



IRISH CONGRESS TRADE UNIONS

Observations and Recommendations on

2012/0061 (COD)

Proposal for a

DIRECTIVE 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

May 2012

Introduction

1. The Irish Congress of trade Unions is the representative body for workers and their trade unions on the island of Ireland. The ICTU is an affiliate of the European Trade Union Confederation (ETUC) and we work with and support the recommendations made by the ETUC and other EU trade union confederations.
2. The posted workers Directive, which came into force in December 1999, had as its basic principle, that pay and working conditions in a Member State should be applicable to workers from that State and to those from other EU countries posted to work there.
3. **Congress believes that the original objective of the Posted Workers Directive is more important than ever.** Providing a climate of fair competition and guaranteeing equality and respect for the rights of workers is essential. Especially as workers are faced with an economic era in which transnational provision of services is increasingly common and where the economic crisis is intensifying a downward pressure on wages and conditions of employment from organisations seeking competitive advantage on 'price'. The Posting Directive plays a key-role in protecting the workers and labour markets concerned, by ensuring that employers respect the framework of labour law and industrial relations of 'host' Member States.
4. It is of major importance to ensure that the main goals of this Directive are achieved, to maintain the confidence of workers that 'Europe' is not about organising social dumping and competition on wages in a race to the bottom of the welfare state, but rather 'Europe' is still aiming at the constant improvement of the living and working conditions of its inhabitants.

Congress analysis of the implementation of the Posted Workers Directive in Ireland on the whole is positive.

5. All workers posted to Ireland from other EU Member States have the protection of all Irish employment legislation in the same way as employees who have an Irish contract of employment. This is by virtue of the Protection of Employees (Part-Time Work) Act 2001, section 20, which states that all employment legislation which confers rights or entitlements on an employee applies to a posted worker in the same way that it applies to any other employee and that, a person, irrespective of nationality or place of residence, who works in the State under a contract of employment, has the same rights under Irish employment protection legislation as Irish employees (see copy in annex)
6. This means that posted workers have a statutory right to be paid at least the national minimum wage. Posted workers have entitlements under employment equality law e.g. on the 'nationality' ground. Posted workers are also entitled to be the pay, terms and conditions in each Registered Employment Agreements (REAs) not just those in the construction sector (and when reconstituted Employment Regulation Orders made by Joint Labour Committees JLCs).
7. Applying the full complement of Ireland's employment law to posted workers is permissible as employment law in Ireland is conceived and implemented as a matter of 'public policy' aimed at protecting a minimum 'decent work' standard for all workers regardless of their immigration status. It would be unacceptable and contrary to equality principles and rights under the EU Treaty (TFEU) if workers exercising their right to EU free movement were

afforded less protection than that afforded to third country nationals. Applying Ireland's decent work threshold to posted workers creates a climate of fair competition (a level playing field) for workers and employers alike and has been instrumental in preventing the growth of racism and xenophobia and creating an environment in which the free movement of persons and services can thrive.

8. It is worth recalling here that the European Court of Justice in its ruling on Laval showed a preference for the use of collective agreements or arbitration awards 'declared universally applicable' within the meaning of Article 3(8) and 3(10) as a means of securing the enforcement and application of collective agreements to posted workers. Posted workers' rights to coverage under REAs (and JLCs) is afforded double protection, explicitly under the Directive as collective agreements declared universally binding and secondly under Ireland's employment law framework. The Duffy / Walsh Report is instrumental in setting out the public policy dimension of the REAs and JLC.

Ensure posted workers are provided with full protection of all employment laws and all universally applicable collective agreements

9. We urge government to promote the benefits of including posted workers in the scope of a Member State's body of employment law, and of the REA/JLC system. **It is essential that this Directive promotes the right for all workers, regardless of their immigration status or where their employer is based, to have an entitlement to full protection of a host member state's employment law and that they will be entitled to 'equal pay and treatment' with their local colleagues.** Congress is calling on government to seek amendment to ensure that the Directive provides that member states are not only free, but obliged to provide posted workers with full protection of all employment laws not just those defined in Article 3(1) of the Directive and all universally binding collective agreements not just in the construction sector.

Extend the proposals for Joint and several liability to all sectors of activity

10. The protection of workers' rights is a matter of particular concern in subcontracting chains, which are becoming widespread in numerous sectors not just the construction sector. There is evidence that, in a number of cases, posted workers are exploited and left without payment of wages or part of the wages they are entitled to under the Directive 96/71/EC.
11. **Congress therefore strongly supports the introduction of a joint and several liability mechanism as this is indispensable to protect workers from abuses.** In its judgment in the Wolff-Müller case, the ECJ declared that the German (chain) liability scheme for minimum wage payments under certain conditions could be considered as a justified measure recognising that in its absence a contractor can easily evade national regulations or collectively agreed labour standards and working conditions by creating extremely complex networks of subcontractors.
12. The Commission's proposal, however, is limited to the construction sector and direct subcontractor situations. It is also undermined by the stipulation that a contractor that has

taken due diligence cannot be held liable. **Congress urges the government to seek amendments to ensure that joint and several liability will apply to any sector of activity.** The Directive should also introduce a mandatory chain liability, which stipulates that the main contractor(s) is liable for the compliance, by all subcontractors, with the applicable terms and conditions of employment, and social security contributions.

13. The concept of “due diligence” should be deleted. There is no definition at the European level and it would therefore vary from one Member State to the other. It might be sufficient for the contractor to check who the subcontractor is and its history to escape liability.

Improve inspection and enforcement to ensure that posted workers can enforce their rights

14. **For labour inspection to be effective, access to records is key.** In the *Finalarte* cases, the ECJ accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that Member State, to the extent that this difference in treatment was justified by objective differences between those businesses and businesses established in the host Member State. Administrative cooperation and national control measures are thus two sides of the same coin and **Congress is calling on government to seek the inclusion of a requirement to maintain records on the host country and to declare to the labour inspectorate (NERA) prior to posting the location of the posted worker and the location of their employment records.**
15. Congress welcomes the obligation to designate a contact person, but this person must be a representative of the employer and its role should not be restricted to negotiations. The contact person should reside in the host Member State.
16. Congress is concerned that the proposed national control measures are restrictive and are not mandatory on Member States. Governments must be free to take measures, other than those listed in the Directive and it must be made clear that the article on national control measures applies to the host Member State. The onus should not be on the Member State of establishment to carry out the control and monitoring, but the host country in which the posted worker is actually working. It is not acceptable to Congress that the host Member States can only act at the request of the Member State of establishment. This proposal should be rejected.
17. Congress welcomes the recognition in the Directive of the role of trade unions in engaging in judicial or administrative proceedings on behalf or in support of a posted worker. In order to ensure that the article on enforcement is coherent with all national legal systems the engagement on behalf or in support of a posted worker by a trade union should be possible as well without the ‘approval’ of the worker.
18. The possibility for posted workers to lodge complaints should not be restricted to outstanding remuneration or refund of excessive costs, but the posted worker should be able to claim any entitlement due to him/her.

Improve the definition of 'posted worker'

19. According to the definition in Article 2(1) of Directive 96/71/EC42 'posted worker' means, for the purposes of this Directive, a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the Member State in which he or she normally works. A 'limited period' is vague and has led to several problems with the implementation, application and enforcement in practice of the Directive in particular with obligations to pay social security contribution. To avoid circumvention of the rules and combat abuse of the application of Directive 96/71/EC, the present proposal contains in Article 3 paragraphs 1 and 2 an indicative list of qualitative criteria/constituent elements characterising both the temporary nature inherent to the notion of posting for the provision of services as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.
20. Congress is concerned that the indicative list of criteria as proposed by the Commission gives Member States the possibility to pick and choose the least cumbersome criteria creating even more legal insecurity. Undertakings throughout the EU must abide by the same rules.
- 21. Congress supports the development of criteria to determine who is a posted worker, such criteria should be precise, cumulative and must be binding in its entirety in every Member State.**
22. To reduce the possibility of circumvention of the Posting of Workers Directive and the Enforcement Directive through false self-employment, criteria based on the worker's economic dependency and subordination in relation to the employer should be added to determine the employment relationship.

Ends
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