POSITION PAPER

BUSINESSEUROPE

17 May 2016

Revision of the Posting of Workers Directive – BUSINESSEUROPE position

KEY MESSAGES

1 BUSINESSEUROPE is against the Commission's decision to revise the Posting of Workers Directive. This will trigger a prolonged period of debate and political divisions between Member States in times when the EU needs actions promoting unity.

2 The existing Posting Directive provides a fair and level playing field. It adequately protects posted workers in line with the rules and cost of life in a host country, including the respect of minimum rates of pay of the host country as providing a decent level of income in that Member State.

3 To promote fair competition, the policy focus should be on fighting illegal practices, including through the implementation of the 2014 Enforcement Directive. On the contrary, by making lawful postings very difficult the Commission's proposal would have the unintended consequence of increasing the incentives for undeclared work, bogus self-employment and other illegal practices.

4 The Commission's proposal is an attack on the single market. Through new disproportional rules on remuneration, longer postings, and subcontracting it undermines the competitive position of foreign services providers. If adopted, it would hamper cross-border trade in services and consequently overall growth and employment creation as well as convergence in the EU. The proposal would also interfere in national wage setting systems. It seems to imply that companies in subcontracting chains can be obliged to pay the same wages no matter the differences in their productivity and the productivity of individual workers. It may also lead to a situation when workers employed by the same employer, performing the same tasks are being paid differently, depending on a subcontracting contract their employer is involved in.

5 In countries where posting of workers is hotly debated most examples mentioned in the public debate are in fact illegal practices. When it concerns legal postings the key issue to address is the lack of competitiveness of domestic enterprises due to excessive labour costs or lack of productivity and innovation. Reducing or shifting taxes away from labour is what is needed in these countries to increase employment opportunities.

WHAT DOES BUSINESSEUROPE AIM FOR?

- BUSINESSEUROPE aims for encouraging and supporting Member State to fight illegal practices and improve the enforcement of the provisions of Directive 96/71/EC by promoting the transposition and effective application of the Enforcement Directive 2014/67/EU.

BUSINESSEUROPE

POSITION PAPER

17 May 2016

Revision of the Posting of Workers Directive – BUSINESSEUROPE position

I. Introduction

1. On 8 March the European Commission adopted a proposal for amending Directive 96/71/ concerning the posting of workers in the framework of the provision of services (COM(2016) 128 final). The proposal is based on Articles 53(1) and 62 of the TFEU, which are identical to those on which the present Posting of Workers Directive is based.

2. BUSINESSEUROPE regrets that in the run up to the adoption process the Commission declined a joint request by the social partners to be consulted, despite the fact that the proposal directly affects both companies and workers. Moreover, the Commission did not carry out public consultation before publishing the proposal, which means the principles of better regulation were not fulfilled.

3. BUSINESSEUROPE also regrets that the Commission decided not to publish all the elements of the Labour Mobility Package at the same time, as well as deplores the lack of coherence of the proposal for a revision of the Posting Directive with the initiatives aimed at deepening of the single market for services.

II. General comments

<u>EU single market in services contributes to competitiveness, jobs and convergence</u>

4. The single market has added more than 2% of EU GDP and created 3 million new jobs since 1992. EU Member States currently trade twice as much with each other as they would do in the absence of the single market. Our common market is fundamental for European companies, as it facilitates trade with global partners, creates new business opportunities, and offers more choice and better prices to consumers.

5. The freedom to provide services, which includes possibilities for companies to post workers abroad, is an important part of the single market, contributing to increased efficiency and competitiveness of the EU economy. Services account for 71% of EU GDP. Yet, only one fifth of services in the EU are provided across borders, accounting for just 5% of EU GDP compared with 17% for manufactured goods. It is thus essential not to create new barriers in the single market for services, and to facilitate its development.

6. The EU single market in services is also an essential vehicle for achieving a catching-up process within the EU. Productivity and wages in Member States with lower levels of economic development have been growing gradually, so wage differences within

BUSINESSEUROPE a.i.s.b.l.
AVENUE DE CORTENBERGH 168 – BE 1000 BRUSSELS – BELGIUM
TEL +32 (0)2 237 65 11 – FAX +32 (0)2 231 14 45 – E-MAIL main@businesseurope.eu
WWW.BUSINESSEUROPE.EU – Follow us on Twitter @BUSINESSEUROPE
EU Transparency register 3978240953-79

the EU have been declining[1]. But if the single market is not allowed to function smoothly, this catching-up process will be slowed down.

7. In the context of the debate on posting and the allegation that posting workers from less economically developed Member States to more prospering ones leads to "social dumping", it is important to underline that the competition resulting from cross-border service provision is in essence no different than other forms of competition (e.g. resulting from free movement of goods and capital). All forms of competition between or within a Member State can exert influence on prices, profits, wages etc. but lead to more jobs and prosperity overall.

8. Furthermore, by aiming to "*divert the basis of competition away from wage costs*[2]*"* the Commission's proposal seems to disregard the link between wages and productivity that to a large extent is the reason for differences in the level of wages both between and within Member States, and which is essential for job creation and growth in Europe. The proposal, in particular on subcontracting, seems to imply that companies can be obliged to pay the same wages no matter the differences in their productivity and the productivity and performance of individual workers. Despite the claims of the Commission, this is in fact contrary to the principle of equal pay for equal work.

9. The minimum wages are what Member States have decided provide a "decent" income at national level. The minimum rates of pay should therefore remain the basis for EU rules on posting (and not as proposed "*remuneration*").

10. It is important to remember that on top of national rules and contractual obligations all companies operating on the EU single market have to comply with EU social legislation, i.e. about 70 different directives, which provide minimum standards in areas such as health and safety, information and consultation, working time and maternity leave. Part of the rationale behind these directives is to establish a level playing field between companies in the EU and to ensure that competition between companies will not mean a race to the bottom in terms of social standards.

11. Instead of trying to restrict competition in the EU single market, Member States should make efforts to increase their competitiveness, including in terms of labour costs. It is a key concern for European business that the tax wedge on labour in the EU is much higher than in other advanced economies. For example, the tax wedge on average income earners is almost 40% higher in the EU compared to the US and Japan. This relates to the debate on posting of workers as high taxes on labour and social security contributions in some countries are the main reason behind the growing perception of unfair competition coming from service providers from other

[1] e.g. average wages in Polish companies have grown between 2004 and 2014 by 63%, from about 600 EUR to 1000 EUR, and the minimum wage has more than doubled, from 175 EUR in 2004 to 409 EUR today.

[2] Commission Staff Document: Impact Assessment concerning the revision of the Posting of Workers Directive, page 20.

EU countries. Reducing the tax wedge on labour in these countries will be essential to improve their competitive position vis-à-vis other Member States[3].

12. In the context of promoting fairness in competition (both within and between Member States), the fight against illegal practices including undeclared work should be the priority. On the contrary, by making lawful posting and subcontracting very difficult, the Commission's proposal would have the unintended consequence of increasing the incentive for undeclared and illegal work.

13. In common perception, posting is – unjustifiably – often linked with negative labour market phenomena and illegal practices that are in fact unrelated to posting, such as bogus self-employment, undeclared work or human-trafficking. To reduce social and political concerns about posting, policy discourse should be based on facts and stop lumping together posting of workers with these illegal practices.

<u>BUSINESSEUROPE is against the revision of the Posting of Workers Directive</u>

14. The appropriate EU legal framework for posting of workers is already in place. Directive 96/71/EC requires host Member States to apply a range of standards (including e.g. provisions on minimum rates of pay and on equal treatment of men and women) equally for posted and national workers. The Directive is a practical way to ensure fair competition between national and foreign services providers, and for conditions of posted workers to be adequate in view of the costs of life as well as practices in the host country. The Directive has been functioning since 1999 and was further supplemented by the Enforcement Directive of 2014 which still needs to be implemented.

15. The proposed revision is not efficient as it does not address real problems related to posting. The main problem is the lack of enforcement of existing rules. This has been indicated also by the study prepared for the European Commission: "*an important result of the study is a strong consensus between stakeholders across countries on the fact that the current challenges arising in the field of 'posting of workers' are not resulting from the narrow definition of the hard-core but from the poor enforcement, lack of information on existing rules and 'creative' ways of circumventing existing rules with regard to determining and actually paying the minimum rate of pay of posted workers"* [4]

16. The effective implementation of the 2014 Enforcement Directive (Directive 2014/67/EU) is of crucial importance to tackle cases of fraud and abuses of posting and to help law-abiding companies operate in the single market. The Enforcement Directive aims to strengthen cooperation between national authorities, ensure more transparency on terms and conditions of employment to be applied to posted workers, address the problem of letter-box companies, make inspections more

[3] Eurogroup has reaffirmed several times that reducing the tax burden on labour is a clear policy priority (see e.g. Eurogroup statements from 8 July 2014, 12 September 2014 and more recently the statement of 12 September 2015 on 'benchmarking the tax burden on labour").
[4] Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors, final report, January 2016, page 16.

effective and improve cross-border enforcement of fines and penalties. But efforts are now needed in Member States to make the Enforcement Directive truly effective. This means adopting necessary laws, but also devoting adequate resources to enforcement, and engaging in genuine cooperation with other Member States.

17. BUSINESSEUROPE and its members support and are ready to contribute to a good implementation of the Enforcement Directive. We are thus concerned that the Commission's proposal for a revision of the Posting Directive, which changes the basic rules to be enforced, is likely to hamper the process of implementation of the Enforcement Directive. Energy and time of Member States' administrations will be spent on negotiating the new text. Questions may also arise over why to use scarce public resources on e.g. establishing IT systems and procedures for cooperation with other Member States if the rules to be controlled might completely change. Poor enforcement will be harmful for companies and workers alike.

18. The Commission's Impact Assessment admits that there are significant limitations to the accuracy of the data available on posted workers at this point in time. The Impact Assessment further acknowledges that improvements in the availability of reliable data can be expected from the transposition of the Enforcement Directive. BUSINESSEUROPE submits, therefore, that any assessment of the Posting of Workers Directive can only follow the Commission's report on the application and implementation of the Enforcement Directive which is due to be published in June 2019.

19. Despite the increase in the recent years, the number of postings remains low, reaching only 0.7% of a total EU labour force. Any regulation on posting should be thus proportionate to its scale.

20. Posting situations are very diverse. Posting flows are not only going from the less developed parts of the EU to the more prosperous ones but are used in various directions. Posting concerns various sectors of business. Therefore, the Commission should not automatically broaden the scope of sectoral solutions to all sectors, including those where no major problems with postings have been identified.

21. Finally, revising the Posting of Workers Directive is likely to lead to a prolonged period of debate, triggering political divisions between Member States in times when the EU needs actions promoting unity.

<u>Commission's proposal increases complexity and uncertainty for companies posting workers</u>

22. The Commission underlines that "*30% of companies providing services across borders reported problems with existing rules on posting of workers, such as burdensome administrative requirements, paperwork, fees and registration obligations*."[5] BUSINESSEUROPE regrets that the Commission's proposal does

[5] Proposal for a Directive of the European Parliament and of the Council amending 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, Explanatory Memorandum, page 3.

nothing to address these concerns. On the contrary, the Directive, if adopted, would make posting of workers more difficult for companies, in particular SME's, through increased costs, more complex requirements and uncertainty.

23. BUSINESSEUROPE finds that the proposed rules on subcontracting, the proposal to replace the reference to "*minimum rates of pay*" with "*remuneration*", as well as new rules for postings lasting more than 24 months would substantially limit the freedom to provide services guaranteed by the TFEU. This will in turn harm growth and job creation in the EU as well as hamper upward convergence in the level of prosperity between Member States.

24. Any discussions on posting should take into account that the situations of foreign and domestic undertakings are different. A foreign undertaking that wants to post workers bears additional costs resulting solely from performing service in another Member State such as travel or hiring a contact person to cooperate with local administrative bodies as well as additional operating expenses, such as costs of becoming familiar with administrative requirements and regulations in another Member States, fulfilling notification procedures, translating relevant documents and cooperating with inspection authorities in other Member States.

25. As regards further legislative process, BUSINESSEUROPE is of the opinion that the proposal should be discussed both by the Employment Council (EPSCO) and the Competitiveness Council, given a potentially significant impact of the proposal on the internal market in services, as well as subcontracting markets.

III. Specific comments on the Commission's proposal

Minimum rates of pay - Remuneration

26. The Commission's proposal replaces the reference to "minimum rates of pay" in Article 3 of the original Posting Directive by a reference to "remuneration". According to the proposal "*remuneration means all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable (…), in the Member State to whose territory the worker is posted*."

27. For BUSINESSEUROPE it is essential to keep the reference to "*minimum rates of pay*" in the Posting Directive. In spite of the Commission's stated objective to improve the clarity of EU rules on posting, the term "*remuneration*" is imprecise, gives room for various interpretations and it will create legal uncertainty. The term "*minimum rates of pay*", despite certain doubts it raises, is more precise and easier to define, and it has already been clarified by the Court of Justice of the European Union.

28. If the intention of the Commission was to clarify the interpretation of "*minimum rates of pay*" on the basis of ECJ rulings, this could be better done in the form of an interpretative communication or if necessary by adding some elements to the existing definition of minimum rates of pay in Directive 96/71/EC.

29. The Commission claims that the proposal will not affect Member States' competences and traditions in wage setting. In this context, it is concerning that the Commission proposes to delete the reference existing in the current directive that "*minimum rates of pay are defined by the national law and/or practice of the Member State to whose territory the worker is posted*". This provision is important in order to respect national industrial relations systems. Moreover, the more precise the definition of pay will get at the EU level, the more likely it is that it will interfere in national competences in wage setting.

30. We are also concerned that the proposed changes will harm the implementation of the Enforcement Directive. According to the Enforcement Directive, Member States are obliged to publish on a single website information on terms and conditions of employment applicable to workers posted to their territory. We are concerned that Member States will delay putting in place the single website, as applicable terms and conditions are likely to change.

31. What is more, while the formal obligation to publish information on the website is addressed to Member States, it does not necessarily mean that the lack of some information may be an excuse or a mitigating circumstance in case of non-compliance by a company. Given that it is ultimately the employer's responsibility to comply with the core rights to be applied to posted workers in the host Member States, it is essential to maintain a simple and clear legislative framework on posting.

<u>Extension of the scope of the application of universally applicable collective agreements to all sectors</u>

32. The Commission's proposal envisages that the collective agreements universally applicable within the meaning of Article 3(8) should be applicable to posted workers in all sectors of the economy (at present, such obligation only exists in case of the construction sector).

33. BUSINESSEUROPE is concerned with this proposal. Based on Art. 3(10) of Directive 96/71/EC, Member States are permitted to apply universally applicable collective agreements in areas other than construction. But there is no justification to automatically extend the sources of employment standards applicable to posted workers in all sectors, also those where no major problems with postings have been registered. This is disproportionate and contrary to the aim of the Directive 96/71/EC, i.e. ensuring clear and precise standards.

<u>Posting for more than 24 months</u>

34. The Commission's proposal envisages that when the anticipated or the effective duration of posting exceeds 24 months, the host Member State is deemed to be the country in which the work is habitually carried out.

35. BUSINESSEUROPE is against setting such a fixed time limit. Neither the TFEU nor Regulation 593/2008 on the law applicable to contractual obligations (Rome I Regulation) gives basis for adopting the period of 24 months as a reference period to determine a country in which the work is habitually carried out. The proposal to

introduce the 24 months limit to the definition of the notion of where "work is habitually carried out" in the Posting of Workers Directive will create legal uncertainty for companies, since the same term is used in the Rome I Regulation in order to establish the applicable law, and is not linked to a specific time limit. Furthermore, if jurisprudence were to introduce the 24 months limit contained in the Posting Directive as a criterion also for the establishment of the applicable law for employment contracts under the Rome I Regulation, this would lead to considerable problems for companies operating on an EU wide and global scale, where cross border intra company transfers normally have a duration exceeding 2 years. It would lead to heavy administrative procedures required by the change of applicable law. In practice this would create additional barriers to mobility both in the European Single Market and globally, since the rules of the Rome I Regulation would also apply to postings into non-EU countries.

36. Rules requiring parties to change the law applicable to the labour contract in case of posting exceeding 24 months will therefore likely restrict the number of postings in practice, especially for globally operating companies, where longer postings beyond 24 months are the rule.

37. The Commission argues that this change will bring the Posting Directive in line with the social security rules (Regulation 883/04). However, Regulation 883/04 gives Member States the possibility to extend - through bilateral agreements - the initial two year period of payments of social security contributions in the country of origin.

38. Moreover, social security payments in the host country are required only after the two year period has elapsed, unless it is clear from the beginning that the duration of the posting will exceed 24 months. The Commission proposal on the Posting Directive foresees that when the anticipated or the effective duration of posting exceeds 24 months, all working conditions of the host country would have to be applied. It is unclear whether that would apply from the first day of posting or after the 24 months period. The proposal seems to disregard the fact that delays are not unusual for example in infrastructure or construction projects. It is often impossible to predict delays. The proposal would thus lead to uncertainty for foreign companies over the terms and conditions as well as total costs associated with posting. It would also lead to practical difficulties, for example in case there is a need for a retroactive application of host country labour legislation. All this would put foreign services providers at a disadvantage compared to domestic companies.

39. Moreover, the proposal contradicts Article 4(3) of the Enforcement Directive, which already contains the list of criteria to assess whether a worker temporarily carries out work in a Member State other than the one in which he or she normally works. At the latest after the 24 months limit this term would become completely obsolete.

40. The Commission also proposes that if the same tasks are performed in the same place by subsequent posted workers, the period of 24 months will include periods of posting of particular workers that worked for more than 6 months. This is a very unclear rule that can potentially lead to diverse practices at national level and would be very burdensome for companies to apply in practice. For example, it is unclear who will determine the “same tasks” and how it will be done, or whether there could

be retroactive application of host country labour legislation in the event that it is later determined that the posting of different workers resulted in a replacement situation exceeding 24 months.

Subcontracting

41. The Commission's proposal stipulates that "*If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to sub-contract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, the Member State may, on a non–discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1 (1) posting workers to its territory*."

42. BUSINESSEUROPE is concerned with this provision and it is potential impact on the single market and competitiveness. It is worrying that the Commission did not present in its impact assessment any in-depth consideration of the potential consequences of such rules. Such measures would be disproportionate and they could have significant economic consequences, far beyond the issue of posting, as they would affect all subcontracting situations (cross border and purely national).

43. The term "*certain terms and conditions of employment covering remuneration*" is imprecise and will lead to legal uncertainty, various interpretations, and potential conflicts with other parts of the Directive. For example, in some countries terms and conditions of employment may include pensions, which would lead to a conflict with Article 3 of the Directive. There would also be problems of comparisons – for example, when a worker has a contract providing for some terms and conditions of employment which are more favourable and some which are less favourable than the "*certain terms and conditions of employment covering remuneration*" that have to be guaranteed.

44. It is also unclear how the Commission would define and apply non-discrimination and proportionality tests of such provisions, taking into account that foreign companies may not be familiar with institutions, language and terms and conditions of employment in the host Member State, while domestic companies have institutional, cultural and geographic advantages.

45. It is also of concern that the proposal may in fact allow for elimination of all wage competition in subcontracting chains, disrespecting the differences in productivity of different companies and different workers.

46. Companies often act as subcontractors for a number of different companies. This rule may thus lead to a situation of pay discrimination within a company, with workers employed by the same employer, performing the same tasks being paid differently, depending on a subcontracting contract their employer is involved in. Such a rule can also interfere with subcontractors' wage setting systems and collective agreements.

47. The proposal allows Member States to apply stricter employment rules if workers are employed by a company acting as a subcontractor than in case of workers employed by companies which are not subcontractors. This difference in treatment would work to the detriment of subcontracting market and all companies providing services to other companies.

48. BUSINESSEUROPE believes that existing laws (including Enforcement Directive) and ECJ rulings (e.g. C-115/14) already provide for the protection of workers' rights in subcontracting chains. The Commission does not provide any evidence to support the need for new proposals. There is no justification for introducing further rules applicable specifically to subcontracting.

Temporary Agency Work

49. The Commission's proposal envisages that the conditions to be applied to posted agency workers must be those that are, pursuant to Article 5 of Directive 2008/104/EC, applied to national agency workers.

50. BUSINESSEUROPE believes that these provisions are not necessary, as original Posting of Workers Directive already provided for such a possibility. Art. 3(9) of the Directive 96/71/EC stipulates that Member States may provide that temporary work undertakings must guarantee to posted agency workers the terms and conditions which apply to temporary workers in the Member State where the work is carried out. According to Commission's Impact Assessment 15 Member States took advantage of this possibility. BUSINESSEUROPE is of the opinion that this decision should remain at the discretion of Member States, which are best placed to adapt the rules to the situation of their particular labour market.

51. In any case, the consequences of an obligation to apply to posted agency workers the conditions that are applied to national agency workers pursuant to Article 5 of Directive 2008/104/EC have to be assessed carefully. In some countries this might lead to unintended consequences, e.g. in Ireland due to the wide definition of agency worker and employment agency, a wider cohort of posted workers could potentially fall within the scope of this provision than may be intended.