



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 23 March 2012**

**8040/12**

---

**Interinstitutional File:  
2012/0061 (COD)**

---

**SOC 224  
MI 193  
COMPET 168**

**PROPOSAL**

---

from:	The Commission
dated:	23 March 2012
No Cion doc.:	COM(2012) 131 final
Subject:	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

---

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

---

Encl.: COM(2012) 131 final



EUROPEAN COMMISSION

Brussels, 21.3.2012  
COM(2012) 131 final

2012/0061 (COD)

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)

{SWD(2012) 63 final}  
{SWD(2012) 64 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### *General context*

The free movement of workers, freedom of establishment and the freedom to provide services are fundamental principles of the European Union.

The free movement of workers must be distinguished from the freedom to provide services under Article 56 of the Treaty on the Functioning of the European Union (TFEU).

The *free movement of workers* gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions in comparison to nationals of that Member State. In contrast, the *freedom to provide services* gives businesses the right to provide services in another Member State. To that end, they may send ('post') their own workers temporarily to the other Member State to carry out the work necessary to provide the services. Posted workers in this sense are covered by Directive 96/71/EC<sup>1</sup>.

This Directive aims to reconcile the exercise of this freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose. In order to do so, it sets out mandatory rules at EU level that must be applied to posted workers in the host country<sup>2</sup>. It establishes a core set of clearly defined terms and conditions of work and employment that must be complied with by the service provider in the host country to ensure the minimum protection of workers. The Directive thus provides a significant level of protection for workers who may be vulnerable given their situation (temporary employment in a foreign country, difficulty of obtaining proper representation, lack of knowledge of local laws, institutions and language). The Directive also plays a key role in promoting a climate of fair competition between all service providers (including those from other Member States) by guaranteeing both a level playing field and legal certainty for service providers, service recipients, and workers posted for the provision of services.

#### *Key contents of Directive 96/71/EC*

The Directive applies to businesses that post workers temporarily to a Member State other than the one whose laws govern the employment relationship. It covers three cross-border situations:

- Posting under a contract concluded between the business making the posting and the party for whom the services are intended ('contracting/subcontracting');

---

<sup>1</sup> 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, OJ 1997 L 18.

<sup>2</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers, COM(2007) 304 final.

- posting to an establishment or business owned by the group in the territory of another Member State (‘intra-corporate transfers’),
- hiring out by a temporary employment firm or placement agency to a user business established in another Member State,

with the proviso that, in all three situations, there is an employment relationship between the business making the posting and the worker during the period of posting<sup>3</sup>.

The core terms and conditions of work and employment to be complied with, as defined in Article 3(1) of the Directive, include:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates (this does not apply to supplementary occupational retirement pension schemes);
- the conditions for hiring out workers, in particular the supply of workers by temporary employment firms;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, children and young people;
- equality of treatment between men and women and other non-discrimination provisions.

Where these terms and conditions of employment are laid down by law, regulation or administrative provisions, Member States must apply them to workers posted to their territory. Member States must equally apply them to posted workers if they are laid down by collective agreements or arbitration awards that have been declared universally applicable within the meaning of Article 3(8), insofar as they concern the activities referred to in the Annex to the Directive (building work). With regard to other activities, Member States are left the choice of imposing terms and conditions of employment laid down by such collective agreements or arbitration awards (Article 3(10), second indent). They may also, in compliance with the Treaty, impose terms and conditions of employment in matters other than those referred to in the Directive in the case of public policy provisions (Article 3(10), first indent).

The Directive does not oblige Member States to set minimum wages. At the time of adoption of the Directive, the Council and the Commission stated: ‘The first and second subparagraphs of Article 3(1) do not, as regards the Member States the legislation of which makes no provision for minimum wages, entail any obligation to make provision for such wages.’<sup>4</sup>

---

<sup>3</sup> Article 1(1) and (3)(a) to (c).

<sup>4</sup> Council Doc. 10048/96 ADD1 of 20 September 1996.

While the Directive does not apply directly to businesses established in third countries, Article 1(4) provides for businesses established in a third country not to be given more favourable treatment than businesses established in a Member State. This means that Member States must not provide businesses established in a third country with a more advantageous competitive position in comparison to businesses established in a Member State, in particular with regard to working conditions and wage costs. Consequently, the Directive indirectly sets a minimum level of protection for their workers.

Further, Articles 4, 5 and 6 of the Directive contain provisions on access to information, administrative cooperation, enforcement and jurisdiction.

#### *Political context — developments since the adoption of the Directive in 1996*

Already before the adoption of the Posting of Workers Directive, the question whether, and if so to what extent, national labour regulations could be applied to workers of foreign service providers had led to considerable controversy, as shown by the case law of the European Court of Justice (ECJ).

The Commission evaluated the implementation and application of the Directive and adopted a report in 2003<sup>5</sup>. This report identified several deficiencies and problems of incorrect implementation and/or application of the Directive in specific Member States.

Furthermore, the Commission adopted in 2006<sup>6</sup> guidelines aimed at clarifying the extent to which certain national control measures could be justified and proportionate in view of prevailing EU law as interpreted in the Court's jurisprudence. In a second Communication in 2007<sup>7</sup> several shortcomings were highlighted as regards the way controls were carried out in some Member States and the poor quality of administrative cooperation and access to information<sup>8</sup>.

The judgments of the European Court of Justice in the Viking-Line, Laval, Ruffert and Commission v Luxembourg cases<sup>9</sup> triggered an intense debate among EU institutions, academics and social partners. This focused on two major issues.

The first concerned how to set the right balance between the exercise by trade unions of their right to take collective action, including the right to strike, and the economic freedoms enshrined in the TFEU, in particular the freedom of establishment and the freedom to provide services. The second was how to interpret some key provisions in Directive 96/71/EC, such as

---

<sup>5</sup> Report from the Commission services on the implementation 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, 2003. Available at: <http://www.ec.europa.eu/social/posted-workers>.

<sup>6</sup> Communication from the Commission — Guidance on the posting of workers in the framework of the provision of services, COM(2006) 159 final.

<sup>7</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers, COM(2007) 304 final.

<sup>8</sup> See for further details: Study 'Information provided on the posting of workers', F. Muller, Strasbourg, September 2010. Available on the website: <http://www.ec.europa.eu/social/posted-workers>.

<sup>9</sup> CJEU cases of 11 December 2007, *Viking* (C-438/05), 18 December 2007, *Laval* (C-341/05), 3 April 2008, *Ruffert* (C-346/06), 19 June 2008, *Commission v Luxembourg* (C-319/06).

the concept of public policy, the material scope of the terms and conditions of employment imposed by the Directive and the nature of mandatory rules, in particular the minimum wage.

At his presentation of political priorities before the European Parliament on 15 September 2009, President Barroso recognised the need to address the concerns and issues raised by several stakeholders during the debate and announced a legislative initiative to resolve the problems with the implementation and interpretation of the Posting of Workers Directive.

The report on the relaunch of the Single Market<sup>10</sup>, submitted by Professor Monti on 9 May 2010, also addressed these concerns. He recognised that the controversy fuelled by the rulings ‘has the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration’. He further added that ‘the Court’s cases have exposed the fault lines that run between the Single Market and the social dimension at national level’.

Previously in 2008, the Commission had adopted a Recommendation<sup>11</sup> calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations, more effective exchange of information between Member States, better access to information and the exchange of best practice. In the same year, it also established<sup>12</sup> an Expert Committee on Posting of Workers, comprising representatives of the Member States and social partners, with the aim of discussing and clarifying problems with the implementation and application of the Directive.

#### *Extent of the phenomenon of posting*

The analysis of posting as an economic and social phenomenon, as distinct from anecdotal evidence, is hampered by the lack of precise figures and the poor quality of the data base. The only available data source at EU level is based on the systematic data collection of E101 certificates (2005-2009) in the field of social security, carried out by DG EMPL in cooperation with national authorities<sup>13</sup>. However, this data base has several limitations<sup>14</sup>.

With these caveats, it can be estimated that around one million workers are posted each year by their employers from one Member State to another. Posting thus concerns only a small share of the active population (0.4% of the active population of EU-15 sending countries and 0.7% of the active population of EU-12 sending countries). However, in terms of labour mobility within the EU, the number of postings represented 18.5% of non-national EU-27 citizens in the labour force in 2007. Therefore, it can be concluded that, while posting is a significant phenomenon in terms of labour mobility, especially in some countries and sectors, it remains a relatively small phenomenon in the EU labour market.<sup>15</sup>

---

<sup>10</sup> A new strategy for the single market — at the service of Europe’s Economy and Society, Report to the President of the European Commission, José Manuel Barroso, by Mario Monti, 9 May 2010.

<sup>11</sup> Commission Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, OJ C 85, 4.4.2008, pp. 1–4.

<sup>12</sup> Commission Decision of 19 December 2008 setting up the Committee of Experts on Posting of Workers (2009/17/EC), OJ L 8/26, 13.1.2009.

<sup>13</sup> European Commission (2011), ‘Posting of workers in the European Union and EFTA countries: Report on E101 certificates issued in 2008 and 2009’; European Commission (2011), ‘Administrative data collection on E101 certificates issued in 2007’.

<sup>14</sup> Cf. IA, p. [...].

<sup>15</sup> Cf. Idea Consult (see footnote 28), executive summary. The percentage provides only a rough indication of the proportion of postings relative to non-national EU-27 citizens in the labour force (it is

However, there are significant numbers of posted workers in some Member States (Germany, France, Luxembourg, Belgium or Poland) and the phenomenon is increasingly widespread, now affecting all Member States as sending and/or as receiving countries. The economic importance of posting also exceeds by far its quantitative size, as it can play a crucial economic role in filling temporary shortfalls in the labour supply in certain professions or sectors (e.g. construction, transport). Furthermore, the posting of workers enhances international trade in services with all the known advantages linked to the Single Market (higher competition, efficiency gains, etc.).

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

### **2.1. Consultation with interested parties**

The rulings of the Court in the Viking-Line, Laval, Ruffert and Commission v Luxembourg cases in 2007-2008 have fuelled an intense debate in particular on the consequences of the freedom to provide services and freedom of establishment for the protection of workers' rights and the role of trade unions in protecting workers' rights in cross-border situations.

The European trade unions and some political groups in the European Parliament see these judgments as anti-social. The ETUC refers to them as a 'licence for social dumping'. They want the legislation to be amended to clarify the legal situation and prevent judges ruling against what they perceive as workers' interests in the future. To this end, they have put forward two key demands for:

- a revision of the Posting of Workers Directive (Directive 96/71/EC) to include a reference to the principle of 'equal pay for equal work' and allow the 'host Member State' to apply more favourable conditions than the core terms and conditions of employment in accordance with Article 3(1) of the Directive;
- the introduction of a 'Social Progress Protocol' in the Treaty to give priority to fundamental social rights over economic freedoms.

Other stakeholders take a different position. BusinessEurope has welcomed the clarification the Court's rulings have brought and does not consider that the Directive needs revising. Most Member States have expressed similar views. The Member States most affected by the rulings (SE, DE, LU and DK) have modified their legislation in order to conform to the rulings.

In October 2008, the European Parliament adopted a resolution calling on all Member States to properly enforce the Posting of Workers Directive and asking the Commission not to exclude a partial review of the Directive after assessing in depth the problems and challenges<sup>16</sup>. At the same time, it emphasised that the freedom to provide services as 'one of the cornerstones of the European project should be balanced, on the one hand, against fundamental rights and the social objectives of the Treaties and on the other hand, against the

---

likely to be an overestimation). An E101 certificate does not represent a full-time one-year equivalent worker, while the Labour Force Survey, which provides the data on non-national EU-27 citizens in the labour force, does not cover posted workers.

<sup>16</sup> Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)), points 25 and 30.

right of the public and social partners to ensure non-discrimination, equal treatment and the improvement of living and working conditions'<sup>17</sup>. On 2 June 2010, the Employment and Social Affairs Committee organised a hearing of three experts (representing the Commission, ETUC and BE), where S&D, Left and Green MEPs called for action to be taken by the Commission very much along the same lines as proposed by the ETUC.

On a joint invitation from Commissioner Špidla and Minister Bertrand (acting as President of the Council) at the October 2008 Forum, the European social partners agreed to carry out a joint analysis of the consequences of the Court rulings in the context of mobility and globalisation. In March 2010<sup>18</sup>, the European social partners delivered a report on the consequences of the ECJ rulings. The document exposed their wide divergences. While Business Europe is opposed to revision of the Directive (but accepts the need for clarification of certain aspects related to enforcement), ETUC wants it thoroughly amended.

In 2010, the European Economic and Social Committee adopted an opinion on the 'Social Dimension of the Single Market'<sup>19</sup>, asking for more effective implementation of Directive 96/71/EC and expressing support for a Commission initiative to clarify the legal obligations for national authorities, business and workers, including partial revision of the Directive. The opinion further encourages the Commission to exempt the right to strike from the Single Market and to explore the idea of a 'European Social Interpol', supporting the activities of the labour inspectorates of the various Member States.

Recognising the controversy fuelled by the Court rulings in his report 'A new Strategy for the Single Market', Professor Monti recommended to:

- Clarify the implementation of the Posting of Workers Directive and strengthening dissemination of information on the rights and obligations of workers and companies, administrative cooperation and sanctions in the framework of the free movement of persons and the cross-border provision of services;
- Introduce a provision to guarantee the right to strike, modelled on Article 2 of Council Regulation (EC) No 2679/98 (the so-called *Monti Regulation*), and a mechanism for informal resolution of labour disputes concerning the application of the Directive.

In October 2010, the Commission launched a public consultation on how to reinvigorate the Single Market with its Communication 'Towards a Single Market Act — For a highly competitive social market economy — 50 proposals for improving our work, business and exchanges with one another'<sup>20</sup>. It put forward two proposals (numbers 29 and 30) designed to restore confidence and support among citizens, one on the balance between fundamental social rights and economic freedoms and one on the posting of workers.

- Proposal 29: 'Pursuant to its new strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the Commission will ensure

---

<sup>17</sup> Point 1; see also points 17 and 31.

<sup>18</sup> The text was presented during the Oviedo conference in March 2010, organised by the Spanish Presidency. The debates once again showed divided opinions among stakeholders.

<sup>19</sup> Opinion 2011/C 44/15.

<sup>20</sup> COM(2010) 608 final/2, 11.11.2010.



that the rights guaranteed in the Charter, including the right to take collective action, are taken into account. ....’

- Proposal 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.’

The public consultation showed huge interest and support for these actions from unions, individual citizens and NGOs.

Proposal 29 on the effective implementation of the Charter of Fundamental Rights and the social impact assessment is considered one of the most important issues by the 740 respondents (out of the more than 800).

The European social partners responded to the consultation along their established lines. ETUC reiterated its request for a ‘Social Progress Protocol’ amending the Treaty and maintained that the Commission should not only clarify and improve the implementation of the Posting of Workers Directive, but also thoroughly revise it. BusinessEurope supported the Commission’s approach for better implementation and enforcement of the existing Directive.

The idea of a so-called Monti II regulation was welcomed by ETUC (and also expressly mentioned in several replies from national trade unions) in addition to a Social Progress Protocol. BusinessEurope’s contribution does not make a clear statement, but seems to question its added value, clearly indicating that it should not call into question the exclusion of the right to strike from EU competences.

Following the wide-ranging public debate and on the basis of the contributions during the public debate, the Commission adopted the Communication ‘A Single Market Act — Twelve levers to boost growth and strengthen confidence’ on 13 April 2011<sup>21</sup>. Legislative initiatives regarding the posting of workers are among the twelve key actions included under the social cohesion chapter: *‘legislation aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the Posting of Workers Directive, which will include measures to prevent and sanction any abuse and circumvention of the applicable rules, together with legislation aimed at clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights’*.

Following the adoption of the Single Market Act, the European Parliament adopted three resolutions on 6 April 2011<sup>22</sup>. However, unlike the more general issue of mobility (and portability of pension rights), the posting of workers was not among the key priorities identified.

In contrast, the posting of workers and the economic freedoms do figure among the priorities identified by the European Economic and Social Committee<sup>23</sup>.

In its Conclusions on the priorities for relaunching the Single Market, the Council:

---

<sup>21</sup> COM(2011) 206 final.

<sup>22</sup> On a Single Market for Enterprises and Growth [2010/2277(INI)], a Single Market for Europeans [2010/2278(INI)], and on Governance and Partnership in the Single Market [2010/2289(INI)].

<sup>23</sup> Opinion Ms Federspiel, Mr Siecker and Mr Voles, INT 548, 15 March 2011.

‘14. CONSIDERS that proper implementation and enforcement of the Posting of Workers Directive can contribute to a better protection of posted workers’ rights and ensure more clarity regarding the rights and obligations of service providing businesses as well as national authorities and can help to prevent circumvention of the applicable rules; moreover CONSIDERS that more clarity in the exercise of the freedom of establishment and the freedom to provide services alongside fundamental social rights is necessary;’<sup>24</sup>

The Conference on Fundamental Social Rights and the Posting of Workers (27-28 June 2011) gathered ministers, social partners, representatives of EU institutions and academics in order to discuss the regulatory options available and help identify feasible solutions<sup>25</sup>. It was intended to contribute, through an open constructive debate, to a more shared vision and to present the results of recent studies.

Moreover, the Krakow declaration<sup>26</sup> reiterated that the cross-border provision of services and the mobility of posted workers are essential elements of the Single Market. Facilitating the temporary cross-border provision of services should go hand in hand with guaranteeing an adequate and appropriate level of protection for workers posted to another Member State to provide these services.

## 2.2. Impact assessment

In line with its policy on better regulation, the Commission conducted an impact assessment of policy alternatives based on an external study<sup>27</sup>. Since 2009, the Commission has also launched four ex-post evaluation studies:

- Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union<sup>28</sup>;
- Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 12 Member States)<sup>29</sup>;
- Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 15 Member States)<sup>30</sup>;
- Study on the protection of workers’ rights in subcontracting processes in the European Union<sup>31</sup>.

---

<sup>24</sup> 3094th Competitiveness Council meeting, 30 May 2011.

<sup>25</sup> See for more information, keynote speeches and related documents: <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&eventsId=347&furtherEvents=yes>.

<sup>26</sup> Single Market Forum, Krakow, 3-4 October 2011, in particular the fifth paragraph of the Declaration and point 5 of the Operational Conclusions.

<sup>27</sup> Multiple Framework Contract VT 2008/87, *Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of services*, (VT/2010/126).

<sup>28</sup> Idea Consult and Ecorys Netherlands, Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union, Brussels, 2011. Available on the website: <http://www.ec.europa.eu/social/posted-workers>.

<sup>29</sup> Aukje van Hoek and Mijke Houwerzijl, Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union, 2011. Available on the website: <http://www.ec.europa.eu/social/posted-workers>.

<sup>30</sup> .Available on the website: <http://www.ec.europa.eu/social/posted-workers>.

The policy alternatives contain a range of possible options, sub-options and packages of options representing different degrees of EU intervention: non-regulatory intervention and regulatory intervention. With respect to the latter, the sub-options and option packages provide more differentiated scenarios ranging from minimum to maximum intervention.

All these options were analysed against the general objectives, namely the sustainable development of the Single Market, based on a highly competitive social market economy, the freedom to provide services and promotion of a level playing field, the improvement of living and working conditions, respect for the diversity of industrial relation systems in the Member States, and the promotion of dialogue between management and labour. In addition, they were examined against the more specific (and related operational) objectives: (i) better protection of the rights of posted workers, (ii) facilitating the cross-border provision of services and improving the climate of fair competition, and (iii) improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers. Based on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, the impact assessment was used to identify fundamental rights liable to be affected, the degree of interference with the right in question and the necessity and proportionality of the interference in terms of policy options and objectives<sup>32</sup>.

The preferred option is a combination of different measures. As far as the present proposal is concerned, a package of regulatory measures to deal with the implementation, monitoring and enforcement of the minimum working conditions ('problem 1') and with the abuse of posted worker status in order to evade or circumvent legislation ('problem 2'), combined with non-regulatory measures to deal with controversial or unclear interpretation of the terms and conditions of employment required by Directive 96/71/EC ('problem 3'), is considered to be overall the most effective and efficient solution to address the specific objectives 'better protection of the rights of posted workers', 'improving the climate of fair competition' and 'facilitating the cross-border provision of services' and the most coherent with regard to the general objectives. It is therefore in essence the basis for the present proposal.

A positive impact on SMEs and especially micro-businesses can be expected thanks to the improved and clearer regulatory 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 bear lower costs of investigating applicable working and employment conditions in the host Member State, and will benefit from the possibility of providing services in new markets. Since SMEs and micro-businesses are especially affected by administrative requirements that create excessively onerous obligations for foreign undertakings they will benefit from the present proposal which will limit Member States possibilities to impose such measures. It provides guidance for Member States with regard to inspections. SMEs and micro-businesses with a good record will benefit from inspections based on a risk assessment. Effective inspections, improved administrative cooperation, cross-border execution of fines and a carefully balanced liability scheme will contribute to fairer competition and a more level playing field. SMEs and micro-businesses which are particularly sensitive to unfair competition will benefit from these provisions.<sup>33</sup>

---

<sup>31</sup> Ongoing – draft final results have been taken into account.

<sup>32</sup> COM(2010) 573 final, p. 6-7

<sup>33</sup> See Impact Assessment regarding the Posting of Workers dossier, Annex 11, of January 2012.

In its report "Minimizing regulatory burden for SMEs - Adapting EU regulation to the needs of micro-enterprises" of 23 November 2011, the European Commission elaborated the principle that micro-entities should be excluded from the scope of proposed new legislation unless the proportionality of their being covered can be demonstrated.<sup>34</sup> With respect to the present proposal, micro-businesses cannot be excluded from the scope because this would undermine one of the proposal's key objectives - the fight against letter box companies - and it would create considerable new loopholes. It would equally imply a decrease in legal certainty since the level of protection to be respected for their posted employees would have to be established on a case by case basis. A better enforcement of the existing legislation can only be achieved by including micro-businesses into the scope of the Enforcement Directive. However, micro-businesses and other SMEs will benefit in general from more legal certainty, fairer competition and more targeted risk-based inspections.

In conclusion, the Enforcement Directive will have differing, but mostly very positive impact on different types of SMEs. Genuine SMEs will benefit from a fairer level-playing field, while some letter-box SMEs are likely to disappear. SMEs which have already had subcontractors abiding to minimum wage legislation and therefore had higher costs (in comparison to competitors with subcontractors not abiding the law) will benefit from a better level-playing field. SMEs that so far benefitted from subcontractors not abiding to minimum wage legislation will have to find new business models.

The draft impact assessment was scrutinised by the Impact Assessment Board ('IAB') and its recommendations for its improvement were integrated within the final report. The opinion of the IAB as well as the final Impact Assessment and its executive summary are published together with this proposal.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **3.1 General context — summary of the proposed action**

Without re-opening Directive 96/71/EC, the present proposal aims to improve, enhance and reinforce the way in which this Directive is implemented, applied and enforced in practice across the European Union by establishing a general common framework of appropriate provisions and measures for better and more uniform implementation, application and enforcement of the Directive, including measures to prevent any circumvention or abuse of the rules. It ensures at the same time guarantees for the protection of posted workers' rights and the removal of unjustified obstacles to the free provision of services. As highlighted in the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, people must be able to effectively enjoy their rights enshrined in the Charter when they are in a situation governed by Union law<sup>35</sup>.

Together with the proposal for a Regulation clarifying the exercise of the right to take collective action within the context of the economic freedoms of the Single Market, in particular the freedom of establishment and the freedom to provide services<sup>36</sup>, it constitutes a targeted intervention in line with one of the key objectives of the Treaty, namely to establish an internal market and work for a highly competitive social market economy, aiming at full

---

<sup>34</sup> COM(2011) 803 final

<sup>35</sup> COM(2010) 573 final

<sup>36</sup> COM(2012) 130 final

employment and social progress. In particular by facilitating the cross-border provision of services and improving the climate of fair competition, this initiative will allow the potential for growth offered by the posting of workers and jobs for posted workers to be tapped as a key element in the provision of services in the internal market. It will thus contribute to smart, sustainable and inclusive growth recovery in line with the objectives and priorities of the Europe 2020<sup>37</sup> strategy.

### **3.2 Legal basis**

This proposal is based on Articles 53(1) and 62 TFEU, which are identical those on which Directive 96/71/EC is based and allow for the adoption of directives under the ordinary legislative procedure.

### **3.3 Subsidiarity and proportionality principles**

The problems identified with respect to the implementation, application and enforcement of Directive 96/71/EC are linked to the objectives set out in Article 3(3) TEU, according to which the European Union is to establish an internal market based on a highly competitive social market economy, aiming at full employment and social progress, and in Articles 56 and 151 TFEU.

Adequate implementation and effective application and enforcement are key elements guaranteeing the effectiveness of the applicable EU rules. Differences and disparities in the way Directive 96/71/EC is implemented, applied and enforced in the different Member States are detrimental to the proper functioning of the Directive. It thus risks making it very difficult, if not impossible, to create the required level playing field for service providers and ensure that workers posted for the provision of services enjoy the same level of protection guaranteed by the Directive throughout the EU. Under these circumstances, the required legal clarity and certainty can only be achieved at EU level.

Therefore, the objectives of the proposal cannot be sufficiently achieved by Member States and require action at EU level

In line with the principle of proportionality, this Directive does not go beyond what is necessary in order to achieve the objectives. In order to improve the application and enforcement of Directive 96/71/EC in practice, a combination of effective preventive measures and adequate, proportionate penalties is proposed. The proposed more uniform rules for administrative cooperation, mutual assistance, national control measures and inspections reflect the heterogeneous nature of inspection and control systems across Member States, while also endeavouring to avoid unnecessary or excessive administrative burden for service providers. At the same time, moreover, respect for the diversity of the different social models and industrial relations systems in the Member States is guaranteed.

### **3.4 Detailed explanation of the proposal**

#### *3.4.1 Subject matter*

Apart from describing the objectives of the proposal for a Directive, *Article 1* contains what is often referred to as the ‘Monti clause’. It combines the text of Article 2 of Council Regulation

---

<sup>37</sup> COM(2010) 2020 final, 3.3.2010.

No 2679/98<sup>38</sup> and Article 1(7) of the Services Directive<sup>39</sup>. It is also in line with the text of similar provisions in, for example, the recent proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast Brussels I)<sup>40</sup> and the recently adopted Regulation on macroeconomic imbalances<sup>41</sup>.

### 3.4.2 *Preventing abuse and circumvention – elements improving implementation and better monitoring of application of the notion of posting*

According to the definition in Article 2(1) of Directive 96/71/EC<sup>42</sup> ‘*posted worker*’ means, for the purposes of this Directive, a worker who, *for a limited period*, carries out his or her work in the territory of a Member State *other than the Member State in which he or she normally works*.

Without prejudice to Article 2(2) of Directive 96/71/EC<sup>43</sup>, a worker qualifies as posted by virtue of his or her factual situation and the circumstances in which he or she is expected to carry out his or her activities, including:

- the temporary nature of the activities to be performed,
- the existence of a direct employment relationship between the undertaking making the posting and the worker during the whole period of posting,
- the country in which the worker normally works, and
- the existence of a genuine link between the employer and the worker’s country of origin.

However, Directive 96/71/EC does not contain any further indication as to how to determine whether the employer is established in a Member State, nor does it contain more specific criteria as to how to determine the temporary nature of the work to be performed by the posted workers or the Member State in which the workers concerned ‘normally work’.

This has led to several problems with the implementation, application and enforcement in practice of the Directive. Competent authorities in the Member States, service providers as well as the posted workers themselves often face unclear situations where it appears difficult to determine whether there is a posting within the meaning of the Posting of Workers

---

<sup>38</sup> Regulation No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among Member States, OJ L337/8, 12.12.98.

<sup>39</sup> Directive 2006/123, OJ L 376/36, 27.12.2006; cf. recital 22 of Directive 96/71/EC.

<sup>40</sup> COM(2010) 748 final, 14.12.2010, Article 85.

<sup>41</sup> Article 1(3), last sentence, Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25, 23.11.2011.

<sup>42</sup> To be read in combination with Articles 1(1) and 1(3) of the Directive.

<sup>43</sup> The definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

Directive or not<sup>44</sup>. Abuses have also been committed by employers exploring insufficient clarity of the legal provisions in order to circumvent the applicable rules<sup>45</sup>.

To avoid circumvention of the rules and combat abuse of the application of Directive 96/71/EC, the present proposal contains in *Article 3 paragraphs 1 and 2* an indicative, non-exhaustive list of qualitative criteria/constituent elements characterising both the temporary nature inherent to the notion of posting for the provision of services<sup>46</sup> as well as the existence of a genuine link between the employer and the Member State from which the posting takes place. This further specification and clarification will also enhance legal certainty.

A clearer, more easily enforceable indicative description of the constituent elements of the notion of posting for the provision of services as well as the criteria relating to what constitutes a genuinely establishment of the service provider in a Member State will help avoid ‘creative use’ of Directive 96/71/EC for situations that are not proper postings in the sense of the Directive.

The role of the Member State from which the posting takes place is further clarified in the context of administrative cooperation (*Article 7*).

### 3.4.3 Access to information

Access to advance information about the terms and conditions of employment applicable in the host country is a prerequisite for interested parties to be able to provide services in compliance with the rules resulting from Directive 96/71/EC and its transposition into national law. 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. It also constitutes an important means for facilitating respect for workers’ rights and their protection. Furthermore, proper and effective administrative cooperation among Member States is essential for compliance control. The successful implementation, application and

---

<sup>44</sup> See for further details chapters 2.2, 3.2 and 5.2 of the (complementary) study on the legal aspects of the posting of workers in the framework of the provision of services. — Cf chapter 3.2.1 Impact Assessment

<sup>45</sup> See for further details in particular chapter 3.5 ‘cases in the media and in court of the legal study and chapter 3.4 of the complementary legal study.— Cf chapter 3.2.2 Impact Assessment. For instance, the fact that the posted worker is not a national of either the Member State of the service provider or agency by or through which he/she is recruited or the Member State where the service is temporarily provided constitutes a clear indication that such a situation would not qualify as ‘posting’ in the sense of Directive 96/71, unless the posted worker has previously been employed by the service provider or agency and/or worked on the territory of the Member State where the service provider or agency is established.

<sup>46</sup> According to the case law of the ECJ, the temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty (judgment of 11.12.2003, case C-215/01, Schnitzer, rec. 28 and 31. cf. judgment of 30.11.1995, C-55/94, Gebhard). However, an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, does not come under the EU provisions concerning the provision of services (judgment of 7.9.2004, case C-456/02, Trojani, rec. 28).

enforcement of Directive 96/71/EC would be difficult unless these requirements are sufficiently guaranteed.

Notwithstanding improvements made in terms of access to information<sup>47</sup>, *Article 5* therefore contains a number of important more detailed measures to help ensure easily accessible and generally available information on the terms and conditions to be respected, including where these are laid down in collective agreements (paragraph 4).

#### 3.4.4 *Administrative cooperation and mutual assistance*

The general principles, rules and procedures necessary for effective administrative cooperation and assistance are laid down in *Article 6*, whereas the role of the Member State from which the posting takes place is covered by *Article 7*.

An appropriate legal basis is also provided in *Article 18* for the use of the separate and specific application of the Internal Market Information System ('IMI') as the electronic information exchange system to facilitate administrative cooperation on the posting of workers.

*Article 8* provides for accompanying measures to develop, facilitate, support, promote and further improve administrative cooperation and to increase mutual trust, including through financial support.

#### 3.4.5 *Monitoring compliance — national control measures — link with administrative cooperation*

Chapter IV 'Monitoring compliance' covers national control measures, including those which may be applied to legally resident and lawfully employed third-country nationals who are posted within the EU by their employer, as well as inspections. It is closely linked with Chapter III (administrative cooperation) and Chapter I (general provisions, in particular Article 3 (1) and (2), so should be read in close connection with those provisions.

As recognised by the case law of the ECJ, the effective protection of workers' rights, which constitutes an overriding reason of general interest, may equally justify certain national inspections and control measures necessary to carry out the general supervisory task of authorities in monitoring the observance of substantive obligations justified by the general interest<sup>48</sup>. For inspections relating to the implementation of the Directive, however, Member States must abide by Article 56 TFEU and refrain from creating or upholding unjustified and disproportionate restrictions on service providers within the European Union<sup>49</sup>. In the

---

<sup>47</sup> Cf. COM(2007) 304, p. 9. See for further details: Study 'Information provided on the posting of workers', F. Muller, Strasbourg, September 2010. Available on the website: <http://www.ec.europa.eu/social/posted-workers>.

<sup>48</sup> Communication 'Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers', COM(2007) 304 final, 13.6.2007, point 2.2, p. 4. Communication 'Guidance on the posting of workers in the framework of the provision of services, COM(2006) 159 final, 4.4.2006, p. 3. Cf. judgment of 23.11.1999, joined cases C-369/96 and C-376/96, *Arblade and others*, paragraph 38. Cf. also judgment of 19.1.2006, case C-244/04, *Commission v Germany*, paragraph 36 and judgment of 21.10.2004, case C-445/03, *Commission v Luxembourg*, paragraph 39/40 (both judgments concern third-country nationals as posted workers).

<sup>49</sup> See, in this context, the *Rush Portuguesa* judgment, cited above, paragraph 17, as well as the judgments of 21.10.2004, *Commission v Luxembourg*, case C-445/03, paragraph 40, and 19.1.2006, *Commission v Germany*, C-224/04, paragraph 36.



*Finalarte* cases<sup>50</sup>, the Court accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that Member State, to the extent that this difference in treatment was justified by objective differences between those businesses and businesses established in the host Member State.

However, as equally acknowledged by the ECJ, there is at the same time no doubt a link between the existence of an organised system for cooperation and exchange of information<sup>51</sup> and the possibility for Member States to apply certain control measures in order to monitor compliance. Indeed, an effectively functioning system of this kind may render certain obligations superfluous<sup>52</sup>.

Administrative cooperation and national control measures are thus two sides of the same coin. For certain aspects of the notion of posting, such as the genuine link of the employer with the sending Member State, the Member State from which the posting takes place plays the key role, whereas matters such as compliance with the terms and conditions of employment to be respected in the country where the services are provided can only be controlled in the host Member State. Close collaboration by both countries is also necessary on other matters, such as the indicative qualitative criteria to be used in the context of the notion of posting. Therefore, both countries are an essential part of an effectively functioning system of cooperation and exchange of information, even if the actual scope of their activities in this context may differ.

The effectiveness of administrative cooperation as well as the control and monitoring already carried out in the Member State of establishment are thus important elements in the case-by-case assessment of the compatibility of national control measures with EU law<sup>53</sup>. Therefore, a review clause has been included in order to evaluate the situation further, in particular to examine the necessity and appropriateness of the application of national control measures in the light of the experiences with and effectiveness of the functioning of the system of administrative cooperation as well as technological developments<sup>54</sup> (*Article 9, paragraph 3*).

The monitoring exercise launched on the basis of the Commission's Communication of April 2006 not only highlighted the striking diversity of national control measures used by Member States, but also showed that many Member States appear to rely solely on their own national measures and instruments to control service providers<sup>55</sup>. Moreover, those were applied in a

---

<sup>50</sup> Judgment of 25 October 2001, joined cases C-49/98, 50/98, 52/98, 54/98, 68/98 and 71/98 (*Finalarte Sociedade de Construção Civil L<sup>da</sup> v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others*), paragraphs 69-74.

<sup>51</sup> Judgment of 23.11.1999, joined cases C-369/96 and C-376/96, *Arblade and others*, paragraph 61 and 79, of 18.7.2007, C-490/04, *Commission v Germany*, paragraph 78; cf. conclusions AG Ruiz-Jarabo Colomer, case C-490/04, paragraphs 81-88, conclusions AG Trstenjak, case C-319/06, *Commission v Luxembourg*, paragraph 86, conclusions AG Cruz Villalón, case C-515/08, *Santos Palhota e.a.* paragraph 92.

<sup>52</sup> Such as the retention of documents in the host Member State after the employer has ceased to employ workers, cf. judgment of 23.11.1999, joined cases C-369/96 and C-376/96, *Arblade and others*, paragraph 79.

<sup>53</sup> Cf. COM(2007) 304, p. 7, first paragraph, last sentence.

<sup>54</sup> Moreover, the mandate of the Expert Committee on Posting of Workers will be adapted in order to establish clearly its role in examining the feasibility of developing more uniform, standardised templates for the social documents accepted by the Court as being compatible with EU law (such as time sheets, payslips, etc.).

<sup>55</sup> Cf. COM(2007) 304, p. 6-8 and 11.

way not always justified or proportionate in view of the objectives pursued and were thus not in conformity with Article 56 TFEU as interpreted by the ECJ.

In its case law, the ECJ has further clarified the compatibility of certain national control measures with EU law. It reiterated that a proportionate prior declaration requirement is an appropriate measure for enabling subsequently the necessary checks to be carried out and preventing fraud<sup>56</sup>. Moreover, with respect to the obligation to keep certain specific social documents within the territory of a Member State, the ECJ<sup>57</sup> accepted that the obligation imposed on foreign businesses to retain the employment contract (or an equivalent document within the meaning of Directive 91/533), payslips, time-sheets and proof of payment of wages at the building site, as well as an obligation to translate the relevant documents into the language of the Member State concerned<sup>58</sup>, did not constitute unjustified and disproportionate restrictions on the freedom to provide services<sup>59</sup>. A similar obligation to keep copies equivalent to the individual accounts and payslips at the workplace<sup>60</sup> or at the address of the employer's agent or servant on the territory of the Member State concerned was likewise considered not to violate the Treaty provisions on the freedom to provide services<sup>61</sup>.

However, notwithstanding the requirements indicated in the previous paragraph, the Court decided that Member States may not impose any of the following requirements on a service provider established in another Member State which temporarily posts workers to another Member State for the provision of its services:

- an obligation for the provider to have an establishment in their territory;
- an obligation for the provider to obtain an authorisation from or to be registered with their competent authorities, including entry in a register or registration with a professional body or association in their territory, or to satisfy any other equivalent requirement, except where provided for in other instruments of EU law;
- an obligation to designate a representative or ad hoc agent established, domiciled or residing in the host Member State;
- a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to be able to provide the services in question;

---

<sup>56</sup> Judgment of 7.10.2011, case C-515/08, dos Santos Palhota, par. 54 and 52 and of 1.10.2009, C-219/08, Commission v Belgium, par. 16 and the case law referred to.

<sup>57</sup> Judgment of 18.7.2007, case C-490/04, Commission v Germany, paragraphs 56–80.

<sup>58</sup> Acknowledging that on-site supervision would be extremely difficult, even impossible, in practice, if those documents could be presented in the language of the Member State where the undertaking is established (par. 71). However, the Court equally indicated that of particular importance for its conclusion in this respect was the fact that the translation requirement concerned only four documents that were not excessively long and for which standard forms were generally used (par. 76).

<sup>59</sup> An important element in the Court's assessment was that the necessary or requested information (without which the national authorities cannot carry out their supervisory task effectively) could not be easily obtained via the employer or the authorities in the Member State of establishment within a reasonable period of time and/or less restrictive measures would not ensure achievement of the objectives of the national control measures deemed necessary.

<sup>60</sup> Cf. for a similar requirement to keep certain documents on site or in an accessible and clearly identified place, judgment of 23.11.1999, joined cases C-369/96 and C-376/96, Arblade and others, paragraph 64-66, judgment of 25 October 2001, joined cases C-49/98, 50/98, 52/98, 54/98, 68/98 and 71/98 (Finalarte Sociedade de Construção Civil L<sup>da</sup> v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others), paragraph 74.

<sup>61</sup> Judgment of 7.10.2010, case C-515/08, dos Santos Palhota, paragraphs 55-58 and 42.

- an obligation to keep certain social documents on its territory, without any exception and/or time limitation, when the information can be obtained via the employer or the authorities in the Member State of establishment within a reasonable period of time;
- an obligation to draw up relevant social documents in accordance with the rules of the host country.

It is considered appropriate to clarify this case law by codifying it in the present proposal, indicating clearly which requirements are compatible with obligations under EU law and which are not. By complying with their obligations, Member States would substantially contribute to reducing administrative burdens in line with the objectives set by the European Council. SMEs would benefit from better enforcement of the existing Directive, a more level playing field and fairer competition. Improved administrative cooperation and effective and adequate inspections based on risk assessment would make inspections more effective and reduce costs for companies in non-risk sectors or situations and thus contribute to less burdensome controls<sup>62</sup>.

Furthermore, in line with ILO Convention No 81<sup>63</sup>, effective and adequate inspections, primarily based on regular risk assessment by the competent authorities, should be carried out in order to control and monitor compliance with the applicable rules (*Article 10*). In order to reflect the different industrial relations systems and diversity of systems of control in the Member States, other actors and/or bodies may also monitor certain terms and conditions of employment of posted workers, such as the minimum rates of pay and working time.

#### 3.4.6. *Enforcement — defence of rights, subcontracting chains, liability and penalties*

Chapter V (*Articles 11 and 12*) relates to the enforcement and defence of rights, which in itself concerns a fundamental right: the Charter of Fundamental Rights of the European Union confirms the right to effective remedy for everyone whose rights and freedoms guaranteed by the law of the European Union are violated or not respected.

##### *Complaint mechanisms*

To facilitate better enforcement and ensure more correct application in practice of Article 6 of Directive 96/71/EC, effective mechanisms need to be in place for posted workers to lodge complaints directly or through designated third parties, such as trade unions, subject to their approval (*Article 11*). This is without prejudice to the jurisdiction of the courts in the Member States as laid down, in particular, in the relevant instruments of Union law and/or international conventions as well as to national rules of procedure concerning representation and defence before the courts. Common institutions of social partners in so far as they are covered by Article 3 (1) of Directive 96/71/EC may equally have a legitimate interest in ensuring that the provisions of Directive 96/71/EC are complied with.

##### *Joint and several liability*

The protection of workers rights is a matter of particular concern in subcontracting chains, which are particularly widespread in the construction sector in the European Union. There is evidence that, in a number of cases, posted workers are exploited and left without payment of wages or part of the wages they are entitled to under the Directive 96/71/EC. Posted workers

---

<sup>62</sup> See for further details IA Study, pp. 55–56.

<sup>63</sup> Labour Inspection Convention 1947, ratified by the 27 Member States.

may also not be able to enforce their wage claims against their employer because the company has disappeared or never really existed. Adequate, effective and dissuasive measures are necessary in order to ensure the compliance of subcontractors with their legal and contractual obligations, particularly as regards workers' rights. Moreover, increased transparency in subcontracting processes will enhance the overall protection of workers' rights.

The European Parliament has referred to the need to table a proposal in parliamentary questions<sup>64</sup> and has adopted several resolutions on this issue, calling upon the Commission to establish a legislative instrument on joint and several liability at EU level, in particular for long subcontracting chains<sup>65</sup>.

However, a cautious approach is required in this respect in order to take due account of the variety of legal systems in place in the Member States, as well as the impact such a system may have on cross-border service provision within the Internal Market. It is therefore understandable that differing views among stakeholders exist as to the feasibility and/or desirability of an instrument at EU level<sup>66</sup>.

Currently, only a limited number of Member States (8) and Norway establish joint and/or several liability for parties other than the direct employer with regard to social security contributions, taxes and/or (minimum) wages. Substantial differences exist between the various national systems for several and joint liability<sup>67</sup>. The different legal traditions and industrial relations cultures in the countries concerned indicate that the systems adopted are highly specific to each national situation and few elements, if any, are transferable to a European solution.

Further research confirms that even if some mechanisms for joint and several liability show similarities, they remain significantly different in terms of scope, actual implementation and effectiveness, including in cross-border situations<sup>68</sup>.

In its constant case law, the Court of Justice of the EU reiterates that the protection of workers rights can justify a restriction to the freedom to provide services. In the *Finalarte* case<sup>69</sup>, the Court also indicated that a difference in treatment between foreign and national companies can be justified by objective differences and does not necessarily constitute a discrimination contrary to the freedom to provide services.

The case law of the Court of Justice of the EU provides some guidance on the possible incompatibility of some existing joint and several liability systems with obligations under EU

---

<sup>64</sup> See for instance E-6753/2011 and E-5137/09.

<sup>65</sup> See for instance Resolution A6-0065/2009 of 26.3.2009 on the basis of the own-initiative Lehtinen report as well as point 9 of the recently adopted report on the mid-term review of the European strategy 2007-2012 on health and safety at work (2011/2147(INI)).

<sup>66</sup> Cf.: Communication on the outcome of the public consultation on the Commission's Green Paper 'Modernising labour law to meet the challenges of the 21<sup>st</sup> century', COM(2007) 627 final, 24.10.2007, p. 8.

<sup>67</sup> Cf. study 'Liability in subcontracting processes in the European construction sector' carried out by the European Foundation for the Improvement of Living and Working Conditions in 2008. <http://www.eurofound.europa.eu/publications/htmlfiles/ef0894.htm>.

<sup>68</sup> Study on the protection of workers' rights in subcontracting processes in the European Union, Ghent University, 2012. The preliminary final results have been taken into consideration.

<sup>69</sup> Judgment of 25.10.2001, case C-49/98.

law. In its judgment in the *Wolff-Müller* case<sup>70</sup>, the Court declared that the German (chain) liability scheme for minimum wage payments under certain conditions could be considered as a justified measure, whereas a Belgian joint liability scheme for (wage) tax debts was deemed to be disproportionate and thus incompatible with the Treaty provisions on the freedom to provide services<sup>71</sup>.

The current proposal contains specific provisions concerning contractors' obligations and (joint and several) liability with respect to compliance with the relevant terms and conditions of employment of posted workers by subcontractors (*Article 12*). The focus is on preventive measures, combined with the possibility for Member States who so wish to maintain or implement more far-reaching systems of joint and several or chain liability.

The provisions are limited to the construction sector, as defined by the list of activities included in the Annex to Directive 96/71. Posting by temporary work agencies is included provided it is aimed at activities in the construction sector. However, Member States may, if they so wish, extend these provisions to other sectors.

This balanced package of measures should reflect sufficiently the variety and diversity of existing systems at national level, while at the same time avoiding adding unnecessary or unjustified administrative burden for companies. Furthermore, companies should not assume the responsibilities of public authorities to verify the application of labour laws by other companies. However, in line with the OECD Guidelines for Multinational Enterprises, responsible business conduct and governance should at least require them to carry out risk-based due diligence when selecting subcontractors. There is equally evidence to suggest that proportionate risk management can make good business sense<sup>72</sup>.

The proposal for this Directive takes a comprehensive approach to enforcement, including awareness raising (better information), state enforcement mechanisms (inspections and sanctions) and private law enforcement mechanisms (joint and several liability). All aspects are important for a balanced approach. Weakening one of the aspects would imply strengthening other aspects of enforcement in order to achieve a similar result. Therefore, all aspects have been included in the proposal in a balanced way. The proposed system of joint and several liability is limited to direct subcontractor situations in the construction sector where most of the cases of non-payment of wages have been reported. Contractors which have undertaken due diligence obligations cannot be held liable in accordance with Article 12(1). Joint and several liability is a mechanism of self-regulation between private actors and a far less restrictive and more proportionate system than possible alternative systems such as pure state intervention by inspections and sanctions.

#### 3.4.7. *Cross-border enforcement of administrative fines and penalties*

Given the transnational nature of posting, the mutual recognition and enforcement of fines and penalties, particularly in the country of establishment of the company posting the workers temporarily to another Member State, is crucial. The absence of a common mutual recognition

---

<sup>70</sup> Judgment of 12.10.2004, case C-60/03.

<sup>71</sup> Judgment of 9.11.2006, case C-433/04, *Commission v Belgium*.

<sup>72</sup> 'Reclaiming health and safety for all: an independent review of health and safety legislation', Professor Ragnar E Löfstedt, nov. 2011, preface.

and enforcement instrument has been identified as causing major practical enforcement problems and difficulties<sup>73</sup>.

Part of the problem is caused by the fact that non-compliance with the obligations under Directive 96/71/EC is sanctioned differently in the Member States<sup>74</sup>. In a number of Member States the sanctions imposed are of a penal or criminal nature, whereas in others they are governed by administrative law, and a combination of the two can also be found. However, the underlying claims concerning the terms and conditions of employment to be complied with are mainly (if not all) of a civil nature.

Existing EU instruments govern to a certain extent some of the fines and penalties imposed, including via mutual assistance, and their mutual recognition. For example Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties<sup>75</sup> provides for the mutual recognition of financial penalties<sup>76</sup> and thus facilitates via a simple and effective system their cross-border enforcement. It also covers the recognition and enforcement of decisions concerning offences serving the purpose of implementing obligations arising from instruments adopted under the Treaties. The recognition and enforcement of judgments with respect to underlying claims of a civil nature is governed by the Brussels I Regulation<sup>77</sup>.

With respect to fines and penalties of an administrative nature, which can be appealed to courts other than penal courts, similar instruments do not exist. Therefore, Chapter VI (*Articles 13 – 16*) sets out a system for the cross-border enforcement of such administrative fines and penalties. The systems established for the recovery of social security claims by Regulation 987/2009<sup>78</sup> and for tax claims by Directive 2010/24/EU<sup>79</sup> were used as a source of inspiration. The IMI system will be used for the necessary mutual assistance and cooperation between the competent authorities.

This Chapter does not aim to establish harmonised rules for judicial cooperation, jurisdiction, or the recognition and enforcement of decisions in civil and commercial matters, or to deal with applicable law. Equally, other EU instruments that govern such matters in general terms remain applicable.

#### 3.4.8. *Final provisions - Penalties*

---

<sup>73</sup> Communication ‘The implementation of Directive 96/71/EC in the Member States’, COM(2003) 458 final, 25.7.2003, p. 20, as well as the Commission report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SEC(2006) 439, p. 28/29.

<sup>74</sup> See for further details the CIBELES project:  
[http://www.mtin.es/itss/web/Sala\\_de\\_comunicaciones/Noticias/Archivo\\_Noticias/2011/11/22112011\\_n\\_ot\\_web\\_port.html](http://www.mtin.es/itss/web/Sala_de_comunicaciones/Noticias/Archivo_Noticias/2011/11/22112011_n_ot_web_port.html).

<sup>75</sup> OJ L 76, 22.3.2005, p. 16.

<sup>76</sup> Including administrative fines, provided the decisions concerned can be appealed to a penal court.

<sup>77</sup> Council Regulation (EC) 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001. Cf. Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21.4.2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004.

<sup>78</sup> Regulation 978/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 30.10.2009, in particular Articles 75–85.

<sup>79</sup> Directive 2010/24 of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31.3.2010.

*Article 17* contains the standard provision for penalties in the case of non-compliance, which should be effective, proportionate and dissuasive (*Article 17*). Effectiveness requires the sanction to be suitable for achieving the desired goal, i.e. observance of the rules. Proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the goal. Dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators.

The appropriate legal basis for the use of the Internal Market Information System ('IMI') as the electronic information exchange system to facilitate administrative cooperation is provided for in *Article 18*, whereas *Article 19* contains the necessary technical amendments to the IMI Regulation.

#### **4. BUDGETARY IMPLICATIONS**

This proposal is expected to have implications for the EU budget.. Costs for grants (projects, seminars, exchange of good practice etc) of 2 million EUR as well as for the Expert Committee on the Posting of Workers of 0,264 million EUR per year will be covered by PROGRESS (2013) and the Programme for Social Change and Innovation (2014-2020). Costs of 0,5 million EUR for an ex-post evaluation study in 2016 will be covered by the Programme for Social Change and Innovation. Costs for human resources of 0,232 million EUR and other administrative expenditure (travel costs 0,01 million EUR; stakeholder conferences every second year 0,36 million EUR) will be covered under heading 5 of the Multiannual Financial Framework. Details are explained in the financial statement annexed to this proposal.

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>80</sup>,

Having regard to the opinion of the Committee of the Regions<sup>81</sup>,

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty. The implementation of these principles is further developed by Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.
- (2) The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions in comparison to nationals of that Member State. It needs to be distinguished from the freedom to provide services, which includes the right of undertakings to provide services in another Member State, for which they may send ('post') their own workers temporarily to carry out the work necessary to provide these services there.

---

<sup>80</sup> OJ C , , p. .

<sup>81</sup> OJ C , , p. .



- (3) With respect to workers temporarily posted to carry out work in order to provide services in another Member State than the one in which they habitually carry out their work, 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>82</sup> establishes a core set of clearly defined terms and conditions of work and employment which must be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned.
- (4) In order to prevent, avoid and combat circumvention and/or abuse of the applicable rules by companies taking improper or fraudulent advantage of the freedom to provide services enshrined in the Treaty and/or the application of Directive 96/71/EC the implementation and monitoring of the notion of posting should be improved.
- (5) Therefore, the constituent factual elements characterising the temporary nature inherent to the notion of posting, which implies that the employer should be genuinely established in the Member State from which the posting takes place, as well as the relationship between Directive 96/71/EC and Regulation (EC) No 593/2008 on the law applicable to contractual obligations (hereinafter the ‘Rome I Regulation’)<sup>83</sup> need to be further clarified.
- (6) As is the case with Directive 96/71/EC, this Directive should not prejudice the application of the law which, under Article 8 of the Rome I Regulation, applies to individual employment contracts, or the application of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems<sup>84</sup> and Regulation No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems<sup>85</sup>.
- (7) Respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the Treaty<sup>86</sup>.
- (8) Trade unions play an important role in the context of the posting of workers for the provision of services since social partners may, in accordance with national law and/or practice, determine the different levels (alternatively or simultaneously) of the applicable minimum rates of pay<sup>87</sup>.
- (9) For the purpose of ensuring that a posted worker receives the correct pay and provided allowances specific to posting can be considered part of minimum rates of pay, such allowances should only be deducted from wages if national law, collective agreements and/or practice of the host Member State provide for this.
- (10) Adequate and effective implementation and enforcement are key elements in protecting the rights of posted workers, whereas poor enforcement undermines the

---

<sup>82</sup> OJ L 18, 21.1.1997, p. 1.

<sup>83</sup> OJ L 177, 4.7.2008, p. 6.

<sup>84</sup> OJ L 166, 30.4.2004, p. 1.

<sup>85</sup> OJ L 284, 30.10.2009, p. 1.

<sup>86</sup> Article 152 of the Treaty on the Functioning of the European Union.

<sup>87</sup> Cf. judgment 15.4.2008, case C-268/06, Impact, in particular points 123 and 129.

effectiveness of the Union rules applicable in this area. Close cooperation between the Commission and the Member States is therefore essential, without neglecting the important role of labour inspectorates and the social partners in this respect.

- (11) Mutual trust, a spirit of cooperation, continuous dialogue and mutual understanding are essential in this respect.
- (12) In order to facilitate better and more uniform application of Directive 96/71/EC, it is appropriate to provide for an electronic information exchange system to facilitate administrative cooperation and competent authorities should use the Internal Market Information System (IMI) as much as possible. However, this should not prevent the application of bilateral agreements or arrangements concerning administrative cooperation.
- (13) Administrative cooperation and mutual assistance between the Member States should comply with the rules on the protection of personal data laid down in Directive 95/46/EC, and with regard to administrative cooperation through the Internal Market Information System (IMI), it should also comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data<sup>88</sup> and Regulation (EU) xxx (IMI Regulation) on administrative cooperation through the Internal Market Information System (IMI)".
- (14) Member States obligations to make information on terms and conditions of employment generally available and to provide effective access to it, not only to service providers from other Member States, but also to the posted workers concerned, should be further concretised.
- (15) Member States should determine the way in which providers and recipients are provided with easily accessible relevant information, preferably by making this information accessible through a website, following web accessibility standards. Such websites should include in particular any website put in place pursuant to EU legislation with a view to promote entrepreneurship and/or the development of the cross-border of services.
- (16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain control measures or administrative formalities to undertakings posting workers for the provision of services. Such measures and requirements may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and the necessary information cannot be obtained easily from the employer of posted workers or the authorities in the Member State of establishment of the service provider within a reasonable delay and/or less restrictive measures would not ensure that the objectives of the national controls measures deemed necessary are attained.

---

<sup>88</sup> OJ L 8, 12.1.2001, p. 1.

- (17) A comprehensive system of preventive and control measures, together with deterrent penalties to identify and prevent individual instances of bogus self-employed, should contribute to combat concealed employment effectively.
- (18) To ensure better and more uniform application of Directive 96/71/EC as well as its enforcement in practice, and to reduce, as far as possible, differences in the level of application and enforcement across the Union, Member States should ensure that effective and adequate inspections are carried out on their territory.
- (19) National labour inspectorates, social partners and other monitoring bodies are of paramount importance in this respect and should continue to play a crucial role.
- (20) In order to cope in a flexible way with the diversity of labour markets and industrial relations systems, by way of exception, other actors and/or bodies may monitor certain terms and conditions of employment of posted workers, provided these offer the persons concerned an equivalent degree of protection and exercise their monitoring in a non-discriminatory and objective manner.
- (21) Member States' inspection authorities and other relevant monitoring and enforcement bodies should avail themselves of the cooperation and exchange of information provided for in the relevant legislation in order to verify whether the rules applicable to posted workers have been respected.
- (22) Member States are particularly encouraged to introduce a more integrated approach to labour inspections. The need to develop common standards in order to establish comparable methods, practices and minimum standards at Union level should equally be examined.
- (23) To facilitate the enforcement of Directive 96/71/EC and ensure more effective application of it, effective complaint mechanisms should exist through which posted workers may lodge complaints or engage in proceedings either directly or through relevant designated third parties, such as trade unions or other associations as well as common institutions of social partners. This should be without prejudice to national rules of procedure concerning representation and defence before the courts.
- (24) In view of the prevalence of subcontracting in the construction sector, and in order to protect posted workers' rights, it is necessary to ensure that in such sector at least the contractor of which the employer is a direct subcontractor can be held liable to pay to posted workers the net minimum rates of pay due, any back-payments of outstanding remuneration and/or contributions due to common funds or institutions of social partners regulated by law or collective agreement in so far as these are covered by Article 3 (1) of Directive 96/71/EC in addition to or in place of the employer. The contractor shall not be held liable if he/she has undertaken due diligence. The latter may imply preventive measures concerning proof provided by the subcontractor, including where relevant based upon information emanating from national authorities.
- (25) In specific cases, other contractors may, in accordance with national law and practice, be also held liable for failure to comply with the obligations under this Directive, or their liability may be limited, after consultation of the social partners at national or sectoral level.

- (26) The obligation to impose a liability requirement on the contractor where the direct subcontractor is a service provider, established in another Member State, posting workers is justified in the overriding public interest of the social protection of workers. Such posted workers may not be in the same situation as workers employed by a direct subcontractor established in the Member State of establishment of the contractor with regard to the possibility to claim outstanding pay or refunds of taxes or social security contributions unduly withheld.
- (27) The disparities between the systems of the Member States for enforcing imposed administrative fines and/or penalties in cross-border situations are prejudicial to the proper functioning of the internal market and risk making it very difficult, if not impossible, to ensure that posted workers enjoy an equivalent level of protection throughout the Union.
- (28) Effective enforcement of the substantive rules governing the posting of workers for the provision of services should be ensured by specific action focusing on the cross-border enforcement of imposed administrative fines and penalties. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite in order to ensure a higher, more equivalent and comparable level of protection necessary for the proper functioning of the internal market.
- (29) The adoption of common rules for providing mutual assistance and support for enforcement measures and the associated costs, as well as the adoption of uniform requirements for the notification of decisions relating to administrative penalties and fines imposed, should resolve a number of practical cross-border enforcement problems and guarantee better communication and better enforcement of such decisions emanating from another Member State.
- (30) Notwithstanding the establishment of more uniform rules with respect to the cross-border enforcement of penalties and fines and the need for more common criteria for follow-up procedures in the event of the non-payment of these they should not affect the Member States' competences to determine their system of penalties, sanctions and fines or the recovery measures available under their internal legislation.
- (31) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, or the recognition and enforcement of decisions in civil and commercial matters, or to deal with applicable law.
- (32) Member States should take appropriate measures in the event of failure to comply with the obligations laid down in this Directive, including administrative and judicial procedures, and should provide for effective, dissuasive and proportionate penalties for any breaches of the obligations under this Directive.
- (33) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably protection of personal data (Article 8), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31), and the right to an effective remedy and to a fair trial (Article 47) and has to be implemented in accordance with those rights and principles.

- (34) Since the objective of this Directive, namely to establish a general common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty of the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER I GENERAL PROVISIONS**

### *Article 1 Subject matter*

1. This Directive establishes a general common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules.

This Directive aims to guarantee respect for an appropriate level of minimum protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers.

2. This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and by Union law, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

### *Article 2 Definitions*

For the purposes of this Directive,

- (a) ‘competent authority’ means an authority designated by a Member State to perform functions under this Directive;
- (b) ‘requesting authority’ means the competent authority of a Member State which makes a request for assistance, information, notification or recovery concerning a penalty or fine as referred to in Chapter V;

- (c) ‘requested authority’ means the competent authority of a Member State to which a request for assistance, information, notification or recovery is made.

*Article 3*  
*Preventing abuse and circumvention*

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC the competent authorities shall take into account factual elements characterising the activities carried out by an undertaking in the State in which it is established in order to determine whether it genuinely performs substantial activities, other than purely internal management and/or administrative activities. Such elements may include:
- (a) the place where the undertaking has its registered office and administration, uses office space, pays taxes, has a professional licence or is registered with the chambers of commerce or professional bodies,
  - (b) the place where posted workers are recruited,
  - (c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand,
  - (d) the place where the undertaking performs its substantial business activity and where it employs administrative staff,
  - (e) the abnormally limited number of contracts performed and/or size of turnover realised in the Member State of establishment.

The assessment of these elements shall be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the Member State in which it is established.

2. In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined.

Such elements may include:

- (a) the work is carried out for a limited period of time in another Member State;
- (b) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 and/or the Rome Convention;
- (c) the posted worker returns or is expected to resume working to the Member State from which he/she is posted after completion of the work or the provision of services for which he or she was posted;
- (d) travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done; as well as

- (e) any repeated previous periods during which the post was filled by the same or another (posted) worker.

All the factual elements enumerated above are indicative factors in the overall assessment to be made and may not therefore be considered in isolation. The criteria shall be adapted to each specific case and take account of the specificities of the situation.

## **CHAPTER II**

### **ACCESS TO INFORMATION**

#### *Article 4* *Role of liaison offices*

For the purposes of this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more competent authorities, which may include the liaison office(s) referred to in Article 4 of Directive 96/71/EC.

Contact details of the competent authorities shall be communicated to the Commission and the other Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.

#### *Article 5* *Improved access to information*

1. Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC which are to be applied and complied with by service providers are made generally available in a clear, comprehensive and easily accessible way at a distance and by electronic means, in formats and by web standards that ensure access to persons with disabilities and to ensure that the liaison offices or the other competent national bodies referred to in Article 4 of Directive 96/71/EC are in a position to carry out their tasks effectively.
2. In order to bring about further improvements with respect to access to information, Member States shall:
  - (a) indicate clearly, in a detailed and user friendly manner and accessible format on national websites which terms and conditions of employment and/or which parts of their (national and/or regional) legislation have to be applied to workers posted to their territory;
  - (b) take the necessary measures to make generally available on internet sites information on which collective agreements are applicable (and to whom), and which terms and conditions of employment have to be applied by service providers from other Member States in accordance with Directive 96/71/EC, whereby, where possible, links to existing internet sites and other contact points, in particular the relevant social partners, shall be provided;

- (c) make the information available to workers and service providers in languages other than the national language(s) of the country in which the services are provided, if possible in summarised leaflet form indicating the main labour conditions applicable and upon requests in formats accessible to persons with disabilities;
  - (d) improve the accessibility of the information and clarity of the information provided on national websites;
  - (e) indicate, if possible, a contact person at the liaison office in charge of dealing with requests for information;
  - (f) keep the information provided for in the country fiches up to date.
3. The Commission shall continue to support the Member States in this area.
  4. Where, in accordance with national law, traditions and practices, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with article 3 paragraph 1 and 8 of that Directive, Member States should ensure that the social partners shall identify these and make the relevant information, in particular concerning the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and the qualifying criteria for classification in the different wage categories, , available in an accessible and transparent way for service providers from other Member States and posted workers.

## **CHAPTER III**

### **ADMINISTRATIVE COOPERATION**

#### *Article 6*

#### *Mutual assistance — general principles*

1. Member States shall work in close cooperation and provide each other mutual assistance in order to facilitate the implementation, application and enforcement in practice of this Directive.
2. The cooperation of the Member States shall in particular consist in replying to reasoned requests for information and to carry out checks, inspections and investigations from competent authorities with respect to the situations of posting referred to in Article 1 (3) of Directive 96/71/EC, including investigation of any abuses of applicable rules on the posting of workers or possible cases of unlawful transnational activities.
3. For the purpose of responding to a request for assistance from competent authorities in another Member State, Member States shall ensure that service providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws.



4. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall rapidly inform the requesting Member State with a view to finding a solution.
5. Member States shall supply the information requested by other Member States or the Commission by electronic means as soon as possible and at the latest within 2 weeks from the reception of a request.

A specific urgency mechanism shall be used for special situations where a Member State becomes aware of particular circumstances requiring urgent action. In such circumstances, the information shall be submitted within 24 hours.

6. Member States shall ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States.
7. Member States shall ensure the confidentiality of the information which they exchange. Information exchanged shall be used only in respect of the matter(s) for which it was requested.
8. Mutual administrative cooperation and assistance shall be provided free of charge.
9. The Commission and the competent authorities shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10) of Directive 96/71/EC.

#### *Article 7*

##### *Role of the Member State of establishment*

1. The Member State of establishment of the service provider shall continue to control, monitor and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State.
2. In the circumstances referred to in Article 3 (1) and (2) and Article 9(1), the Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and this Directive. The Member State of establishment of the service provider shall, on its own initiative, communicate to the Member State to which the posting takes place any relevant information as specified in Articles 3 (1) and (2) and 9(1), where the Member State of establishment of the service provider is aware of specific facts which indicate possible irregularities.
3. Competent authorities of the host Member State may equally ask the competent authorities of the Member State of establishment, for each instance where services are provided or for each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 6.

4. The obligation laid down in paragraphs 1 and 2 shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State where the service is provided. Such checks and controls shall, if need be, be carried out by the authorities of the host Member State at the request of the competent authorities of the Member State of establishment, in accordance with Article 10 and in conformity with the powers of supervision provided for in the host Member State's national law, practice and administrative procedures and which respect Union law.

*Article 8*  
*Accompanying measures*

1. Member States shall, with the assistance of the Commission, take accompanying measures to develop, facilitate and promote the exchange between officials in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring the compliance with and enforcement of the applicable rules.
2. The Commission shall assess the necessity for financial support in order to further improve administrative cooperation and increase mutual trust through projects, including promoting exchanges of relevant officials and training, as well as developing, facilitating and promoting best practice initiatives, including those of social partners at Union level, such as the development and updating of databases or joint websites containing general or sector-specific information concerning terms and conditions of employment to be respected.

## **CHAPTER IV**

### **MONITORING COMPLIANCE**

*Article 9*  
*National control measures*

1. Member States may only impose the following administrative requirements and control measures:
  - (a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, whereby the declaration may only cover the identity of the service provider, the presence of one or more clearly identifiable posted workers, their anticipated number, the anticipated duration and location of their presence, and the services justifying the posting;
  - (b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its

territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;

- (c) a translation of the documents referred to under (b), may be justified provided these documents are not excessively long and standardised forms are generally used for such documents;
  - (d) an obligation to designate a contact person to negotiate, if necessary, on behalf of the employer with the relevant social partners in the Member State to which the posting takes place, in accordance with national legislation and practice, during the period in which the services are provided.
2. Member States shall ensure that the procedures and formalities relating to the posting of workers can be completed easily by undertakings, at a distance and by electronic means as far as possible.
  3. Within three years after the date referred to in Article 20, the necessity and appropriateness of the application of national control measures shall be reviewed in the light of the experiences with and effectiveness of the system for cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.

#### *Article 10* *Inspections*

1. Member States shall ensure that appropriate checks and monitoring mechanisms are put in place and that effective and adequate inspections are carried out on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC and to guarantee its proper application and enforcement. Such inspections shall be based primarily on a risk assessment to be drawn up regularly by the competent authorities. The risk assessment shall identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such risk assessment the realisation of big infrastructural projects, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers shall be taken into account.
2. Member States shall ensure that inspections and controls of compliance with Directive 96/71/EC are not discriminatory and/or disproportionate.
3. If information is needed in the course of the inspections and in the light of the criteria in Article 3, the Member State where the service is provided and the Member State of establishment shall act in accordance with the rules on administrative cooperation, i.e. the competent authorities shall cooperate pursuant to the rules and principles laid down in Articles 6 and 7.
4. In Member States where, in accordance with national law and practice, the setting of the terms and conditions of employment of posted workers referred to in Article 3 of

Directive 96/71/EC, and in particular the minimum rates of pay, including working time, is left to management and labour they may, at the appropriate level and subject to the conditions laid down by the Member States, also the monitor the application of the relevant terms and conditions of employment of posted workers, provided that an adequate level of protection equivalent to that resulting from Directive 96/71/EC and this Directive is guaranteed.

5. Member States where labour inspectorates have no competence with respect to the control and monitoring of the working conditions and/or terms and conditions of employment of posted workers may, by way of exception, after consulting the social partners at national level, establish or maintain arrangements guaranteeing the respect of these terms and conditions of employment, provided that the arrangements offer the persons concerned an adequate degree of protection equivalent to that resulting from Directive 96/71/EC and this Directive.

## **CHAPTER V ENFORCEMENT**

### *Article 11*

#### *Defence of rights — facilitation of complaints — back-payments*

1. For the enforcement of the obligations under Article 6 of Directive 96/71/EC and this Directive, Member States shall ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended.
2. Paragraph 1 shall apply without prejudice to the jurisdiction of the courts in the Member States as laid down, in particular, in the relevant instruments of Union law and/or international conventions.
3. Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the posted workers or their employer, with their approval in any judicial or administrative proceedings provided for with the objective of implementing this Directive and/or enforcing the obligations under this Directive.
4. Paragraphs 1 and 3 shall apply without prejudice to national rules on prescription deadlines or time limits for bringing similar actions and to national rules of procedure concerning representation and defence before the courts.
5. Member States shall ensure that the necessary mechanisms are in place to ensure that posted workers are able to receive

- (a) any outstanding remuneration which, under the applicable terms and conditions of employment covered by Article 3 of Directive 96/71/EC, would have been due;
- (b) refund of excessive costs, in relation to net remuneration or to the quality of the accommodation, withheld or deducted from wages for accommodation provided by the employer.

This paragraph shall also apply in cases where the posted workers have returned from the Member State to which the posting took place.

*Article 12*  
*Subcontracting — Joint and several liability*

1. With respect to the construction activities referred to in the Annex to Directive 96/71/EC, for all posting situations covered by Article 1(3) of Directive 96/71/EC, the Member States shall ensure on a non-discriminatory basis with regard to the protection of the equivalent rights of employees of direct subcontractors established in its territory, that the contractor of which the employer (service provider or temporary employment undertaking or placement agency) is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker and/or common funds or institutions of social partners for non-payment of the following:
  - (a) any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 (1) of Directive 96/71/EC;
  - (b) any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary.

The liability referred to in the present paragraph shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

2. Member States shall provide that a contractor who has undertaken due diligence shall not be liable in accordance with paragraph 1. Such systems shall be applied in a transparent, non discriminatory and proportionate way. They may imply preventive measures taken by the contractor concerning proof provided by the subcontractor of the main working conditions applied to the posted workers as referred to in Article 3 (1) of Directive 96/71/EC, including pay slips and payment of wages, the respect of social security and/or taxation obligations in the Member State of establishment and compliance with the applicable rules on posting of workers.
3. Member States may, in conformity with Union law, provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontractor liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC. Member States may in these cases provide that a contractor that has undertaken due diligence as defined by national law shall not be liable.

4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.

## **CHAPTER VI**

### **CROSS-BORDER ENFORCEMENT OF ADMINISTRATIVE FINES AND PENALTIES**

#### *Article 13*

##### *General principles — mutual assistance and recognition*

1. Without prejudice to the means which are or may be provided for in Union legislation, the principles of mutual assistance and recognition as well as the measures and procedures provided for in this Article shall apply to the cross-border enforcement of administrative fines and penalties imposed for failure to comply with the applicable rules in a Member State on a service provider established in another Member State.
2. The requesting authority may, in accordance with the laws, regulations and administrative practices in force in its own Member State, request the competent authority in another Member State to recover a penalty or fine or notify a decision imposing a penalty or a fine, in so far as the relevant laws, regulations and administrative practices in force in the requested authority's Member State allow such action for similar claims or decisions.

The competent authority in the requesting Member State shall ensure that the request for recovery of a penalty or a fine or notification of a decision imposing a penalty or fine is made in accordance with the rules in force in that Member State, whereas the competent requested authority shall ensure that such recovery or notification in the requested Member State is effected in accordance with the national laws, regulations and administrative practices in force in the latter.

The requesting authority may not make a request for recovery of a penalty or a fine or notification of a decision imposing a penalty or fine if and as long as the fine or penalty, as well the underlying claim and/or the instrument permitting its enforcement in the requesting Member State, are contested in that Member State.

#### *Article 14*

##### *Request for recovery, information or notification*

1. Further to the request by the requesting authority for recovery of a penalty or a fine or notification of a decision imposing a penalty or fine, the requested authority shall provide any information and mutual assistance which would be useful to the requesting authority in the recovery of a fine and/or penalty, as well as, to the extent possible, for the underlying claim.

The request for information concerning the recovery of penalty or fine as well as the notification of a decision concerning such matters shall at least indicate:

- (a) the name and known address of the addressee, as well as any other relevant data or information for the identification of the addressee,
  - (b) the purpose of the notification or request for recovery, the period within which it shall be effected and any dates of relevance to the enforcement process;
  - (c) a description of the nature and amount of the fine or penalty, as well as the underlying claim in respect of which the request is made, and its different components;
  - (d) all other relevant information or documents, including those of a judicial nature, concerning the claim, fine or penalty; and
  - (e) the name, address and other contact details regarding the competent authority responsible for the assessment of the fine and/or penalty, and, if different, the competent body where further information can be obtained concerning the penalty or fine or the possibilities for contesting the payment obligation or decision imposing it.
2. For the purpose of recovery of a penalty or fine or notification of a decision imposing a penalty or fine in the requested Member State, any fine or penalty in respect of which a request for recovery or notification has been made shall be treated as if it were a fine or penalty of the requested Member State.
  3. The requested authority shall promptly inform the requesting authority of the action taken on its request for notification or recovery and, more specifically, of the date on which the instrument or decision was forwarded or notified to the addressee.

The requested authority shall likewise inform the requesting authority of the grounds for refusing a request for information, recovery or notification.

*Article 15*  
*Suspension of the procedure*

1. If, in the course of the recovery or notification procedure, the fine, penalty and/or underlying claim is contested by the service provider concerned or an interested party, the cross-border enforcement procedure of the fine or penalty imposed shall be suspended pending the decision of the appropriate national authority in the matter.

The requesting authority shall without delay notify the requested authority of the contestation.

2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body or judicial authority of that Member State in accordance with its laws and regulations.

*Article 16*  
*Costs*

1. The requested authority shall remit to the requesting authority the amounts recovered with respect to the fines or penalties referred to in this Chapter.

The requested authority may recover amounts from the natural or legal person concerned and retain any costs which it incurs in connection with recovery, in accordance with the laws, regulations and administrative procedures or practices of the requested Member State which apply to similar claims.

2. Member States shall not claim from each other the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive or resulting from its application.

Where recovery creates a specific problem or concerns a very large amount, the requesting and requested authorities may agree reimbursement arrangements specific to the case(s) in question.

3. Notwithstanding the paragraph 2, the competent authority in the requesting Member State shall remain liable to the requested Member State for any costs and any losses incurred as a result of actions held to be unfounded, in terms of the substance of the fine or penalty, the validity of the instrument issued by the requesting authority for the purpose of enforcement and/or any precautionary measures taken by the requesting authority.

## **CHAPTER VII** **FINAL PROVISIONS**

*Article 17*  
*Penalties*

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by [... date of transposition] at the latest. They shall notify without delay any subsequent amendments to them.

*Article 18*  
*Internal Market Information System*

1. The administrative cooperation and mutual assistance between the competent authorities of the Member States provided for in Articles 6, 7, 10(3), 13, 14 and 15



shall be implemented through the Internal Market Information System (IMI), established by [reference to IMI Regulation]<sup>89</sup>.

2. Member States may continue to apply bilateral arrangements concerning administrative cooperation between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers referred to in Article 3 of Directive 96/71/EC, in so far as these arrangements do not adversely affect the rights and obligations of the workers and companies concerned.
3. In the context of bilateral agreements referred to in paragraph 2, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall be used for any follow-up required and shall take precedence over the mechanism(s) foreseen in such a bilateral agreement with respect to administrative cooperation and mutual assistance.

*Article 19*  
*Amendment to [IMI Regulation]*

The following point shall be added to Annex I to [IMI Regulation]:

1. Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services<sup>90</sup>: Article 4;
2. Directive xxxx/xx/EC 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<sup>91</sup>: Articles 6, 7, 10(3), 13, 14 and 15.

*Article 20*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 2 years after its entry into force. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

---

<sup>89</sup> IMI is a secure online application that allows national, regional and local authorities to communicate quickly and easily with their counterparts abroad. It was funded under the IDABC programme (Interoperable Delivery of European eGovernment Services to public administrations, businesses and citizens). See Proposal for a Regulation of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System ('the 'IMI' Regulation), COM (2011) 522 final, 29.8.2011

<sup>90</sup> OJ L18, 21.1.1997.

<sup>91</sup> OJ reference

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 21*  
*Report*

No later than 5 years after the expiry of the deadline for transposition, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

*Article 22* *Entry into force*

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

*Article 23*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels, 21.3.2012

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## LEGISLATIVE FINANCIAL STATEMENT

### **1. FRAMEWORK OF THE PROPOSAL/INITIATIVE**

- 1.1. Title of the proposal/initiative
- 1.2. Policy area(s) concerned in the ABM/ABB structure
- 1.3. Nature of the proposal/initiative
- 1.4. Objective(s)
- 1.5. Grounds for the proposal/initiative
- 1.6. Duration and financial impact
- 1.7. Management method(s) envisaged

### **2. MANAGEMENT MEASURES**

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

### **3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE**

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
  - 3.2.1. *Summary of estimated impact on expenditure*
  - 3.2.2. *Estimated impact on operational appropriations*
  - 3.2.3. *Estimated impact on appropriations of an administrative nature*
  - 3.2.4. *Compatibility with the current multiannual financial framework*
  - 3.2.5. *Third-party participation in financing*
- 3.3. Estimated impact on revenue

## LEGISLATIVE FINANCIAL STATEMENT

### 1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

#### 1.1. Title of the proposal/initiative

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

#### 1.2. Policy area(s) concerned in the ABM/ABB structure<sup>92</sup>

Employment, social solidarity  
Single Market Policy  
Internal Market for services

#### 1.3. Nature of the proposal/initiative

- The proposal/initiative relates to **a new action**
- The proposal/initiative relates to **a new action following a pilot project/preparatory action**<sup>93</sup>
- The proposal/initiative relates to **the extension of an existing action**
- The proposal/initiative relates to **an action redirected towards a new action**

#### 1.4. Objectives

##### 1.4.1. *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

Contributing to the European 2020 targets:  
- Promote increased participation in the labour market  
- Develop a safe, flexible and mobile European labour market  
- Promote social and economic cohesion  
Create an effective regulatory framework for the internal market for services, on the basis of sound evidence, in order to benefit consumers and business

##### 1.4.2. *Specific objective(s) and ABM/ABB activity(ies) concerned*

Specific objective No.1 (EMPL):

<sup>92</sup> ABM: Activity-Based Management – ABB: Activity-Based Budgeting.  
<sup>93</sup> As referred to in Article 49(6)(a) or (b) of the Financial Regulation.

Bring about effective application of EU law on matters related to health and safety, labour law in all Member States

Specific objective No.3 (EMPL):

Reinforce effective partnerships with national and pan-European stakeholders in support of outcomes related to employment and social solidarity policy areas

Specific objective No.1 (MARKT):

Deliver on the Single Market Act and promote the development of social business

Specific objective No.12 (MARKT):

Develop the full potential of the Internal Market Information system (IMI) to support improved implementation of single market legislation

ABM/ABB activity(ies) concerned

Employment, social solidarity (EMPL)

Single Market Policy (MARKT)

Internal Market for services (MARKT)

1.4.3. *Expected result(s) and impact*

*Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.*

1. Better protecting the rights of posted workers
  - Improving information regarding the applicable working conditions for posted workers
  - Enabling posted workers to better defend their rights, including in subcontracting chains
  - Clarifying the role of social partners in enforcement activities
  - Improving monitoring and enforcement of working conditions
2. Facilitating cross-border provision of services and improving climate of fair competition
  - Providing for a more precise definition of posting
  - Improving information regarding the obligations of undertakings in respect of applicable working conditions for posted workers
  - Providing for clarity regarding administrative requirements and national control measures
  - Improving administrative cooperation between the responsible national authorities

1.4.4. *Indicators of results and impact*

*Specify the indicators for monitoring implementation of the proposal/initiative.*

Once the substance of future action is clarified, the Commission together with the Expert Committee on the Posting of Workers (ECPW) will develop a limited set of indicators which cover relevant aspects of the operation of the Directive. The initial proposal for a list of

indicators to be tracked is the following (after each indicator the source of the information is provided): (i) the number of searches of national posting websites (provided by Member States); (ii) the number of inter-country cooperation projects on posting promoted by national authorities or social partners (Member States); (iii) the number of requests made through the special IMI application for posting (Commission); (iv) number of litigation cases in national courts (Member States); (v) percentage of inspections leading to sanctions (Member States). The Commission will also continue to collect administrative data on posting based on social security data. With regard to frequency of use, these indicators will be regularly presented and discussed in the ECPW, and will also form part of the set of indicators to be used in the evaluation mentioned below.

## **1.5. Grounds for the proposal/initiative**

### *1.5.1. Requirement(s) to be met in the short or long term*

The proposal will aim at improving and reinforcing the implementation, application and enforcement in practice of the Posting of Workers Directive, including measures to prevent and sanction any abuse and circumvention of the applicable rules.

It will address deficiencies with respect to information for employers and posted workers, in control, monitoring and enforcement action and with regard to administrative cooperation. It will address unnecessary administrative requirements and control measures imposed on service providers, the protection of posted workers in disputes concerning their individual employment conditions, situation in which posting is no longer of a temporary nature or has a rotational character or in which the employer has no genuine link with the sending Member State.

In order to do so, the initiative will introduce more precise provisions regarding the implementation, monitoring and enforcement of the Directive, including the protection of posted worker's rights as well as further criteria to clarify the constituent elements of the notion of posting by so as to better fight circumvention and abuses of the rules.

### *1.5.2. Added value of EU involvement*

The problems identified are linked to the objectives set out by Article 3(3) TEU and Articles 56 and 151 TFEU. Lack of clarity of the existing legal framework on EU level is at the origin of the problems identified. The existing Directive leaving Member States wide margin with regard to implementation, application and enforcement in practice as well as previous attempts to address existing problems by the way of non-binding measures have not been sufficient to solve the identified problems. Therefore, it is necessary to address the existing problems at EU level in order to better achieve the objectives of the Treaty.

### *1.5.3. Lessons learned from similar experiences in the past*

Previous attempts to solve problems of implementation and enforcement in practice of the Posting of Workers Directive by non-legislative means have not reached their objectives. The issues have been addressed by interpretative guidelines in 2006. A monitoring exercise in

2007 showed that there were a number of deficiencies. The respective Communication provided further clarifications for Member States. In 2008, the Commission adopted a Recommendation<sup>94</sup> calling on Member States to take urgent action to improve the situation of posted workers through better cooperation between national administrations, for more effective exchange of information between Member States and better access to information and exchange of best practice.

Since 2009, the Commission launched several ex-post evaluation studies: Study on the economic and social effects associated with the phenomenon of posting of workers in the European Union; Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 12 Member States); Complementary study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (covering 15 Member States); Study on the protection of workers' rights in subcontracting processes in the European Union (ongoing).

In order to prepare the Impact Assessment an ex-ante evaluation study has been carried out by an external consultant in 2011: 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

These recent studies confirmed that a number of the problems identified still exist.

#### *1.5.4. Coherence and possible synergy with other relevant instruments*

**Fundamental rights:** The proposal is consistent with the EU's fundamental rights strategy, COM(2010) 573 final.

**Europe 2020 strategy:** The initiative will contribute to the creation of employment within the strategy for smart, sustainable and socially inclusive growth (Europe 2020).

**Single Market Act:** This initiative is one of the twelve levers identified by the Commission in order to boost growth and reinforce citizens' confidence in the Single Market. The proposal will in particular facilitate the cross-border provision of services and improve the climate of fair competition. This initiative allows for untapping the potential of growth of posting of workers as a key element of the provision of services in the Internal market. In addition, it may contribute to mitigate the social and political tensions raised by controversies around several Court rulings and their perceived effects on industrial relations systems.

**Small Business Act:** To the extent that most undertakings posting workers are SMEs, and that the present initiative envisages facilitating the provision of services by harmonising the implementation and enforcement of the Directive, thereby creating favourable opportunities for business across borders, it is in line with the Small Business Act.

---

<sup>94</sup> Commission Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, OJ C 85, 4.4.2008, p. 1–4.

Smart Regulation: The initiative is also in line with the Smart Regulation agenda, designed to achieve regulation which is of the highest quality possible, in full respect of the principles of subsidiarity and proportionality. The present proposal is based on a full evaluation of existing legislation and policies, covering legal, economic and social aspects. They aim at making legislation clearer and more accessible and drive Member States and social partners' efforts to ensure more effective and coherent enforcement of legislation. It takes into account the outcome of consultation with stakeholders, especially the European social partners.

Internal Market Information System (IMI): The initiative proposes to use IMI in the area of posting of workers to improve administrative cooperation between Member States. It is in line with the Commission's strategy for expansion and further development of IMI, COM(2011) 75 final. It is linked to the Commission's proposal for a horizontal Regulation on IMI, COM(2011) 522 final.

EU Programme for Social Change and Innovation (follow-up PROGRESS): Accompanying measures, in particular projects of non-governmental organisations and social partners, will be financed via call for proposals under the new EU Programme for Social Change and Innovation, COM(2011) 609 final, in order to support the implementation and application in practice of the initiative. (2 million Euro per year).

#### 1.6. Duration and financial impact

Proposal/initiative of **limited duration**

- Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY
- Financial impact from 2013 to 2020

The implementation of the directive is of unlimited duration and it is expected that the successor programme(s) of Social Change and Innovation Programme will keep bearing the related costs after 2020.

Proposal/initiative of **unlimited duration**

- Implementation with a start-up period from 2013 to 2014,
- followed by full-scale operation

#### 1.7. Management mode(s) envisaged<sup>95</sup>

**Centralised direct management** by the Commission

**Centralised indirect management** with the delegation of implementation tasks to:

---

<sup>95</sup> Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: [http://www.cc.cec/budg/man/budgmanag/budgmanag\\_en.html](http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html)



- executive agencies
  - bodies set up by the Communities<sup>96</sup>
  - national public-sector bodies/bodies with public-service mission
  - persons entrusted with the implementation of specific actions pursuant to Title V of the Treaty on European Union and identified in the relevant basic act within the meaning of Article 49 of the Financial Regulation
- Shared management** with the Member States
- Decentralised management** with third countries
- Joint management** with international organisations (*to be specified*)

*If more than one management mode is indicated, please provide details in the "Comments" section.*

Comments

## 2. MANAGEMENT MEASURES

### 2.1. Monitoring and reporting rules

*Specify frequency and conditions.*

Five years after the deadline for transposition there will be a on-going evaluation. The main focus of this evaluation will be to assess the initial effectiveness of the Directive as modified. Emphasis will be placed on analysis of enhanced cooperation arrangements between Member State and quality of information generated by these arrangements. This evaluation will be carried out by the Commission with the assistance of external experts. Terms of reference will be developed by Commission services. Stakeholders will be informed of and asked to comment on the terms of reference through the Expert Committee on the Posting of Workers (ECPW), and they will also be regularly informed of the progress of the evaluation and its findings. The findings will be made public.

### 2.2. Management and control system

#### 2.2.1. Risk(s) identified

Regarding accompanying measures under the EU Programme for Social Change and Innovation: Under this programme, centralised direct management will involve the attribution of numerous contracts and grants for specific activities and the payment of numerous grants to governmental and non-governmental organisations. The main risk will be relating to the

---

<sup>96</sup> As referred to in Article 185 of the Financial Regulation.

capacity of (especially) smaller organisations to effectively control expenditure as well as to ensure the transparency of operations carried out.

2.2.2. *Control method(s) envisaged*

Regarding accompanying measures under the EU Programme for Social Change and Innovation: The control measures indicated in COM(2011) 609 final will be used.

**2.3. Measures to prevent fraud and irregularities**

*Specify existing or envisaged prevention and protection measures.*

Regarding accompanying measures under the EU Programme for Social Change and Innovation: Measures to prevent fraud and irregularities indicated in COM(2011) 609 final will be used.

### 3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

#### 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing expenditure budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Description.....]	Diff./non-diff. (97)	from EFTA <sup>98</sup> countries	from candidate countries <sup>99</sup>	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
1	04.04.01.03 (may change with new programme) <sup>100</sup> PROGRESS (replaced by the Programme for Social Change and Innovation in 2014)	Diff	YES	Yes	No	NO
1	04.01.04.10 (may change with new programme) <sup>101</sup> PROGRESS (replaced by the Programme for Social Change and Innovation in 2014)	non-diff	YES	No	No	NO

- New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [Heading.....]	Diff./non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 18(1)(aa) of the Financial Regulation
	[XX.YY.YY.YY]		YES/N	YES/N	YES/N	YES/NO

<sup>97</sup> Diff. = Differentiated appropriations / Non-diff. = Non-Differentiated Appropriations

<sup>98</sup> EFTA: European Free Trade Association.

<sup>99</sup> Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

<sup>100</sup> The financial impact indicated under this budget line is covered by PROGRESS (2013) and the EU Programme for Social Change and Innovation (2014-2020, follow-up PROGRESS), COM(2011) 609 final.

<sup>101</sup> The financial impact indicated under this budget line is covered by PROGRESS (2013) and the EU Programme for Social Change and Innovation (2014-2020, follow-up PROGRESS), COM(2011) 609 final.

			0	0	0	
--	--	--	---	---	---	--

### 3.2. Estimated impact on expenditure

#### 3.2.1. Summary of estimated impact on expenditure

EUR million (to 3 decimal places)

Heading of multiannual financial framework:		1	Sustainable growth (from 2014 onwards: Smart and Inclusive Growth)									
DG: EMPL <sup>102</sup>			Year 2013 <sup>103</sup>	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	TOTAL	
• Operational appropriations												
04.04.01.03 (may change with new programme for Social Change and Innovation)	Commitments	(1)	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	16,000	
	Payments	(2)	0,800	2,000	2,000	2,000	2,000	2,000	2,000	2,000	14,800	
Appropriations of an administrative nature financed from the envelope for specific programmes <sup>104</sup>												
04.01.04.10 (may change with new programme for Social Change and Innovation)		(3)	0,264	0,264	0,264	0,764	0,264	0,264	0,264	0,264	2,612	
	Commitments	= <sup>1</sup> + <sup>1a</sup> + <sup>3</sup>	2,264	2,264	2,264	2,764	2,264	2,264	2,264	2,264	18,612	
<b>TOTAL appropriations</b>												

<sup>102</sup>

For details on the general IMI funding see COM(2011) 522 final (proposal on the IMI Regulation).

<sup>103</sup>

Year N is the year in which implementation of the proposal/initiative starts.

<sup>104</sup>

Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.

<b>for DG EMPL</b>														
		Payments	=2+2a +3	1,064	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	
• TOTAL operational appropriations	Commitments		(4)	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	
	Payments		(5)	1,064	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes			(6)											
<b>TOTAL appropriations under HEADING I</b> of the multiannual financial framework	Commitments		=4+6	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	
	Payments		=5+6	1,064	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	2,264	
												<b>18,612</b>		
												<b>17,412</b>		

<b>Heading of multiannual financial framework:</b>	<b>5</b>	<b>" Administrative expenditure "</b>
--	----------	---------------------------------------

EUR million (to 3 decimal places)

DG: EMPL	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	<b>TOTAL</b>
• Human resources	0,232	0,232	0,232	0,232	0,232	0,232	0,232	0,232	<b>1,856</b>
• Other administrative expenditure	0,010	0,360	0,010	0,360	0,010	0,360	0,010	0,360	<b>1,48</b>
<b>TOTAL DG EMPL</b>	0,242	0,592	0,242	0,592	0,242	0,592	0,242	0,592	<b>3,336</b>

<b>TOTAL appropriations under HEADING 5</b> of the multiannual financial framework	0,242	0,592	0,242	0,592	0,242	0,592	0,242	0,592	<b>3,336</b>
---	-------	-------	-------	-------	-------	-------	-------	-------	--------------

EUR million (to 3 decimal places)

	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	<b>TOTAL</b>
<b>TOTAL appropriations under HEADINGS 1 to 5</b> of the multiannual financial framework	2,506	2,856	2,506	3,356	2,506	2,856	2,506	2,856	<b>21,948</b>
Commitments	1,306	2,856	2,506	3,356	2,506	2,856	2,506	2,856	<b>20,748</b>

3.2.2. Estimated impact on operational appropriations

- The proposal/initiative does not require the use of operational appropriations
- The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to 3 decimal places)

Indicate objectives and outputs ↓	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2019	TOTAL										
										OUTPUTS									
										Average cost of the output <sup>105</sup>	Type of output <sup>105</sup>	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost	Number of outputs	Cost
SPECIFIC OBJECTIVE No 1 <sup>106</sup> : Effective application of EU law																			
Exchange of best practices, training, mutual learning, capacity building in order to improve administrative cooperation between national	0,400	Projects, conferences, seminars, good practice guides (grants)	5	2,000	5	2,000	5	2,000	5	2,000	5	2,000	5	2,000	40	16,000			

<sup>105</sup> Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).  
<sup>106</sup> As described in Section 1.4.2. "Specific objective(s)..."





### 3.2.3. Estimated impact on appropriations of an administrative nature

#### 3.2.3.1. Summary

- The proposal/initiative does not require the use of administrative appropriations
- The proposal/initiative requires the use of administrative appropriations, as explained below:

EUR million (to 3 decimal places)

	Year 2013 <sup>107</sup>	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020	TOTAL
--	-----------------------------	--------------	--------------	--------------	--------------	--------------	--------------	--------------	-------

<b>HEADING 5 of the multiannual financial framework</b>									
Human resources	0,232	0,232	0,232	0,232	0,232	0,232	0,232	0,232	<b>1,856</b>
Other administrative expenditure	0,010	0,360	0,010	0,360	0,010	0,360	0,010	0,360	<b>1,48</b>
<b>Subtotal HEADING 5 of the multiannual financial framework</b>									

<b>Outside HEADING 5<sup>108</sup> of the multiannual financial framework</b>									
Human resources									
Other expenditure of an administrative nature									
<b>Subtotal outside HEADING 5 of the multiannual financial framework</b>									

<b>TOTAL</b>	0,242	0,592	0,242	0,592	0,242	0,592	0,242	0,592	<b>3,336</b>
--------------	-------	-------	-------	-------	-------	-------	-------	-------	--------------

<sup>107</sup> Year N is the year in which implementation of the proposal/initiative starts.

<sup>108</sup> Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former "BA" lines), indirect research, direct research.

### 3.2.3.2. Estimated requirements of human resources

- The proposal/initiative does not require the use of human resources
- The proposal/initiative requires the use of human resources, as explained below:

*Estimate to be expressed in full amounts (or at most to one decimal place)*

	Year 2013	Year 2014	Year 2015	Year 2016	Year 2017	Year 2018	Year 2019	Year 2020
<b>• Establishment plan posts (officials and temporary agents)</b>								
XX 01 01 01 (Headquarters and Commission's Representation Offices) (1 AD)	127000	127000	127000	127000	127000	127000	127000	127000
XX 01 01 02 (Delegations)								
XX 01 05 01 (Indirect research)								
10 01 05 01 (Direct research)								
<b>• External personnel (in Full Time Equivalent unit: FTE)<sup>109</sup></b>								
XX 01 02 01 (CA, INT, SNE from the "global envelope") (1 SNE)	73000	73000	73000	73000	73000	73000	73000	73000
XX 01 02 01 (CA, INT, SNE from the "global envelope") (0,5 CA)	32000	32000	32000	32000	32000	32000	32000	32000
XX 01 02 02 (CA, INT, JED, LA and SNE in the delegations)								
<b>XX 01 04 yy<sup>110</sup></b>	- at Headquarters <sup>111</sup>							
	- in delegations							
XX 01 05 02 (CA, INT, SNE - Indirect research)								
10 01 05 02 (CA, INT, SNE - Direct research)								
Other budget lines (specify)								
<b>TOTAL</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>	<b>232000</b>

**XX** is the policy area or budget title concerned.

The human resources required will be met by staff from the DG who are already assigned to management of the action and/or have been redeployed within the DG, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

<sup>109</sup> CA= Contract Agent; INT= agency staff ("*Intérimaire*"); JED= "*Jeune Expert en Délégation*" (Young Experts in Delegations); LA= Local Agent; SNE= Seconded National Expert;

<sup>110</sup> Under the ceiling for external personnel from operational appropriations (former "BA" lines).

<sup>111</sup> Essentially for Structural Funds, European Agricultural Fund for Rural Development (EAFRD) and European Fisheries Fund (EFF).

Officials and temporary agents (1 AD)	monitoring transposition, infringement procedures, coordination call for proposals/tenders, coordination administrative cooperation
External personnel (1 SNE)	support to administrative cooperation, support to call for proposals/tenders, evaluation
External personnel (0,5 CA)	management of grants and contracts, relations with beneficiaries of grants and contracts

### 3.2.4. Compatibility with the current multiannual financial framework

- Proposal/initiative is compatible the current multiannual financial framework.
- Proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.

- Proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework<sup>112</sup>.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

### 3.2.5. Third-party contributions

- The proposal/initiative does not provide for co-financing by third parties
- The proposal/initiative provides for the co-financing estimated below:

Appropriations in EUR million (to 3 decimal places)

	Year N	Year N+1	Year N+2	Year N+3	... enter as many years as necessary to show the duration of the impact (see point 1.6)			Total
<i>Specify the co-financing body</i>								
TOTAL appropriations cofinanced								

<sup>112</sup> See points 19 and 24 of the Interinstitutional Agreement.

### 3.3. Estimated impact on revenue

- Proposal/initiative has no financial impact on revenue.
- Proposal/initiative has the following financial impact:
  - on own resources
  - on miscellaneous revenue

EUR million (to 3 decimal places)

Budget revenue line:	Appropriations available for the ongoing budget year	Impact of the proposal/initiative <sup>113</sup>						
		Year N	Year N+1	Year N+2	Year N+3	... insert as many columns as necessary in order to reflect the duration of the impact (see point 1.6)		
Article .....								

For miscellaneous assigned revenue, specify the budget expenditure line(s) affected.

Specify the method for calculating the impact on revenue.

<sup>113</sup> As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25% for collection costs.