European Federation of Building and Woodworkers

Final adopted

EFBWW assessment

of the proposal for a Directive

on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2012) 131final)

This paper contains specific headings (topics) which all need to be taken into account during the legislative debate of the proposed Enforcement Directive.

A follow-up document will contain precise proposals for amendments

4 June, 2012

For additional information contact:
Werner Buelen, ☏ +32 (0)2 227 10 40/46, ☏ +32 (0)475 84 06 48, 🖱 wbuelen@efbh.be
Sam Hagglund, ☏ +32 (0)2 227 10 40/45, ☏ +32 (0)475 84 06 51, 🖱 samhagglund@efbh.be

This paper has been prepared by the European Federation of Building and Woodworkers (EFBWW), which organises 72 national trade unions from 31 countries. The EFBWW is a recognised European social partner for the construction, wood and furniture sector.

EFBWW assessment of the proposal for a Directive (COM(2012)131) on the Enforcement of the Posting Directive 96/71/EC

On the basis of existing problems regarding the interpretation and application of the Posting of Workers Directive (PWD), the EFBWW has assessed the legislative proposal to improve the enforcement of the existing PWD. The proposal for a Directive could be a positive step in the right direction, and, provided that **profound and fundamental improvements are made**, it could contribute (1) to equal treatment of all workers whatever their country-of-origin and (2) to an improvement of the prevention of malpractices, of the level of controls/checks and of the compliance with the terms and conditions of employment applicable for temporarily employed cross-border workers. However, to achieve these objectives, the proposal for a Directive must focus more on:

- a fundamental horizontal (re)interpretation of the PWD,
- adequate, improved and additional transparent definitions;
- efficient cross-border cooperation between national authorities and inspectorates and
- an efficient prevention, identification and compliance policy regarding social abuses and fraud in the context of cross-border temporary employment.

President Barroso, when addressing the European Parliament on 15 September 2009, made a formal commitment as to "*the need to address the concerns and issues raised by several stakeholders during such debate*" and announced "*a legislative initiative to resolve the problems of implementation and interpretation of the posting of workers Directive*". The proposal for a Directive tackles the questions of interpretation only indirectly and in part. As a result, the European Commission only partially fulfils the commitment made by its President.

1 General provisions

A Directive on the enforcement of the PWD must strive to restore the original objectives and the minimum character of the PWD and, thereby, the aim of the European legislator. Unfortunately, the present PWD displays various deficiencies which originate, on the one hand, from an inadequate legal basis in the EU Treaty, and on the other hand, from a political compromise. Over the years, these deficiencies have led to various legal conflicts and political and social tensions, in particular generated by the ECJ "Laval quartet" of judgments. By means of the proposed Directive, many existing deficiencies could be rectified. The EFBWW calls on the European legislators to discuss all issues which lead to an improvement and a better application and enforcement of the existing PWD and thereby securing good working conditions for workers subject to cross-border posting.

1.1 Legal basis

The proposal for a Directive has the same legal basis as the 1996 PWD. Meanwhile, since the adoption of the Lisbon Treaty there have been fundamental changes regarding the political context of the "social market economy". It is necessary that the proposal on the one hand refers to the changed legal grounds and on the other hand actually takes the changed legal grounds into account in the material provisions. In particular, it is important that the proposal for a Directive explicitly refers to and takes into account Article 3(3) of the Treaty of

Lisbon and Article 21(2) of the Charter of Fundamental Rights of the European Union. The EFBWW emphasises that the Treaty expressly lays down the goal to achieve "social progress", which requires that any form of "discrimination" shall be prohibited.

1.2 Aims

When the PWD was drafted in the 1990s, it was repeatedly emphasised that the Directive aimed at achieving a "*fair and non-discriminatory level playing field*", on the one hand by promoting the "free movement of undertakings" and on the other hand by "striving for equal rights between workers". Against the initial spirit of the European legislators, from 2007 onwards the PWD has been extremely narrowly interpreted by the ECJ in a number of judgements delivered. The ECJ has by its interpretation watered down article 3(7) – which states that the Directive "shall not prevent application of terms and conditions of employment which are more favourable to workers" - to mean that the directive shall not prevent application of terms and conditions of employment in *the home country* which are more favorable to posted workers. According to most legal experts, Article 3(7) referred originally to a possibility to give workers "more favorable conditions", referring *to conditions both in the home state and in the host state.* The EFBWW considers that the political reinterpretation by the ECJ is detrimental to the original "will of the European legislators" to create a fair and non-discriminatory playing field for workers and undertakings. The EFBWW considers that only the European legislators have the competence to define the political framework of the PWD and to restore the original aims of the Posting Directive.

Via the proposed Directive, the European legislators can remedy this situation – the re-interpretation of the PWD by the ECJ – by including a goal-oriented ("teleological") (re)interpretation of the PWD in the Enforcement Directive, in accordance with the original political will of the legislator.

For this purpose, the EFBWW proposes that a paragraph is added to Article 1 of the proposed Directive stipulating that the PWD promotes transnational provision of services in a climate of fair competition and with respect for the right of the posted worker to benefit from the minimum terms and conditions of employment that prevail in the host state, and to have the same possibilities as the workers in the host state to improve their conditions above the minimum level.

2 Definition of posted worker

It is clear that the PWD applies only to employed workers, and not to self-employed workers. However, it has been shown repeatedly that "false self-employment" – on a large scale – has been utilised as a means to circumvent the application of the PWD. A joint study by the European social partners in the construction industry on "self-employment and bogus self-employment in the construction sector", concluded that bogus self-employment is often used to entirely circumvent the application of the PWD. The proposal for a Directive expressly recognises the problem of bogus self-employment in Recital 17.

The lack of legal clarity is one of the reasons why falsely self-employed are used frequently as a means to circumvent the PWD. A clearer definition of the concept of an employee or worker is of major importance to be able to draw a clear-cut distinction between the genuine self-employed and a posted worker in the meaning of the PWD.

For the purpose of the PWD, the definition of a worker is that which is applied the law of the host state. This is a good principle, but unfortunately it is partly undermined by recent judgments from the ECJ which bring back the definition to the country-of-origin rules, and thereby make it possible to "export" false self-employment.[1] In the 1980s and 1990s, however, the ECJ has on several occasions formulated detailed and useful criteria to enable a distinction to be drawn between "workers" and "self-employed persons". In Case 66/85 *Lawrie-Blum v. Land Baden Württemberg* (1986) the ECJ argued that as it defines the scope of the fundamental freedom, the community concept of a 'worker' must be interpreted broadly and defined in accordance with objective criteria which distinguish the employment relationship by referring to the rights and duties of the persons concerned, and that the essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration. Based on ECJ case-law[2], the EFBWW and FIEC propose to add the criterion of "subordination" to the concept of a "worker".[3]

The EFBWW considers that the actual circumstances under which the work is being performed, should determine whether a person is an employee or not.. The label of the contract between the parties should not be decisive in establishing whether a person is an employee or a self-employed. Likewise, registration or classification for other purposes, such as taxation and social security, or the existence of a registered company should not influence the classification under labour law.

To prevent the circumvention of the PWD by using falsely self-employed, the EFBWW proposes to introduce, in the definition of a posted worker, the objective criteria of "subordination" and "economic dependency" as mandatory for the determination of an employment relationship. Such a definition could draw on ILO Recommendation 198, Article 13 paragraphs a) and b).

3 Preventing abuse and circumvention

3.1 Definition of posting

In today's internal market there is widespread abuse of both the freedom to provide services and the PWD. This hinders fair competition and makes it difficult for a genuine undertaking to compete against undertakings which are choosing a regime of convenience based on "cheap cross border labour". To prevent abuse and circumvention there should be a clear and enforceable definition of the posting of workers in the framework of the provision of services.

[1] ECJ, Banks-case, C-178/-97
[2] ECJ, Jany-case, C-268/99
[3] Joint conclusions and recommendations of the European social partners in the construction industry on self-employment and bogus self-employment, Prague 5 February 2010

The PWD contains definitions and formulations that are vague, ambiguous and unclear in this respect. The proposal for an Enforcement Directive recognises this shortcoming and tries to improve the situation in article 3. However, the existing lack of clarity persists with the proposed text. Article 3 proposes a non-exhaustive list of criteria which are merely indicative as to whether a situation is posting in the meaning of the PWD. It also proposes a dual check i.e. even when verified that the posting undertaking is genuinely established in the posting state (article 3.1), the workers still have to qualify as posted workers (article 3.2). This could lead both to more legal uncertainty and undesirable results and should be avoided.

The EFBWW proposes that article 3 should be rewritten so as to make a short and exhaustive list of mandatory conditions to be met for the PWD to apply. For this purpose it should be assessed whether the undertaking genuinely performs substantial activities in the State in which it is established, whether the posting is limited and how and/or for how long it is limited, and whether there is a genuine connection between the sending state and the employment contract of the posted worker. Such a connection should be deemed to exist when the worker is subject to the legislation in the MS in which his employer is established, and the employer bears the costs of the posting. It should be made explicitly clear that in case it is not demonstrated that these conditions are met, the Member States in which the activities are performed may apply all their national law provisions, relevant collective agreements and/or practices.

3.2 Substantial activity

The EP Report on Challenges to collective agreements in the EU[4] and the Report on the joint work of the European social partners (BusinessEurope and ETUC) on the PWD[5] point to the need to make a clear distinction between “genuine companies” and “letterbox companies”. In order to prevent employers acting in bad faith from going in search of a country with the most favourable regulations, there is a need for clear criteria to be applied uniformly in the Member States, before the service provider can profit from the free provision of services within the internal market.

The EFBWW proposes that concrete substance is given to the concept of “substantial activity”. It must relate to real economic activities that can be demonstrated relatively simply on the basis of tangible evidence of declarations and payments e.g. for social security/protection, VAT and taxes.

3.3 Temporary posting

The Legal Study launched by the Commission[6] points out (in recommendation 11) that “to enhance possibilities to combat abusive situations, the definition of temporary posting in the

[4] EP Report on Challenges to collective agreements in the EU, 2008/2085 (INI)
[5] Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases (19.03.2010).
[6] Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union to the European Commission (Contract Number VT/2009/0541) by Aukje van Hoek & Mijke Houwerzijl, p 189.

PWD should be amended or clarified." This might be done by introducing "*a legal presumption of 'structural' employment in the host state in case the workers are not 'genuinely' posted in the host country and if the conditions of the country of origin are not more favourable for the worker*".

In case parts of the applicable and mandatory working conditions of the country of origin are more favourable to the posted worker than those of the host country, those parts of the contractual or mandatory working conditions of the country of origin apply during the stay in the host country which are deemed to be more favourable for the posted worker.

In line with the reasoning in the Commission's Legal Study[7], the EFBWW thinks that if the worker carries the risks and expenses of moving abroad, there is no reason to limit the social protection to the terms and conditions of employment according article 3(1) of the PWD.

Temporary posting means firstly that the worker is not hired in the host country or is not working there on a more or less permanent basis; secondly that the posting is limited in time. However, a definite time limit could mean that posted workers fall outside the scope of the PWD, as well as lead to arbitrary unequal treatment of workers working for the same employer at the same work place. Therefore, instead of a definite time limit it should be clearly stated in the Enforcement directive that unless the employer can provide proof to the competent authorities that the work is carried out for a limited period of time, and how and/or for how long time it is limited, the law and the working conditions of the host Member State shall apply from day one.

3.4 Allowances specific to the posting

The PWD article 3(7) states that "allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging." If this could be circumvented by the employer simply leaving it up to the workers to pay for this out of their wages, the PWD article 3(7) would lose its meaning. The EFBWW therefore strongly supports the Commission Legal study's Recommendation 12, for it to be made clear that the PWD article 3(7) provides for the payment of expenditure for travel, board and appropriate lodging/accommodation to be the obligation of the service provider.

On the other hand it should be also made clear that if the employer pays lump sums to compensate the expenditures of the workers for accommodation, board and lodging instead of the actual costs, that those lump sums have to be sufficient to cover the costs actually incurred by the worker and that the payment of such lump sums must not be treated as a payment of wage for the work performed, even if they are paid as hourly supplements. So, the EFBWW considers that allowances directly related to posting and other supplements paid to compensate the costs of the posted worker for travel and stay in the host country should only be considered as a supplement to the minimum wage of the host country, but not as a payment or part payment to fulfill the obligation of the employer to pay the due net or gross applicable minimum wages of the host country.

[7] P 21 and 45.

Paragraph 9 of the preamble should be rewritten accordingly.

4 Relationship between the Posting Directive and the Directive on Temporary Agency Work[8] - proposal for addition

There is currently legal uncertainty concerning posted foreign workers. These workers are covered, on the one hand, by the scope of the PWD under Article 1(3)(c) and, on the other hand, by the Directive on Temporary Agency Work.

These differences have consequences for determining the applicable terms and conditions of employment. The Directive on Temporary Agency Work contains an express provision (Article 5(3)) that allows "equal treatment regarding working and employment conditions" to be arranged by collective agreement for temporary workers. Consequently, the will of the European legislator in drafting the Temporary Agency Work Directive was to allow for equal treatment between all workers irrespective of their country-of-origin.

This express possibility for equal treatment is not provided for in the PWD.

In order to resolve this ambiguity, the EFBWW proposes that the Enforcement Directive provides that the temporary workers (as described in Article 1(3)(c) of the PWD) fall within the scope of the Directive unless more favourable terms and conditions of employment are concluded pursuant to Article 5(3) of the Directive on Temporary Agency Work.

5 Access to information, administrative cooperation, and monitoring compliance

5.1 Improved access to information (article 5)

One of the typical features of posted workers is that they are all employed on a foreign labour market, of which they have no knowledge or information regarding their rights and options to file complaints. Most of them live isolated and do not speak the language of the country in which they are employed. As such, many posted workers are in a very vulnerable position and can be easily exploited. This problem should be acknowledged and resolved. Firstly, all information regarding terms and conditions of employment and ways of legal support should be available in an accessible and transparent way in the mother tongue of the workers in the country-of-origin. Secondly, all posted workers should have simple access to free-of-charge legal, administrative and practical support and aid in the country of employment. Thirdly, workers' representatives should receive adequate financial and logistic support to help, assist and defend workers who are faced with social fraud.

The EFBWW points out that it should be clear that providing accessible and transparent information regarding the applicable terms and conditions of employment is an obligation of

[8] Directive 2008/104/EC of 19 November 2008 on temporary agency work.

the national authorities; this obligation cannot be shifted to the social partners. To clarify this, article 5.4 should be redrafted.

5.2 Administrative cross–border cooperation

Opting in favour of bilateral cross-border cooperation in the proposal for a Directive (article 18.2) is contrary to the principle to minimise the administrative burden. By means of the proposal for a Directive, the European Union is even opting in favour of imposing a heavy administrative burden on Member States and service providers. This explicitly contributes towards legal uncertainty and lack of transparency, which will certainly not promote free movement.

With a view to greater effectiveness, transparency and simplicity of cross-border cooperation between Member States, the EFBWW is of the opinion that Chapter III of the proposal for a Directive must be revised in full and replaced by a uniform European cooperation agreement, which in the long run is a more sustainable instrument.

5.3 Compulsory warning procedure in the case of a suspected letterbox company

Practical experience has shown that prevention and identification of letterbox companies is extremely difficult. For this reason, the EFBWW is of the opinion that the national authorities/inspectorates must cooperate at European level and have at their disposal a compulsory early warning procedure in the event of serious suspicions of legal artifices. Immediate actions should be possible, and the direction of the investigation must be fully in the hands of the inspectorates of the host country.

Article 6(5), second subparagraph, provides for an “urgency mechanism”, whereby urgent measures are required on account of “particular circumstances”. Unfortunately, this necessary procedure is not developed. Experience has shown that letterbox companies can cause a great deal of damage to both workers and authorities in a very short period of time. Consequently, it is desirable to introduce a rapid compulsory warning procedure if there are serious grounds for suspecting that the temporary employment is occurring by means of a letterbox company.

The compulsory warning procedure must be directly accessible at all times for all administrative authorities responsible for monitoring the application of the PWD. In addition, the procedure must be devised via a European standard procedure and be easily accessible. The proposed period of 24 hours is sufficient to take all the necessary steps immediately in the country-of-origin and the country-of-employment to counter further abuse/damage, to inform all parties involved and to take all necessary protective measures.

5.4 Country-of-employment principle regarding checks and controls

It should be underlined that in case of social fraud the tangible negative economic and social consequences take place in the host country. Consequently, the EFBWW considers that article 6 of the proposed Directive should explicitly recognise that the direction of the checking of undertakings is expressly assigned to the inspectorates of the country-of-employment. This explicit competence of the national authorities/inspectorates of the host country avoids potential conflicts between Member States if the control of letterbox companies would be assigned to the country-of-origin.

In some urgent cases prompt actions are absolutely indispensable and the national authorities/inspectorates of the host country should be able to take all immediate appropriate measures to prevent, investigate and sanction social fraud.

Article 6.7 foresees that the national authorities can use information "only in matter(s) for which it was requested". This is an unnecessary limitation for the national authorities of the host Member State to use information. This provision is an "open door" for lawyers to contest the use of information by national authorities. This restricted use of information should be deleted.

Article 6.9 which provides that Members States shall cooperate closely in order to "examine any difficulties which might arise in the application of article 3(10) of the Directive 96/71/EC should be deleted.

We would like to point out that no provision is foreseen in article 6 of the proposed Directive for sanctions of any kind if a Member State's cooperation is deficient, late or incomplete. This should be remedied in the proposed Directive

The application of the country-of-origin principle in article 7.4 is completely unacceptable to the EFBWW. According to this provision, the national authorities of the Member State could only conduct the checks and controls "*at the request of the competent authorities of the Member State of establishment*". This would mean that the national authorities of the host country would subordinate themselves to the authorities of the country-of-origin.

5.5 Opting for efficient mechanisms in the-country-of employment (Articles 9 and 10)

The proposed Directive introduces a voluntary and exhaustive list of national control measures that a Member State may impose (Article 9(1)). However, some points of the list of control possibilities are too restrictive and sometimes more restrictive than the ECJ judgments. In order to develop a level playing field, where everyone knows what the administrative requirements are in the case of posting, the EFBWW proposes that all the national control measures listed in Article 9 are imposed as mandatory on all Member States. This uniform application would create more transparency, since all service providers would have to apply the same set of rules.

5.5.1. Prior declaration of employment in the country-of-employment

In order to allow national inspectorates to rapidly take preventive action against social security fraud in cross-border posting, it is essential that the inspectorates in the country-of-employment are informed in good time prior to the posting. The EFBWW proposes the introduction of a uniform scheme of compulsory prior declaration of employment of posting workers.

In this respect, reference can be made to the joint standpoint of the European social partners of the construction sector,[9] which states the following:

> "*To facilitate preventive checks in the country of origin and the host country, the EFBWW and FIEC are in favour of a compulsory notification system by the undertaking of origin prior to the posting. Such a system aims to inform the national actors of the situation regarding the posting and provides insight into the scale and occurrence of this phenomenon at sectoral level*."

It should be clearly stated in article 9.1(a) that all posted workers should be clearly identified in the prior declaration.

5.5.2. Presence of documents

Here too, reference can be made to the joint standpoint of the European social partners of the construction sector, which states:

> "*The EFBWW and FIEC are of the opinion that the practice of imposing obligations on foreign Service providers, such as the production of pay slips and contracts of employment or documentation on conditions of employment during controls by the competent national authorities, should be applied throughout Europe*."

Based on the practical experience that the national authorities/inspectorates have tremendous problems to identify where the employer that posts workers is paying his social contributions and taxes (if paid at all), the EFBWW considers that it is vital that the company is obliged to keep and make available all documents which "prove to the competent national authority where the social security premiums and taxes are paid".

5.5.3. Translation of documents

In this respect, the question arises as to whether or not a translation is "excessive". In any case, care should be taken that the documents are usable for the inspectorates carrying out the checks.

[9] 13.07.2011 "Joint proposals of the European social partners of the construction industry for improving the application and the enforcement of the "Posting" Directive (96/71/EC) (PWD)"

5.5.4. Presence of a contact person at the place of employment

The compulsory presence of a contact person in the country-of-employment is a prerequisite for carrying out checks. The proposal for a Directive applies a narrow interpretation of the tasks of the contact person. As such the proposed Directive allows that a posting company would designate a person to negotiate who has "no legal competence" to represent the company. Thus it should be stated explicitly that the designated person "acts on behalf and in name of the company as legal representative".

5.5.5. Introduction of a European Social Identity Card (for the construction sector)

In order to facilitate checks of construction sites quickly, effectively and without additional burdens for employers, the EFBWW proposes that everyone, irrespective of whatever law applicable to the employment relationship on a building site, must be in possession of a Social Identity Card, issued by the National Authorities of Social Security of the country-of-origin. The National Authorities must deliver the Social Identity Card periodically to those whose payment of Social Security and insurances is guaranteed.

The EFBWW wishes to emphasise that agreement has already been reached with the European employers on the outlines of the introduction of a Social Identity Card in the construction sector. The agreement (5.2.2010) provides for the following:

> *"In order to root out malpractices there is a clear need to put sector specific measures in place, in order to facilitate transparency on construction sites. Such measures could take the form of a Social ID-card or, according to national practices, of any other alternative instrument providing a similar level of transparency. Such instruments would facilitate the verification of whether the information on the employment status contained in such an instrument corresponds with the facts.*
>
> *EFBWW and FIEC propose that everyone on a building site must be in possession of a personal recognition document, issued by the competent national authority or by the concerned body. Such a document should at least allow the identification of the person concerned, his/her employment status (directly employed or self-employed) and the contact information of the issuing national authority or the concerned body."*

All main contractors should be obliged to keep a daily staff register on the work place, which includes at least names of the business, identification of the card owner and working hours of the persons on their building sites. The daily registration and control of the SIC on the building site is the responsibility of the main contractor. The main contractors will only permit access to the site to those who are in possession of a valid Social Identity Card.

Through the SIC every worker knows if his employer has declared him at the national Social security. The obligation to wear the SIC visibly on a building site, has a self-regulating factor and substantially facilitates the work of labour inspectors.

5.6 Inspections (article 10)

The EFBWW is of the opinion that the inspectorate(s) of the country-of-employment must be able to obtain all the information it considers necessary to carry out its task – in this case monitoring compliance with the terms and conditions of employment – from the inspectorate of the country-of-origin. Consequently, the national authority/inspectorate in the country-of-employment should be the leading authority.

The proposed restriction that checks and monitoring/inspection mechanisms could only take place on the basis of preliminary risk assessment (see article 10.1) limits the autonomy of the national authorities to act as they deem necessary to execute their task. The obligation to execute a prior risk assessment should never hinder the possibility to conduct surprise checks and monitoring/inspections or react to new developments or needs. The EFBWW considers that the second part in article 10.1 regarding the "risk assessments" interferes with the autonomy of the national authorities and thus should be deleted.

Finally, the proposed Directive aims to hinder national checks and monitoring/inspection mechanisms by requesting that they should not be "disproportionate" (article 11.2). By imposing this serious restriction "thorough" controls are made impossible. In practice, each service provider will always consider a "thorough control" as "disproportionate". This requirement should be deleted.

As stated earlier (see point 5.4, last§) the demand in article 7.4, that national authorities/inspectors should act "at the request of the competent authorities of the Member State of establishment" is completely unacceptable.

Articles 10.4 and 10.5 could be seen as an interference by the Member State in the autonomy of the social partners to check and monitor the application of the terms and conditions of employment for which the social partner have an exclusive competence. These articles are not coherent with recital nr 7, which guarantees the "respect for the diversity of national industrial relations as well as the autonomy of the social partners …".

5.7 Towards efficient European administrative and legal cooperation between Member States (article 18 and 19)

5.7.1. Opting for a uniform, transparent and effective European cooperation framework agreement

At present, cross-border administrative and legal cooperation between Member States on the exchange of information is organised bilaterally. The procedure is also confirmed in the proposal for a Directive (see Article 18). As regards efficiency, transparency and optimisation, the fundamental question has to be asked whether this is the best method. After all, the disadvantages of bilateral cooperation within the EU are very considerable:

- Drawing up a bilateral agreement is a long and arduous procedure for each Member State;
- Each bilateral agreement is different in regulation and effect;

- Each Member State has to conclude 29 bilateral cooperation agreements to cover the EEA as a whole;
- The number and diversity of the bilateral agreements represent a heavy financial and administrative burden for the national authorities (which must implement and maintain them), for the EU (which must monitor them) and for service providers (who in each case are confronted with different agreements);
- Bilateral cooperation relies entirely on the goodwill of the other party to provide the requested information quickly and correctly.

Opting in favour of bilateral cooperation in the draft Directive is consequently a singular choice which only reinforces the present inefficient cross-border cooperation and certainly will not improve it. A common multilateral framework would create more transparency and would contribute to efficient cross-border cooperation in order to root out existing social fraud practices.

5.7.2. Serious question marks against the IMI as a good alternative to bilateral cooperation agreements. Is this a reintroduction of the country-of-origin principle through the backdoor?

Article 18(3) provides for a singular solution on the part of the European Commission of replacing the bilateral agreements by the above-mentioned IMI (Internal Market Information system). The IMI system – as an Internal Market instrument – is based primarily on the exchange of information from the country-of-origin to the country-of-employment. Since one of the objectives of the European Internal Market is to reduce administrative burdens, using the IMI system could lead to a situation where the control and exchange of information, would become determined by Internal Market rules. This implies that not all data requested by the national authorities of the country-of-employment will be obtainable. In the case of the introduction of the IMI system for enforcement of the PWD, it is self-evident that, in the short term, the exchange of supplementary information (depending on the request of the competent inspectorate in the country-of-employment) will become considerably curtailed. Furthermore, the country-of-origin has considerable discretion in itself determining the extent to which it will forward information to the inspectorate of the country-of-employment (complete or incomplete, in part, quickly, slowly, officially, etc.). De facto, the recognition of the IMI as an instrument for the exchange of information in the context of the PWD boils down to the inspectorates being entirely subject to the rules of the Internal Market and on the recognition of the power of control of the country-of-origin.

In addition, it should be pointed out that the IMI is mainly an economic instrument and not a labour market instrument. This difference will without any doubt lead to tensions between economic and labour market interests at national level.

The EFBWW is of the opinion that the proposed exchange of information on cross-border posting by means of the IMI system (Articles 18 and 19 of the proposal for a Directive) could be used as long as the leading competence is attributed explicitly to the national authorities/inspectorates of the host country

5.8. Setting up a temporary workers' coordination body for large scale cross-border work places

Large building sites with various foreign companies and workers employed through a complex system of subcontracting and outsourcing, are extremely un-transparent working places for workers' representatives (and labour inspectorates) to ensure proper information and check/control/monitoring of the existing terms and conditions of employment. In this way, compliance with the provisions of the PWD is (almost by nature) hindered.

Based on its experience to set-up temporary ad-hoc workers' coordination meetings on large building sites (for example the Alp-Transit Sites, the Cologne-Frankfurt Railway Sites, …[10]), the EFBWW proposes that the main contractor has a prior obligation to inform – as soon as possible - the competent national labour inspector authority and national trade union(s) of the country where a service contract will be executed, when at least 500 workers will be employed simultaneously.

The national trade union(s) of the country where the work will be performed, should, for the period of the execution of the work, have the right to set up a temporary cross-border trade union cooperation body, with the right to inform workers, establish dialogue with the contractors and conduct necessary checks and controls. In this cooperation body all trade unions that represent the legitimate interests of the employed workers can participate.

6. Enforcement

6.1. Defence of rights – facilitation of complaints

The EFBWW welcomes the requirement imposed on Member States to set up "effective mechanisms" "to lodge complaints directly" (Article 11(1)). However, in this respect it is necessary for this procedure to be devised in full consultation with the parties involved. An important point in this respect is the question "who pays the costs for this?". Taking account of the argument that the Enforcement Directive must guarantee the applicable terms and conditions of employment – which come under public policy – it is only logical that the organisational, administrative, logistic and legal costs are paid directly by the National authority, which must devise the effective mechanisms in accordance with Article 11(1) of the proposal for a Directive. In order to obtain a refund of the costs incurred, the National authority – which has borne the costs – should have the right of recourse against the defaulting employer.

6.2. Country-of-employment principle

The EFBWW wants to point out that the country-of-employment principle must apply fully also for enforcement measures. The requirements laid down in Article 11.3 would mean that a part of the Laval judgment would be codified negatively towards the trade unions of the host country. In the Laval case the posted workers concerned had a collective agreement

[10] Projects funded by the European Commission

from their home country which was supposedly valid also outside of Latvia. Article 11.3 in the proposed Directive would probably mean that such a collective agreement from the home country would be "protected" also in the host country, which, in its turn, would mean that trade unions in the host country would be restricted from imposing host country conditions. According to the EFBWW, Article 11.3 must be re-written to ensure the role of trade unions in the host country and their right to enforce host country conditions**.**

6.3. Back payments

As regards the possibilities for refunds (Article 11(5)(b)), the EFBWW sees no reason why posted workers only should receive a refund for "excessive" costs relating to "the quality of accommodation", as the accommodation of the posted workers is at the cost of the employer. It should be made clear that the Member States shall ensure that the necessary mechanisms are in place to ensure that posted workers are able to receive refunds of costs in relation to travel, board and lodging withheld or deducted from wages by the employer.

6.4. Joint and several liability (Article 11 and 12)

The introduction of a European rule on chain liability is on the one hand a clear demand by the European Parliament, which is calling for a "*clear-cut European legal instrument*"[11][12] and on the other hand a practical consequence of everyday reality, in which ever more frequently complex chains of subcontracting and outsourcing are deliberately set up, whether or not with the intention of tolerating social abuses in the last link.

Partly as a result of the success of the cross-border mobility of service providers, the large differences in conditions of pay and employment and social protection and the extremely inadequate (i.e. non-existent or very difficult) control, it has become very simple for contractors acting in bad faith to establish social security fraud in the subcontracting chain via the subcontracting and outsourcing system. Subcontracting and outsourcing are extremely widespread, especially in the construction sector, not only for reasons of efficiency and rationalisation of the production process (as is always claimed by employers), but above all on account of the cost-saving consequences. By creating long and complex chains of subcontracting and/or outsourcing, very heavy price pressure is created automatically on the final implementers in the lowest link. Consequently, a call is often made on foreign undertakings here, which usually do not apply the existing regulations correctly. As a result, social fraud is committed in a structural manner in the subcontracting chain.

The liability arrangements proposed in article 11 and 12 shall only apply to the direct subcontractor, and the Member State shall provide that a contractor which has undertaken due diligence shall not be held liable. The EFBWW thinks these limitations run counter to the experiences on liability in the MS, which point to chain liability being the most potent instrument on objective grounds. The ECJ has in its first judgment on the basis of the PWD established that chain liability on objective grounds is a good way to provide that adequate

[11] EP Report on Modernising labour law to meet the challenges of the 21st century, 2007/ 2023(INI)
[12] EP Report on Social responsibility of subcontracting undertakings in production chains, 2008/2249 (INI)

procedures are available to workers and/or their representatives for the enforcement of obligations under the PWD, as called for in PWD article 5.[13]

6.4.1. Chain liability

It is well recognized that good experiences exist of Member States with a system of chain liability in force. However, there are no good experiences to be found if the liability is restricted to the direct subcontractor. Liability for the direct subcontractor may easily be circumvented, and even encouraged if the company introduces an extra link in the subcontracting chain, as a "fall guy" between the contractor and the subcontractor employing the workers. A liability only towards the direct subcontractor is ineffective and insufficient because employers in the subcontracting chain often operate with two companies simultaneously, one company being the subcontractor and another being the employer of the workers. A limitation of the liability to the direct subcontractor will in these cases mean that the worker still has no one else to claim than his employer. And if the direct contractor of the employer will not pay, or has disappeared, or never really existed, the worker has no one else to claim.

It is often argued that it is unreasonable that the main contractor should be held liable for the doings of his subcontractors' subcontractor which he has no way to control. However, it should be noted that it is not the contractor who is on his subcontractors' mercy. It is usually the other way around. Secondly, if a contractor decides to subcontract work, it is his decision. Therefore, it is reasonable that the contractor bears the risk for his choice to subcontract or outsource work or services to other workers than his own workers. Thirdly, it should be noted that it is more difficult for a posted worker to protect himself against not being paid than it is for the contractor to protect himself against being held liable. A contractor is always free, on basis of his own risk assessment, to take any contractual precautions that he wants against ending up liable.

The EFBWW calls for an instrument of chain liability where all contractors including the principal contractor assume their responsibility for the obligations of all subcontractors and temporary work agencies in the contract chain, so that a worker who is not paid or not paid in full, can file a claim against whomever in the chain, without having to file a claim against his employer first.

6.4.2. Due dilligence

Article 12(2) of the proposal for a Directive provides that an undertaking, if it has "undertaken due diligence", cannot be held liable for social abuses of its direct subcontractor. The EFBWW opposes this Article for several reasons. Firstly, there is no known experience to indicate that it will lead to the contractors being more careful in their choice of subcontractors. Secondly, if the contractor cannot be held liable on grounds that he has shown due diligence, the worker still has no one else to file a claim against but his employer. It adds nothing to the procedures already available to the workers and/or their

[13] ECJ, Case Wolff & Muller GmbH & Co v Felix, C-60/03.

representatives for the enforcement of the obligations under the PWD, as called for in the PWD article 5. Thirdly, it will be generating trials. As the contractor can free himself of the liability by pleading that he has done what he should do, he will be more inclined to oppose the claim before the courts.[14] Fourthly, it will mean that some of the most well-functioning liability arrangements in Europe cannot be upheld. Fifthly, the EU legislators should not forbid what the ECJ already has approved, as the Court in the Wolff & Müller case ruled that the German legislation on liability on objective grounds could be a way to secure that sufficient procedures are available to the posted workers to really obtain the wage they are entitled to under the PWD.

The EFBWW therefore calls for chain liability on objective grounds. There should be no other way for the liable party to free himself of the liability than by one or more of the liable parties paying up.

[14] Regarding the legal value of the concept of "due diligence", reference can be made to the European Study on the protection of workers' rights in subcontracting processes in the European Union", DG EMPL/B2, VC/ 2011/115: "*Nevertheless, one should ask the question how due diligence as well as deliberate fraud can be verified and proven in court*".