Position paper

on the application of the EU Posting of Workers Directive

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Department for the promotion of skilled crafts and Department for the labour market
A. Introduction

Free movement of workers and the freedom to provide services are fundamental to the provision of providing transnational services in the EU Single Market. However, use of these freedoms must take not only EU legislation into account, but also proportional and national labour and social standards, in order to prevent distortions of competition at the expense of domestic providers.

Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (PWD) seeks to ensure this balance between use of the Single Market freedoms and respect of national labour and social standards. The directive was transposed into German legislation as the Arbeitnehmerentsendegesetz (Posted Workers Act, or PWA for short), with the latter being repeatedly amended to take account of the latest developments. The PWA provisions have stood the test of time and, in the view of the German Skilled Crafts sector, are absolutely necessary to ensure that German labour and social standards are adhered to by foreign providers.

Coming into force on 30 July 2018, Directive (EU) 2018/957 has fundamentally changed and extended the PWD, with the aim of enforcing the principle of “equal pay for equal work at the same place”. Member States are required to transpose the new provisions into national legislation by 30 July 2020.

What we are currently experiencing is an increase in complaints from Skilled Crafts companies, especially those operating in border regions. They are finding themselves increasingly hit by the often disproportional and non-transparent national provisions for employing posted workers in neighbouring EU Member States.

To ensure a level playing field and prevent distortions of competition, the goal of any transposition should be the creation of a clear regulatory regime with a solid legal footing. We must avoid having the transnational provision of services by Skilled Crafts companies hindered by non-transparent and unclear interpretations of the Directive in the Member States and having companies run the risk of breaching national labour and social standards.

The Skilled Crafts sector sees the European Commission as being responsible for ensuring the transparent and legally certain enforcement of the PWD in all EU Member States.

B. Specific comments

To improve enforcement of the Posting of Workers Directive throughout Europe and to support the transposition of the amended Posting of Workers Directive, the German Skilled Crafts sector suggests the following administrative measures:

1. Establishment of a remuneration calculator

Member States are now required to ensure that, notwithstanding the legislation applicable to the employment contract in question, the companies referred to in PWD Art. 1.1 must no longer just pay their posted workers “minimum rates of pay” but must in future guarantee the “remuneration” applicable in the Member State in which the service is provided.

This replacement of the term “minimum rates of pay” by the term “remuneration” threatens to cause a good deal of legal uncertainty in companies which post workers. It is often not clear for the posting company
which elements are to be included in the broad term "remuneration", as these are subject to different legal provisions and customs in the respective Member States and are moreover very complex.

To create the necessary transparency and planning certainty for posting companies, the Skilled Crafts sector suggests that the Member States establish a "remuneration calculator" in line with the Swiss model (www.entsendung.ch). Although the information provided by this calculator is not legally binding, such tools are able to provide a good and transparent overview of the employment conditions applicable in the respective Member State, including the remuneration elements.

In the interest of posting companies, any such calculator should be available in several languages. In accordance with the EU three-language regime, the information should be made available in English, French and German, or failing this, at least in the respective national language and English. Furthermore, an opportunity to contact the competent national enforcement authority to clarify any special cases should be provided, including a guaranteed (quick) response time. Austria has implemented such a scheme (see its contact form at www.entsendeplattform.at). Such a remuneration calculator could be integrated in national eGovernment portals, also accessible at EU level via the single digital gateway.

Pursuant to the enforcement directive for the original PWD, a host Member State can require a non-domestic company posting a worker to it to provide documentation in a language accepted by it before commencement of the service provision. Furthermore, it may require a posting company to keep or make available documentation, to designate a liaison person, and/or to provide further documentation (cf. Art. 9 of the enforcement directive (2014/67/EU)). Several Member States have established respective measures, albeit in very different forms.

In the view of the German Skilled Crafts sector, any Member State requiring prior registration of the posting of workers to it should allow such to be submitted in an electronic and user-friendly manner via a multilingual registration website, including the possibility to store documents. A good example of such a website is offered by Luxembourg (see (https://guichet.itm.lu/edetach/)). This possibility to upload all necessary documents considerably reduces the administrative effort needed and could render obsolete the general necessity to keep documents in paper form.

Such registration websites could be constructed using a harmonised URL template, with only the domain suffixes differentiating Member States. A further helpful suggestion would be to generate IDs for posted workers, making it easier for the enforcement authorities to identify employees and employers in the field. With regard to the language requirements, we refer to Point 1 above.

Existing national derogations to registration requirements should be harmonised throughout the EU. At a minimum, however, a clear explanation, ideally with examples, of the derogations should be presented on the
respective national pages of the registration website.

This electronic storage of the registration data would make it easier for the enforcement authorities to perform targeted controls. At the same time, highly-sensitive data on individual workers would be exclusively available to the host country’s enforcement authorities, allowing better protection against any unauthorised third-party access.

3. Harmonised EU definition of posting

The amended PWD contains terms which have either not been defined or whose definition is left to the discretion of individual Member States. However, the interpretation of these terms is of decisive importance for the posting companies. They therefore need to be transparent and user-friendly throughout Europe, and to be applied consistently. This applies in particular to the terms “posting”, “posting duration”, and “posting extension”.

Under PWD Art. 3.1.a, posting duration is limited to 12 months, in exceptional cases to 18 months. What is not clear is how this duration is to be calculated or which grounds allow it to be extended to 18 months without causing legal uncertainty. Service providers in border regions, often operating in several countries, must not be disadvantaged. This applies above all in cases where the posted workers perform tasks in several different projects. Reliable criteria therefore need to be developed. We call on the European Commission to develop implementation guidelines together with the Member States, allowing consistency in the application of unclear legal terms.

4. Improved inter-agency communication channels

The German Skilled Crafts sector would also like to see Member States authorities stepping up their inter-agency communications and cooperation in the field of transnational service provision within the framework of the Internal Market Information System (IMI).

Adoption of the posting of workers’ enforcement directive led to the IMI functions being extended to include the posting of workers. These new IMI functions – complemented by agency requests for information on working conditions – allow better administrative and judicial cooperation between the competent authorities in the Member States. Existing IMI deficits, such as the translation software used or the problems encountered when filling out online forms, need to be overcome in order to make this website even more user-friendly. Furthermore, it needs to be checked whether the existing option to configure new case-related fields in the IMI system can be extended to also cover fundamental posting questions.