



An Roinn Post, Fiontar agus Nuálaíochta
Department of Jobs, Enterprise and Innovation

**Consultation on Transposition of the Posted Workers Enforcement Directive
(2014/67/EU)**

11 December, 2015

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A. Overview

1. Introduction

1.1 The Department of Jobs, Enterprise and Innovation is seeking the views of interested parties on the transposition of EU Directive 2014/67/EU¹ on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Enforcement Directive). The Directive provides a small number of options to Member States when transposing into national law and these options are the focus of this consultation. However, in responding to the consultation interested parties may wish to address any related issues in their submissions. The Posted Workers Enforcement Directive must be transposed into national law by 18 June 2016.

Posted Workers and the 1996 Framework Directive

1.2 Posted Workers are individuals who are employed in one EU Member State but are posted by their employer to work in another Member State on a temporary basis. The Posted Workers Directive 96/71/EC1 (the 1996 Framework Directive)² aims to balance the freedom to provide services across the Internal Market while ensuring that the rights and working conditions of posted workers are protected. The Framework Directive provides that posted workers are entitled to core statutory employment rights in the country to which they are posted including, for example, national minimum rates of pay, minimum paid annual holidays, maximum work periods and minimum rest periods. Employers may apply the rights of the home Member State (i.e. the Member State where the posted worker normally works) if they are more favourable, or offer enhanced terms and conditions as an incentive for working away from home, but this would be a contractual agreement and not a statutory obligation. In Ireland, the Framework Directive was transposed by section 20 of the Protection of Employees (Part-Time Work) Act 2001. Posted workers are not the same as migrant workers who, of their own accord, move between Member States to seek work and are employed there.

1.3 The European Commission estimates that in 2013 there were over 1.3 million posted workers in Europe. However, the numbers sent to and from Ireland are relatively low. The Commission estimates that there were around 5,500 postings to Ireland and 3,500 posted from Ireland in 2013. Posted workers are a more significant issue for some Member States. The Member States receiving most posted workers in the EU are Germany, France and Belgium. Those sending out most posted workers are Germany, France and Poland.

The Enforcement Directive

1.4 EU Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Enforcement Directive) was adopted in

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0067>

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML>

May 2014 after lengthy negotiations. The Directive stemmed from the Commission's proposals of March 2012 for such a Directive following concerns raised by some Member States that the protections outlined in the 1996 Framework Directive were not being fully complied with.

2. Objectives of the Enforcement Directive

2.1 The overall objective of the Enforcement Directive is to ensure that the rights of posted workers are respected and enforced, and to ensure more effective application of the rules applicable to posting through a range of measures including closer monitoring of compliance with the rules by competent authorities and closer and more effective cross-border co-operation to tackle fraud and abuse. One of the main reasons the Enforcement Directive was brought forward was to enable posted workers to enforce their employment rights and to deal with the concerns raised by some Member States about abuses of the posting rules set down in the Framework Directive.

3. Key Aspects of the Enforcement Directive

3.1 The Enforcement Directive contains a number new measures aimed at improving co-operation between Member States and their competent authorities to ensure the effectiveness of the protections provided for in the Framework Directive. Both Directives put in place a framework for the provision of services by posting workers, and create the conditions to enable those posted workers to enforce their rights. The Enforcement Directive also covers monitoring and compliance and builds on the information exchange requirements in the 1996 Framework Directive to support cross-border enforcement between Member States. Specifically, the key new provisions in the Enforcement Directive are:

- **Article 9 - Monitoring and compliance:** Article 9 of the Directive specifies the information requirements that Member States can impose on service providers posting workers to work within its territory. It also provides that Member States must publish information about employment rights and how they can be enforced.
- **Article 12 - Subcontracting liability in the construction sector:** Article 12 introduces the concept of "subcontracting liability" to enable posted workers in the construction sector to claim unpaid wages up to the statutory wage rate applicable to the construction sector from the contractor one up the subcontracting chain from their direct employer (the concept of subcontracting liability is also referred to as joint and several liability). The requirement to introduce subcontracting liability is limited to the construction sector and to one link in the subcontracting chain, i.e. the contractor immediately above the direct employer. Member States may introduce sanctions as an alternative to the subcontracting liability – see Section 2.9. They may also go further than the mandatory provisions of Article 12 by, for example, extending the subcontracting liability provisions to other sectors or to more than one link in the subcontracting chain – see Sections 2.7 and 2.8.

- **Chapter III – Administrative Cooperation:** The Directive provides for co-operation between the competent authorities of Member States in the areas of information exchange, inspections and mutual assistance in order to facilitate the implementation and enforcement of posting rules. The co-operation will be facilitated by and routed through the Commission’s Internal Market Information (IMI) system.
- **Chapter VI - Cross-Border enforcement of financial administrative penalties:** The Directive creates a system for these penalties to be notified and recovered cross-border.

B. Implementation of the Directive

1. Implementation Requirements for Member States

Ireland already has a comprehensive body of employment rights and industrial relations legislation, which together with the newly established structures and procedures of the Workplace Relations Commission (WRC), provide effective and robust arrangements for the protection of all workers, including posted workers. Member States do not necessarily have to introduce specific measures or legislate in the areas set out in the Enforcement Directive if their existing systems comply with the 1996 Framework Directive and the Enforcement Directive. However, as outlined at section 3 above, the Directive introduces a number of new measures, which are not currently provided for under our existing arrangements, and provides a number of options which Member States may exercise in implementing the Directive.

2. Implementation of Provisions with Options for Member States

2.1 There are two main provisions within the Enforcement Directive where options are available to Member States regarding the manner in which the relevant provisions are transposed into national law.

Article 9 sets limits on the administrative requirements and control measures that a Member State can use in relation to posting and enables Member States to request specific information from overseas employers (service providers) in relation to posted workers. Ireland does not currently collect this information for posted workers and any new obligations would fall on overseas employers posting workers to Ireland rather than Irish based employers.

Under Article 12 Member States must ensure that posted workers employed in the construction industry are able to claim against their employer’s immediate contractor (i.e. one up in the sub-

contracting chain) for unpaid wages up to the minimum statutory wage rate applicable³. The Directive allows for the introduction of the defence of due diligence on the part of the contractor. The Directive also provides that Member States may choose to impose sanctions on the contractor as an alternative to subcontracting liability, as a means of preventing fraud and abuse. One or other option must be adopted. We do not currently have any system of subcontracting liability in Ireland in respect of claims for unpaid wages.

Article 9 - Monitoring of posted workers and control measures

2.2 In order to protect the freedom to provide services, Article 9 of the Enforcement Directive specifies a limited list of information which Member States can request from employers posting workers to Ireland in order to ensure effective compliance with the Enforcement Directive and the Framework Directive. The information can relate to the parties involved in a posting situation, paperwork that must be maintained, and the details of the posting, including the work being undertaken. Any measures must be justifiable and proportionate in accordance with EU law.

2.3 Currently, there is no general requirement in Ireland for posted workers to be registered either before arrival or on entry, nor is there a system to monitor or keep records specifically in relation to postings.

Preferred Implementation Options for Ireland on Article 9

2.4 The implementation of Article 9 is optional for Member States; however, it is proposed to implement the measures provided for in Article 9(1) in order to ensure that the Enforcement Directive is being complied with. The primary purpose of Article 9(1) is to provide a means by which Member States can identify and monitor posting activity and ensure compliance with posting rules. By implementing this provision the intention would be to introduce all of the various requirements on service providers set out in Article 9(1) as follows;

- the requirement in Article 9(1)(a) to notify the Workplace Relations Commission Inspectorate with details of each posting;
- the requirement in Article 9(1)(b) to keep appropriate records including contracts of employment, payslips and timesheets in an accessible and clearly identified place in this jurisdiction;
- the requirement under 9(1)(c) to provide the documents/records referred to under 9(1)(b) to the relevant Irish authorities, at their request, for a reasonable period of time after the period of posting;
- the requirement under 9(1)(d) to provide, if requested to do so, a translation of the documents referred to in 9(1)(b);
- the requirement under 9(1)(e) to designate a person to liaise with the Irish authorities for the purpose of monitoring of compliance with the posting rules; and

³ Amounting to any outstanding net remuneration equalling to the minimum rates of pay and or contributions due to common funds or institutions of social partners.

- the requirement under 9(1)(f) to designate a contact person with whom the relevant worker representative bodies may seek to engage the service provider to enter into collective bargaining in accordance with relevant national legislation.

Article 9(2) provides that Member States may impose other administrative measures in addition to those provided for in Article 9(1) if the Article 9(1) measures are considered insufficient to allow for effective monitoring of compliance with the posting rules. It is not the intention to introduce additional measures under Article 9(2). It should be noted Article 9(5) provides that any measures introduced by Member States pursuant to Article 9(1) or (2) must be notified to the Commission.

Article 9(4) of the Directive requires Member States to ensure that the administrative requirements introduced under Article 9 can be completed by service providers in a user-friendly way, at a distance and by electronic means as far as possible. The intention is to provide, via the website of the Workplace Relations Commission, a facility for online notification of the information required to be provided by service providers under Article 9(1).

Questions

- 1. Do you agree/disagree with the preferred policy option to implement the measures provided for in Article 9(1) of the Directive?***
- 2. If you agree please outline the reasons why you consider Ireland should implement the measures provided for in Article 9(1).***
- 3. If you disagree please outline the reasons why you consider Ireland should not implement these measures provided for in Article 9(1).***
- 4. Do you consider that the imposition of the requirements detailed in Article 9(1) would impose disproportionate additional costs/obligations on employers?***
- 5. If so, please elaborate on the nature of the additional costs/obligations that would be imposed on employers?***
- 6. Do you consider that there are specific elements included in Article 9(1) that do not need to be required of service providers?***
- 7. If so, please provide details of the specific elements within Article 9(1) that should not be required?***
- 8. Do you consider that there are other administrative and control measures that could or should be introduced in accordance with the provisions of Article 9(2) to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and the Enforcement Directive? If so, please provide details of the specific measures?***
- 9. What are your views on the proposal to comply with Article 9(4) by providing for an online notification facility?***

Article 12 - Subcontracting Liability

2.5 The primary aim of Article 12 is to guard against posted workers not being paid their wages. It does so by introducing the concept of subcontracting liability to allow posted workers to make a claim against the contractor for unpaid wages up to the level of the statutory wage rate applicable. The requirement in the Directive is limited to posted workers in the construction sector (as defined in the Annex to the Framework Directive) and to the contractor immediately above the direct employer in the supply chain. However, the Directive does allow Member States to go beyond this.

Preferred Implementation Options for Ireland on Article 12

2.6 Article 12 of the Directive provides Member States with a number of different options in terms of implementation into national legislation including broadening the scope to sectors other than the construction sector and extending the sub-contracting liability to more than one link in the chain. Details of these options are set out hereunder together with the preferred policy options in terms of implementing these provisions of the Directive into Irish legislation. In this regard, the Department is inviting views on a number of specific questions in relation to these matters.

Should the scope of the subcontracting liability be limited to the Construction Sector or beyond?

2.7 The introduction of the subcontracting liability requirements by Member States is compulsory for the construction sector; however, it is optional for Member States to extend the scope of this subcontracting liability to other sectors. The preferred option in terms of the implementing this element of Article 12 is to limit the subcontracting liability requirements to the construction sector, in compliance with the mandatory provisions of Article 12. The intention is not to extend the scope of the subcontracting liability beyond the construction sector at the present juncture.

Questions

10. Do you agree/disagree with the preferred policy option that the subcontracting requirements in Article 12 should be limited to the construction sector?

11. If you agree please outline the reasons why you consider the subcontracting requirements in Article 12 should be limited to the construction sector?

12. If you disagree please outline the reasons why you consider that the subcontracting requirements in Article 12 should be extended to other sectors and specify the sectors?

Should the scope of the subcontracting liability be limited to the contractor immediately above the direct employer in the subcontracting chain?

2.8 Article 12 provides that subcontracting liability is limited to one link in the subcontracting chain; however, it is optional for Member States to introduce more stringent rules by extending

subcontracting liability beyond one link in the chain. The preferred option is to limit the subcontracting liability to the contractor immediately above the direct employer.

Questions

- 13. Do you agree/disagree with the preferred policy option that the sub-contracting liability should be limited to the contractor immediately above the direct employer in the supply chain?***
- 14. If you agree please outline your views why you consider that the sub-contracting liability should be limited to the contractor immediately above the direct employer?***
- 15. If you disagree please outline your views on how far down the sub-contracting chain the main contractor should be held liable.***

Alternative sanctions against the contractor in lieu of the contracting liability

2.9 As an alternative to introducing the subcontracting liability requirements referred to above, Article 12(6) allows Member States the option to take other appropriate enforcement measures which would enable, in a direct subcontracting relationship, effective and proportionate sanctions against the contractor, to tackle fraud in situations when workers have difficulties in obtaining their rights. As it is proposed to implement the subcontracting liability provisions of Article 12(2), the question of implementing alternative sanctions under Article 12(6) does not arise.

Questions

- 16. Do you agree/disagree with the preferred policy option to introduce subcontracting liability in the construction sector and therefore not to exercise the option of implementing the alternative measures provided for in Article 12(6)?***
- 17. If you agree please outline your views as to why Ireland should not exercise the option of implementing the alternative measures provided for in Article 12(6)?***
- 18. If you disagree please outline what other alternative enforcement measures should be introduced and how they would be operated and enforced in practice?***

Contractor's Defence of Due Diligence

2.10 Article 12(5) allows Member States to exercise the option that a contractor who has carried out due diligence shall not be held liable by the posted worker with respect to any outstanding unpaid wages (up to the level of the statutory wage rates applicable). This would mean that contractors would need to establish the bona fides of the service provider with whom they are subcontracting and be able to demonstrate that they have undertaken due diligence in respect of the service provider's record of paying their employees. The intention is not to exercise this option.

Questions

19. *If you disagree with the intention not to introduce the defence of due diligence, outline the reasons why the due diligence provision should be exercised, how it would be implemented in practice and what it would mean for employees seeking payment of outstanding unpaid wages?*
20. *What measures might a contractor reasonably be expected to undertake to demonstrate due diligence?*
21. *How would the contractor prove this?*

Extending subcontracting liability in the construction sector to include non-posted workers

2.11 Implementing the mandatory provisions of Article 12 of the Directive in respect of posted workers only, would put posted workers in a more favourable position vis a vis non-posted workers. It would mean that posted workers, whose wages were unpaid by their direct employer, would have a claim against the contractor one up from their direct employer in the subcontracting chain in respect of the unpaid wages. However, employees of the same service provider who were not posted workers and who were due outstanding wages, would have no such claim. Such an outcome would be fundamentally unfair to non-posted workers. The intention, therefore, is to provide that the subcontracting liability provision be implemented in respect of posted workers and non-posted workers alike in the construction sector.

Questions

22. **Do you agree/disagree with the proposal that subcontracting liability should apply equally to posted workers and non-posted workers in the construction sector?**
23. **If you disagree, outline the reasons why it should not apply to non-posted workers?**

C. Consultation on Transposition of the Posted Workers Enforcement Directive

1. Submissions

Submissions are invited on the transposition of the Directive into Irish law in general, and in particular on the issues raised in questions 1 to 23 outlined below.

Respondents are requested to make their submissions in writing and, where possible, by email. Submissions to this consultation should be sent to Postedworkers@djei.ie or posted to:

Posted Workers Enforcement Directive Consultation
Employment Rights Policy Section
Department of Jobs, Enterprise and Innovation
Davitt House
65A Adelaide Road
Dublin 2

The closing date for submissions is Friday, 29 January 2016. Any questions regarding the consultation can be emailed to Postedworkers@djei.ie, or contact Seamus Grehan (01) 6313166 or Enda Murphy (059) 917 8963.

2. Confidentiality of Submissions

Contributors are requested to note that it is the Department's policy to treat all submissions received as being in the public domain unless confidentiality is specifically requested. Respondents are, therefore, requested to clearly identify material they consider to be confidential and to place same in a separate annex to their response, labelled "confidential". Where responses are submitted by email, and those emails include automatically generated notices stating that the content of same should be treated as confidential, contributors should clarify in the body of their emails as to whether their comments are to be treated as confidential.

3. Relevant provisions of Freedom of Information Act 1997 (as amended)

Respondents' attention is drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Acts. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with any potentially affected respondent regarding information identified as sensitive before making a decision on any Freedom of Information request.