Cracow, 25th November 2013

Dear Sir or Madam,

Labour Mobility Initiative, All-Polish Convention of Labour Agencies, Polish Chamber of Commerce, Polish HR Forum and Association of Employment Agencies express our **deepest concern** with the direction of work on the enforcement directive of directive 96/71/CE concerning posting of workers in the framework of provision of services.

We are unanimously of opinion that the directive in the form proposed by the EU Parliament **does not serve its primary goal,** which is to fight illegal employment and 'letter-box' companies. On the contrary – it enforces additional responsibilities which will **make it impossible for Polish entrepreneurs**, especially from the sector of small and medium enterprises, to provide services on the internal EU market.

Moreover, we emphasize that a portion of the provisions included in the draft directive is **against the law**, because:

- it is **contradictory** to the provisions of directive 96/71/CE
- it is of **protectionist** nature
- it is of **discriminatory** nature

Therefore, we **unequivocally appeal** to you to take any effective measures possible in order to cancel those provisions which result in excluding reliable enterprises from the internal EU market – and not in ensuring better protection for workers posted abroad, as initially intended.

**Attached you will find our standpoint on the key provisions of the aforementioned directive and our proposals of new provisions which will effectively downscale the problem of 'letter-box' companies.**

Yours sincerely,

Stefan Schwarz

President of the Board

| Stefan Schwarz | Waldemar Nowakowski | Anna Wicha | Jarosław Adamkiewicz | Dawid Seifert |
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| President of the Board | President of the Board | President of the Board | President of the Board | President of the Board |

# Detailed standpoint

We herewith present our reservations and recommendations which we consider key in the context of the project of the directive which is currently subject to negotiation in the Council.

## 1. Article 3.2.e

> *any previous periods during which the post was filled by the same or another (posted) worker*

This point refers to the provisions of directive 96/71/CE, which in article 3 speaks about **posting workers temporarily** to work on the territory of a different Member State than that on whose territory they are normally employed.

The concept of **posting workers temporarily** is explicated in Regulation 883/2004, article 12:

> *A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work* ***does not exceed twenty-four months and that this person is not sent to replace another person.***

In Executory Order 987/2009 the phrase ”to replace another person” has not been further explicated, as it has thus far not caused any interpretation issues. It is there to emphasize **the temporary character** of posting and to eliminate possibilities of bypassing regulations by filling certain posts on the side of the service recipient permanently with posted workers. It would be contradictory to the concept of **temporary employment** within the scope of the agreement between the posting company and the service recipient in the host country.

In other words, it was the goal of the legislator to **prevent perpetual rotation** of workers posted to the **same positions and for the same purposes** and to counteract the transformation of posting from being principally of a temporary character into **permanent**.

However, the provision suggested in the draft of the enforcement directive introduces an **absurd** interpretation of the concept of **temporary posting** which has never been applied before. In fact, according to this provision, posting becomes **a one-time act**. As a consequence, most services, especially those performed on a seasonal and cyclic basis, or in a rotating model, are excluded from the framework of posting.

It needs to be underlined that the analyzed provision does not ban perpetual posting to the same positions. It only **prevents the next worker posted to perform work** in the same position or workplace where a posted worker had worked before, from taking advantage of the **exception** from article 12 of the Regulation. Therefore, it should be understood that the **(second) posted worker is not allowed to remain within the social security system** of the **posting country** and is subject to the law of the place – *lex loci laboris*.

Such a solution is **illogical and contradictory to the intention** of coordinating social security systems, whose aim should be to **prevent fragmentation of insurance periods** of migrating workers in case employment in another Member State is **temporary** – and this situation is particularly valid for posted workers.

Why is it that one worker, **the first to be posted to perform a certain service** – whether it is comprehensive, rotating or seasonal – can take advantage of the benefits of coordination, while **the second one, posted in order to finalize the comprehensive service** started previously by a posted worker, will be forced to accept a fragmented insurance period and to transfer to the social security system of another Member State, if he is also a posted worker?

The problem of replacement is closely related to a **principle preventing fragmentation of insurance periods** which has been adopted in provisions pertaining to the coordination of social security systems.

The alleged particularization of this provision in the project of the enforcement directive is in fact a change of the **substantive law and excludes from social security** of the posting country any posted worker who takes a position previously occupied by another posted worker. From the perspective of the entrepreneur who posts his employee in good faith and with respect to the law, to provide services in another Member State this means **uncertainty of legal transactions**. Neither the employer nor the Social Insurance Institution are in the position to find out whether a certain position has or has not been previously occupied by any posted worker from any company based in any other Member State.

Regulations hitherto valid, allowed the **Social Insurance Institution** to accurately and unambiguously specify which Member State's law of the place will be relevant in terms of insurance. If the law of the place was that of the posting country, this fact was confirmed by issuing the A1 form. Should the regulations change, such a specification will **become impossible**. As a consequence, the posted worker providing services abroad will be deprived of his **constitutional right to be covered by insurance**. To put it colloquially, the posted worker will fall out of both systems and it will not come to a negative competence injunction.

Article 12 and 13 of the aforementioned Regulation foresee **exceptions** from *lex loci laboris* which do not offer the possibility of choosing the law of the place neither to the insured, nor to the **Social Insurance Institution**. However, they unambiguously specify when a posted worker is covered by the social security system of the posting country. The questioned provision in the project of the enforcement directive **introduces uncertainty** in this area, **decreases the level of trust in law** and makes it difficult to decide with certainty which insuring institution sets the relevant legislation.

## Case Study

### **a.** Seasonal model of service provision

Every year, vineyard owners from Austria, France, Germany, Italy, Portugal, Spain and other countries employ workers for the period of **intensive grape harvest**. When the local workforce turns out to be insufficient, they look for subcontractors or hire workers from employment agencies – those from other Member States included.

Temporary employment of manual labour providers for the position of **"grape harvester"** for the period of 3-6 weeks every year is a fully legal – and **typical** – **example of posting workers** in agreement with directive 96/71/CE, which bears no signs of being permanent.

According to the analyzed provision, the above case is **not an example of posting workers** because in previous periods this position (grape harvester) has been occupied by another posted worker.

Hence, this provision **excludes from the scope of posting those services which are provided in a seasonal or cyclic model,** even if it is demonstrated that those services are provided rarely, in repeated short intervals (e.g. once a year for a month, a week every three months, etc.).

### **b.** Rotating model of service provision

There are many types of services which **cannot be performed by one employee throughout the process**. This results from the specifics of the work involved. If the type of work is too overwhelming for one employee, there is a need for the workers to rotate. This means that they exchange at specified intervals, for example, every two weeks. An example of such work is elderly live-in care. Owing to the mental burden such work implies, elderly carers work in turns in the following model:

patient 1 – vacation – patient 2 – vacation – patient 1.

Within the framework of elderly live-in care, carers rotate so that their **right to rest** and to refuse to work overtime is secured.

Providing elderly live-in care services (only if under 24 months) is a typical example of temporary posting of workers along the provisions of directive 96/71/CE, which is **not permanent in any way.**

The analyzed provision **does not interpret the situation in question as posting,** because the work of the carer has already been performed by another posted worker before.

Thus, this provision **excludes from the definition of posting all services which require that workers rotate** or exchange in a cyclic manner at short intervals, so their rights can be secured.

We express our deepest concern with the content of the provision in article 3.2 (e), which will in fact hamper cross-border provision of services by replacing the **temporary** character of posting with one-time posting.

In the present form, the provision in article 3.2 (e) goes beyond what the general directive 96/71/CE clearly specifies – that the **character** of posting is temporary.

### Recommendations

In our opinion, the provision in article 3.2 (e) leads to an **erroneous overinterpretation** of the phrase "to replace" and in this way contradicts provisions of the primal directive.

Our proposals:

- **remove point (e)** in article 3.2

If this modification cannot be implemented:

- **replace** it with the following formulation which is in line with IMCO's proposal: "the posted worker is not replacing another posted worker, except in the case of illness or resignation",
- **modify** the current provision so that it is in line with the example from the "Practical Guide": "whether it occurred **repetitively** that **the same** post was **exclusively** and without interruptions occupied by the same or another posted worker whose **posting period has ended**".

## 2. Art. 3.3. (f) [EMPL]:

*(f) holding a valid A1 form, issued for the posted employee*

The A1 form is issued upon the request of the employer or employee. This implies that the A1 form is a purely **declarative administrative decision** which means that it does not constitute law, but only states its

existence.

The A1 form validated by the relevant institution confirms that the employee who owns it has been posted as understood in directive 96/71/CE. The document is **binding for controlling institutions** of the host country, until it is cancelled by the issuing institution.

Even if the relevant institution of a host Member State decides that the elements characteristic of posting have not been met, in case the worker holds a valid A1 form, he or she **has to be treated as a posted worker** until the A1 form is cancelled in the course of administrative proceedings.

A validated A1 form is a document which confirms the fact of posting. Therefore, it cannot serve as **one of many elements in a comprehensive evaluation** of whether we deal with posting or not.

## Case Study

> Posting subsidiaries have been educating workers about **safe and legal work abroad** for years. They convince employees that it is vital for them to make sure each time that the employer who posts them abroad **provides them with the A1 form**. Only a valid A1 form guarantees that the employer has posted the worker legally.
>
> Consequently, posted workers associate the A1 form with **safety** and legal employment abroad and with a proof that all the procedures have been carried out legally. Lack of the A1 form indicates that the posting company might be unreliable. Such a connotation is helpful from the point of view of fighting **abuse and instances of law bypassing**.

The provision enclosed in article 3.3. (f) threatens the **trust of the employees** towards the posting country social security institution which validates the A1 form. Moreover, the aforementioned provision **deprecates the significance of the A1 form** and deprives the employee of the confirmation that the posting procedure is legal. This will lead – contrary to the legislator's intentions – to abuse, law bypassing by dishonest subsidiaries and to an increase in **unregistered employment.**

## Recommendation

We propose that article 3 should start with the following passage:

> *3. In case the A1 form has not been validated for the posted employee, in order to assess whether the temporarily posted employee provides his service in a different Member State than that where he works regularly,* ***all the factual circumstances characteristic of the position as well as the employee's situation shall be considered.***

If the above modification cannot be implemented, we recommend adding the following point:

> *4. A valid A1 form issued for the posted employee constitutes a confirmation that all the elements listed in points 2 and 3 are met until it is annulled or cancelled by the institution which validated it.*

# 3. Article 9

**We demand that the list of control measures should remain closed**. We hold the position that granting the Member States the right to introduce any administrative requirements and control measures they find efficient, will enable those of them who are not in favour of posting to take advantage of these measures **for protectionist purposes,** and will be a source of l**egal uncertainty** among service providers.

Member States disapproving of posting have been using controlling institutions to **discriminate foreign service providers**. Posting subsidiaries are commonly aware of situations in which the controllers, if they failed to identify any infringements, demanded that the foreign service provider should present the menu for the posted workers, or decided to measure the space between beds in hotels where the posted workers lived with rulers. Some clients who buy services provided by foreign service providers complain about perpetual inspections during periods in which they use the services provided by a posted worker.

## 4. Article 9.1. (b), (c) and (d)

The requirements according to which posting subsidiaries are obliged to keep documentation and designate a contact person in the host country are **nonsensical** and **put additional and unnecessary burdens on the company.**

Both requirements force posting subsidiaries to create a **permanent infrastructure in each country** where they provide or plan to provide their services. Obviously, the contact person needs to have an office and the documentation needs to be stored in a safe place and be regularly updated (even by the designated contact person).

For service providers, this provision has the following **negative consequences**:

1. In article 5, the bilateral agreements pertaining to the avoidance of double taxation usually define the concept of the so-called **foreign tax establishment** of the company. If a company has a **permanent establishment** abroad, it is treated as a foreign tax establishment. **A rented office is treated as a permanent establishment**. Hence, a company which has such an establishment will have to fulfil all the obligations specified by the taxing laws of that particular country, which is a huge responsibility.

2. Setting up **permanent establishments** in the country where the company posts or is planning to post workers **is in contradiction with the temporary character of posting**.

Demanding that a truck driver should carry copies of his personal files and printed confirmations of bank transfers of his wages is an outlandish requirement. As is the obligation to translate those documents into the languages used in each country the driver is passing through. The proposal set forward by the EMPL committee goes even further than that and imposes an additional **obligation to notify** each country the truck driver will be passing through about this fact **5 days in advance**.

### Recommendation

We demand a change in the regulation proposed by IMCO in article 9.2. (b):

> (*b) an obligation to keep **or make available within a reasonable period of time** and/or retain, **at the choice of the services provider**, copied in paper or electronic form of the employment contract (or an equivalent document, within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets and proof of payment of wages or copies of equivalent documents, issued in accordance with the national law of the Member State of establishment (…).*

We demand that the phrase ”in the host Member State” should be removed from article 9.1. a) [EMPL]:

> *(a) An obligation to designate a contact person in the host Member State, acting as the representative of the posting company, who can be contacted by the competent authorities of the host Member State (…).*

## Case Study

A small welding firm from Cracow which **employs 5 workers** and specializes in welding of aluminum elements **received queries** from three subsidiaries from Portugal, Norway and Slovakia. The queries relate to a series of welding contracts which will require the work of one welder for a period of 2-4 weeks.

In order to perform the contract, the aforementioned firm, before it even signs any contracts, will have to **translate the firm's documentation into three languages**, recruit and **employ three people to act as points of contact** in each of the three countries and **rent rooms** for the purpose of storing documentation. Realistically speaking, the firm will need approximately 2 months to perform all of these tasks and incur enormous costs.

Consequently, the welding firm will not be in the position to provide those services because the **costs, time involved and risk** will be unacceptable for the clients. This small firm from Cracow will not be selected to perform the contract because it will not be competitive in comparison with local subsidiaries.

# 5. Article 12

The **joint and several liability** on part of the recipient of services provided by posting can positively influence the **security of posted workers**. However, it cannot be any different from the one they will be liable to if they use services of local providers. Otherwise, this provision will not protect posted workers, but **drastically discriminate posting subsidiaries** causing them to entirely lose their competitiveness.

## Recommendation

Echoing IMCO's proposal, we demand that article 12 should be removed.

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## A more effective prevention of law bypassing by extending the definition of a ‘letter-box’ companies

‘Letter-box’ companies are one of the **most problematic infringements of the law** pertaining to posting workers within the framework of service provision. They are not easily identified because regulations **do not offer an effective definition** that could enable relevant institutions to objectively and effectively differentiate them from regular enterprises.

## The activity of regular enterprises in the posting country

A person who is employed in a Member State by an employer normally doing their business there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the posting country.

In determining whether a company runs regular business in the posting country, we need to consider **various criteria characteristic of the business** run by this company. This is usually done by **analyzing a number of factors**, such as:

- location of the registered office of the posting company
- location at which employees are recruited
- location at which most contracts with clients are signed
- turnover recorded by the posting company in the posting country
- number of contracts performed by the posting company in the posting country
- determining whether the posting employer is the actual employer of the posted worker

## Bypassing the law by ‘letter-box’ companies

A typical example of bypassing the law in the posting country is a situation in which a company running business in a country where the costs of work are high, **registers a subsidiary** in a country where costs of work are low. **Through it**, workers are **hired and posted** to the parent establishment and it is the sole reason for registering the subsidiary.

The Committee of the Regions (2013/C 17/12) confirms this by opining that the most frequent mechanisms of bypassing the law are:

- **fictional subsidiaries** registered in the country which is allegedly the posting one
- a method applied by some of the big corporations which consists in **establishing platforms for posted workers** in the form of **subsidiaries** registered in countries where tax and social laws are beneficial form the financial point of view, from which workers are later being posted.

## Case Study

Case A

BAU-SERVICE GmbH, a big construction company from Germany, performs a contract for building a school on the German territory. In the process, it uses the services of a subcontractor – BAU-SERVICE POLSKA SP. Z O.O., to whom it delegates part of the building tasks. According to the company register, the owner and president of the board of both subsidiaries is the same person.

Case B

IT-SERVICE SARL, a big French company in the IT branch, employs 200 programmers in its Paris office. They have been posted by IT-SERVICE PORTUGAL S.A. to whom IT-SERVICE SARL is outsourcing programming jobs. IT-SERVICE PORTUGAL S.A. obtains 20% of its turnover from performing contracts in Portugal. The remaining 80% is obtained from the contracts performed for IT-SERVICE FRANCE SARL.

## Analysis

We need to determine **which features differentiate subsidiaries** running their **business** on **regular principles** from 'letter-box' companies which only serve as **platforms for posting workers**.

Examples of **factors** by which to **identify subsidiaries** running their business on **regular principles**:

- the company advertises its services and leads active **sales**
- the company has at least **several different clients**
- **clients change** (contracts are finalized, new contracts are signed)

Examples of factors by which to identify **fictional companies** acting as posting platforms:

- the company **does not advertise** its services, nor does it actively lead sales in the posting country
- the company provides services to the **same client or group of clients** all the time
- the revenue structure indicates that contracts are carried out mainly with the **same client or group of clients**
- the company is **personally or financially related** with its clients

## Conclusions

In order to determine whether a posting company is a 'letter-box' company or a company running business on regular market principles, it needs to be established whether within the framework of the business:

> *it posts workers solely or mainly to one or several regular contractors with whom it is related financially or personally,*

or

> *it obtains all or the majority of its turnover in the host country by providing services to a contractor, or contractors with whom it is financially or personally related.*

This definition cannot obviously replace the criteria currently applied to characterize regular business run in the country where the parent company has its registered office. However, it completes these criteria.

## Pros

- **quick and easy verification** by the relevant institution during the process of validating the A1 form, based on the information included in the application
- **objective evaluation criteria** based on an analysis of invoices and contracts presented by the company
- bypassing possible only through **very complex procedures**, such as using supposititious people to register a 'letter-box' compnay
- **based on definitions of financially or personally related entities** which already function in tax law
- possibility of **retroactive verification** based on accounting records
- What is important, entities related personally also include through **family members** and close relations

## Cons

- lack of unambiguous interpretation of "**mainly**"
- possibility of bypassing by **creating chains of entities** or registering subsidiaries with supposititious people

## Recapitulation

The proposed criterion is an **extra tool** which seems to be **objective** and **easy** to use. It would make it easier to identify instances of posting by 'letter-box' companies. In particular, this is valid in the case of **posting platforms** established by big enterprises, which are the most common example of this procedure.

The greatest advantage of this criterion is its **objectivity**. It is unimaginable that within normal mechanisms of the free market, a company provides services in another country solely or mainly to companies with whom it is financially or personally affiliated. Such a company cannot be treated as one running regular business in the posting country, which indicates that it is in fact a 'letter-box' company.

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