



Brussels, 25.9.2019
COM(2019) 426 final

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**on the application and implementation of 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) 1024/2012 on administrative co-operation through the
Internal Market Information System ('the IMI Regulation')**

{SWD(2019) 337 final}

1. INTRODUCTION

1.1. The Directive

The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the European Union enshrined in the Treaty on the Functioning of the European Union (TFEU). The Posting of Workers Directive 96/71/EC¹ (as amended by Directive 2018/957/EU²³) (*hereinafter “the Posting of Workers Directive”*) implements those principles with the aim to guaranteeing a level playing field for businesses and respect for the rights of workers.

The Enforcement Directive 2014/67/EU⁴ (*hereinafter “the Directive”*) establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC.

1.2. The report

Article 24 of the Directive requires the Commission to review the application and implementation of this Directive to present a report and propose, where appropriate, the necessary amendments no later than 18 June 2019. It specifies certain provisions of the Directive that have to be assessed in particular, namely those mentioned in Article 4 (regarding identification of a genuine posting and prevention of abuse and circumvention), Article 6 (regarding mutual assistance), Article 9 (regarding administrative requirements and control measures), 12 (regarding subcontracting liability) and in Chapter VI (regarding cross-border enforcement of financial administrative penalties and/or fines) as well as the adequacy of data available and the use of bilateral agreements or arrangements related to the Internal Market Information System. In addition to these issues, the report also looks at other provisions of the Directive. Insofar as the available information allows, the report also reflects on the effectiveness in practice of the measures taken by Member States. In addition, it explores whether any amendment to the Directive is necessary.

The report is written based on information about the national measures transposing the Directive that Member States have communicated to the Commission under Article 23(2) of the Directive⁵. The Commission has also consulted the members (national experts) and observers (experts from European Free Trade Area countries and European social

¹ 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, p. 1).

² Directive 2018/957/EU of the European Parliament and of the Council 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L 173, 9.7.2018, p.16).

³ The amendments introduced by Directive 2018/957 only apply as of 30 July 2020.

⁴ 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).

⁵ References to the national laws transposing the Directive can be found on the Eur-Lex webpage: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0067&qid=1547558891458>

partners) of the Expert Committee on Posting of Workers⁶ by sending them a questionnaire (*hereinafter the questionnaire*) and the preliminary draft report. The Commission has also used information about transposition measures collected by the European Centre of Expertise in the field of labour law, employment and labour market policy. In addition, information brought to the attention of the Commission by members of the European Parliament, complaints and letters by the citizens as well as through the contacts with different stakeholders have been taken into account.

The report is accompanied by the Staff Working Document including several annexes: Annex I and II concern Member States' transposition measures of Articles 9 and 12, respectively. Annex III contains the Internal Market Information System's statistics on the use of the posting module as well as of the module concerning the administrative cooperation in the area of cross-border enforcement of penalties and fines. Annex IV contains a report on collection of data from national declaration tools for the year 2017 drafted by the Network Statistics of the Free Movement of Workers, Social Security Coordination and Fraud and Error.

2. TRANSPOSITION PROCESS

In accordance with Article 23(1), the Member States had to transpose the Directive by 18 June 2016.

To assist Member States with the transposition, the Commission established the Expert Group on the Transposition of the Enforcement Directive of the Posting of Workers Directive 2014/67/EU, which met nine times between December 2014 and May 2016. Furthermore, the implementation and the application in practice of the Directive have been discussed at several meetings of the Expert Committee on Posting of Workers.

All Member States have by now transposed the Directive.

To that effect, all Member States, but Germany, which considered its legislation to be in line with the Directive, passed new laws or administrative acts or amended existing acts. By the deadline of 18 June 2016, in ten Member States (Denmark, Finland, France, Hungary, Malta, the Netherlands, Poland, Slovakia, Slovenia and the UK) laws transposing the Directive entered into force. Later in 2016, after the deadline, in another six Member States (Belgium, Estonia, Greece, Ireland, Italy, Latvia) relevant legislation entered into force. In 2017, new legislation came into force in Austria, Bulgaria, Croatia, the Czech Republic, Cyprus, Lithuania, Luxembourg, Portugal, Romania, Spain and Sweden.

3. IMPLEMENTATION OF THE DIRECTIVE

3.1. Subject matter and Definitions (Articles 1 and 2)

Article 1 sets out the scope and objectives of the Directive and its relation to the Posting of Workers Directive. Although it is not necessary to expressly transpose this provision, national law needs to ensure that the scope of implementing provisions covers cases of posting as defined in that Directive, in particular, Articles 1-3.

⁶ Established by the Commission Decision of 19.12.2008 setting up the Committee of Experts on Posting of Workers (OJ L 8 13.1.2009 p. 26).

Hence, many Member States have not expressly defined the scope of implementing legislation, but clarify it through the context and references to other provisions of national law. Member States which define the scope explicitly in reference to the Posting of Workers Directive are Bulgaria, Cyprus, Estonia, Finland, Greece, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, and Spain.

All Member States apply the national provisions resulting from the transposition of the Directive to the posted workers. Some Member States, however, apply these provisions in a broader manner, namely to persons who are not posted workers in the sense of the Posting of Workers Directive or to activities that do not involve a provision of service. This is the case for Austria, where the law covers all cases of workers sent to work to Austria by their employer. Though not stated explicitly, such a broad application is also implied by the provisions of the Hungarian Labour Code. The Dutch and Slovenian regulations apply this legislation partly also to the self-employed cross-border service providers.

The employers' organisations in two Member States (Austria and France) have pointed out that measures transposing the Directive should be applied only to the situations that can be considered posting according to the Posting of Workers Directive. Trade unions, in general, considered that it is possible and fully in line with the competences of the Member States to apply the provisions provided in the Directive also to other categories of workers who are not considered as posted according to the Posting of Workers Directive.

3.2. Competent authorities and liaison offices (Article 3)

Article 3 of the Directive deals with the designation by the Member States of competent authorities and liaison offices for the purposes of the Directive.

The obligation to nominate competent authorities and liaison offices through which the administrative cooperation and/or exchange of information regarding the posting of workers takes place dates back to the transposition of Article 4 of the Posting of Workers Directive. Hence, all Member States have designated the authorities and liaison officers responsible for issues related to the posting of workers.

The majority of the Member States have opted for a direct transposition of Article 3 of the Directive. The authorities have been either directly designated by law or appointed by the Government or by another authority.

The list of competent authorities and liaison offices can be found on Your Europe webpage⁷.

3.3. Identification of a genuine posting and prevention of abuse and circumvention (Article 4)

Article 4 of the Directive provides for two non-exhaustive lists of elements which Member States may in particular use when making the overall assessment to determine whether an

⁷ https://europa.eu/youreurope/citizens/national-contact-points/index_en.htm

undertaking genuinely performs substantial activities in the Member State of establishment (Art 4(2)) and whether a posted worker carries out his work temporarily in a Member State other than the one in which he or she normally works (Art 4(3)). These elements should assist competent authorities when carrying out checks and controls and where they have a reason to believe that a worker may not qualify as a posted worker. It should be kept in mind that failure to satisfy one or more of these elements does not preclude a situation from being characterised as posting (Art 4(4)), meaning that there should be no requirement that each element is satisfied in every posting case.

3.3.1. Elements to determine whether an undertaking genuinely performs substantial activities

Most of the Member States have provided for a list of elements identical to those in the Directive. Austria, Germany, Ireland, the Netherlands, Sweden and the UK have not explicitly transposed this part of the Article. Eight Member States (Bulgaria, Croatia, Italy, Romania, Slovenia, Austria, Spain and Greece) have introduced or maintained other existing elements, such as:

- the duration of the actual posting (Bulgaria),
- the duration and frequency of an employer’s activity in the national territory, and whether it is performed occasionally or continuously (Croatia);
- any other element useful for the overall assessment (Italy);
- the main activity of the undertaking where it is authorized to operate and the object of the service contract; the employment contracts/other forms of employment concluded by the undertaking with its own employees (Romania);
- whether the employer has suitable premises where the service is provided; employment of administrative staff which performs work at the head office or premises of the employer; whether the employer advertises the activity and if there have been changes related to the employer’s activity in the last six months (Slovenia);
- true economic nature of the activity rather than the appearance of the facts shall be relevant for assessing whether an employment relationship, the cross-border posting or hiring out of workers exists (Austria) and a posting shall not require the conclusion of a service contract between an employer not established in Austria and a service recipient operating in Austria;
- identification of the undertaking posting the workers (Spain);
- the time of the undertaking’s establishment and the undertaking which really pays wages to the posted workers (Greece).

3.3.2. *Elements to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works*

Most of the Member States have transposed the list of elements in Article 4(3), except for Austria, Denmark, Germany, Ireland, Sweden and the UK, mainly by providing a list of elements identical to those in the Directive. In Croatia, Latvia, Italy, Luxembourg, Greece and Slovenia additional elements have been provided:

- the date of employment, the possession of the Portable Document A1-certificate (or application for that certificate), whether the employer sent workers to the Member State in previous 12 months and what tasks and where the worker performed them a month before being posted to the Member State (Croatia);
- any other element useful for the overall assessment and a certification concerning the applicable social security legislation (Italy);
- in order to assess if a posted worker performs the work in other MS than the one where she/he normally works, the State Labour Inspectorate should check in advance if there is genuine employment relationship (Latvia);
- the intention of the worker to return to the home country (Luxembourg, as a result of case law);
- prior periods of insurance of posted worker on the basis of employment or self-employment (Slovenia);
- the end date of posting and whether the employment contract or relationship between the posted worker and the service provider shall continue after the end of posting (Greece).

The majority of the Member States have explicitly transposed Article 4(4), and have also clarified that the above-mentioned criteria are non-exhaustive.

3.4. Improved access to information (Article 5)

Article 5 establishes obligations for the Member States regarding access to information and the setting up of single official national websites (*hereinafter the website(s)*).

Regarding the transposition of Article 5(2), in the majority of the Member States (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Spain and the UK) the national legislation does not specify the criteria to be applied to the information provided on the website.

Nevertheless, all Member States have set up the websites and these largely fulfil the conditions provided in the Directive, including the language requirements, i.e. most websites are available not only in the host Member State's national language(s), but also in English and many also have it in other relevant languages.

When it comes to the presentation of information regarding the terms and conditions of employment stemming from legislation, Member States have taken different avenues. They either reproduce national legislative or administrative texts, or provide summaries or overviews in plain language and/or questions and answers.

Information regarding the terms and conditions of employment that apply to posted workers stemming from collective agreements applicable in accordance with Article 3(8) of the Posting of Workers Directive (Article 5(4)) is presented by Member States, where such agreements exist, on the website in different forms. These can be in the form of: (1) the full text of the collective agreement (Austria, Croatia, Luxembourg, Latvia and Sweden); (2) a summary of the collective agreement presented on the website (Austria, Belgium, Germany, Luxembourg and Estonia); (3) a link to the collective agreement on the website (Belgium, Bulgaria, Croatia, Finland, Ireland, Estonia and the Netherlands); and (4) a link to the database on collective agreements is presented on the national websites of Belgium, Spain, Finland, Hungary, Italy, Portugal, Slovakia, Slovenia and the Netherlands.

The Expert Committee on Posting of Workers has undertaken an exercise where the Commission, Member States and European level social partners review the websites and present their views and findings, including best practices and make suggestions for improvement. This exercise is still ongoing. The preliminary results show that while most of the websites have been set up as provided in Article 5 of the Directive, many websites go further as regards the scope of information presented and languages covered.

European level social partners have highlighted access to information as one of the most crucial elements in guaranteeing the rights of the posted workers and ensuring legal certainty for businesses. Employers have pointed out that a template for a uniform website would be a significant improvement when it comes to the clarity and accessibility of information. Trade unions have pointed out the importance for the websites to include also information about the contacts of the relevant social partners.

The single national official websites of all Member States are accessible from the Your Europe website⁸.

3.5. Administrative cooperation (Articles 6 and 7)

Articles 6 and 7 of the Directive concern administrative cooperation between Member States, which should be carried out without undue delay in order to facilitate the implementation, application and enforcement in practice of the Directive and the Posting of Workers Directive. Article 6 also sets out deadlines for replying to the requests: 2 working days in urgent cases and 25 working days for other requests. Article 7 specifies further the roles of the host and home Member State in administrative cooperation.

Most Member States have explicitly transposed Articles 6 and 7 or have pre-existing legislation applicable. UK, Belgium, France, Luxembourg and Netherlands comply with the entirety or some aspects of Articles 6 and 7 by way of administrative practice and there is no respective legislation in place.

Article 6(3) allows Member States also to send and service documents. This provision is not mandatory, however most Member States use it in practice by host Member States' liaison

⁸ https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites

offices to deliver documents to service providers in home Member States and it works well, in general, even in Member States which have not transposed it.

As administrative cooperation in relation to the posting of workers takes mainly the form of sending and replying to the reasoned requests of information from competent authorities through the Internal Market Information System, the statistics of its usage give a quantitative overview of how it is applied in practice.

In relation to requesting information through administrative cooperation, Member States have pointed out some difficulties. In some cases authorities of the requested Member States claim not to be competent to answer certain questions and/or do not provide an answer or provide an incomplete answer. In some cases due to short deadlines, authorities are unable to carry out an inspection. This results in unanswered or partially answered requests.

Regarding the deadlines set in Article 6(6), most Member States consider these adequate, albeit in some cases too short, for example if documents need to be gathered from other authorities or inspections are needed to retrieve the necessary information. The Internal Market Information System's statistics (see Annex III of the Staff Working Document) show that there are about 1/3 of the requests that are not replied within the deadlines.

In their replies to the Expert Committee on Posting of Workers questionnaire, the trade unions stressed the importance to ensure compliance with the deadlines provided in Article 6 (6). They highlighted that in order to be able to tackle abuses, it is important to receive reliable and comprehensive information quickly. They furthermore stressed the need for Member States to ensure adequate resources for administrative cooperation.

Internal Market Information System's statistics regarding sending and receiving of requests

In 2018, a total of 4789 posting of workers information exchanges were sent in Internal Market Information System. The majority of these requests were requests for information (2785 exchanges), and requests to send documents (1089). Other types of exchanges were less frequent: requests to notify a decision imposing an administrative penalty or fine (568), requests to recover a penalty or fine (201), urgent requests (130), and communications of irregularities (16).

The level of cooperation represents a steady increase since 2017, where the total number of information exchanges grew from 873 exchanges in the fourth quarter of 2017 to 1214 exchanges in the fourth quarter of 2018. Most notably, the number of urgent requests rose from 22 requests in the fourth quarter of 2017 to 50 requests in the fourth quarter of 2018.

In 2018, Belgium was the most active sender of information requests, followed by Austria and France. Belgium also sent the most of the urgent requests while Austria sent the highest number of requests to send documents, to notify a decision and recover a penalty or fine. The highest number of communications of irregularities was sent by Slovakia.

In total, Slovenia received the most requests in 2018, though the highest number of *information* requests were sent to Poland followed by Portugal and Slovenia. Romania received the highest number of *urgent* requests followed by Poland and Portugal. Slovenia

received the highest number of requests to send documents, notifications of a decision and requests to cover a penalty or fine, while Germany received the highest number of communications of irregularities.

The average time taken to respond to urgent requests, where the required information should be available in a register, was ten calendar days in 2018, while the Directive sets a deadline of just two working days.

The average time taken to respond to (non-urgent) requests for information was 43 days in 2018, while the legal deadline for answering these requests is 35 days (25 working days). In some cases, Member States receiving high numbers of requests provide answers quicker than Member States receiving fewer requests.

See Annex III of the Staff Working Document for an overview of statistics.

3.6. Administrative requirements and control measures (Article 9)

The Directive allows Member States to put in place administrative requirements and control measures in order to ensure the effective monitoring of compliance with the Directive and the Posting of Workers Directive, provided that these are justified and proportionate in accordance with Union law. There is no obligation on Member States to introduce these measures. The list of possible measures provided is non-exhaustive. However, other administrative requirements and control measures may be imposed only if they are justified and proportionate.

An overview of the measures taken by Member States under Article 9 can be found in Annex I of the Staff Working Document.

3.6.1. Article 9(1)(a) simple declaration

This provision allows Member States to require a service provider established in another Member State to make a ‘simple declaration’ containing the relevant information necessary in order to allow factual controls at the workplace, including: (i) the identity of the service provider; (ii) the anticipated number of clearly identifiable posted workers; (iii) the contact persons referred to under Article 9(1) (e) - (f); (iv) the anticipated duration, envisaged beginning and end date of the posting; (v) the address(es) of the workplace; and (vi) the nature of the services justifying the posting.

All Member States, but the UK (with the exception of Gibraltar), require such a declaration to be made by the service provider before the commencement of activities on their territory. In most Member States the declaration needs to be done any time before the start of the service provision, including on the same day (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia Slovenia, Spain, Sweden). However, in some Member States (Italy, Lithuania, Romania) the notification has to be done on the previous day (this means on the day preceding the day when the service provision starts). Since the declaration may be required “at the latest at the commencement of the service provision”, any requirement for the declaration to be made within a certain deadline (for example, a few hours or a few days) before the posting goes beyond what is expressly authorised under the Directive.

In case of changes to the information submitted in the declaration, Austrian, Finnish and German laws require such changes to be notified immediately, and other Member States indicate a precise time frame for this notification: on the first weekday after the change in Denmark, three days in Croatia and Sweden, five days in Italy and Romania, seven days in Poland, ten days in the Czech Republic and fifteen days in Cyprus and Greece, since the changes were made. In Italy, changes in “essential information” (identification code and state of the establishment of the service provider, the identification codes of posted workers etc.) are not allowed, in such cases declaration have to be resubmitted by the time the service provision starts. In Greece, in case of changes in working time, the information has to be submitted at the latest on the day of the change.

3.6.1.1. Information regarding the service provider/employer

Member States require at least information on the service provider’s name and address, usually also some further contact data such as phone number and/or e-mail address. Apart from these requirements, twelve Member States (Austria, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Italy, Latvia, Poland, Slovakia and Spain) require the posting employer to notify its VAT number, business registration number or similar, and Cyprus demands the undertaking to indicate its legal form. Nine Member States (Austria, Croatia, Cyprus, Estonia, Finland, Germany, Greece, Hungary and Lithuania) prescribe information on the type of business, i.e. the business sector in which the undertaking is active.

3.6.1.2. Information regarding posted workers

Basic information on the workers usually entails the workers’ names and addresses, in the Czech Republic and Germany also their birth date, and in thirteen Member States (Austria, Croatia, Denmark, Finland, France, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Slovakia and Slovenia) both birth date and nationality. In Spain personal and professional details are required. Finland and Hungary ask for an indication of the number of posted workers and Hungary also asks for the names of posted workers.

Additional requirements have been put in place in thirteen Member States: eight Member States (Croatia, the Czech Republic, Denmark, Finland, Greece, Italy, Lithuania and Portugal) require the passport or identification number; the Czech Republic, Denmark and Greece workers’ gender; Austria, Finland and Sweden their social security number; Slovenia the address of temporary residence in Slovenia; France the social security status, Denmark information on social security and the Netherlands requests the submission of documents on the payment of social security contribution in the home country. Austria, Croatia, Finland and Latvia require the work and/or resident permits of third country nationals posted to their territory. Luxembourg and Lithuania also require the worker’s occupation.

3.6.1.3. Information regarding the contact persons

Article 9(1) mentions that Member States may require the service provider to indicate a person to liaise with the authorities in the host state. Whereas Member States may require this contact person to be present in the host Member State, no disproportionate requirements may be imposed. In addition, Member States may also require to designate another contact person to act as a representative through whom the social partners may ask the service provider to engage in collective bargaining. That contact person, unlikely to the one liaising with the authorities, cannot be required to be present in the host Member State, but needs to be available on a reasonable and justified request.

All Member States that made use of the provision(s) in Article 9(1)(e) and/or (f) also require these persons to be indicated in the simple declaration. Accordingly, all Member States except the Czech Republic, Lithuania and the UK require the declaration to contain information about a contact person to liaise with the competent authorities. Information about a person to be contacted regarding collective bargaining has to be indicated in the declaration in Bulgaria, Cyprus, Denmark, Hungary, Italy, Latvia, Malta, Portugal and Spain.

In addition, eleven Member States (Austria, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Italy, Luxembourg, Slovenia and Sweden) ask information on a contact person generally entitled to represent the employer; the Dutch regulation indicates the person responsible for wage payment. All these three types of contact persons typically need to be identified by their name and address, sometimes by additional contact information.

3.6.1.4. Information regarding work performed

Information regarding Article 9(1)(a) points (iv) to (v): the anticipated duration, envisaged beginning and end date of posting and the address(es) of the work place; is required by almost all Member States that require declaration. Similarly, the duty to indicate the type or nature of work as indicated, corresponds to Article 9(1)(a)(vi), that is the nature of services, of the Directive. Also this information is required by all countries that require a declaration, with the exception of Greece and Ireland. As for Spain, the duty to indicate the type of work/services may be implied by the law's reference to 'professional data'.

In addition to these requirements Member States ask for additional information to be mentioned in the declaration, which does not relate to Article 9(1)(a), but to other provisions in that Article. Such requirements are allowed provided they are justified and proportionate. Indication of the location of the documents that need to be kept and provided to authorities upon request is prescribed in the legislation of seven Member States (Austria, Croatia, Germany, Hungary, Lithuania, Poland and Slovenia). Five Member States (Austria, Bulgaria, Croatia, France and Greece) require information relating to matters of working time and wages; Belgium at least the inclusion of a work schedule and an indication whether contracts are temporary; and Italy requires wage details in case of posting in the transport sector. Under Lithuanian law the provision of 'guarantees' for workers in a number of areas including, for example, health and safety issues, is prescribed.

3.6.1.5. Information on service recipient

Several Member States ask also information relating to the service recipient to be contained in the simple declaration, which is not listed in Article 9(1)(a). In most cases they require basic information (name, address, contact information) about the posting employer's contractual partner to be included in the declaration. In Germany and Poland, this is only mandatory where posting takes place under a contract for temporary agency work, in which case the user undertaking needs to be indicated. As opposed to this, a total of fifteen Member States (Austria, Belgium, Croatia, Denmark (not in case of a private person), Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Slovenia and Spain) require the indication of the service recipient in all cases of posting. Eight of these countries (Cyprus, Estonia, Finland, Italy, France, Greece, Lithuania and Slovenia) require also information on the service recipient's type of business, in Austria the applicable collective agreement needs to be indicated. Austria, Greece and Italy also prescribe the notification of

the service recipient's VAT number and Austria also the trade licence, Estonia its registration code. Italy also asks information on the legal representative of the service recipient.

In some Member States, obligations related to the declaration of posted workers are put on the service recipient. This is the case in the Czech Republic, where the declaration has to be done by the service recipient. In Denmark, the service recipient has an obligation to inform the Danish competent authority in case he has not received documentation proving that the service provider has notified information to the Danish competent authority or if the information is incomplete or wrong.

3.6.2. Article 9(1)(b) to (d) – documentation requirements

Article 9(1)(b) allows the Member States to demand that certain documents related to the employment contract are kept or made available in paper or electronic form. This does not mean that such documents may be required to be notified together with the simple declaration.

All Member States (with the exception of the United Kingdom) ask for documentation that largely corresponds to the items explicitly mentioned in Article 9(1)(b) ('the employment contract or an equivalent document [...], payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages').

Additionally, six Member States require copies of documents on the identity and/or status of workers to be available in the workplace: such documents are typically passports or identity cards (Austria, Croatia, Latvia, Luxembourg), Portable Document A1 certificates (Austria, Italy, Luxembourg, Slovenia), work and/or resident permits of third country nationals (Austria, Croatia, Latvia, Luxembourg and Spain).

Luxembourg asks for copies of medical certificates of fitness for work and in case of part-time work or fixed-term employment contract, a certificate of conformity issued by the competent control authority. Croatia and Lithuania ask for other evidence necessary for control and supervision.

Most Member States have transposed Article 9(1)(b) into national law by stating that the documents have to be available – in paper or electronic form – at the workplace to which the workers are posted.

The obligation to retain documents formally ends with the end of the period of posting in nine countries (Austria, Cyprus, the Czech Republic, Denmark, Finland, Lithuania, Luxembourg, the Netherlands and Slovakia).

In Luxembourg all documents need to be submitted electronically in advance of the posting, rather than being kept or made available in an accessible and clearly identified place in its territory.

The Directive allows asking for the documents to be delivered after the period of posting at the request of the authorities of the host Member State within a reasonable period of time

(Article 9(1)(c)). Most Member States require the availability of documents over a specific timeframe after the end of the posting period, except Malta where the duration is not specified and Lithuania where documents need to be available, but can be kept in the sending Member State. This timeframe amounts to one year in Belgium, Bulgaria and Portugal; two years in eight Member States (Finland, France, Germany, Greece, Italy, Latvia, Poland and Slovenia); three years Hungary, Ireland and Romania, five years in Croatia and seven years in Estonia.

3.6.3. Language and translation requirements

The wording of Article 9(1)(a) and (d) allows Member States to prescribe the language for both the declaration and the documentation duties – both of which can be demanded in the host country’s official language or any ‘language(s) accepted by the host Member State.

Most Member States require the declaration to be done in (one of) their official language(s). In addition to the official language, declaration in English is an option in Austria, Croatia, Denmark, Estonia, Hungary, Poland and Sweden. In Austria, the declaration can be made in Czech, English, Spanish, Croatian, Italian, Hungarian, Polish, Romanian, Slovakian and Slovenian languages. In Sweden, the languages available are English, German, Polish, Romanian and French. In Denmark, posted workers can be registered using English, German and Polish languages. The possibility to make the declaration in other languages is given in many Member States with electronic systems for declaration.

Keeping the documents without translation is accepted in twelve Member States, in nine of which (Belgium, Croatia, Denmark, Estonia, Hungary, Lithuania, Poland, Slovakia and Slovenia) the authorities can request a translation into their official language (or into English, in case of Belgium and Finland) in individual cases. English is an option for the employment contract in Austria, and documents can be kept in the official language or in English in Cyprus and Sweden. The Netherlands have no regulation requiring for the translation of documents.

3.6.4. Other administrative requirements and control measures

Some Member States have put in place measures for the identification of the posted workers, like the construction card (“Carte d’identification professionnelle du BTP”) in France, the ConstruBadge in Belgium and the social identification badge in Luxembourg.

General assessment

Most Member States impose most or all of the administrative measures listed in Article 9(1). While this may suggest that very similar duties apply for service providers across the Member States, the concrete requirements put in place in Member States, in particular with respect to the process of notification, the documentation and translation requirements are rather diverse.

All Member States consider the administrative requirements and control measures put in place useful for facilitating the monitoring of compliance with the obligations set out in the Directive and the Posting of Workers Directive.

Member States consider the simple declaration especially useful, as it makes the posted worker “visible” to the inspection services and thus facilitates the monitoring of their working conditions and detection of fraud. In addition, the notification gives the necessary information for targeting controls to the most affected sectors/regions/companies, based on a risk assessment. The same aim is served by the documents that can be required by the inspection services. The designation of the liaison person has had a positive effect on receiving the documents referred to above and on making contact with the representative of the employer.

Many Member States have also taken measures to limit administrative burden that could be caused by the above-mentioned measures. Usually these measures concern postings that are of short duration or in certain sectors or professions. Belgium, Denmark, Germany, France, Italy, Luxembourg, Hungary, Malta, Austria, Poland, Slovenia, Slovakia, Finland and Sweden have implemented an online/electronic posting declaration tool.

In Belgium, urgent repair and maintenance works of machines or equipment, delivered by the same employer to the business where the repair/maintenance takes place, are exempted from the notification requirement in “Limosa” (mandatory declaration for workers and self-employed who are sent to work/work in Belgium), in case such a work does not exceed 5 days per month.

In Germany, a notification is obligatory only in the construction and construction-related industries, building cleaning services and in care provision.

Trade unions find that adequate and effective administrative requirements and control measures are extremely important to monitor compliance with the obligations established in the Posting of Workers Directive. They also find that it would be important to define at EU level certain mandatory administrative requirements and control measures, including the obligation to declare the posting before its start and introduction of an electronic register of posted workers, which could improve monitoring of the compliance with the applicable rules. Regarding concrete measures taken, trade unions have pointed out that in case a contact person in view of collective bargaining needs to be designated according to national law transposing the Directive, this information should be communicated also to the trade unions.

Employers, on the other hand, have voiced a concern that the introduction of measures according to Article 9 has led to practical problems when posting workers, especially due to increased administrative burden.

According to Article 9(2) of the Directive Member States are allowed to take other administrative requirements and control measures provided that these measures are justified and proportionate. From the transposition measures as described above, it is clear that most Member States have taken a number of measures that fall under this Article.

3.7. Inspections (Article 10)

Article 10 deals with inspections in posting situations, prescribing that they should be based on risk assessment and not be discriminatory and/or disproportionate.

The majority of the Member States have opted for an explicit transposition of Article 10. However, a number of Member States (Belgium, Bulgaria, Czech Republic, Estonia, Luxembourg, the Netherlands and Sweden) consider that existing legislation is compliant with Article 10 through general provisions setting out the competences of labour inspection authorities. The UK has indicated that compliance is based on the practice of the authorities.

When it comes to the reference to the risk assessment in the sense of Article 10(1), a number of Member States (Bulgaria, Cyprus, Denmark, Greece, Hungary, Ireland, Latvia, Malta, Portugal, Romania and Slovenia) have regulations in place which require such a risk assessment to be conducted when selecting the entities subject to inspection. With the exception of Cyprus, Denmark and Ireland, such regulations also set out the criteria to be used in the risk assessment, many of which closely follow the criteria suggested in Article 10(1).

Some other countries have indicated that such risk assessment is not a legal requirement in their national system but a general practice of the authorities in charge of the inspection. This is the case for the Czech Republic, Germany, Spain and Sweden.

Trade unions consider that while the situation varies from Member State to Member State, the controls and inspections are still insufficient. They stress that it is important for Member States to put in place adequate mechanisms, controls and inspections to ensure compliance with the rules and to avoid cross-border abuses.

While effective monitoring procedures are essential for the enforcement of the Directive and the Posting of Workers Directive, the Commission considers that inspections need to be based primarily on risk assessment by competent authorities. In addition, Member States need to ensure that inspections and controls of compliance are not discriminatory and/or disproportionate. This means that they have to be suitable for achieving the objectives pursued without restricting the cross-border provision of services any more than necessary⁹.

3.8. Defence of rights – facilitation of complaints – back payments (Article 11)

Article 11 requires Member States to have mechanisms in place for posted workers to lodge complaints against their employers directly, institute judicial or administrative proceedings and establishes standards for enforcement, particularly requiring procedures for employees, but also trade unions and third parties to engage in the defence of posted workers' rights before judicial and administrative bodies in the host state.

All Member States¹⁰ provide for posted workers' possibility to turn with a complaint to the competent labour inspection authority in case of a violation of their rights by the employer.

All Member States give posted workers access to their judicial system in respect of claims arising in relation to the period of posting and neither the end of the posting period nor the return to the home state precludes claims by posted workers in the host Member State in any country.

⁹ See the *Rush Portuguesa* judgement of 27.3.1990, case C-113/89, paragraph 17, as well as the judgements of 21.10.2004, *Commission v Luxembourg*, case C-445/03, paragraph 40, and of 19.1.2006, *Commission v Germany*, C-244/04, paragraph 36

¹⁰ Except UK where there is no labour inspection or similar authority.

The possibility for trade unions and third parties to engage in judicial proceedings is in principle provided for in most, but not all, Member States. Notably, Slovenia does not provide for any direct involvement of these parties in court proceedings, and five Member States (Bulgaria, Finland, Hungary, Lithuania and Luxembourg) envisage this possibility only for trade unions but not for other organisations. While Maltese law does not refer to trade unions explicitly, there is a possibility to bring claims by an organization or other legal entity, having a legitimate interest in ensuring that these regulations are complied with in the law. In Italy, trade unions, although not having the right to act directly in court on behalf of an individual worker, can act in support of the posted workers.

Moreover, for the trade unions and third parties to be involved, in many Member States, except in Austria, Estonia, Greece, Slovakia, Spain and the UK, additional conditions have to be fulfilled, such as the employee has to be a member of the organisation in question or the violation concerned needs to relate to a collective agreement of which the union is a party.

For third parties to be involved in proceedings, Member States commonly require the demonstration of a legitimate interest in the case at issue, e.g. by reference to an organisation's purpose according to its statutes. This is prescribed by the law in Croatia, the Czech Republic, Latvia, Malta, Poland, Portugal and Romania.

In practice, the initiation of court proceedings by trade unions on behalf of posted workers is used often in Finland, Denmark, the Netherlands and Sweden.

Eleven Member States (Belgium, Bulgaria, Croatia, Cyprus, Denmark, Greece, Malta, Poland, Portugal, Romania and Sweden) have expressly transposed Article 11(5) by introducing an explicit protection of posted workers against retaliation by the employer in their national law. In twelve Member States (Austria, the Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Luxembourg, Slovenia, Spain and the UK) there was no necessity of doing this, as the application of general principles of protection against victimisation extends also to posted workers.

In Finland, Ireland and Slovakia such principle applies only in those areas where it is expressly made applicable. In the Netherlands there are no provisions prescribing a protection against retaliation, apart from those areas where protection against victimisation is mandated by EU law and has been incorporated in provisions transposing it. In Lithuania, employees are explicitly protected against 'retaliation' in the sense of compensation claims for violating the employer's economic interests.

3.9. Subcontracting liability (Article 12)

In order to tackle fraud and abuse, Article 12 allows Member States to take measures to ensure that in subcontracting chains the contractor to which the employer is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker. While Member States are required to introduce such sub-contracting liability in the construction sector and cover at least unpaid net remuneration corresponding to the minimum rates of pay (Article 12(1)), they may provide for it in any sector, also for more tiers than only towards the direct contractor and with a broader scope than minimum rates of pay (Article 12(2) and (4)). Instead of such a system of subcontracting liability, Member States may take other appropriate enforcement measures (Article 12(6)). All these measures have to be taken on a non-discriminatory and proportionate basis.

Overview of the measures taken by Member States under Article 12 can be found in Annex II of the Staff Working Document. According to the replies to the questionnaire sent to the Expert Committee on Posting of Workers, in many Member States the liability rules have not yet been frequently applied practice as there are no relevant cases. However, several Member States (Belgium, Bulgaria, Croatia, Denmark, Germany, Finland, Italy, Lithuania, Luxembourg, Malta, the Netherlands and France) indicated that the introduction of these rules has increased the effective protection of the workers' rights in subcontracting chains. Employers, in general, consider that the introduction of subcontracting liability or alternative measures have not increased the effective protection of workers' rights in subcontracting chains. Trade unions find that where Member States maintained or introduced full subcontracting liability and limitation to the possible length of the subcontracting chain, this has had a positive impact on the protection of posted workers' rights in the chain.

3.9.1. Minimum requirement covering the construction sector

All Member States (except Denmark and Finland, which have taken 'other appropriate enforcement measures' according to Article 12(6)), have implemented the minimum requirement of making direct ('first tier') contractors in the construction sector generally responsible in case of the employer's (subcontractor's) failure to pay wages at least corresponding to the applicable minimum wage and contributions to social security.

Nine Member States (Croatia, Estonia, Finland, Ireland, Lithuania, Poland, Romania, Sweden and the UK) limit this liability to the construction sector. All other Member States extend the scheme of subcontracting liability to other sectors. Eleven Member States (France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovakia and Spain) have decided to extend the scheme to all sectors of the economy.

3.9.2. Broader application in terms of scope and range

While most Member States limit the liability to the direct contractor, ten Member States (Austria, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Slovenia, Spain and Sweden) provide for the possibility to claim unmet payments also from parties that are not in a direct contractual relationship with the posting employer. In Austria, however, this applies only where the use of several tiers had the purpose of circumventing legal obligations, and Lithuania and Sweden have restricted liability to the main contractor of the construction project.

Most commonly, workers are entitled to claim their total wages (i.e. also contractually stipulated wages that are higher than the minimum wage) or at least compensation for overtime work from the contractor. The former applies to thirteen Member States (Austria, Belgium, Estonia, France, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Slovenia, Spain and Sweden), the latter to three (Croatia, Czech Republic and Slovakia). France also includes the provision of housing by the employer, and Luxembourg has extended liability to all monetary claims arising from the employment relationship as far as they concern work in the framework of their employer's service provision to the contractor.

At the same time, all countries except Austria limit the contractor's liability to the amount stipulated in the contract with the subcontractor.

3.9.3. Due diligence

The Directive allows for introducing an exception by which contractors meeting specific standards of ‘due diligence’ in respect of their subcontractor are exempt from liability (Article 12(5)).

Sixteen Member States have introduced the option of a due diligence defence. In the majority of cases, this takes the form of an overall assessment of the contractor’s diligence in the individual case (Cyprus, the Czech Republic, Estonia, Greece, Ireland, the Netherlands, Poland and the UK).

Twelve Member States (Austria, Belgium, Croatia, the Czech Republic, France, Hungary, Luxembourg, the Netherlands, Poland, Romania, Slovakia and Spain) have explicit criteria for the contractor’s obligations to control and/or promote compliance by the subcontractor stipulated by law, whereby the degree of detail ranges from a very general indication in Poland to an extensive enumeration of criteria in Croatia. The Italian law provides for a due diligence only for the road transport sector.

3.9.4. Other appropriate enforcement measures according to Article 12(6)

As mentioned above, Denmark and Finland are the only countries that did not introduce schemes of subcontracting liability. In Denmark, the alternative scheme to transpose Article 12(6) is based on the establishment of a Labour Market Fund for Posted Workers whereby if workers posted to Denmark and covered by a Danish collective agreement have problems receiving their wage from the employer the worker can get the missing wage paid from the abovementioned fund. If the fund has paid wages to posted workers as mentioned above, the employer as well as the Danish service recipient are imposed to pay an extraordinary contribution to the fund. The fund will seek to recover the wage the fund paid to the workers from their employer in his home country. The fund is financed by contributions from all employers (Danish as well as foreign employers) providing services in Denmark.

In Finland, if a posted worker has not been paid the minimum rate of pay, he or she may notify the construction site builder or the general contractor of the matter. After receiving the notification, the builder or the general contractor shall immediately request the posting undertaking to provide a report on the wages paid to the posted worker. The builder or the general contractor shall immediately send the request for information and the report submitted by the posting undertaking to the worker. At the request of the worker, the information request and the report shall immediately be submitted to the occupational safety and health authority. The builder or the general contractor shall keep the information request and report for two years following the end of the work. Non-compliance with these obligations may lead to a sanction but not to the contractor’s liability for outstanding wage claims.

3.9.5. Application of liability provisions only to cross-border service providers

Member States may not set up a system of subcontracting liability which applies only to cross-border service providers, as this would directly discriminate against those service providers. Such system could might discourage customers’ final clients and contractors to contract or subcontract with undertakings established in other Member States.

Sixteen Member States (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and the UK) seem to apply provisions of subcontracting liability only to foreign service providers, while other Member States apply them or comparable ones equally to domestic as well as foreign service providers.

In addition, national law on liability rules in Austria, Estonia, Hungary and Italy seem to apply to any situation (not only subcontracting) when an employer engages into a contract with a service provider established in another Member State.

3.10. Cross-border enforcement of financial administrative penalties and/or fines (Chapter VI)

Articles 13 to 19 of the Directive deal with the cross-border enforcement of financial administrative penalties and (or) fines. Notably, these provisions provide that the decision by the competent authority of one Member State to impose a penalty on a service provider be notified to the addressee and recovered by the competent authority of the Member State where the provider is currently located.

Most countries have explicitly transposed Articles 13-19. By means of exception, Germany, Denmark, Ireland and the UK report compliance through the practice of authorities rather than through new legal provisions. A partial transposition has been realised in the Netherlands (no transposition of Articles 13, 14, and 18) and Slovenia (no transposition of Article 18).

Internal Market Information System's statistics on the use of Chapter VI

Only a few Member States (Austria, Belgium, Finland, Italy, Romania, Sweden, Slovakia, Slovenia and Netherlands) have made use of the administrative cooperation under cross-border enforcement of financial administrative penalties and/or fines as a requesting authority, that means sending a request to another Member State in order to notify or recover a penalty or fine.

The situation is different when we look at how many Member States (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Spain, Hungary, Italy, Lithuania, Latvia, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and the UK) have been addressed as a requested authority, meaning a request to notify or recover a penalty or fine has been sent to them.

In general, administrative cooperation via the Internal Market Information System on these issues is considered effective by Member States who replied to the Expert Committee on Posting of Workers questionnaire. Some practical problems have been flagged in relation to the recognition of fines and penalties in other Member States and grounds for refusal to deliver a penalty or a fine. These issues are being discussed by the Member States' experts in the Expert Committee on the Posting of Workers. Some Member States indicated increased workload due to the requests.

The Internal Market Information System statistics show that the usage of the administrative cooperation for the cross-border enforcement of financial and administrative penalties and/or fines is low.

In 2018, 568 requests to notify a decision of an administrative penalty or fine and 201 requests to recover such a penalty or fine were sent via the Internal Market Information System. The highest number of requests to notify a decision were sent by Austria (550) as were the highest number of requests to recover a penalty or fine (192).

Slovenia received the most requests to notify a decision (190), followed by Czech Republic (90), Romania (67) and Hungary (51). Slovenia also received the highest number of requests to recover a penalty or fine were also sent to Slovenia (69), followed by Hungary (44) and Czech Republic (21).

See Annex III of the Staff Working Document for an overview of statistics.

3.11. Penalties

According to Article 20 of the Directive Member States have to set penalties in the event of infringements of national provisions adopted pursuant the Directive. The penalties provided for shall be effective, proportionate and dissuasive.

3.11.1. Penalties for violating administrative duties relating to the posting of workers

All Member States have implemented a system of sanctions applicable in the event of administrative violations.

Austria, Belgium, Bulgaria, Finland, France, Italy, Luxembourg and Malta have defined the possible range of the financial sanction to be applied per worker. A comparison of the maximum fine per worker shows that this ranges from EUR 1165 in Malta to EUR 10 000 in Austria and Finland.

Alternatively or additionally, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungarian, Ireland, Latvia, Lithuania Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and the UK define the range or at least upper threshold of sanctions that are applicable per employer, irrespective of the number of workers concerned. The maximum amount of these fines ranges from EUR 240 in Lithuania to EUR 48 000 in Belgium.

In Austria, Bulgaria, Denmark, France, Latvia, Lithuania, Luxembourg, the Netherlands and Spain a repeated violation will carry an additional sanction. As a result, the fine per worker may be raised up to EUR 20 000 in Austria, and also a suspension of activities is envisaged in Austria and (for temporary work agencies) in Spain. There are also circumstances defined under which the applicable upper threshold can be further increased – and be as high as EUR 40 000 per worker in Austria for repeated violations concerning more than three workers. Finally, three countries (Austria, Bulgaria and Croatia) foresee a sanction for the individual (manager) involved in the infringement.

3.11.2. Penalties for violating the rights of posted workers

Most Member States stipulate penalties applicable in the event of non-compliance by an employer with obligations towards its workers imposed by the Posting of Workers Directive.

Austria, Belgium, Bulgaria, France, Greece, Hungary, Latvia, Luxembourg, Malta and Spain take into account the number of workers concerned in this case. The maximum fine ranges from EUR 1165 in Malta to EUR 50 000 (for denying premium for holiday work) in Luxembourg.

Belgium, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal (except in some cases), Romania, Slovakia, Slovenia, and the UK have established a system where the sanction to be imposed on the employer is not depending of the number of workers concerned. Maximum fines envisaged in these systems range from EUR 300 in Lithuania to EUR 500 000 in Germany.

Repeated violation and other qualifying circumstances lead to higher penalties in Austria, Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Latvia, Lithuania Slovakia and UK or have to be taken into account when determining the amount of the specific sanction as in the case of Germany. In such circumstances, the maximum fine per worker may be as high as EUR 40 000 in Austria, and the highest possible total fine for an undertaking in Belgium up to EUR 96 000. Non-monetary sanctions in such serious cases involve imprisonment in Cyprus and Greece, the suspension of activities in France and the inclusion of the employer in a ‘naming and shaming’ scheme in the UK. Finally, Austria, Bulgaria, Croatia, Slovakia and Slovenia also impose fines on individuals involved in the infringement such as managers.

The criteria for deciding on the amount of fines are usually the same as the ones referred to in Chapter 3.11.1.

3.11.3. Other measures

In Austria, the national law provides for the possibility to prohibit the employer from carrying out the work. Furthermore, national law provides for a “security deposit” and a “payment freeze”, which may be imposed in case of suspicion of breach of any relevant rule by the employer.

General assessment

It has been pointed out by the employers’ representatives that sanctions and the level of fines for not complying with the administrative requirements are in some Member States not proportionate. In addition to the fines, also injunctions are used, whereby posted workers are denied access to their worksite and thereby the provision of service is hindered. According to the trade unions, too often sanctions, penalties and fines are neither effective nor dissuasive enough. They claim that the advantage for the company in not respecting the rules can be very high and the risk to be identified and fined is usually low.

When introducing the declaration system many Member States introduced penalties for breaching this administrative requirement. The fines are sometimes as high as penalties for the violation of rights of workers. In some cases the fines are calculated based on the number of posted workers concerned and taking into account previous violations, which may lead to high fines.

Although the Directive was not yet applicable *ratio temporis* to the case, it seems worthwhile to mention a ruling from 13 November 2018, in case C-33/17, *Čepelnik*¹¹, where the Court of Justice of the European Union held that Article 56 Treaty on the Functioning of the EU must be interpreted as precluding legislation of a Member State under which the competent authorities can order a commissioning party established in that Member State to suspend payments to his contractor established in another Member State. Furthermore, it also precludes an obligation to pay a security in an amount equivalent to the price still owed for the works in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the first Member State.

The proportionality of penalties provided for by Austrian law is also at the core of Case C-64/18, *Maksimovic*¹².

4. DATA RELATING TO THE POSTING PROCESS

The availability of comprehensive and reliable data on the posting process retains some weaknesses although the implementation of the Directive is bringing some improvements.

The main source of comparable information on the number of postings and posted workers are the so-called 'Portable Document A1' in the field of social security coordination. This form is provided by the competent Member State at the request of the employer or the person concerned and establishes the presumption that the holder is properly affiliated to the social security system of the Member State that has issued the certificate. It is up to national social security administrations to collect national data as regards documents issued and received, and to communicate it to the Commission who prepares an annual comparative report within the framework of the Administrative Commission for the Coordination of Social Security Systems.

The data collected through this process has the advantage of reliability and comparability across the Member States. However, it has some limitations. First, the fact that data are based on the definition of posting according to social security coordination rules creates some mismatches with definitions established by the Posting of Workers Directive. This is notably the case as regards the inclusion of the self-employed and the persons active in two or more Member States in the total count and on the lack of data regarding postings longer than two years, who are included in the Portable Document A1 data. Second, actual compliance with social security coordination rules may influence the adequacy of data concerning short-term, sudden and repetitive postings. Finally, there are some gaps in the completeness of data on received posted workers, notably concerning the country of destination of workers posted to two or more Member States, which does not have to be collected by the Member States in the data collection process in the social security coordination domain.

As can be seen from Chapter 3.6.1 all Member States (except the UK) have introduced an obligation of a simple declaration and, therefore, it is now possible to complement the data based on the Portable Document A1 form with data concerning the posting declarations.

¹¹ Judgment of the Court (Grand Chamber) of 13 November 2018, in Case C-33/17, *Čepelnik d.o.o. v Michael Vavti*, ECLI:EU:C:2018:896

¹² Judgment of the Court of 12 September 2019, in Case C-64/18 *Maksimovic* (Joined Cases C-64/18, C-140/18, C-146/18, C-148/18) ECLI:EU:C:2019:723.

In 2018, this data was for the first time collected through a questionnaire, which was sent to the Expert Committee on Posting of Workers. The report presents the results of the data collection on the number of posted workers registered in the declaration systems of host Member States in 2017. This report can be found in Annex IV of the Staff Working Document.

These two data collection sources have potential to complement each other and enable to have more precise information in particular on the number of posted workers and postings in the host Member States, the sectors of activity they are working in and on the average duration of the posting period.

5. BILATERAL AGREEMENTS

According to the replies to the questionnaire sent to the Expert Committee on Posting of Workers, most Member States (Austria, Belgium, Bulgaria, Czech Republic, Germany, Spain, Finland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Estonia, Denmark, Croatia, France, the Netherlands) have bilateral agreements or joint statements in place with other Member States covering the area of posting of workers when it comes to administrative cooperation between different authorities. A majority of these Member States has reported that they have made use of these agreements instead of or in addition to the Internal Market Information System, and this for various reasons. According to Member States replies, in Croatia and Netherlands the first contact is made bilaterally, to collect more information, and after that the Internal Market Information System is used for exchanges. In Estonia, information exchange is considered to be faster over the phone and e-mail.

However, there is also a large number of Member States (Czech Republic, Germany, Hungary, Ireland, Italy, Lithuania, Latvia, Malta, Portugal, Sweden, Slovakia, Cyprus and the Netherlands) who use only the Internal Market Information System for the administrative cooperation because it is considered more convenient or in the absence of any applicable bilateral agreements.

6. POSSIBLE AMENDMENTS AND OTHER IMPROVEMENTS

Article 24(1) of the Directive states that the Commission, while making the review of the application and implementation of the Directive, shall also propose, where appropriate, necessary amendments and modifications. In addition, Article 24(2) of the Directive expressly indicates in two cases the possibility for amendments. Firstly, regarding the lists of factual elements in Article 4(2) and (3) concerning the overall assessment to determine whether an undertaking genuinely performs substantial activities in the Member State of establishment and whether a posted worker carries out his work temporarily in a Member State other than the one in which he or she normally works, respectively. Regarding these two lists, possible new elements could be defined. Secondly, regarding the adjustment of the deadlines in Article 6(6) with a view to reducing them.

With respect to the lists of factual elements in Article 4(2) and (3), some Member States generally indicated in their replies to the questionnaire that these lists were considered adequate, with some Member States suggesting to add in Article 4(2), for example, information related to the turnover, the address of companies registered office or personal manager, the payment of social security contributions and corporate tax, the law and/or collective agreement applicable and the undertaking that directs and supervises the worker, defines overtime work and sets the work schedule. However, these issues are already covered

by Article 4 (or questions related to Article 4 in the Internal Market Information System), Article 9(1) or could fall under Article 9(2), if Member States wish to make the use of them. In addition, it has to be noted, that the lists of elements in Article 4 are not exhaustive. Member States may define other/additional elements in their national law transposing the Directive, as some have done.

Therefore, the Commission does not consider necessary to propose to amend Article 4 at this stage.

With respect to the deadlines set in Article 6(6), for supplying the information requested in the Internal Market Information System, no Member State suggested in their replies to the questionnaire that these should be shortened. The Internal Market Information System's statistics show that about 2/3 of the requests are replied within the deadlines.

For the above reasons, the Commission does not consider it useful to have Article 6(6) amended at this stage. In view of further enhancing the enforcement of the Posting of Workers Directive, the Commission will take steps to promote and facilitate administrative cooperation, in particular through the European Labour Authority.

There are some areas that have been brought to the attention of the Commission by different stakeholders and where improvements could be necessary. These include the simplification of the administrative control systems by, for example, introducing a single EU-wide declaration system or a common template for websites. These issues could be solved by common work in the Expert Committee on Posting of Workers or in the framework of the European Labour Authority, once it becomes operational and thus do not require amending of the Directive.

In the light of the above and taking into account the limited period of time the Directive has been in force and the fact that no further problems were indicated that would require amendments to the Directive the Commission does not consider it necessary to propose any amendments to the Directive at this stage.

7. CONCLUSIONS

Rules applicable to posting have been discussed at the EU level during the past five years. In May 2014, the European Parliament and the Council agreed on the Enforcement Directive 2014/67/EU (“the Directive”), which contains a common framework of a set of provisions, measures and control mechanisms necessary for better and uniform implementation, application and enforcement in practice of Directive 96/71/EC.

Following a proposal from the Commission in March 2016, the European Parliament and the Council agreed in July 2018 on Directive 2018/957/EU amending the Posting of Workers Directive 96/71/EC with a view to better ensuring the rights of workers and guaranteeing fair competition for service providers. The amendments introduced by Directive 2018/957 only apply from 30 July 2020.

The Commission closely worked with all relevant actors from the Member States and social partners, in the preparation on the implementation of the new rules. This work as regards Directive 2018/957/EU is still ongoing.

Today, the Commission notes that the transposition by all Member States of the Directive has improved the enforcement of the Posting of Workers Directive in the Member States, in particular through administrative cooperation through the Internal Market Information System. By introducing administrative requirements and control measures, Member States are in a better position to monitor compliance with the rules and ensure that the rights of posted workers are guaranteed.

The Commission will continue working with the Member States to ensure that the Directive continues to be correctly transposed and applied, in particular as regards the administrative requirements and control measures and subcontracting liability.

Furthermore, to ensure a greater coherence in the interpretation and application of the posting rules throughout the EU, the Commission has also published the Practical Guide on Posting, after consulting the Member States representatives and the European level social partners organisations. The document aims at assisting employers, workers and national authorities in understanding the rules on posting of workers. It will be regularly updated to take into account new developments. This will be the case in particular concerning the application of posting rules to mobile international transport workers to integrate the case law of the Court¹³ and the changes in the legal framework¹⁴.

The Commission will also continue to provide support, together with the European Labour Authority, as soon as it becomes operational, to all actors involved. In particular, it will promote cooperation between the authorities in charge of the administrative cooperation and mutual assistance in order to ensure synergies between all information and assistance services and to facilitate compliance with administrative requirements and support cross-border enforcement procedures relating to penalties and fines.

¹³ In particular in joint cases C-370/17 and C-37/18 and in cases C-16/18 and C-815/18.

¹⁴ See the proposal for a *lex specialis* for international road transport workers, document COM(2017)278 and the proposal for a Regulation to update EU Social Security Coordination Rules COM(2016) 815.