

**FIEC position
on the proposed Directive
on the enforcement of Directive 96/71/EC concerning the posting of workers
in the framework of the provision of services [COM(2012) 131]**

Created in 1905, FIEC is the European Construction Industry Federation, representing via its 33 national Member Federations in 29 countries (27 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.

FIEC main requests :

- 1. The decision of whether or not to introduce a system of “joint liability” should be left up to each Member State. There is no evidence of the need or of the added value of a EU intervention in this respect.**
- 2. A proper application and enforcement of the “Posting” Directive (PWD) can only be ensured if appropriate control measures can effectively take place. The current proposal would limit such possibilities of controls and would therefore be counterproductive.**
- 3. Facilitating the availability of and access to information, for companies, workers and between public administrations, about the provisions to be applied is a key element for an effective enforcement of the PWD.**

A. General considerations

1. Since its adoption in 1996, FIEC has always considered the PWD as an adequate and balanced instrument for addressing the issue of temporary mobility of workers in the framework of the provision of services, whilst at the same time avoiding social dumping.
2. Also following the judgments of the European Court of Justice in the Laval (C-341/05), Rüffert (C-346/06) and Luxembourg (C-319/06) cases, FIEC continued to consider that the Posting of Workers Directive does not need to be revised and is a well balanced instrument for achieving the objectives of articles 56 and 57 of the TFEU, including fair competition and social protection.
3. FIEC however recognises the need for improving the application and enforcement of the PWD, in order to ensure a level playing field for companies and the appropriate social protection for workers.
4. One of the key elements for an adequate application and enforcement of the PWD is the availability of information to enterprises, workers and public authorities concerning the provisions to be applied. In this respect, the EU sectoral social partners for the construction industry, FIEC and the EFBWW, have jointly developed a website (www.posting-workers.eu), which has been indicated in an independent study¹ undertaken on behalf of the European Commission (EC) DG EMPL as a best practice example. FIEC therefore welcomes the provisions presented by the EC in Art. 5 of the proposed Directive aiming at promoting this kind of initiative, with the support of the EC.

¹ “Information provided on the posting of workers”, Institut du travail of Strasbourg (FR), September 2010

5. FIEC also welcomes the work undertaken so far by the “Group of Experts on Posting” set up by the EC in 2008 and in which FIEC participates as observer.
6. In the proposed “Enforcement” Directive several positive provisions can be highlighted :
 - the designation of a specific competent authority for “Posting” (Art.4);
 - the measures for improving and facilitating the access to information (Art.5);
 - the principles for mutual assistance between Member States (Art.6);
 - the accompanying measures (Art.8).
7. However, FIEC wishes to express serious concerns about a certain number of provisions contained in the proposed “Enforcement” Directive, which may seriously hinder the initial objectives of the proposal. These concerns are presented in the following section, together with some specific proposals for amendments.

B. Issues of concern for FIEC

Preventing abuse and circumvention (Art. 3)

8. The proposed provisions of Art.3 enumerate a non exhaustive list of factual elements, which should help the competent authorities to determine both the temporary nature inherent to the notion of posting for the provision of services, as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.
9. Such a list provides an adequate level of flexibility, which allows to take into account the specificities of each situation on a case by case basis.
10. However, although these provisions aim at avoiding a “creative use” of the PWD, they do not provide any clarification as regards the legislative framework that should be applied in case the listed criteria are not fulfilled.
11. FIEC considers that the proposed Directive should explicitly indicate that in cases of “false posting” (i.e. the listed criteria are not fulfilled) the whole working conditions of the host country must be applied to the concerned workers.

National control measures (Art. 9)

12. The proposed provisions of Art.9 define an exhaustive list of possible administrative requirements and control measures.
13. FIEC shares the view that these provisions go beyond the case law of the European court of Justice as described in the detailed explanation of the proposal and would considerably reduce the possibilities of controls by the competent national authorities.
14. Such a limitation would not allow a proper application and enforcement of the PWD and would therefore go against the objectives of the proposed Directive.
15. The list of possible administrative requirements and control measures should therefore be indicative and non-exhaustive.

16. Furthermore, in order to allow effective controls, the competent authorities of a country must be informed, in due course before the posting effectively starts, that a foreign service provider will come on its territory.
17. FIEC therefore considers that a mandatory system of prior notification must be imposed in all the Member States, whilst at the same time it should allow the continuation of those systems that are already in place.
18. A recent study² undertaken on behalf of the European Commission (DG EMPL) clearly states that *"Several reports...consider the presence of registration or notification obligations as very positive. The introduction of a European notification system is therefore often called upon and might/should be considered"*.

Inspections (Art. 10)

19. In order to achieve the objectives of better applying and enforcement of the PWD the EC correctly proposes that Member States shall ensure that appropriate checks and monitoring mechanisms are put in place and that effective and adequate inspections are carried out on their territory.
20. These controls are necessary in order to ensure a level playing field for companies.
21. However the fact that, according to the EC, such inspections must be based primarily on a "risk assessment" to be drawn up by the competent authorities significantly reduces the possibilities and the efficiency of these controls.

Defence of rights – facilitation of complaints – back-payments (Art.11)

22. FIEC expresses concerns about the proposed provisions contained in Art.11 §3 which, if adopted, would oblige the Member States to ensure that *"...trade unions and other third parties...which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the posted workers or their employer, with their approval in any judicial or administrative proceeding..."*.
23. These proposed provisions go beyond what is currently possible in several Member States and could therefore endanger the existing systems of industrial relations. This matter must therefore be governed at the national level taking into account the specificities of each country.

Subcontracting – Joint and several liability (Art. 12)

24. FIEC does not consider as appropriate the proposal of the Commission to introduce mandatory provisions on "joint liability", which would only apply to construction activities. "Joint liability" has been proposed as an instrument for protecting workers rights in sub-contracting chains, but sub-contracting is not just a specificity of the construction industry as it is a practice which exists in many other sectors.
25. The study² undertaken on behalf of the European Commission (DG EMPL) highlights that currently only 7 Member States (AT, DE, ES, FI, FR, IT, NL) and Norway have

² "Study on the protection of workers' rights in subcontracting process in the European Union", University of Ghent (BE), March 2012

implemented a system of general joint and several liability for certain aspects related to wages and/or labour conditions and that these systems remain significantly different in terms of scope, amount and actual implementation. Other countries have some functional equivalents or alternative measures in place, instead of joint and several liability. In this respect, the study underlines that “It is unclear to what extent a transposition can be made from a mechanism applicable in a national context to a broader European or international context”.

26. The same study raises a number of legal concerns related to the conformity of a EU-wide system of joint liability with the free movement of services :
 - Would it be acceptable to limit such a liability system to foreign sub-contractors ? This would imply that contractors who work with local sub-contractors would not be subject to this system of joint liability and such limitation would be extremely difficult to defend.
 - In cross-border sub-contracting situations, the joint and several liability imposed will in practice, at least for one of the parties concerned, require cross-border legal proceedings in another country. Such a system would basically impose a direct hindrance to a contractor’s ability to rely on service providers abroad just as it complicates matters for the foreign service contractor to offer his services.
27. Finally, the study adds that *“The general need to combat possible fraud and the fact that other usual methods for recovery... have proved to be ineffective are – in itself – deemed insufficient to justify the application of joint and several liability, generally and on a precautionary basis.”*
28. On these basis, FIEC considers that it is up to each Member State to decide, as it is already the case today, whether or not to introduce such a joint liability system at its national level or whether alternative measures are more appropriate.
29. Art. 12 of the proposed Directive should therefore be deleted.

General principles - mutual assistance and recognition (Art. 13 §2)

30. FIEC welcomes the intention of the EC to improve cross-border enforcement of administrative fines and penalties.
31. However, the proposed provisions of Art.13 §2 are limited in so far as the relevant laws, regulations and administrative practices in force in the requested authority’s Member State allow such action for similar claims or decisions.
32. In order to be effective such conditionality should be removed.