutional support of trade union representation and collective bargaining is widespread, whereas in the UK the role of autonomous regulation of labour is fully recognised, but there are limited promotional measures. Moreover, the structure of collective bargaining is centred on industry-wide agreements in Denmark, even though with a significant degree of flexibility at decentralised level; in the UK firm-level bargaining prevails, with an important exception in the engineering construction sector. It is exactly in this sector that our analysis will be focused, since the presence of multi-employer and notably sectoral agreements becomes relevant for posting, as a means to set the minimum protections covered by Art. 3.1 PWD which is alternative to legislation. Indeed, other important common features of the two countries are the importance that the question of posted workers has gained in the public debate in the most recent years and the actions autonomously undertaken by industrial relations actors to address the issues raised by posting.

Besides the importance in terms of flows, Germany, France and Belgium present interesting features for the regulation of posting. All countries share a system for extending the coverage of collective bargaining and in Germany this is specifically implemented through the regulation of posting. They all introduced a system of prior notification of posting and Belgium developed an on-line declaration tool, which is also meant to ensure an effective monitoring of the phenomenon. This latter feature is shared by Denmark, which developed a similar initiative in the recent years and therefore provides a significant comparative case also in this respect.

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<sup>3</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

The case studies have focussed on existing research and studies with a view to collect all additional data and information available at national level to integrate aggregate data which was collected using EU level sources. A special focus was devoted to highlight existing problems and issues that had emerged at national level on the posting of workers and to identify possible solutions put forward by national actors. In this perspective, two case studies were particularly devoted to analyse the experiences and the results of monitoring tools introduced in Belgium (LIMOSA) and Denmark (RUT-Register). In consideration of the lack of quantitative data sources, even at national level, a mainly qualitative approach was followed. A number of interviews were carried out with the main social actors and stakeholders in the field of posting: public administrations, especially those responsible for regulating posting and for the enforcement of the existing regulations; employers and employer associations; and trade union representatives. The interviews cover the present state of play regarding posting (both in terms of economic integration and social cohesion), its regulation and enforcement; the issues raised by posting and possible existing problems which needs to be tackled either at national or at EU-level; the practice and the assessment of national answers to the issues raised by posting; a discussion of the possible revision of the legislative framework on posting at EU-level, with a view to address the issues related to posting which have emerged in the 15 years since the PWD.

## **THE DRIVERS OF POSTING**

The national case studies carried out for this report provide important insights, which supplement and better specify the analysis of aggregate data. Besides the evidence used to clarify the problems and issues illustrated in Section 1.2, the cases also show how the drivers of posting combine in a number of actual experiences and how their relevance can change over time.

### **Geographical proximity**

The aggregate analysis indicates that geographical proximity is one of the main determinants which structure the distribution of inward and outward postings. This fundamental factor clearly emerges in the case studies. In Denmark, an important share of postings systematically concentrates in the southern regions of Fynen and Southern Jutland, which are close to both Germany and Poland, the main countries of origin of posted workers. In 2009, this area even surpassed the capital region of Copenhagen, with almost 40% of postings, while in general it is the second receiving area with more than 20% of posted workers. In Germany, the meat processing industry, where the presence of posted workers is reportedly high, has important locations in the Lander close to the eastern borders, like Brandenburg and Saxony. In France, nearly 60% of the pre-declarations submitted according to the French law on posting are concentrated in the cross-border regions in the North, North-East and South-East of France. This is linked to cross-border activities with Belgium, Luxembourg, Germany and Italy. The main origin and destination of posted workers to/from the UK is France, which accounts for around 40% of all postings to the UK and one third of all UK postings abroad over the 2007-2009 period.

## Labour and skill shortages

Labour and skill shortages are other highly significant drivers of posting. While they are usually the main factors linked to outward postings from high labour cost countries, such as France and Germany (for Germany, Dribbusch 2010), they are also important in a receiving perspective. For instance, most of the relevant cross border activities performed through posting in France are linked to these divers and are associated with a well-established system of ‘cross-border’ firms, with a long lasting tradition of operation on the two sides of borders.

In this respect, the experience of Denmark seems particularly interesting. It must be underlined that, in the wake of the 2004 enlargement, the posting of workers was considered as a highly positive phenomenon because it helped to face labour shortages, especially linked to the ageing indigenous workforce, and it contributed to accommodate the economic boom, thereby avoiding inflationary pressures on domestic wages and salaries. The yearly overall macroeconomic positive contribution on the Danish GDP of migrant labour (which, it must be underlined, in the Danish debate, includes posting) was estimated in 2006 at DKR 4.2 billion, or some EUR 565 million (Tranæs *et al* 2009, p. 137). In a sending perspective, Danish construction firms and workers took part and could significantly benefit of the German post-reunification construction boom in the 1990s and of the oil-driven Norwegian sustained economic growth. In sum, the positive implications of both inward and outward posting were appreciated by Danish actors.

This was reflected in a study on east European workers in the construction sector which estimated that around 13,000 posted workers and some 100 self-employed workers from central and eastern European MSs were working in building sites in the second half of the 2000s (Hansen et Andersen, 2008), out of a total domestic sectoral workforce of about 180,000 at that time. The research was based on interviews with 236 Danish construction companies which had requested and obtained the approval to employ eastern European residents, according to the transitional measures then in place. Some 80% of the surveyed firms were using foreign workers (both migrants and posted workers) with a view to face the general labour shortage at that time (2005-2007). An additional benefit firms were expecting was a reduction in labour costs. The majority of Danish firms which employed foreign workers reported a number of advantages since these workers were more willing to perform less attractive tasks and demonstrated more flexibility. Some problems were reported in terms of lack of knowledge both concerning health and safety regulations and practices and regarding building standards, need for more control and supervision, and language difficulties which made the organisation and the performance of work harder.

The broad appreciation of the contribution of migrant and posted workers to the Danish economy changed with the start of the economic recession in 2008. Increasing unemployment, especially in the construction sector, and the overall worsening economy, shifted the focus of the public debate on labour cost differentials and notably on the impact of the posting of workers on the ‘autonomous’ Danish system of industrial relations. The alleged presence of ‘sub standard’ terms of employment (with the meaning of terms of employment below the Danish collective agreements) and the related lack of a level playfield between Danish and foreign service providers emerged as key issues.

## Labour cost

Labour cost differentials are always underlined as a basic component of the phenomenon of posting. Besides being identified as one of the main drivers of posting in general, labour cost is relevant in connection with other drivers. This is an important consideration, which has been highlighted in the aggregate analysis and has been stressed in the cases studies. All drivers influence posting of all countries at the same time, in both receiving and sending perspectives, and they imply the level and structure of postings in combination. So, even if the main driver of inward posting in certain situations is skill shortage, nevertheless labour cost – in connection with other factors such as geographical proximity – contributes to define and select the origin of this posting. For instance, even the high skilled German posted workers tend to move towards countries with relatively higher labour costs, so that the benefits of filling skill (or labour) shortages combine with cost-related advantages for utilising firms linked to comparatively lower labour costs.

In the case studies, there are indications on the wage differentials between indigenous and posted workers. Of course, it is difficult to compare the situations of workers, so that pay differences may reflect distinct characteristics of the workers involved. However, the pay gaps are usually quite high, so that even by taking into consideration the possible different situations in terms of skills and productivity, wages of posted workers would remain lower. 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 on the construction sector indicated that, in the mid-2000s, workers from Eastern European countries had on average a salary lower than Danish building worker by 25-28% (Hansen et Andersen 2008, p. 9). 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. 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 (see for instance [the German language section of the web site of the European Migrant Workers Union](#), EMWU<sup>4</sup>)

Despite such large difference in estimated wage levels in Germany, it is important to stress that in recent years a significant decrease in the number of postings was recorded in the construction sector, which is now less than half of the level of the late 1990s (source: SOKA Bau). This was due to the overall reduction in construction works for both the end of the post-reunification building projects and the impact of the recent recession. The total sectoral employment was 3.2 million workers in 1995 and declined to 2.2 million in 2010.

As regards inward posting, a compositional shift is apparently emerging in Germany, with the share of low-labour cost countries diminishing to the benefit of high-labour cost countries. Particularly striking is, for instance, the decrease in postings from Poland, which slumped from more than 40,000 at the end of the 1990s to significantly less than 20,000 in 2009. In the

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<sup>4</sup> The European Migrant Workers Union (Europäische Verein für Wanderarbeiterfragen, EMWU) was established in September 2004 by Germany's Trade Union for Building, Forestry, Agriculture and the Environment (IG BAU). See the EIRO article, [European Migrant Workers Union founded](#), EIRO 2004, DE0409206F.

same period, the relevance of postings from some high-wage countries has increased, like Belgium, the Netherlands and Denmark (Eichhorst 2005). These trends seem to signal a relative weakening of the labour cost driver apparently in favour of geographical proximity and possibly other drivers, such as skill and labour shortages.

It is important to stress that the case studies clearly show that minimum wage systems, neither those setting nation-wide minima (like in the UK) nor those establishing sector specific collectively agreed minimum pay rates differentiated by job classification levels (like in the case of Germany), are able to eliminate the role of labour cost differentials in driving posting. Of course, if effectively enforced, minimum pay rates represent a floor for wages and can eliminate the most evident forms of wage competition, but the differences between minimum and actual pay rates as well as the application of distinct social security regimes do entail some room, at times significant, for labour cost competition. As long as such minimum pay rates represent the only mandatory constraints for domestic firms too, the same scope for wage competition should be available even among national businesses.

### **Market integration**

The importance of the link between market integration and posting (which is clearly a two-way connection with self-reinforcing incremental effects) is forcefully depicted by the role of geographical proximity outlined above. Most of postings occurs precisely in the areas and between the economies which are better integrated. The case studies refer to outward posting and external trade as complement, especially on the case of capital goods and foreign direct investment for Germany. The relationship with Norway and its oil-driven 'booming' economy is mentioned to illustrate outflows of Danish construction workers. Another example can be found in the UK, where the high share of posted workers in the financial sector can be linked to the importance of London in the global financial market.

### **PROBLEMS AND ISSUES**

The case studies provide important indications about the problems and the issues linked to posting, especially with reference to the economic and social dimensions and to the problems of enforcement.

It is important to underline that all case studies highlight that the attention in the national debate and the concerns of domestic stakeholders about posting are exclusively concentrated on inward posting. Information on domestic workers posted to other countries is even more limited than on foreign posted workers. The few references that can be found at national level consider posting abroad as an opportunity for businesses and workers and a sign of the dynamism and strengths of the domestic economy. Another type of posting which does not seem to be problematic is intra-group posting in well-established multinational firms, especially in high-wage sectors. Therefore, the two types of posting which are typically at centre of debate and tensions are those linked to the provision of services through a contract with a user companies (which may entail intra-group posting when the service provider has a local branch in the receiving country) and temporary agency transnational posting.

The issue of unfair competition and ‘social dumping’ linked to inferior employment and working conditions of posted workers emerges prominently. In each case there is at least some reference to lower pay rates, longer working hours, poor working conditions – also in terms of health and safety –, poor living conditions – especially with reference to housing –, disproportionate deductions for accommodation and other forms of exploitation. Such reference is usually presented by trade unions in interviews and in union documents on specific situations, but it is also mentioned by labour inspectors and is sometimes identified in studies and official enquiries/documents. Unfair competition and social dumping are seen as producing job – and company – displacement on one side and highlight the need to strengthen protections for posted workers and reduce the pressure on employment and working conditions of domestic workers, on the other.

It is interesting to underline that the link between the posting of workers and unfair competition and social dumping is sometimes stressed also by SMEs. For instance in Denmark and France small firms in the construction industry, but also in other sectors such a temporary employment agency, underline that foreign undertakings can often exert a very strong competitive pressure only by virtue of using posted workers with lower wage levels and lower social security contributions obligations. In this respect, there seem to be a potential divergence between the interests of SMEs and large firms in the receiving perspective: whereas SMEs tend to compete directly with foreign service providers, large firms are more often among the users of posted workers which can obtain the advantages of posting in terms of increased allocative efficiency and of filling labour and skill gaps<sup>5</sup>.

The recent economic downturn, with the connected increase in unemployment and the possible reduction in the importance of skill and labour shortages, contributed to exacerbate tensions around such issues. The concept of job displacement has a very vivid and direct representation if we focus on individual cases, so that we can see, for instance, that in tendering procedures in the civil engineering and construction sector foreign subcontractors tend to be awarded contracts while domestic firms have great difficulties in coping with that competition – something which is in fact reported for France, Germany and UK. This effect is similar to off-shoring, when a company closes down in a country to open/move production abroad. In a dynamic perspective, the assessment is much more difficult, because sectoral shifts and potential efficiency gains can in fact lead to job creation which may (partly) offset the ‘static’ loss. Of course, possible dynamic gains leave open the question on how to support the workers who do not get or lose a job to find another one.

### **Industrial disputes**

The UK provides a number of cases where there have been disputes on the utilisation of posted workers in the engineering construction sector. In all cases, social dumping and lately the restriction of job opportunities for domestic workers were the issues at stake. Trade unions also contend the prevailing view that foreign contractors bring in the UK labour and

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<sup>5</sup> 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 possibly small companies are often involved in the posting of workers. This can be true even if in certain sectors, like in the engineering construction industry, the role of large multinational companies is very important, since the subcontracting chain is extended and can include numerous SMEs at its downstream end. As a consequence, in a sending perspective, the benefits of posting may be enjoyed especially by SMEs.

organisational skills which are not available domestically. Drawing on their day-to-day practice in workplaces, union representatives believe that posted workers often lack the special skills required to operate on demanding and difficult building sites, like nuclear power stations. However, if it were skill shortages to drive the posting of workers, trade unions stress that particular attention should be devoted to develop such skills locally. According to the unions, the disputes on posting should not be regarded as contrasting the employment of foreign nationals, but rather as the effort to enforce fair employment standards and a level playing field between UK and foreign workers and contractors. In this perspective, the importance of focusing on skill development at local level is also underlined by UK employers.

The engineering construction sector represents a special case within the UK industrial relations system because of the presence of an industry-wide agreement<sup>6</sup> (the National Agreement for the Engineering Construction Industry, NAECI) and of a high unionisation rate of around 80%. The major sectoral employer association, the Engineering Construction Industry Association (ECIA), is committed to the application of the national agreement throughout the industry. The NAECI 2010-2012 includes a set of guidelines for ensuring the application of the terms of the agreement also to non-UK contractors and to encourage foreign contractors to join ECIA. However, the national legislation implementing the PWD does not provide for the application of collective agreements (which, in any case, are not generally binding), but only of minimum legal standards, including the national minimum wage. Since the national minimum wage is below the minimum collectively agreed pay rates, this can give rise to significant wage gaps between domestic and posted workers in the engineering construction sector.

The first high-profile dispute on posted workers in the engineering construction sector occurred in late 2003. It concerned a project at a power station at Cottam, in the East Midlands, owned by the France-based EDF Energy. Through the subcontracting chain (the German-based RWE was the main contractor) some Portuguese companies were involved in the project and used Portuguese posted workers. Workers took unofficial industrial action and demonstrated in protest at UK workers being “unable to secure employment on the project due to being undercut by non-UK contractors and posted workers”. Also sympathy action took place at other sites (NECC 2004). While the unions criticised the unofficial action, they shared the workers’ concerns. The National Joint Council for the Engineering Construction Industry (NJC), a bipartite organism in charge of negotiating the NAECI and ensuring its application, intervened to stop the protest and guarantee that the agreement was correctly applied.

The action prompted the intervention of EDF, which stated that the industry-wide agreement had to be applied throughout the site. An internal audit found some elements of violation: as a consequence, the contract with a Portuguese supplier was terminated and a second Portuguese contractor was given an advice to apply the NAECI. Some extra work was given to tender and this gave the opportunity for UK workers to be employed. A similar case occurred at the same site in 2006 when another unofficial strike was staged in support of Hungarian workers who

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<sup>6</sup> This is also true for a number of related construction sectors such as electrical contracting, building and allied trades, heating and ventilation, plumbing mechanical engineering, environmental engineering and demolition. Growing concerns about the potential impact of posting on industrial relations are growing in other sectors with nation-wide bargaining such as public services and rail transport.

were believed to be paid under the NAECI rate. The workers were posted by an Austria-based firm, SFL.

A quite different outcome than the first Cottam dispute was reached at a site owned by Castle Cement at Mold, in North Wales, where construction work was contracted to a Belgium-based firm, Pirson, which used posted workers. According to the unions, Castle Cement declined to implement the NAECI on “grounds of price”. The NJC tried to obtain the application of the agreement by Castle Cement, but without success.

More recently, other high-profile cases occurred at sites at the Isle of Grain in South-East England in 2008, at Staythorpe, in the East Midlands, and at Lindsey in Lincolnshire in 2009. The first two cases involved the construction of power stations and Alstom was in both sites the general contractor; the third one concerned the building of an oil refinery and the general contractor was the US-based firm Jacobs Engineering. In all cases the issues at stake were both the possibility to provide employment opportunities for UK-workers and underpayment of posted workers employed by Polish (at the Isle of Grain) and Italian (at the other two sites) subcontractors. Trade unions claimed they had evidence that the posted workers at the Isle of Grain employed by a Polish subcontractor were paid 30% less than the NAECI rate. There were unofficial strikes and demonstrations. Eventually Alstom made a commitment that non-UK employees would be paid the NAECI rate. According to the ECIA, underpayment was due to involuntary misclassification of employees. The Polish subcontractor reviewed and reissued the contracts. Moreover, local workers were interviewed for jobs at the site. Unofficial strikes and demonstrations were also held at Staythorpe in protest of the exclusion of UK workers, since the Italian subcontractors had stated that they would use their workforce to carry out the work. Also in that case, the foreign subcontractors agreed to recruit a number of local workers. At the same site, the trade unions claimed that Somi, an Italy-based subcontractor, did not pay the NAECI rates to some of its 400 posted workers, despite the firm’s commitment to do so. An independent audit of Somi’s payroll found that some 20 workers had been underpaid by an average of EUR 1,300 per month over a significant period. ECIA found the situation “not acceptable” and reported that Somi had undertaken to take immediate corrective action. ECIA said the Somi case was an isolated incident and declared that there was “no evidence of widespread undercutting” of agreed rates.”

The 2009 dispute at Lindsey oil refinery in Lincolnshire, owned by the France-based company Total, attracted most attention. The Italian subcontractor IREM planned to post Italian and Portuguese workers to do most of the work under the contract. The lack of employment opportunities for UK workers sparked an unofficial strike in January 2009 and sympathy strikes at other engineering sites. There were also allegations that IREM was paying lower pay rates than provided by the NAECI. The UK Advisory, Conciliation and Arbitration Service (Acas) helped solve the conflict and conducted an investigation on circumstances surrounding the dispute. A deal was signed in February 2009 to end the strike, which included the commitment to make available to UK workers around 100 jobs. Acas found no evidence that Total, Jacobs Engineering or IREM had broken the law in relation to the use of posted workers or entered into unlawful recruitment practices. Further, Acas received assurances from IREM that it would abide by the NAECI (Acas 2009).

## Abuse and violations

The case studies illustrate a number of situations where the working conditions of posted workers appear as violations of the regulatory framework on posting. One of the irregularities indicated in the case studies is the extension of the weekly working hours, even beyond the legal maximum, without compensation, so that hourly wages are pushed down compared to their nominal level. Harder working conditions can also be reflected in higher accident rates.

In this case, references can be made to single high-profile cases. A relevant example is provided by the Bouygues Travaux Publics in the construction of a nuclear site in Flamanville concerning some 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 same case was echoed in the public debate in the UK, where the unions were worried that the same subcontractors could be used in the construction of another nuclear site. Indeed, the presence of large contractors and sub-contractors in the engineering sector with EU-wide operations can facilitate the emergence of common practices violating workers' rights. At the same time, this also points to the possibility of building a transnational system of monitoring and enforcement and, in positive, it could help the diffusion of good practices. In this respect, it is interesting to note that the issues around posting do not only refer to SMEs coming from low labour cost countries, but also involve large MNCs based in high labour cost countries.

Case studies report other abuse undermining workers' rights. For instance, bogus self-employment represents a challenge to enforce the PWD and to effectively protect workers. Besides the construction sector, where bogus self employment is apparently frequent in most of the countries covered by the study (at least Germany, France and UK) and a more effective enforcement should be strongly ensured, the German case study shows that another sector where problems of enforcement are emerging is the meat processing industry.

Trade union reports about the meat processing industry in Germany point to a situation where in recent years 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 (EFFAT 2011). In practice, often abattoirs and meat processing plants employ only a minority of the overall workforce while the majority of workers on site are part of the transnational provision of services. Long working hours, increase in workload and pace of work, deteriorating working conditions, including growing MSDs, are reported as emerging features of the sector in Germany. Some of these developments are linked to reorganisation and off-shoring of companies which move to locations in Germany which allows exploiting this kind of workforce composition based on posting and transnational service provision. Wage differences with domestic workers are quite high and absolute wage levels so low (allegedly down to around EUR 3 per hour) that Germany has become to be regarded as a low-wage country in the meat processing industry and competitors in neighbouring countries such as France and Belgium claim there are increasing forms of unfair competition involving German-located firms (UECBV 2011).

Public concern about the employment and working conditions of posted workers in the meat industry and its impacts on employment and the protection of workers' rights date at least

back to the mid 2000s ([Deutscher Bundestag 2005](#)). Two cases cited in a recent conference involve the Germany's largest pig abattoir owned by B & C Tönnies in Rheda-Wiedenbrück, where only around 800 workers of the 4,500 total workforce are employed directly, while the remainder is provided by various eastern European service firms, and the Westfleisch's abattoir at Hamm in Westphalia, where of the about 1,200 workers only some 10% have a direct employment relationship (Klaus-Harald Güster, NGG, *The German meat industry*, European Conference on "Investing in people – Fight precarious work", 3-4 May 2010).

The related deterioration of employment and working conditions contributes to the low attractiveness of employment in the industry for the local workforce. This encourages firms to further source workers abroad, while the role of industrial relations and collective bargaining is significantly weakened by decreased membership (and membership fees) and because of the (credible) threats by employers to have recourse to reorganisation or off-shoring, if labour costs are not sufficiently low. The absence of an industry-wide collective agreement for the meat processing sector in Germany makes it particularly difficult to refer to the protections granted by the national legislation on posting (AEntG), which introduces minimum pay rates by extending the coverage of sectoral agreements in certain industries. This is why one of the basic demands of trade unions in the meat processing industry is to introduce a national minimum wage.

Other cases of abuse are reported in the road haulage sector. These involve for instance France and substantially include the establishment of 'fake' foreign subsidiaries or transnational contractual relationships with the only aim to provide 'low-cost' workforce for French operations. Such practices recently acquired prominence in the public debate due to media reports on the activities of the Norbert Dentressangle group, a French major group in the road sector. In one case a French transport operator set up a subsidiary in Poland which recruited some 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 could verify that a proper but disguised employment relationship was present between the French company and the Polish drivers, as the former organised and directed in all details the work of the latter (TRANSPO 2011). A similar case, involved another French company which established a subsidiary in Slovakia. The Slovak drivers were actually working for up to 15 weeks in France and were in any respects integrated in 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 (TRANSPO 2011). In other cases, the provision of drivers for on-going operations in France is organised through agencies. For instance, the case of agencies posting Turkish drivers to France for several months was reported in the national case study.

Also the very high level of posting from Luxembourg, for instance to Belgium and France, has been linked to the search of lower social security costs. The French national case study illustrates that this practice mainly involves posting through temporary work agencies. In

2010, the temporary work agency sector showed the highest number of pre-declarations of posting in France (14,336 out of 38,651, or 37% of the total – but in terms of working days it was only second to the construction sector with 14% of total working days compared to 46% of construction). It is interesting to note that 75% of pre-declarations in the temporary work agency sector come from Luxembourg (10,844 pre-declarations or some 80% of the total from Luxembourg) and that temporary agency transnational posting concentrate in the bordering Moselle district (61%). According to the interviews carried out for the French national case study, temporary work agencies based in Luxembourg post mainly French workers who never worked in Luxembourg in companies located in the Lorraine region. Such practice enables firms to pay less social contributions and workers to get equivalent and sometimes even higher benefits. In addition to the lower social security costs, utilising firms can also benefit from the non application of provisions introduced by collective bargaining in the temporary agency sector in France, like the payment of the contribution for the vocational training of French agency workers.

Other forms of abuse concern the accommodation provided to posted workers by subcontractors. Apart from reports of very poor housing facilities and disproportionate deductions, which are rather common, it is also highlighted that housing expenses are often used to integrate the minimum pay rates that must be granted to posted workers. In 2006, there was a case in France where this kind of infraction was detected. At the electric power station building site in Porcheville, following a report by trade unions, labour inspectors found that a Polish subcontractor was in fact including housing benefits in the minimum wage, which is against the rules. Since the company did not respond immediately to an order by the French Labour inspectorate to pay integration, the case was reported to court and compensation was eventually obtained in 2008.

## **Enforcement**

According to the case studies, the enforcement of the PWD represents a common concern of stakeholders at national level. Labour inspectors explicitly refer to widespread difficulties in checking the actual establishment of firms in foreign MSs, to qualify the grounds of posting in terms of the foreign habitual place of work and residence, and to verify terms of employment of posted workers, due to language problems, difficulties with foreign documents, lack of a supervisor of posted-workers on site, lack of information on conditions applicable in the sending MS, and slow cooperation by corresponding authorities in the sending MSs.

Trade unions, and often employers, stress the importance of strengthening the enforcement of rules on posting and demand stricter checks and controls. Such requests in many cases have to consider the lack of resources of inspection services, so that only a few controls can be made, even when, like in Germany, existing rules would require much broader and deeper monitoring of posting. Scarcity of staff, training and specialisation of inspection services on posting have been reported in France and Germany.

The German case study highlights that Finanzkontrolle Schwarzarbeit, the public body responsible for the monitoring the implementation of the Posted Workers Act, finds it often difficult to verify whether a foreign company posting workers to Germany is genuinely established in the country of origin or it was set up solely for the purpose of illegally posting workers abroad. Other problems are reported in the field of transnational cooperation. According to the interviews, there is scope for improvement in terms of effective

collaboration, exchange of data and information and the transnational application of fines and sanctions.

In France, one of the main issues concerning posting is the difficulty to implement the provisions of the PWD. In this field, the public administration has undertaken a number of actions to improve the capacity of monitoring posting and with a view to improve transnational cooperation, especially through the establishment of bilateral agreements. In particular, in recent years the French Labour inspectorate stressed a number of difficulties in carrying out controls on posting, especially concerning practical problems (language difficulties, different document formats, lack of a reference person among posted workers, the short duration of posting), legal issues (the qualification of the employment relationship with very few pieces of information, knowledge of relevant foreign labour regulations), and administrative aspects (administrative work, slow and insufficient cooperation by foreign public administrations, problems in the transnational application of sanctions). It is interesting to highlight that part of the difficulties of enforcement are linked to the fact that posted workers lack information about their rights and entitlements. As a consequence, measures aimed at improving the implementation of the PWD should not be focused on public administrations only, but should aim to involve and better integrate posted workers at workplace level.

#### **ADDRESSING THE PROBLEMS**

The case studies present a number of ways to address the problems and the issues raised by the posting of workers. Since most of the public concern is focused on the protection of workers' rights and the enforcement of the regulation on posting, these are the two crucial areas where it is possible to identify potential solutions developed at national level by both the social actors and public authorities.

#### **Collective bargaining**

Voluntarist and autonomous industrial relations system are those where the activity of the social partners have contributed to develop contractual tools to deal with the challenges they face because posting represent an area which remains substantially outside the direct regulatory capacity of national bargaining systems. In fact, the full integration of posted workers would require the extension of representation to posted workers and foreign service providers as well as their direct coverage by collective bargaining. These inclusion strategies are difficult and have limited success rates, as the Danish experience shows with a trade union density rate of around 5% among migrants and posted workers and a collective bargaining coverage rate of less than 15% of foreign service providers. Therefore, in both UK and Denmark, beyond the pressure exerted by conflict in specific cases, a general indirect response has been sought by committing employers to subcontract work only under the provision that the industry-wide collective agreement is applied by service providers, including foreign firms.

In the UK, the issue of posted workers was at the centre of the 2010-2012 renewal of the industry-wide agreement for the engineering construction sector (NAECI). After difficult negotiations, the renewal incorporated a number of trade union demands on posted workers. In particular, the agreements includes an appendix on "Non-UK contractors and non-UK

labour on engineering construction sites”, which is a development of previous guidelines for members introduced by ECIA, the sectoral employer association. The Appendix states clearly that posted workers must be paid the same rates as UK employees and strictly in accordance with the NAECI. Moreover, it endorses another key request by trade unions and it seeks to ensure equal employment opportunities for UK workers on building sites, also in presence of foreign subcontractors.

The measures envisaged by the Appendix include early trade union involvement in tendering processes and meaningful consultations in the appointment of contractors; the obligation for main contractors to ensure that non-UK contractors observe the NAECI for relevant workers; the active support for membership of ECIA by non-UK contractors (and a number of them are indeed members of ECIA, notably some of the foreign suppliers involved in the above mentioned disputes); the provision to non-UK contractors of UK of information about health and safety legislation; the involvement of the UK public employment services in the preparation of new large projects in order to favour recruitment of local unemployed workers; the encouragement of non-UK contractors to enrol UK workers in they need extra workforce; the request to consider the possible special needs of non-UK workers. Moreover, the 2010-2012 NAECI provides for a stronger auditing process for terms and conditions of employment on sites, in order to ensure greater transparency and full compliance with the NAECI. Finally, the agreement includes a provision for guaranteeing workers working away from home paid travel to return 12 times a year.

Similarly, in Denmark, the 2010 bargaining round for the construction sector has seen the request by the trade union to establish some sort of subcontracting-chain liability system for the main contractors in order to ensure that all subcontractors, including foreign service providers, apply the relevant industry-wide agreement. The Danish Construction Association (Dansk Byggeri) rejected the unions demand, maintaining that such system would be in contrast with EU rules on competition. Some different points of view were also present within the trade unions, since it was debated whether such kind of liability should be introduced by legislation and whether a pre-requisite for subcontracting-chain liability was the establishment of a national minimum wage. Both social partners expect that the discussion on joint liability systems will emerge again in the 2012 renewal. It is worth noting that, in the meantime, such a provision has been effectively introduced in a small segment of the construction sector as, at the end of January 2011, the agreement between the United Federation of Danish Workers (3F) and the employer association Danish Craft (DHV) introduced the obligation for the employer to contract out work only to companies covered by a Danish collective agreement. This agreement covers around 500 small and medium-size enterprises in construction, handicrafts, and the wood industry (EIRO 2011, *New agreement to combat social dumping*, DK1103019I).

In line with the basic features of the Danish autonomous industrial relations system, even the Danish adaptation to the ECJ *Laval* judgement has relied on the inclusion of foreign service providers in collective bargaining, despite the limitations the ruling seems to entail for the utilisation of industrial action. In 2008, an amendment of the national law on the posting of workers was passed with a view to ensure the possibility for Danish unions to use industrial conflict to put pressure on foreign service providers and obtain the application of Danish collective agreements and thereby granting equivalent conditions for posted workers. Industrial action is possible only if the foreign company is aware of the specific content of the agreement to be applied and if the deal was signed by the most representative organisations in

the relevant industry and covers the whole Danish territory. In order to fully implement the legislative provisions, social partners should clearly identify in collective agreements the regulations and benefits which are relevant for posted workers. The employers have however declined to do so and the unions have identified the parts of the collective agreements in the relevant sectors which should be applied to posted workers.

Information provided by the Danish Ministry of Employment on [Working in Denmark](#) clearly states that “foreign enterprises that post their employees to Denmark should be aware that Danish trade unions will try to obtain a collective agreement on the pay and working conditions for the work that is carried out in Denmark” and that, if they refuse to sign an adoption agreement or to negotiate a specific deal, the “enterprise should then be aware that the trade union will take industrial action”, which may include strikes, boycotts and sympathy actions. In fact, the Danish central social partners – LO (the Danish Confederation of Trade Unions) and DA (the Confederation of Danish Employers) – have agreed that “posted employees from other EU Member States should have the same rights as their Danish colleagues in similar jobs with regard to pay and working conditions”. Accordingly, most major contractors in the Danish Building industry, when making agreements with subcontractors, include a special clause which binds sub-contractors “to pay their employees in accordance with the contractual terms laid down for the building and construction sector in Denmark”. Indeed, the “social partners recommend that foreign employers join the relevant Danish employers’ organisation, thus committing themselves to respect Danish pay and working conditions”; for instance, “the Danish Construction Association has many foreign enterprises among its members” (Danish Ministry of Employment 2009, p. 8).

Besides these examples of regulation by collective bargaining, all the case studies illustrate that monitoring by trade unions is very important and is a crucial component in monitoring employment and working conditions at workplaces. It can become particularly important in certain situations, but everywhere unions have proved to be a key element in pointing to potentially illicit situations and they are also important in supporting posted workers in individual disputes. A strengthened role of trade unions in ensuring that posted workers are granted appropriate employment and working conditions was suggested, for instance, in a recent report by the European Affairs Committee of the French National Assembly (Assemblée Nationale, [Rapport d’information sur le détachement des travailleurs](#), February 2011)

### **Monitoring and administrative tools**

Monitoring tools in Belgium and Denmark were introduced in order to improve the quality of the information on posting and mainly to enhance the enforcement of regulation and better contrast abuse and violations. The LIMOSA system provides an important and integrated dataset that can be used by the different public administrations which are responsible for the enforcement of labour and social security regulations in order to concentrate inspections according to a risk assessment. This has reportedly improved the cost-effectiveness of checks and controls and increased detection rates of violations.

In Denmark, the RUT-Register was eventually introduced following the unsatisfactory results of other monitoring tools. The recent introduction of the online system and of the joint liability of utilising companies to check effective registration of the foreign service providers,

like in the case of LIMOSA, are considered important steps in the direction of respectively reducing the administrative burdens for posting firms and strengthening enforcement of rules.

It is important to note that the RUT-Register is also meant to enhance the autonomous capacity of social partners to regulate the employment of posted workers. In fact, the RUT-Register allows trade unions to access information on the activity of foreign service providers in Denmark, in the same way as the CVR-system provide details on companies established in Denmark. Trade unions are thus able to approach foreign service providers with a view to demand the application of collective agreements. Whether this feature can effectively support the inclusion of foreign service providers in the autonomous Danish labour relations system or rather may discourage registration by foreign operators, as some observers have underlined, will be seen in the future.

At this stage, it is interesting to see that both public administrations and the social partners are quite confident that the present regulatory and enforcement framework shall both preserve the Danish autonomous system and effectively address the issues and problems raised by posting. In fact, the changes in the Danish Act on Posting should, on one side, ensure the viability of industrial action and therefore confirm the ‘Danish approach’ to the regulation of the employment relationship of posted workers. On the other side, the renewed RUT-Register, with the introduction of the online procedure and the establishment of the joint liability of utilising Danish firms, should enhance enforcement. The RUT-Register should in fact provide relevant information to enforcing authorities with a view to effectively fight abuse and violations and contrast illegal transnational activities. In the stakeholders’ view, such promising national arrangements are then complemented by the start of the pilot project of the IMI module on posting which should improve transnational administrative cooperation and contribute in this way to further strengthen the enforcement of the rules on posting.

Besides the potential of monitoring tools, the case studies draw the attention on additional administrative initiatives which can contribute to improve the enforcement of existing regulations. France, for instance, has tried to develop specific measures and a methodological support for labour inspection services especially devised for the posting of workers. Special guidelines, the translation of relevant documents, the activation of training initiatives and the implementation of European projects to exchange best practices are measures which have been recently taken in France. Also a network of regional liaison offices has been established alongside the central national office (Strasbourg for Germany, in the North of France for Belgium, in Perpignan and Bayonne for Spain, in Nancy pour Luxembourg and in Chambéry for Italy) in order to improve the provision and exchange of information on posting. Several bilateral agreements have been signed in recent years to support information exchange and better enforcement with Germany (2001 and 2008), Belgium (2003), Netherlands (2007), Bulgaria (2008), and Spain (2010), while some others are still under negotiation (notably with Luxembourg and Poland)

The recent [\*Rapport d'information sur le détachement des travailleurs\*](#) of February 2011 prepared by the European Affairs Committee of the French National Assembly and mentioned above includes a number of proposals regarding possible interventions in the regulatory framework on posting, in order to cope with the present difficulties in protecting workers’ rights and ensure enforcement. Such measures include interventions to strengthen the application of collective agreements, the introduction of a social clause in public tenders, the introduction of a joint liability scheme between main contractors and subcontractors, clearer

criteria to distinguish between employees and self-employed workers, and the protection of human dignity in terms of working conditions and housing. Besides such provisions, however, the report devotes great attention to the administrative dimension of enforcement by underlining the importance of closer and more effective cooperation between all the relevant national enforcement bodies, of the circulation of information between MSs, including with a view to fight letterbox companies, of improved information systems for workers and firms on the conditions applicable to posted workers, of the integration of a specific role for trade unions in the monitoring and enforcement systems, and of the introduction of adequate sanctions which can be applied at trans-national level.

## **THE POSITION OF THE STAKE HOLDERS AND THE POLICY OPTIONS**

In general, the case studies show that there is a widespread dissatisfaction with the implementation and enforcement of the PWD and the need for action emerge as a common element across cases and stakeholders, of course with varying degrees of urgency and different focus. The only notable exception is the UK. Here trade unions demand a change in the rules of posting and focus their attention on national-level regulation, notably by asking the establishment of collective agreements as a source of minimum protections as for Art. 3.1 PWD, and, as far as the implications of ECJ rulings are concerned, they request that the possibility to use strikes in disputes over posting be confirmed. The employers, especially the Confederation of British Industry (CBI), are satisfied with both the content and the implementation of the PWD, while the government is especially concerned with avoiding further red-tape for companies and therefore it is not particularly keen on intervening in the field of posting with new regulations.

Despite the common demands for intervention, stakeholders maintain that any new measures must be carefully considered, in order not to ‘worsen’ the present balance of interest. While this position is generally voiced by employer representatives, notably for fears of new restrictions and administrative burdens, in some cases, like in Denmark, unions share such attitude, for the opposite concern that the new interventions – including in the field of the right to strike – may imply a reduction in the protections of workers and further challenges for the Danish autonomous system of labour regulation. In fact, Danish stakeholders, despite the relevance of posting in the national debate, are the most cautious in supporting any legislative interventions, essentially because they are confident that the present situation at national level enables the social partners and the public authorities to effectively regulate posting.

Turning to the content of the possible legislative review of the PWD, trade union representatives are more supportive of substantial interventions, also in the areas covered by Art. 1-3 PWD; however, the strengthening of the enforcement of the PWD is indeed a quite general request, with the qualification by the employer representatives that it should take place with the lowest costs and with the lowest possible barriers to transnational service provision and by the trade unionists that it should be accompanied by strengthened worker protections.

## CONCLUDING REMARKS

The case studies underline that the posting of workers in the framework of the transnational provision of services presents a number of critical aspects. This is essentially because posting by definition lies, at least partly, outside the scope of the regulatory capacity of national actors, both in legal and practical terms. While it certainly brings important business opportunities for posting and utilising firms, its peculiar regulatory framework, on one side, confronts national actors with new challenges and, on the other, opens room for opportunistic and elusive behaviours.

This second feature – the room for opportunistic behaviours basically linked to information asymmetries and weak monitoring and enforcement tools – operates as a multiplier of the concerns of social actors committed to protect the interest of workers and of public authorities responsible for the enforcement of labour and social security legislation. In order to redress such situation, irrespective of whether changes in the substantive regulation of posting are considered useful, it is important to act for closing such information asymmetries and strengthening monitoring and enforcement tools. Infringements and violations in the area of posting are not dissimilar of what happens with undeclared work and irregular employment, sometimes involving migrant workers, but they are more difficult to detect and sanction because of their often ‘social seclusion’ and their special regulatory regime, which requires, among other things, the cooperation of different public authorities, both within and across national borders.

More information on posting is needed; a better integration of posted workers and transnational service providers in the social and economic systems of the receiving countries can be greatly useful to avoid abuse and violations, strengthened cooperation between public administrations is essential to make the regulatory framework effective. Not all the issues raised by posting can be solved by such measures. The challenges represented by increased transnational competition, which can also involve some degree of labour cost competition, will remain, both for domestic production systems and for industrial relations and the regulation of labour. But, as long as social actors and public authorities have the instruments to monitor and ensure that common minimum protections are effectively enforced, such competition will operate in an environment where domestic and foreign service providers operate under comparable and fair conditions. In this perspective, posting can play an important role in the integration of European economies and societies.

#### **ANNEX 4: Pilot project on the use of a separate and specific application of the Internal Market information System (IMI) in the area of posting of workers – first statistics and user feedback**

In line with the Council Conclusions of 7 March 2011<sup>7</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. The aim of the pilot project is to test in practice the operability and usefulness of 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 and experiences with the use of the module at the latest within one year after the launching of the pilot project.

After four and a half months, the following preliminary information can be provided:

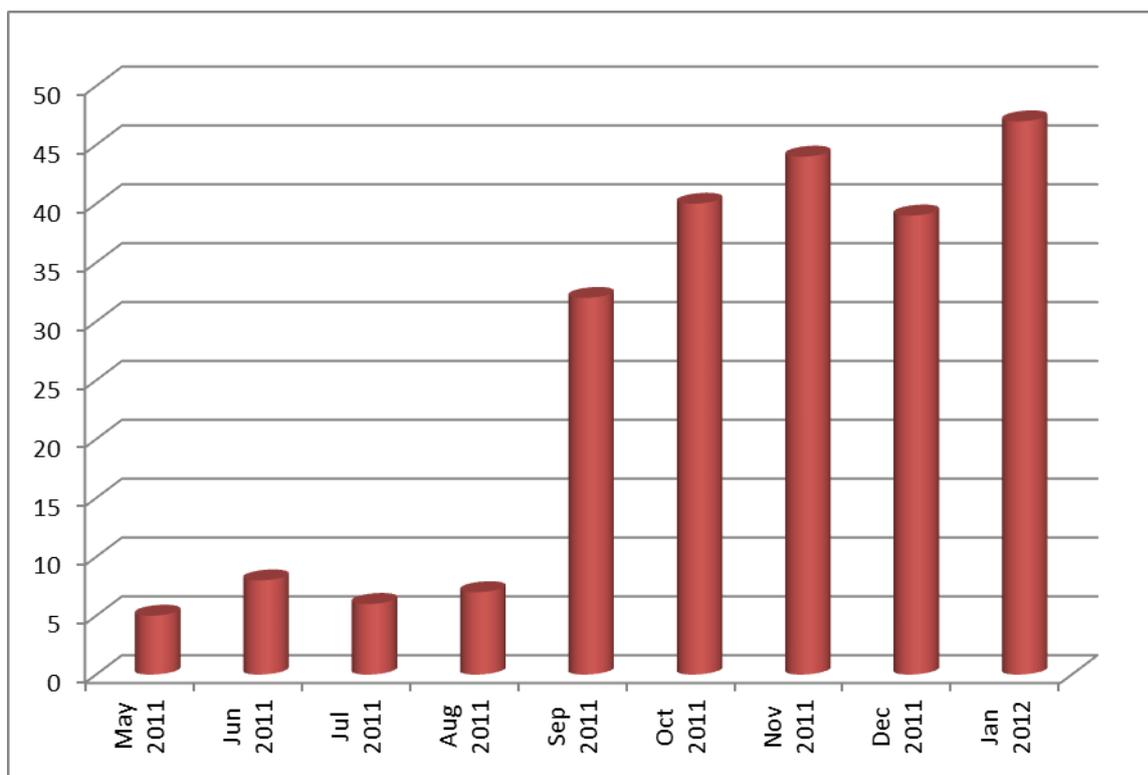
- After a slow start, the use of IMI has picked up considerably;
- Until now, 15 Member States have send requests and 24 Member States have received requests;
- Response times are still relatively long (compared to general IMI response times for the other modules) with 60% of all requests taking more than 4 weeks to receive a reply;
- The Commission received positive user feedback.

#### **1. Statistics**

##### **a. Number of requests for information submitted per month - IMI Posting of Workers module**

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<sup>7</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).



#### b. Sending and recipient countries

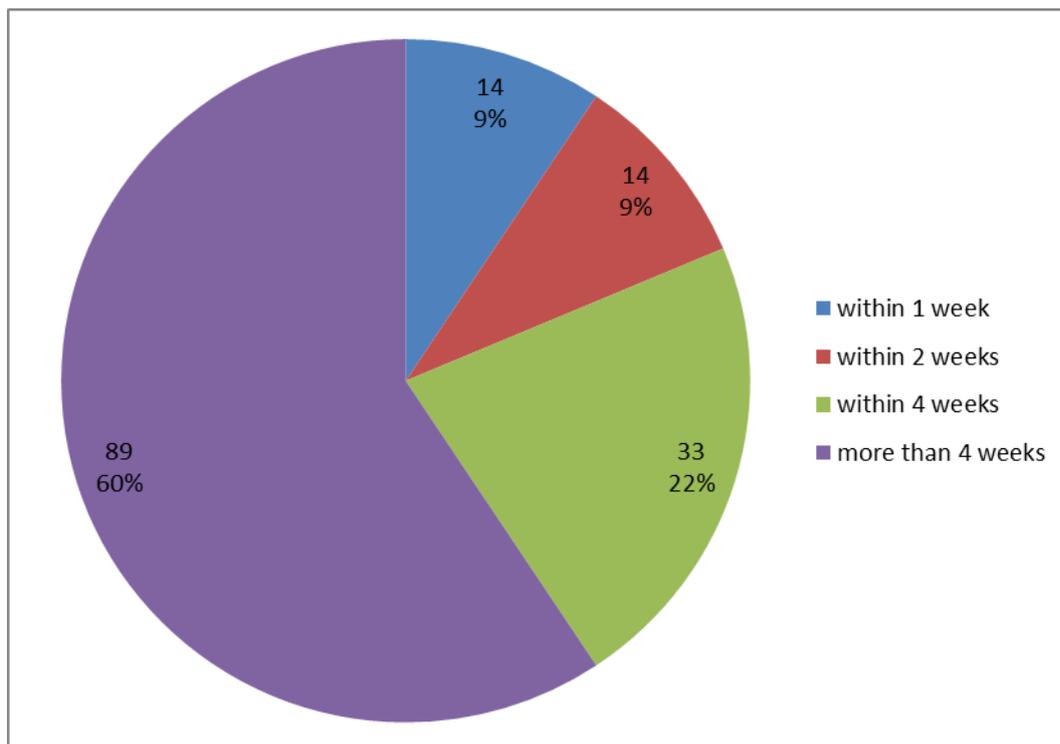
Member State	Number of requests sent
BE	71
FR	53
AT	47
FI	22
IT	13
ES	5
LV	3
SI	3
NO	2
DE	2
HU	2
PT	2
LT	1
NL	1
PL	1

Member State	Number of requests received
RO	31
HU	25
PT	24
PL	23
DE	17
SK	16
EE	14
ES	13
NL	10
CZ	9
BG	8
SI	8
CY	6
LT	4
IT	4
LV	4
UK	3
LU	2
BE	2
DK	1
FI	1

<b>Total:</b>	<b>228</b>

FR	1
MT	1
SE	1
<b>Total:</b>	<b>228</b>

### c. Time to respond



This graphic is based on 150 completed requests.

## 2. User feedback

From **Finland**: IMI made our lives easier. Finland has been using the posting module since May 2011 and sent nine requests via IMI so far, mainly to Estonia and Poland. Finland has not received any requests of information yet. Finnish labour inspectors have occasionally difficulties with foreign employers because the employers do not give the needed documents to labour inspectors. The lacking documents are the basic documents needed for the labour inspection purposes, for example, employment contracts of posted workers, records of hours worked in Finland and records of wages paid for work in Finland. In these cases Finland has used IMI to ask for help from Estonian and Polish authorities. Estonian and Polish authorities have contacted the employer and asked for the documents. Finland is very grateful for the help it has got so far and thinks that IMI is a good system which makes it easier to contact foreign authorities. It is great that the Commission is developing IMI technically further.

From **Hungary**: An Example: The Austrian tax office wanted to check Hungarians working on construction in Austria, so it sent us a request asking about the lawfulness and the duration of the posting as well as about the activity and the contact details of the posting enterprise. The Austrian authority also attached copies of the identity cards of the workers, which helped us a lot in answering their questions. We asked our local inspectorate to carry out control on field and also contacted the National Health Insurance Fund Administration in order to be able to answer all the questions. All the information exchange took around 20 days, which is very fast compared to our previous methods.

Positive experiences: The exchange of information through IMI is a lot more efficient and faster than previous methods based on exchange of letters. It is cheaper, the documents need

only to be scanned and attached without being registered. The request arrives to the competent person immediately, because it is a lot easier to choose the competent authority of the other Member State. Without knowing national rules it had been very difficult to find out to whom send our questions, today it becomes very easy to do through the searching facility of IMI. Even if we don't choose the right authority, our partners can easily forward our request or split it and forward only the half of it to the competent authorities. We are very happy that since IMI we don't need to send several letters to several authorities in other Member States. The controlling activity of IMI coordinators ensures that our partner authorities don't forget about our requests and answer them every time.

From **Austria**: Our institution, the Vienna Health Insurance Fund (wage and social dumping control centre) has already sent ten requests to authorities in different countries via IMI. Due to our field of action all the questions concerned posting companies. To meet our legal obligations we need to know the owner of the enterprise respectively the external representative of the enterprise. For example we have put this question to the Hungarian authority and have received the answer within a few days. Without this information we would not have been able to perform our task. From our point of view IMI has made communication much easier and even quicker as our experience shows that the authorities really make an effort to answer the questions as quickly as possible. IMI has become an essential tool for our work.

From **Austria**: The financial police of the Austrian tax administration controls many workers every day. Because of increased mobility and the freedom to provide services more and more workers from all regions of Europe are posted to Austria. IMI now offers an electronic tool to check the information given by the posted workers. Recently, my team checked Italian workers on a construction site. The workers claimed to have worked for the Italian company for a while already, but not all workers could provide the "A1"-document. Through an IMI-request we found out that not all workers were employed by the Italian company. The big advantage of IMI is that it overcomes the language barrier by offering structured and pre-translated questions and answers. Using IMI we can ensure that workers get their rights and employers can be held accountable.

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

**1. Member States and/or social partners**

Content package B and option 7	Relevant text of the existing Directive	General implementation costs	Administrative burden resulting from new Information Obligations (IO) in EU law (compared to existing Directive)	Costs which already occur (business as usual)
<b>1. Access to information (package B)</b>				
<p>MS shall provide transparent and easy accessible information re applicable working conditions to posted worker set by law and collective agreements (to be provided by Member States <u>or</u> social partners).</p> <p>Information shall be provided:                      - via national websites                      - summarised leaflet                      - in languages other than national language</p>	<p>Each Member State shall take the appropriate measures <b>to make the information</b> on the terms and conditions of employment referred to in Article 3 <b>generally available</b>.</p>	<p>-</p>	<p>The existing Directive did neither foresee various means for dissemination of information nor various languages. Therefore, new IOs result from:                      - the leaflet                      - other language</p> <p>At the same time, improved information will reduce costs for companies since the necessary information will be easier accessible.</p>	<p>Some MS already provide information in other languages; as well as leaflets</p>

<b>2. Administrative cooperation (package B)</b>				
Reply to information requests, carry out checks, inspections and investigations (if necessary) regarding compliance with Directive; as well as re good conduct and infringement of applicable rules in sending MS	Member States shall make <b>provision for cooperation between the public authorities</b> which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in <b>replying to reasoned requests</b> from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.	No significant new costs. Existing costs will be reduced through the use of IMI.	No new IO compared to the existing Directive.	To a large extent this seems to be business as usual; compared to the Directive this option specifies that checks/inspections/investigations have to be carried out in order to reply to requests.
MS shall reply in 2 weeks; in 24 hours in case of urgency	-	No significant costs.	No new IO compared to the existing Directive.	The content of the obligation to investigate and to reply is the same than before. However, in a limited period of time. This may require specific arrangements by MS re organisation and staff of the liaison offices.
MS shall use IMI to exchange information electronically	-	Implementation costs are not significant. The web-based application as well as part of the training is provided by the EC.  Compared to the status quo IMI will facilitate work of national administrations (paperwork; predefined questions; translation) and reduce costs linked to replying to information requests.	No new IO compared to the existing Directive.	-

<b>3. Inspections (package B)</b>				
<p>MS shall ensure that effective and adequate inspections are carried out; MS shall base inspections on a risk assessment.</p> <p><i>Derogations in accordance with national law/practice as far as national labour inspectorates are not responsible for the controls:</i></p> <ul style="list-style-type: none"> <li>- inspections can be delegated to social partners (e.g. Nordic MS)</li> <li>- establish or maintain (alternative) arrangements which guarantee the respect of working conditions of posted workers (e.g. UK)</li> </ul>	<p>5 Member States shall take <b>appropriate measures in the event of failure to comply with this Directive.</b></p> <p>They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.</p>	<p>No significant new costs. The risk assessment – as far as it does not exist already in MS – will contribute to more effective and focused inspections and reduce implementation costs.</p>	<p>No new IO compared to the existing Directive.</p>	<p>The existing Directive implies that MS carry out inspections.</p>
<b>4. Protection of workers (package B)</b>				
<p>Complaint mechanism for posted workers</p>	-	<p>No significant costs, depending on implementation.</p>	<p>No new IO compared to the existing Directive.</p>	<p>Mechanism exists in some MS; requires nomination of responsible authorities dealing with complaints.</p>
<b>5. Execution of fines (package B)</b>				
<p>- Cross-border enforceability of administrative fines</p>	-	<p>No significant costs.</p>	-	<p>Nominating responsible authorities dealing with requests from other MS (existing bodies may be nominated).</p>
<b>6. Alert mechanism (option 7)</b>				
<p>Notification obligation for situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned</p>	-	-	<p>New IO: Notification from MS to EC and other concerned MS</p> <p>No significant costs due to very limited number of expected cases.</p>	-

## 2. Companies

Content option 4	Relevant text of the existing Directive	General compliance costs	Administrative burden resulting from new Information Obligations (IO) in EU law (compared to existing Directive)	Costs which already occur (business as usual)
<b>1. Access to information (package B)</b>				
<p>MS shall provide transparent and easy accessible information re applicable working conditions to posted worker set by law and collective agreements (to be provided by Member States <u>or</u> social partners).</p> <p>Information shall be provided:</p> <ul style="list-style-type: none"> <li>- via national websites</li> <li>- summarised leaflet</li> <li>- in languages other than national language</li> </ul>	Each Member State shall take the appropriate measures <b>to make the information</b> on the terms and conditions of employment referred to in Article 3 <b>generally available</b> .	More transparent information in more languages will reduce costs for companies, in particular for SMEs.	No new IO for companies compared to the existing Directive.	At the moment not all MS provide transparent information in different languages by different means of dissemination.

<b>2. National control measures (package B)</b>	-			
<p>MS may impose:</p> <ul style="list-style-type: none"> <li>- prior declaration (limited number of information)</li> <li>- obligation to keep certain documents for inspections</li> <li>- obligation 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</li> </ul> <p>However, this option will limit MS possibilities to require certain information and/or documents as it also clarifies what MS may <u>not</u> impose.</p>	-	-	<p>No new IO compared to the existing Directive imposed by EU law.</p> <p>Package B will limit the number of information MS may ask within the prior declaration. Therefore, the option reduces administrative burden for companies. The same is valid for the possibility to ask for certain documents.</p> <p>The possibility to designate a representative to negotiate with relevant social partners is only relevant for a very limited number of MS in accordance with their national industrial relation systems.</p>	<p>In accordance with the existing jurisprudence of the CJEU MS may already ask for a prior declaration and for keeping certain documents for inspection purposes. Currently, 18 MS ask for a prior declaration covering approximately two third of the postings.</p> <p>With regard to documents a number of MS have already such an obligation. Furthermore, Directive 91/533 already requires a document during the posting which will be taken into account.</p>

<b>3. Inspections (package B)</b>				
<p>MS shall ensure that effective and adequate inspections are carried out; MS shall base inspections on a risk assessment.</p> <p><i>Derogations in accordance with national law/practice as far as national labour inspectorates are not responsible for the controls:</i></p> <ul style="list-style-type: none"> <li>- inspections can be delegated to social partners (e.g. Nordic MS)</li> <li>- establish or maintain (alternative) arrangements which guarantee the respect of working conditions of posted workers (e.g. UK)</li> </ul>	<p>5 Member States shall take <b>appropriate measures in the event of failure to comply with this Directive.</b></p> <p>They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.</p>	<p>No significant costs; risk assessment will better target controls on problematic sectors and firms.</p>	<p>No new IO compared to the existing Directive.</p>	<p>The existing Directive implies that MS carry out inspections.</p>
<b>4. Joint and several liability (package B)</b>				
<p>MS shall ensure that: Contractor can be held liable to pay net minimum wage instead of direct subcontractor</p>		<p>General compliance cost resulting from a possible change in behaviour of companies while selecting subcontractors.</p>	<p>No new IO.</p>	<p>Exists in some MS.</p>

## **ANNEX 6: Quantification of administrative burden and other costs resulting from package B and option 7**

### **1. Summary**

Costs for Member States: Package B causes additional administrative burden with regard to access to information (required translation and leaflet) of approximately 90,000 EUR (one-off costs) and 180,000 EUR (repetitive costs per year) in total for EU-27. The use of IMI will reduce costs. Option 7 causes additional administrative burden with regard to the foreseen alert mechanism. Such a burden should not be significant due to the very limited number of expected cases.

Costs for companies: There is no additional administrative burden for companies linked to package B and option 7. Package B entails additional general compliance costs of 2 million EUR in total for 27 Member States resulting from the provision on joint and several liability. Provisions regarding inspection will not cause new costs. The risk assessment may shift inspections and respective costs to risk sectors and situations. General compliance costs should decrease since package B will provide for better access to information and limit administrative requirements of Member States (national control measures).

Benefits: Costs are balanced by benefits for Member States, companies and posted workers since they contribute to better enforcement of the Directive and a more level playing field. Member States will benefit from the cross-border execution of fines.

In detail:

### **2. Overall administrative burden and other costs in EU 27**

#### **2.1. Access to information (package B)**

Impact on Member States

Impact on companies

Increase in administrative burden resulting from new IO (requirement of a leaflet and additional language)

Reduction of costs since information regarding the applicable working conditions are easier accessible

#### **New requirements compared to the existing Directive:**

According to Article 4(3) of the Directive, Member States must take the appropriate measures to provide information on the applicable conditions of employment to posted workers set by law, regulation or collective agreement in accordance with Article 3. This implies that Member States have to provide this information at least in their national language through one appropriate mean (e.g. website). Package B foresees that Member States provide this information at least in one additional language (other than the national) and through websites and a summarised leaflet in a transparent and clear manner. Since all Member States provide information via websites, this can be taken as the status quo (business as usual). The leaflet is an additional requirement. It is necessary since not all posted workers have access to internet. Equally not all posting companies may be used to find information on the internet (i.e. SMEs).

**Benefits:** More transparent, clearer and easier accessible information will produce benefits for posted workers, companies and Member States. Companies will save costs because it will be easier to find the relevant information. Posted workers will be better informed about their rights and Member States will benefit from better compliance with the applicable working conditions.

**Costs:** There is additional administrative burden for Member States resulting from these new Information Obligations. Member States will have to translate the information in at least one language other than the national language (one-off costs). Translation costs will be partially repeated when applicable working conditions change (repeated costs). The leaflet has to be produced with existing information from the website (one-off costs) and it has to be regularly updated when applicable working conditions change (repeated costs).

The following action is required:

<i>Description</i>	<i>Type of information obligation/goldplating</i>	<i>Required administrative action</i>	<i>Target group</i>	<i>Type of cost</i>
1. Translation of the information	Not labelling information for third parties	Translation	Public administration	One-off
2. Translation of the information	Not labelling information for third parties	Translation of updated information	Public administration	Repetitive (periodical)
3. Designing the leaflet	Not labelling information for third parties	Designing information materials	Public administration	One-off
4. Printing of the leaflet	Not labelling information for third parties	Updating information materials and copying	Public administration	Repetitive (periodical)

#### Quantification of costs:

- The evaluation of the costs linked to the first translation of the information (item 1, one-off) is calculated considering the number of keystrokes (characters + spaces) in the Belgian information website multiplied by the average European tariff per keystroke usually applied for professional translations of legal text (for 1 language). The Belgian information web site was selected as the benchmark since it is regarded as best practice in communication on posting<sup>8</sup>. Therefore, this reference reflects a conservative approach. The rate for translation has been based on a review of a number of internet based translation services<sup>9</sup>. Both parameters (keystrokes and translation rates) have been increased by 20-40% to adopt a conservative approach.
- The costs for translation of updated information (item 2, repetitive) are estimated to be 50% of the one-off costs per year.

<sup>8</sup> Fabienne Muller, Information provided on the posting of workers, Strasbourg, 2010. Available on the website: <http://www.ec.europa.eu/social/posted-workers>

<sup>9</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.

- The assessment of costs linked to the designing of the leaflet (item 3) is calculated considering two working days of a PA employee as the average time necessary to produce information materials on posting. The approach follows the EU Standard Cost Model (SCM).
- The costs for updating the leaflet (item 4, repetitive) are calculated considering one working day of a PA employee.
- The costs linked to the printing of the leaflet (item 4, repetitive) is calculated considering three colours printing, double sided leaflet, on gloss paper. The rate for translation has been based on a review of a number of internet based printing services (Ismeri). The cost has been increased by 40% to take a conservative approach. This is calculated at EUR 1,400 per 10,000 leaflets and for a total number of 1 million leaflets.

<i>Description</i>	<i>Target group</i>	<i>Tariff</i>	<i>Type of cost</i>	<i>Total administrative cost (see spreadsheet for details per country)</i>
1. Translation of the information	Public administration	Internet based translation services, cost per keystroke, one language (Ismeri)	One-off	EUR 81,000
2. Translation of the information	Public administration	Internet based translation services, cost per keystroke, four languages (Ismeri)	Repetitive (annual)	EUR 40,500
3. Designing the leaflet	Public administration	Two working days at labour costs for public administrations (Labour Cost Survey 2008, NACE rev. 2, O84, hourly rate per MS, EUROSTAT)	One-off	EUR 8,871
4. Printing of the leaflet	Public administration	Internet based printing services, cost per 10,000 leaflets (Ismeri)	Repetitive (annual)	EUR 140,000

## 2.2. Administrative cooperation (package B)

### Impact on Member States

No new administrative burden. The use of IMI to exchange information electronically will reduce costs.

### Impact on companies

Reduction of costs since better administrative cooperation will to a certain extent limit national control measures

New requirements compared to the existing Directive:

(i) Member States shall reply to information requests, carry out checks, inspections and investigations (if necessary) regarding compliance with the Directive; as well as good conduct and infringement of applicable rules in sending Member States. Already under the existing Directive Member States have to reply to information requests. This implies necessary checks, inspections and investigations in this respect (business as usual).

(ii) Member States shall reply in 2 weeks; in 24 hours in case of urgency: The content of the obligation to investigate and to reply is the same than before.

(iii) Member States shall use IMI to exchange information electronically. This is a new obligation for Member States. However, implementation costs are not significant in this respect. The web-based application as well as part of the training is provided by the EC. Compared to the status quo IMI will facilitate work of national administrations (paperwork; predefined questions; translation) and reduce costs linked to replying to information requests.

Benefits: There are benefits for Member States, companies and posted workers. Better administrative cooperation and quick replies to information requests will contribute to better enforcement of the existing Directive. Better administrative cooperation might reduce the need for Member State to rely on national control measures and hence might reduce costs for companies. Member States will benefit from the use of IMI (less paperwork; use of predefined questions; less translation).

### **2.3. Inspections (package B)**

#### Impact on Member States

No new administrative burden/costs. Better risk assessment may help to better target problematic sectors or companies.

#### Impact on companies

No new administrative burden/compliance costs resulting from this aspect. Risk assessment may shift inspections to companies in problematic sectors or with a bad record.

New requirements compared to the existing Directive: The existing Directive (Article 5) implies that Member States carry out inspections (business as usual). Providing for more effective and adequate inspections does not imply an increase in controls, inspections and respective costs or resources compared to the status quo. It depends very much on the specific situation of each Member State how effective and adequate inspections can be ensured (organisation of labour inspectorates, priority of tasks etc.).<sup>10</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 when there is 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.

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<sup>10</sup> With regard to concepts, competences and methods used by labour inspectorates cf. Commission staff working document, SEC(2006) 439, p.25.

Benefits: Member States, companies and posted workers will benefit from more effective and adequate inspection since they will contribute to a better compliance with the Directive and a more level playing field. The required risk assessment – as far as it does not exist already in Member States – will contribute to more effective and focused inspections and reduce overall implementation costs.

#### **2.4. Complaint mechanism for posted workers (package B)**

Impact on Member States

Impact on companies

No new administrative burden. No significant implementation costs, depending on implementation. No additional administrative burden or costs.

New requirements compared to the existing Directive: The existing Directive foresees that Member States shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive (Article 5). In order to comply with this provision it is sufficient if Member States grant posted workers access to Courts in order to claim their rights. However, a specific easy accessible complaint mechanism for posted workers is not foreseen in the existing Directive.

Benefits: A specific complaint mechanism will facilitate enforcing posted worker's rights when disputes with their employers about individual employment contracts arise. Member States will benefit from better enforcement of the Directive.

Costs: The complaint mechanism does not imply additional costs for Member States (e.g. existing bodies could be nominated to fulfil the task).

#### **2.5. Execution of fines (package B)**

Impact on Member States

Impact on companies

No new administrative burden. No significant implementation costs. No additional administrative burden or costs.

New requirements compared to the existing Directive: The existing Directive does not entail any provisions regarding the cross-border enforceability of administrative fines. Furthermore, the current EU regulatory framework does not provide effective means to enforce administrative sanctions in other Member States (see for instance the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

Benefits: Member States, companies and posted workers will benefit from a better compliance with the existing Directive and a more level playing field. Member States will benefit from enforced fines.

Costs: The execution of fines does not imply significant additional costs since Member States have already established the requisite bodies in related areas (e.g. Council Framework Decision 2005/214/JHA) in the past.

## **2.6. Alert mechanism (option 7)**

Impact on Member States

Impact on companies

New administrative burden linked to notification obligation for situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned

No additional administrative burden or costs.

New requirements compared to the existing Directive: Option 7 will entail a notification obligation for Member States regarding situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned. The existing legal framework does not entail such an obligation. The notification will be submitted to the European Commission and other concerned Member States.

Benefits: The European Commission and other Member States will be made aware of situations causing serious damage or grave disruption, or creating social unrest in the Member States concerned. Respective measures can be taken if appropriate.

Costs: There will be no significant additional costs since the number of potential cases is expected to be low.

## **2.7. Joint and several liability (package B)**

Impact on Member States

Impact on companies

No additional administrative burden or costs.

No additional administrative burden. General compliance costs of 5.7 million Euro. Since the main receiving Member States have already systems of joint and several liability in place (representing 3.7 million Euro) only 2 million Euro are in fact new compliance costs for companies.

New requirements compared to the existing Directive: The existing Directive does not entail a provision re joint and several liability. Package B will oblige Member States to provide for the liability of companies for minimum wage claims of posted workers of their subcontractors.

Benefits: Posted workers employed by subcontractors will be able to hold liable the contractor instead of their direct employer for minimum wage claims. Member States and companies, in particular SME in sending and receiving Member States which are sensitive to unfair

competition, will benefit from better enforcement of the existing Directive, a more level playing field and fairer competition.

Costs: The liability provision does not entail an Information Obligation and will not produce administrative burden.<sup>11</sup> It entails additional general compliance costs of 2 million EUR resulting from a possible change in behaviour of companies while selecting subcontractors (5.7 million overall minus 3.7 million for Member States which have already a system of joint and several liability in place: AT, DE, ES, FI, FR, IT, NL).

The proposed measures focus on preventive measures aimed at a risk selection of subcontractors. Companies might analyse whether there is a risk that the subcontractor will not comply with its minimum wage obligations in the host Member State. In line with the OECD Guidelines for Multinational Enterprises, responsible business conduct and governance should at least imply carrying out risk based due diligence while selecting subcontractors.

#### Quantification of costs:

The time needed to monitor the application of the rules on minimum rates of pay by subcontractors can be estimated as fifteen minutes of work per posting at labour costs for business support activities (Labour Cost Survey 2008, NACE rev. 2, N82, hourly rate per MS, EUROSTAT).<sup>12</sup> The number of postings is approximately 1 million.

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<sup>11</sup> This is confirmed by the German assessment of administrative burden with regard to the respective provision in § 14 AEntG (Law on the posting of workers) in accordance with the Standard Cost Model, cf. <https://www-skm.destatis.de/webskm/online>.

<sup>12</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.

<i>Description</i>	<i>Target group</i>	<i>Tariff</i>	<i>Type of cost</i>	<i>Total administrative cost (see spreadsheet for details per country)</i>
Joint and several liability/risk based selection of subcontractors	Companies	Labour Cost Survey 2008, NACE rev. 2, N82, hourly rate per MS, EUROSTAT	Repetitive	5.7 million

## 2.8. National control measures (package B)

Impact on Member States

No additional administrative burden or costs.

Impact on companies

No additional administrative burden or costs resulting from EU law.

Package B will reduce Member States possibilities to impose administrative requirements compared to the current situation and reduce administrative burden for companies.

New requirements compared to the existing Directive: The existing Directive does not entail any provisions regarding national control measures. Package B will not impose any new obligations in this respect on Member States. Package B will clarify the possibilities of Member States to impose such measures. It provides that Member States may impose a prior declaration, the obligation to keep certain documents for inspections and the obligation 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. These requirements are effective means for Member States in order to ensure compliance with the Directive. At the same time this option clarifies what Member States may not impose on service providers.

Simple prior declaration before the posting: In accordance with the existing jurisprudence of the CJEU Member States may already ask for a prior declaration. Currently 16 Member States impose mandatory ex-ante notification obligations on service providers and two Member States on the service recipient. Another two Member State impose notification obligations on service provider vis-à-vis the service recipient. Package B will limit the extent of information Member States may ask within the prior declaration. Therefore, as far as Member States require more information at this stage, the option reduces administrative burden for companies.

Obligation to keep certain documents for inspections: The same is valid for the possibility to ask for certain documents. This package will reduce Member States possibilities to require certain documents for inspections. Package B will take into account the obligations stemming

from Directive 91/533 which already requires a document during the posting. Consequently, this option will reduce administrative burden for service providers.

Designate a representative to negotiate with social partners: The possibility to designate a representative to negotiate with relevant social partners is only relevant for a very limited number of MS in accordance with their national industrial relation systems.

Benefits: Package B will provide for legal clarity for Member States and companies with regard to possible national control measures and respective administrative requirements on service providers.

Costs: Administrative burden for companies based on national law will be reduced. However, due to the lack of information regarding the quantitative impact of the very diverse national administrative requirements in place it is impossible to quantify the reduction of administrative burden.

Concerning the prior declaration, were the remaining seven Member States to introduce such a mechanism the respective administrative burden for companies can be calculated.

The following action is required:

<i>Description</i>	<i>Type of information obligation/goldplating</i>	<i>Required administrative action</i>	<i>Target group</i>	<i>Type of cost</i>
1. Notification of posting	Notification of activity	Submitting the information to the relevant authorities	Companies (sending)	Repetitive <u>Goldplating</u>

- The notification of posting is based on the case studies of LIMOSA and RUT-Register (Ismeri). This considers 15 minutes as the average time used per one posting by a business consultant.<sup>13</sup>
- The number of postings is approximately 1 million.

Quantification of (maximal) costs through goldplating for 27 Member States:

<i>Description</i>	<i>Target group</i>	<i>Tariff</i>	<i>Type of cost</i>	<i>Total administrative cost for 27 MS</i>
1 Notification of posting	Companies (sending)	Ismeri case studies, fifteen minutes per posting at labour costs for business consultants (Labour Cost Survey 2008, NACE rev. 2, M70, hourly rate per MS, EUROSTAT)	Repetitive	EUR 8 million per year

<sup>13</sup> NB: 15 minutes for a posting declaration is a relatively high assumption in order to take a conservative approach. The German prior declaration according to § 18 (1) AEntG requires 2.77 minutes according to the Standard Cost Model (SCM). See <https://www-skm.destatis.de/webskm/online>

- Currently 16 Member States impose mandatory ex-ante notification obligations on service providers and two Member States on the service recipient. Another two Member States impose notification obligations on service providers vis-à-vis the service recipient. These 20 Member States represent approximately 75% of the received postings. These Member States represent 6 million EUR of overall 8 million EUR administrative burden through possible goldplating.
- The remaining seven Member States (IE, EE, IT, NL, PT, SE, UK) represent approximately 25% of the overall received postings in 2009. If these Member States would use the possibility for goldplating this would cause additional administrative burden of 2 million EUR.

### 3. Administrative burden and other costs by Member State

Country	No	Type of IO/compliance costs	Required admin. actions	Target group	A. Tariff	B. Time or units	C. Price A.*B.	Num. actions of per year	Type of cost	Total admin. costs
<b>Austria</b>	1	Non labelling information for third parties	Designing leaflet	PA	25.23	16	403.68	1	one-off	2,018
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	40,083	per year	5,612
11,505	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
40,083	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	24.69	15	6.17	40,083	per year	247,413
LC in PA										
25.23										
High LC										
46.31										
Low LC										
24.69										
<b>Belgium</b>	1	Non labelling information for third parties	Designing leaflet	PA	34.68	16	554.88	1	one-off	555
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	114,972	per year	16,096
46,260	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
114,972	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	32.80	15	8.20	114,972	per year	942,768
LC in PA										
34.68										
High LC										
59.23										
Low LC										
32.80										
<b>Bulgaria</b>	1	Non labelling information for third parties	Designing leaflet	PA	3.44	16	55.04	1	one-off	55
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	2,800	per year	392
4,739	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
2,800	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	3.11	15	0.78	2,800	per year	2,177
LC in PA										
3.44										
High LC										
5.83										

Low LC										
3.11										
<b>Cyprus</b>	1	Non labelling information for third parties	Designing leaflet	PA	22.29	16	356,64	1	one-off	357
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	2,381	per year	333
143	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
2,381	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	8.26	15	2.07	2,381	per year	4,916
LC in PA										
22.29										
High LC										
14.23										
Low LC										
8.26										
<b>Czech Rep.</b>	1	Non labelling information for third parties	Designing leaflet	PA	10.87	16	173.92	1	one-off	174
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	16,988	per year	2,378
14,244	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
16,988	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	9.47	15	2.37	16,988	per year	40,219
LC in PA										
10.87										
High LC										
22.03										
Low LC										
9.47										
<b>Denmark</b>	1	Non labelling information for third parties	Designing leaflet	PA	36.61	16	585.76	1	one-off	586
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	18,149	per year	2,541
3,774	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
18,149	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	34.05	15	8.51	18,149	per year	154,491
LC in PA										
36.61										
High LC										
47.95										
Low LC										
34.05										

<b>Estonia</b>	1	Non labelling information for third parties	Designing leaflet	PA	9.81	16	156.96	1	one-off	157
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	2,088	per year	292
8,723	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
2,088	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	9.74	15	2.44	2,088	per year	5,085
LC in PA										
9.81										
High LC										
14.93										
Low LC										
9.74										
<b>Finland</b>	1	Non labelling information for third parties	Designing leaflet	PA	30.60	16	480.60	1	one-off	481
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	19,260	per year	2,696
2,146	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
19,260	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	22.24	15	5.56	19,260	per year	107,087
LC in PA										
30.60										
High LC										
38.23										
Low LC										
22.24										
<b>France</b>	1	Non labelling information for third parties	Designing leaflet	PA	28.87	16	461.92	1	one-off	462
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	151,168	per year	21,164
219,795	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
151,168	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	30.47	15	7.62	151,168	per year	1,151,525
LC in PA										
28.87										
High LC										
50.71										
Low LC										
30.47										

<b>Germany</b>	1	Non labelling information for third parties	Designing leaflet	PA	30.49	16	487.84	1	one-off	488
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	224,138	per year	31,379
179,279	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
224,138	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	18.22	15	4.56	224,138	per year	1,020,951
LC in PA										
30.49										
High LC										
45.02										
Low LC										
18.22										
<b>Greece</b>	1	Non labelling information for third parties	Designing leaflet	PA	13.66	16	218.56	1	one-off	219
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	9,307	per year	1,303
3,224	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
9,307	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	17.29	15	4.32	9,307	per year	40,230
LC in PA										
13.66										
High LC										
14.78										
Low LC										
17.29										
<b>Hungary</b>	1	Non labelling information for third parties	Designing leaflet	PA	10.73	16	171.68	1	one-off	172
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	8,302	per year	1,162
36,377	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
8,302	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	7.23	15	1.81	8,302	per year	15,006
LC in PA										
10.73										
High LC										
16.37										
Low LC										
7.23										
<b>Ireland</b>	1	Non labelling information for third parties	Designing leaflet	PA	35.72	16	571.52	1	one-off	572

Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	7,723	per year	1,081
957	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
7,723	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	23.55	15	5.89	7,723	per year	45,471
LC in PA										
35.72										
High LC										
45.76										
Low LC										
23.55										
<b>Italy</b>	1	Non labelling information for third parties	Designing leaflet	PA	25.35	16	405.60	1	one-off	406
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	56,302	per year	7,882
2,687	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
56,302	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	22.21	15	5.55	56,302	per year	312,619
LC in PA										
25.35										
High LC										
35.28										
Low LC										
22.21										
<b>Latvia</b>	1	Non labelling information for third parties	Designing leaflet	PA	8.54	16	136.64	1	one-off	137
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	2,982	per year	418
913	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
2,982	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	6.52	15	1.63	2,982	per year	4,861
LC in PA										
8.54										
High LC										
9.95										
Low LC										
6.52										
<b>Lithuania</b>	1	Non labelling information for third parties	Designing leaflet	PA	8.21	4,800	656.80	1	one-off	657
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	60	0.14	5,974	per year	836

1,657	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
5,974	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	4.77	15	1.19	5,974	per year	7,123
LC in PA										
8.21										
High LC										
12.12										
Low LC										
4.77										
<b>Luxembourg</b>	1	Non labelling information for third parties	Designing leaflet	PA	33.62	16	537.92	1	one-off	538
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	29,245	per year	4,094
47,008	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
29,245	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	33.62	15	8.41	29,245	per year	245,806
LC in PA										
33.62										
High LC										
33.62										
Low LC										
33.62										
<b>Malta</b>	1	Non labelling information for third parties	Designing leaflet	PA	11.58	16	185.28	1	one-off	185
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	1,664	per year	233
102	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
1,664	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	9.03	15	2.26	1,664	per year	3,756
LC in PA										
11.58										
High LC										
12.52										
Low LC										
9.03										
<b>Netherlands</b>	1	Non labelling information for third parties	Designing leaflet	PA	38.95	16	623.20	1	one-off	623
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	91,082	per year	12,751
9,299	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000

received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
91,082	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	23.34	15	5.84	91,082	per year	531,461
LC in PA										
38.95										
High LC										
46.28										
Low LC										
23.34										
<b>Poland</b>	1	Non labelling information for third parties	Designing leaflet	PA	9.37	16	149.92	1	one-off	150
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	14,853	per year	2,079
227,672	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
14,853	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	7.09	15	1.77	14,853	per year	26,328
LC in PA										
9.37										
High LC										
9.08										
Low LC										
7.09										
<b>Portugal</b>	1	Non labelling information for third parties	Designing leaflet	PA	14.68	16	234.88	1	one-off	235
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	12,706	per year	1,779
64,345	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
12,706	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	12.75	15	3.19	12,706	per year	40,500
LC in PA										
14.68										
High LC										
19.64										
Low LC										
12.75										
<b>Romania</b>	1	Non labelling information for third parties	Designing leaflet	PA	5.28	16	84.48	1	one-off	84
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	10,585	per year	1,482
9,078	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500

10,585	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	3.95	15	0.99	10,585	per year	10,453
LC in PA										
5.28										
High LC										
6.38										
Low LC										
3.95										
<b>Slovakia</b>	1	Non labelling information for third parties	Designing leaflet	PA	6.68	16	106.88	1	one-off	107
Sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	4,562	per year	639
9,078	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
4,562	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	6.99	15	1.75	4,562	per year	7,972
LC in PA										
6.68										
High LC										
11.84										
Low LC										
6.99										
<b>Slovenia</b>	1	Non labelling information for third parties	Designing leaflet	PA	18.19	16	291.04	1	one-off	291
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	3,838	per year	537
12,908	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
3,838	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	13.68	15	3.42	3,838	per year	13,124
LC in PA										
18.19										
High LC										
21.01										
Low LC										
13.68										
<b>Spain</b>	1	Non labelling information for third parties	Designing leaflet	PA	22.12	16	353.92	1	one-off	354
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	86,158	per year	12,062
26,526	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
86,158	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	16.01	15	4.00	86,158	per year	344,846

LC in PA										
22.12										
High LC										
22.58										
Low LC										
16.01										
<b>Sweden</b>	1	Non labelling information for third parties	Designing leaflet	PA	33.62	16	537.92	1	one-off	538
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	21,724	per year	3,041
3,503	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
21,724	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	25.03	15	6.26	21,724	per year	135,936
LC in PA										
33.62										
High LC										
48.29										
Low LC										
25.03										
<b>United King.</b>	1	Non labelling information for third parties	Designing leaflet	PA	25.25	16	404	1	one-off	404
sent	2	Non labelling information for third parties	Copying leaflet	PA	0.14	1	0.14	38,550	per year	5,397
39,354	3	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	100,000	3,000.00	1	one-off	3,000
received	4	Non labelling information for third parties	Designing information materials: Translation	PA	0.03	50,000	1,500.00	1	per year	1,500
38,550	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	21.94	15	5.49	38,550	per year	211,448
LC in PA										
25.25										
High LC										
32.82										
Low LC										
21.94										

### Legenda

<b>Target group:</b>	PA= Public Authorities RF= Receiving Firm
<b>A. Tariff</b>	<p>It is the relevant tariff per hour or per relevant unit of service.</p> <p>For Target group PA it is labelled <b>LC in PA</b> and is defined as the hourly labour costs in public administration and defence; compulsory social security (Nace 2 O84) with the exception of France and Slovakia (Labour costs in public administration and community services Nace 1.1. L) and Austria, Belgium, Luxembourg, Malta and Sweden (Labour costs in Services). Source Labour Costs Survey 2008 Eurostat.</p> <p>For actions required to SF/RF, tariff is the hourly labour cost in activities of head offices; management consultancy activities (Nace Rev. 2, M 70) - labelled as <b>High LC</b>- or the labour costs in office administrative, office support and other business support activities (Nace Rev. 2 N82 - MIN -) – labelled as <b>Low LC</b>. The choice depends on the skills involved in the required administrative activity. In some cases missing data are replaced by other data: for Luxembourg we use the labour cost in service, for Portugal Low LC is calculated as the costs in service. Source Labour Cost Survey 2008 Eurostat.</p> <p>Tariff of leaflets printing per copy is calculated as the Internet based printing services average cost per 10,000 leaflets (Ismeri Europa)</p> <p>Tariff of translation is calculated as the internet based translation services cost per keystroke (Ismeri Europa)</p>
<b>B. Time or units</b>	<p>When the tariff corresponds to hourly labour cost, time corresponds to the hours which are necessary to one person to perform the required administrative action.</p> <p>In the case of translation the total number of keystrokes required by the administrative action is provided.</p>
<b>C. Price per action</b>	It is calculated as A.*B.
<b>Number of actions (per year)</b>	<p>This column reports 1 for One-off action.</p> <p>Otherwise it reports the number of received/sent postings in 2010 according to Ismeri Europa simulation when the price of the administrative action is calculated per individual posting.</p> <p>When the action requires more than one person in PA., the column reports the number of people involved in the administrative action (price is calculate for one person performing the action).</p>

**Summary – New administrative costs in EU27**

	No	Type of IO/compliance costs	Required administrative action	Target group	Tot. admin. cost	Per Posting	Type
<b>EU 27</b>	1	Non labelling information for third parties	Designing leaflet	PA	8,871	0.01	one-off
Sent	2	Non labelling information for third parties	Copying leaflet	PA	139,662	0.14	per year
997,585	3	Non labelling information for third parties	Designing information materials: Translation	PA	81,000	0.08	one-off
Received	4	Non labelling information for third parties	Designing information materials: Translation	PA	40,500	0.04	per year
997,585	5	General compliance costs	Risk assessment for subcontractor selection (joint and several liability)	RF	1,957,671*	1.96*	per year
EU27 Average PA							
20.60							
EU27 Average High LC							
27.51							
EU27 Average Low LC							
16.74							
<b>Overall admin. cost one-off</b>		<b>89,871</b>		<b>Overall one-off admin. cost per posting</b>		<b>0.09</b>	
<b>Overall admin. costs per year</b>		<b>2,137,833</b>		<b>Overall admin. costs per posting per year</b>		<b>2.14</b>	

\* This figure takes into account that AT, DE, ES, FI, FR, IT and NL already have a system of joint and several liability in place (representing 3.7 million EUR).

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

	Costs for Member States (Information)		Costs for companies (Joint and several liability)	Cost-related benefits *
	EUR one off	EUR per year	EUR per year	
AT	5.000	7.000	0 **	++ specialised receiving country
BE	4.000	18.000	943.000	+++ major sending and receiving country
BG	3.000	2.000	2.000	+ specialised sending country; relatively low number of posting
CY	3.000	2.000	5.000	+ specialised receiving country; relatively low number of posting
CZ	3.000	2.000	40.000	++ medium number of sent and received postings
DE	3.000	33.000	0 **	+++ major sending and receiving country
DK	4.000	4.000	154.000	++ specialised receiving country
EE	3.000	2.000	5.000	++ specialised sending country
EL	3.000	3.000	40.000	++ specialised receiving country
ES	3.000	14.000	0 **	+++ major receiving country
FI	3.000	4.000	0 **	++ specialised receiving country
FR	3.000	23.000	0 **	+++ major sending and receiving country
HU	3.000	3.000	15.000	++ specialised sending country

IE	4.000	3.000	45.000	++ specialised receiving country
IT	3.000	9.000	0 **	+++ major receiving country
LT	4.000	2.000	7.000	++ sending and receiving country
LU	4.000	6.000	246.000	+++ major sending country
LV	3.000	2.000	5.000	++ sending and receiving country
MT	3.000	2.000	4.000	+ specialised receiving country; relatively low number of posting
NL	4.000	14.000	0 **	+++ major receiving country
PL	3.000	4.000	26.000	+++ major sending country
PT	3.000	4.000	41.000	+++ major sending country
RO	3.000	3.000	10.000	++ sending and receiving country
SE	4.000	5.000	345.000	++ specialised receiving country
SI	3.000	2.000	13.000	++ specialised sending country
SK	3.000	2.000	8.000	++ specialised sending country
UK	3.000	7.000	211.000	++ sending and receiving country

\* Benefits for sending countries result from more transparent information on the applicable working conditions; benefits for both sending and receiving countries result from fairer competition, a more level playing field following and a better protection of rights of posted workers following the introduction of joint and several liability.

\*\* Member State already has a system of joint and several liability in place.

## **ANNEX 8: Anecdotal evidence regarding the non-respect of the applicable working conditions and abuses of the posting legislation in the German construction sector**

This Annex provides anecdotal evidence regarding the non-respect of the applicable working conditions and abuses of the posting legislation in the German construction sector based on information provided on the website<sup>14</sup> of the European Migrant Workers Union (EMWU) and an interview with one of their employees.<sup>15</sup>

### **1. Who is EMWU?**

EMWU is a German association supporting in particular posted workers in the construction sector in case of disputes with their employers. The association started its work in 2005 and is supported by German and Polish trade unions. The focus is on enforcing the German minimum wage mainly for Polish and Romanian posted workers. The association provides advice to workers and negotiates with employers. Since the association has been restructured in 2010 judicial proceedings are handled by IG BAU in close cooperation with EMWU.

Since October 2011 EMWU, together with Deutscher Gewerkschaftsbund (DGB), participates in the project 'Faire Mobilität' (fair mobility) which provides information and advice to workers in particular from EU-8 and EU-2 Member States concerning the applicable working conditions and the rights of workers in Germany. The project is co-financed by the European Social Fund (ESF) and the German Federal Ministry of Labour and Social Affairs.

### **2. Information provided at the request of the European Commission services**

At the request of the European Commission services EMWU has provided via interview, information concerning their experience of the phenomenon of posting:

- Since 2005, as a result of actions by EMWU between 2.5 and 3 million Euro have been recovered on behalf of posted workers following judicial proceedings or settlements out of court.
- The interviewee joined EMWU in 2007 and handled about 1.000-1.500 cases of Romanian posted workers per year. None of them had received the German minimum wage. Through on the spot visits the case handler estimates that he has an overview of approximately **3.000 cases per year**. Most posted workers remain loyal to their employer and do not dare to go against them.
- Cases concern single or groups of posted workers, sometimes large groups.
- The situation of posted Polish workers got better since the economic situation in Poland improved considerably. However, even there in most of the cases a part of the minimum wage is missing.

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<sup>14</sup> <http://emwu.org/>

<sup>15</sup> The interview and the analysis of the website have been carried out by Commission services in November 2011.

- Wages are generally paid in cash on the spot against signature of the pay slip. It is common that workers sign for the minimum wage but receive only part of it (e.g. one third). Payments are often late.
- Problems often re-occur with a particular company or an employer who operates several companies.
- Posted workers often arrive in Germany without a written employment contract or similar documents.
- Foreman/gang masters on construction sites openly state that posted workers are not allowed to join a trade union and that they would lose their jobs. Sometimes contracts foresee explicitly that workers are not allowed to join a trade union and include respective fines up to 30.000 Euro. The interviewee indicated that he was in possession of copies of such documents.
- A large number of posted workers are recruited only on the day of the posting.
- Several firms that are posting workers are primarily operating in Germany. They only have minor business activities in the sending countries or even only a letter box.
- In cases of Romanian posted workers the interviewee said that it was common that A1 forms were issued on the basis of falsified information and that workers have been without social security coverage during their work. This has led to serious consequences in cases of accidents at work since adequate medical treatment has not been provided. The interviewee reported that he personally knew two workers concerned and that he had heard of further cases.

### **3. Analysis of cases described on the EMWU website**

On the website of EMWU 39 cases are described concerning about 900 posted workers (or fake posted workers or fake self-employed) from Romania and Poland in the construction sector in Germany which have not been paid according to the German minimum wage provisions. 14 of the 39 cases concerned fake self-employed. In all cases subcontractors were involved. EMWU supported these workers in order to enforce their wage claims against their employers or the main contractor. As a result of actions by EMWU approximately 1.5 million Euro have been recovered on behalf of posted workers following judicial proceedings or settlements out of court in these cases. In the few cases in which enforcement against the subcontractor was successful the main contractor was involved in the negotiations.

In several cases it is mentioned that:

- Workers and employers deliberately agreed on wages below the German minimum wage as a condition for the posting. Otherwise workers would not have been posted and/or recruited.
- Workers have been threatened with violence or pressure has been put on workers after having contacted EMWU.

- Employers deducted disproportionate costs for housing and meals from (minimum) wages of workers.
- Middlemen/gang masters have been involved, in particular in cases of fake self-employed.
- The website also mentions letter box companies.
- Enforcement was not successful because workers could not agree to pursue their employer and/or main contractor, workers have been afraid of losing their job or (false) promises have been made by the employer and/or main contractor.

These cases represent only a very small selection of cases handled by EMWU. Cases are generally very similar to those presented on the website.

A detailed overview of the cases is provided in the table at the end of this Annex.

#### **4. Conclusions with regard to the problem definition and the baseline scenario of the Impact Assessment**

The analysis of the cases combined with the information provided in the interview suggests that there is a systematic and deliberate non-respect of the applicable minimum wage in the German construction sector by posting undertakings from Romania. It also suggests that in a large number of cases of postings from Poland the applicable minimum wage is not respected.

*This finding supports the negative effects of posting described in the problem definition in section 3.1.5 and the baseline scenario in section 6.2 regarding non-respect of working conditions, enforcement problems, unfair competition, pressure on local labour markets and working conditions in high labour cost receiving countries. It also supports enforcement deficiencies indicated in problem 1b in section 3.2.1.2.*

Posted workers often agree to work for less than the minimum wage during the posting in order to be recruited and/or posted. Mostly, they do not dare to go against their employer and they enforce the minimum wage only in exceptional circumstances (e.g. when they are paid much less than what has been agreed or not at all).

*This finding supports problem 3.2.2.5 (no adequate protection in disputes concerning individual employment conditions). The right of third parties to intervene in cases and bring them to Court is important to enforce posted workers rights. The role of trade unions and joint bodies of social partners is crucial in this respect.*

In all cases 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.

*This finding supports problem 3.2.2.5 (no adequate protection in disputes concerning individual employment conditions). A system of joint and several liability seems appropriate in order to enable posted workers to enforce their rights in the host Member State.*

**Summary of cases described in press releases of EMWU from 2005 to 2011<sup>16</sup>**

<b>Case<sup>17</sup></b>	<b>Number of workers</b>	<b>Posted from</b>	<b>Subcontractor involved</b>	<b>Fake self-employed</b>	<b>Enforced against subcontractor</b>	<b>Enforced against main contractor</b>	<b>Other issues mentioned (e.g. strike, housing, threat/pressure on workers contacting EMWU, falsified pay slips/time sheets)</b>
1	4	RU	Yes		Partly	Involved in negotiations	Threat against workers
2	50	RU	Yes		100.000 Euro (not entirely clear if employer or main contractor paid)		Systematic violation of minimum wage provision as well as health and safety at work
3	Several	RU	Yes			Seems that main contractor paid (not entirely clear)	
4	45	?	Yes			76.000 Euro	
5	Several	RU	Yes	Yes		Main contractor paid	
6	8	RU	Yes	Yes		28.000 Euro	Overpriced housing; threat against workers
7	1	RU	Yes	Yes	7.000 Euro		Housing costs deducted from minimum wage; middleman involved
8	Several	RU	Yes	Yes		No, workers could not agree to go against (main) contractor	900 Euro deduction from wage for housing (12 persons in 3 room apartment), middleman involved; pressure on workers
9	3	RU	Yes	Yes	5.000 Euro after pressure from main contractor		

<sup>16</sup> <http://emwu.org/> → German website → Aktuelles. All cases concern wage claims of posted or fake-posted workers or fake self-employed in the construction sector.

<sup>17</sup> Cases are numbered chronologically backwards from 2011 to 2005. Sometimes several press releases concern the same case or several cases are part of one press release. This has been taken into consideration.

10	Several	RU	Yes				Neither minimum wage is paid nor conditions agreed in RU before posting; workers fear to be "sent home" by employer in case of contact with trade unions
11	120	RU	Yes			176.000 Euro (out of Court)	Subcontractor asked workers to work for less than minimum wage but did not pay at all; workers reported that three times in 12 months they have not been paid at all by different employers
12	Several	RU	Yes			Yes, judicial proceeding	Subcontractor asked workers to work for less than minimum wage (otherwise they would not have been recruited); agreed wages have not been paid; high deductions from wages for housing and food.
13	Several	RU	Yes		No, judicial proceeding re holiday pay without success (insolvency)	Partly, judicial proceeding	
14	28	RU	Yes	Yes	3.500 Euro travel costs	30.000 Euro, part of outstanding wages	Wages of 2-4 Euro have been paid in the beginning, afterwards nothing at all; deduction of costs for housing and meals
15	81	RU	Yes			No, wage claim has not been perused (136.000 Euro)	Sub and main contractor reached agreement with workers and promised payment; some workers did not receive payment even after return
16	14	RU	Yes	Yes		12.600 Euro plus travel costs	Letter box company
17	12*	RU	Unclear	Yes		24.000 Euro (not entirely clear who paid)	Middleman/gang master involved

18	40	RU	Yes	Yes		90.000 Euro	Blockade of offices of main contractor
19	15*	RU	Yes	Yes		30.000 Euro	
20	19	RU	Yes	Yes		67.000 Euro	
21	6	RU	Yes			Partly	Letter box company
22	10	PL	No	Yes		15.000 Euro, judicial proceeding	
23	49	RU	Yes	Yes		89.500 Euro	
24	15*	PL	Yes			30.000 out of Court	Subcontractor states in PL media that he paid less than minimum wage like everybody does
25	12	PL	Yes	Yes		Judicial proceeding	8 Euro agreed in written contract (less than minimum wage) but not paid
26	50*	RU	Yes			100.000 Euro	
27	1	RU	Yes			4.000 Euro	800 Euro/month agreed in RU (instead of 1.800 Euro minimum wage), only 425 Euro paid; worker attacked with knife and threatened by other RU worker
28	19	RU	Yes			30.000 Euro	Workers have been paid 500 Euro for two months
29	55*	PL	Yes			110.000 Euro out of Court	
30	20	PL	Yes			29.000 Euro, judicial proceeding	
31	33*	PL	Yes			67.000 Euro	
32	20*	PL	Yes			40.000 Euro	
33	44*	PL	Yes			88.500 Euro	
34	24	PL	Yes			45.000 Euro	
35	19	RU	Yes			65.000 Euro	
36	Several	PL	Yes				Workers are systematically working 10 hours per day but are paid for only 7. The system is organised by a foreman.
37	29	PL	Yes			38.000 Euro	

38	15	PL	Yes			28.600 Euro	Strike
39	8*	PL	Yes			16.500 Euro	Unclear if workers had signed having been paid the minimum wage; some workers said they would not have signed such papers others said they had to sign blank papers before the posting

\* Estimated with regard to sum of wage claim.

**ANNEX 9: Public consultation on the Single Market Act (COM(2010) 608 final) – summary of replies to proposals 29 and 30**

*Proposal No 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.*

*Proposal No 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.*

**1. Member States**

a. Governments

	Proposal 29	Proposal 30
Czech Republic	Considers the single market as a policy priority and supports the global approach of the SMA, but finds particularly problematic the propositions in the social domain covering a new strategy for the effective implementation of the Charter of Fundamental Rights.	Also finds particularly problematic the revision of the Posting of Workers Directive since this proposal can affect the balance between economic freedoms and workers' social rights in the EU. Recognises the importance of the social dimension, but this should not lead to damaging the competitiveness in Europe.
Finland	Attention must be paid to the equal treatment of workers and the equal competitive position of companies, in addition to rights guaranteed in the Charter of Fundamental Rights.	Positive view of measures to promote practical implementation of the rights of posted workers and better implementation of Directive 96/71/CE, through cooperation between authorities (including IMI).
France	Underlines the importance of the social IA.	Better implementation of the exiting PWD is needed (in line with announcement of Pres Barroso). In particular: better access to information for service providers on the applicable working conditions; better administrative cooperation.

	Proposal 29	Proposal 30
Germany	Understands the Commission's announcement to precede legislative proposals for the single market with a social impact analysis as a reference to the integrated impact assessment approach, i.e. to mean that the economic, social and environmental impacts will all continue to be scrutinised.	A clarification of the relationship between fundamental economic freedoms and social rights must cause neither a reduction in existing standards of protection nor a reduction in the possibilities for national control.
Ireland	Welcomes the Commission's reaffirmation of the social dimension of its integrated impact assessment approach.	Welcomes the legislative initiative which is intended to ensure effective respect for posted workers rights and to clarify the obligations of national authorities and business.
Lithuania	Measures in relation to rights guaranteed in the Charter of Fundamental Rights, including the right to take collective action raises serious reservations.	Included within the top 12 proposals.
Luxembourg	-	Existing Directive is sufficient.
Poland	-	Welcomes any initiatives to strengthen the administrative cooperation among MS in order to enhance the process of posting the workers (including the use of IMI).  Objects to any amendment of the existing PWD.
Sweden	Finds it worthwhile to clarify that the cross border posting of workers should not affect the right to take industrial action or to strike as provided for in national law and practice which respects Community law. These rights are integral parts of the Swedish labour market model.	It is positive that the Commission intends to adopt a legislative proposal aimed at improving the implementation of the Posting Directive.

	Proposal 29	Proposal 30
UK	Cf. 30.	Could not support any proposals for improved enforcement of the Posting of Workers Directive that did not respect individual Member States' employment and enforcement framework or that sought to guarantee the right to take industrial action in any new single market legislation.

b. Parliaments

	Proposal 29	Proposal 30
Parliament of the Czech Republic	-	The emphasis should be put on the due implementation of the Directive rather than adopting new legislation
German Bundesrat	Underlines the importance of the social dimension of the single market and the social impact assessment.	In favour of a Monti clause.  In favour of revising the PWD clarifying that Directive is only setting minimum conditions and MS can go beyond. Employment relationships which were only concluded for posting should fall under the law of the host MS.

## 2. Trade Unions

### a. European level

	Proposal 29	Proposal 30
ETUC	<p>Attaches very high priority to the introduction of a social progress protocol in the Treaties in order to balance the movement of workers and services and to make the economic freedoms respect fundamental rights. There is a need of an instrument that gives priority to fundamental social rights in case of conflict with economic freedoms.</p> <p>Supports a social clause guaranteeing the right to collective action and strike.</p>	<p>Supports the revision of the Posting Directive in order to reverse the ECJ rulings and a Monti II Regulation</p> <p>[In addition, supports a review of the EU public procurement directives for strengthening social criteria in public contracts.]</p>
ETF and EFBW	<p>Upholds a Social Progress Protocol to be added to the Treaties and a Monti II regulation in order to ensure rights of trade unions and employers to negotiate and conclude collective agreements and, in case of conflict of interest, the right to take collective action to defend their interests, in the context of economic freedoms in the Single Market.</p>	<p>Welcomes the Commission's commitment to present legislative proposals to enhance the interpretation and the implementation of the Posting of Workers Directive.</p> <p>Supports a legislative proposal which clarifies the exercise of fundamental social rights within the context of the economic freedoms of the Single Market, ensuring a level playing field for business and labour</p>

	Proposal 29	Proposal 30
EFFAT		<p>Calls for a thorough revision of the Posting of Workers Directive, which effectively implements fundamental ILO Conventions and the EU Charter of Fundamental Rights. This Directive must include specific tools that prevent it from being used in aid of human trafficking and must clearly and unambiguously allow workers to join unions, bargain collectively and take industrial action.</p> <p>Supports the principle of equal treatment and same working conditions regardless the location of work.</p>
European Service Workers' Union	Supports an instrument which gives priority to fundamental rights over economic freedoms and upholds the right to collective action and strike as proposed in the ETUC Socvial Progress Protocol or Monti-stile regulation.	A legal act improving implementation of the Directive is not enough, and the EU should guarantee equal treatment of local and migrant workers and avoid unfair competition on wages and working conditions.

b. National level

	Proposal 29	Proposal 30
Deutscher Gewerkschaftsbund	<p>Welcomes that Commission is willing to fulfil their already existing legal obligations under the Lisbon Treaty.</p> <p>Considers that a social protocol amending primary EU law is necessary to clarify that, in case of conflict, fundamental social rights are prevailing over economic freedoms.</p>	Proposal is not sufficient. In favour of a fundamental revision of the PWD: equal pay and equal rights, minimum protection, respecting different models of collective bargaining, limiting the duration of posting, fight against letter box companies, appropriate control measures and enforcement of workers rights.

	Proposal 29	Proposal 30
LO (Swedish Trade Union Confederation)	<p>Deems positive (not new) the proposal to conduct social impact assessments.</p> <p>Supports a social progress protocol which lays down that fundamental human and trade union rights are not secondary over economic freedoms.</p>	<p>The part concerning the legislative proposal is insufficient and proposes that this legislative proposal addresses the interpretation problems that the ECJ's has caused.</p> <p>The second part of the proposal (clarification of the exercise of fundamental social rights in the context of economic freedoms) is an important commitment. This regulation should include: proportionality assessment of the conflict at national level, a threshold for obstacles to the free movement in sectors regulated by collective agreements, basic system for exchange of information where cross border consequences.</p>
LO Norwegian Confederation of Trade Unions	The proposal lacks an instrument which can guarantee respect for the rights, and which protects and maintains the right to collective actions and right to strike.	Proposes a limited revision of the Directive to the extent required to ensure that posted workers wages and working conditions are equal to those workers in the host country
Nordic Financial Unions	Strongly supports this proposal.	-
CFDT	<p>Regrets that the Commission's Communication has not included a Monti clause, in order to tie up single market and fundamental rights.</p> <p>The integration of the Charter of Fundamental Rights in the Treaty and the transversal social clause are needed in order to guarantee the balance between economic freedoms and fundamental rights.</p>	The legislative proposal must respect fundamental rights and the access to market of employers throughout the EU, for which social dialogue at all levels (professional, sectoral and decentralised) is needed.
TUC	Need for action to address problems created by the ECJ cases. Adoption of a social progress clause.	It is necessary to revise the PWD.

	Proposal 29	Proposal 30
CFDT (France)	Include Monti clause in all internal market Directives.	In favour of a 'Social Protocol' amending the Treaty.  Revision of the legal framework; concerned about ECJ jurisprudence.
IG BAU (Germany)	In favour of a 'Social Protocol' amending the Treaty.	Not in favour of changing the PWD. ECJ jurisprudence has to be revised by changes of primary law (Social Protocol).
FGTB, CSC, CGSLB (France)	In favour of a 'Social Protocol' amending the Treaty.	Revising the PWD and including the principle equal pay for equal work at the same place.
Bundesarbeitskammer Österreich	In favour of a 'Social Protocol' amending the Treaty.	In addition to a Social Protocol a Monti clause is welcome. PWD has to be revised: Allow effective control measures for MS and Social partners, re-establish minimum character.
Deutscher Beamtenbund	-	ECJ jurisprudence Rüffert and Luxembourg should be revised.
DGB Sachsen	In favour of a 'Social Protocol' amending the Treaty.	PWD has to be revised: equal pay for equal work at the same place.
GMB Trade union (UK)	Social clause protecting social rights from market freedoms is needed. Taking into consideration ECtHR and ILO.  Equal treatment for all workers.	Fundamental revision of the PWD.
TCO (Sweden)	In favour of a Monti II Regulation and a 'Social Protocol' amending the Treaty.	Revising the ECJ jurisprudence. Guarantee equal treatment.

	Proposal 29	Proposal 30
Force Ouvriere (France)	In favour of a 'Social Protocol' amending the Treaty.	Revision of the PDW to revise the ECJ jurisprudence.
Chambre des fonctionnaires et employés publics (Luxembourg)	Assuring that fundamental social rights always prevail over economic freedoms.	Important
Central Organisation of Industrial Employees in Denmark (CO-industri)	-	Revising ECJ jurisprudence; guarantee equal treatment of posted and national workers.

#### 4. Employers

##### a. European level

	Proposal 29	Proposal 30
BusinessEurope	Art. 9 TFEU is sufficient. Further guarantee will not provide added value and contravene the clear exclusion of the right to strike from EU competences.	Supports COM proposal on better implementation and enforcement (without reopening debate on working conditions).
Eurocommerce	-	There is no need to revise the PWD, but rather to improve its enforcement and implementation
CEEMET, Council of European Employers of the Metal, Engineering and Technology-based industries.	Supports the Commission's goal to overcome tensions between economic freedoms and freedom of collective action, but there is no need for a further guarantee of the right for collective action at EU level.	A proper national application of the PWD will contribute to complementing the European Single Market.

b. National level

	Proposal 29	Proposal 30
Union des Entreprises Luxembourgeoises (UEL)	-	Support but no priority; clarifications for better implementation of the existing PWD but no new legislative text.
CBI, The voice of business	Considers that this proposal does not have a role to play in fulfilling the Single Market's potential.	Considers that this proposal does not have a role to play in fulfilling the Single Market's potential.
Wirtschaftskammer Österreich	Respect of fundamental rights is important. However, the right to take collective action is not expressly guaranteed in all MS.	Could be helpful with regard to the trade union's negative position re posting.
Verband der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs	Welcomes in depth analysis of social impact of future legislation to strengthen fundamental rights. Points out importance of early involvement of social partners. Public economy must comply with fundamental rights.	Points out importance of effective control measures and enforcement by host Member States. In favour of fundamental revision of the PWD, in particular: clarifying that PWD only provides for minimum protection, limiting the definition of postings (duration, fight against letter box companies), better respecting national social models, allowing reference to local wages in public procurement, broadening the concept of public policy provisions.  Welcomes Monti-clause with regard to all economic freedoms. However, instead of including in the PWD a separate horizontal instrument should be introduced (e.g. be extending the existing Regulation 2679/98). Revision of primary EU law remains indispensable (social protocol).

	Proposal 29	Proposal 30
Conseil Supérieur des Indépendants et des PME	-	In favour of revision and better implementation of the PWD, in particular: control obligations for the service receiver has to be simplified by better exchange of information between MS; labour inspections should be able to qualify a posted worker as a migrant worker if need be.
BDA/BDI (Germany)	Existing framework is sufficient.	No revision of the PWD. Better implementation, enforcement and administrative cooperation are needed to combat abuse.  No need for a Monti clause. Art. 153.5 has to be respected.
Zentralverband des deutschen Handwerks	Existing IA is sufficient.	No need for changes. In favour of better administrative cooperation, in particular cross-border enforcement of sanctions is an issue to be tackled.
Handwerkskammer Rhein-Main	-	No need for changes. In favour of better administrative cooperation, in particular cross-border enforcement of sanctions is an issue to be tackled.
Westdeutscher Handwerkskammertag	Existing framework is sufficient.	No need for changes. In favour of better administrative cooperation, in particular cross-border enforcement of sanctions is an issue to be tackled.
Fédération des Entreprises de Belgique	Existing framework is sufficient.	Welcomes better implementation; no need for revision.

	Proposal 29	Proposal 30
CEOE, Confederacion Espanola de Organizaciones Empresariales	Additional guarantee re Fundamental Rights is not necessary. Regulation on the right to take collective action could go against article 153.3 TFEU	It is fundamental to guarantee the effective implementation of the Directive. More cooperation is needed. Reopening a debate on the posted workers' working conditions is rejected.
Chambre de Commerce et d'industrie de Paris	-	It is a priority to improve and clarify the legal framework of the Directive.

## 5. Others

	Proposal 29	Proposal 30
S&D	<p>Proposal 29 is clearly insufficient.</p> <p>Upholds a horizontal social progress clause in the form of a) an overarching Regulation; b) a social clause in all single market legislation, in order to give priority to fundamental social rights (collective action and strike) in case of conflict with economic freedoms, so the basic social rights are not subordinated to the economic freedoms and that employment protection and working conditions are guaranteed.</p> <p>Draws attention to a necessary thorough social impact assessment when developing SMA.</p>	<p>Upholds a clear revision of the existing legislation and a more ambitious approach ensuring, along with the economic freedoms, protection of the most advanced labour law and industrial relation standards and practices, the respect of rights to collective action, collective representation and bargaining, strike and full implementation of equal pay for work of equal value.</p>

	Proposal 29	Proposal 30
CES. Conseil Economic et Social de Luxembourg. Workers Group	Gives priority to fundamental social rights, right to take collective action and right to strike, in case of conflict with economic freedoms.  Support the introduction of a social progress clause in the Treaties	Endorses a legal instrument reversing the ECJ rulings by revising the Directive and the principle of country of origin and guaranteeing the fundamental labour law regulations
Economic and Social Council of the Republic of Bulgaria	Supports creating conditions for the better implementation of the Charter of Fundamental Rights, including the right to collective action.	New problems related to increased transnationalisation of labour and social rights have to be taken into account when preparing changes to directives concerning labour and social policy
COSLA, Convention of Scottish Local Authorities		Welcomes the Commission's intentions to make easier for workers posted elsewhere in the EU to avoid complex national administrative procedures.
Sveriges Kommuner och Landsting	Support for better respect of fundamental rights, in particular the right to take collective action.	-
AEIP, European Association of Paritarian Institutions of Social Protection		Proposal should ensure worker's protection and uphold fair competition.  Improving the implementation of PWD should not affect the control mechanisms that the Member States have already efficiently put into place in accordance with Art. 5. This is particularly true with regard to any improvements of cross-border cooperation in terms of Art. 4. Cross-border cooperation between the national control authorities should be built for supporting, rather than replacing national control mechanisms.

	Proposal 29	Proposal 30
AIM (Association Internationale de la Mutualite)	The in-depth analysis of the social impact of all proposed legislation should consider how far proposed measures foster sustainable growth with job creation and social cohesion.	There is no clarity re the definition of posted workers (in Directive and according to ECJ rulings). The Commission should seek, jointly with all relevant parties, a unified definition, clarifying the rights and entitlements from which posted workers should benefit
Mutualité Française	Support	Interested in particular in Monti clause.
Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege (Germany)	-	PWD has to be revised: Re-establish minimum character.
COFACE - Confederation of Family Organisations in the EU	Calls for a broad range of stakeholder to be included in the practical implementation of the social impact assessment of EU policy making based on the Charter of Fundamental Rights.	-

## ANNEX 10: Summary of CJEU cases: Viking Line, Laval, Ruffert and Commission v. Luxembourg

### 1. Viking Line

#### Facts:

This case concerns a dispute that dates back to 2003 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, ITF sent a circular to all its affiliates requiring them to refrain from entering into negotiations with Viking Line.

#### Main points of the ruling:

The referral from the Court of Appeal in London to the ECJ concerned ten questions on the compatibility of the right to take collective action by trade unions with the rules on the freedom of establishment and on whether the threat to take collective action constituted an unjustified restriction of Article 43 EC on the freedom of establishment.

Most importantly, the Court acknowledged that the right to take industrial action must be recognised as a fundamental right which forms an integral part of the general principles of Community law (the observance of which the Court ensures).

At the same time, the Court stated clearly that this, or the fact that Article 137(5) EC does not give the Community the competence to regulate the right to strike or the right to impose lock-outs, does not mean that this right to take industrial action falls outside the scope of Community law, or in other words, that it renders Community law inapplicable, and that the exercise of this right may be subject to certain restrictions. The latter very much reflects the situation in national legal orders, such as in Finland and in Sweden, as well as in other Member States, where this right enjoys constitutional protection, but may not be exercised without any limitation.

One must therefore consider whether the fact that trade unions can take collective action is a restriction on the freedom to provide services and, if so, whether it can be justified. With respect to the latter, it follows from the case law that a restriction of a fundamental freedom is warranted only if:

- it pursues a legitimate objective compatible with the Treaty, and
- it is justified by overriding reasons of public interest, and if that is the case,
- it must be suitable for attaining the objective sought and does not go beyond what is necessary to attain it.

According to the Court, the exercise of the fundamental right to strike must therefore be reconciled with the economic freedoms of the Treaty, such as the freedom of establishment and the freedom to provide services, which it may restrict.

In this context the Court recognises that collective action may be justified by the protection of workers against social dumping and that action by a trade union involving blockading of the host Member State with the aim of ensuring that their terms and conditions of employment of workers posted in connection with transnational provision of services are fixed at a certain level falls within the objective of protecting workers. Furthermore, the Court clearly indicated that economic considerations do not per se prevail over objectives pursued by social policy, or vice versa.

The question whether, and to what extent, the exercise of the right to take collective action respects prevailing Community law obligations, and in particular the proportionality of the action, was left to the national judges to decide, contrary to its ruling in the *Laval* case where the Court ruled itself on this issue.

## 2. Laval

### Facts:

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 (i.e. in September and October 2004) 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 since 2 November 2004. From December 2004, 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 apply a Swedish collective agreement, the Swedish Labour Court referred the matter to the Court of Justice for a preliminary ruling.

### Main points of the ruling:

First, the Court ruled that the right to take collective action is a fundamental right which forms an integral part of the general principles of Community law, but that the exercise of the collective action must be justified and proportionate. The Court recognised that collective action may be justified by the protection of the posted workers against social dumping.

In the case in point, however, the Court found that the collective action was not justified because it aimed to force a foreign service-provider into negotiation on wages and to sign a collective agreement which contained obligations which went beyond the Posting of Workers Directive.

In other words, trade unions will continue to be able to defend the interests of their members at national level. However, in the specific case at issue, the Swedish trade unions cannot try to impose obligations contained in collective agreements on companies from other Member States posting workers which exceed the requirements of the Posting of Workers Directive.

It results from the ruling that Member States have agreed on the appropriate level of protection of the posted workers in the host Member State (the Posting of Workers Directive which contains rules on which minimum working conditions apply to posted workers in the Member State to which they are posted – Sweden was already a member of the EU when the Directive was negotiated and adopted). Terms and conditions in excess of the Posting of Workers Directive (such as paying training or insurance fees which are of no benefit to the posted workers) cannot be justified. These conditions are contrary both to the Directive and to Article 49 (on the freedom to provide services).

Although the Court does not say explicitly that Sweden has not correctly transposed the Posting of Workers Directive, this could be the implicit result of the judgment, which imposes clear obligations of transparency and predictability of collective agreements in order to make it possible for foreign companies to know in advance what salary to pay and which working conditions to apply in the host country.

Second, the Court found that the Swedish law (lex Britannia) was discriminatory because it allowed the trade unions to take collective action against foreign service-providers in order to force them to sign up to the collective agreement, even where the service-provider already had a collective agreement in its home country, whereas collective action against a Swedish company was not allowed in a similar situation.

### **3. Rüffert**

#### Facts:

The Rüffert case concerns a law of a German Land on the award of public contracts. The law at stake requires contractors (and, indirectly, their subcontractors) to pay workers, posted for the purpose of performing a public contract, at least the remuneration laid down in the collective agreement in force at the place where those services are performed (so-called "Tariftreueklausel"). The wage levels in these 'locally' applicable collective agreements were well above the minimum rates of pay required in Germany under the 'generally' applicable collective agreements.

#### Main points of the ruling:

The preliminary question the ECJ decided on is whether such a Tariftreueklausel is in compliance with Community law, notably the posting of workers directive and Article 49 EC when the collective agreement is not "declared to be of universal application" as provided for in directive 96/71/EC.

The Court stated that the binding effect of a collective agreement such as that at issue covered only a part of the construction sector falling within the geographical area of that agreement, as it applied only to public contracts and not to private contracts and the collective agreement had not been declared universally applicable.

The Court concluded that such an obligation was able to impose on service providers established in another Member State an additional economic burden and that measure such as

that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC.

Such a measure could also not be considered to be justified by the objective of ensuring the protection of workers, as the Tariftreueklausel solely applies to public contracts and not to private contracts. There was no evidence to support that the protection resulting from such a rate of pay is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract

#### "Rüffert" is different from "Laval" in several respects

1) The "Rüffert" case does not affect the freedom of trade unions to conclude collective agreements or to take collective action. In that judgment, the Court merely presented and explained the possibilities available under the Posting of Workers Directive to public authorities to extend collective agreements to all economic operators, including posted workers.

2) The German system to apply collective agreements to foreign service providers is very different from the Swedish one. In contrast to Sweden, Germany has a regulatory system to declare collective agreements generally applicable and has made use of this system in the sector concerned in "Rüffert" (construction).

3) The situation in "Rüffert" is specific to certain public procurement legislation in certain German Länder. There were no indications in the hearing in this case that there was any other Member State in a comparable situation.

#### 4. Commission v. Luxembourg

##### Background:

On 20 July 2006 the Commission brought an action before the European Court of Justice against the Grand Duchy of Luxembourg concerning

- the incorrect transposition of the so-called Posting of Workers directive (Directive 96/71/EC), and
- the use of national control measures it considered incompatible with article 49 EC.

The posting of workers directive allows for service providers to send their employees temporarily to other member states in order to provide these services.

1) While posting workers to another Member State, certain rules of the host country, the so called 'nucleus of mandatory rules for minimum protection', have to be complied with by foreign service providers, such as,

(a) **maximum work periods** and minimum rest periods;

(b) minimum paid annual holidays;

(c) **the minimum rates of pay**, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) 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;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

The directive allows Member States to apply further working conditions on foreign service providers provided they concern 'public policy provisions' (such as prohibition of forced labour).

When implementing the directive Luxembourg went beyond the so called nucleus/hard core of mandatory provisions considered to fall under 'public policy provisions' and imposed, among other, the following requirements as 'public policy provisions' :

- (1) an automatic adjustment of pay to changes in the cost of living
- (2) the respect of national rules governing part-time and fixed-term employment
- (3) the respect of collective labour agreements even if they are not universally applicable

2) Furthermore the Commission pled that Luxembourg breached Articles 49 EC and 50 EC on free movement of services by setting up additional barriers for foreign service providers whose workers carry out temporary activity in Luxembourg.

Two issues:

a) Luxembourg is very unspecific in when the service provider has to give prior notification of the posted workers to allow for efficient controls (make available to the Inspection du Travail et des Mines 'before the start of the works', 'at the mere request' and 'as quickly as possible' the particulars necessary for a control). It further appears that the non-respect of this requirement enables the Luxemburgish Labour Inspectorate to order the immediate cessation of works and leads to fines.

b) Luxembourg further requires foreign service providers to designate an 'ad hoc' agent resident in Luxembourg responsible for keeping the documents necessary for monitoring the obligations which lie upon them. Luxembourg has failed to prove that such an 'ad hoc' agent resident in Luxembourg is necessary in order to be able to efficiently control the compliance with the mandatory employment conditions by foreign service providers.

On 19 June 2008 the Court of Justice rendered its judgment in case C-319/06, Commission v. Luxembourg and:

"Declares that,

– by declaring the provisions of points (1), (2), (8) and (11) of Article 1(1) of the Law of 20 December 2002 transposing 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 and the monitoring of the implementation of labour law to be mandatory provisions falling under national public policy;

– by failing fully to transpose Article 3(1)(a) 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;

– by setting out, in Article 7(1) of that Law of 20 December 2002, conditions relating to access to the basic information necessary for monitoring purposes by the competent national authorities with insufficient clarity to ensure legal certainty for undertakings wishing to post workers to Luxembourg; and

– by requiring, in Article 8 of that Law, that documents necessary for monitoring purposes be retained in Luxembourg by an ad hoc agent resident there,

the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3(1) of Directive 96/71, read in conjunction with Article 10 thereof, and Articles 49 EC and 50 EC."

## **ANNEX 11: Expected impact on competitiveness of EU industry (Competitiveness Proofing)**

### **1. INTRODUCTION**

The analysis below aims at providing additional information on the expected impact on competitiveness of the regulatory initiatives concerning the *"enforcement of the provisions applicable to the posting of workers in the framework of the provision of services"* preferred policy option (package B).

#### **1.1. Objectives of "Competitiveness Proofing"**

The legal framework on the posting of workers in the context of the provision of services aims at facilitating the cross-border provision of services while ensuring an adequate level of protection of workers' rights. The Directive defines the core of mandatory working conditions which have to be respected by companies in the host country. 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 preferred policy option B aims at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, including measures to prevent and sanction any abuse and circumvention of the applicable rules. Some sectors such as construction and temporary work agencies deserve particular attention, due to the significant reliance on Posting of workers.

A set of specific competitiveness-related questions will be addressed, in line with the "Competitiveness Proofing" which provides operational guidance for assessing impacts on sectoral competitiveness<sup>18</sup>:

- Cost competitiveness: the cost of doing business, which includes cost of intermediate consumption and of factors of production (labour, capital and energy);
- Capacity to innovate: the capacity of the business to produce more and/or higher quality products and services that meet better customers' preferences
- International competitiveness: the above two aspects could also be assessed in an international comparative perspective, so that the likely impact of the policy proposal on the sector market shares and revealed comparative advantages on the world markets is taken into account.

#### **1.2. Availability of data**

The only available direct source at EU-level is the administrative data based on E101 social security forms which enables an effective EU comparison of the number of postings. Further evaluation of impact of the new regulatory environment in terms of competitiveness would require the improvement of statistical information. However, in order to avoid additional

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<sup>18</sup> Operational guidance for assessing impacts on sectoral competitiveness within the commission impact assessment system

administrative burden for companies a mandatory EU wide notification system for posting has not been included in the policy options.

## 2. COST AND PRICE COMPETITIVENESS: COST OF LABOUR

Posting can have a specific role in internationalization of companies. The possible flow of labour exerts a pressure on costs and allows companies to enter new markets using its existing pool of skills. Posting will have a stronger impact in what concerns the cost of labour. The expected impacts of posting of workers regulatory initiatives in labour market are the following:

- Lower labour costs for receiving companies
- Externalisation of costs: experienced posted workers are immediately productive whereas newly recruited employees need training.
- Reducing labour shortages. In times of economic growth, posting has had an important labour market effect in sectors where it is concentrated. Posting can have a positive impact in overcoming labour shortages both volume and skills. In receiving countries there is limited evidence of displacement of local workers by foreign workers.
- Flexible capacity and seasonal demand: posted workers can be hired on short term contracts in accordance to the needs of a company. In this way, a company can adapt the volume of the workforce to the demands of seasonal labour or other labour demand fluctuations.
- Benefit from competitive prices of foreign-service providers due to lower wage and labour costs: posting can decrease the cost of services purchased if the labour costs of posted workers are below that of workers from the host country doing comparable work.
- Reducing transaction costs through improved and easy access to information. Currently, companies have difficulties finding out and interpreting the conditions of employment and rules related to posting given the different national legal frameworks. Better and adequate information available to undertakings as regards the provision of services in the framework of posting of workers provide for more clarity and certainty for companies regarding the applicable working conditions and will also contribute to a better respect of the applicable labour legislation. Package B will contribute to the reduction of costs for compiling and gathering information. A reduction in transaction costs, due to an easy access to information can have a positive contribution to the development of the externalization of activities and can promote the use of such services without the negative impacts on competition arising from social dumping. Thus, an increased legal certainty can reduce the cost of compliance for business which do need to use posted workers as part of their transnational operations, therefore a positive impact on competitiveness can be expected through the enhanced ability of companies being able to assemble resources at an European level.

- Improving quality of cross-border services: posting is important in order to maintain and improve the amount and quality of cross-border services offered to international clients. It allows companies to send experienced employees for a short period abroad to give training, or to install specialised equipment.
- Centralizing purchasing policies: companies will have the choice of implementing purchasing strategies at EU-level (e.g. maintenance or ICT, for example).
- Higher potential liability costs: package B includes the introduction of a system of joint and several liability. This will contribute to reduce unfair competition compared to the current situation. This can lead to a reduction of costs related with complaints against service users. However, companies must be aware of the risks entailed in using the services of subcontractors who do not comply with the minimum wage provisions applicable to posted workers. A respective risk assessment entails additional general compliance costs of about 2 million Euro for EU-27 per year.

Beyond joint and several liability package B does not entail other costs for companies. Provisions regarding national control measures will limit Member States possibilities to impose administrative requirements on service providers and reduce costs for companies. For further details see Impact Assessment section 6.3.1 and Annexes 5, 6 and 7.

In increasingly globalised markets competitiveness in products and services markets depend on the competitiveness of the different value chain stages. If companies can benefit from a more stable regulatory environment, which allow them to make more efficient choices about the use of resources at European level, that has the potential to generate savings and impact the cost of inputs. Posting can contribute for companies to gain more flexibility in the organization of their value chains, being able to adjust to the economic cycles. It will give companies a higher ability to implement low cost strategies. Improved regulatory framework for posting of workers is expected to reinforce competitiveness of European companies by contributing to lower labours costs, increased flexibility in value chains and a clearer level playing field.

### **3. CAPACITY TO INNOVATE AND TO PRODUCE AND BRING R&D TO THE MARKET**

Package B can have a beneficial impact on the capacity of companies to innovate: multinational companies tend to organize themselves on a larger geographical scale (e.g. European scale) for internal activities such as R&D, this increases the need for short term international staff mobility. Also, from the perspective of the sending countries, cooperation with companies from other EU countries inevitably raises the capacity for learning and innovating.

## **4. INTERNATIONAL COMPETITIVENESS**

### **4.1. Competitiveness in internal market**

From the perspective of business, posting is closely associated with the trend towards internationalisation of production chains. One of the main drivers of posting are labour and/or skills shortages in the host market. Companies benefit from posting their workers abroad in different ways:

- Entering new markets: companies looking to expand often consider entering new geographical markets. Once they have started offering services in another Member State they often make use of posting during the start-up period. Experienced staff from the company is sent to support the development of business abroad. Improvements in the Posting of workers regulatory framework will make it easy and less risky for the companies to enter a new market using their own pool of resources, therefore reducing the barriers to entry in other markets.
- Using own workforce and maintaining a higher degree of control over the work performed: companies prefer to send experienced and specialized staff to supervise or assist to the work done in other countries.
- Gaining experience and learning through working abroad: companies and employees want to benefit from improved competences gained through work abroad, with positive spill-over effects in what concerns competition in the internal market.
- Adapt to demand in the home market: there can be a negative relation between the economic climate and the amount of postings in a sector, whereby a decline in the home market can force companies to look for work abroad and an increase in the home market reduces this need. Thus posting will create incentives for increased competition in the internal market as it provides companies with additional opportunities to exploit new markets and to reduce the risks associated with economic cycles.

The posting of workers legislation has an important role in defining the level playing field, guaranteeing fair competition and respect for the rights of posted workers. The positive effects of the existing Directive will be reinforced by package B. This is expected to have the following positive effect in terms of competitiveness:

- Reducing social dumping: In labour law, the Posting of Workers Directive implies compliance with a hard core of applicable terms and conditions of employment in the host Member State, unless the rules of the sending state are more favourable, the objective being that freedom to provide services should not promote social dumping. Since package B will improve the application of the existing Directive in practice this will have a positive effect on the most productive and profitable companies which will not be exposed to the behaviours of less efficient companies which exploit the current loopholes in legislation.
- Reducing effects of unfair competition: The new measures will tackle the abuse of the posting legislation. It will envisage better monitoring *in order to diminish fraud*. In this respect, the rules concerning liability of recipients (clients/main contractors/user companies) of a service carried out by posted workers, will contribute to prevent the non-payment of wages by their employer, thus reducing effects of unfair competition.
- Generating pressure on local competitors of foreign service providers in local services markets (e.g. price competition): The new regulatory efforts concerning posting will encourage cross-border trade and free movement of services. This is expected to have a positive impact in promoting competitiveness of firms in a very broad range of sectors operating the internal market.

**Example: Unfair competition by exploiting legal uncertainty: letter box companies**

Setting up letter box companies which then hire workers specifically to post them to other Member States and incidences of consecutive postings of a single worker to a single Member State by different ‘employers’ in different Member States. In some cases, the employer is not genuinely established in the sending state, in other cases a link between the employment contract and the state of establishment of the employer is missing.

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. Other cases might describe situations of rotational posting in which the worker is posted consecutively to different Member States.

#### **4.2. Competitiveness in external markets**

Posting between different companies is related to the international provision of services. Posting of Workers regulatory environment will have economic effects in the areas of:

- Market entry and internationalisation: it allows service providers consolidate or expand their international market by servicing international clients through short term assignments at the client’s workplace. However, it will ensure that international players will not be subject to better conditions in the use of posted workers.
- Increase flexibility and competitiveness: From a receiving perspective, posting is used as a tool to increase flexibility and competitiveness. The clients are able to have access to specialist skills across borders. Intra-company posting is rather a phenomenon of multinational companies although specialised SME’s with international activities also make use of it. International mobility is a necessity for these enterprises and it contributes to the overall development of the companies and to their ability to access and combine resources.
- Reducing distortions to competition and the adverse effects on the protection of workers resulting from the transnational provision of services.

Improved application and enforcement in practice of the posting of workers Directive would allow EU companies to exploit cost advantages of externalising activities, allowing them to better respond to the challenge of globalised competition, being able to access critical resources at competitive costs. Since companies established outside the Union have to respect at least the same terms and conditions of employment a better enforcement of the current legal framework would also reduce unfair competition on wages and working conditions by these companies.

#### **5. SECTOR IMPLICATIONS – ILLUSTRATIVE CASES**

From the preparatory studies and consultation it emerges that the main sectors concerned with the use of posted workers are:

- Agriculture;

- Hotels; restaurants and catering;
- Transport;
- Construction;
- Temporary agencies.

According to the main report the sectors that are more likely to be affected and which better illustrate the relevance of posting of workers are the last two. Posting has played a significant role in the construction sector, noticeably, regarding competition and competitiveness in the sector and temporary work agencies have been identified as critical components for the effective implementation of the posting of workers directive

### **Illustrative case 1: Construction sector**

Posting in the construction sector is the archetypal cross-border posting, which lay at the origin of the Directive. The sector is characterized by the fact that the service is actually performed at a specific site, and hence requires workers to move to that site to perform the services. Compared with other industries, construction is one of the most labour-intensive industries with many workers working on temporary basis, so labour costs are an important element for companies. As the number of posted workers in this sector is relatively high, the Posting of Workers Directive is considered to be one of the cornerstones of European legislation for the construction sector. Conflicts in the construction sector are at the origin of numerous proceedings before the CJEU.

Most drivers and barriers regarding posting in the construction sector do not significantly differ from other sectors: economic and financial motives, together with labour shortages in the receiving country constitute the main drivers.

The high level of postings can, amongst other elements, be explained by the labour intensity of the industry and the high share of temporary work. The other drivers and barriers do not differ significantly from other sectors - economic and cost motives, especially related to labour costs, together with labour shortages in the receiving country constitute the main drivers. As an example in Germany the Construction sector faced a need to cut costs since prices become increasingly under pressure, cost-reduction was achieved through the deployment of posted workers.

As regards economic effects, posting seems to have a positive effect on competitiveness (reflected in costs) of the construction sectors, but with differences between sending and receiving countries:

- Economic drivers and competitiveness: foreign (posted) employees often have very competitive prices. The externalisation of costs as construction companies do not have to cover the costs of education and training for example, as educated workers can be posted directly. For longer distance posting, wage differences and market opportunities are the main drivers for posting.
- Shortages and lack of qualifications in the local economy: shortage of labour supply in the local economy could be a driver to receiving posted workers. In addition, for some professions in the construction sector, competences and qualifications in

technical aspects are lacking. In some countries the construction sector finds insufficiently qualified candidates to fill the market-place demands.

- More competition in the sector: posting of workers would contribute to more competition in the sector in the local labour market. In the current status of the Posting of Workers Directive companies who are not competitive in their own local market but survive through using cheaper services available from foreign providers, could be rewarded. It is thus a way for those non-efficient companies to survive for longer instead of going bankrupt. For receiving countries, posting in the construction sector is mainly about cutting costs and thus the search for cheap labour. Posting of workers in the construction sector is mainly about having low-skilled activities performed by foreign workers who are prepared to work for low payment and who are quickly employable.
- Trend of subcontracting in the sector: In Germany for example, the posting of workers enabled large construction companies to develop a completely different business model in which the organisation of large subcontracting chains plays a key role. Even though the management costs of such subcontracting chains are high, the cost-reduction achieved through the deployment of posted workers largely exceeds these costs.
- Limited effect on local workers and working condition. In companies where workers from abroad are posted, there has been a possible limited effect on wages and working time for (low qualified) local workers, following from the direct competition with posted workers.

It was to be mentioned by several stakeholders from different countries, in the construction sector, that under the current system there were unfair competition practices, because labour conditions (working hours and wages) were not respected by companies making use of foreign posted workers. This allowed certain competitors to set lower prices in bids, which were, in some cases, even considerably lower than prices estimated by the client. The clear interpretation of those issues by the proposed regulation is expected to have a positive impact in terms of reducing unfair competition and through that means contributing to reinforced competitiveness of the European construction firms. Package B will also be instrumental in tackling unlawful labour conditions by improving the effectiveness of controls.

## **Illustrative case 2: Temporary work agencies**

Another sector which is characterized by the fact that the services are performed ‘on site’ is the service provided by temporary work agencies. The temporary agency industry is atypical: temporary agency workers are placed at the disposal of an employer in another sector, which could be anything from construction to banking and other commercial services, to agriculture and manufacturing. This means that workforce provision crosses the lines between different sectors of industry.

Intermediaries/service providers have nevertheless discovered the legal possibility to hire people in the cheapest and/or easiest way. Sometimes intermediaries in other Member States are used with the sole purpose of turning (temporary or seasonal) migration into posting. Besides this, provision of manpower is quite often associated with illegal operations and undeclared work. In extreme cases this may lead to forms of modern slavery and/or trafficking in human beings.

The illegal temporary work agencies may be established both in the country of recruitment (leading to posting) or in the country of work (leading to migration). Several reported cases of abuse concerned migrant workers or even (bogus) self-employed. These cases involve social dumping in its purest form – with no respect for either the protective system of the country of origin or that of the host country.

With respect to posting by means of temporary agency work, the new provisions concerning control measures and enforcement (defence of rights, subcontracting chains, liability and penalties), will contribute to create a more predictable regulatory environment and will distinguish between "fair" exploitation of differentials in remuneration and in business cycles between regions and unfair practices. A positive impact on competitiveness is expected from the increased certainty in the provision of services by temporary work agencies making it possible for companies to exploit the advantages of outsourcing in their value chains in a secure way.

## **6. IMPACTS ON SME AND MICRO-SME**

A positive impact on the competitiveness of SMEs and micro-SMEs can be expected since an improved and clear regulatory environment will improve the predictability of the business environment. SMEs are in particular affected by the lack of transparent information regarding the applicable working and employment conditions in the host Member State since they have little capacity to investigate the applicable rules themselves. Thus, companies will have lower costs of investigating applicable working and employment conditions in the host Member State, and will benefit from the ability of SMEs and micro-SMEs to exploit the possibility of providing services in new markets. Since SMEs and micro-SMEs are especially affected by any kind of administrative requirements that create excessively onerous obligations for foreign undertakings they will benefit from package B which will limit Member States possibilities to impose such measures. Package B provides guidance for Member States with regard to inspections. SMEs and micro-SMEs with a good record will benefit from inspections based on a risk assessment. Effective inspections, improved administrative cooperation, cross-border execution of fines and joint and several liability will contribute to fairer competition and a more level playing field. Since SMEs and micro-SMEs are in particular sensitive to unfair competition they will benefit from these provisions.

## **ANNEX 12: Directive 96/71/EC**

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<sup>19</sup>

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

*(1) Whereas, pursuant to Article 3 (c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services constitutes one of the objectives of the Community;*

*(2) Whereas, for the provision of services, any restrictions based on nationality or residence requirements are prohibited under the Treaty with effect from the end of the transitional period;*

*(3) Whereas the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed;*

*(4) Whereas the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract;*

*(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;*

*(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;*

*(7) Whereas the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (4), signed by 12 Member States, entered into force on 1 April 1991 in the majority of Member States;*

*(8) Whereas Article 3 of that Convention provides, as a general rule, for the free choice of law made by the parties; whereas, in the absence of choice, the contract is to be governed, according to Article 6 (2), by the law of the country, in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a*

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<sup>19</sup> Official Journal L 018 , 21/01/1997 P. 0001 - 0006

*whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country;*

*(9) Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice;*

*(10) Whereas Article 7 of the said Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted;*

*(11) Whereas, according to the principle of precedence of Community law laid down in its Article 20, the said Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts;*

*(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;*

*(13) Whereas the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;*

*(14) Whereas a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting;*

*(15) Whereas it should be laid down that, in certain clearly defined cases of assembly and/or installation of goods, the provisions on minimum rates of pay and minimum paid annual holidays do not apply;*

*(16) Whereas there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays; whereas, when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements; whereas, where the amount of work to be done is not significant, Member States may derogate from the provisions concerning minimum rates of pay and the minimum length of paid annual holidays;*

*(17) Whereas the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;*

*(18) Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld;*

*(19) Whereas, without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers*

*and temporary employment undertakings to undertakings not established in their territory but operating therein in the framework of the provision of services;*

*(20) Whereas this Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services; whereas this Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers;*

*(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (5) lays down the provisions applicable with regard to social security benefits and contributions;*

*(22) Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions;*

*(23) Whereas competent bodies in different Member States must cooperate with each other in the application of this Directive; whereas Member States must provide for appropriate remedies in the event of failure to comply with this Directive;*

*(24) Whereas it is necessary to guarantee proper application of this Directive and to that end to make provision for close collaboration between the Commission and the Member States;*

*(25) Whereas five years after adoption of this Directive at the latest the Commission must review the detailed rules for implementing this Directive with a view to proposing, where appropriate, the necessary amendments,*

HAVE ADOPTED THIS DIRECTIVE:

### **Article 1 - Scope**

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

- (a) post workers to the territory of a 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; or
- (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
- (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the

temporary employment undertaking or placement agency and the worker during the period of posting.

4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

## **Article 2 - Definition**

1. For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

## **Article 3 - Terms and conditions of employment**

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) 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;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days.

This provision shall not apply to activities in the field of building work listed in the Annex.

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) when the length of the posting does not exceed one month.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1 (b) and (c) in the cases referred to in Article 1 (3) (a) and (b) on the grounds that the amount of work to be done is not significant.

Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as 'non-significant'.

6. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.

For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker.

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

**9.** Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

**10.** This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,
- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

#### **Article 4 - Cooperation on information**

**1.** For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.

**2.** Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3 (10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.

4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.

#### **Article 5 - Measures**

Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

#### **Article 6 - Jurisdiction**

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

#### **Article 7 - Implementation**

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 16 December 1999 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

#### **Article 8 - Commission review**

By 16 December 2001 at the latest, the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council where appropriate.

#### **Article 9**

This Directive is addressed to the Member States.

Done at Brussels, 16 December 1996.

For the European Parliament

The President

K. HÄNSCH

For the Council

The President

I. YATES

(1) OJ No C 225, 30. 8. 1991, p. 6 and OJ No C 187, 9. 7. 1993, p. 5.

(2) OJ No C 49, 24. 2. 1992, p. 41.

(3) Opinion of the European Parliament of 10 February 1993 (OJ No C 72, 15. 3. 1993, p. 78), Council common position of 3 June 1996 (OJ No C 220, 29. 7. 1996, p. 1) and Decision of the European Parliament of 18 September 1996 (not yet published in the Official Journal). Council Decision of 24 September 1996.

(4) OJ No L 266, 9. 10. 1980, p. 1.

(5) OJ No L 149, 5. 7. 1971, p. 2; Special Edition 1971 (II), p. 416. Regulation as last amended by Regulation (EC) No 3096/95 (OJ No L 335, 30. 12. 1995, p. 10).

## ANNEX

The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

1. excavation
2. earthmoving
3. actual building work
4. assembly and dismantling of prefabricated elements
5. fitting out or installation
6. alterations
7. renovation
8. repairs
9. dismantling
10. demolition
11. maintenance
12. upkeep, painting and cleaning work
13. improvements.