

Position Paper

UEAPME¹ position on the proposal for a directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

UEAPME generally welcomes the Commission's proposal for a directive aimed at a better enforcement and implementation of Directive 96/71/EC, as lack of enforcement proved to be one of the main shortcomings of the current directive.

However, UEAPME is concerned that this Commission initiative strongly risks increasing red tape and bureaucracy, as well as creating high costs and legal uncertainty for SMEs, notably with the establishment of a system at EU level of joint and several liability in the construction sector. This is clearly not the right way to strengthen the implementation of Directive 96/71/EC. Furthermore the decision to set up a joint and several liability system and to define the scope of such a joint and several liability should remain the strict competence of Member States. UEAPME therefore requests the deletion of Article 12.

On Article 3: Preventing abuse and circumvention

UEAPME fully supports the principle of preventing abuse and avoiding a circumvention of the rules on posting of workers. It is essential to create a good level playing field and to avoid unfair competition through notably the creation of letter-box companies.

Thus qualitative criteria are important, but should remain indicative since for example the notion of "temporary" posting is intrinsically linked to the sector and type of activities performed and should be defined on a case by case basis. At the same time legal uncertainties should be reduced to a minimum. Member States exchange of information and notably the social protection documents should contribute to prevent misuse and circumvention.

On Article 9: National control measures

The current article 9 is not precise enough and therefore could lead to diverging interpretations. In order to avoid such ambiguity we consider it important to make a clearer link between the newly proposed directive and Article 3 of the current existing directive on posting. In practical terms, the current article 9 should include a direct reference to "the terms and conditions of employment" listed in Article 3 of directive 96/71/EC.

Furthermore UEAPME disagrees with the strict limitation of the current list of administrative requirements and control measures to what has been included under 9a, 9b, 9c, 9d. Since this list cannot be an exhaustive list UEAPME therefore asks for the deletion of "only" in the first sentence of Article 9, therefore the first line should read:

"Member States may impose the following administrative requirements and control measures as a basis but they may also impose other proportionate measures".

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](https://ec.europa.eu/transparency/regexp1/index.cfm?do=groupDetail.groupDetail&id=55820581197-35).

On article 11: Defence of rights, facilitation if complaints, back-payments

UEAPME has some serious concerns regarding article 11(3) introducing the obligation for Member States to ensure trade unions and other third parties with a legitimate interest in guaranteeing that the provisions of the Directive are complied with may lodge complaints on behalf of posted workers.

It should be left to the Member States to take such a decision in accordance with their industrial relation systems respecting the role trade unions play or do not play in each country.

On Article 12: Subcontracting - Joint and several liability

UEAPME would like to recall that subcontracting is an important part of the economic activity of SMEs in general and in the construction sector in particular. It constitutes an important opportunity for smaller companies to expand their activities and contribute to growth and job creation within the Single Market.

Therefore it is highly necessary to keep the right balance between facilitating the use of subcontractors and avoiding as much as possible abuse and fraudulent behaviour of subcontracting in the case of posting of workers.

However, the joint and several liability provision as proposed by the Commission at European level, cannot be accepted by UEAPME and its members because of the very high costs, new burdens and obligations it would put on companies and particularly in a disproportionate manner on SMEs with a danger of strongly limiting their activities and hampering their competitiveness.

Thus, UEAPME is clearly opposed to the underlying approach and philosophy that requires businesses to replace public authorities and labour inspectorates, in order to control the financial, legal and tax situation of other companies mainly small companies - which might be working as subcontractors in the context of posting of workers.

The proposal of the Commission to introduce such a joint and several liability system at EU level in the case of posting of workers in the construction sector – even if limited to the direct contractual link – is going much further than what already exists in certain Member States, where the liability is mostly limited to social security contributions and does not cover unpaid taxes or wages.

In this particular case, enterprises might be held liable for other businesses working as direct subcontractors and would have to ensure the full check of compliance including pay slips and payment of wages in the Member State of establishment of the main subcontractor.

SMEs do not have the financial, human and technical resources to do such a prior check of compliance for the subcontractors they select in terms of wage level, social security or tax contributions and even more so in a foreign language.

As UEAPME we cannot endorse this task as these actions must remain in the remit of public authorities, administrative offices and inspection services.

Furthermore UEAPME warns about the very high costs this would generate for small companies acting as main contractors.

Against this background, UEAPME is calling for the rejection of this article which would put a lot of obligations and high potential costs on small businesses in the case they would like to work with subcontractors from other EU Member States in the context of posting of workers.

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