

## EU Posting of Workers Directive Review

### **Purpose**

1. To summarise the key provisions of the revision of the Posting of Workers Directive announced by the European Commission on 8<sup>th</sup> March, which is part of measures to develop a European Labour Mobility Package.

### **Background**

2. A posted worker is a person who is employed in one Member State, but is sent temporarily to carry out duties in another. It may for example, occur when an organisation secures a contract to provide services in another part of the EU and posts employees there to complete the undertaking. Despite remaining under the labour law of the sending Member State, posted workers are also entitled to a set of core rights in the host Member State.
3. Directive 96/71/EC, the Posting of Workers Directive, outlines core rights regarding the terms and conditions for posted workers. This set of rights consists of:
  - minimum rates of pay;
  - maximum work periods and minimum rest periods;
  - minimum paid annual leave;
  - the conditions of hiring out workers through temporary work agencies;
  - health, safety and hygiene at work;
  - equal treatment between men and women.
4. The Enforcement Directive (2014/67/EU) was adopted in 2014 and is intended to strengthen overall application, enforcement, the ability to combat abuse, the level of information provided to business and cooperation between competent authorities across the EU Member States. The Enforcement Directive is due to be transposed into national legislation by June 18<sup>th</sup> 2016.

### **Introduction**

5. The Labour Mobility Package is part of EU efforts to increase labour mobility, make the Single Market fairer and give greater social protection to EU citizens. It is being introduced within the context that there are still high levels of unemployment in Europe but yet there remain skill shortages. In October 2015, as part of the European Commission's 2016 Work Programme, it was announced that the Package will consist of a communication on labour mobility, a targeted revision of the Directive on the posting of workers and the revision of Regulations on social security coordination. Also under development are a strengthening of the EURES job portal and a platform for combatting undeclared work.
6. A targeted revision of the Posting of Workers Directive was therefore confirmed in March 2016. The primary purpose is to address unfair employment practices including social dumping, or moving employees from a country with weaker labour laws to another and undercutting by paying lower wages. The Commission highlights significant changes to European economic and labour conditions since the Directive was adopted in 1996. In particular, the difference in national wages across the EU has increased and with it the potential for abuse. The revision is intended to modernise the legal provision for posted workers across the EU and address gaps left by the original 1996 Directive.
7. The issue of posted workers is being given such high-level importance for reasons twofold: there has been a large increase of posted workers in recent times, representing almost 50%

increase in the last 4 years, and for the fact that posted workers are crucial to the cross-border provision of services, an integral part of a well-functioning Single Market. In the year 2014 there was an estimated 1.9 million posted workers, representing 0.7% of the EU total workforce.

8. A primary motivation behind the revision of the Posting of Workers Directive is to ensure fair wage conditions. Under current legal provision, a company or business posting workers to another Member State is only obliged to pay minimum rates of pay. In other words they are under no obligation to pay wages equal to the local workforce or offer full remuneration to posted workers on an equal basis. This can in turn mean that companies can undercut those in host Member States, through the use of a cheaper posted workforce. It can even create disincentives for foreign companies to hire from within the locally based population.
9. There are three specific aspects to the proposed revision:
  - **remuneration of posted workers** - ensuring posted workers receive the same rates of remuneration,
  - **long-term posting** - clarifying that after 2 years of posted work the host Member States' employment legislation will apply, and,
  - **rules on temporary work agencies** - extending conditions for temporary agency workers to apply in a posted working setting.
10. In terms of remuneration, there are three changes. The rules will now require **the same rules of remuneration** of the host country to apply to posted workers. To do this, Member States will be required to demonstrate how remuneration is made up in their territory. Secondly, all **"universally applicable collective agreements"** across all sectors will now apply to posted workers (there remain very few sectors in the UK that have national agreements setting out terms and conditions). Finally in **sub-contracting**, Member States will now be able extend the obligation to pay the same rates of remuneration for posted workers to subcontractors.
11. After two years (long term posting), posted workers will be entitled to the social security of the host Member State. This means that in addition to being protected by minimum labour laws in the host country (health and safety, equal treatment), **posted workers will now be entitled to full protection under the law from the point when the duration of the posting exceeds 24 months**. The Commission notes that this would reflect the 24 month rule in Regulation 883/2004 on the coordination of social security.
12. The principle of equal treatment will be extended to **posted temporary agency workers**. While temporary agency workers carrying out duties within a Member State are legally entitled to the same conditions as full-time workers, this provision will now apply to temporary agency workers in a posted worker setting.
13. Within the revision is the overall aim to streamline other relevant pieces of legislation, make rules clearer and address inconsistencies particularly with the Regulations on coordination of social security systems and the Temporary Agency Work. The Commission maintains that this proposal will not impact the provisions of the Enforcement Directive or the work currently being undertaken to transpose it.
14. It is worth recognising the special status of the construction sector under this legislation. The construction sector is by far the most common industry affected, accounting for 43.7% of all postings in the EU. Where rules for working conditions are laid down by "universally applicable collective agreements" (not the case in the UK), they must also be applied to posted workers employed in the construction industry. Member States also have the choice to extend this to other sectors. In the UK, terms and conditions of employment are guaranteed by law and there is no mechanism for extending the terms of collective agreements on a universal basis. In short, there are no special rules in the UK for construction due to the peculiarity of our legal system and organisation of industrial relations. That being said, some terms and conditions from sectoral collective agreements may apply.

## UK Context

15. In the UK the total number of posted workers, sent from another EU Member State, amounted to **50,893** in 2014. In the same year UK companies posted **33,092** workers abroad. The figures represent a 48.3% increase in workers posted to the UK between 2010 and 2014 and a 19.5% decrease in UK workers posted elsewhere in the EU over the same period.
16. 2010 research by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) gives an indication of the main sectors in the UK in receipt of posted workers. The most prominent three are: **real estate renting and business activity, financial intermediation** and **manufacturing**. With more relevance for Scottish Local Authorities however is **health and social work** (19,332), **public administration and defence** (9,235) and **education** (4,353). Posted workers in **construction** are also pertinent to the UK economy.
17. There is no single piece of UK legislation that transposes the Posting of Workers Directive. Rather, all aspects of UK labour law apply to all workers in the UK. Employees and workers are protected by UK labour law, regardless of their nationality and duration of employment in UK (although subject to any relevant qualifying period of service). All employees or workers, working permanently or temporarily are protected by the Working Time Regulations, the National Minimum Wage Act 1998, the Employment Agencies Act 1973, and the Health and Safety at Work Act 1974 for example. The top countries of origin of workers posted to the UK are France, Germany and Spain.
18. When the Directive was introduced, the UK took minimal steps to transpose it and in the main took steps to extend legislative provision to UK nationals posted outside the UK. The chief changes it brought in was to repeal section 196 of the Employment Rights Act 1996 which excluded employees working outside UK from individual employment rights and amended the Equal Opportunities Regulations 1999 to extend anti-discrimination legislation to workers posted from UK. In the UK there have to date been few industrial disputes involving posted workers.
19. Just last year, the UK Department of Business, Innovation and Skills (BIS), which manages the Posted Workers National Liaison Office for UK, published a consultation on how the Enforcement Directive should be implemented. BIS consulted on a number of measures designed to meet new EU requirements. Primarily it included limited subcontracting liability for the construction sector. When finalised it will mean that construction contractors in the UK (one up the supply chain from the posted worker's direct employer) will have subcontracting liability for paying the national legal wage.

## EU Context

20. The revision of the Posting of Workers Directive has potential to be particularly divisive among EU members. This is because while Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden publicly support the modernisation of the Posting of Workers Directive, Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania are at this time opposed. While the former countries are championing the "equal pay for equal work in the same place" principle, the latter argue that the revision is premature and that "equal pay for equal work in the same place" could distort the Single Market by minimising the competitive advantage those countries with lower national wage have.
21. A further point of contention will be regarding the coordination of social security. The latter group of Member States (mainly Eastern European) are arguing that posted workers should remain under the protection of the social security system of the sending country and therefore resist any EU action to link posting of workers to social security. We can therefore expect some difficult negotiations as this initiative is taken forward.
22. There are also increasing criticisms of the Commission's overall approach, particularly as being too piece-meal, rather than holistic and innovative. Some critics argue that the current

legislation for posted workers is sound, affects a relatively small part of the EU labour force, and that this whole revision is representative of exactly what the Commission said it would not do at the start of its mandate and that was “be big on the big things, and small on the small things”.

### **Scottish Local Government Context**

23. The planned revision of the Posting of Workers Directive will have fundamental implications for Scottish Council activity in terms of **procurement and subcontracting**. Member States will now have the option to extend the obligation to pay the same rates of remuneration to subcontractors employing posted workers. Current UK policy indicates that this will at present, only apply to the construction sector in the UK. This means that Scottish Local Authorities when contracting construction services, will require verification that subcontractors using posted workers, also meet the necessary posted workers rules.
24. Colleagues will also recall that the European Commission has [ruled](#) that the non-discrimination principle of the Posting of Workers Directive was in conflict with Scottish Government plans to introduce a living wage above the national minimum wage as an eligibility clause criteria for procurement contracts. This has remained unchanged in the new Directive.
25. More widely, the new 24 month cap on posting might have consequences both to longer term EU workers operating in Scotland but contracted abroad (e.g. social carers, medical specialist) as well as for the (admittedly much smaller number of) Scottish Council workers doing a long-term posting elsewhere in the EU.
26. COSLA has anticipated possible **additional reporting burdens** for Scottish Local Authorities for some time. Given that Member States will now have to “specify in a transparent way the different elements of how remuneration is composed on their territory”, it is likely that Scottish Councils will be contacted by UK civil servants in due course. This will be supplementary to the information, controls and cooperation needed to meet the requirements of the Enforcement Directive.
27. The revision also has the added benefit of **raising awareness** around the rights of posted workers and the responsibilities of companies relying on posting. Further awareness can of course lead to a reduction of abuse, with Scottish Local Authorities provided more information on relevant actors in their locality and in turn more able to identify and report problem causes. Community well-being is subsequently bolstered in that respect.
28. In terms of **human resource management**, of course Scottish Councils can also choose to send or receive posted workers, which with more detailed information they may wish to give further consideration to. Additional information on the terms and conditions of posted workers, in light of the Enforcement Directive transposition deadline, should be made available this year by BIS. Impact assessment at EU level has found that the benefits for those at regional and local level in receiving Member States include increased competitiveness, addressing skill shortages and overall improvements to the local labour market. For sending posted workers, possible benefits include international business opportunities and the upskilling of employees.

### **Next Steps**

29. The Draft Directive will now go to be debated by MEPs and Council of Ministers. In order to ensure that Scottish Local Government interests are protected, and so that COSLA can influence these negotiations, we would be grateful to have an estimation of the number and types of EU nationals working for your Council, particularly those that were contracted (or crucially subcontracted) in another EU Member State.

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