



UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL' ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME's Reply
to the questionnaire sent to the European Social Partners concerning the follow-up of
Communication COM (2006) 159 – “Guidance on the posting of workers in the
framework of the provisions of services”

General remark:

The free movement of services is one of the four freedoms within the internal market. Against this background the posting of workers directive is a central piece of legislation and one of the main tools to organise the good functioning of the internal market services avoiding unfair competition.

Therefore, in the case of such an important issue, and taking into account the scope of the questionnaire sent to the social partners, the European Commission should have made the questionnaire available in each of the 21 European languages. This would have greatly helped to get more feed back from the various actors on the ground.

Replies to the questions

PART I – CONTROL MEASURES AND OTHER OBLIGATIONS

Question 1: Requirement to have a representative established on the territory of the host Member State

A minority of countries imposes the obligation to have a representative on the territory of the host Member State.

More generally speaking, it seems that SMEs are more suffering than larger companies of control measures such as the requirement to have a representative established in the host country because of the administrative burdens and the level of costs linked to it.

A practical example of heavy burdens is Slovakia, where the assembly work, which lasts more than a 12-month period is considered as a permanent work with the obligation to set up a subsidiary with all the complexity linked to it.

Concerning the number of companies complying or not complying with these rules, as social partners we have no evidence of it.

Question 2: Requirement to obtain authorisation or prior registration

Requirement to obtain authorisation or prior registration may affect the ability of service providers to have access to another Member State's market.

Moreover the transitional measures put into place by Austria, Germany, France, Spain, Portugal, Italy, Greece and Denmark, towards the 10 Member States having joined the EU in 2004 are viewed by some new member states as putting additional administrative burdens on companies. This seems to be particularly the case for companies from Poland, Hungary and partly Slovakia.

Question 3: Requirement to make a declaration

The rule of making a declaration prior to a posting of a worker is largely used by many member States like Austria, Germany, France, Ireland, Czech Republic and Slovenia.

In some countries the declaration is a light procedure whereas in others it seems to be heavier and could be felt as hindering cross-border services.

On the other hand, the principle of having a declaration prior to the posting of a worker is the only way for the authorities to be aware of the posting and to make controls if necessary.

Some additional remarks:

In **Austria**, non-Austrian employers must notify workers who are posted by them to Austria for a continuous period of employment, to central the co-ordination agency charged with investigating illegal employment in accordance with the Austrian Act on the employment of foreigners and the Contractual Labour Law - Adjustment Act), at the Federal Ministry of Finances not later than one week prior to the start of their work, and deliver a copy of the notification to the posted worker. In the event of an emergency or work which cannot be delayed or which can be completed quickly, such notification must be made promptly before the start of the work.

The notification must include the following information:

- employer's name and address,
- the posted worker's name and address,
- name and address of the Austrian general contractor,
- names, addresses, birth dates and social insurance numbers of the workers posted to Austria,
- start and envisaged period of their work in Austria,
- amount of pay due to each worker,
- place of work in Austria (including other locations in Austria),
- type of work and use of the worker in the case of building work within the meaning of Directive 97/71/EC.

In **Germany** there is a requirement to provide a declaration written in German which contains data about the posted worker, the beginning and the duration of employment, the place of work and the name of representative.

Slovenia requires along the declaration a list of data comprising:

- data of the contractor company (Slovenian company)
- data of the service provider
- description of the task
- place of work in Slovenia
- number of posted workers
- beginning and end of the work (with a copy of contract)

Additional required documents:

- a) copy of the registration of the service provider
- b) copy of identity document of each posted worker
- c) list of workers

When a worker must be replaced, the employment service must be informed and documents b) and c) must be newly presented. In the same way in case of early termination of work, the Slovenian contracting company must end the employment relationship with the same form. It appears to be a rather heavy procedure.

In **France**, the posted worker should be declared to the regional employment services prior to starting the work. This system seems to be satisfactory for both sides and does not create any major obstacle for cross-border services.

In **Belgium**, this requirement to make a declaration before a worker can be posted (or even a foreign independent worker can work in Belgium) will be introduced in April 1st 2007. It's called "Limosa". It means that the employer will have to make an electronic declaration with the following information:

- Identity of the worker(s)
- Starting date of the posting
- Expected duration
- Place in Belgium where the work is done
- Weekly labour time
- Work schedule

The last two points are still under discussion.

Important is also that every Belgian entrepreneur that works with a foreign company or an independent worker will be obliged to check whether the Limosa declaration has been made. If not, the Belgian entrepreneur will be obliged to give notice to the social security services.

Question 4: Requirement to keep and maintain social documents on the territory of the host country

Several countries do require social documents on their territory for posted workers.

In **Austria**, foreign employers should keep a copy of the notification on file in Austria and if the worker posted to Austria is not subject to an obligatory social insurance scheme in Austria, the employer must also keep a record (E 101) in Austria documenting that the worker is registered with the relevant social security institution at home.

In **France**, the authorities require copy of the E 101 form for the posted workers.

In **Germany**, there is an obligation to keep and maintain the social documents for the workforce at the workplace. The situation has become less strict with the timesheet system. In case of controls, timesheets are the first required documents. The manager has to note the start

and end of working time for each worker. Moreover, the German law foresees prescribes to keep and maintain social documents in Germany as a host country for posted workers. These obligations may affect small and micro-companies starting cross-border activities. However, the German social partners consider these legal requirements indispensable in order to effectively control the posting of foreign workers and the respect of minimum social rights.

As social partners we do not have evidence on the compliance or non compliance of these rules.

Question 5: Specific requirements to the posting of a worker who is a third country national

Specific obligations related to the posting of workers who are third country nationals exist in various EU Member States.

In **Austria**, a posting certificate is necessary. It is a kind of authorisation from the employment authority which verifies that the Austrian wage level (collective agreement) is respected. The pre-conditions for obtaining the certificate are the following:

- the third country national posted worker is employed for more than one year or has a indefinite duration contract
- the Austrian wage conditions are respected

This should be modified following the judgement of the Court of Justice.

In **Belgium**, a non EU worker still needs a work permit and a residence permit. No other obligations are requested. All foreign workers should be treated as Belgians: same wages and same labour law.

In **Germany**, the requirements for companies from third countries posting workers in Germany are currently being revised according to the judgement of the European Court of Justice of 19 January 2006 (“Vander Elst II”, C-244/04).

Nevertheless, third country nationals have to present themselves to the German embassy in the country from which they will be posted in order to obtain a visa. This can dissuade a number of small companies based in other more distant areas or countries to start such a procedure in particular for small contracts.

In **France**, a third country national posted worker with an indefinite duration contract in another Member State is treated in the same way as an EU citizen and has no specific requirements to comply with.

In **Slovakia** the posting of third country national workers requires a work permit and a residence permit, if the period of posting exceeds 7 consecutive working days or if the period of posting exceeds one month within a 12-month reference period

In the **Czech Republic** a residence permit is obligatory for the posting of third country national workers.

In **Sweden** the posting of third country nationals is only accepted if the worker can prove a residence and a work permit of more than one year in the country of origin. For a period exceeding 3 months the posted worker is obliged to request a residence permit in Sweden.

Question 6: Other specific obligations relating to the posting of workers

In **France**, all the documents and proofs have to be in French, but for many companies it does not seem to be a real problem.

In **Spain**, the translation of the work contract in Spanish is obligatory before posting any worker. The reason behind this is to facilitate the control of labour inspectors particularly for the compliance with Spanish collective agreements. This can create an obstacle for many companies.

In **Germany** posted workers who are nationals of the new EU Member States need special work permits, certified by the Federal employment office. This regulation corresponds to the transitional provisions of the Accession Treaty.

According to the directive 96/71/EC there is the obligation to comply with the minimum wage and the paid holidays. In the construction sector there is an additional obligation to contribute to the social fund benefit schemes.

In some cases the contribution to the construction social fund benefit schemes has created practical administrative and financial problems for Austrian companies.

PART II – ACCESS TO INFORMATION AND LIAISON OFFICES

Question 7: Access to information and liaison offices

In general providing information through internet websites dedicated to information on posting of workers is one of the best ways to facilitate access to various types of information.

This means that such websites have to be easily accessible, clear, user friendly, exhaustive, up-dated and available in several languages.

In **Austria**, the Federal Ministry of Economics and labour set up its own website dedicated to the posting of workers in Austria

<http://www.bmwa.gv.at/BMWA/Schwerpunkte/Arbeitsrecht/Arbeitsrecht/GrenzueberEntsendEU/default.htm>

The website is up-dated and complete but not really user friendly for non speaking German people. In fact the English version exists but is well hidden and therefore difficult to find.

In addition a hotline is available.

The Federal Chamber of Economy (Social Partner) is also providing specific information on posting of workers but mainly available to its members.

In **Belgium** the internet website is available in the 3 national languages as well as in English, what is very useful. After April 2007 a new “Limosa” website will set up with additional foreign languages. An international campaign will be organised to make aware of the new regulation.

In **France** the internet website is accessible through a search engine.

Unfortunately the website is only in French. The information is regularly up-dated, but further improvement is highly necessary.

More positively, in some cases, like the assistance to fill in forms, texts exist in English, Spanish and German.

Brochures and leaflets are less relevant. The main information and its up-dating are provided through the Internet.

Other types of information means in France:

On call information is also possible, but only in French. In addition it is difficult to find an interlocutor, particularly when one calls from abroad.

Questions sent by E-mails even when drafted in French, remain very often non-answered.

In **Germany** there is an internet website dedicated by the customs authority to information on posting of workers.

http://www.zoll.de/d0_zoll_im_einsatz/b0_finanzkontrolle/e0_aentg/index.html

The website is easy to access, complete and useful but the part specifically dedicated to the posting of workers is only in German, despite the fact that the front page exists in 3 languages.

In addition, the German construction sector holiday fund, which is jointly managed by employers and trade unions made a lot of efforts to provide information about German obligations for paid holidays in the construction sector.

They have set up their own website with a lot of practical information and produce brochures in 12 languages about the functioning of the collective agreements in Germany with some concrete examples for foreign employers. For employees they have leaflets in 13 languages and dispose of a multilingual staff for direct requests from foreign workers.

In **Estonia** the website is easy to access and well organised.

<http://www.ti.ee/index.php?page=542>

In **Finland** the website is easy to access with a direct link to the Finnish transposition of Directive 96/71/EC

http://www.mol.fi/mol/en/03_labourlegislation/01_employment_contracts/01_posted_workers/index.jsp

In **Lithuania** the internet website is easy of access and the exchange of information and diffusion to foreign authorities is very satisfactory.

Question 8: effective actions aimed at disseminating information on posting of workers undertaken by national authorities or social partners?

The Economic Chamber of Upper Austria and the Craft Chamber of Niederbayern-Oberpfalz created the so-called “Grenzoffensive” - cross-border offensive www.grenzoffensive.org. The objective is to facilitate neighbouring cross-border work. They propose information events, brochures and personal advice concerning the obligation for the posting of workers. The feed back in the two regions has been excellent, in particular in view of reaching the SMEs audience.

In Belgium most actions still need to be taken after the introduction of the Limosa. But it seems that they are going to be very broad, at international but and national levels in close cooperation with the employers' federations. By definition, employers' federations, in particular UNIZO which represent SMEs in Flanders, help entrepreneurs to deal with regulations abroad and with national regulations for foreign companies.

Question 9: does the lack of information make it more difficult for companies to provide their services in any Member States?

The lack of information is a central problem for SMEs and creates a real obstacle to become active in another Member State.

The main challenge is how an entrepreneur from a small business can be easily acquainted with all the different rules of the various countries. A certain level of coordination in Europe would be of great help.

The Austrian companies can receive effective support from the Austrian Trade Commissions of the Austrian Federal Economic Chamber present all over the world.

Questions II- 10-13

In France, the experience shows that it is easier to get in touch with someone for information in regional or local liaison offices, but at the end they very often redirect you to the central service in Paris, where of course it is much more difficult to find a contact person.

One additional problem is the fact that in general, forms, questions and replies are formulated in French only.

Finally it also happens that regional authorities are less strict in terms of proof and requirement than the liaison office in Paris.

QUESTION III – MONITORING OF COMPLIANCE WITH DIRECTIVE 96/71/EC

Question 14 – Involvement of social partners in the monitoring of the compliance

In **Austria**, social partners manage on a bilateral basis the paid leave fund and the unemployment benefits fund in the construction sector.

As collective agreements are extended to all companies and workers, social partners have the entire responsibility for the design of minimum wage as well as for working conditions. In this context they are in charge of informing foreign companies which are posting workers in Austria about the various Austrian obligations.

In **Germany**, the social partners of the construction sector are directly involved in the control of the implementation of collective agreements on holidays and minimum wage. They do it through the holidays fund structure.

In Latvia, the social partners are involved but the dialogue is not particularly intensive.

Question 15 - Are authorities responsible for checking compliance sufficiently equipped in order to follow up the complaints?

In **Austria**, the various chambers receive an increasing number of complaints from part of their members, the Austrian companies, concerning the non respect of the Austrian minimum wage by foreign businesses. The fact is that not only the payroll has to be checked, but one has to verify that the money is effectively paid, which is the most difficult part.

In **Germany** the holiday fund structure can start an infringement procedure in case of complaints for non compliance with the Directive, and it is a useful and efficient tool to enforce rights deriving from the directive.

Question 16 – Do you have the possibility to take measures in view of enforcing compliance with Directive 96/71/EC?

As social partners we have no possibility.

Question 17 – Has any Member State made any changes in the monitoring methods over the last few years and in particular since April 2006 in view of the Social Partners?

As far as we know, nothing new happened since April 2006, except in Belgium where a brand new system will be created and applicable from 1st April 2007 onwards.

Question 18 – In case Social Partners see room for improvement, please give concrete suggestions for improvement of monitoring of compliance with Directive 96/71/EC

For **Austria**, the most important element would be the reinforcement of controls of the effective payment of minimum wage which should be legally paid to posted workers. The main difficulty is that the national authorities in the host country have no means to enforce obligations in case of infringement by employers based abroad. For them, there is no possibility to introduce administrative procedure nor start administrative offence.

There is therefore an urgent need for an EU instrument in order to effectively sanction the infringement of foreign service providers concerning the Directive 96/71/EC.

One concrete proposal, could be to set up a central body, possibly the one delivering the E 101 form, where it could be possible to turn to in order to check if the employer posting a worker abroad and using a E 101 form is effectively affiliated to a social security system.

PART IV - MEASURES IN THE EVENT OF FAILURE TO COMPLY

Question 19 – Are Social Partners informed of measures within the meaning of Article 5 of Directive 96/71 which are in place in member States and efficiency of measures

In **Austria**, when the obligation of notification is not done on time (1 week prior to start) or when the required documents are not available, a fine of 726 euros apply and in case it happens again the fine goes up to 1450 Euro.

Nevertheless the measures are not particularly efficient, because an incomplete notification is currently not considered as an infringement, whereas it should be.

In Belgium, a company that works with a foreign company should inquire whether the declaration concerning the sporting of workers has been made. If not, the Belgian company has to make a shorter declaration about this fact. If the Belgian entrepreneur does not respect this obligation, he is also considered responsible and fines are extremely high.

Question 20 – Experience of social partners with national systems for joint and several liability for the general or principal contractor in case of subcontracting with the contribution of enforcement of the rights under the directive 96/71/EC

We do not have any experience about the role of the joint and several liability as a tool to help enforcing rights under directive 96/71/EC.

Question 21 and 22 - Examples of good practices as regards measures in the event of failure to comply with Directive 96/71/EC and evolution of the measures

We don't have examples of good practices.

Conclusions:

Most of the time one or the other obligation in itself does not dissuade a company to start cross-border activities, but the accumulation of various control measures and obligations can keep small businesses from providing cross-border services through the posting of workers.

A better coordination of national systems could help to develop cross border activities. In some cases, social security services could also automatically provide with certain information facilitating the task for local small entrepreneurs.

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