

Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services’

(COM(2016) 128 final — 2016/0070 (COD))

(2017/C 075/15)

Rapporteurs: **Vladimíra DRBALOVÁ** and **Ellen NYGREN**

Consultation	European Parliament, 11.4.2016
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	22.11.2016
Adopted at plenary	14.12.2016
Plenary session No	521
Outcome of vote	180/84/30
(for/against/abstentions)	

1. Conclusions and proposals

1.1. The EESC welcomes the European Commission’s commitment to work towards a deeper and fairer Single Market as one of the chief priorities of its mandate, and its efforts to provide an additional boost to cross-border service provision via its Investment Plan for Europe.

1.2. The EESC supports the EC’s decision to introduce Enforcement Directive 2014/67/EU ⁽¹⁾ to improve a common interpretation and implementation of the Posting of Workers Directive 96/71/EC ⁽²⁾.

1.3. The Enforcement Directive and the current proposal for a targeted revision of the Posting of Workers Directive address different aspects of the practice of posting workers. Not only do they complement one another, but the results expected from the implementation of the Enforcement Directive could also provide a clearer picture of the real situation.

1.4. The EESC supports in principle the Commission’s proposed recast of the Posting of Workers Directive. The principle of equal pay for equal work in the same place is the cornerstone of the pillar of social rights in Europe.

1.5. The EESC considers collective agreements to be the benchmark for levels of remuneration.

1.6. The EESC emphasises that the role of the exclusivity of social partners was not respected and wonders why a proper consultation was not launched with them in accordance with Article 154(2) of the Treaty on the Functioning of the European Union (TFEU).

1.7. The EESC broadly welcomes the fact that the Commission has specifically laid down the maximum duration of postings. The limit of 24 months is a step in the right direction, but a limit of 6 months would be closer to real business conditions.

⁽¹⁾ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 of the European Parliament and the Council on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) (OJ L 159, 28.5.2014, p. 11).

⁽²⁾ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997).

1.8. The EESC calls for the Posting of Workers Directive to include a clarification that the directive sets out a minimum standard, not a maximum. To this end, the legal basis will need to be extended.

2. European political framework

2.1. The free movement of workers, freedom of establishment and the freedom to provide services are fundamental principles of the European Union.

2.2. A distinction should be made between the free movement of workers and the freedom to provide services under Article 56 of the Treaty on the Functioning of the European Union (TFEU). The *free movement of workers* gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions compared to nationals of that Member State.

2.3. In contrast, the *freedom to provide services* gives businesses the right to provide services in another Member State. To that end, they may post their own workers temporarily to the other Member State to carry out the work needed to provide the services.

2.4. On 16 December 1996, the European Parliament and the Council of the European Union adopted **Directive 96/71/EC concerning the posting of workers** in the framework of the provision of services⁽³⁾.

2.5. That directive aims to reconcile exercising the freedom to provide cross-border services under Article 56 TFEU with appropriate protection for the rights of workers temporarily posted abroad for that purpose.

2.6. In October 2010, in its communication ‘Towards a Single Market Act — For a highly competitive social market economy — 50 proposals for improving our work, business and exchanges with one another’⁽⁴⁾, the Commission put forward two proposals designed to restore public confidence and support, one relating to the balance between fundamental social rights and economic freedoms and the other to the posting of workers.

2.7. In March 2010, the European social partners delivered a report⁽⁵⁾ on the consequences of the European Court of Justice rulings, which pointed to their wide divergences. While BUSINESSEUROPE was opposed to a revision of the directive (but accepted the need for clarification of certain aspects related to enforcement), the ETUC wanted it thoroughly amended.

2.8. In December 2012, the Commission published a proposal on the enforcement of Directive 96/71/EC. **The Enforcement Directive**⁽⁶⁾ establishes a common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform practical implementation, application and enforcement of Directive 96/71/EC, including measures to prevent and sanction any circumvention or abuse of the rules applicable. At the same time, it provides guarantees for the protection of posted workers’ rights and the removal of unjustified obstacles to the free provision of services.

2.9. The deadline for transposition of the Enforcement Directive was 18 June 2016 and by 18 June 2019 at the latest the Commission should present a report on its application and implementation to the EP, the Council and the EESC and propose amendments and modifications where necessary. In its review, the EC shall, after consultation with the Member States and the European Social Partners, assess the adequacy and appropriateness of all the measures introduced and applied, including the adequacy of the data available relating to postings.

⁽³⁾ See footnote 2.

⁽⁴⁾ COM(2010) 608 final/2.

⁽⁵⁾ The text was presented during the Conference on Posting of Workers and Labour Rights organised by Spanish Presidency of the European Union on 23 March 2010 in Oviedo. The debates once again showed that stakeholders’ opinions were divided.

⁽⁶⁾ See footnote 1.

3. Proposal for a targeted revision of the Posting of Workers Directive

3.1. According to the latest available data, there were over 1,9 million postings in the EU in 2014, relating to 0,7 % ⁽⁷⁾ of the total EU labour force. This represents an increase of 10,3 % over 2013 and 44,4 % with respect to 2010. These statistics are based on the number of A1 forms issued by national social security authorities; the number of non-registered de facto posted workers is not known.

3.2. The 1996 Posting of Workers Directive provides an EU regulatory framework for establishing a proper and fair balance between the objectives of promoting and facilitating the cross-border provision of services, providing protection for posted workers and ensuring a level playing field between foreign and local competitors.

3.3. The Commission has now tabled a proposal for the targeted revision of this directive, with the aim of both addressing unfair practices ⁽⁸⁾ and promoting the principle that the same work at the same place should be remunerated in the same manner.

3.4. The proposal was published before the deadline for transposing the 2014 Enforcement Directive and before any assessment of its implementation could be carried out. Many of the challenges concerning the posting of workers continue to be related to poor enforcement and a lack of controls in the Member States. At the same time, the main objective of the proposed revision is to clarify the principle of equal remuneration. This objective can only be achieved through a revision of Directive 96/71/EC itself.

3.5. In this respect, the EESC had already recognised that the effective implementation of the Posting of Workers Directive should 'not exclude a partial revision of the Posting of Workers Directive in order to apply the place of work principle consistently, making it possible to establish by law that the same working and remuneration conditions must always apply for the same work at the same location' ⁽⁹⁾.

3.6. The proposal was published without any prior consultation of the European social partners, who sent a joint letter to the Commission asking to be properly consulted in accordance with Article 154(2) TFEU.

3.7. The publication of the Commission's proposal has generated different points of view, dividing Member States, social partners and companies themselves. The proposed directive should not undermine competitiveness or create new obstacles for cross-border service providers. The revision should at the same time guarantee fair competition in the Single Market and prevent discrimination between workers based on their nationality.

3.8. In line with Protocol No 2 to the Treaties ⁽¹⁰⁾, fourteen chambers of national parliaments sent reasoned opinions to the Commission stating that the Commission proposal on the revision of the Posting of Workers Directive did not comply with the principle of subsidiarity, thus triggering the yellow card procedure. Following its subsidiarity review, the Commission concluded ⁽¹¹⁾, on 20 July, that the proposal for a targeted revision of Directive 96/71/EC complied with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal was not required. The Commission therefore maintained the proposal.

3.9. A part of the business community takes the view that the proposal contravenes the proportionality principle. Some companies believe that the proposed changes will lead to legal uncertainty and additional administrative burdens. They think that the revision may particularly affect companies from Member States with lower wages levels that intend to provide cross-border services in the Single Market and that this is contrary to the intention and efforts to strengthen the convergence process within the EU.

⁽⁷⁾ See European Commission 'Posting of workers — Report on A1 portable documents issued in 2014', published in December 2015. It is necessary to take into account the fact that the situation differs from country to country and 0,7 % is only an average. The reality is somewhere between 0,5 % - 3,6 %, and the consequences for the Member States are also different.

⁽⁸⁾ See also the EESC Opinion on *Fairer mobility within the EU*, adopted on 27 April 2016, OJ C 264, 20.7.2016, p. 11.

⁽⁹⁾ EESC Opinion on *The Social Dimension of the Internal Market*, adopted on 14.07.2010, par. 1.7 (OJ C 44, 11.2.2011, p. 90).

⁽¹⁰⁾ Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality.

⁽¹¹⁾ See Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505 final of 20 July 2016.

3.10. Others, including trade unions, consider that the proposed revision — and in particular the idea of ‘equal pay for equal work in the same place’ — would provide for a level playing field for companies and more equal rights for workers in the EU. It will also strengthen the upward convergences process within the EU by, inter alia, eliminating wage differences between workers from the old and new Member States.

3.11. The Commission’s proposal was accompanied by an impact assessment ⁽¹²⁾ stating that the proposed measures for applying the revised directive would have different impacts on different Member States, sectors and companies and noting that strong data limitations on the posting of workers still constituted an ongoing problem.

3.12. In 2010, Eurofound published a report on ‘Posted workers in the European Union’ ⁽¹³⁾, looking at the phenomenon in the EU Member States and Norway. This report maps the available sources of information about the number of postings and provides figures for those countries where data are available. Eurofound’s research shows that there is a lack of data regarding the overall number and characteristics of posted workers throughout the EU.

3.13. This Eurofound report is followed by two recent pieces of research related to fairer mobility on the labour market: ‘Topical update on Member States’ progress in transposing Enforcement Directive on posting of workers’ and ‘Exploring the fraudulent contracting of work in the European Union’ ⁽¹⁴⁾.

4. Main changes in the proposed revision of Directive 96/71/EC

4.1. Remuneration

4.1.1. The Commission proposes replacing the concept of ‘minimum rates of pay’ with ‘remuneration’. According to the EC proposal, remuneration covers all the elements of remuneration that are mandatory in the host Member State.

4.1.2. The Commission tabled the proposal in response to many calls for action to address the causes of wage differentials. According to the Commission, there is a gap between the conditions applied for local workers and those for posted workers. According to the impact assessment accompanying the proposal, the wage differential between posted and local workers is estimated to range from 10 % to 50 % depending on the country and sector. Differentiated pay rules distort the level playing field among companies. The concept of ‘minimum rates of pay’ is not the same as the mandatory rules that are applied to local workers.

4.1.3. According to the Commission, the concept of ‘remuneration’ can therefore better contribute to achieving a level playing field in the Single Market for services. The concept of ‘remuneration’ encompasses all the elements that are paid to local workers if they are laid down by law or by collective agreement which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or in the absence of such a system, by collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout the national territory. ‘Remuneration’ could include some elements that are not included in the concept of ‘minimum rate of pay’, such as seniority allowances, allowances and supplements for dirty, heavy or dangerous work, quality bonuses, 13th month bonuses, travel expenses, meal vouchers — although most host countries have already included several of those elements in the ‘minimum rate of pay’.

⁽¹²⁾ Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 52 final of 8 March 2016.

⁽¹³⁾ Eurofound report on ‘Posted workers in the European Union’, Roberto Pedersini and Massimo Pallini, published in 2010.

⁽¹⁴⁾ Preliminary findings of both research projects were presented during the EESC Labour Market Observatory conference entitled ‘Towards a fairer mobility within the EU’ held on 28 September 2016. See Eurofound (2016) EurWORK Topical update on ‘Member States’ progress in transposing Enforcement Directive on posting of workers’ and Eurofound (2016) ‘Exploring the fraudulent contracting of work in the European Union’.

4.1.4. According to the Commission, the introduction of the concept of 'remuneration' should contribute to improving clarity on the constituent elements of remuneration and to reducing existing cross-sector differences in the mandatory application of collective agreements. The concept of remuneration should also remove any uncertainty as to the level of pay that is to be guaranteed to posted workers. The proposed revision seeks to codify the European Court of Justice case law in case C-396/13 *Sähköalojen ammattiliitto*, thereby considerably increasing legal certainty for workers and companies alike⁽¹⁵⁾.

4.1.5. The Commission affirms that the proposal will not affect Member States' competences and traditions in setting wages and that it respects a strong autonomous role for the social partners. In this context, it is worrying that the Commission proposes to delete the reference in the current directive stating that 'minimum rates of pay are defined by the national law and/or practice of the Member State to whose territory the worker is posted'. This provision is important in order to comply with various national industrial relations systems.

4.1.6. For the purpose of this Directive, the concept of remuneration shall be defined by the national law, collective agreements, and/or practice of the Member State to whose territory the worker is posted.

4.1.7. This Directive shall not prevent application of terms and conditions of employment of the host country or of the country of origin of the posted worker which are more favourable to workers, in particular through the exercising of the fundamental right of workers and employers to negotiate and conclude collective agreements at the appropriate levels and to take collective action to defend their interests, including strike action, to protect and improve the living and working conditions of workers, including the right to equal treatment.

4.1.8. To ensure proper implementation of the Enforcement Directive, Member States are obliged to publish information on terms and conditions of employment applicable to workers posted to their territory on a single website. This process should not be negatively influenced by any new proposal.

4.1.9. EESC members have discussed the question of 'remuneration' in great depth, taking account of all the implications of this new concept.

4.1.10. Some Members consider that the newly-introduced concept is the only way to ensure equal working conditions for both posted and local workers, eliminating wage differentials and guaranteeing a level playing field among companies. In order to ensure that the equal remuneration principle is fully effective, collective agreements that are actually applied at the workplace must be respected — regardless of whether they are universally or generally applicable.

4.1.11. Other Members believe that the introduction of this new concept could result in less legal certainty and clarity and increasing administrative and financial burdens. Any discussion on posting should take account of the fact that the situations of foreign and domestic companies are different. A foreign service provider that wants to post workers bears additional costs resulting solely from performing services in another Member State — additional operating expenses⁽¹⁶⁾ and indirect cross-border labour costs⁽¹⁷⁾.

⁽¹⁵⁾ In case C-396/13 *Sähköalojen ammattiliitto* of 12 February 2015, the European Court of Justice has ruled that 'minimum rates of pay' cannot be a matter of choice for an employer who posts employees with the sole aim of offering lower labour costs than those of local workers. The Court also ruled that daily allowances constituting compensation for being sent away from home must also be paid to posted workers at the same level as they are paid to local workers in a similar situation. The ECJ therefore rejects the claim that an employer could apply the lowest level in the pay classification, regardless of the qualifications or seniority of the workers concerned.

⁽¹⁶⁾ Indirect expenses: cost of becoming familiar with administrative requirements and regulations in other Member States, e.g. notification procedures, translation of documents, cooperation with inspection authorities.

⁽¹⁷⁾ This indirect cross-border labour cost could increase by up to 32%. These are some of the preliminary results of a study on 'Labour cost in cross-border services', conducted by Dr Marek Benio of the Department of Public Economy and Administration of the Krakow University of Economics. These results were presented during the EESC Labour Market Observatory conference entitled 'Towards a fairer mobility within the EU' held on 28 September 2016.

4.2. *Posting exceeding 24 months*

4.2.1. The Commission is addressing the issue of the duration of postings by introducing a proposal that, in cases where the anticipated or the effective duration of posting exceeds 24 months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out. This is applicable from the first day that the posting effectively exceeds a duration of 24 months. The Commission is also introducing a cumulative duration of posting periods in cases where workers are replaced.

4.2.2. The original directive does not set any fixed limit and states that, for the purposes of the directive, 'posted worker' means a worker who, for a *limited period*, carries out his/her work in the territory of a Member State other than the state in which he/she normally works.

4.2.3. The EESC welcomes in principle the limit set on the period of posting in the area governed by the Posting of Workers Directive. In fact, long-term or repeated postings or even chains of postings extending over several years are common practice. The EESC believes, however, that the 24 month period is unrealistic in practice and should be significantly reduced. For comparison, the average period of postings in 2014 was less than four months (103 days). An accumulation rule that only applies to workers posted for at least six months would therefore be ineffective. The maximum duration of postings should be limited to 6 months in total.

4.2.4. The EESC therefore calls for a rule stipulating that periods of posting be aggregated from the first day. To ensure that this rule does not lead to an exchange of posted workers, it is important that reference be made to the specific workplace. The employer should be required to maintain transparency with regard to workplaces and, for example, to provide employees and the competent authorities with information on the number of workers employed and the duration of employment at the workplace in question.

4.2.5. The EESC welcomes the rule whereby, when the maximum posting period is exceeded, the law of the host Member State will in principle apply. The EESC considers it problematic, however, that Recital 8 makes reference to the Rome I Regulation ('The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation.'). Under Article 8 of the Rome I Regulation, an individual employment contract is governed by the law chosen by the parties.

4.3. *Subcontracting*

4.3.1. The Commission's proposal gives Member States the option of applying to workers in a subcontracting chain the same conditions as are applied by the main contractor. These conditions would have to be applied in the same way to both national and cross-border subcontractors, in accordance with the principle of non-discrimination.

4.3.2. There are considerable differences between the laws, regulations, administrative provisions or collective agreements applicable in Member States to ensure that subcontracting does not allow undertakings to avoid rules guaranteeing certain terms and conditions of employment covering remuneration. There is no evidence showing how many Member States already apply such a system and the Commission did not present any in-depth analysis of the potential consequences of such rules in its impact assessment.

4.3.3. However, in order for this part of the proposal to be effective in practice, it might be useful to make a reference to a rule on joint and several liability throughout any subcontracting chains introduced by article 12 of the Enforcement Directive⁽¹⁸⁾.

4.3.4. Moreover the phrase 'certain terms and conditions of employment covering remuneration' is vague and will lead to legal uncertainty, differing interpretations, and potential conflicts with other parts of the directive. There would also be problems of comparison and many other purely practical problems, such as access to information (also in connection with the duty of the governments to publish such information under Article 5 of Directive 2014/67/EU) and the availability of collective agreements).

4.3.5. It is also unclear how the Commission would define and apply non-discrimination and proportionality tests for such provisions.

⁽¹⁸⁾ Article 12 of Directive 2014/67/EU on subcontracting liability (see footnote 1).

4.3.6. In addition, it will be necessary to introduce adequate provisions to check the genuine self-employed status of subcontractors, in accordance with Member States' standards.

4.4. *Temporary agency work*

4.4.1. The Commission introduces a new obligation for Member States by adding a new paragraph which establishes the conditions applicable to the workers referred to in Article 1(3)(c) of the Directive, i.e. workers hired out by a temporary agency established in a Member State other than the Member State of establishment of the user undertaking. The undertakings referred to in Article 1(3)(c) will have to guarantee posted workers the terms and conditions which apply pursuant to Article 5 of Directive 2008/104/EC on temporary agency work⁽¹⁹⁾ to temporary workers hired out by temporary agencies established in the Member State where the work is carried out.

4.4.2. The EESC believes that this new provision is not necessary, as the original Posting of Workers Directive already provided for such an option under Article 3(9). Member States may make the provision that the undertakings referred to in Article 1(1) must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out. The option of applying Directive 2008/104/EC has already been taken up by a majority of host countries.

4.4.3. The EESC considers that the Commission should stick to the existing arrangement. Consideration needs to be given to the fact that the provisions of Directive 2008/104/EC are applicable to the situation in the various Member States, whereas Directive 96/71/EC is applicable to cross-border activities. This was acknowledged by the Commission itself in the Report on the application of Directive 2008/104/EC on temporary agency work⁽²⁰⁾.

4.4.4. The EESC points out that Article 5 of Directive 2008/104/EC is much broader than Article 3(9) of Directive 96/71/EC and that this could paradoxically lead to different conditions for the posting of workers under Article 1(3)(a) and (b) and Article 1(3)(c) of the current law.

5. **Additional action**

5.1. The Commission should encourage Member States to transpose Directive 2014/67/EU⁽²¹⁾ if they have not done so yet and ensure that all Member States implement it properly. After two years, the Commission should assess its impact and determine whether the adopted measures have led to adequate and effective implementation and enforcement, as these are key elements in protecting the rights of posted workers and ensuring a level playing field for service providers.

5.2. The Commission should provide an in-depth analysis of the situation in the various EU Member States, as well as real quantitative information on posted workers and ways of implementing and enforcing the existing directive.

5.3. The availability of reliable data on posted workers is a precondition for an effective debate on their specific characteristics and need for protection.

5.4. If the Commission wants to ensure fair competition, its next steps should also focus on combating fraudulent practices and eliminating the phenomenon of irregular or undeclared work, primarily in the form of the abuse of letterbox companies.

5.5. The Commission should speed up economic and social upward convergence within the EU, while at the same time ensuring fair mobility of workers in the context of cross-border provision of services.

5.6. The Commission should consult social partners, recognise their autonomy and respect collective agreements that are relevant in this field.

⁽¹⁹⁾ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327, 5.12.2008, p. 9).

⁽²⁰⁾ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final.

⁽²¹⁾ See footnote 1.

5.7. The EESC calls for the revision to make it clear that the Posting of Workers Directive is not a pure Single Market instrument, but also an instrument for the protection of workers. This requires the legal base to be extended to include social policy law (Articles 153, 155 TFEU). The revision of the Directive must also correct the false interpretation of the Directive as a maximum standard, which has arisen from a series of ECJ judgments (*Laval*, *Rüffert*, *Commission v Luxembourg*), and re-establish it as a minimum standard.

Brussels, 14 December 2016.

The President
of the European Economic and Social Committee
Georges DASSIS

APPENDIX

The following counter opinion, which received at least a quarter of the votes cast, was rejected during the discussion:

Counter opinion:

Replace the whole opinion with the following text (reason at the end of the document):

1. Conclusions and proposals

1.1. The EESC welcomes the European Commission's commitment to work towards a deeper and fairer Single Market as one of the chief priorities of its mandate, and its efforts to provide an additional boost to cross-border service provision via its Investment Plan for Europe.

1.2. The EESC supports the EC's decision to introduce Enforcement Directive 2014/67/EU⁽¹⁾ to improve a common interpretation and implementation of the Posting of Workers Directive 96/71/EC⁽²⁾ which nevertheless represents a well-balanced instrument guaranteeing both rights to provide services and rights of posted workers.

1.3. The Enforcement Directive and the current proposal for a targeted revision of the Posting of Workers Directive address different aspects of the practice of posting workers, but they do not only complement one another, but the results expected from the implementation of the Enforcement Directive could also provide a clearer picture of the real situation.

1.4. To date, not all Member States have completed its transposition. The EESC expects that the Commission's report, scheduled for 18 June 2019 at the latest, should provide a reliable overview of the application and implementation of the directive. Some EESC members recommend waiting for this report before any further amendments and modifications are proposed.

1.5. Some EESC members think that the introduction of the targeted revision is premature and does not comply with the better regulation principle. Such an approach may lead to slowing down the transposition of the 2014 Directive mixing enforcement measures with the new proposals.

1.6. The EESC feels that there is still a lack of evidence relating to postings across Europe and this may give rise to concerns as regards the proportionality principle — namely whether the impact assessment accompanying the intended revision provides a clear picture of the real situation.

1.7. Introducing any new changes based only on a very light impact assessment, with insufficient data and without taking account of the different levels of economic performance across the EU can only lead to new divisions among the Member States and undermine the Commission's efforts to encourage convergence, integration and trust in Europe.

1.8. The EESC emphasises that the role of the exclusivity of social partners was not respected and wonders why a proper consultation was not launched with them in accordance with the Article 154(2) TFEU.

1.9. A crucial aspect of the targeted revision proposed by the European Commission is still the concept of 'remuneration'. EESC members are not alone in this respect in rethinking in depth both the option of 'the minimum pay' clarified by case law and a new way of calculating remuneration. Some members consider this new approach as a means of improving and guaranteeing the same conditions for posted workers as for local workers. At the same time, other members do not consider this proposal to be appropriate for the business reality, as it creates uncertainty and greater administrative and financial burdens for companies.

⁽¹⁾ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ L 159, 28.5.2014, p. 11).

⁽²⁾ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997).

1.10. The EESC is not convinced about the need for introducing any strict rules regarding the duration of periods of posting. Experience shows that an extremely long posting is not a major problem in reality for European businesses.

2. **European political framework**

2.1. The free movement of workers, freedom of establishment and the freedom to provide services are fundamental principles of the European Union.

2.2. A distinction should be made between the free movement of workers and the freedom to provide services under Article 56 of the Treaty on the Functioning of the European Union (TFEU). The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions compared to nationals of that Member State.

2.3. In contrast, the freedom to provide services gives businesses the right to provide services in another Member State. To that end, they may post their own workers temporarily to the other Member State to carry out the work needed to provide the services.

2.4. On 16 December 1996, the European Parliament and the Council of the European Union adopted **Directive 96/71/EC** concerning the posting of workers in the framework of the provision of services⁽³⁾.

2.5. That directive aims to reconcile exercising the freedom to provide cross-border services under Article 56 TFEU with appropriate protection for the rights of workers temporarily posted abroad for that purpose.

2.6. In October 2010, in its communication 'Towards a Single Market Act — For a highly competitive social market economy — 50 proposals for improving our work, business and exchanges with one another'⁽⁴⁾, the Commission put forward two proposals designed to restore public confidence and support, one relating to the balance between fundamental social rights and economic freedoms and the other to the posting of workers.

2.7. In March 2010, the European social partners delivered a report⁽⁵⁾ on the consequences of the European Court of Justice rulings, which pointed to their wide divergences. While BUSINESSEUROPE was opposed to a revision of the directive (but accepted the need for clarification of certain aspects related to enforcement), the ETUC wanted it thoroughly amended.

2.8. In December 2012, the Commission published a proposal on the enforcement of Directive 96/71/EC. **The Enforcement Directive**⁽⁶⁾ establishes a common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform practical implementation, application and enforcement of Directive 96/71/EC, including measures to prevent and sanction any circumvention or abuse of the rules applicable. At the same time, it provides guarantees for the protection of posted workers' rights and the removal of unjustified obstacles to the free provision of services.

2.9. The deadline for transposition of the Enforcement Directive was 18 June 2016 and by 18 June 2019 at the latest the Commission should present a report on its application and implementation to the EP, the Council and the EESC and propose amendments and modifications where necessary. In its review, the EC shall, after consultation with the Member States and the European Social Partners, assess the adequacy and appropriateness of all the measures introduced and applied, including the adequacy of the data available relating to postings.

⁽³⁾ See footnote 2.

⁽⁴⁾ COM(2010) 608 final/2.

⁽⁵⁾ The text was presented during the Conference on Posting of Workers and Labour Rights organised by Spanish Presidency of the European Union on 23 March 2010 in Oviedo. The debates once again showed that stakeholders' opinions were divided.

⁽⁶⁾ See footnote 1.

3. Proposal for a targeted revision of the Posting of Workers Directive

3.1. According to the latest available data, there were over 1.9 million postings in the EU in 2014, relating to 0.7 %⁽⁷⁾ of the total EU labour force. This represents an increase of 10.3 % over 2013 and 44.4 % with respect to 2010. These statistics are based on the number of A1 forms issued by national social security authorities; the number of non-registered de facto posted workers is not known.

3.2. The 1996 Posting of Workers Directive provides an EU regulatory framework for establishing a proper and fair balance between the objectives of promoting and facilitating the cross-border provision of services, providing protection for posted workers and ensuring a level playing field between foreign and local competitors.

3.3. However, the Commission has now tabled a proposal for the targeted revision of this directive, with the aim of both addressing unfair practices⁽⁸⁾ and promoting the principle that the same work at the same place should be remunerated in the same manner.

3.4. The proposal was published before the deadline for transposing the 2014 Enforcement Directive and before any assessment of its implementation could be carried out. Many of the challenges concerning the posting of workers continue to be related to poor enforcement and a lack of controls in the Member States.

3.5. The proposal was also published without any prior consultation of the European social partners, who sent a joint letter to the Commission asking to be properly consulted in accordance with the Article 154(2) TFEU. 'We are now writing to ask the Commission to take the time needed to adequately consult with the social partners before launching its proposal⁽⁹⁾.'

3.6. The publication of the Commission's proposal has generated different points of view, dividing Member States, social partners and companies themselves. The proposed directive should not undermine competitiveness or create new obstacles for cross-border service providers.

3.7. In line with Protocol No 2 to the Treaties⁽¹⁰⁾ fourteen chambers of national parliaments sent reasoned opinions to the Commission stating that the Commission proposal on the revision of the Posting of Workers Directive did not comply with the principle of subsidiarity, thus triggering the yellow card procedure. Following its subsidiarity review, the Commission concluded⁽¹¹⁾, on 20 July, that the proposal for a targeted revision of Directive 96/71/EC complied with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal was not required. The Commission therefore maintained the proposal.

3.8. A part of the business community takes the view that the proposal contravenes the proportionality principle. Some companies believe that the proposed changes will lead to legal uncertainty and additional administrative burdens. The revision may particularly affect companies from Member States with lower wages levels that intend to provide cross-border services in the Single Market, which is contrary to the intention and efforts to strengthen the convergence process within the EU.

3.9. Others, including trade unions, consider that the proposed revision — and in particular the idea of 'equal pay for equal work in the same place' — would provide for a level playing field for companies and more equal rights for workers in the EU.

⁽⁷⁾ It is necessary to take into account the fact that the situation differs from country to country and 0.7 % is only an average. The reality is somewhere between 0.5 % - 3.6 %, and the consequences for the Member States are also different.

⁽⁸⁾ EESC Opining on 'Fairer mobility within the EU', adopted on 27 April 2016 (OJ C 264, 20.7.2016, p. 11).

⁽⁹⁾ Joint letter of the European social partners (ETUC, BUSINESSEUROPE, UEAPME, CEEP) to president Juncker, 2 March 2016.

⁽¹⁰⁾ Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality.

⁽¹¹⁾ See Communication from the Commission to the European Parliament, the Council and the National Parliaments on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2, COM(2016) 505 final of 20 July 2016.

3.10. The Commission's proposal was accompanied by an impact assessment⁽¹²⁾ stating that the proposed measures for applying the revised directive would have different impacts on different Member States, sectors and companies and noting that strong data limitations on the posting of workers still constituted an ongoing problem.

3.11. Comparable figures are based on the A1 portable documents requiring detailed information from companies posting workers to a country. The accuracy of the information contained in A1 portable documents cannot be guaranteed due to the lack of official controls by the authorities in the countries from which workers were sent. Therefore the figures presented in the impact assessment represent merely an estimate of the actual number of postings taking place and do not provide a clear picture of the real situation.

3.12. In 2010, Eurofound published a report on 'Posted workers in the European Union'⁽¹³⁾, looking at the phenomenon in the EU Member States and Norway. This report maps the available sources of information about the number of postings and provides figures for those countries where data are available. Eurofound's research shows that there is a lack of data regarding the overall number and characteristics of posted workers throughout the EU.

3.13. This Eurofound report is followed by two recent pieces of research related to fairer mobility on the labour market: Brief analysis of the EU Member States transposition of the 'Enforcement' Directive 2014/67/EU improving enforcement of Directive 96/71/EC on the Posting of workers and Fraudulent forms of contracting work and self-employment⁽¹⁴⁾.

4. Main changes in the proposed revision of Directive 96/71/EC

4.1. Remuneration

4.1.1. The Commission proposes replacing the concept of 'minimum rates of pay' with 'remuneration'. According to the EC proposal, remuneration covers all the elements of remuneration that are mandatory in the host Member State.

4.1.2. The Commission tabled the proposal in response to many calls for action to address the causes of wage differentials. According to the Commission there is a gap between the conditions applied for local workers and those for posted workers. According to the impact assessment accompanying the proposal, the wage differential between posted and local workers is estimated to range from 10 % to 50 % depending on the country and sector. Differentiated pay rules distort the level playing field among companies. The concept of 'minimum rates of pay' is not the same as the mandatory rules that are applied to local workers.

4.1.3. According to the Commission, the concept of 'remuneration' can therefore better contribute to achieving a level playing field in the Single Market for services. The concept of 'remuneration' encompasses all the elements that are paid to local workers if they are laid down by law or by collective agreement which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, or by collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory. 'Remuneration' could include some elements that are not included in the concept of 'minimum rate of pay', such as seniority allowance, allowances and supplements for dirty, heavy or dangerous work, quality bonuses, 13th month bonuses, travel expenses, meal vouchers — although most host countries have already included several of those elements in the 'minimum rate of pay'.

4.1.4. According to the Commission, the introduction of the concept of 'remuneration' should contribute to improving clarity on the constituent elements of remuneration and to reducing existing cross-sector differences in the mandatory application of collective agreements.

⁽¹²⁾ Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, SWD(2016) 52 final of 8 March 2016.

⁽¹³⁾ Eurofound report on 'Posted workers in the European Union', Roberto Pedersini and Massimo Pallini, published in 2010.

⁽¹⁴⁾ Preliminary findings of both research projects were presented during the EESC Labour Market Observatory conference on 'Towards a fairer mobility within the EU' held on 28 September 2016.

4.1.5. Nevertheless the term 'remuneration' itself can be seen as imprecise, giving room for various interpretations, and this will create legal uncertainty. The concept of 'minimum rates of pay', despite the various doubts it raises, is more precise and easier to define.

4.1.6. The Commission affirms that the proposal will not affect Member States' competences and traditions in setting wages and that it respects a strong autonomous role for the social partners. In this context, it is worrying that the Commission proposes to delete the reference in the current directive stating that 'minimum rates of pay are defined by the national law and/or practice of the Member State to whose territory the worker is posted'. This provision is important in order to comply with various national industrial relations systems.

4.1.7. For the purpose of this Directive, the concept of remuneration shall be defined by the national law and/or practice of the Member State to whose territory the worker is posted.

4.1.8. This Directive shall not prevent application of terms and conditions of employment of the host country or of the country of origin of the posted worker which are more favourable to workers, in particular through the exercising of the fundamental right of workers and employers to negotiate and conclude collective agreements at the appropriate levels and to take collective action to defend their interests, including strike action, to protect and improve the living and working conditions of workers including the right to equal treatment.

4.1.9. To ensure proper implementation of the Enforcement Directive, Member States are obliged to publish information on terms and conditions of employment applicable to workers posted to their territory on a single website. Member States could delay putting the single website in place, as the applicable terms and conditions are likely to change. This process should not be negatively influenced by any new proposal.

4.1.10. EESC members have discussed the question of 'remuneration' in great depth, taking account of all the implications of this new concept.

4.1.11. Some Members consider that the newly-introduced concept is the only way to ensure equal working conditions for both posted and local workers, eliminating wage differentials and guaranteeing a level playing field among companies.

4.1.12. Other Members believe that the introduction of this new concept could result in less legal certainty and clarity and increasing administrative and financial burden. Any discussion on posting should take account of the fact that the situations of foreign and domestic companies are different. A foreign service provider that wants to post workers bears additional costs resulting solely from performing services in another Member State — additional operating expenses⁽¹⁵⁾ and indirect cross-border labour costs⁽¹⁶⁾.

4.1.13. With regard to extending the scope of application of universally applicable collective agreements to all sectors, the EESC recommends reconsidering whether it is also necessary to automatically extend the sources of employment standards applicable to posted workers in those sectors where no major problems with posting have been recorded.

4.2. Posting exceeding 24 months

4.2.1. The Commission is addressing the issue of the duration of postings by introducing a proposal that, in cases where the anticipated or the effective duration of posting exceeds 24 months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out. This is applicable from the first day that the posting effectively exceeds a duration of 24 months. The Commission is also introducing a cumulative duration of posting periods in cases where workers are replaced.

⁽¹⁵⁾ Indirect expenses: cost of becoming familiar with administrative requirements and regulations in other Member States, e.g. notification procedures, translation of documents, cooperation with inspection authorities.

⁽¹⁶⁾ This indirect cross-border labour cost could increase by up to 32%. These are some of the preliminary results of a pilot study on 'Labour cost in cross-border services', conducted by the Department of Public Economy and Administration of the Krakow University of Economics. These results were presented during the EESC Labour Market Observatory conference on 'Towards a fairer mobility within the EU' held on 28 September 2016.

4.2.2. The original directive does not set any fixed limit and states that, for the purposes of the directive, 'posted worker' means a worker who, for a limited period, carries out his/her work in the territory of a Member State other than the state in which he/she normally works.

4.2.3. In order to avoid unclear situations where it is difficult to determine whether or not there is a posting within the meaning of the Posting of Workers Directive, Article 3(1) and (2) of the Enforcement Directive set out a non-exhaustive list of qualitative criteria characterising both the temporary nature inherent in the concept of posting for the provision of services and the existence of a genuine link between the employer and the Member State from which the posting takes place.

4.2.4. One of the main arguments raised was that neither the TFEU nor Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I Regulation)⁽¹⁷⁾ provides a basis for adopting a period of 24 months as the reference period for determining the country in which the work is habitually carried out. In addition, it is not appropriate to use a directive to change the application of a regulation, or to define the terms used in the Rome I Regulation differently for the purposes of the Posting of Workers Directive. According to the explanations given by the European Commission's legal service in its opinion: '... (New Article 2a) does not affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services in circumstances also where the posting exceeds 24 months. The purpose is merely to create legal certainty in the application of the Rome I Regulation to a specific situation, without amending that Regulation in any way.'⁽¹⁸⁾

4.2.5. The EESC is not in favour of setting such a fixed time limit. It goes against the nature of the posting of workers and is contrary to the purpose of the directive. The average duration of posting in the EU is 103 days⁽¹⁹⁾ (only 4-5 % of all postings are longer than 12 months⁽²⁰⁾). There is no evidence that posting periods of longer than two years are a widespread and problematic practice leading to abuse of the rules on the posting of workers.

4.2.6. On the contrary, introducing the term 'anticipated duration of posting' and setting rules for replacement of workers could lead to uncertainty and uneven application of the rules on the posting of workers. In the construction sector in particular, it will be difficult to anticipate the 'duration of work performance' and for inspection bodies to prove it.

4.2.7. The existing definition is sufficient, and any fixing of a time limit for the posting of workers would run counter to the principle of verifying what is a case of a genuine and justified posting. Moreover, the ECJ has repeatedly confirmed that the term 'temporary' has to be considered on a case-by-case basis.

4.2.8. The Commission argues that this change will bring the Posting of Workers Directive in line with the social security rules set out in Regulation (EC) No 883/2004⁽²¹⁾. However, Regulation (EC) No 883/2004 gives Member States the option of extending — through bilateral agreements — the initial two-year period during which social security contributions are paid in the country of origin. The Commission proposal on the revision of the Posting of Workers Directive makes the provision that, when the anticipated or the effective duration of posting exceeds 24 months, all working conditions of the host country would have to be applied from the very first day of posting. This is neither necessary nor consistent.

4.3. Subcontracting

4.3.1. The Commission's proposal gives Member States the option of applying to workers in a subcontracting chain the same conditions as are applied by the main contractor. These conditions would have to be applied in the same way to both national and cross-border subcontractors, in accordance with the principle of non-discrimination.

⁽¹⁷⁾ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

⁽¹⁸⁾ Opinion of the European Commission's legal service — institutional file 2016/0070 (COD) of 28 May 2016.

⁽¹⁹⁾ Commission Staff Working Document SWD (2016)52 final, p. 39, J. Pacolet and F. De Wispelaere, *Posting of Workers. Report on A1 portable document issued in 2014*, December 2015.

⁽²⁰⁾ Commission Staff Working Document SWD (2016)52 final, p. 39, L&R Sozialforschung, *Entwicklungen im Bereich des Lohndumpings*, May 2014.

⁽²¹⁾ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

4.3.2. There are considerable differences between the laws, regulations, administrative provisions or collective agreements applicable in Member States to ensure that subcontracting does not allow undertakings to avoid rules guaranteeing certain terms and conditions of employment covering remuneration. There is no evidence showing how many Member States already apply such a system and the Commission did not present any in-depth analysis of the potential consequences of such rules in its impact assessment.

4.3.3. However, in order for this part of the proposal to be effective in practice, it might be useful to make a reference to a rule on joint and several liability throughout any subcontracting chains introduced by article 12 of the Enforcement Directive⁽²²⁾.

4.3.4. Moreover the phrase 'certain terms and conditions of employment covering remuneration' is vague and will lead to legal uncertainty, differing interpretations, and potential conflicts with other parts of the directive. There would also be problems of comparison and many other purely practical problems, such as access to information (also in connection with the duty of the governments to publish such information under Article 5 of Directive 2014/67/EU) and the availability of collective agreements).

4.3.5. It is also unclear how the Commission would define and apply non-discrimination and proportionality tests for such provisions.

4.3.6. In addition, it will be necessary to introduce adequate provisions to check the genuine self-employed status of subcontractors, in accordance with Member States' standards.

4.4. Temporary agency work

4.4.1. The Commission introduces a new obligation for Member States by adding a new paragraph which establishes the conditions applicable to the workers referred to in Article 1(3)(c) of the Directive, i.e. workers hired out by a temporary agency established in a Member State other than the Member State of establishment of the user undertaking. The undertakings referred to in Article 1(3)(c) will have to guarantee posted workers the terms and conditions which apply pursuant to Article 5 of Directive 2008/104/EC on temporary agency work⁽²³⁾ to temporary workers hired out by temporary agencies established in the Member State where the work is carried out.

4.4.2. The EESC believes that this new provision is not necessary, as the original Posting of Workers Directive already provided for such an option under Article 3(9). Member States may make the provision that the undertakings referred to in Article 1(1) must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out. The option of applying Directive 2008/104/EC has already been taken up by a majority of host countries.

4.4.3. The EESC considers that the Commission should stick to the existing arrangement. Consideration needs to be given to the fact that the provisions of Directive 2008/104/EC are applicable to the situation in the various Member States, whereas Directive 96/71/EC is applicable to cross-border activities. This was acknowledged by the Commission itself in the Report on the application of Directive 2008/104/EC on temporary agency work⁽²⁴⁾.

4.4.4. The EESC points out that Article 5 of Directive 2008/104/EC is much broader than Article 3(9) of Directive 96/71/EC and that this could paradoxically lead to different conditions for the posting of workers under Article 1(3)(a) and (b) and Article 1(3)(c) of the current law.

5. What should be the European Commission's main focus

5.1. The Commission should encourage Member States to transpose the Enforcement Directive⁽²⁵⁾ if they have not done so yet and ensure that all Member States implement it properly. After two years, the Commission should assess its impact and determine whether the adopted measures have led to adequate and effective implementation and enforcement, as these are key elements in protecting the rights of posted workers and ensuring a level playing field for service providers.

⁽²²⁾ Article 12 of Directive 2014/67/EU on subcontracting liability (see footnote 1).

⁽²³⁾ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ L 327, 5.12.2008, p. 9).

⁽²⁴⁾ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final.

⁽²⁵⁾ See footnote 1.

- 5.2. The Commission should provide an in-depth analysis of the situation in the various EU Member States, as well as real quantitative information on posted workers and ways of implementing and enforcing the existing directive.
- 5.3. The availability of reliable data on posted workers is a precondition for an effective debate on their specific characteristics and need for protection.
- 5.4. If the Commission wants to ensure fair competition, its next steps should focus on combating fraudulent practices and eliminating the phenomenon of illegal work, primarily in the form of the abuse of letterbox companies.
- 5.5. The Commission should speed up economic and social convergence within the EU, while at the same time ensuring fair mobility of workers in the context of cross-border provision of services.
- 5.6. Introducing a new concept such as 'remuneration' might prompt questions both from Member States in the Council and from companies during the public consultation. The Commission should carry out an in-depth socioeconomic analysis of the consequences for consumers, companies and generally for EU competitiveness and employment.
- 5.7. The Commission should consult social partners, recognise their autonomy and respect collective agreements that are relevant in this field.

Reason for the amendment:

This amendment seeks to propose a balanced approach to this Commission proposal, which has generated different points of view, both amongst Member States, the social partners and businesses. The aim of this amendment is to adequately reflect those diverging views in a credible and balanced manner, while also showing points where there is a consensus. This amendment, which corresponds to the text submitted by the two SOC section rapporteurs, following the 3rd study group meeting, better presents this balance between different views than the text amended and adopted by the section.

Outcome of the vote

In favour	94
Against	175
Abstentions	23
