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**Joint proposals of the European social partners of the construction industry  
for improving the application and the enforcement  
of the “Posting” Directive (96/71/EC) (PWD)**

**A. Introduction**

1. The EFBWW and FIEC have taken note of the Communication of the European Commission entitled “Single Market Act : Twelve levers to boost growth and strengthen confidence - Working together to create new growth” COM(2011) 206 final.
2. In addition the EFBWW and FIEC have also taken note of the various studies, commissioned by the European Commission in relation to the PWD.
3. The EFBWW and FIEC reconfirm their mutual will to deliver a responsible contribution to prevent and combat “social fraud” and “unfair competition”, with the aim of ensuring non-discrimination and an equal and transparent level playing field within the construction industry.
4. Regarding the preparatory discussion between the cross-sectoral social partners regarding the interpretation, application and enforcement of the PWD, the EFBWW and FIEC would like to refer to the report of discussions between BusinessEurope (BE) and the European Trade Union Confederation (ETUC) of 25 February 2010. In particular the EFBWW and FIEC refer to the following joint statement:

*“One of the problems jointly recognized is the abuse of letterbox companies, using their artificial structure with the sole intention of avoiding the labour and social laws and regulations of the host country.”*

*“The European social partners recognise the importance of better monitoring and enforcement of the Posting Directive, but have different views about the degree to which this may solve the key problems arising from the ECJ cases.”*

5. In this joint statement BE and the ETUC confirm their willingness to improve the interpretation, application and enforcement at European and national level of the articles 4, 5 and 6 of the PWD.

6. The EFBWW and FIEC recognize that the discussions regarding the interpretation, application and enforcement of the PWD have a links with and implications on other policy areas such as “undeclared labour”, “free establishment of service providers”, “public procurement”, “social security” and these have also to be taken into account.
7. Because of the complex framework, the EFBWW and FIEC are of the opinion that “solutions” should be sought by a combination of prevention and sanction measures.
8. The EFBWW and FIEC underline that the proposed legislative initiative should not interfere on the one hand with the autonomy of the national social partners in determining the applicable wages and terms of employment and the national labour market model and, on the other hand, with the rights of the services providers.
9. The EFBWW and FIEC agree that each form of social fraud and unfair competition should be prevented, efficiently detected and swiftly and adequately sanctioned. This requires adequate means to enable cross-border enforcement.
10. The EFBWW and FIEC agree that each envisaged measure should not entail excessive administrative burdens for service providers.
11. The EFBWW and FIEC are of the opinion that the Regulation 883/2004 on the coordination of social security systems and it’s implementing Regulation (987/2009) offer specific provisions on controlling opportunities, exchange of information, etc, which should be further explored by the European Commission.
12. The EFBWW and FIEC clearly underline that the existing liability schemes in force at national level should in no manner be influenced, by the upcoming EU legislative initiative.

The following proposals refer to issues on which a consensus between EFBWW and FIEC was reached and which should be taken into account in the forthcoming legislative initiative aimed at improving and reinforcing the transposition, implementation and enforcement in practice of the PWD. Other matters on which EFBWW and FIEC do not share the same view can be the object of possible separate individual own positions.

## **B. Proposals by EFBWW and FIEC**

### ***Clarification of the employment relationship between service provider (undertaking making the posting) and worker during the period of posting***

12. In order to ensure that the concept of posting is based on a genuine connection between the sending state and the employment contract of the posted worker, the EFBWW and FIEC fully support a clarification stating that the concept of posting and the concept of posted worker in the PWD has to be interpreted in the light of the provisions of the Rome I Regulation.
13. Furthermore, the clarification should be accompanied by specific, adequate and enforceable controlling measures.
14. The EFBWW and FIEC would also favour the introduction of a provision stating the obligation for the employer to bear the travel, board and lodging costs of the posting, (see Art. 3(7) second sentence).

### ***The scope of the PWD***

15. The EFBWW and FIEC agree that the existence of an intermediary between the employer and the recipient of the services should not prevent application of the PWD. In order to prevent employers from circumventing and abusing the rules it is necessary to establish a clear definition of "undertakings established in a Member State" (see e.g. in art 4(5) of the "Services" directive 2006/123/EC). Only genuinely "established" companies may benefit from the freedom to provide services and hence from the PWD. The requirement of a cross-border service provision likewise needs clarification. In this respect the EFBWW and FIEC underline that there should be a demonstrable economic bound between the posting company and the country of establishment.
16. In addition to this, minimum links to the country where the posted worker normally works should exist, in order to qualify the mobility as genuine posting under the PWD.
17. Finally the EFBWW and FIEC support the recommendation of a rebuttable legal presumption of 'structural' employment in the host state to be introduced in case the length of employment in the host state exceeds a certain period of time (the duration of which may be partly left to – or in consultation with - the sectoral social partners of the host country).

### ***Interpretation of minimum rates of pay***

18. The EFBWW and FIEC share the view that it should be made clear at European level that the Member States – or where appropriate, the national social partners, in accordance with the national social model – can determine the different levels (alternatively or simultaneously) of the applicable minimum rates of pay.
19. The forthcoming legislative initiative should impose to the Member States to monitor and enforce working time regulations and paid holidays legislation (Art. 3(1b)), which have an impact on effective hourly wage costs

### ***Enforcement matters***

20. The EFBWW and FIEC favor more transparency in the monitoring systems of the sending and of the host countries, by appointing one authority at the national level as the first contact point/first responsible actor in respect of monitoring the correct application of the provisions of the PWD and/or the presence of posted workers. In respect of countries where the national system insufficiently ensures the adequate enforcement of posted workers' rights the European Commission must undertake appropriate compliance and enforcement measures at EU-level in order to ensure that the national systems do allow the adequate compliance and enforcement of rights for posted workers and the effective application of the 'effet utile' of the PWD.
21. Due to the high level of posting in the construction industry, EFBWW and FIEC agree that a closer focus is needed in the sector by the national authorities' as regards the monitoring and enforcement policies.

22. The EFBWW and FIEC consider that Member States must focus their attention (and enforcement) on the specific legal position of posted workers. In addition a cross-border coordination at EU-level must be ensured, in particular as regards inspection measures targeted at posting of workers situations<sup>1</sup>.
23. EFBWW and FIEC consider that adequate (e.g. financial as well as institutional) support at national level together with appropriate supervision at EU-level for ensuring adequate monitoring / enforcement of rights and obligations, is necessary.

### ***Dissemination of information***

24. The EFBWW and FIEC consider that all Member States must continue their efforts to improve access to and content of the information on host country labour law standards, especially respecting entitlements in Collective Labour Agreements (CLA). At EU level, this should be supported by practical measures and/or legislative amendments aiming at extending the scope of Art. 4(3) of the PWD to other additional and useful information, such as mandatory notifications, liability systems, etc. In addition, best practice initiatives of social partners at EU level, such as the EFBWW-FIEC joint website ([www.posting-workers.eu](http://www.posting-workers.eu)) must be facilitated and supported in a structural way.
25. In order to facilitate the access to information and transparency, EFBWW and FIEC recommended that national authorities designate one website/webgate as the central entry point for the provision of information on posting of workers in the context of the PWD, at both European and national level.
26. Adequate information on paper and special information and awareness-raising campaigns focused on posted workers in their native language is indispensable, which Member States and social partners have to put into practice. To promote and sustain such initiatives, financial support and facilitation at EU and national level should be mandatory.

### ***Inspection/enforcement matters (Art. 5)***

27. EFBWW and FIEC agree that further implementation/application of initiatives at EU and national level already taken with regard to the enhancement of both domestic and (bilateral) cross-border cooperation between labour inspectorates is indispensable. What should effectively be done from an operational point of view depends on the situation in each Member State. To keep authorities continuously focused on the need for a smooth and effective cooperation, we advise to evaluate and monitor the situation on paper and in practice regularly (for instance once or twice a year).
28. The EFBWW and FIEC consider that in order to meet or sustain a satisfactory level of effective, proportionate and dissuasive enforcement, adequate, sufficient resources and measures for undertaking monitoring and enforcement tasks must be put in place at national level. One of the main objectives is to reduce the differences between the Member States in the level of enforcement of the PWD.

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<sup>1</sup> This could be done either according the recommendations of the Regioplan study on the possible setting up of a EU platform in order to fight against undeclared labour or extending the competences of the European 'Committee of Senior Labour Inspectors' 'SLIC' so that it give its opinion to the Commission either at the Commission's request or at its own initiative, on all problems relating to the enforcement of the PWD by the Member States.

29. As concerns the problem of bogus self-employment, EFBWW and FIEC refer to their “Joint conclusions and recommendations of the European social partners in the construction industry on self-employment and bogus self-employment” of 5/1/2010. In particular they emphasise the need for a set of common European criteria which would provide guidelines for determining the nature of the employment status, independently of the legitimate wish of the parties, taking into account the realities of the construction industry, would provide a significant improvement of legal clarity to enterprises and workers. In addition, the determination of the employment status should be the legal responsibility of the country in which the work is done, which must decide whether subordination/control is apparent from the working circumstances and the contractual terms. EFBWW and FIEC call upon the EU-legislator to clarify this immediately.
30. Despite EU measures in the field of recognition and execution of foreign judgements and decisions, the enforcement of rights conveyed by the PWD still seems to stop at the national frontier. In part this is due to legal lacunae, and to that extent additional measures should be taken at national and also at EU level to enhance the cross-border recognition and execution of penalties in the context of the PWD.

#### ***Duties on service providers***

31. In order to facilitate preventive controls in both the sending and hosting countries, the EFBWW and FIEC favor a mandatory notification system by the sending company prior to the posting. Such a system aims at informing the national actors about posting of workers situations and it gives insight into the size and occurrence of this phenomenon at sectoral level.
32. The EFBWW and FIEC consider that the practice to impose duties on foreign service providers, such as, in case of controls by the competent national authorities, to provide pay receipts and employment contracts or documentation on the terms of employment is to be applied European-wide.

#### ***Duties on service recipients***

33. In order to create more transparency of building sites a specific obligation for each contractor to verify according to national provisions whether its direct foreign subcontractors have effectively fulfilled their duty of prior notification, should be introduced (*this paragraph has to be read in connection with paragraph 31*). In the absence of such a verification, effective enforcement measures must be introduced.
34. EFBWW and FIEC also stress that costs cannot be the only factor to be taken into consideration when negotiating business relations with suppliers. It is in a company's interest to take into account a range of supply chain issues including quality, social and fiscal standards and health and safety policies.
35. Legal subcontracting and outsourcing are usual working methods of the construction industry and have to be acknowledged. However, joint EFBWW-FIEC research projects (on posting and undeclared labour) indicate on the one hand the existence of social security fraud by the abusive use of chains of subcontracting and outsourcing methods in most of the Member States and, on the other hand that bogus self-employed workers are involved in domestic and cross-border subcontracting amongst other due to strong price pressure.

36. EFBWW and FIEC agree that companies should manage their supply chain responsibility in case of subcontracting and outsourcing by a combination of approaches and tools.

***Supportive tools/remedies for posted workers (Art. 6)***

37. In order to facilitate the transparency about the workers on a building site, the EFBWW and FIEC consider that the introduction of a European sectoral Social Identity Card would be beneficial to prevent and detect social fraud. In this respect, the EFBWW and FIEC will ask the “Dublin foundation” (EUROFOUND) to undertake a study on the feasibility of such an initiative.
38. The EFBWW and FIEC agree that an EU Communication could recommend the provision of access to legal aid for posted workers in countries where this is currently not available.

***Additional documents***

39. The Joint conclusions and recommendations of the European social partners in the construction industry (EFBWW and FIEC) on self-employment and bogus self-employment, are attached to this joint opinions and are an integrated part of this paper.

A translation of this joint position is available in French, Italian, German, Dutch and Spanish. The original document is the English version.

Brussels, 13<sup>th</sup> July 2011.

On behalf of the European social partners of the construction industry,

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