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Posting of Workers Directive

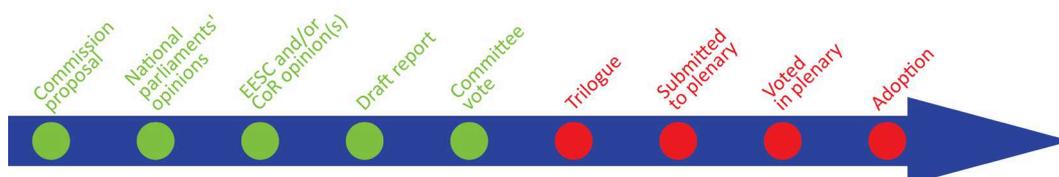
Posting of workers plays an important role in the internal market, particularly in the cross-border provision of services. While the number of posted workers continues to increase significantly, problems such as unfair practices and unequal remunerations persist. In addition, the correct balance between the freedom to provide cross-border services and the social rights of workers is needed, adapted to today's situation.

The targeted revision of the Posting of Workers Directive (96/71/EC) proposed by the Commission would bring changes in three main areas: the remuneration of posted workers (making it equal to that of local workers, even when subcontracting), more coherent rules on temporary agency workers, as well as long-term posting. Despite the 'yellow card' procedure triggered by 11 Member States because of subsidiarity concerns, the European Commission stands by its initial proposal. Stakeholders and advisory committees have emphasised sector-specific differences to posting, the danger of 'cascade subcontracting' practices, as well as the importance of collective agreements. The EMPL Committee's report seeks to strike a balance between a level playing field in the provision of services and sound social protection of workers.

Proposal for a Directive of the European Parliament and of the Council amending 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

COM(2016) 128, 8.3.2016, 2016/0070(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Employment and Social Affairs (EMPL)
Rapporteurs:	Elisabeth Morin-Chartier (EPP, France) Agnes Jongerius (S&D, The Netherlands)
Shadow rapporteurs:	Anthea McIntyre (ECR, UK); Martina Dlabajová (ALDE, Czech Republic); Rina Ronja Kari (GUE/NGL, Denmark); Terry Reintke (Greens/EFA, Germany); Laura Agea (EFDD, Italy); Dominique Martin (ENF, France)
Next steps expected:	Trilogue negotiations



16 November 2017
Third edition
The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

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Introduction

On 8 March 2016, the European Commission proposed, as announced in its [Political Guidelines](#) and confirmed in its 2016 [Work Programme, a revision of the rules on posting of workers](#) within the European Union to ensure they remain fit for purpose. The revision of the Posting of Workers Directive is in line with the Commission's fourth priority concerning the establishment of a deeper and fairer internal market, and is also part of the [Labour Mobility Package](#).

Posting of workers occurs when services are provided across borders within the single market. A [posted worker](#) is legally employed in a given Member State and is sent by their employer to work temporarily in another EU Member State (where the employer is providing a service). Posted workers pay social contributions in the sending Member State. They are different from EU mobile workers in that they remain in the other Member State for a limited time only and do not integrate into its labour market. Posting of workers is [particularly frequent](#) in certain economic sectors. A [study](#) by the European Policy Centre (EPC) mentions the following areas: the construction sector (42%), especially in small and medium-sized businesses; manufacturing industry (21.8%); service sectors including personal services, such as education, health and social work (13.5%); and business services, like administrative, professional, and financial services (10.3%). Sectors less common for posting of workers are transport, communication and agriculture. The Member States that attract the highest [number](#) of posted workers are Germany, France and Belgium, hosting roughly 50% of total received posted workers. Poland, Germany and France are the three largest senders of posted workers, mostly due to geographical proximity to the main host countries.

While posted workers benefit from the same rules regarding health and safety as host Member State employees, in other areas the situation of posted workers is more problematic. For example, the employer is not obliged to pay a posted worker more than the minimum rate of pay set by the host country, even while offering home country workers a different pay scale or benefits. Posted workers are therefore often less remunerated than other workers¹ for the same job and this situation can potentially lead to unfair competition between companies. Other problems are the lack of transparency and legal protection, in particular in specific situations (e.g. subcontracting, agencies).

Existing situation

The legal basis for companies to offer services in another EU Member State, and to temporarily post workers to supply those services, is Articles 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU). The existing [Posting of Workers Directive](#) (Directive 96/71/EC), adopted in 1996 and in force since December 1999, provides a first framework to protect the social rights of posted workers and to prevent social dumping.

1 This is especially the case in Member States with relatively high wage levels. Posted workers are [reported](#) to earn up to 50 % less than local workers in some sectors and Member States.



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Member States have to ensure that posted workers are subject to the host country's laws, regulations and administrative provisions concerning the following issues:

- > maximum work periods and minimum rest periods;
- > minimum paid annual holidays;
- > minimum rates of pay, including overtime rates;
- > conditions of hiring out workers, in particular the supply of workers by temporary employment undertakings;
- > health, safety and hygiene at work;
- > protective measures in the terms and conditions of employment of pregnant women or those who have recently given birth; of children and of young people;
- > equal treatment between men and women and other provisions on non-discrimination.

The Directive covers three types of working scenarios. First, workers can be posted to another Member State under a service contract and in the framework of direct provision of services. In this case, they are on the account and under the direction of their original employer. In the second scenario, workers can be posted to an establishment or to an undertaking owned by the same group, in the territory of another Member State (intra-group posting). Third, workers can be hired out to a work agency established or operating in the territory of a Member State.

On 21 March 2012, the European Commission published an [Impact Assessment](#) on the revision of the legislative framework on the posting of workers in the context of the provision of services. It was accompanied by a [proposal for an Enforcement Directive](#) seeking to improve the implementation and enforcement of the existing Posting of Workers Directive, without changing its provisions.

The Enforcement Directive on Posted Workers (Directive 2014/67/EU) was adopted by the Parliament and Council on 15 May 2014. The [Enforcement Directive](#):

- > increases the awareness of workers and companies about their rights and obligations as regards the terms and conditions of employment;
- > improves cooperation between national authorities in charge of posting;
- > clarifies the definition of posting so as to increase legal certainty for posted workers and service providers (while at the same time dealing with the issue of 'letter-box' companies that use posting to circumvent the law);



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- > defines responsibilities of Member States to verify compliance with the rules laid down in the 1996 Directive (designation of specific enforcement authorities responsible for verifying compliance; necessary supervisory and enforcement measures for service providers established in the Member State);
- > requires posting companies to designate a contact person for liaison with the enforcement authorities; to declare their identity, the number of workers to be posted and the posting modalities; and to keep basic employment documents available;
- > improves the enforcement of rights and the handling of complaints, by requiring both host and home Member States to insure posted workers, with the support of trade unions and other interested third parties;
- > ensures that administrative penalties and fines imposed on service providers by one Member State for failure to respect the requirements of the 1996 Directive can be enforced and recovered in another Member State.

This directive had to be transposed into national law by 18 June 2016.²

Parliament's starting position

In its [resolution](#) of 25 October 2012 on the 20 main concerns of European citizens and businesses about the functioning of the single market, the European Parliament stressed the need to improve working conditions and guarantee adequate protection, without any form of discrimination, for workers posted in the EU. It called for action to enhance the implementation and application of Directive 96/71/EC, in close cooperation with the social partners. It also urged the Commission to create a central coordination point at EU level in order to record the concerns of mobile workers, employers and other interested parties, to find solutions between Member States and prevent problems arising from mobile employment relationships, including the posting of workers. In February 2013, the Commission came forward with a follow-up to this resolution and informed the Parliament that it had submitted a proposal for an enforcement directive relating to Directive 96/71 in the framework of the provision of services.

In its [legislative resolution](#), the European Parliament adopted its position at first reading on the proposal for a directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services on 16 April 2014. The adopted text was published as Directive 2014/67/EU.

² The directive has still not been [implemented](#) in seven Member States: Czech Republic, Germany, Croatia, Cyprus, Luxembourg, Portugal and Slovenia.



Proposal

Preparation of the proposal

The Commission organised a consultation of European social partners on the Labour Mobility Package, including the targeted review of the Posting of Workers Directive, in the form of a roundtable, which was held on 10 June 2015. A [public consultation](#) open to EU citizens and organisations for a duration of 12 weeks was started on 15 June 2015. During the public consultation period, the Commission received written contributions from 16 Member States, in the form of two joint letters. The first, signed by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden, was sent on [18 June 2015](#). These Member States called for support for modernisation of the Posting of Workers Directive establishing the principle of 'equal pay for equal work in the same place'. They suggested that the provisions regarding working and social conditions, most notably remuneration, applicable to posted workers should be amended and widened; the establishment of a maximum duration limit to postings should be considered, and the applicable conditions to the road transport sector should be clarified. Other important points were the improvement of cross-border cooperation between inspection services and the promotion of a study on bogus self-employment³ in the context of posting. The second letter, signed by Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Romania and Slovakia, was sent on 31 August 2015. These Member States argued that a review of the 1996 Directive is premature and should be postponed until after the deadline for the transposition of the Enforcement Directive has passed and its effects carefully evaluated and assessed. They expressed the [concern](#) that the principle of equal pay for equal work in the same place may be incompatible with the single market, as pay rate differences constitute one legitimate element of competitive advantage for service providers. Moreover, their position is that posted workers should remain under the legislation of the sending Member State for social security purposes.

The preparatory open consultations launched by the Commission on 15 July 2015, were also marked by the participation of about 300 stakeholders, mostly SMEs. Some 30% of companies providing services across borders reported problems with existing rules on posting of workers, such as burdensome administrative requirements, paperwork, fees and registration obligations. The lack of clarity of labour market rules in the country of destination has also been considered a relevant burden to cross-border service provision, especially among SMEs.

The changes the proposal would bring

In her [message](#) of 8 March 2016, Commissioner Marianne Thyssen highlighted that the number of posted workers⁴ had increased by almost 50% in recent years, which shows that cross-border enterprises are a sizeable component of the internal market. There is a need for fairer conditions for the workers and companies concerned.

3 [Bogus](#) (or false) self-employment is the abuse of self-employed status. The self-employed status is used to hide a true employment relationship, in order to avoid non-wage labour costs.

4 Between 2010 and 2014, the [number](#) of postings increased by almost 45 %. In 2014, around 1.92 million European workers were posted to other Member States. This equals 0.7 % of the EU's total employment.



Preparation of the proposal

The changes the proposal would bring

The [European Commission proposal](#) adopted on the same day is a targeted revision of the Posting of Workers Directive which would introduce changes in three main [areas](#): remuneration of posted workers, including in situations of subcontracting; rules on temporary agency workers; and long-term posting.

Rules on remuneration and allowances that are applied to local workers in the host Member State would also have to be granted to posted workers (with a contract from another Member State). Remuneration would thus not only comprise the minimum rates of pay, but also other elements such as bonuses or allowances if applicable. In order to ensure equity and transparency, Member States would be required to transparently specify the different constituent elements of remuneration on their territory.

Rules set by law or universally applicable collective agreements would become mandatory for posted workers in all sectors. The proposal would also give Member States the possibility (if such a rule is enacted at national level) to oblige national and cross-border subcontractors to grant their workers the same pay as the main contractor. In addition, the proposal would ensure that national rules also apply to temporary workers hired out by temporary agencies established in the Member State where the work is carried out.

Concerning long-term posting (when the duration of posting exceeds 24 months), the labour law conditions of the host Member States will be applied, where this is favourable to the posted worker.

The current proposal does not address any issues covered by the 2014 Enforcement Directive, which is to be transposed into national law by June 2016. The proposal, rather, focuses on issues which were not addressed by the Enforcement Directive. Therefore, according to an [EPC \(European Policy Centre\) discussion paper](#), the revised Posting of Workers Directive and the Enforcement Directive are self-standing, complementary legal instruments pursuing different objectives. The first aims to tackle abuse and fraud as well to as reinforce the exchange of information, while the second aims to achieve better protection of posted workers through the reduction of inequality.

The revised Posting of Workers Directive would also underpin the initiatives for the [road transport sector](#) announced by the Commission in its 2016 [Work Programme](#), as it will enhance the social and working conditions of road transport workers, and foster at the same time the efficient and fair provision of road transport services.

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Views

Advisory committees

In its [opinion](#), adopted on 7 December 2016, the Committee of the Regions (CoR) called for a reasonable balance between the free movement of services, the protection of posted workers and the fight against social dumping. The CoR estimated that the time limit beyond which host-country labour law should apply to the posted worker should be 12 months (contrary to the 24 months proposed by the Commission). It highlighted the danger of cascade subcontracting practices, which lead to the dilution of the responsibility of the employer and precarious employment conditions for workers. It pointed out the fact that the skills of posted workers are often under-estimated in order to justify a lower remuneration level. CoR considers that the changes proposed by the Commission can only be made at EU level.

The European Economic and Social Committee (EESC) adopted its [opinion](#) on 14 December 2016. This considers the principle of equal work for equal pay in the same place to be a cornerstone of the European 'social pillar', and should therefore be one of the main targets of the revision. It considers, however, that the proposal for revising the directive came too early, since the transposition deadline of the Enforcement Directive had not expired at that moment. The EESC expressed concerns that no proper consultation was carried out with social partners. It welcomed the establishment of a maximum duration of postings, although it considered that six months would be better suited for the practice. The EESC pointed out the importance of collective agreements, which should be the benchmark for levels of remuneration.

National parliaments

More than three quarters of the EU's national parliaments had scrutinised the European Commission's proposal before the [deadline](#) of 10 May 2016. Further to the protocol on subsidiarity, 11 Member States' parliamentary chambers submitted a reasoned opinion: [Bulgaria](#), [Croatia](#), [Czech Republic](#), [Denmark](#), [Estonia](#), [Hungary](#), [Latvia](#), [Lithuania](#), [Poland](#), [Romania](#), and [Slovakia](#). The principal concerns raised against the proposal were that it does not contain a detailed qualitative or quantitative analysis making it possible to appraise its compliance with the principles of subsidiarity and proportionality, and that its added value is not clear enough. Furthermore, there is no financial analysis on the proposed directive's impact.

Among the concerns raised in the reasoned opinions, the Czech Senate stressed that the introduction of an 'equal pay for equal work' could cause competitive disadvantages for workers and societies from the newer Member States. Denmark's parliament pointed out the fact that the current Directive states that pay and working conditions should be regulated at national level, the proposed revision, however, does not refer to these competences. Estonia's MPs found it doubtful whether the principle of equal pay for equal work in the same location is in conformity with the principles of a common market. The Hungarian Parliament highlighted that the Impact Assessment carried out by the European Commission does not sufficiently take into account the regional and local impacts of the proposal and does not contain relevant information regarding the real impact of the introduction of equal remuneration (instead of minimum rates of pay). Latvia's parliament considered that consultations (especially with the Member States and the social partners) cannot be considered as having been conducted widely and that their results have not been considered properly. The Polish and Bulgarian reasoned opinions highlighted as a problematic point



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in the proposed directive Article 3(1)a, stating that the submission of subcontractors from other Member States to requirements laid down in acts of law, regulations, provisions and collective agreements should occur from now on, on a general basis. Poland's parliament also considered problematic Article 3(1)b of the proposed directive which restrains the Member States' right to decide whether posted workers employed by temporary work agencies must meet the requirements specified in Article 5 of Directive 2008/104/EC on temporary agency work. Romania's parliament drew attention to the lack of reliable data on the number of posted workers for periods longer than 24 months, and considered that the proposal could create barriers for the free provision of services and the labour force mobility. The Slovak Parliament pointed out that there is a need for a more balanced approach, taking into account the different level of development of individual Member States and the specific characteristics of the newer Member States. The posting of workers must be considered from a broader perspective taking into account globalisation, technological change, and aging of the population.

As 14 chambers of 11 national parliaments declared themselves against the proposal of the European Commission in reasoned opinions (thus the threshold of at least one third of the votes assigned to the national parliaments/chambers was exceeded; 11 Member States equalling 22 votes out of 56), the '[yellow card](#)' procedure was triggered on the text. This means that, according to the [Protocol on the application of the principles of subsidiarity and proportionality](#) (Article 7(2)), annexed to the Treaties, the Commission must review its proposal. On the basis of that review, the Commission may decide to maintain, amend or withdraw the proposal. Reasons must be given for its decision.

Stakeholders' views

On 2 March 2016, four stakeholders (ETUC, BusinessEurope, UEAPME and CEEP) sent a [joint letter](#) to Commission President Jean-Claude Juncker in which they asked the Commission for a social partner consultation regarding the proposed targeted revision of the directive, in order to focus on problematic issues and 'various options that exist to deal with the Posting of Workers Directive' before the proposal gets adopted.

In its [statement](#) of 8 March, the ETUC expressed its appreciation for the Commission's proposal to introduce full equal treatment for posted temporary agency workers, and that it aligned the duration of posting to social security provisions. Nevertheless, in its opinion, the proposed restrictive definition of the type of recognised collective agreement is not satisfactory as it excludes most sectoral collective agreements in some countries (including Germany and Italy) and all company-level agreements. Furthermore, the proposal only partly addresses the key demands of the organisation, in particular the demand for unconditional equal pay for posted workers. ETUC also asked to significantly reduce the maximum duration of posting.

The European Confederation of Private Employment Services ([EUROCIETT](#)), which represents the temporary work agency industry, expressed the view that there is no need to reopen the 1996 Directive, but supported the equal work-equal pay principle. However, EUROCIETT underlined that it supports the current optional nature of the equal pay provision in the Directive.

The European Construction Industry Federation ([FIEC](#)) is not convinced that the new proposal and its concept of remuneration will provide real added value. It considered, however, that the new proposals on



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posting of agency workers are a positive step, at least for some countries. It also strongly supports concrete proposals to reduce abusive practices and to improve the enforcement of the Posting of Workers Directive.

In favour of the reopening were the European Business Confederation ([EBC](#)) and the EU Federation of Building and Woodworkers ([EFBWW](#)). EBC stressed that micro- and small enterprises are negatively affected by unfair competition to a much greater extent than other companies. EFBWW stated that there should be no restriction in applicable collective agreements. Furthermore, it criticised the 24-month limit for posting, which it considered far too long.

According to [BusinessEurope](#) and [UEAPME](#), the priority is to ensure the correct transposition and evaluation of the Enforcement Directive. UEAPME regretted that the Commission had not consulted the social partners before the proposal was issued, and highlighted that the concept of equal pay of posted workers raises a number of questions, likely to create new legal uncertainties.

In its [position](#) of 17 May, BusinessEurope stated that the existing directive adequately protects posted workers. It considers the Commission proposal as an attack on the single market, as it undermines the competitive position of foreign service providers. It also risks interfering in national wage-setting systems and would have other negative consequences for the single market, as well as economic and labour market development in the EU. The focus should rather be on fighting illegal practices, and on addressing the lack of competitiveness of domestic enterprises.

As a cross-sectoral employer's organisation, the European Centre of Employers and Enterprises providing Public Services and Services of general interest ([CEEP](#)) stressed that there is a need to legally clarify the relationship between the PWD and public procurement rules that seek to foster social criteria in tender processes.



Legislative process

The proposal was published by the European Commission on 8 March 2016. The parliamentary committee responsible is Employment and Social Affairs (EMPL), which has appointed as co-rapporteurs Elisabeth Morin-Chartier (EPP, France) and Agnes Jongerius (S&D, The Netherlands). The opinion-giving committees are Internal Market and Consumer Protection (IMCO) and Legal Affairs (JURI).

After the reasoned opinions of 11 Member States' parliaments against the proposal leading to the triggering of the 'yellow card' procedure, the European Commission was required to carry out a subsidiarity review. On 20 June 2016, after 'careful consideration' of Member States' views, the European Commission concluded that the proposal for a targeted revision of the directive did not constitute a breach of the subsidiarity principle, and that a withdrawal or an amendment of the proposal was not required. The European Commission therefore maintained its proposal unchanged.

After a thorough consultation with stakeholders, the rapporteurs published their [draft report](#) on 2 December 2016. The draft report aims to establish a balance between ensuring a level playing field for undertakings and granting social protection for workers. The legal basis should be extended, from just provisions concerning the free movement of services, to Article 151 TFEU and points (a) and (b) of [Article 153\(1\) TFEU](#) on workers' rights. There is an emphasis on improved information for employers and workers, as well as on transparency. Member States are given the autonomy to determine the concept of remuneration on their own territory, but they should ensure that posted workers receive all due entitlements. Double payment of elements constituting remuneration in the home and the host Member State should be avoided. The directive should not affect the freedom to strike and to conclude collective agreements. In order to avoid cascade postings, the same terms and conditions should apply for workers hired by subcontractors or temporary employment undertakings.

The EMPL committee adopted its report on 16 October. The following issues were emphasised:

- > because of the highly mobile nature of work in international road transport, the implementation of the posting of workers directive in that sector raises particular legal questions and difficulties which are addressed in the Commission's proposal for a directive [2017/0121(COD)] laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector;
- > all the applicable terms and conditions of employment of the host Member State should be applied after 24 months. For postings that require a longer duration, it should be possible to grant extensions based on a reasoned request made to the competent authority of the host Member State;
- > the setting of wages is a matter for the Member States and the social partners alone. Care should be taken not to undermine national systems of wage setting and the freedom of the parties involved;
- > the Directive should not in any way affect the exercise of fundamental rights as recognised in the Member States and at Union level, including the right to strike, to conclude and enforce collective agreements, or to take collective action in accordance with national law and/or practice;



- > information concerning the constituent elements of remuneration should be published officially by Member States on a single national official website;
- > in the case of subcontracting, the contractor should inform a service provider from another Member State about the applicable terms and conditions of employment as regards remuneration, before the commencement of the service contract.
- > the host Member State and the Member State of establishment should be responsible for the monitoring, control and enforcement of the obligations laid down in the Directive and take appropriate measures in the event of failure to comply with it. Sanctions should be effective, proportionate and dissuasive;
- > in the case of non-genuine posting, irrespective of which law applies to the employment relationship, the terms and conditions of the Member State where the service is provided apply.

In the Council, on the basis of the replies of delegations to a Council Presidency questionnaire, the Slovak Presidency presented a set of options for five topics (long-term postings, remuneration, collective agreements, subcontracting, and temporary agency workers) at the end of September 2016. These topics were discussed by the preparatory body (the Social Questions Working Party) of the Council several times, with a progress report published on [25 November 2016](#). The issues discussed included the definition of the concept of 'the same task for the same pay', the necessity to establish specific conflict-of-law rules for postings exceeding 24 months, and further clarification of the concept of 'remuneration' as well as leave and holiday entitlements.

The file was discussed in the Council on 12 June 2017, further to a [progress report](#) summarising the work achieved under the Maltese Presidency. The main issues on which the text was clarified under the Maltese Presidency were:

- > concerning remuneration: complementing the Commission proposal in order to underline that remuneration is defined according to national law and practices, as well as in order to clarify and simplify the procedure;
- > concerning long-term posting: stating that after 24 months, a posted worker is to be granted all the applicable terms and conditions of employment of the host Member State, with the explicit exclusion of the procedures, formalities and conditions of the conclusion and termination of the employment contract;
- > concerning subcontracting: deleting the Commission's new provision of subcontracting, which obliges Member States' undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration, including those resulting from non-universally applicable collective agreements. The Commission's proposal may also suggest that this obligation applies to enterprises posting workers to their territory.

At the [Employment, Social Policy, Health and Consumer Affairs Council](#) of 23 October in Luxembourg the Council agreed on a general approach on the [Commission's proposal](#). This political agreement:



- > confirmed the Commission's key principle of equal pay for equal work at the same place, and set out that posted workers will generally benefit from the same rules governing pay and working conditions as local workers;
- > stated that all terms and conditions of the host country should apply in the case of postings exceeding 12 months. The Member State in which the service is provided should, on the basis of a motivated notification of a service provider, extend to 18 months the period before which the provisions of this paragraph apply;
- > highlighted that because of the highly mobile nature of work in international road transport, the implementation of the Directive in this sector will be addressed through specific rules for road transport, also reinforcing the fight against fraud and abuse, in the framework of the mobility package;
- > stated that Member States should adopt and publish, by three years after the entry into force of the Directive, the laws, regulations and administrative provisions necessary to comply with it. They should apply those measures from four years after the entry into force of this Directive. Until that date, Directive 96/71/EC shall remain applicable.

With the Parliament's plenary having confirmed the EMPL committee's mandate to enter negotiations with the Council on 25 October, a first trilogue meeting was held on 14 November, with a second planned for 28 November.



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EP supporting analysis

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