

FIEC is the European Construction Industry Federation, representing via its 29 National Member Federations in 26 countries (23 EU & EFTA and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.

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EUROPEAN CONSTRUCTION
INDUSTRY FEDERATION

FIEC position paper

20.09.2016

FIEC position¹ on the proposal for amending the “Posting” Directive [COM(2016)128]

■ FIEC main messages

- 1) FIEC is of the opinion that the proposed targeted revision is not needed, amongst others considering the on-going implementation of the “Enforcement” Directive 2014/67/EC. There is a real danger of long political and controversial discussions during the legislative procedure creating political divisions between Member States, as well as legal uncertainty and possible conflicts with the “Enforcement” Directive itself.**
- 2) The proposal does not address the real concerns related to “posting”. Most of the problems identified in relation to “posting” are linked, on the one hand, to difficulties or shortcomings in the application and enforcement of the existing legislative framework and, on the other hand, to illegal practices, which will not be solved by this proposal. It is therefore on these problems that priorities must be concentrated before considering possible changes to the legislative framework itself.**
- 3) The proposal presented by the European Commission contains provisions that are of little or no added value, that can interfere with industrial relations and wage setting mechanisms at national level and that create legal ambiguity. It could therefore facilitate frauds and abuses instead of combating them, as well as hamper the provision of cross-border services.**
- 4) FIEC will continue to collaborate in a constructive manner with the European Institutions and all the concerned stakeholders, in order to address adequately the problem of illegal practices and social-fraud in the framework of “posting”.**

¹ This position is not shared by our Belgian member “Confédération Construction”

1. Introduction

On 8/3/2016 the European Commission presented a proposal for a targeted revision of the “Posting” Directive 96/71/EC, with the aim of addressing unfair practices and to promote the principle that the same work at the same place should be remunerated in the same manner.

This proposal is part of an initiative initially entitled “Labour mobility package” which was supposed to include as well a proposal for amending the “Social security” Regulation 883/2004. The latter has been postponed after the referendum in the UK.

This initiative follows the adoption of the “Enforcement” Directive 2014/67/EC, which has to be transposed in the various national legislations by 18/6/2016 and which provided for new and strengthened instruments to fight and sanction circumventions, fraud and abuses. It also laid down provisions to improve administrative cooperation between national authorities in charge of posting.

According to the European Commission both the proposed targeted revision and the “Enforcement” Directive are complementary to each other and mutually reinforcing.

On 18/6/2015 in a letter addressed to the European Commission the Ministries of 7 countries (AT, BE, DE, FR, LU, NL and SE) asked, amongst others, for a “targeted review” of the “Posting” Directive. A few weeks later the Ministries of 9 other countries (BG, CZ, EE, HU, LV, LT, PL, RO and SK) also sent a letter to the Commission for underlining their opposition to an amendment of the “Posting” Directive, which could *“be used to undermine some of the fundamental principles of the EU, including the freedom to provide services”*.

The “reasoned opinions” addressed to the European Commission by 11 Member States triggered the so-called “Yellow card procedure” (as defined in the Protocol nr. 2 on the application of the principles of subsidiarity and proportionality, which is annexed to the Treaties) and on 20/7/2016 the European Commission decided to maintain its initial proposal unchanged and explained the reasons for this in a Communication [COM(2016)505].

2. FIEC main positions

In 2015 the EU sectoral social partners for the construction industry, FIEC and the EFBWW (European Federation of Building and Wood Workers) adopted joint proposals aiming at fighting against social fraud in particular in cross-border operations, which was presented and discussed with Commissioner Thyssen, the Luxembourg Minister for Social Affairs, Mr. Nicolas Schmit, during the Luxembourg EU Presidency, and the Dutch Minister for Social Affairs, Mr. Lodewijk Asscher, during the Dutch EU Presidency.

The practical joint FIEC-EFBWW proposals can all be implemented without any modification of the “Posting” Directive 96/71/EC through initiatives that can be introduced and implemented rapidly. The increasing amount of fraud and abuse that construction companies and workers have to face, in particular in connection with cross-border operations, are undermining our social and economic models. In this respect actions must urgently be taken without taking the risk of going through a new difficult and long legislative procedure.

FIEC also regrets that the proposal for revising the “Social security” Regulation 883/2004 has been postponed. Although it is a separate piece of legislation many frauds in a cross-border context concern wrong payments or non-payments of social security contribution.

For an efficient fight against such frauds and abuses, any envisaged amendments of both pieces of legislation should have been addressed jointly.

Labour mobility, freedom to provide services and lawful “posting” are crucial for the competitiveness of the EU economy, as long as they take place in a framework that can guarantee a level playing field for companies and respect for workers’ rights. Most of the problems identified in relation to “posting” are linked, on the one hand, to difficulties or shortcomings in the application and enforcement of the existing legislative framework and, on the other hand, to illegal practices such as, for example, “letterbox” companies, fake A1 forms, bogus self-employed workers, etc. It is therefore to these aspects that priority must be given before considering possible changes to the legislative framework itself.

3. Detailed comments on the targeted revision

As regards the main provisions introduced by the proposal for amending the “Posting” Directive, FIEC raises the following concerns :

a) Duration of “Posting”

Without prejudice to the possible duration of a temporary provision of services, the proposal introduces new provisions to be applied when the anticipated or the effective duration of posting exceeds 24 months. In both cases the “host Member State” is deemed to be the country in which the work is habitually carried out and, according to the Rome I Regulation (593/2008), the whole labour law of the “host country” will therefore apply to the employment contract of the posted workers concerned, and not just the “hard core” defined in the “Posting” Directive, if no other choice of laws was made by the parties. In order to avoid the circumvention of the proposed provision, the text specifies that in case of replacement of a worker regarding the same task, calculation of the duration of posting must take into account the cumulative duration of posting of the workers concerned, only for those workers posted for at least 6 months.

According to the Commission the EU average of posted workers delivering a service in another country is less than 4 months.

FIEC therefore doubts about the added value of a provision which would *de facto* not cover the vast majority of cases of posting, also in respect of the “6 months” criteria used for calculating the cumulative duration, and which would therefore not offer in this respect a better protection to posted workers – although this is one of the proposal’s main objectives.

Moreover, the provision should apply from the start of the posting assignment whenever it is envisaged for more than 24 months and from the first day subsequent to the 24 months when it effectively exceeds this duration. Besides creating confusion on which legislation to apply, it seems evident those companies who want to fraud and circumvent such provision will never announce that the posting is envisaged for more than 24 months.

The “Rome I” Regulation 593/2008, on the law applicable to contractual obligations, doesn’t provide the basis for indicating the 24 months period as a reference for determining the place where the worker habitually carries out his work and therefore FIEC questions the validity of amending the “Posting” Directive for addressing an issue that is covered by an existing Regulation.

Finally, the “Enforcement” Directive 2014/67/EC already provides in its Art. 4(3) a list of criteria aiming at determining whether or not 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.

b) Minimum rates of pay - Remuneration

The proposal replaces the reference to “minimum rates of pay” by a reference to “remuneration”, on the basis of the case law of the European Court of Justice (ECJ) (Case C-396/13), which indicates that the wording “minimum rates of pay” is not to be taken in its narrowest sense. This implies that the rules on remuneration applicable to local workers, stemming from the law or collective agreements universally applicable within the meaning of Art. 3(8) of the “Posting” Directive, are also applicable to posted workers.

Despite the obligation for Member States to publish on a single official national website the constituent elements of “remuneration” for FIEC the term remains imprecise and leads on the one hand to legal uncertainty and, on the other hand, to more difficulties than for “minimum rates of pay” for companies to understand its scope in different countries.

FIEC also believes that the current difficulties of labour inspectors in controlling the compliance by posting companies with the applicable “minimum rate of pay” will increase if controls have now to take into account the applicable “remuneration”, thereby providing further opportunities for frauds and abuses.

c) Sub-contracting

The proposal adds a new provision dealing with sub-contracting chains, giving the possibility to Member States to oblige undertakings to sub-contract only to undertakings that grant workers certain conditions on remuneration applicable to the (main)contractor, including those resulting from non-universally applicable collective agreements. This is possible only if the same obligations are imposed also on all national sub-contractors.

FIEC is concerned about this provision which contains imprecise and unclear terms (“...*certain terms and conditions of employment covering remuneration...*”), thereby making controls on their effective application by posting companies extremely complicated, and which constitutes a significant obstacle in the contractual freedom and in the freedom of negotiating of companies.

Furthermore, the proposed provision interferes with the national industrial relations systems and wage setting mechanisms, on the one hand, by including also those conditions resulting from non-universally applicable collective agreements, and, on the other hand, for companies with their own collective agreements, by making such agreements inapplicable to some of its workers, in case of posting as sub-contractors.

The “Enforcement” Directive 2014/67/EC in its Art. 12 already contains provisions aiming at allowing Member States to tackle fraud and abuses in sub-contracting chains, which also cover “remuneration”. We therefore do not see the need to amend the “Posting” Directive in this respect, as the terms and conditions of employment are independent of whether the company acts as main or as sub-contractor.