



Reform of the Posting of Workers Directive

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Introduction

The 1996 EU Directive on the Posting of Workers was part of the Single Market legislative programme. It regulates employees sent to work from their home Member State to another Member State. Under the original legislation, workers retained many (but not all) of their home country employment conditions when posted abroad. In particular, employers could pay a posted worker the minimum wage level of the Member State where they have been posted without bonuses and other remuneration which apply to local workers. This led to claims that the directive was being used to undercut pay and conditions of employment in host countries – a practice often called “social dumping”. As a result, the EU adopted an enforcement measure against abuses in 2014. But doubts remained and after the directive became a major issue in the 2017 French presidential election, a further move was made to reform it.

The EU Member States and the Parliament adopted a revised Posting of Workers Directive on 21 June 2018; it will come into force in two years' time.¹ Posting of workers will now be limited to 12 months, with the possibility of a six-month extension and they will in future have to be paid the same rate (and bonuses) as those of the host country.

This briefing explains the original legislation, the criticisms made of it after implementation (including those raised in the UK), the 2014 reforms and the new legislation.

The 1996 Posting of Workers Directive

The Posting of Workers Directive, which was adopted on 16 December 1996, was intended to regulate the posting of workers between Member States as part of the provision of services in the Single Market.² It is important to understand that the legislation was seen in the context of expanding the EU market in services across borders as part of the EU's Single Market rather than being primarily about employment rights.

The directive applies to those employees sent to another Member State either as a result of a contract between their employer and the service provider (e.g. a construction company), or because the employee is going to work for their company in another Member State. It does not apply to self-employed people or to individuals seeking employment in a Member State other than their own.

¹ For the text of the revised directive, see European Council, *Legislative Acts and Other Instruments: Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, PE-CONS 18/18, 14 June 2018

² See *Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services*, 1997 OJ L 18/1

The directive sets out a minimum terms and conditions of employment for all posted workers. These include the obligation to give the posted workers the same rights as locally employed workers in respect of the following:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- health and safety;
- maternity rights;
- equality between men and women and other non-discrimination measures.

The legislation did not set a maximum length of time for the posting, nor did it require employers to pay equal rates of pay to posted and local workers. There were also some exemptions from the minimum standards if the posting was a very short period of time. Posted workers continue to pay into their home country's social security system for the first 24 months of their posting.

The UK government opposed the directive because it saw it as unnecessary regulation that might inhibit the posting of workers by UK companies to other Member States.³ Within the UK, the implementation of the legislation fell to the incoming 1997 Labour Government which did not make significant changes to UK legislation as it believed that employment rights for posted workers were already protected in the UK.

The effects of the legislation

Although the numbers of workers involved has been relatively small (about 0.7 per cent of the EU workforce) the economic impact is greater in some Member States, whether in terms of the share of the workforce that has been posted to that country or that has been posted abroad.⁴ The top six Member States for posting workers abroad are: Poland, Germany, France, Slovenia, Estonia and Italy.⁵ In terms of the highest net sending and receiving Member States, Poland is the highest net sender at about four per cent.⁶ Of the highest net receiving countries, about 4.5 per cent of the Belgian workforce is made up of posted workers.⁷

Critics of the directive have argued that since the 2004 enlargement of the EU, substantial numbers of posted workers have come from Central and Eastern Europe and worked for wages well below those of local employees in Western Europe. Statistics for the number of social security forms (known as an A1 form) issued to posted workers do indeed show a rising trend from less than a million in 2005 to over two million in 2015. In the case of

³ The UK and Portugal voted against but the measure was carried under qualified majority voting.

⁴ European Council, 'Fair labour mobility in the EU', 26 June 2018

⁵ Eurostat figures cited in 'Posted worker problems', Mehreen Khan, *Financial Times*, 24 October 2017

⁶ European Commission, *Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, SWD(2016) 52 final, 8 March 2016, p. 58

⁷ Cited in Mikkel Barslund, Matthias Busse & Frederic De Wispelaere, *Posted Workers – for some it matters*, Centre for European Policy Studies, No 2017/37, 26 October 2017, pp. 3-4

Slovenia, for example, it issued 127,000 such forms in 2015, corresponding to 13.5 per cent of its workforce (the same person maybe posted several times in a year).⁸

In addition, critics argue, the EU has changed since 1996 when its (then) 15 Member States were more homogenous economically than the 28 Member States are today. In this regard they point to the ratio of highest to lowest wages in the EU. Wage differences between Member States may mean that a person from a low-wage country would be more willing to work in another Member State for what is perhaps a higher wage than they would receive at home but considerably lower than host country workers would expect. In 1996 the highest average wage was in Belgium and the lowest average in Portugal, at a ratio of 3:1. In 2017 the highest was in the Netherlands and the lowest in Bulgaria at a ratio of 7:1.⁹

Despite the overall numbers being low, impact in particular sectors has been greater. For example, over 40 per cent of posted workers are in the construction sector and over 20 per cent work in industry. The impact in individual Member States of this phenomenon can be large: for example, over a quarter of construction jobs in both Belgium and Luxembourg in 2016 were filled by posted workers and it was almost 20 per cent in Austria.¹⁰

The impact on the UK of posted workers has always been small. Research by the European Commission found that there were just over 50,000 posted workers in the UK in 2015, barely one tenth of one per cent of the workforce.¹¹ Nonetheless, the perception that posted workers were reducing job opportunities and undermining pay levels for native workers developed in the UK too.

An example which attracted a great deal of attention was the decision by the French company Total to employ IREM, an Italian construction company, at its Killinghome refinery in Lincolnshire in 2009. IREM announced it was bringing in workers from Italy and Portugal to carry out the work, prompting unofficial industrial action at a number of other energy industry sites. Ministers expressed some sympathy with the argument of the unions that British workers were being undercut in these situations by foreign workers willing to take lower-paid work.¹²

The Posting of Workers Enforcement Directive

The adoption of the Enforcement Directive in May 2014 followed the criticism of the effects of the original directive.¹³ As has been noted, the number of posted workers had increased following the major enlargement of the EU in 2004.

The 2014 directive focused on tightening existing enforcement measures, such as the timely provision of information from the company posting the workers (s) to another Member State's relevant authorities, and proper inspection of employment arrangements

⁸ *Ibid.*, p. 3

⁹ *Ibid.*, p. 1

¹⁰ *Ibid.*, p. 4

¹¹ European Commission, *Posted Workers in the EU*, 6 February 2017

¹² For a discussion of this case, see Vincent Keter, *Posted Workers*, House of Commons Library Standard Note SNB/BT/301, 2 February 2009

¹³ See *Directive 2014/67/EU of the European Parliament and of the Council 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 ('the IMI Regulation')*, 2014 OJ L 159/11

by national authorities. It contained one specific measure for the construction sector: the creation of a right for the employee of a sub-contractor who hadn't been paid to pursue the main contractor for the unpaid wages.

The 2018 reforms

Nonetheless the debate about posted workers continued and the repeated allegations of social dumping in some Member States, especially France, Germany, Belgium and the Netherlands, led to pressure for further action. Some critics of the 1996 directive felt that the case law of the Court of Justice had weakened its provisions by emphasising the directive's contribution to the Single Market in services rather than its employment protection provisions.

Evidence of new ways to avoid higher social security and other costs in receiving Member States also added to the case for change. The use of so-called letter box companies, for example, through which employees are nominally employed in a lower cost Member State but in practice permanently posted to another, higher cost Member State, demonstrated concerted attempts by unscrupulous contractors to get around the 1996 directive.¹⁴ Emmanuel Macron made a major issue of these abuses in the 2017 French presidential election, promising to clamp down if he was elected.

The European Commission had already brought forward a proposal for a further tightening of the original directive in March 2016.¹⁵ The final legislation was agreed in April 2018. It deals with three key issues: remuneration; temporary agency workers; and long-term posting. Its main provisions are:

- equality of treatment in terms of remuneration between posted workers and other workers, for example in relation to bonuses and allowances; this means that posted workers and local workers should be paid the same from day one;
- pay rules agreed collectively will apply to posted workers if national law so requires;
- national rules will have to be applied to temporary agency workers who are posted workers;
- travel, board and lodging are to be treated separately from remuneration;
- posting will be limited to 12 months, with a further extension of six months, making a maximum posting period of 18 months; after that the posted worker would be covered by the national employment law of the host country;
- the transport sector is not covered by this legislation but there will be sector-specific legislation for transport in due course; until then, the 1996 directive continues to apply.¹⁶

The final text was more restrictive than the Commission's first proposals, reflecting concerns expressed in the Parliament and in some Member States. When the Council agreed its

¹⁴ The problem of letter box companies and other abuses is discussed in European Parliament, *Posting of Workers Directive – current situation and challenges*, 7 June 2016, p. 39 *et seq.*

¹⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council concerning the posting of workers in the framework of the provision of services*, COM (2016) 128 final

¹⁶ European Parliamentary Research Service, *Posting of Workers Directive*, EU Legislation in Progress, 31 May 2018, p. 13

position on the draft legislation in October 2017, 21 Member States voted for, Hungary, Lithuania, Poland and Latvia voted against and the UK, Ireland and Croatia abstained.

Next steps

Member States have two years to implement the legislation and it will be reviewed after five years. As the legislation will come into force during the proposed transition period, the UK will need to apply it from 2020.

Conclusion

The wider implications of the adoption of this reform have been largely ignored in the UK. They illustrate that there is the scope within the EU to reform legislation that was one of the grievances about EU free movement rules in the UK.

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