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CP/em

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Re: follow up of Communication "Guidance on the posting of workers in the framework of the provision of services", COM(2006)159

Dear Mr van der Pas,

The ETUC and the EFBWW received in November 2006 a Questionnaire, addressed to the "Social Partners' organisations" regarding the application and implementation of the Posting Directive (96/71/EC), and especially the situation in Member States with regard to all the aspects covered by the above mentioned Communication. In the letter accompanying the questionnaire a deadline for presenting the replies was mentioned.

Both organisations have immediately sent this questionnaire to their affiliates, and have informed your DG that responding within the deadline was going to be impossible, as this questionnaire was a complicated one, and affiliates would need more time for responding, also because of the period of the year (Christmas holidays).

With this letter we want to send you the joint response of the ETUC and the EFBWW, which is summarizing our position on the above mentioned Guidance of the Commission, as well as pointing at the most essential points raised in the replies of our affiliates. In the Annex you will find a series of these responses summarized.

EUROPEAN TRADE UNION CONFEDERATION
CONFEDERATION EUROPEENNE DES SYNDICATS
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The more elaborate responses of affiliates, which have already been sent directly to the Commission and/or their national government, are sent to you as separate Annexes (notably: the responses of the DGB Germany, ÖGB Austria, and CGT-L Luxemburg, and the joint response of LO-TCO-SACO Sweden).

Furthermore, we send to you for your information the joint response of the Belgian trade unions, which is giving detailed information about a recent agreement between the Belgian social partners in the National Labour Council (NAR, see FR and NL texts attached), on the basis of a proposal by the Belgian government, regarding prior declarations for posted workers.

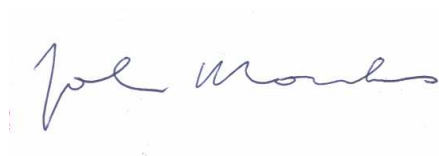
We apologize for the delay. However, as the issues raised are of great concern to our organisations as well as our affiliates, we hope that you will take all the documents into serious consideration.

In order to avoid misunderstanding the ETUC and the EFBWW decided to send only one joint reply to the European Commission.

We also want to propose to you to organise a meeting to discuss with you the further process and developments around the implementation and application of the Posting Directive in general and the specific issues raised in the 'Guidance' Communication.

We are looking forward to a further exchange of views on these issues.

Yours sincerely,



John Monks
General Secretary

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ANNEX I GENERAL COMMENTS

Introductory remarks

As we have stressed on many occasions, the ETUC and its affiliates are very concerned with the implementation and application of the Posting Directive.

In its legislative resolution on the Services Directive, adopted in February 2006, the European Parliament deleted the contentious Articles 24 and 25 from the Commission proposal, which dealt with prohibited administrative requirements and enforcement mechanisms for implementation of the Posting Directive. The deletion of these Articles was very much welcomed by the ETUC and its affiliates.

In response, the Commission has drawn up in April 2006 Guidelines explaining to Member States their obligations with regard to postings that take place on their territory. The main focus of the document is on clarifying under which conditions Member States are allowed to restrict the free provision of services, and which enforcement mechanisms are considered to be not allowed, on the basis of ECJ jurisprudence regarding Article 49 of the EU Treaty.

In the same period, the Commission published a Communication regarding the implementation of the Posting Directive, stressing the need for Member States to step up their actions and activities to monitor compliance and take effective measures in case of non-compliance.

In our view, the Commission in these two communications has been sending out confusing and contradictory messages, calling on Member States to improve implementation and application and strengthen enforcement, while at the same time putting into question the very mechanisms and instruments that Member States are currently utilising to that end.

This criticism has also been taken up by the European Parliament in its recent resolution on the application of the Posting Directive, based on the report prepared by Elisabeth Schroedter, which was adopted by an overwhelming majority on the 26th of October 2006.

The ETUC strongly regrets that on several occasions the representatives of the Commission have questioned the validity of the criticism raised by ETUC and the report of the EP.

We therefore have major question marks with regard to the current Questionnaire, and several of our affiliates have raised serious doubts as to how the information about the situations at national level would be treated by the Commission.

Some fear that instead of taking up seriously the task of promoting proper implementation and enforcement, the Commission would be more interested in chasing Member States that seem to somehow 'restrict' the free provision of services.

The restrictive interpretation of the concept of "provisions for public policy" by the European Commission has created a strong feeling that the European Commission is not interested in the real labour market problems and is focusing its policy on "deregulation".

In the current situation there is therefore a *serious lack of confidence that needs to be urgently addressed* by all actors at European level.

Concrete proposals by the European Parliament to be followed up

The report of the EP contains specific proposals aiming a better application and enforcement of the Directive. As such the EP has formulated concrete proposals to the European Commission. A few examples:

- Adoption of appropriate remedies for the enforcement of the directive (point 3),
- Proposing a directive on the conditions required for the crews of vessels providing regular passenger and freight ferry services between Member States (point 4),
- better coordination between Member States and enhanced notification procedures (point 5),
- Taking appropriate measures to enforce in practice the Posting of Workers Directive in some Member States (point 6),
- Initiate negotiations with the Member States as a matter of urgency, with the aim of establishing transparent and consistent criteria for determining the status of "workers" and "self-employed persons" with regard to employment law (point 9),
- Encouraging sharing information between Member States' employment inspection services to enable a joint campaign against sham self-employment (point 11),
- Stimulating cooperation between the national liaison offices and the sectoral social partners concerned (point 21),
- Regulating the joint and several liability for general or principal undertakings, in order to deal with abuses in the subcontracting and outsourcing of cross-border workers and to set up a transparent and competitive internal market for all companies (point 28),

These proposals need to be urgently given a proper follow up by the Commission.

The key role of the Posting Directive in safeguarding proper conditions for mobility of services and workers should not be undermined

In a period in which transnational provision of services and mobility of workers is increasingly taking place within the EU 25, the Posting Directive plays a key role in providing for fair competition by guaranteeing the respect for workers' rights, labour law and industrial relations systems in Member States.

Mid March 2006¹, the ETUC Executive adopted a position on the implementation of the Posting Directive emphasizing that it expects from the Commission a proactive approach to improve the level of implementation and enforcement of the Directive.

ETUC also stressed *that an increasingly open labour market in the EU requires a set of firm and fair rules of the game*, in which transparency and security for workers are put centre stage, to support cross border mobility of workers, both in the framework of services and the free movement of workers. *Such framework cannot do without mechanisms and instruments for the cross border monitoring and enforcement of working conditions and labour standards.*

Therefore, the ETUC welcomed the emphasis in the Commission's evaluation report regarding the Posting Directive on the need for Member States to step up their actions and activities to monitor compliance and take effective measures in case of non-compliance.

However, for the same reason we have raised strong concerns about the Commission's Guidelines, summarizing ECJ case-law. In our view they appear to be an over-simplification, overlooking the specificities of the various cases, taking no account of the great diversity of national labour market regulation and industrial relations systems. There seems to be also a lack of understanding *that Member States, according to the Posting Directive, have a **legal obligation to use effective instruments – adapted to their circumstances – to enforce the Posting Directive and provide workers with protection.***

The ETUC on several occasions has warned the Commission and members of the Parliament *not to confuse legitimate claims to administrative transparency and simplification with questioning the validity of requirements* that - in the framework of complex regulatory systems that exist at national level - are necessary to properly monitor and enforce the Posting Directive, and that provide workers from across the EU with proper protection with regard to especially wages, working hours, and health and safety.

¹ ETUC website: <http://www.etuc.org/a/2222>

The ETUC especially has drawn attention to the fact that the diversity in legal systems and industrial relations in the Member States will have to be taken into account when judging if certain requirements are necessary and proportionate. If systems like the Nordic ones rely on collective bargaining and social partner activity to implement and enforce the Posting Directive, the question if a certain requirement (such as having a representative on the territory) is 'disproportionate' has to be judged in the framework of the overall objectives of the Posting Directive, and the legitimate objectives of these Member States while taking into account the specificities of their systems.

The same must be said about requirements to obtain authorisation, to register, to make prior declarations, to have a legal representative or to keep social documents available.

The ETUC wants to stress that it *agrees with the need for more transparency and simplification* in the implementation and enforcement of the Posting Directive, and for *better information* of all the parties involved, in the joint interest of workers, companies and Member States' authorities.

ETUC is in favour of respecting the right to free movement of workers across the EU, but this must be based on the principles of equal treatment and upward harmonisation of working conditions and social systems. Labour market opening must be accompanied by strong supervision of working conditions, and measures to combat exploitation and unfair competition on wages and working conditions, too often taking place when there is cross border mobility of workers or services.

ETUC very much regrets that the Commission did not make its guidelines subject to any **prior** consultation of the Social Partners at EU level, nor asked the European Parliament for its opinion.

This issue has rightfully been taken up by the Parliament on the occasion of the Schroedter-report.

The Commission is now asking questions to Member States and Social Partners regarding the issues raised in the Guidelines.

In the Annex II you will find a summary of the comments and responses of affiliates on the Questionnaire. Furthermore, we send you as separate annexes the more elaborate responses of some affiliate organisations.

A few key messages are coming clearly and unambiguously from our affiliates:

1) The Commission should urge the Member States to *substantively improve implementation* as regards:

- access of foreign service providers and their posted workers to adequate information concerning the applicable terms and conditions of employment on the basis of laws or collective agreements on their territory (Article 4,3 of the Directive)

- enforcement of the applicable terms and conditions of employment (Article 5 of the Directive).

2) The various requirements, mentioned in the Guidelines, such as the requirement of having a representative on the territory, and especially the prior registration or declaration and keeping of social documents, are perceived as necessary requirements and as *pre-conditions* for a proper functioning of the mobility of services, and not as 'obstacles' to the free movement;

3) A system for joint and several liability for the main contractor in cases of subcontracting and agency work is an important tool to support efficient and effective enforcement of the rights under the Posting Directive.

4) The creation of a European permanent co-ordination structure aiming to improve the exchange of information and data is a vital instrument to facilitate the work of thousands labour inspectors. At the moment all the Member states have to negotiate the exchange of information and data via bilateral agreements (27MS X 27MS = 729 bilateral agreements!).

5) Although there is a clear difference between regulation 1408/71 with regard to the social security of posted workers and the Posting Directive regarding the terms and conditions of employment, there is a need to provide for more transparency and a more effective link between the two bodies of regulation when it comes to monitoring and enforcement. In this regard, the future of the so called E101 form is important, and should be discussed with social partners.

Furthermore, the ETUC has received several complaints regarding manipulation and abuses in several Member States, arising from an incorrect interpretation and/or application of the concept of the Posting Directive especially as regards the definition of posted worker. According to Article 2,1 of the Directive '*a posted worker means a worker who, **for a limited period**, carries out his work in the territory of a Member State other than the State **in which he normally works***'.

In addition in several Member States employers and service providers are abusing the "self-employment" status to allow posted workers to circumvent the application of the Posting Directive.

It would be very useful if the Commission would also develop *clear guidelines* with regard to such issues, taking into account that the definition as such of an employment relationship is a matter to be dealt with at national level by national law and practice.

The ETUC expects the Commission, when following up on this Questionnaire, to take the position as taken by the European Parliament and the ETUC and its affiliates on the issues raised in the Guidance very seriously, so as not to endanger the important compromise that was reached on the draft Services Directive.

Commissioner Barroso, when presenting on the 21-st of February 2007 his vision for the single market of the 21-st century, highlighted the need for, among other things,

- *a well regulated Europe*: the dismantling of barriers went hand in hand with the establishment of new rules. The benefits of the single market will be limited if the rules are not correctly applied, and if the rights created are not satisfactorily upheld and redressed;
- *a sustainable Europe*: recognising the social and environmental aspects of the single market are key conditions for gaining public confidence, and they are both investments in Europe's future quality of life.

The adequate and effective implementation and enforcement of the Posting Directive is a key element in the coming about of such a well regulated and sustainable Europe.

ANNEX II

COMMENTS BY MEMBER ORGANISATIONS

I. Control measures and other obligations

Questions 1 – 6

Netherlands FNV

None of the listed requirements are applicable in the Netherlands

Finnish trade union confederations SAK-STTK-AKAVA

According to the Finnish unions, the requirements under mentioned in questions 1-6, if existing in Finland, do not affect the ability of foreign service providers in Finland.

NSZZ Solidarnosc Poland

There are no such requirements in Poland.

LBAS-Latvia

1) It could be necessary in some cases that a Member State needs this requirement of a representative to help implement the tasks determined in the Directive.

2) This can also be the case for authorisation or prior registration, but these requirements have to be commensurate.

3) Taking into account that in recent times several cases of illegally employed foreigners have occurred, such declarations are necessary. It would help the State Labour inspectorate (VDI), the State Revenue Service and the State Border Guard, to do control and supervision activities. The requirement of prior declarations is not a restriction to the labour market but is supporting the tasks determined in the Directive.

4) LBAS considers that the requirement to keep and maintain social documents is necessary because it will help in the process of control and supervision. It is mainly related to illegal employment which in Latvia is rather high.

5) LBAS considers specific requirements on third country nationals not as restricting access to the labour market. In their opinion, the host country has the right to find out whether the service provider has observed all the regulations of the host state.

TUC Slovak Republic

On questions 1-6 the TUC does not have relevant information.

There is a need to develop and clarify the situation and regulation with regard to posted workers in the Slovak republic, as currently there do not exist specific rules.

II. Access to information and liaison offices

Questions 7 – 13

Netherlands FNV

Under Article 4,3 of the Directive public authorities of the Member State are primarily responsible.

The most appropriate means of informing foreign service providers is a website. The quality of the existing website is bad (B). The Ministry of Social Affairs has also published brochures on 'Working in the Netherlands', but these are not specific enough.

What therefore is lacking is proper information about generally binding (legal and collectively agreed) provisions concerning the core terms and conditions as meant in Article 3 of the Directive.

When discussed with the Ministry, there was clear unwillingness to provide financial means for selection and translation of the relevant collective agreement provisions. The Ministry holds the parties to the collective agreements responsible for this information.

Finnish trade union confederations SAK-STTK-AKAVA

7)

In the majority of cases, internet is the best way, it is easy to access, etc. Brochures are also needed. Completeness of information however is not so easy to achieve.

Rating of the use of internet websites:

- a) VG
- b) VG
- c) VG

Use of brochures

- a) G
- b) B
- c) VG

Other ways: no information

8)

SAK and TU (International department of Union of Salaried Employees TU) has an information office in Tallinn (Estonia). This office has been seen as a good way to disseminate information. Regarding the authorities, see www.mol.fi (also in EN)

9)

Lack of information can be a problem. When drafted legislation on subscriber's liability (Act on Customer Liability 2007) the social partners together with the government agreed on the need to develop public registers to get information easier and as inexpensive as possible in one place in internet. No data.

10)

In 2007, 12 new inspectors will be recruited by the Finnish supervision authority.

11) Liaison offices

- a) G
- b) G
- c) B
- d) B

12) No

13) It works, however, you must be active. No improvements

NSZZ Solidarnosc Poland

Information on legislation applicable to undertakings which for a limited period of time post workers to the territory of another Member State can be obtained at the Chief Labour Inspectorate in Warsaw. Also, cases of failure to comply with the prescribed terms and conditions of employment in Poland and possible cases of illegal transnational activities can be reported there.

Information given on the website of the Chief Labour Inspectorate is basic in character. It is available in German, French and English. According to Art. 8 para. 1 point 11c of the National Labour Inspectorate Act, it is responsible for fulfilling the tasks of providing information – on written request – about minimum work conditions in Poland for posted workers.

LBAS-Latvia

7)

Website: a) G, b) G, c) VB

brochures: a) VB, b) B, c) B

8) no

9) taking into account that Latvia is just starting to have experiences with posting of workers, they cannot give adequate conclusions

10) In the framework of a ESF project, a project is planned for VDI (labour inspectorate) capacity building

11) liaison offices: a) VG, b) M, c) VB, d) G

12) role of Social Partners: they have signed an agreement for cooperation, together they are organising informative events, and they have made common surveys to companies.

13) the cooperation is improving every year.

CGTP-IN Portugal

In relation to the practical enforcement of the Directive, they feel that the major difficulties have to do with information, co-operation and monitoring of its application.

Access to information concerning the existing national labour conditions that are to be applied to the posted workers is not always easy nor accessible to everyone. In this regard, the national legislation (item b of Article 13 of Law nº 35/2004) which limits the possibility of asking for information – on the working conditions that are applicable to the posted workers – “from whom has procedural legitimacy in accordance with the Code of Administrative Procedure”, makes information only available to a very limited and specific group of people, thus clearly contradicting the idea of general accessibility and of the open spirit enshrined in the Directive.

TUC Slovak Republic

7) Most suitable is website, but brochures are useful as well.

Internet: a) VG, b) M, c) G

Brochures and leaflet: a) M, b) M, c) G

Other methods: workshops, sessions, courses:

a) M, b) M, c) M

On access to information and liaison offices:

Information for foreign services providers and for posted workers is provided by employment and social issues offices, where there are also EURES assistants. The Trade Unions Confederation does not have any information about the quality of these services nor to workers, neither to employers or services providers. There is no link provided to web sites of employment and social issues offices at the web site of the Ministry of Labour, Social Affairs and Family of the Slovak Republic.

At the web site of the Ministry of Labour, Social Affairs and Family of the Slovak Republic (MLSAF) there is the web page giving some information about possibilities to work in some countries and some general information about social security of migrant workers. However, the web page with information about 'working abroad' is not easy to find at the MLSAF web page. It contains only information about conditions in the UK, Ireland, Germany, France and Sweden. All provided informations are from the time before accession of Slovakia into the EU, not updated and the majority of them, except of those on UK and Sweden, are translations of official materials provided by relevant countries for the MLSAF and for expert workers and not for common people looking for jobs in their country or for services providers.

Only one short leaflet prepared by the MLSAF informs specifically about conditions under which the job seeker may conclude a contract with an employment agency (contract about posting), and which conditions worker and services providers (Slovak Agency) have to keep when signing an agreement.

The MLSAF web page does not provide any information for services providers from foreign countries nor in Slovak neither in any other language.

8) Especially before and during the summer last year some newspapers published information about conditions under which contracts with employment agencies have to be concluded, what agencies have to provide for workers, how much job seekers have to pay, etc.

9) Yes, we are feeling lack of information on EU level. We need consequent implementation of this Directive in all Member States of the EU. We expect the SR and neighbouring countries to participate in a workshop that TUC is organising in third quarter of 2007, where the issue of posted workers in process of globalisation will be discussed.

10) Yes, we solve these problems in the framework of Eures-T Danube, but there have not yet been practical results.

11) Do not have any information on functioning of liaison offices

12) No

13) We think this questionnaire is an important step to solve the problems with posting of workers. In recent times, the information for social partners in Member States has improved. But we still do not have proper information about comparable data and indicators in the social field and with regard to posting of workers.

III. Monitoring of compliance with Directive 96/71/EC **Questions 14 – 18**

Netherlands FNV

In NL the labour inspection is only responsible for limited parts of the legislation concerning core terms and conditions of employment, namely only those regarding health and safety and minimum wage. The enforcement of all other terms and conditions of employment, in law or generally binding collective agreements, is left to 'private parties'.

This leaves the enforcement of the Posting Directive in a disproportionate manner on the shoulders of the social partners, and thereby the enforcement in practice is dependent on the willingness and commitment of both sides of industry to invest in enforcement arrangements.

The Dutch unions question if this is in conformity with the obligation of Member States to give full effect to the Posting Directive. In their view, currently the level of implementation and enforcement is very deficient for this reason. Only in some sectors it has been possible to reach joint enforcement agreements with the employers.

The Dutch trade unions think that it would be useful to introduce a general mechanism, according to which social partners would be informed or could easily access information about every posting taking place on their territory, so that the posting firm and the posted worker can be identified and monitored.

The European Commission should consider to introduce a linkage of such information to the exchange of information between national authorities about posting of workers on the basis of Regulation 1408/71 and the E101 form.

Finnish trade union confederations SAK-STTK-AKAVA

14) Social partners are involved and can affect the implementation process.

15) quite good, no, no

16) In practice no

17) In Finnish occupational safety and health organisation, there are some inspectors whose main work is to monitor foreigners' working conditions.

18. The Directive is good, the only problem is bad enforcement. In addition, the trade unions should have the right to be a plaintiff in the court process on behalf of the posted worker.

European Transport Federation ETF

The ETF reports a total lack of monitoring and enforcement notably in road transport and inland-shipping.

With regard to road-transport, especially the issue of 'cabotage' (if a Belgian transport firm delivers goods from Brussels to Rotterdam in NL, and then takes new goods from Rotterdam to Groningen NL, the transport between Rotterdam NL and Groningen NL is 'cabotage') is a major problem, because its definition is different from country to country, and because monitoring and control depend on the ministry of traffic that doesn't understand these situations. Liaison offices can only be effective if there is cooperation between the different relevant ministries. A form of prior registration, by phone, fax or mail, such as is obligatory in Belgium for such situations, would be useful.

With regard to inland-shipping, the situation on cruise ships for instance on the Donau is very worrying, as a consequence of the fact that the ship maybe owned by a Norwegian, registered in Luxemburg, and hiring Hungarian workers via a Hungarian temporary agency to work on Hungarian employment contracts. In such a situation, no country feels responsible for monitoring and enforcement of anything.

LBAS-Latvia

14) Is not very topical

15) cooperation is improving every year

16) no info

17) no info

18) to improve labour inspection capacity, to inform the society, to work with illegal employment

CGTP-IN Portugal

In terms of enforcement monitoring, mechanisms have very little accuracy and inspection works in quite an inefficient way.

In their view, and considering the problems that the Portuguese workers posted in other member states are facing, those difficulties (in information, co-operation and monitoring) are not specific to our workers and happen in other countries; actually in relation to information and co-operation there is a widespread malfunctioning of the adequate mechanisms.

The information exchanges and co-operation activities, aimed at preventing and repressing illegal activities and abusive situations, are extremely important, and are in fact the way to efficiently apply the directive; without information exchange and without co-operation this

mechanism simply does not work. Therefore, we believe that these aspects need improvement and member states must adopt the respective adequate measures.

Finally, they underline that the posting of temporarily contracted workers is the model that creates more difficulties and where more abuse occurs, meaning that it is in this area that vigorous action is more required, if needed through better regulation on these cases, to ensure better protection for these workers.

TUC Slovak Republic

14) No

15) No

16) yes, but there has not been a reason to use this possibility.

18) we expect to have more concrete experiences to report about next year

IV Measures in the event of failure to comply

Questions 19 – 22

Finnish trade union confederations SAK-STTK-AKAVA

19) Yes they are. The problem is bad enforcement.

20) Better enforcement. We have not noticed any negative impact. See answer on 19)

21) No

22) No

LBAS-Latvia

19) yes

20) With a system of joint and several liability for the general or main contractor it would be easier to control and supervise, the general contractors could choose by themselves not the cheapest but the most loyal collaboration partners. Those foreign companies would be disciplined that observe the regulations when they are at home in their own countries but not when they are in Latvia.

V. General

Question 23

Finnish trade union confederations SAK-STTK-AKAVA

See reply to 19) It must ensure that the posted workers are truly guaranteed the same rights as the workers in the state to which they are posted. This means for example

- better enforcement, firstly, more resources to the authorities of the state where posted workers are posted, and secondly,

- the right to the trade union to be a petitioner in the court process on behalf of the posted worker
- the subscriber's (client's) liability for the posted worker's salary etc.

NSZZ Solidarnosc Poland

For the trade unions it is difficult to judge the impact of posting regulations on free movement of services as there are a limited number of posted workers in Poland. At present, the trade unions are preparing to face the problem. There are several agreements for cooperation with trade unions in Germany, Ireland, UK and Norway.

TUC Slovak Republic

In their opinion, it would be suitable and useful to inform all new Member States about good practices with regard to posting of workers.