Association Européene des Institutions Paritaires
European Association of Paritarian Institutions
Association Internationale de droit belge - aisbl - 1921

AEIP Position Paper on the Revision of the Posting of Workers Directive 96/71/EG

Brussels, 29 August 2017

On the proposal of the European Commission of 8 March 2016 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 (COM (2016) 0128 final)

and

On the draft report of the European Parliament of 2 December 2016 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 (2016/0070(COD))

Introduction

On 8 March 2016, the European Commission presented a proposal for a reform of the Posting of Workers Directive (Directive 96/71/EC). This proposal contains a set of mandatory rules regarding the terms and conditions of employment to be applied to workers who are employed in one Member State and being posted to another Member State by their employer. The aim of the proposal is to protect posted workers and to facilitate the posting of workers within a climate of fair competition and respect of workers' rights. In its proposal the European Commission presents amendments to the Posting Directive in the areas of long-term posting, remuneration of posted workers, subcontracting and temporary agency workers.

The European Parliament appointed Elisabeth Morin-Chartier (EPP, France) and Agnes Jongerius (S&D, Netherlands) as rapporteurs on 10 May 2016. After a thorough consultation with stakeholders, the rapporteurs published their draft report on 2 December 2016. The draft report aims to establish a balance between ensuring a level playing field for undertakings and granting social protection for workers. Overall 877 amendments have been introduced in the Committee on Employment and Social Affairs, the Committee on Internal Market and Consumer Protection and in the Committee on Legal Affairs.

Key concerns

1. The maximum duration of postings set at 24 months in the legislative proposal is too long and should be significantly reduced as a large majority of postings in the construction industry lasts less than 3 months.
2. In case of replacement of a posted worker, the cumulative duration of posting should take every single posting period into account and not only those of at least 6 months as only a small minority of all posted workers in the construction industry are employed between 3 and 6 months.
3. A provision to offset remuneration elements of „equal or similar nature“ between the home country Member State and the host country Member State must be rejected as it would result in considerable legal and practical uncertainty and create opportunities for abuse and fraud. Furthermore it would not add any value.

1. Long-term posting

Proposal of the European Commission

The new article 2a refers to the labour law which will be applied to all posted workers if the expected or effective posting period exceeds 24 months. If a posting lasts longer than 24 months, the labour law conditions of the host Member State will have to be applied. In order to avoid a circumvention of the 24 months rule by the employer, posting periods of different workers which succeed each other are aggregated. However, there is an exception to this rule for cases where the posting period of a worker lasts less than 6 months *(Article 1, para. (1), subpara. 1 and 2).*

Report of the EMPL committee of the European Parliament

The rapporteurs refer to the favourability principle and add that in cases where a posting exceeds 24 months, the terms and conditions of employment of the host Member State will have to be applied as long as they are more favourable to the posted worker than the ones in the home country Member State *(Amendment 4, Draft Report page 7).*

Opinion

The European Commission proposes that the labour law of the host Member State will be applied to all workers whose posting lasts longer than 24 months. If the labour law conditions of the host Member State will be applied this could also include the obligation to contribute to supplementary pension schemes in the host country.

The derogation for supplementary pension schemes in *Article 1, para (2) (a), lit. c* would not be pertinent as it only refers to wage elements. However, exemptions from the obligation to contribute could arise from Article 6, (2) of Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. According to this provision workers and their employers are exempt from the obligation to contribute if they continue paying into a supplementary pension scheme in another Member State. However, a comparison of the pension schemes is not required.

In practice the question arises whether the period of 24 months and the cumulation rule are adequate and suitable. In 2016, 88 % of all posted workers in the German construction industry were employed up to 3 months whereas only 12 % of all posted workers were employed between 3 and 6 months. The numbers are similar in other countries such as Belgium (more than 60% of all postings in the construction industry last less than 2 months and only 10% of all posted workers are employed more than 7 months), Austria (more than 60% of all postings in the construction industry last up to 3 months and only 16% of all posted workers are employed between 3 and 6 months) and France (the average duration of postings is only 47 days). Therefore, the 24 months rule seems to be of no relevance as the great majority of postings only last up to 3 months. The same applies to the cumulative duration of the posting periods as only workers who are posted for an effective duration of at least 6 months would be taken into consideration. This makes it easy for employers to circumvent the cumulation rule by posting workers for periods shorter than 6 months. This leads to the conclusion that posting periods should be counted from day one.

There is a significant danger that – as it is already the case now under Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems – employers will not declare postings as lasting more than 24 months even if they know from the beginning this will be the case. From a practical point of view, it is important to know at what point in time the host labour law conditions would need to be applied in situations where postings exceed the 24 months limit but were initially declared to last shorter. It is therefore important to elaborate on this specific point in the Directive in order to avoid complex questions on how to cope with a retroactive change in labour law.

2. Remuneration of posted workers

Proposal of the European Commission

The term ‘minimum rates of pay’ is replaced by the term ‘remuneration’. Remuneration differs from minimum rates of pay insofar as it includes additional elements such as bonuses or allowances, if these are imposed by national legislative, regulatory or administrative provisions or by collective agreements which have been declared universally applicable *(Article 1, para. (2)(a)).*

The remuneration elements should be published in a transparent way on one official website in accordance with Article 5 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System *(Article 1, para (2)(a)).*

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The rapporteurs shorten the proposal of the European Commission and suggest that the concept of ‘remuneration’ should be determined by national law and practices. (*Amendment 16, Draft Report page 12).* Moreover, the rapporteurs propose that it should be possible to offset ‘elements of equal or similar nature’ of remuneration (*Amendment 17, Draft Report page 13).*

With regard to the publication of remuneration elements, the rapporteurs add that these should be transparent and easily accessible for posted workers. The Member States should therefore take the necessary measures in accordance with their national legislation and practice while respecting the autonomy of the social partners (*Amendments 8/18, Draft Report pages 9/13).*

Opinion

The Member States must continue to be able to determine which remuneration elements are specifically covered by the Posting of Workers Directive. Independent of this, Amendment 17 deserves critical scrutiny. This Amendment states that „elements of equal or similar nature which are mandatory in both the host and the home Member State, shall be offset to avoid double payment“. This wording creates considerable legal and practical uncertainty as labour

law systems differ significantly from Member State to Member State which makes a final assessment of remuneration elements very difficult if not impossible.

Besides the question whether a remuneration element is equal or similar in nature to another as to its case/structure/objective, it is also not clear to what extent the monetary amount of the element must be comparable. A meaningful comparison requires a case-by-case assessment in the home and host Member States which can be best illustrated by using a practical example: the provision to offset elements of „equal or similar nature“ bears the risk of opening up a discussion as to whether the minimum wage in Bulgaria, for example, is comparable to the minimum wage in Germany. The amounts in the two countries differ significantly as the minimum wage in Bulgaria is approx. 1,47 Euro/hour whereas the minimum wage in the German construction industry is at least 11,30 Euro/hour. The information that would need to be made available for such an offset would be very difficult to verify. The goal of the reform, to make the Posting of Workers Directive more effective, would be thwarted. Moreover, an offset mechanism would entail substantial possibilities for abuse and fraud. In Austria and Germany for instance workers in the construction industry are offered a real advantage through the holiday fund scheme which contributes significantly to their social protection. These advantages include a generous holiday entitlement of at least 25 days per year and a high holiday allowance as well as a transfer of holidays and a worker-friendly enforcement of entitlements even after the end of their posting There is a risk that regulations such as transfer of holidays and legal enforcement of entitlements will not be adequately taken into account when evaluating ‘elements of equal or a similar nature’.

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CONTACT

Bruno GABELLIERI

Secretary General

bruno.gabellieri@aeip.net

info@aeip.net

AEIP - The European Association of Paritarian Institutions

Rue Montoyer 24

B- 1000 Brussels

+32 2 233 54 20

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