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Law Alert

Labor & Employment Law

A photograph of two business professionals sitting in the back of a car. A woman in a dark blazer is looking out the window while holding a smartphone. A man in a suit is partially visible next to her. A yellow text box is overlaid on the left side of the image.

**Evaluation report
Enforcement
Directive
Posting of Workers**

In 2014, the Enforcement Directive (Directive 2014/67/EU) was introduced to provide Member States with a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of the Posting of Workers Directive 96/71/EC. The Enforcement Directive required the European Commission to review the application and implementation of the Directive and propose, where appropriate, necessary amendments.

The European Commission has published this report on 25 September 2019. The report is based on information about the national measures transposing the Enforcement Directive that Member States have communicated to the European Commission, as well as information from various authorities and members of the European Parliament. In this blog, we will discuss the general conclusion of this report, as well as the implementation of the Enforcement Directive and key deviances therein.

1. General conclusion

The Member States had to transpose the Enforcement Directive by 18 June 2016. According to the report this has been done successfully by all Member States. To this end, all Member States with the exception of Germany, passed new laws of administrative acts or amended existing acts.

The conclusion of the evaluation of the European Commission is that amendments to the Enforcement Directive are not necessary at this stage. The provisions are implemented correctly, and administrative cooperation between national authorities on the rules and sanctions of posting of workers has notably improved.

According to the report trade unions consider the control and inspections still insufficient. Employers on the other hand, have voiced concerns on the increased administrative burdens of the regulations as a result of the Enforcement Directive. The European Commission notes that access to information is an area of attention, as it is one of the most crucial elements in guaranteeing

the rights of posted workers and ensuring legal certainty for business.

Possible improvements include a single EU-wide declaration system and a common template for the national websites.

The European Commission also announces that the European Labour Authority is expected to launch operations in October. This new authority will play a key role in fighting abuse of these regulations. It will support and coordinate joint inspections, as well as facilitate the cross-border exchange of information. National liaison officers will be appointed to act as contact points for country specific information. Additionally, the authority will provide a mediation system for disputes between Member States on any cooperation aspects.

2. Implementation

The Enforcement Directive introduced certain mandatory and optional provisions for Member States to implement. The report shows that as a result, similar duties apply for service providers across Member States, but the specific requirements which are put in place are rather diverse. Below you will find an overview of key components of the Enforcement Directive and on which manner and in which countries deviations from these key components exist.

See the overview on the following pages.

3. Conclusion

The European Commission report shows that, although the Enforcement Directive obligations are largely the same EU-wide, many differences exist on a legislative country level. It is also important to be aware of the possible nuances and variations in the elements that can be taken into account for the identification of a genuine posting. For now, no new administrative obligations will be imposed on employers who post workers to other Member States. However, the EU will (likely) also not establish less administrative burdensome obligations than those currently exist pursuant to the Enforcement Directive. We will of course monitor the developments regarding the introduction of the European Labour Authority.

If you have additional questions, please do not hesitate to contact us.

Implementation Enforcement Directive	Key deviations
All Member States have implemented the provisions of the Directive to be applicable to posted workers.	<ul style="list-style-type: none"> • Austria, Hungary, the Netherlands and Slovenia also apply the provisions to persons who are not posted workers in the sense of the Directive, or to activities that do not involve a provision of services. • For example, the Netherlands and Slovenia (partly) apply this legislation also to the self-employed cross-border service providers.
The elements necessary for identification of a genuine posting have been implemented by most Member States by providing a list of elements identical to those in the Enforcement Directive.	Eight Member States have introduced or maintained other elements. Greece for example, looks at which undertaking actually pays the wages of the posted employees, and Slovenia looks at whether the employer has suitable premises where the service is provided.
The elements 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	Six Member States have introduced or maintained other elements. Latvia for example requires the authority to assess beforehand whether there is a genuine employment relationship, and Croatia looks at elements like the question what tasks and where the worker performed them a month before being posted.
All Member States have set up official national websites .	Information regarding the terms and conditions that apply to posted workers are presented in different forms.
Most Member States have explicitly transposed the possibility for administrative cooperation between Member States. Administrative cooperation takes mainly the form of sending and replying to the reasoned requests of information from competent authorities through the Internal Market Information System (IMIS).	<ul style="list-style-type: none"> • The level of cooperation represents a steady increase since 2017. Belgium was the most active sender of information requests, followed by Austria and France. The highest number of information requests was received by Poland, Portugal and Slovenia. Romania received the highest number of urgent requests. • The average response time is 43 days, while the deadline is 35 days. Average response time for urgent requests is ten days, while the deadline is two working days.
All Member States, but the UK, have implemented the duty for the service provider to register the posting in advance.	<ul style="list-style-type: none"> • Most Member States require the declaration to be made any time before the start of the service, including on the same day. Italy, Lithuania and Romania require the notification to be submitted on the day before the commencement of the services. The required information varies per Member State. • Most Member States require the declaration to be submitted in (one of) their official language(s). A declaration in English is an option in Austria, Croatia, Denmark, Estonia, Hungary, Poland and Sweden. Austria, Sweden and Denmark have additional possible languages. • In Belgium, there is an exception for urgent repair and maintenance work of machinery or equipment for up to five days a month. In Germany, notifications are only necessary for the construction and construction-related industries, building cleaning services and care provision.

<p>All Member States have implemented the documentation requirements.</p>	<ul style="list-style-type: none"> • Most Member states have implemented the specific documentation list of the Directive. • Six Member States require copies of documents on the identity and/or status of workers to be available in the work place. • Some Members States provide a time frame for availability after posting, in other Member States the obligation to retain documents formally ends with the end of the period of posting in nine Member States. • In Luxembourg, all documents need to be submitted electronically in advance of the posting. • Keeping the documents without translation is accepted in twelve Member States, in nine of which the authorities can request a translation into their official language in individual cases. In Austria, the employment contract can be kept in English.
<p>Some Member States have put in place additional measures.</p>	<ul style="list-style-type: none"> • In France, Belgium and Luxembourg, there are additional measures for the identification of posted workers.
<p>All Member States have made use of the possibility to implement a subcontracting liability.</p>	<ul style="list-style-type: none"> • All Member States, except Denmark and Finland who have taken other appropriate measures, have implemented the minimum requirement of liability for contractors in the construction sector in the event of employer's failure to pay (due) wages. • Croatia, Estonia, Finland, Ireland, Lithuania, Poland, Romania, Sweden and the UK limit this liability to the construction sector. All other Member States extend this liability to other sectors. • Some Member States have extended the scope and range. • Sixteen Member States only apply the subcontracting liability to foreign service providers. The report notes that this may be direct discrimination of those service providers.
<p>All Member States have put into place penalties for infringements of national provisions.</p>	<ul style="list-style-type: none"> • The possible range of penalties set by Member States shows great variation. Some Member States define the possible range per worker, other per employer, and some apply a raise to repeated violations. • Austrian law additionally provides for the possibility to prohibit the employer from carrying out work. However, the European Court of Justice recently ruled that the cumulative penalty system of Austria constitutes an interference with the free movement of services.

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HVG Law

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