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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on the enforcement of Directive 96/71/EC concerning the posting of workers in the
framework of the provision of services
(Text with EEA relevance)**

and

**Proposal for a
COUNCIL REGULATION**

**on the exercise of the right to take collective action within the context of the freedom of
establishment and the freedom to provide services
(Text with EEA relevance)**

{COM(2012) 130 final}
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1. INTRODUCTION

Directive 96/71/EC¹ (hereafter: 'the Directive'), based on Article 53(1) and 62 TFEU, defines the core of mandatory working conditions to be respected in the host country by companies posting workers temporarily to that country. This facilitates the cross-border provision of services considerably as the service provider does not have to know and apply the entire body of employment rules of the host country. At the same time, the Directive provides for a significant level of protection of posted workers and avoids that working conditions in the host country are undermined as an effect of competition.

Posted workers fall in three categories: workers posted under a service contract, intra-corporate transferees or temporary agency workers. The hard core of terms and conditions of employment, as defined in Article 3(1) of the Directive (hereafter also: applicable working conditions), includes: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; 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, of children and of young people; equality of treatment between men and women and other provisions on non-discrimination.

¹ 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.

As far as these terms and conditions of employment are laid down by law, regulation or administrative provision 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 which have been declared universally applicable within the meaning of Article 3(8). Member States may apply terms and conditions of employment laid down by such collective agreements or arbitration awards with regard to other activities than building work (Article 3(10) second indent) and on matters other than those referred to in Article 3(1) in the case of public policy provisions (Article 3(10) first indent) in accordance with primary law.

The Directive also includes in Articles 4, 5 and 6 provisions on information, administrative cooperation, enforcement and jurisdiction.

2. GATHERING INFORMATION AND CONSULTING STAKEHOLDERS

Since 2009, the Commission launched four ex-post evaluation studies concerning social, economic and legal aspect of posting. In order to prepare the Impact Assessment, an ex-ante evaluation study has been carried out by an external consultant in 2011. The work of the Expert Committee on the Posting of Workers (ECPW) has been taken into consideration, in particular the pilot project on electronic information exchange using a separate and specific application of the Internal Market Information System (IMI) in the area of posting of workers.

The Commission held a public consultation on 50 proposals to re-launch the single market (Communication "Towards a Single Market Act" of 27 October 2010), including two proposals concerning the legislative initiatives assessed by this Impact Assessment. On 27/28 June 2011, the Commission organised a Conference on fundamental social rights and the posting of workers in the framework of the provision of services in Brussels gathering key stakeholders (Member States, social partners at EU and national level, EU institutions and international organisations as well as academics and researchers). On this occasion stakeholders and key political actors have had an additional opportunity to express their views on Commission ideas regarding the regulatory options and possible content of the legislative initiatives announced in the Single Market Act: a so-called 'Monti II Regulation' and an Enforcement Directive.

3. PROBLEM DEFINITION

3.1. The phenomenon of posting

3.1.1. Extent of the phenomenon

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 the Commission in cooperation with national authorities². However, this database has several limitations. It measures the number of postings, not the number of posted persons (the same person can be posted several times). Furthermore, the E101 social security form is not issued to all posted

² 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".

workers, either because it is not required (postings of over 12 months are not considered for social security purposes) or because some companies do not apply for E101 forms when workers are posted, especially in the cases of very short-term postings.

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.

In relation to labour mobility within the EU, the number of postings represented 18.5% of non-national EU-27 citizens in the labour force in 2007. However, posting concerns only a small share of the total 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). While posting is a significant phenomenon in terms of labour mobility, especially in some countries and sectors, it remains a relatively small observable phenomenon in the EU labour market.³

3.1.2. Sector-specific breakdown

The available data suggest that on average in 2009, around 55% of posted workers were sent to the industrial sectors. Most important among these sectors is construction sector with 24% of overall postings. The service sector represented on average 44% of postings of which the most important are financial intermediation and business activities (16%) as well as transport, storage and communication (7%). In the construction sector there is a strong presence of SMEs in posting, mainly as subcontractors.⁴

The findings of two studies⁵ which assessed the factors that influence the phenomenon of posting, suggest that the following factors are most relevant: geographical proximity seems to be the most relevant factor able to explain the distribution of flows of posting (the direction and the extent of the phenomenon); labour costs for receiving countries; labour and skill shortages as well as specialisation, in particular for posting from high labour cost countries to other Member States; unemployment rate for sending countries (in particular in low labour cost countries); level of economic market integration between Member States (however less relevant).

3.1.3. Effects of posting

Despite its small size as compared to the overall workforce, the posting of workers plays an important role in the cross-border provision of services, in particular sectors. The possibility to provide services internationally represents an opportunity for business expansion across Europe, particularly for SMEs. Posting provides business and job opportunities, and is a source of additional income in sending countries. It contributes to the improvement of competitiveness and efficiency in receiving countries.

³ Cf. 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>, executive summary. The percentage provides only a rough indication of the weight of postings on non-nationals EU-27 citizens in the labour force (it is likely to be an overestimation). On the one hand, a E101 certificate does not represent a full-time one-year equivalent worker, on the other, the Labour force survey which provides the data on non-nationals EU-27 citizens in the labour force does not cover posted workers.

⁴ Idea Consult (footnote 3), case study on the construction sector, p. 164.

⁵ Ismeri Europa, Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, Draft final report; Idea Consult (footnote 3).

Posting has implications for the labour markets of both sending and receiving countries. It offers job opportunities in sending countries and fills skill and labour shortages in the receiving countries. Therefore, posting contributes to a more efficient allocation of labour across boundaries. However, it can have 'displacement' effects in the receiving labour markets, whereby local workers are substituted by posted ones. The strength of this effect will depend on the existence of an oversupply of labour in particular sectors and professions. At the same time, it should be underlined that, since employment creation in the EU relies heavily on the development of an integrated market for services, posting may effectively contribute to support job creation.

3.2. The problems to be addressed

3.2.1. Problems related to the implementation, monitoring and enforcement of the applicable working conditions of posted workers, including the protection of worker's rights

3.2.1.1. Problem 1a: Deficiencies with respect to information for employers and posted workers

Despite the obligation in Article 4 (3) of the Directive, the information concerning the applicable working conditions in the host Member State is often difficult to obtain, uneven, and of insufficient quality. This information is crucial for service providers in order to guarantee the applicable working conditions and for posted workers in order to claim their rights.

3.2.1.2. Problem 1b: Deficiencies in control, monitoring and enforcement action

According to Article 5 of the Directive, Member States have to ensure compliance with the provisions of the Directive by taking appropriate measures, in particular to ensure adequate procedures for enforcement of the applicable working conditions. The 'how' of monitoring and enforcement of the rights conveyed in the Directive is left to the national level. Deficiencies with regard to control, monitoring and enforcement action cause a serious risk that applicable working conditions in the host state are not respected, in particular with respect to wages, working time and health and safety conditions. They may also facilitate anti-competitive behaviour. Such gaps are compounded by the short-term nature of much of the posting taking place, which makes the task of controlling authorities more difficult.

3.2.1.3. Problem 1c: Unnecessary administrative requirements and control measures imposed on service providers

Member States should comply with the obligation inscribed in Article 5 of the Directive in line with prevailing EU law, in particular the freedom to provide services as interpreted by the Court of Justice. The monitoring exercise in 2007 showed that several Member States impose administrative requirements and control measures on service providers which are incompatible with prevailing EU law.⁶

⁶ 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.

3.2.1.4. Problem 1d: Deficiencies with regard to administrative cooperation

Article 4(1) and (2) of the Directive impose obligations as regards cooperation between national administrations, and makes it the responsibility of Member States to create the necessary conditions for such cooperation. However, the provisions included in the Directive are not sufficiently precise. The proper functioning of administrative cooperation among Member States is an essential instrument for compliance control. Its virtual absence referred to in COM(2007) 304 undermines the operation of the Directive and may at least partly explain other problems like disproportionate national control measures.

3.2.1.5. Problem 1e: Posted workers are not adequately protected in disputes concerning individual employment conditions

Article 6 of the Directive contains a jurisdiction clause allowing the posted worker to enforce his rights granted by the Directive in the host state. However, there is evidence indicating that posted workers are not adequately protected in disputes concerning individual employment conditions.

3.2.2. *Abuse of the posted workers status in order to evade or circumvent legislation*

3.2.2.1. Problem 2a: Posting is no longer of a temporary nature or has a rotational character

In order to justify the difference in treatment between posted workers (core protection) and migrant workers (equal treatment), posting has to be of temporary nature. If the duration of the posting is excessive, and becomes permanent, the presumption behind the difference in legal status between these two categories of workers is no longer valid. The same situation occurs if the same or different employees are repeatedly recruited by an undertaking with the purpose of being posted to another Member State for carrying out the same job (rotational postings).

The problem is mainly driven by the absence of criteria which would enable Member States authorities to determine if a posting is of temporary nature. The Directive defines the posted worker as a worker who, for a *limited period of time* carries out his work in the territory of a Member State other than the State in which he normally works. There is however no indication as to the temporary nature of the posting.⁷ The Directive neither provides for a fixed time limit nor other criteria to determine the temporary character of the stay in the host State⁸. There is no reference either to the possibility of repeated posting for the same job.

⁷ CJEU, judgment of 11 December 2003, case C-215/01, *Schnitzer*; 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>, p. 46-48, 187-189 (recommendations 1, 11, 12).

⁸ Requested periods of previous employment in the sending Member State in the context of posting of third country nationals of 6 or 12 months were considered as incompatible with Article 56 TFEU by the CJEU (cases C-445/03, *Commission v Luxembourg*; C-168/04, *Commission v Austria*; C-244/04, *Commission v Germany*). See also 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>, recommendation 12 (reimbursement of expenditure for travel).

However, the social security legislation applying to posted workers⁹ sets a time limit of two years for posting and excludes the possibility of repeated postings for the same job.

3.2.2.2. Problem 2b: The employer has no genuine link with the sending Member State

The Directive provides that the posting undertaking has to be 'established' in a Member State. This requires the existence of a genuine link between the undertaking and the sending Member State. However, the Directive does not set the criteria in order to determine the existence of such a genuine link. The social security administrative rules applying to posting are more explicit, as they establish criteria allowing to define posting more precisely. With regard to the activities in the sending Member State, such rules require that an undertaking ordinarily carries out substantial activities in the territory of the Member State in which it is established in order to be authorised to post its workers to another Member State.¹⁰ In order to evade or circumvent employment or social security legislation, unscrupulous employers may direct their operations involving the posting of workers exclusively towards the market of another Member State without having in fact any relevant economic activity in the country where they are formally registered.

The use of 'letter-box' companies is particularly problematic in this respect. These companies are opened in the sending country only for the purpose of evading social security and labour legislation of often one specific host Member State.

3.2.3. *Problems related to the unclear or controversial interpretation of the terms and conditions of employment of the Directive*

3.2.3.1. Problem 3a: The scope and level of the terms and conditions of employment

In countries where minimum wages are set by law or by universally applicable collective agreements, their application to posted workers is straightforward, however, in countries where no such tools exist, an uncertain situation is created for undertakings and workers.

Authorities of the countries deprived of minimum wages set by law or by universally applicable collective agreements have not appreciated the full scale of the consequences of the uncertainty created by the absence of provisions regarding posted workers, or were eager to maintain their traditional industrial relations systems unaffected by the application of the Directive.

3.2.3.2. Problem 3b: Unclear level of protection with regard to the notion of 'minimum rates of pay'

It is legally unclear which components of the wage paid form part of the minimum rate of pay in the host Member State. The definition of the concept of minimum rates of pay is in principle a matter for the host Member State, which is explicitly referred to in the last sentence of Article 3 (1), however, within the limits of the jurisprudence of the CJEU.¹¹ The definition may thus vary from one Member State to another. Member States may determine

⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

¹⁰ Article 12 of Regulation (EC) 883/2004 in conjunction with Article 14(2) of Regulation (EC) 987/2009 and Decision A2.

¹¹ See in this respect case C-341/05, Laval, in particular points 60 and 68.

the various allowances and bonuses which are included in the minimum pay applicable. Some Member States restrict it to the minimum wage as such others include different kinds of bonuses, allowances or contributions to funds. Existing jurisprudence¹² did not clarify this issue.

3.2.4. Problem 4: Tensions between the freedom to provide services/establishment and national industrial relation systems

The rulings of the Court, interpreting the Directive and Treaty provisions, in cases Viking and Laval, exposed underlying tensions between the freedoms to provide services and of establishment, and the exercise of fundamental social rights such as the right of collective bargaining and the right to industrial action. In particular, the rulings were perceived by trade unions as imposing a screening of industrial action by EU or national courts whenever such action could affect or be detrimental to the exercise of the freedom to provide services or the freedom of establishment. Such perceptions have led in the recent past to negative "spill-over" effects as illustrated by a few transnational industrial disputes.

The importance of this problem has been highlighted in the 2010 Report of the ILO Committee of Experts on the Application of Conventions and Recommendations which expressed 'serious concern' about the practical limitations on the effective exercise of the right to strike imposed by the CJEU rulings. The right to strike is enshrined in ILO Convention No. 87, which is signed by all EU Member States.

3.2.5. Social partners views on the problems identified

Problems 1a, 1b, 1d and 2b are shared concerns of ETUC and BUSINESSEUROPE. However, according to BUSINESSEUROPE only problems 1d and 2b justify an intervention on EU level. With regard to problem 1e ETUC is in favour of a far-reaching system of joint and several liability while BUSINESSEUROPE is against. Concerning problem 1a ETUC would be in favour of a clear time limit for posting while BUSINESSEUROPE is not. Social partners have divergent views on problems 3a and 4 mainly resulting from a different perception of the jurisprudence of the CJEU.

4. OBJECTIVES

4.1. General objectives

The initiative should contribute to the following Treaty-based policy objectives:

- The sustainable development of the internal market, based on a highly competitive social market economy (Article 3 TEU);
- The freedom to provide services across borders and the promotion of a level playing field (Article 56 TFEU);
- The improvement of living and working conditions, so as to make possible their harmonisation while the improvement is being maintained (Article 151 TFEU);

¹² Case C-341/02, *Commission v. Germany*.

- The respect for the diversity of industrial relation systems in the Member States and the promotion of dialogue between management and labour (Article 152 TFEU).

4.2. Specific and operational objectives

4.2.1. Better protecting the rights of posted workers

The following operational objectives are related to this specific objective:

- 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 the applicable working conditions
- Providing for more clarity regarding the interpretation of the provisions concerning the terms and condition of employment of the Directive

4.2.2. Facilitating cross-border provision of services and improving climate of fair competition

The following operational objectives are related to this specific objective:

- 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
- Improving monitoring and enforcement of the applicable working conditions
- Providing for more clarity regarding the interpretation of the provisions concerning the terms and conditions of employment of the Directive

4.2.3. Improving legal certainty as regards the balance between social rights and economic freedoms, in particular in the context of the posting of workers

The following operational objectives are related to this specific objective:

- Clarifying that no primacy exists between the freedom to provide services/freedom of establishment and the right to take collective action, including the right to strike.
- Clarifying that worker's rights may continue to be defended either individually or collectively through trade union action in cross-border situations.

5. ANALYSIS OF SUBSIDIARITY

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 problems 1, 2 and 3 at EU level in order to better achieve the objectives of the Treaty. Legal clarity and certainty with regard to problem 4 can only be achieved at EU level. The action is necessary and proportionate in order to better achieve the objectives of the Treaty.

6. POLICY OPTIONS

6.1. Options and sub-options related to problems 1, 2 and 3

- **Option 1:** No policy change (baseline scenario)
- **Option 2:** Non-regulatory intervention
 - Sub-option 2a: Clarifying Member States' obligations with regard to implementation, monitoring and enforcement of the Directive, including the protection of posted worker's rights (addressing the drivers underlying problem 1)
 - Sub-option 2b: Clarifying the constituent elements of the notion of 'posting' to better fight circumvention and abuses of the rules (addressing the drivers underlying problem 2)
 - Sub-option 2c: Clarifying certain issues related to the interpretation of different aspects of the terms and conditions of employment of the Directive (addressing the drivers underlying problem 3)
- **Option 3:** Regulatory intervention
 - Sub-option 3a: Introducing more precise provisions regarding the implementation, monitoring and enforcement of the Directive, including the protection of posted worker's rights (addressing the drivers underlying problem 1)
 - Sub-option 3b: Introducing further criteria by legislative means to clarify the constituent elements of the notion of posting by so as to better fight circumvention and abuses of the rules (addressing the drivers underlying problem 2)
 - Sub-option 3c: Modifying the scope and level of terms and conditions of employment under the Directive (addressing the drivers underlying problem 3)
- **Option 4:** Repealing the existing regulatory intervention (the Directive)

6.2. Options related to problem 4

- **Option 5:** No policy change (baseline scenario)
- **Option 6:** Non-regulatory intervention
 - Clarifying the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights by the way of a Communication
- **Option 7:** Regulatory intervention
 - Introducing by legislative means rules designed to clarify how the exercise of the fundamental social right to collective action can be made compatible with the freedom of establishment and the freedom to provide services

7. MAIN ECONOMIC, SOCIAL AND ENVIRONMENTAL IMPACTS OF EACH OPTION

With regard to the policy options concerning the posting of workers the impact of different packages (combinations of sub-options) is assessed against the baseline scenario (option 1). The packages address all drivers underlying problems listed under headings 1, 2 and 3 either by legislative or non-legislative means in order to ensure comparability. Packages which address the drivers underlying problems grouped under 1 by non-legislative means (see section 6.1) will not be considered for further analysis since previous attempts to address such problems by non-legislative means have not reached their objectives. Therefore, the following packages will be taken into consideration.

	Sub-option addressing drivers underlying problem 1	Sub-option addressing drivers underlying problem 2	Sub-option addressing drivers underlying problem 3
Package A	3a	2b	2c
Package B	3a	3b	2c
Package C	3a	2b	3c
Package D	3a	3b	3c
intervention by non-legislative means; intervention by legislative means			

With regard to the policy options concerning the tensions between the freedom to provide services/establishment and national industrial relation systems (problem 4) option 6 (intervention by non-legislative means) and option 7 (legislative intervention) are assessed against the baseline scenario (option 5).

7.1. Option 1: Baseline posting of workers

7.1.1. Economic Impact

Continuing deficiencies regarding information, monitoring and enforcement, legal uncertainty regarding administrative requirements as well as abuses and circumvention of the applicable rules will continue to have negative effects on fair competition and the functioning of the single market. SMEs are in particular sensitive to unfair competition on labour costs and will continue to be affected by such deficiencies.

7.1.2. *Social impact*

Negative impact on fair competition will indirectly affect labour markets, job opportunities and worker's rights in sectors and regions where posting is concentrated in receiving countries. Due to wage convergence, this effect might slightly decrease.

7.2. Package A (Regulatory measures to deal with problem 1, combined with non-regulatory measures to deal with problems 2 and 3)

7.2.1. *Economic Impact*

Package A (sub-option 3a) will contribute to fair competition and a more level playing field by providing for more clarity regarding monitoring, controls, enforcement (including joint and several liability), and administrative cooperation. It will facilitate the cross border provision of services by clarifying the administrative requirements Member States may impose on service providers. Increased regulatory certainty and cooperation between Member States will reduce barriers to the provision of services and create positive effects on the development of the single market. Facilitated cross border provision of services will increase competition in the internal market for services.

SMEs are in particular sensitive to unfair competition. Therefore, they will benefit from better enforcement of the existing Directive, a more level playing field and fairer competition. With regard to unfair competition on labour costs, the positive impact on SMEs in receiving countries will be even more significant. Effective and adequate inspections including risk assessment, improved administrative cooperation, cross-border execution of fines and joint and several liability (regarding costs see below) will contribute to better enforcement of the Directive. However, the positive impact will be less significant than in packages B and D since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses. SMEs especially in sending countries will benefit from improved information regarding the applicable working conditions and legal clarity regarding administrative requirements in the host Member State. They will particularly benefit from the removal of some disproportionate forms of control measures which imply extra costs.

Costs for Member States: Administrative burden related to access to information is anticipated to amount to approximately 90,000 EUR (one-off costs) and 180,000 EUR (repetitive costs per year) for the EU as a whole. Member States will benefit from the use of IMI, better administrative cooperation and the cross-border enforcement of fines. The use of IMI will reduce costs for Member States. Costs for companies: No administrative burden for companies is linked to package A. Additional indirect compliance costs of about €2 million could be expected from businesses adapting their risk assessment in selecting subcontractors to the introduction of joint and several liability in those Member States where such a system is not in place. However, a decrease in compliance costs could be expected as a result of better access to information and reduced administrative requirements of Member States (national control measures) brought about by package A.

7.2.2. *Social impact*

Reducing non-respect of the applicable working conditions and better enforcement of posted workers rights will have a positive impact on existing tensions in receiving high labour cost countries with regard to posting. However, the impact will be less significant than in packages

B and D since package A will not provide for binding legal clarity regarding the definition of posting as well as provisions aiming at reducing abuses. Transparent information and clarity regarding administrative requirements will positively affect market opportunities for sending firms. Working and employment conditions of posted workers will improve due to better information, monitoring and enforcement. At the same time downward pressure on working condition of local workers in receiving countries will decrease.

7.3. Package B (Regulatory measures to deal with problems 1 and 2, combined with non-regulatory measures to deal with problem 3)

Package B is to a large extent identical to package A. However, it provides for binding rules regarding the definition of posting and additional provisions aiming at reducing abuses and circumvention of the applicable working conditions. Therefore, the positive impacts regarding fair competition and a more level playing field, worker's rights and job quality as well as reducing potential downward pressure on local wages is more significant than in package A (no changes in costs).

7.4. Package C (Regulatory measures to deal with problems 1 and 3, combined with non-regulatory measures to deal with problem 2)

7.4.1. Economic Impact

Package C (sub-option 3c) would give the host Member State the possibility to impose a wider set of employment conditions to foreign undertakings than currently foreseen in Article 3 of the Directive. It would also allow for establishing wages for posted workers in excess of the minimum wage rate set by law or collective agreement.

Like package A and B this sub-option will facilitate the cross border provision of services by clarifying the administrative requirements Member States may impose on service providers. Increased regulatory certainty and cooperation between Member States will reduce barriers to the provision of services and create positive effects on the development of the single market. However, the economic incentive for posting and therefore for cross-border provision of services would be greatly reduced in this package. Foreign undertakings would have to know in detail the entire body of labour law of all Member States they intended to post workers to. Equal treatment of posted workers as regards wages would suppress the wage cost difference that is an incentive for posting. Indeed, it would create a disincentive given the extra costs incurred by posting (transport, accommodation, administrative formalities). Therefore, this option will decrease competition in the internal market for services in some sectors and regions. Local firms in high labour cost countries will benefit from reduced competition on labour costs. However, firms in sending countries would lose business opportunities.

7.4.2. Social impact

Extending the protection of posted workers beyond the core of mandatory working and employment conditions and/or providing for equal pay with local workers might reduce posting flows and have a negative impact on job opportunities for workers in low labour cost countries. Local firms and workers in receiving high labour cost countries will in principle benefit from less competition on labour costs. Better enforcement of posted workers rights will have a positive impact on fair competition in receiving high labour cost countries with regard to posting. However, the positive impact on fair competition is less significant against the baseline scenario than in package B or D since package C will not reduce abuses and

circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses. The impact in this respect is similar to package A. At the same time, raising significantly the level of protection of posted workers may increase abuses and circumvention of the applicable rules as well as undeclared work if not compensated by additional efforts regarding monitoring, controls and enforcement. Equal working conditions for local and posted workers will greatly reduce the flows of legal posting.

7.5. Package D (Regulatory measures to deal with problems 1, 2 and 3)

The impact of package D is close to the impact of package C. However, the positive impact of package D on fair competition and a more level playing field is more significant against the baseline scenario than in package C since package D will reduce abuses and circumvention of the applicable rules by providing for binding legal clarity regarding the definition of posting and provisions aiming at reducing abuses. In this respect, impacts are similar to package B.

7.6. Option 5: Baseline related to the tensions between the freedom to provide services/establishment and national industrial relation systems (problem 4)

7.6.1. Economic Impact

Regulatory uncertainty in case of conflicts will negatively impact on the functioning of the internal market. Possible loss of support for the single market of an important part of stakeholders would have a significant negative impact. It would create an unfriendly environment for service providers and could include protectionist behaviour.

7.6.2. Social impact

Regulatory uncertainty in case of conflict between the right to strike and fundamental economic freedoms creates a risk of damage claims. Doubts regarding the role of national courts with regard to the exercise of the proportionality test concerning strikes in cross-border conflicts may prevent trade unions from playing their role in protecting worker's rights. This creates a negative impact on the protection of worker's rights. There is a direct negative impact on Article 28 of the Charter (Right of collective bargaining and action) since regulatory uncertainty in this context will weaken trade union involvement in protecting worker's rights.

7.7. Option 6: Non-legislative intervention

7.7.1. Economic Impact

Clarifying the extent to which trade unions can make use of the right to strike in cross-border situations involving the freedom to provide services and the freedom of establishment would have a positive impact on the functioning of the single market, to the extent that it would reduce the scope for legal uncertainty.

7.7.2. Social impact

There is an indirect positive effect on the protection of worker's rights, since this option would clarify social partner's role in protecting worker's rights in case of cross-border social conflict as well as providing for more legal certainty in case of conflict between the right to strike and fundamental economic freedoms. This could strengthen trade union involvement in

protecting worker's rights by providing more legal clarity in case of conflict between the right to strike and fundamental economic freedoms. This clarification could have an indirect positive effect on the functioning of national industrial relation systems. Since the material content of the right to strike differs between the Member States, stressing the important role of national courts in applying the proportionality test on a case-by-case basis while reconciling the exercise of fundamental social rights and economic freedoms should positively affect national industrial relation systems.

7.8. Option 7: Legislative intervention

Option 7 has the same positive impacts as option 6, to the extent that it pursues the same objective of clarifying the jurisprudence of the CJEU. Impacts should be more significant since a Regulation provides for more legal certainty than a soft law approach (option 6). A further provision regarding an alert mechanism would have additional positive impacts. In addition, a legislative intervention would express a more committed political approach by the Commission to respond to a problem that is seen with great concern by the unions and parts of the Parliament.

7.8.1. Economic Impact

Establishing an alert mechanism for situations causing serious damage or grave disruption, or creating social unrest will have an indirect positive impact, to the extent that it would increase transparency and provide timely information to Commission, national authorities and stakeholders of concerned Member states allowing them to intervene if necessary.

7.8.2. Social impact

To the extent that this option clarifies the jurisprudence of the Court of Justice that there is no inherent conflict between the exercise of the right to take industrial action, including the right or freedom to strike, and the freedoms of establishment and to provide services, or primacy of one over the other, it will have a positive impact on Article 28 of the Charter. Recognising the key role of social partners to take action to protect workers' rights, including through industrial actions will also clarify that no incompatibility exists in relation to ILO Convention No. 87.

7.9. Social partner's views on the policy options

With regard to the posting of workers both social partners agree that action on EU level is necessary, excluding option 1 (do nothing) and 4 (repeal the Directive). The preferred option of ETUC would be package D. According to BUSINESSEUROPE the existing problems could be tackled by better administrative cooperation only. As a result, package A is already considered to be too far-reaching, in particular with respect to joint and several liability.

Concerning the problem of tensions between national industrial relation systems and economic freedoms ETUC is in favour of a legislative intervention providing for primacy of social rights over economic freedoms. This would go beyond option 7. BUSINESSEUROPE does not consider EU action necessary

8. COMPARISON OF THE OPTIONS AND PREFERRED OPTION

The options have been compared with regard to their effectiveness, efficiency and coherence with the general objectives of the EU.

The preferred option is a combination of package B and option 7. Package B is overall most effective and efficient in addressing the specific objectives ‘Better protecting the rights of posted workers’, ‘Improving climate of fair competition’ and ‘Facilitating the cross-border provision of services’. It is also most coherent with regard to the general objectives. Option 7 is most effective and efficient with regard to the specific objective ‘Reducing tensions between national industrial relation systems and the freedom to provide services’. The option is most coherent with regard to the general objectives.

The preferred option is proportionate since the costs are relatively small while the benefits are significant.

Package B can be realised by a separate new enforcement Directive which would express more clearly the policy objectives of the Commission – improving and reinforcing the transposition, implementation and enforcement in practice of the Directive, including measures to prevent and sanction any abuse and circumvention of the applicable rules - than a proposal amending the existing Directive. The enforcement Directive would be based on the same legal basis as the Directive 96/71 (Articles 53 and 62 TFEU).

A legislative initiative clarifying the exercise of the fundamental right to collective action within the context of the freedom of establishment and the freedom to provide services would have to be adopted on the basis of Article 352 TFEU. Such an initiative would not establish rules regarding the exercise of the right to strike.

9. MONITORING AND EVALUATION

9.1. Monitoring

Monitoring will take place via Implementation Reports issued by the Commission. The ECPW expert committee should continue to play a role in the follow-up of the implementation of the Directive. Once the substance of future action is clarified, the Commission together with ECPW will develop a strictly 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 on 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); (vi) number of cases reported under the alert mechanism established for cross-border industrial conflicts (Commission). 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.

9.2. Evaluation

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 States 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 the Commission. Stakeholders will be informed of and asked to comment on the terms of reference through the ECPW, and they will also be regularly informed of the progress of the evaluation and its findings. The findings will be made public.