



Brussels, 1 March 2007  
CP/em

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**Re: follow up of Communication "Guidance on the posting of workers in the framework of the provision of services", COM(2006)159**

Dear Mr van der Pas,

The ETUC and the EFBWW received in November 2006 a Questionnaire, addressed to the "Social Partners' organisations" regarding the application and implementation of the Posting Directive (96/71/EC), and especially the situation in Member States with regard to all the aspects covered by the above mentioned Communication. In the letter accompanying the questionnaire a deadline for presenting the replies was mentioned.

Both organisations have immediately sent this questionnaire to their affiliates, and have informed your DG that responding within the deadline was going to be impossible, as this questionnaire was a complicated one, and affiliates would need more time for responding, also because of the period of the year (Christmas holidays).

With this letter we want to send you the joint response of the ETUC and the EFBWW, which is summarizing our position on the above mentioned Guidance of the Commission, as well as pointing at the most essential points raised in the replies of our affiliates. In the Annex you will find a series of these responses summarized.

EUROPEAN TRADE UNION CONFEDERATION  
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John Monks, General Secretary

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The more elaborate responses of affiliates, which have already been sent directly to the Commission and/or their national government, are sent to you as separate Annexes (notably: the responses of the DGB Germany, ÖGB Austria, and CGT-L Luxemburg, and the joint response of LO-TCO-SACO Sweden).

Furthermore, we send to you for your information the joint response of the Belgian trade unions, which is giving detailed information about a recent agreement between the Belgian social partners in the National Labour Council (NAR, see FR and NL texts attached), on the basis of a proposal by the Belgian government, regarding prior declarations for posted workers.

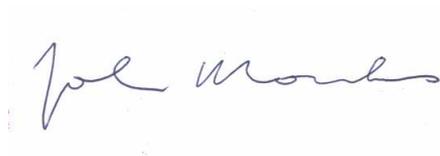
We apologize for the delay. However, as the issues raised are of great concern to our organisations as well as our affiliates, we hope that you will take all the documents into serious consideration.

In order to avoid misunderstanding the ETUC and the EFBWW decided to send only one joint reply to the European Commission.

We also want to propose to you to organise a meeting to discuss with you the further process and developments around the implementation and application of the Posting Directive in general and the specific issues raised in the 'Guidance' Communication.

We are looking forward to a further exchange of views on these issues.

Yours sincerely,



John Monks  
General Secretary

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## **ANNEX I GENERAL COMMENTS**

### **Introductory remarks**

As we have stressed on many occasions, the ETUC and its affiliates are very concerned with the implementation and application of the Posting Directive.

In its legislative resolution on the Services Directive, adopted in February 2006, the European Parliament deleted the contentious Articles 24 and 25 from the Commission proposal, which dealt with prohibited administrative requirements and enforcement mechanisms for implementation of the Posting Directive. The deletion of these Articles was very much welcomed by the ETUC and its affiliates.

In response, the Commission has drawn up in April 2006 Guidelines explaining to Member States their obligations with regard to postings that take place on their territory. The main focus of the document is on clarifying under which conditions Member States are allowed to restrict the free provision of services, and which enforcement mechanisms are considered to be not allowed, on the basis of ECJ jurisprudence regarding Article 49 of the EU Treaty.

In the same period, the Commission published a Communication regarding the implementation of the Posting Directive, stressing the need for Member States to step up their actions and activities to monitor compliance and take effective measures in case of non-compliance.

In our view, the Commission in these two communications has been sending out confusing and contradictory messages, calling on Member States to improve implementation and application and strengthen enforcement, while at the same time putting into question the very mechanisms and instruments that Member States are currently utilising to that end.

This criticism has also been taken up by the European Parliament in its recent resolution on the application of the Posting Directive, based on the report prepared by Elisabeth Schroedter, which was adopted by an overwhelming majority on the 26<sup>th</sup> of October 2006.

The ETUC strongly regrets that on several occasions the representatives of the Commission have questioned the validity of the criticism raised by ETUC and the report of the EP.

We therefore have major question marks with regard to the current Questionnaire, and several of our affiliates have raised serious doubts as to how the information about the situations at national level would be treated by the Commission.

Some fear that instead of taking up seriously the task of promoting proper implementation and enforcement, the Commission would be more interested in chasing Member States that seem to somehow 'restrict' the free provision of services.

The restrictive interpretation of the concept of "provisions for public policy" by the European Commission has created a strong feeling that the European Commission is not interested in the real labour market problems and is focusing its policy on "deregulation".

In the current situation there is therefore a *serious lack of confidence that needs to be urgently addressed* by all actors at European level.

### **Concrete proposals by the European Parliament to be followed up**

The report of the EP contains specific proposals aiming a better application and enforcement of the Directive. As such the EP has formulated concrete proposals to the European Commission. A few examples:

- Adoption of appropriate remedies for the enforcement of the directive (point 3),
- Proposing a directive on the conditions required for the crews of vessels providing regular passenger and freight ferry services between Member States (point 4),
- better coordination between Member States and enhanced notification procedures (point 5),
- Taking appropriate measures to enforce in practice the Posting of Workers Directive in some Member States (point 6),
- Initiate negotiations with the Member States as a matter of urgency, with the aim of establishing transparent and consistent criteria for determining the status of "workers" and "self-employed persons" with regard to employment law (point 9),
- Encouraging sharing information between Member States' employment inspection services to enable a joint campaign against sham self-employment (point 11),
- Stimulating cooperation between the national liaison offices and the sectoral social partners concerned (point 21),
- Regulating the joint and several liability for general or principal undertakings, in order to deal with abuses in the subcontracting and outsourcing of cross-border workers and to set up a transparent and competitive internal market for all companies (point 28),

These proposals need to be urgently given a proper follow up by the Commission.

## **The key role of the Posting Directive in safeguarding proper conditions for mobility of services and workers should not be undermined**

In a period in which transnational provision of services and mobility of workers is increasingly taking place within the EU 25, the Posting Directive plays a key role in providing for fair competition by guaranteeing the respect for workers' rights, labour law and industrial relations systems in Member States.

Mid March 2006<sup>1</sup>, the ETUC Executive adopted a position on the implementation of the Posting Directive emphasizing that it expects from the Commission a proactive approach to improve the level of implementation and enforcement of the Directive.

ETUC also stressed *that an increasingly open labour market in the EU requires a set of firm and fair rules of the game*, in which transparency and security for workers are put centre stage, to support cross border mobility of workers, both in the framework of services and the free movement of workers. *Such framework cannot do without mechanisms and instruments for the cross border monitoring and enforcement of working conditions and labour standards.*

Therefore, the ETUC welcomed the emphasis in the Commission's evaluation report regarding the Posting Directive on the need for Member States to step up their actions and activities to monitor compliance and take effective measures in case of non-compliance.

However, for the same reason we have raised strong concerns about the Commission's Guidelines, summarizing ECJ case-law. In our view they appear to be an over-simplification, overlooking the specificities of the various cases, taking no account of the great diversity of national labour market regulation and industrial relations systems. There seems to be also a lack of understanding *that Member States, according to the Posting Directive, have a **legal obligation to use effective instruments – adapted to their circumstances – to enforce the Posting Directive and provide workers with protection.***

The ETUC on several occasions has warned the Commission and members of the Parliament *not to confuse legitimate claims to administrative transparency and simplification with questioning the validity of requirements* that - in the framework of complex regulatory systems that exist at national level - are necessary to properly monitor and enforce the Posting Directive, and that provide workers from across the EU with proper protection with regard to especially wages, working hours, and health and safety.

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<sup>1</sup> ETUC website: <http://www.etuc.org/a/2222>

The ETUC especially has drawn attention to the fact that the diversity in legal systems and industrial relations in the Member States will have to be taken into account when judging if certain requirements are necessary and proportionate. If systems like the Nordic ones rely on collective bargaining and social partner activity to implement and enforce the Posting Directive, the question if a certain requirement (such as having a representative on the territory) is 'disproportionate' has to be judged in the framework of the overall objectives of the Posting Directive, and the legitimate objectives of these Member States while taking into account the specificities of their systems.

The same must be said about requirements to obtain authorisation, to register, to make prior declarations, to have a legal representative or to keep social documents available.

The ETUC wants to stress that it *agrees with the need for more transparency and simplification* in the implementation and enforcement of the Posting Directive, and for *better information* of all the parties involved, in the joint interest of workers, companies and Member States' authorities.

ETUC is in favour of respecting the right to free movement of workers across the EU, but this must be based on the principles of equal treatment and upward harmonisation of working conditions and social systems. Labour market opening must be accompanied by strong supervision of working conditions, and measures to combat exploitation and unfair competition on wages and working conditions, too often taking place when there is cross border mobility of workers or services.

ETUC very much regrets that the Commission did not make its guidelines subject to any **prior** consultation of the Social Partners at EU level, nor asked the European Parliament for its opinion.

This issue has rightfully been taken up by the Parliament on the occasion of the Schroedter-report.

The Commission is now asking questions to Member States and Social Partners regarding the issues raised in the Guidelines.

In the Annex II you will find a summary of the comments and responses of affiliates on the Questionnaire. Furthermore, we send you as separate annexes the more elaborate responses of some affiliate organisations.

A few key messages are coming clearly and unambiguously from our affiliates:

1) The Commission should urge the Member States to *substantively improve implementation* as regards:

- access of foreign service providers and their posted workers to adequate information concerning the applicable terms and conditions of employment on the basis of laws or collective agreements on their territory (Article 4,3 of the Directive)

- enforcement of the applicable terms and conditions of employment (Article 5 of the Directive).

2) The various requirements, mentioned in the Guidelines, such as the requirement of having a representative on the territory, and especially the prior registration or declaration and keeping of social documents, are perceived as necessary requirements and as *pre-conditions* for a proper functioning of the mobility of services, and not as 'obstacles' to the free movement;

3) A system for joint and several liability for the main contractor in cases of subcontracting and agency work is an important tool to support efficient and effective enforcement of the rights under the Posting Directive.

4) The creation of a European permanent co-ordination structure aiming to improve the exchange of information and data is a vital instrument to facilitate the work of thousands labour inspectors. At the moment all the Member states have to negotiate the exchange of information and data via bilateral agreements (27MS X 27MS = 729 bilateral agreements!).

5) Although there is a clear difference between regulation 1408/71 with regard to the social security of posted workers and the Posting Directive regarding the terms and conditions of employment, there is a need to provide for more transparency and a more effective link between the two bodies of regulation when it comes to monitoring and enforcement. In this regard, the future of the so called E101 form is important, and should be discussed with social partners.

Furthermore, the ETUC has received several complaints regarding manipulation and abuses in several Member States, arising from an incorrect interpretation and/or application of the concept of the Posting Directive especially as regards the definition of posted worker. According to Article 2,1 of the Directive '*a posted worker means 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***'.

In addition in several Member States employers and service providers are abusing the "self-employment" status to allow posted workers to circumvent the application of the Posting Directive.

It would be very useful if the Commission would also develop *clear guidelines* with regard to such issues, taking into account that the definition as such of an employment relationship is a matter to be dealt with at national level by national law and practice.

The ETUC expects the Commission, when following up on this Questionnaire, to take the position as taken by the European Parliament and the ETUC and its affiliates on the issues raised in the Guidance very seriously, so as not to endanger the important compromise that was reached on the draft Services Directive.

Commissioner Barroso, when presenting on the 21-st of February 2007 his vision for the single market of the 21-st century, highlighted the need for, among other things,

- *a well regulated Europe*: the dismantling of barriers went hand in hand with the establishment of new rules. The benefits of the single market will be limited if the rules are not correctly applied, and if the rights created are not satisfactorily upheld and redressed;
- *a sustainable Europe*: recognising the social and environmental aspects of the single market are key conditions for gaining public confidence, and they are both investments in Europe's future quality of life.

The adequate and effective implementation and enforcement of the Posting Directive is a key element in the coming about of such a well regulated and sustainable Europe.