



# The Posting of Workers directives and the latest developments

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# Figures 2022

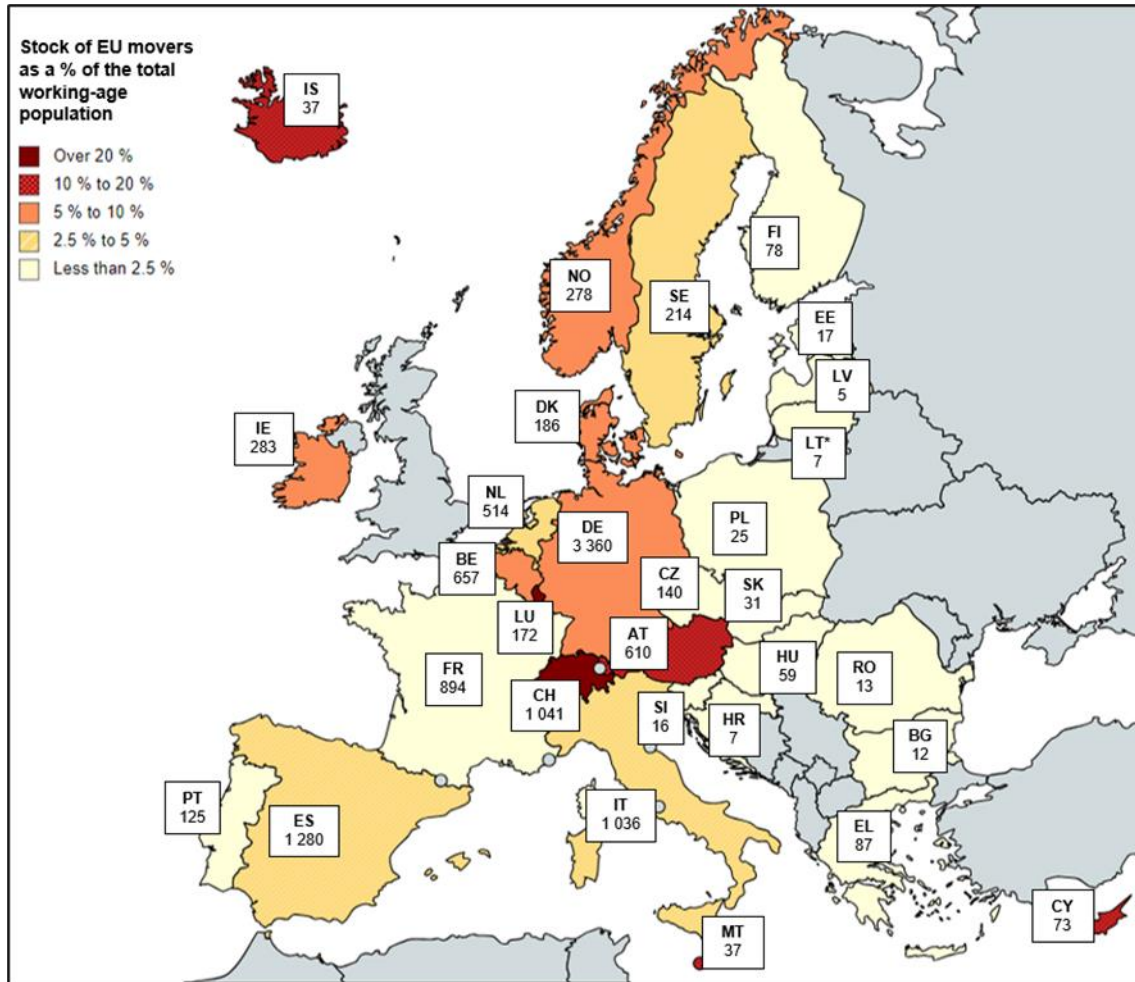
- *~ 14 million movers (all ages)*
- *~ 10 million working age movers*
- *3.8 % of EU working age population*
- *Stagnation of working age movers*

- **~ 17 million TCN (working age)**

- *4.6 million postings (+27%)*
- *1.8 million cross-border workers (+8%)*

- **859 000 movers (+7%)**
- **676 000 returnees (+3%)**

# Key Destinations



# Facts

- *LU: 73% non-locals*
- *RO: origin of 2 million movers*
- *IT: ~80% of movers in Italy are RO citizens*

# Thinking about mobility

- 58% think labour mobility is good for the labour market and good for European integration – in 2009 only 50% thought it was good for the labour market
- Citizens in Austria (34%) and Greece (45%) are least convinced that labour mobility is good for the labour market
- Citizens in Portugal (81%), Lithuania (79%) and Ireland (76%) are most convinced of its positive effects, in Spain 72%
- Denmark (65%), Finland (72%) and Sweden (66%) see mobility quite positive.



# EU Legal framework



# Directive 96/71/EC - scope

- Applies to undertakings **established in a Member State** that in the framework of the transnational **provision of services** post workers through:
  - **a contract of services between two parties**
  - intra-corporate transfer
  - temporary agencies
- **Cross border element**: applies to workers that “for a limited period” carry their work in another MS
- **Employment contract** throughout the period of posting (i.e not self-employed)
- Not applicable to **undertakings established in 3rd countries** (with the exception of non-favourable treatment) and to **self-employed**

# Provision of service

- No definition in the Posting Directive
- Art 57 TFEU, Art 4 of the Services Directive (2006/123/EC) and ECJ case law\* clarify that “a service is an economic activity normally provided for a remuneration” (not necessarily paid by the people that profit from it and without necessarily aiming for profit)“

\*C-352/85 Bond van Adverteerders and Others [1988] ECR 2085, paragraph 16 and C-157/99 Smits and Peerbooms [2001] ECR I-5473, paragraphs 50 and 52



# Notion of „undertaking“

- no definition in the Posting Directive

- Case Law, where the ECJ consistently has considered that: “The concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed“

(see, inter alia, Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21, and Case C-280/06 ETI and Others [2007] ECR I-10893, paragraph 38)

- „It is clear from established case-law that any activity consisting in offering goods and services on a given market is an economic activity“

(see, inter alia, Case C-218/00 Cical [2002] ECR I-691, paragraph 23)

# Enforcement Directive on Posting of Workers 2014/67

Improved  
access to  
information

Improved  
administrative  
cooperation

*Common  
framework of  
administrative  
and control  
measures*

# Before posting 1

- Administrative measures according to host MS:
  - Posting declaration to the national competent authority (at the latest at the commencement of the service provision) including:
    - the identity of the service provider
    - the anticipated number of clearly identifiable posted workers
    - the person of liaison and the contact person;
    - the anticipated duration, envisaged beginning and end date of the posting;
    - the address(es) of the workplace; and
    - and the nature of the services justifying the posting.

# Before posting 2

- An obligation to designate a person to liaise with the competent authorities in the host Member State;
- An obligation to designate a contact person who can act as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining within the host Member State.
- Host Member States are entitled to put in place other administrative requirements provided they are justified and proportionate

# Posting declarations

- All 27 Member States used this possibility to implement a prior declaration tool for service providers.
- Most Member States have implemented an online/electronic declaration tool (with the exception of RO, HR, IE, CY)
- In 13 Member States some activities/sectors exempted from declaration obligation (for example)
- Belgium: workers attending meetings; specialised technicians for urgent maintenance or repair work on machines or equipment (not more than 5 days a month)

# Posting declarations (continued)

- Denmark: participatin in seminars and conferences, business trips; posting withing a group for up to eight days (not for construction work); supply of a technical facility or a technical installation (less than 8 days)
- Germany: declarations have to be made only in certain sectors and notifications according to the Minimum wage act are not required for employees whose pay exceeds a gross € 4,319 a month, or whose sustained regular monthly pay exceeds a gross € 2,879 provided that the employer can submit evidence of such payment for the past full twelve months
- Austria: cross-border work activities involving few hours for a brief period (business meetings) posting and hiring out of workers whithin one company group, earning beyond a defined pay limit, delivery of goods and follow-up work, exception for assembly

# Single official national posting websites

- Visit single national official posting websites which can be accessed from the pages of Your Europe:
- [https://europa.eu/youreurope/business/human-resources/posted-workers/posting-staff-abroad/index\\_en.htm](https://europa.eu/youreurope/business/human-resources/posted-workers/posting-staff-abroad/index_en.htm)
- Choose: National contact points and websites - Country

# During and after a posting

- Keep/make available copies of employment documents
- Deliver documents after the posting
- Provide a translation of the documents
- Host Member States are entitled to put in place other administrative requirements provided they are justified and proportionate



## Terms and conditions of employment of the host MS applicable to posted workers:

- provided by **law** or by **universally applicable collective agreements** or otherwise applicable in accordance with Article 3(8).
- **Maximum conditions**, MS are not allowed to apply any other condition to postings until 12/18 months
- But, always **more favourable condition** of employment will be applied

# Terms and conditions of employment

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) **remuneration**, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
- (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.
- (h) **the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work**
- (i) **allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.**

# Remuneration

- Remuneration is determined by the host MS national law and/or practice
- Remuneration covers overtime rates, holiday pay and all other constituent elements of remuneration rendered mandatory by national law.
- Comparison of the gross amount of remuneration, not individual elements
- For checks and controls different elements of pay should be identified
- Exception for international road transport sector – minimum rates of pay

## Allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons

- Applied to posted workers:
  - In case they also exist for national workers
  - Include only allowances or expenditure within or from the MS where one is posted
    - To and from the place of work
    - Temporarily sent to another place of work
- Reimbursement of expenditures incurred on the account of initial posting from MS A to MS B according to the host MS rules **are not included** here

# Posting for short term vs long term

- Directives apply to all postings, irrespective of their duration.
- Some provisions are not applicable to short term postings (8 days, assembly of goods)
- Host Member States can decide not to apply some provisions to short term (1 month) postings or in cases work done is not significant

# Long-term posting

- When the duration of posting exceeds 12 months (extensible to 18 months with **motivated notification**)
- Posted workers should be granted **all the applicable terms and conditions of employment** of the host Member State
- Except rules on conclusion and termination of the employment contract, including non-competition clauses and supplementary pensions schemes
- In case of **replacement**, the cumulated duration shall be counted

# Enforcement Directive (EU) 2014/67: latest developments

- In July 2021 the Commission initiated infringement proceedings against 24 Member States
- The Commission challenged issues related to workers' protection, administrative requirements and control measures, subcontracting liability and proportionality of sanctions

# Posting of workers - eDeclaration

- **Basis: Directive 2014/67/EU, Article 9(1)(a)**
- **COM Communication “Updating the 2020 New Industrial Strategy”, 5.5.2021**

The Commission will work with Member States to:

- devise a common form for the declaration of the posting of workers,
- in an electronic format,
- on a voluntary basis.

- **Working group of interested Member States (26)**



# The European Labour Authority

- Focus on the construction sector: specific attention to posting (2023)
- ELA will work towards being a fully operational agency by 2024, by further improving and delivering on its core tasks including:
- Implementation of the Posting 360 Program and Posting Forum, which covers the following areas:
  - Implementation of the Directives on posting of workers
  - Effective administrative requirements and control measures
  - Cooperation in the field of social security coordination
  - Digitalisation – tools and opportunities
  - Posted Third Country Nationals
  - Data collection and streamlining of data



# Useful documents

- Directive 96/71/EC: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31996L0071>
- Directive 2018/957/EU: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0957>
- Consolidated text: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996L0071-20200730>
- Directive 2014/67/EU: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0067>
- Implementation report of the Enforcement Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:426:FIN>
- Practical guide on posting: <http://ec.europa.eu/social/BlobServlet?docId=21472>
- Report on the transposition of Directive 2018/957: <https://ec.europa.eu/social/BlobServlet?docId=22913&langId=en>

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