

September 2015

Posting of workers

- Part of the expected Labour Mobility Package -

Main instruments: [Directive 96/71](#) and [Directive 2014/67](#)

This briefing is one of a series of 'Implementation Appraisals', produced by the European Parliamentary Research Service (EPRS), on the operation of existing EU legislation in practice. Each such briefing focuses on a specific EU law which is, or will shortly be, subject to an amending proposal from the European Commission, intended to update the current text. 'Implementation Appraisals' seek to provide succinct overviews of publicly available material on the implementation, application and effectiveness of specific EU laws, with inputs from, inter alia, the EU institutions and advisory committees, national parliaments and relevant external consultation and outreach exercises. They are provided to assist parliamentary committees in their consideration of new Commission proposals, once tabled.

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| EP committee responsible at time of adoption of the EU legislation: Committee on Employment and Social Affairs (EMPL) |
| Date of adoption of original legislation in plenary: 19 September 1996 (Directive 96/71), 17 June 2014 (Directive 2014/67) respectively. |
| Deadline for transposition of original legislation: 16 December 1999 (Article 7, Directive 96/71), 18 June 2016 (Article 12, Directive 2014/67) |
| Planned date for review of legislation: <ul style="list-style-type: none">- Directive 96/71: By 16 December 2001 at the latest, the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council where appropriate (Article 8). The implementation reports were published in January 2003 and July 2007.¹- Directive 2014/67: No later than 18 June 2019, the Commission shall present a report on its application and implementation to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications (Article 24 (1)). |
| Timeline for new amending legislation: The Commission Work Programme 2015 (Annex I) noted that 'the (Labour Mobility) package aims at supporting labour mobility and tackling abuse by means of better coordination of social security systems, the targeted review of the Posting of Workers Directive and an enhanced EURES'. Based on the accessible information, the Commission intends to submit this package by the end of 2015 ² . |

¹ See, point 2 'EU-level reports, evaluations and studies'.

² See, for example, the [answer](#) given by Ms Thyssen on behalf of the Commission to a [question](#) of a group of MEPs.

1. Background

In Annex I to its annual Work Programme 2015 ([CWP 2015](#)), the European Commission announced that, with a view to a deeper and fairer internal market with a strengthened industrial base, it would submit the Labour Mobility Package. While aiming at supporting labour mobility in general, this package tackles three substantial issues, in particular:

- better coordination of social security systems,³
- an enhanced EURES (European Employment Services)⁴ and
- a targeted review of the Posting of Workers Directive⁵.

This implementation appraisal focuses on the second theme of the expected Labour Mobility Package – posting of workers. In particular, it concentrates on legal acts relating to posted workers, especially Directive 96/71 concerning the posting of workers in the framework of the provision of services (Posting Directive) and Directive 2014/67 on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services (Enforcing Directive). Together with the proposal for the Enforcing Directive, the Commission also submitted a [proposal](#) for a regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services⁶. The aim of the proposed regulation was to clarify the general principles and applicable rules at EU level with respect to the exercise of the fundamental right to take collective action within the context of the freedom to provide services and the freedom of establishment. Its proposed scope covered the temporary posting of workers to another Member State for the cross-border provision of services and any envisaged restructuring and/or relocation involving more than one Member State⁷. However, the Commission withdrew this proposal in 2013, recognising that it was unlikely to gather the necessary political support within the European Parliament and the Council to enable its adoption⁸.

The posting of workers must comply with EU primary law, in particular Article 56 TFEU. This provision states that any restrictions on freedom to provide services within the Union are prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. In 2014, the number of posted workers in the EU was estimated at around 1.2 million, i.e. less than 1 % of the EU working age population⁹. Posted workers are commonly used in various sectors, including construction, hospitality and tourism, transport and communication, agriculture and the financial and business sector.

- [Directive 96/71](#) of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Directive 96/71 applies to undertakings established in a Member State which post workers to the territory of another Member State, provided that there is an employment relationship between the undertaking making the posting and the worker during the period of posting (Article 1). According to Article 2(1) of Directive 96/71, a posted worker is a worker who, for a limited period, carries out his work in the territory of a Member State other than the state in which he normally works, i.e. who is employed in Member State A but carries out his work in Member State B. The category of posted workers is not identical to that of migrant workers who move to another Member State in order to seek work and are employed there.

³ [Briefing – Coordination of social security systems](#) (Implementation appraisal), DG EPRS, January 2015.

⁴ [Briefing – EURES \(European Employment Service\)](#) (Implementation appraisal), DG EPRS, June 2015.

⁵ CWP 2015, Annex I, p. 3.

⁶ COM(2012)0130.

⁷ *Ibid.*, p. 10.

⁸ See OJ C 109, 16.4.2013, and [Commission decision](#) to withdraw the proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (COM(2012)0130).

⁹ [MEMO/14/344](#) of the European Commission of 13 May 2014.

The directive covers three types of workers, namely:

- workers posted to another Member State on the account and under the direction of the employer, under a contract concluded between the employer and the party for whom the services are intended, operating in that Member State,
- workers posted to an establishment or to an undertaking owned by the group in the territory of a Member State, and
- workers hired out to a user undertaking established or operating in the territory of a Member State by an employer which is a temporary employment undertaking or placement agency.

In all three cases, there must be an employment relationship between the employer and the posted worker, which must be maintained during the whole period of posting (Article 1(3)).

The directive explicitly excludes from its scope merchant navy undertakings as regards seagoing personnel (Article 1(2)).

Directive 96/71 protects the rights and working conditions of posted workers. It sets the minimum standards which must be ensured by the Member States. The standards applicable to posted workers must reflect at least the minimum standards of local workers in the Member State where the worker is posted. However, there is nothing to stop employers from going beyond those standards and applying more favourable working conditions to posted workers. Directive 96/71 contains a set of terms and conditions of employment that must be applied with respect to workers posted in the host country, including:

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- the minimum rates of pay, including overtime rates,
- the conditions of hiring-out of workers,
- health, safety and hygiene at work,
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people and
- equality of treatment between men and women and other provisions on non-discrimination.

- **[Directive 2014/67](#) of 15 May 2014 on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services**

Directive 2014/67 was introduced in response to improper implementation of Directive 96/71 and limitations in the enforcement thereof. Among other things, the new directive provides for changes with regard to legal clarity, improved access to information, cooperation between national authorities, the monitoring of compliance and control measures and subcontracting liability. Directive 2014/67 also provides a degree of clarification with regard to the cross-border enforcement of administrative penalties and fines.

Article 1 of 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. This includes various measures to prevent and sanction any abuse and circumvention of the applicable rules and identification of a genuine posting¹⁰. The directive defines its aim as being to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment included in Directive 96/71. This should facilitate the exercise of the freedom to provide services and promote fair competition between service providers.

¹⁰ For example, the competent authorities in the Member States are required to make an overall assessment of all factual elements characterising activities, taking account of a wider timeframe, carried out by an undertaking in the Member State of establishment (Article 4 (2), Directive 2014/67).

Under the terms of Directive 2014/67, the Member States are obliged to take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Directive 96/71 is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means (Article 5(1)). Directive 2014/67 also includes rules which are intended to improve and enhance administrative cooperation between the national authorities of the Member States in order to facilitate the implementation, application and enforcement in practice of Directive 2014/67 and Directive 96/71.

2. EU-level reports, evaluations and studies

The issue of labour mobility, including the posting of workers, has been the subject of various reports and ex-post evaluations on the operation of the legislation in question, in particular:

- **the [Report](#) from the Commission services on the implementation of Directive 96/71 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 (January 2003) and the [Implementation Report](#) on Directive 96/71 concerning posting of workers in the framework of the provision of services - New Member States (July 2007)**

In these two reports the Commission reviewed the operation of Directive 96/71. To facilitate this assessment, the reports looked into the national measures transposing Directive 96/71. The 2003 report noted that, in general, the directive had been transposed into the national law¹¹. The 2003 report found that there were a number of disparities between the definitions of the terms ‘worker’, ‘posted worker’ and ‘posting’. Apart from that this report only describes, provision by provision, the transposition of the directive into the national laws. The 2007 report concerns the implementation of the directive by 10 ‘new’ Member States. It assessed the implementation of the directive, provision by provision, in the Member States concerned. The 2007 report also pointed to inconsistencies between the definitions used in Member States, especially the definition of a ‘posted worker’.

After 2007, no further reports on the implementation of the directive were published. However, in 2015, the Commission will carry out a ‘targeted review’ of Directive 96/71 in order to ‘assess whether any adjustments are needed to further prevent the posting of workers leading to social dumping’¹². According to the information available, this ‘targeted review’ will not include or replace a review of Directive 2014/67, which should be submitted to Parliament by 18 June 2019¹³.

- **the European Commission [Communication](#) on the implementation of Directive 96/71 in the Member States (June 2003)¹⁴**

In this communication, the Commission informed Parliament about the results of the studies on the transposition of Directive 96/71. It noted that none of the Member States had encountered any particular legal difficulties in transposing the directive. The Commission did not find it necessary to amend the directive. However, it pointed to a number of problems in connection with seeking information, monitoring compliance with national implementing provisions and implementing penalties, which limit the directive’s effectiveness. The proposed solutions to these problems included:

¹¹ At the time of drafting of the 2003 report, of the EU-15, Belgium and Luxembourg had not transposed the directive, both countries having only draft legislation on the matter. Furthermore, Ireland and the United Kingdom had not transposed the directive in a specific legal act as they claimed that this particular issue was already included in their national law. Report 2003, pp. 2-3.

¹² See, for example, the [answer](#) given by Ms Thyssen, on behalf of the Commission, to a [question](#) by MEP Jutta Steinruck, April 2015 or CWP 2015, Annex I.

¹³ See, for example, the [answer](#) given by Ms Thyssen, on behalf of the Commission, to a [question](#) by MEP Danuta Jazłowiecka, January 2014.

¹⁴ COM(2003)0458.

- setting up a group of government experts to examine ways of facilitating access to information on the provisions applicable to posted workers in the host Member States¹⁵,
- collection by the Commission of all the relevant information from the Member States (such as laws and collective agreements) and subsequent posting thereof on the Commission's websites¹⁶,
- reflecting on ways of improving administrative cooperation systems and putting forward solutions in 2003¹⁷ and
- evaluating the possibilities of the various forms of collaboration established outside the directive.

- the Commission [Communication](#) on guidance on the posting of workers in the framework of the provision of services (April 2006)¹⁸

The communication contained guidelines intended to clarify the EU law on the administrative procedures connected with the posting of workers. It informed the Member States how to apply the law as interpreted by the Court of Justice and how to achieve the results required by Directive 96/71 in an effective manner¹⁹. The communication pointed to the areas which should be improved, including access to information, administrative cooperation and monitoring of compliance. In particular, the Commission provided the Member States with guidelines regarding:

- the requirement to have a representative established on the territory of the host Member State,
- the requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation,
- the requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory,
- access to information,
- administrative cooperation between Member States and
- monitoring of compliance with Directive 96/71 and measures in the event of failure to comply.

- the Commission's services [report](#) on the implementation of Directive 96/71 concerning the posting of workers in the framework of the provision of services (April 2006)²⁰

This report was a response to [Parliament's calls](#)²¹ for more information on the practical implementation of Directive 96/71 by the Member States. With regard to general information on the implementation of this directive, the report noted that it was very difficult to estimate the total number of posted workers within the EU and the total number of court cases dealing with posted workers.

With regard to legal issues, the report stated that the directive's aim should be considered in more detail and clarified in relation to previous rulings of the Court of Justice. In this context, the report also pointed to the fact that the term 'worker' is defined on the basis of the law of the Member State to whose territory the worker is posted. This can potentially lead to different definitions. The report also examined issues such as the temporary nature of the posting, maximum work periods and minimum rest periods, and minimum wage rates. In this

¹⁵ The Commission set up a group of national experts on the implementation of Directive 96/71 that met, discussed and dealt with issues as integration of the new Member States into arrangements for cooperation on information, multilingual cooperation form or compilation of 'country factsheets' on terms and conditions of employment applicable under the legislation transposing the Directive.

¹⁶ In January 2004, the European Commission launched a webpage specially dedicated to posted workers - www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm. This webpage is not active anymore. It has been replaced by a webpage <http://ec.europa.eu/social/main.jsp?catId=471>.

¹⁷ It seems that, by the end of 2003, the Commission did not officially propose any particular solutions to this problem.

¹⁸ COM(2006)0159.

¹⁹ Ibid., p. 3.

²⁰ SEC(2006)0439.

²¹ See Parliament's resolution of 15 January 2004 on the implementation of Directive 96/71/EC in the Member States (OJ C 92 E, 16.4.2004, p. 404).

regard, it sought to assess the national experiences of Member States and to explain the provisions of the directive and the relevant case law of the Court of Justice.

With regard to administrative cooperation and enforcement of the directive, the report found that, in this field, control measures and exchanges of information among the Member States needed to be improved. The report noted that this can be done, inter alia, by identifying and disseminating best practices. The report also noted that Directive 96/71 did not provide for the means to respond in the event of non-compliance with the law. This option is left to the Member States. Furthermore, the report pointed to practical problems connected with the absence of a common mutual recognition and enforcement instrument in respect of decisions taken by other Member States. In connection with joint and several liability the report noted that there was a divergence of opinions about this topic among the Member States and between social partners.

On the basis of the report, the main problems relating to the proper functioning of Directive 96/71 include:

- inconsistent definitions,
- insufficient cooperation between Member States with regard to information exchange, administrative cooperation and control and
- inconsistent approach to joint and several liability among the Member States.

- **the Commission [Communication](#): Posting of workers in the framework of the provision of services – maximising its benefits and potential while guaranteeing the protection of workers (June 2007)²²**

Through this communication, the Commission sought to meet its commitment to monitor compliance with Directive 96/71²³. The communication sought to provide an objective view of the situation. It also sought to assess any progress made in this field since 2006, on the basis of the guidelines issued by the Commission. The Commission identified several problems relating to the application of Directive 96/71, namely:

- the fact that many Member States rely solely on their own national measures and instruments to control service providers, in a way which does not always appear to be in conformity with the directive,
- the virtual absence of administrative cooperation,
- unsatisfactory access to information and
- cross-border enforcement problems.

- **the [comparative study](#) on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (March 2011) and the [complementary study](#) on the legal aspects of the posting of workers in the framework of the provision of services in the European Union (November 2011)**

These two studies, requested by the Commission²⁴, were intended to provide an overview of issues connected with the implementation, application and enforcement of Directive 96/71 in the Member States (EU 27). The comparative study comprised 32 recommendations and actions at national and European level which were updated by the complementary study. At European level the studies recommend, in particular, that steps be taken to:

- impose a clear duty on the sending state to take responsibilities not only as regards the formal applicability of its norms to posted workers, but also as regards the monitoring of application and enforcement of those norms that continue to apply during the posting,
- enhance the cross-border recognition and execution of penalties in the context of the directive,
- establish a clear definition of ‘undertakings established in a Member State’,
- enhance or clarify the definition of ‘temporary posting’,

²² COM(2007)0304.

²³ See the aforementioned Commission [Communication](#) of April 2006 on guidance on the posting of workers in the framework of the provision of services.

²⁴ Both studies were carried out by the University of Amsterdam in 2011.

- stress the distinction between the ‘passive mobility’ of a worker posted in the framework of service provision of his employer and the ‘active mobility’ of a worker,
- formulate a sub-rule for applying the directive to transport workers,
- enhance domestic and (bilateral) cross-border cooperation between work inspectorates,
- develop a European framework to enable Member States to articulate their standards and allow service providers easily to check the conformity of their ‘own’ employment conditions with the local rates of pay in the host state and
- continue the efforts to improve access to and the content of the information on host country labour law standards.

- the [study](#) on the protection of workers’ rights in subcontracting processes in the European Union (June 2012)

The study,²⁵ requested by the Commission, noted that Directive 96/71 clarified the legal situation of cross-border posted workers. The study also identified a number of shortcomings of the directive, including: the lack of efficient (cross-border) enforcement mechanisms and the limited powers of the directive with regard to the execution of punitive sanctions imposed on the Member States. However, the main objective of the study was to describe and analyse the functioning and effectiveness of existing mechanisms, especially joint and several liability and chain liability schemes with regard to ensuring the protection of posted workers’ rights. In this context the study found that joint and several liability mechanisms are not common in the Member States. The study put forward a number of recommendations in this area, in particular that steps be taken to:

- introduce a mechanism of joint and several liability at European level,
- improve information exchange on posted workers,
- strengthen cooperation by means of bilateral or EU initiatives,
- create and develop cross-border enforcement mechanisms.²⁶

Several other studies and communications analyse the issue of posting of workers²⁷.

3. European Parliament position / MEP questions

- European Parliament [legislative resolution](#) of 16 April 2014 on the proposal for a directive on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services²⁸

Parliament approved the Commission’s proposal. The amendments adopted in plenary were the result of a negotiated agreement between Parliament and the Council. The adopted text is published as Directive 2014/67.

- European Parliament [resolution](#) of 25 October 2012 on the 20 main concerns of European citizens and business with the functioning of the Single Market²⁹

Parliament emphasised the need to improve working conditions and ensure adequate protection, without any form of discrimination, for workers posted in the EU. In this context, it called for action to improve the implementation and application of Directive 96/71, in close cooperation with the social partners. It also urged

²⁵ The study was carried out by the University of Gent in 2012.

²⁶ Ibid., p. 154.

²⁷ For example, [Preparatory study](#) for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services or [Communication](#) from the European Commission - Mobility, an instrument for more and better jobs: The European Job Mobility Action Plan (2007-2010) (COM/2007/0773 final).

²⁸ P7_TA(2014)0415.

²⁹ OJ C 72 E, 11.3.2014, p. 1.

the Commission to establish a central coordination point at EU level aimed at recording the concerns of mobile workers, employers and other interested parties, in order to devise solutions between Member States and prevent problems arising from mobile employment relationships, including the posting of workers.

In February 2013, the Commission came forward with a [follow-up](#) to this resolution³⁰. It informed Parliament that it had submitted a proposal for an enforcement directive relating to Directive 96/71 in the framework of the provision of services. The purpose of the enforcement directive was to improve the way in which Directive 96/71 was being implemented, applied and enforced in practice across the Union. It included specific provisions concerning administrative cooperation and the effectiveness of controls and sanctions.

- **European Parliament [resolution](#) of 11 July 2007 on the Commission Communication on the posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers**³¹

In this resolution Parliament called on the Commission to take into account the variety of labour market models existing in the European Union when it comes to adopting any measure on posting. It also asked the Commission to respect the fact that some Member States require the availability of a mandated representative with legal capacity in the host country in order to properly implement and monitor Directive 96/71. Furthermore, Parliament invited the Commission to adopt guidance measures addressed to employers and the Member States so that they have a better understanding of their rights and obligations under this directive. It also requested that the Commission to support close cooperation between inspection bodies in the Member States.

In September 2007, the Commission came forward with a [follow-up](#) to this resolution. The Commission explained that it did not intend to put into question the different social models chosen by Member States nor the way they organised their system of labour relations and collective bargaining, provided that this was implemented and applied in a way which was fully compatible with the obligations under the Treaty. The Commission also stated that it did not intend to publish any further guidelines as in 2006 it had provided [guidance](#) on control measures based on the existing case law. It suggested improving and reinforcing administrative cooperation with and between Member States, also engaging other actors involved (in particular social partners). In this context it was preparing follow-up actions and measures included in the communication of June 2007, such as the Commission [Recommendation](#) on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services³².

- **European Parliament [resolution](#) of 26 October 2006 on the application of Directive 96/71 on the posting of workers**³³

Parliament pointed out that the difficulties raised by the application of Directive 96/71 were partially due to improper transposition of the directive by the Member States. In this regard it called on the Commission to keep it informed about the progress of the infringement proceedings against defaulting Member States. Parliament also pointed to the fact that there were differences of interpretation of certain key concepts, such as 'worker' and 'minimum salary'. Furthermore, Parliament agreed with the Commission's Guidance³⁴, but noted that the Commission's legal interpretation went beyond the case law of the Court. It called on the Commission to submit a proposal for a directive on the conditions required for the crews of vessels. Parliament also noted that one of the key practical difficulties in the implementation of the directive was the issue of double posting³⁵, which required better cooperation between the Member States. At the same time, Parliament observed that the

³⁰ SP(2013) 72/2.

³¹ OJ C 175 E, 10.7.2008, p. 411.

³² 2008/C 85/01.

³³ OJ C 313 E, 20.12.2006, p. 452.

³⁴ See above Communication on guidance on the posting of workers in the framework of the provision of services.

³⁵ Double posting is a situation where a worker is first posted domestically to a user company which then posts the worker to another Member State.

directive was not enforced in practice in some Member States and called on the Commission to take appropriate measures in this connection. Lastly, it called on the Commission to submit to it, once every two years, concrete data on the transposition of the directive.

In December 2006, the Commission replied to the resolution in a [follow-up](#)³⁶. The Commission pointed out that it had asked for clarification from those Member States which had not adopted a specific transposition instrument³⁷. It also pointed out that, while there could be a difference in the interpretation of the case law of the Court in the Guidance, it was for the Court to decide on the interpretation of the law in the last instance. The Commission informed Parliament that it had already issued a communication on maritime labour standards³⁸. At this stage the Commission did not envisage to present a proposal for a directive on the conditions required for the crews of vessels. The Commission assured Parliament that it would play its role in supporting improved application of the directive. It also pointed out that the [expert group on posting of workers](#) met at least once a year. The Commission promised to support close cooperation between the Member States. It also suggested that it would examine ways to report on further monitoring activities as information on infringement procedures was already available by other means ([website](#) of the Commission's Secretariat General dedicated to the application of Union law).

- European Parliament [resolution](#) of 15 January 2004 on the implementation of Directive 96/71 in the Member States³⁹

Parliament called on the Commission to collect better and more concrete data on the effects of the national implementation of Directive 96/71 and to consider problems resulting from the different options that were allowed by the Directive, including unfair competition, different social protection and clear definition of workers' status. The Commission was also asked to examine legislative solutions which could lead to the prevention of unfair competition and social dumping⁴⁰. Parliament called for a fundamental assessment of the directive's implementation, especially in relation to the practical interpretation of certain concepts and definitions from the directive, the directive's implementation through collective labour agreements, and the effect thereof on relations of competition between employees and undertakings. Parliament suggested that the Commission examine a European legislative framework or other forms of provision governing liability in the case of subcontracting. Furthermore, it called on the Commission to conduct more in-depth research and to submit proposals to simplify and improve the directive. The Commission was also asked to submit a second report to Parliament on the implementation of the directive and measures on improving administrative cooperation to be implemented by the end of 2004.

The Commission's follow-up to this resolution did not come until April 2006. The Commission adopted the above-mentioned Commission's services [report](#) on the implementation of Directive 96/71 concerning the posting of workers in the framework of the provision of services⁴¹.

- Written questions

[Written question by MEP Valentinas Mazuronis](#), March 2015

The MEP inquired whether the Member States had a right to impose national administrative requirements or minimum wages on the foreign road transport sector which do not fall under the scope of Directive 96/71, as for example international transport operations.

³⁶ SP(2006)5635-2.

³⁷ Ireland and the United Kingdom.

³⁸ [Communication](#) from the Commission under Article 138(2) of the EC Treaty on the strengthening of maritime labour standards COM(2006) 0287.

³⁹ OJ C 92 E, 16.4.2004, p. 404.

⁴⁰ Social dumping is a situation where foreign service providers can charge less than local service providers because their labour standards are lower.

⁴¹ See point 2.

[Answer given by Ms Bulc on behalf of the Commission](#), June 2015

The Commission replied that it supported the introduction of a minimum wage in Germany, which was in line with the social policy commitment of this Commission. However, it noted that it must also ensure that the application of the German national measures to the transport sector was fully compatible with EU law, notably Directive 96/71, and the principles of freedom to provide services and freedom of movement of goods, with due regard for the principle of proportionality.

[Written question by MEP Ole Christensen](#), January 2015

With regard to the Commission's intention to carry out a 'targeted review' of Directive 96/71, the MEP inquired about the principal objective of this review. Furthermore, the MEP was interested in the method of the review and asked whether the Commission intended to amend the directive.

[Answer given by Ms Thyssen on behalf of the Commission](#), February 2015

The Commission answered that the targeted review of the directive was an opportunity to evaluate the directive's key provisions and to assess whether any adjustments were needed. At the same time the Commission stated that it was currently determining the scope and methodology of the review. It stated its intention to keep the Member States and social partners informed through their participation in the Expert Committee on the Posting of Workers. The Commission also undertook to report on the conclusions of this review towards the end of 2015. Lastly, it mentioned that it was too early to conclude whether an amendment of the directive was necessary.

[Written question by MEP Danuta Jazłowiecka](#), December 2014

The MEP asked whether the Commission intended to suspend the transposition of Directive 2014/67 and put forward a new legislative proposal. She also asked whether the Commission intended to shorten the review period of the transposition of the directive, what the meaning of the term 'targeted review' was and how it related to directives on the posting of workers.

[Answer given by Ms Thyssen on behalf of the Commission](#), March 2015

The Commission answered that it had no intention to suspend the transposition of Directive 2014/67 or to shorten the time limit for the review stipulated in Article 24 of the directive. With regard to the third part of the question the Commission answered that the targeted review of Directive 96/71 planned for 2015 offered an opportunity to evaluate some of the directive's key provisions and to assess whether any adjustments were needed.

[Written question by MEP Nathalie Griesbeck](#), November 2014

The MEP wished to know whether the review of Directive 96/71 would affect the process of transposition of Directive 2014/67 and whether the Commission intended to carry out a review of the directive before the transposition deadline. Lastly, the MEP inquired about the timescale for a targeted review of Directive 96/71.

[Answer given by Ms Thyssen on behalf of the Commission](#), December 2014

The Commission answered that the targeted review of Directive 96/71 would not affect the process under way for the transposition of Directive 2014/67. It also explained that this directive contained a special review clause, which required the Commission to review its application and implementation, to propose, where appropriate, any amendments or modifications needed, and to present a report by 18 June 2019. As a result, the directive itself would not be part of the review carried out in 2015. However, the targeted review of Directive 96/71 would take into account the fact that the directive's implementation would address some of the concerns expressed about abuses of the directive. Lastly, the Commission stated that it intended to present the results of its targeted review towards the end of 2015, as part of a broader package relating to labour mobility and that the targeted review of Directive 96/71 would offer an opportunity to evaluate whether additional action complementing the implementation of Directive 2014/67 could be considered to prevent social dumping and abuses.

Members of the European Parliament have tabled other questions relating to labour mobility issues, in particular to the posting of workers⁴².

4. The Court of Justice of the European Union

The posting of workers has been the subject of many cases brought before the Court of Justice⁴³. This fact does not only reflect the economic importance of the posting of workers, but also underlines the potential need for clarification of some of its provisions. In this connection, it is worth mentioning a number of judgments in which the Court of Justice responded to referrals by national courts for preliminary rulings and gave authoritative interpretations of EU law:

- Judgment of 18 June 2015, [C-586/13](#) - *Martin Meat kft v Géza Simonfay, Ulrich Salburg*,
In this judgment the Court concluded that, in order to determine whether a particular contractual relationship fell within the scope of Directive 96/71, it was necessary to take into consideration each element indicating whether the movement of workers in the host Member State was the very purpose of the supply of services on which the contractual relationship was based. In principle, evidence that such a movement is not the very purpose of the supply of services at issue includes the fact that the service provider is liable for the failure to perform the service in accordance with the contract and the fact that that service provider is free to determine the number of workers he deems necessary to send to the host Member State.
- Judgment of 12 February 2015, [C-396/13](#) - *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*
In this judgment the Court of Justice ruled that Directive 96/71 prevented a rule of the Member State of the seat of the undertaking that had posted workers to the territory of another Member State from barring a trade union from bringing an action before a court of the second Member State, in which the work was performed, in order to recover the posted workers' pay claims which related to the minimum wage and which had been assigned to it, where that assignment was in conformity with the law in force in the second Member State.
- Judgment of 7 November 2013, [C-522/12](#) - *Tevfik Isbir v DB Services GmbH*
The Court decided that Directive 96/71 did not preclude the inclusion in the minimum wage of elements of remuneration which did not alter the relationship between the service provided by the worker, on the one hand, and the consideration which he received by way of remuneration for that service, on the other.

5. The European Economic and Social Committee and the Committee of the Regions

In its [opinion](#) of September 2012 on the proposal for a directive of the European Parliament and of the Council on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services, the European Economic and Social Committee (EESC) noted that the Commission's proposal (COM(2012)0131) strengthened the rules on posting of workers and codified the existing legislation governing the right to take collective action in cross-border situations. The EESC welcomed the intention to enforce Directive 96/71, focusing on better implementation and effective administrative cooperation among Member States. The EESC stressed the importance of legal certainty and the protection of posted workers. It endorsed the intention expressed in the proposal to address the issue of so-called letter-box companies, but noted that the assessment of whether an undertaking genuinely performed substantial activities in the country of

⁴² See, for example, [E-001248/15](#), [E-000020/15](#), [P-001560-15](#), [P-000200-15](#), [P-000272-15](#), [E-000518-15](#), [E-001010-15](#), [E-000855-15](#), [E-000430-15](#), [E-000838-15](#) and <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2015-000563&language=EN> [E-011088-14](#).

⁴³ See, for example, Judgment of the Court of Justice of 8 December 2007 in Case [C-341/05](#) *Laval un partneri*, Judgment of the Court of Justice of 19 June 2008 in Case [C-319/06](#) *Commission v Luxembourg*, Judgment of the Court of Justice of 14 April 2005 in Case [C-341/02](#) *Commission v Germany*, Judgment of the Court of Justice of 3 April 2008 in Case [C-346/06](#) *Rüffert* and Judgment of the Court of Justice of 12 October 2004 in Case [C-60/03](#) *Wolff & Müller*.

establishment should be made through an overall assessment where all relevant factors were taken into account, which meant that the list included in the proposal should not be seen as exhaustive. Last, but not least, the EESC stressed that the proposal must respect existing systems for several and joint liability in the Member States. In this context, it encouraged the Commission to provide a more precise definition of due diligence, as had been done in some Member States.

In its [opinion](#) of November 2012 on the posting of workers in the framework of the provision of services, the Committee of the Regions (CoR) emphasised that the number of posted workers varied greatly in terms both of Member States of origin and of host Member States of postings, though it highlighted the growth of this phenomenon. The CoR considered it important to adopt a legal act that would harmonise the enforcement of Directive 96/71 and that would address issues that had arisen from the judgments of the Court of Justice. Furthermore, it expressed its regrets about the Commission's proposal (COM(2012)0131) as it did not review or rework Directive 96/71. It also proposed to include a provision limiting the number of sub-contracting levels in order to ensure greater social responsibility.

6. Conclusion

The number of posted workers in the EU is estimated to be less than 1 % of the EU working age population, which is around 1.2 million people out of 242 million. Nonetheless, the posting of workers is a delicate matter as it requires a combination of protection of the rights of posted workers, trans-border cooperation of EU Member States and prevention of negative practices, such as social dumping. The practice showed that, although the Member States did not have particular problems with the transposition of Directive 96/71, there were various problems regarding its enforcement. This situation led to the adoption of Directive 2014/67 on the enforcement of Directive 96/71. These two directives currently form the framework for the posting of workers. The application of Directive 96/71 is also influenced by an extensive case law of the Court of Justice.

The Commission plans to present, at the end of 2015, the Labour Mobility Package, which also involves 'a targeted review' of Directive 96/71. It is not clear how the package will review or alter the directive. However, the review may address some concerns regarding the circumvention of rules and cases of abuse. The review may provide an opportunity to evaluate whether there is a need for additional actions to prevent social dumping or whether these problems can be analysed through better transposition, implementation and enforcement of the existing regulatory framework.

7. Other sources of reference

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