



EUROPEAN COMMISSION
 Directorate-General Employment, Social Affairs and Inclusion

The Director-General

ANNEX

On March 8th 2016, the Commission has presented a proposal for a Directive amending the Posting of Workers Directive¹. The Commission's legislative proposal was open for feedback for 8 weeks following the adoption of the proposal, that is, until May 5th 2016.

Feedback from this procedure allowed a wide scope for comments and was in addition to the reasoned opinions issued by fourteen chambers of eleven Member States (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) within the time limit laid down in Protocol No 2 (Article 6) to the Treaties, triggering the subsidiarity control mechanism provided for in the Protocol (Article 7(2)). The reasoned opinions raised issues concerning the competence of the Union to legislate on aspects related to wages, the proportionality of the proposed measures with respect to the objective, the possible impact of the proposed changes on competitiveness, and the adequacy of prior consultation with the social partners.

Accordingly, the proposal has been reviewed and the Commission has set out its position on the proposal, responding to the arguments set out in the reasoned opinions in the Communication on the proposal for a Directive amending the Posting of Workers Directive with regard to the principle of subsidiarity, in accordance with Protocol No 2 adopted on 20 July 2016².

1. Contributors

The Commission received eight replies from stakeholders, namely from: Eurochambres, the Council of European Employers of the Metal, Engineering and Technology-based Industries (CEEMET), the Chambers of Commerce and Industry of the Czech Republic, Hungary, Poland and Slovakia, the Polish Employers' Association (IPP), the Croatian Chamber of Economy, a joint reply of the Swedish Trade Union Confederation (LO), the Confederation of Professional Employees (TCO) and the Swedish Confederation of Professional Associations (Saco), and two replies from individual citizens.

¹ Document COM(2016)128 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0128&qid=1459769597959&from=EN>.

² COM(2016) 505final, <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-505-EN-F1-1.PDF>

2. Feedback on whether action should be taken

The need for the EU to act on revising the Posting of Workers Directive was questioned by Eurochambres, the Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia and that of Croatia, IPP and CEEMET. Three main reasons are brought to the fore. Firstly, these stakeholders do not see the problem of unfair wage competition in the same manner as it is identified by the Commission. Instead it is argued that wage costs constitute a legitimate factor of competition in the context of the free provision of services in the Internal Market, which also reflects the internal economic and social diversity in the EU. Secondly, doubts are cast on the appropriateness of the timing chosen for the revision of the Posting of Workers Directive. In view of the simultaneous process of transposition of the Enforcement Directive 2014/67/EU, these stakeholders stress the need for the prior evaluation of the impact of this Directive in addressing issues related to the enforcement of existing rules. Thirdly, given that the levels of social protection ensured by the existing Posting of Workers Directive are deemed sufficient, the appropriateness of using legislative means to address the problems is questioned.

On the other hand, the individual citizens and the Swedish Trade Union Confederations believe that the proposal should be improved to more forcefully address the problem of social dumping by enhancing the social protection of posted workers. The issues of the partial recognition of qualifications across EU Member States and the insufficient harmonisation of labour, social and fiscal policy in the EU are also raised.

3. Feedback on the content of the proposal

Most respondents share the opinion that it should be made clear that the Member States have an exclusive competence on wage-setting, with IPP and the Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia questioning the need for the EU to act. There is also a general understanding that the changes proposed by the Commission as concerns rules on remuneration require enhanced transparency by the Member States as regards the components of remuneration.

However, the proposed new rules on remuneration as such are not supported by the Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia, IPP and CEEMET. Eurochambres, the Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia, IPP, CEEMET have concerns both on the legal clarity of the concept of remuneration and of the administrative burden which the provision may create for companies, notably small and medium-sized enterprises (SMEs), with a likely negative impact on employment.

With respect to the extension of the applicability of *erga omnes* collective agreements to posted workers in all economic sectors, CEEMET and IPP raise the issue of the difficulty for companies to identify the correct sectoral agreement of the host Member State to be applied in each case of posting.

On the other hand, the Swedish Trade Union Confederations support the broadening of the legal basis of the Directive to include the Social Chapter of the Treaty in order to steer its future interpretation by the European Court of Justice and propose further rules to protect the right to strike and to clarify provisions on annual holidays.

The proposed regulation of long-term postings raises doubts with Eurochambres, the Chamber of Commerce of the Czech Republic, Hungary, Poland and Slovakia, IPP, CEEMET, and the Swedish Trade Union Confederations as regards the clarity of the rule. These stakeholders expect legal uncertainty to transpire especially on the interplay with Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I Regulation), but also on issues such as the absence of a definition of replacement, and the effectiveness of rules regarding the cumulative duration of postings. However, while IPP and the Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia are concerned about the possibly detrimental effect of the provision on restricting the effective length of posting and the freedom to provide services across borders, the Swedish Trade Union Confederations emphasise instead the risk of possible circumvention of the rule through the regular replacement of posted workers.

Finally, CEEMET and IPP contend that the proposed provision on the posting of workers in the context of sub-contracting chains places a disproportionate barrier on the provision of services, is unclear as to its scope of application and has the effect of favouring domestic service providers.

4. Feedback on the decision-making process

The Chambers of Commerce of the Czech Republic, Hungary, Poland and Slovakia, IPP and CEEMET deemed that the adoption of a revised Posting of Workers Directive would have warranted a wider and more transparent consultation process of economic and social partners. These same stakeholders are of the opinion that the Impact Assessment does not provide sufficient evidence to demonstrate the existence and the causes of the identified problems and to assess the possible impact of the proposed new rules.