UEAPME Note on Posting of workers
Revision of Directive 96/71/EC

Introductory comments:

UEAPME attaches great value to respect the free movement of workers and the free movement of services within the European Union. It is an important "acquis" of the Internal Market and we want to maintain it also within the context of posting of workers. Art. 56 of the Treaty sets clear grounds for provision of services in EU.

At the same time, UEAPME members are asking for a fair level playing field for SMEs and micro-companies at local level concerning posting activities. UEAPME has constantly called for a pragmatic approach to solve real problems considered as unfair competition. Such practices are very often referring to abuses and illegal practices related to posting situations. . The adoption of the enforcement directive 2014/67/EU was an important response to the challenges of combating fraudulent practices and strengthening the protection of posted workers.

The most urgent issues for UEAPME are:

- **tackling abuses** and illegal practices,
- **fighting against letter box-companies and all types of frauds**, including bogus self-employment
- **tackling undeclared work,** we welcome Platform against undeclared work,
- **facilitating controls but avoiding to create disproportionate burdens** for small businesses to continue to operate abroad as well as avoiding as much as possible measures not in line with the spirit of art. 56 of the Treaty.

It should start with a full implementation of **the enforcement directive and assessment of its impact,** a **better cooperation among member States authorities** and more efforts to **transparency** as well as to a **rapid access to information where needed**.

On the revision of posting of workers directive, UEAPME members have different views on the need or not to revise the 96/71/EC Directive.

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- **one group of UEAPME members is opposed to the revision or considers it premature** in the context of the ongoing implementation of the Enforcement Directive 2014/67/EU.

  According to them:

  - The EU Commission took the wrong approach. The Commission's proposal is not necessary in the context of improving the social aspects and combating unfair practices.
  - The targeted revision of the 96 Directive goes against the Internal Market basis and against subsidiarity principle by imposing rules which exceed a minimum level. The proposal is not in line with the Better Regulation agenda.
  - The new proposal will strongly reduce posting activities, affecting negatively the small business situation and employment in some sending countries, providing new incentives for undeclared work, and bogus self-employment and ultimately will lead to further economic migration within the EU.
  - The respect of minimum rate of pay and of a core of mandatory rules for working conditions, as regulated in the 96 Directive is sufficient and provides the adequate basis for a fair level playing field and for protecting posted workers.
  - The main issue at stake is not the validity of such of the 96 Directive rules but cases of their lack of respect or circumvention.
  - Differences in various field and notably wages are not and should not be assimilated to unfair competition or "social dumping". It is about competitiveness, productivity and innovation.
  - For some members, instead of revising the 96/71 Directive, it would have been better to question the rules on social security and review the conditions for issuing and controlling the social security form (A1).
  - Convergence of labour costs in the EU should be progressive and in line with social and economic cohesion objectives.
  - The new proposals does not create a level playing field for all companies. It will result in new bureaucracy and higher costs for employers to post workers, creating additional barriers to the freedom to provide services. It will add new complexity and legal uncertainties, might be the source of new Court cases and thus increase the costs of providing services in the EU.
  - The maximum duration proposed by the Commission is creating legal uncertainties. For example, the Commission is trying to artificially impose a maximum duration of posting. Meanwhile, this issue should be primarily dependent on the agreement between the parties of the service contract and the duration of the service, which can be shaped differently depending on the sector and type of service.
  - Entry into force of such changes in the 96 Directive will contribute to limiting the freedom of services in favour of the freedom of establishment
  - Impact Assessment attached to the revision is based on general assumptions in the absence of reliable data and of the lack of knowledge of the different economic sectors specificities.
  - The EC disregards the additional costs incurred by businesses in connection with the posting or to be incurred after full implementation of the 2014/67/EU directive.
  - In addition, the timing of the new proposal did not allow for a full assessment of the implementation of the Enforcement Directive, for which the transposition deadline was 18 June 2016.

➢ The other group considers it necessary to revise the 96/71/EC directive while at the same time speeding-up efforts to fully implement and effectively apply the 2014 Enforcement directive

While the existing rules contained in the 96 Directive including on minimum rate of pay are too often not respected,.one of the main measures in the proposal of the EU Commission is the replacement of the "minimum rate of pay" with the concept of "remuneration" in order to narrow down the wage gap of local workers and posted workers.

1. The principle of equal pay for equal work

- On the one hand, a large part of members supporting the revision considers it more appropriate to replace "minimum rate of pay" by "compulsory payments" defined by law and/or universally applicable collective agreements.

  For them, the principle of equal pay for equal work at the same place does not constitute the right reference for posted workers since it is unrealistic and hardly possible to fully apply it. Objective differences of pay exist even for domestic workers in the same company mainly related to differences in productivity, competences, qualifications, seniority etc. of each individual worker. Furthermore, in this context, it is important to only apply law and universally applicable collective agreements as level of reference for payments. In the case of posting such principle of equal for equal work would be even more difficult to apply since social security contributions as well as taxes will continue to be paid at different rates in the country of origin.

- On the other hand, some UEAPME members of this group support the proposal made by the European Commission so that from now on "all the rules concerning the remuneration fixed by legislation and/or in universally applicable sectorial collective agreements including supplements will also have to be applied to posted workers".

2. On the duration of posting

The current EU Commission proposal is not satisfactory as it creates many legal uncertainties. Furthermore, such an arbitrary stipulated duration will not support the objective of avoiding abuses.

- Whereas in some cases the average duration of posting is much shorter than the proposed 24 months (e.g. transport, construction), in other cases it is much longer (e.g. intra-corporate posted workers).
- The duration of 24 months is an attempt to align posting provisions with the Regulation on the Coordination of Social Security 883/04. However it does not take into account certain exceptions and the fact that regarding social security, duration is related to the person while in labour law it is related to the service. It can hence result in further uncertainties. There is therefore no need to align these 2 durations.
- In any case, the distinction between anticipated duration and effective duration longer than 24 months is inappropriate as it also creates legal uncertainties.

  Furthermore, accumulating only postings as from an effective duration of 6 months creates further opportunities for circumvention of the provisions. The 6 months should be deleted.

The application of the whole labour law of the receiving state to workers who are posted for a period exceeding 24 months is not adequate and creates additional burden without increasing the protection of the posted worker nor preventing social dumping in the receiving country.

For this reason, a possible solution could be a sector-approach to duration of postings, to be determined after consultation of the European sectoral social partners.

3. On subcontracting

The current proposal is much too vague and extremely problematic for subcontractors which are in most cases SMEs. Furthermore, it goes beyond the issue of posting since it concerns the subcontracting chain as a whole.

The term "certain terms and conditions of employment covering remuneration" is unclear and will create legal uncertainty on the issues to be guaranteed by the subcontractors. The Impact Assessment does not sufficiently analyse the potentially negative economic consequences for small enterprises.

Moreover, even if this obligation remains voluntary for Member States, there is a need to clarify that it should only apply to companies covered by the same sectoral or branch collective agreement.
Otherwise it would be a non-sense to apply the collective agreement of the main contractor to different subcontractors covered by other sectoral/branch collective agreements.
Lastly it should be fully consistent with the entire Art 12of the enforcement directive.

4. On temporary agency workers

There is a clear need to clarify the relationship between the posting of workers directive and the directive on temporary workers in order to avoid loopholes and additional possibilities to circumvent the rules on agency workers.
This new proposal raises a question of consistency since the 96 Directive, Art 3 (9) gives already the possibility to Member States to provide that temporary work undertakings must guarantee to posted workers the terms and conditions which apply to temporary workers in the Member States where the work is carried out. According to the Impact Assessment conducted by the EC, 15 Member States have already used this possibility.

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