

**EU PROPOSALS FOR A POSTING
OF WORKERS ENFORCEMENT
DIRECTIVE :**

Call for evidence

JUNE 2012

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Call for Evidence: EU proposal for a Posting of Workers Enforcement Directive

On 21 March 2012, The European Commission published a draft Directive, which seeks to improve the implementation and enforcement of the existing Posting of Workers Directive. Copies of the proposal and accompanying documents can be found on the following website:

http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/03/20120321_en.htm

This call for evidence seeks views from stakeholders on the impacts of the legislative proposals on the UK. Responses will help to form the UK negotiating position. It should be noted that EU negotiations have already commenced and therefore stakeholder views and evidence would be welcome as soon as possible.

Issued: 14 June 2012

Respond by: **26 July 2012**

Enquiries to:

Michael Hilton
Department for Business, Innovation and Skills
3rd Floor, Abbey 2
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6184

Fax: 020 7215 6414

Email: Michael.hilton@bis.gsi.gov.uk

1. Executive Summary

1. This Call for Evidence seeks views from UK stakeholders on recent proposals from the European Commission for a Posting of Workers Enforcement Directive. The proposals are likely to have an impact on businesses who employ posted workers or post workers to other Member States, and on workers posted to or from the UK. Those in the construction sector who post workers to other Member States or who make use of posted workers through sub-contracting work to EU contractors will be particularly affected. Views and evidence are sought on the likely type and scale of these impacts, which will help inform the UK's negotiating position.
2. The existing Posting of Workers Directive (96/71/EC) is a single market measure, to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. The Directive entitles posted workers to certain core employment rights available in the country they are posted to, including minimum rates of pay, maximum work periods and non-discrimination provisions. It applies both to workers posted from the UK to other Member States and to workers posted from other Member States to the UK.
3. On 21 March 2012, the European Commission published a draft Directive, which seeks to improve the implementation and enforcement of the existing Posting of Workers Directive. Copies of the proposal and accompanying documents can be found on the following website: http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/03/20120321_en.htm.
4. The draft Enforcement Directive was published alongside a proposal for a Regulation to clarify the exercise of the right to take collective action in the context of freedom of establishment and the freedom to provide services.
5. On 30 May, the College of European Commissioners confirmed that reasoned opinions had been received from 12 national parliaments/chambers arguing that the Regulation did not comply with the principle of subsidiarity. These opinions have triggered the 'yellow card' process established under the Lisbon Treaty. The Commission is now obliged to review its proposal and to decide whether it will maintain, amend or withdraw the proposal, giving reasons for its decision. At the time of writing, the timing of the Commission's decision is not clear. Therefore we do not intend to call for evidence on the proposed regulation.

2. How to respond

6. This Call For Evidence is being issued UK wide. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the Call for Evidence response form and, where applicable, by indicating how the views of members were assembled.

7. You may make copies of this document without seeking permission. A copy of the Call for Evidence response form is available electronically at:
<http://www.bis.gov.uk/consultations>

8. Responses can be submitted by letter, fax or email to:

Michael Hilton
Department for Business, Innovation and Skills
3rd Floor, Abbey 2
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6184

Fax: 020 7215 6414

Email: Michael.hilton@bis.gsi.gov.uk

9. Responses would be welcomed as soon as possible in order to inform ongoing EU negotiations and, at the latest, by 26 July 2012. Please state clearly in your response if you wish any or all of it to be kept confidential.

10. A list of those organisations who have received a copy of this Call for Evidence is in Annex D.

3. Confidentiality & Data Protection

11. Information provided in response to this Call for Evidence, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
12. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4. Help with queries

13. Questions about the issues raised in the document can be addressed to:

Michael Hilton
Department for Business, Innovation and Skills
3rd Floor, Abbey 2
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6184
Fax: 020 7215 6414
Email: Michael.hilton@bis.gsi.gov.uk

5. Details of the EU proposals

Background to the proposal

14. On 21 March 2012, the European Commission published a draft Posting of Workers Enforcement Directive. This Call for Evidence seeks views from UK stakeholders on that proposal. Copies of the proposal and accompanying documents can be found at: http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/03/20120321_en.htm.
15. The aim of the draft Directive is to improve the implementation and enforcement of the Posting of Workers Directive (96/71/EC)¹ (from hereon ‘the Postings Directive’). It seeks to do this through: better setting out the situations which may be classed as a posting; improving co-operation between Member States about potential evasions or contraventions of the Postings Directive; setting out mechanisms for the cross-border enforcement of penalties levied on employers who have not met their liabilities under the Directive; and introducing a new system of joint and several liability for contractors in the construction sector.
16. The intention behind the original Postings Directive was to balance the exercise of the economic freedom to provide services across the EU with appropriate protections of the rights of workers who are temporarily posted to another Member State. In doing so, it also seeks to support the Single Market by providing a level playing field and legal certainty for businesses and workers.
17. A posted worker is a worker who is sent by their employer to work temporarily in another Member State in connection with the provision of services. There are three types of situation involving sending workers which can be classed as posting under the Postings Directive:
- Posting under a contract between the business making the posting and the client for whom the services are intended (‘contracting/sub-contracting’);
 - Posting to an establishment or business owned by the group in the territory of another Member State (‘intra-corporate transfers’);
 - Hiring out by a temporary employment firm or placement agency to a user business established in another Member State.

Typical examples of a posted worker would be a travel rep from a UK travel company who is posted to Spain for the summer tourist season (she remains contracted to the UK company but provides a service in Spain for 6 months); or an expert group of sound technicians from Germany who are posted to work on a music festival in the UK (they are contracted by their German employer to a UK company for a month).

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.

18. The Postings Directive requires that while in the host Member State, a posted worker is entitled to benefit from the minimum standards in the host Member State in respect of a set of core employment terms and conditions. These are:
- Maximum work periods and minimum rest periods;
 - Minimum rates of pay, including overtime rates (this does not apply to supplementary occupational retirement pension schemes);
 - Conditions for hiring out workers, in particular the supply of workers by temporary employment firms;
 - 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, children and young people;
 - Equality of treatment between men and women and other non-discrimination provisions.

The relevant standards are those which are set down either in legislation or national collective agreements or arbitration awards.

In the UK, the core rights of posted workers are enforced in the same way as other workers. Some rights, such as the national minimum wage and health and safety are enforced by government agencies. Others, such as annual leave entitlement and non-discrimination provisions, are enforced by individuals through the tribunal system.

19. The European Commission estimates that there are around one million workers posted each year. Posting of workers is therefore a relatively small phenomenon in terms of the EU labour market as a whole. Some Member States send or receive disproportionately large numbers of posted workers, however, the UK sends around 38,000 workers each year, primarily in the services sector and receives around 37,000 per year, from across sectors.² Posting of workers can play a role in filling shortfalls in labour supply or skills in certain sectors (e.g. construction or transport).
20. There has been an ongoing debate about the effectiveness and implementation of the Postings Directive. The Court of Justice of the European Union (CJEU) has ruled in a number of cases about the extent to which Member States can set controls on businesses seeking to post workers to their territory, the scope of the employment terms and conditions set out in the Postings Directive, and which type of minimum standards apply (e.g. when a collective agreement is relevant). Case law has also addressed the question of the balance between social freedoms, most particularly the right to strike, and economic freedoms³. In addition there have been concerns about both evasion of the requirements of the Postings Directive and bogus postings by rogue businesses. There have also arguments that posting can lead to ‘social dumping’ (competing on the basis of lower labour costs / lower labour standards).

² European Commission data on the number of E101 certificates issued per year between 2005 and 2009. This is an imperfect measure of the numbers of posted workers, as not all postings require E101 certificates, and some workers are posted more than once per year.

³ CJEU cases – Viking (C-438/25), Laval (C-341-15), Ruffert (C-346/06), Commission v Luxembourg (C-319/06).

21. The 2011 Single Market Act⁴ included commitments that the European Commission would bring forward legislation aimed at improving and reinforcing the implementation and enforcement of the Postings Directive, and legislation to clarify the exercise of freedom of establishment and the freedom to provide services alongside fundamental social rights.

Summary of the key proposals in the draft Enforcement Directive

22. The summary and questions here focus on the provisions in the proposal which are likely to have an impact on UK businesses and workers. There is an opportunity for respondents to comment on other aspects of the proposal that have not been highlighted in Question 10.

23. Article 3 is intended to clarify situations which may be treated as a posting through non-exhaustive lists of qualitative criteria which characterise the relationship between a posted worker and the sending company, and allow an assessment of the establishment of the sending business. This list is intended to be used in cases of doubt and to target those who abuse the Postings Directive through the use of letterbox companies or filling a permanent role with repeated postings. These criteria could result in authorities in the home Member State needing to carry out enquiries and investigations in order to ascertain information to determine whether the criteria are met in a particular case (processes for administrative cooperation between Member States are set out in Articles 6 and 7). The text of Article 3 has been reproduced in Annex B for ease of reference.

Question 1: Are the criteria in Article 3 (see Annex B) likely to bring more clarity to what classifies as a posting for your organisation / members? Are you able to provide examples of situations where such criteria would have been either helpful or unhelpful? Is there anything that should be added to the lists? Are there any criteria which cause you / your members concern?

24. Article 5 aims to improve the information available for workers and sending companies. It requires Member State governments to make available information about the terms and conditions which apply to workers posted to their Member State, including which collective agreements apply to posted workers. This information would be published on the internet or in leaflets, in appropriate languages. This is intended to improve compliance with the Postings Directive through enabling employers to be better aware of their responsibilities and workers more aware of their rights.

Question 2: What experiences have you / your members had in finding information on the terms and conditions applicable to posted workers in other Member States? Would you welcome making this information more easily accessible? Which languages and what form (online or leaflet) would be most appropriate for your organisation / members?

25. Article 9 sets out the information and administrative requirements which Member States can ask for from sending companies. At present, 18 Member States operate some

⁴ A Single Market Act – 12 levers to boost growth and strengthen confidence' (COM(2011)206 final).

form of notification system for postings but the UK does not. Sending companies are required to provide information and evidence when posting workers. The proposal sets out an exhaustive list of information and administrative requirements that can be requested by a host Member State.

Question 3: What experiences have you had of administrative requirements and/or notification systems when posting workers from the UK to other Member States? What impact would this article have on UK businesses looking to post workers to other Member States or on posted workers themselves?

26. Article 12 introduces a joint and several liability system within the construction sector. This would provide that where a sub-contractor does not meet its responsibilities to posted workers in terms of pay, and tax and social security, the company which sub-contracted to them will be held jointly liable. There would be a defence for contractors who can demonstrate they carried out due diligence during the contracting process. This measure is targeted at the construction sector due to concerns about particular problems with compliance with and enforcement of the Postings Directive within that sector.

Question 4: What evidence is available on existing problems for posted workers in the UK construction sector? What evidence is available to demonstrate that a joint and several liability provision would address compliance and enforcement problems?

Question 5: What are likely to be the practical implications of the introduction of joint and several liability in respect of the rights of posted workers in the UK? What evidence is available to support your conclusions from the UK and other Member States? The proposal focuses on the construction sector but evidence related to other sectors would also be helpful to us in understanding the implications of the proposals.

Question 6: What is your view of the due diligence provisions in Article 12? Are the Commission's suggestions for due diligence appropriate and proportionate for what it aims to achieve?

27. The proposal was accompanied by the European Commission's Impact Assessment and an Explanatory Memorandum which provides the background and rationale. The Commission estimates that the impact on UK businesses will be approximately €211,000 (£175,953) per year.⁵ See Annex A for a brief overview of how the Government estimates the proposals will impact upon the UK. The Commission's own Impact Assessment Board has also published its opinion on the Commission's analysis, which is available here - http://ec.europa.eu/governance/impact/ia_carried_out/cia_2012_en.htm#empl.

Question 7: Overall, how will your organisation / members be affected by the proposal? Please explain and specify the impacts, giving indications of the likely costs/benefits involved and providing as much detail and evidence as possible. If impacts cannot be monetised, please try to quantify in other terms (e.g. the amount of business time spent dealing with administrative requirements).

Question 8: Do you agree with the European Commission's assertion that the Enforcement Directive will have a "positive impact on the competitiveness of SMEs [small and medium-sized businesses] and micro-SMEs"? Has the Commission adequately taken into account the needs and circumstances of SMEs in the UK?

Question 9: What are your views of the estimates the European Commission make in their Impact Assessment on the likely impacts on the UK (summarised in Annex A)? Are the estimates of the costs and benefits for the UK accurate?

28. The summary and questions have focussed on the provisions in the draft directive which appear to have the most significant implications for business and workers. If you would like to comment on any other aspects of the proposal, please do so in question 10.

Question 10: Do you / your members have any comments or evidence about posting of workers relevant to the draft Directive, which have not been covered in the questions above?

6. What happens next?

29. Responses to this Call for Evidence will inform the UK's negotiating position in EU negotiations. A consultation on how the UK will implement any finalised EU legislation would be launched if the proposal is adopted.

⁵ Currency exchange calculated using Cabinet Office recommended exchange rate for April 2012 of €1 = £0.8339

Annex A: Brief overview of the likely impacts of the proposal on the UK

Problem Definition and Rationale for Intervention:

There is an existing Posted Workers Directive (96/71/EC) which clarifies the rights of workers posted to other EU Member States and aims to ensure the proper functioning of the single market. The proposed additional Directive aims to improve the enforcement of the Posted Workers Directive, with the objective of better protecting the rights of posted workers, whilst facilitating greater cross-border provision of services. The proposed Directive imposes largely administrative requirements on governments and some businesses.

Affected groups:

- The affected groups will be the employers who send posted workers to and from the UK, the workers who are posted, and the UK Government.
- The UK posts around 38,000 workers per year to other EU countries⁶
- The UK receives around 37,000 posted workers per year from other EU countries
- Workers posted to the UK represent approximately 0.13% of all those in employment in the UK.
- Workers posted from the UK are predominantly in the services sector (99% of workers posted from the UK are in services)⁷
- Workers posted to the UK are spread across sectors, but with concentrations in Health and Social Care, the Financial and Business sector, and Manufacturing⁸
- Due to the limited nature of the available data on posted workers, it is difficult to state the number and size of businesses affected by the proposals

Costs and benefits of the proposal

Benefits

- UK businesses will benefit from the co-operation of other Member States e.g. where the UK government queries whether a business posting workers to the UK is actually established in the MS it claims to be. This will help to produce a more level playing field. Improving compliance will help to improve confidence in the use of postings.
- The Directive limits the extent of notification systems, which will make it easier for UK businesses to post workers to a number of MS.
- The European Commission has not attempted to monetise the benefits of this proposal in its Impact Assessment

⁶ Source: European Commission data on the number of E101 certificates issued per year between 2005 and 2009. This is an imperfect measure of the numbers of posted workers, as not all postings require E101 certificates, and some workers are posted more than once per year.

⁷ Source: European Commission Report (2011): [Study on the economic and social effects associated with the phenomenon of posting of workers in the EU](#)

⁸ Source: BIS analysis using Labour Force Survey Data

Business costs

- Contractors in the construction sector would be considered liable for the actions of their direct sub-contractors in relation to the treatment of posted workers. This may make it more difficult for UK SMEs and start-ups in the construction sector to win contracts across the EU, as businesses looking to sub-contract may look for firms with an established compliance record, which will favour larger, established businesses. The provision could distort the market to the disadvantage of companies using posted workers because joint and several liability would apply to them but not to a sub-contractor who did not employ posted workers. The Commission suggests that the impact of this joint and several liability measure on the UK construction industry is likely to be relatively small, as fewer than 1% of the workers posted from the UK to other EU states are in the construction sector, and just 3.5% of workers posted to the UK work in the construction sector.⁹
- The enforcement requirements on Member States could result in more regular inspections of posted workers and additional requests for information from employers.
- Cross-border enforceability of administrative fines may impact upon UK firms posting workers abroad, but only to the extent that they do not comply with the existing regulations.
- The European Commission estimates that the impact on business will be approximately €211,000 (£175,953) per year, recurring.

Government costs

- The UK will have to make clearer which terms and conditions apply to posted workers, in different languages and leaflet form as appropriate. This increased information provision will impose costs on the government.
- The UK will incur costs as a result of the administrative co-operation envisioned in the proposal. The UK would be required to co-operate with other EU Member States (MS) to facilitate implementation, application and enforcement practice of the directive. This would involve replying to information requests, and requests to carry out checks, inspections and investigations from competent authorities with respect to the transnational posting or hiring-out of workers within the shortest possible time.
- The UK will be required to provide information to host countries as requested in relation to a business sending posted workers from the UK. Information requested will have to be provided within two weeks, or 24 hours in urgent cases. The Government will have to use a separate and specific module of the Internal Market Information System to exchange information electronically with other Member States.
- The Directive would require the UK to ensure that appropriate checks and monitoring mechanisms are put in place and that effective and adequate inspections are carried out. It may require new checks for posted workers.
- The European Commission estimates that the one-off cost of these proposals to the UK Government is €3,000 (£2,502), with an annually recurring cost of €7,000 (£5,837)¹⁰.

⁹ Labour Force Survey, Q2 2008

¹⁰ Currency exchange calculated using Cabinet Office recommended exchange rate for April 2012 of €1 = £0.8339

Annex B: Text of Article 3 of commission proposal

Article 3 - Preventing abuse and circumvention

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC the competent authorities shall take into account factual elements characterising the activities carried out by an undertaking in the State in which it is established in order to determine whether it genuinely performs substantial activities, other than purely internal management and/or administrative activities. Such elements may include:

(a) the place where the undertaking has its registered office and administration, uses office space, pays taxes, has a professional licence or is registered with the chambers of commerce or professional bodies,

(b) the place where posted workers are recruited,

(c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand,

(d) the place where the undertaking performs its substantial business activity and where it employs administrative staff,

(e) the abnormally limited number of contracts performed and/or size of turnover realised in the Member State of establishment.

The assessment of these elements shall be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the Member State in which it is established.

2. In order 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, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include:

(a) the work is carried out for a limited period of time in another Member State;

(b) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 and/or the Rome Convention;

(c) the posted worker returns or is expected to resume working to the Member State from which he/she is posted after completion of the work or the provision of services for which he or she was posted;

(d) travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done; as well as

(e) any repeated previous periods during which the post was filled by the same or another (posted) worker.

All the factual elements enumerated above are indicative factors in the overall assessment to be made and may not therefore be considered in isolation. The criteria shall be adapted to each specific case and take account of the specificities of the situation.

Annex C: List of Call for Evidence questions

Question 1: Are the criteria in Article 3 (see AnnexB) likely to bring more clarity to what classifies as a posting for your organisation / members? Are you able to provide examples of situations where such criteria would have been either helpful or unhelpful? Is there anything that should be added to the lists? Are there any criteria which cause you / your members concern?

Question 2: What experiences have you / your members had in finding information on the terms and conditions applicable to posted workers in other Member States? Would you welcome making this information more easily accessible? Which languages and what form (online or leaflet) would be most appropriate for your organisation / members?

Question 3: What experiences have you had of administrative requirements and/or notification systems when posting workers from the UK to other Member States? What impact would this article have on UK businesses looking to post workers to other Member States or on posted workers themselves?

Question 4: What evidence is available on existing problems for posted workers in the UK construction sector? What evidence is available to demonstrate that a joint and several liability provision would address compliance and enforcement problems?

Question 5: What are likely to be the practical implications of the introduction of joint and several liability in respect of the rights of posted workers in the UK? What evidence is available to support your conclusions from the UK and other Member States? The proposal focuses on the construction sector but evidence related to other sectors would also be helpful to us in understanding the implications of the proposals.

Question 6: What is your view of the due diligence provisions in Article 12? Are the Commission's suggestions for due diligence appropriate and proportionate for what it aims to achieve?

Question 7: Overall, how will your organisation / members be affected by the proposal? Please explain and specify the impacts, giving indications of the likely costs/benefits involved and providing as much detail and evidence as possible. If impacts cannot be monetised, please try to quantify in other terms. (e.g. the amount of business time spent dealing with administrative requirements).

Question 8: Do you agree with the European Commission's assertion that the Enforcement Directive will have a "positive impact on the competitiveness of SMEs [small and medium-sized businesses] and micro-SMEs"? Has the Commission adequately taken into account the needs and circumstances of SMEs in the UK?

Question 9: What are your views of the estimates the European Commission make in their Impact Assessment on the likely impacts on the UK (summarised in Annex A)? Are the estimates of the costs and benefits for the UK accurate?

Question 10: Do you / your members have any comments or evidence about posting of workers relevant to the draft Directive, which have not been covered in the questions above?

Annex D: List of organisations approached

Business organisations

BCC

CBI

Chambers Wales

EEF

EEG

FPB

FSB

Institute of Directors

Scottish Chambers of Commerce

Scottish Council for Development and Industry (SCDI)

South Wales Chamber of Commerce

Employee Organisations

Northern Ireland Conference of the Irish Congress of Trade Unions (NICICTU)

UNISON

UNITE

The Law Centre (Northern Ireland)

The Law Society of Northern Ireland

TUC

Construction Bodies

Construction Industry Joint Council

Construction Industry Training Board (CITB)

Construction Products Association

Construction Scotland

ECIA

Federation of Master Builders

Scottish Building Federation

UK Contractors Group

Transport Sector

Association of Train Operating Companies (ATOC)

Railway Industry Association (RIA)

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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