

Ibec response to the consultation process for the transposition of the Posted Workers Enforcement Directive

29th January 2016

Ibec is grateful for the opportunity to participate in the consultation process relating to the transposition of Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ("The Enforcement Directive").

We respectfully submit that there are already robust measures in place in Ireland to ensure compliance with the Posted Workers' Directive¹, including a well resourced labour inspectorate in the form of the National Employment Rights Authority under the auspices of the Workplace Relations Commission, which also provides comprehensive employment rights information in a range of languages. Ibec is in favour of improved cooperation between Member States and better information for employers and workers about their respective responsibilities and rights under the Posted Workers' Directive.

However, we are keen to ensure that transposition of the Enforcement Directive is done in a manner which continues to respect the freedom of companies within Member States to provide services in other EU Member States with as small an administrative burden as is reasonably possible while still ensuring that the rights of posted workers are properly respected and enforced. It is vital that Irish companies and individual customers in Ireland continue to benefit from the increased availability of services from across the EU.

Throughout the examination of the issue of enforcement of the Posted Workers' Directive, Ibec has been deeply concerned at the prospect of a contractor being made liable for non-payment of statutory rates of pay or back payment of taxes by subcontractors in the construction sector as outlined in Article 12 of the Directive. The article appears to envisage such sanctions even in circumstances where the contractor may not be at fault or even aware of the breach, the only defence to which appears to be a costly due diligence process carried out in advance.

We are also concerned that the potential splitting of liability in this way has a possible unintended consequence; it is at odds with the objective to penalise employers who do not respect their obligations under the Directive and which may have a cavalier approach to employment rights compliance.

¹ 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

However, now that the Enforcement Directive has been finalised and must be transposed into Irish law, we respectfully submit that this provision is transposed in a manner which reduces the impact on contractors as much as possible.

Below, we answer the questions posed in the consultation document in the order in which they appear.

Questions

- 1. Do you agree/disagree with the preferred policy option to implement the measures provided for in Article 9(1) of the Directive?*
- 2. If you agree, please outline the reasons why you consider Ireland should implement the measures provided for in Article 9(1).*

Ibec supports the principle of the free movement to provide or receive services. To this end, we believe in the reduction of red tape and simplification in the establishment of service providers in their native Member State and abroad.

That said, Ibec recognises that it may be of assistance in ensuring compliance with the Posted Workers' Directive to require companies posting workers to Ireland to give certain basic information to State agencies such as the Workplace Relations Commission to ensure the awareness of the inspectorate of the existence of the workers in the State. Similarly, we recognise the benefit of the requirement of Article 9(1)(a) to (e) inclusive to keep appropriate records in this jurisdiction and make them available for inspection. We think it also appropriate and proportionate to require posting companies to provide a translation of relevant documentation where requested and to designate a person to engage with the Irish authorities for the purpose of compliance with the posting rules.

- 3. If you disagree, please outline the reasons why you consider Ireland should not implement the measures provided for in Article 9(1).*

However, we think that this information listed above² should be sufficient to ensure compliance, and do not believe that the State should require companies posting workers to Ireland to designate a contact person with whom relevant workers representative bodies may engage with a view to entering collective bargaining in accordance with national legislation as envisaged by Article 9(1)(f). Ibec submits that monitoring compliance with Irish statutory employment rights is a role which has been designated to the Workplace Relations Commission and there should be no legal requirement placed on posting companies to engage with any other body in this respect.

² Article 9(1)(a) to (e) inclusive

Ibec appreciates the intention, as proposed in Article 9, to clarify the extent to which Member States may impose administrative obligations on undertakings posting workers, and recognises that the Directive provides that such measures must be proportionate. However, we are concerned at the provisions at Article 9.1(f), which allow Member States to create an obligation to designate a contact person to negotiate, if necessary, on behalf of the employer with the relevant social partners in the Member State to which the posting takes place during the period in which the services are provided. We believe that compliance with the Directive can be achieved by requiring the posting company to engage with the Workplace Relations Commission only as the designated State agency for employment rights enforcement.

4. Do you consider that the imposition of the requirement detailed in Article 9(1) would impose disproportionate additional costs/obligations on employers?

Ibec believes that ensuring compliance for all workers working in Ireland (whether for the long term or for a short duration as a posted worker) is sufficiently important to justify the measures outlined in Article 9(1)(a) to (e) inclusive. Firstly, it is critical that workers' statutory minimum employment rights are respected and enforced. Secondly, it is bad for Irish business to allow a potential situation to arise whereby local service providers are placed at a competitive disadvantage by complying with statutory obligations in their role as employer and facing the administrative burden of engaging with the national labour inspectorate, while their competitors from other Member States can avoid compliance and/or avoid the administrative burden of dealing with local enforcement agencies.

That said, the Directive is correct in stating that these measures must be proportionate, and to this end, we believe that requiring service providers from other Member States to designate a contact person with whom workers representative bodies may engage for collective bargaining purposes (albeit in line with Ireland's voluntarist tradition of industrial relations as prescribed by national law and practice) is a step too far and goes beyond what is necessary for compliance with statutory employment rights.

Ibec has reflected on the requirement of service providers to provide translations of documents such as contracts of employment, payslips and time sheets as required by Article 9(1)(d) and considers that while such a requirement is likely to pose an administrative burden and additional costs on posting companies, we believe that it is a proportionate requirement aimed at securing compliance with the Directive. On balance, Ibec is of the view that Article 9(1)(d) should be required of service providers.

5. If so, please elaborate on the nature of the additional costs/obligations that would be imposed on employers?

As stated above, Ibec submits that the burden that would be imposed on employers by requiring the provision of information and the retention of records as outlined in Article 9(1)(a) to (e) inclusive is proportionate to the aim of the Directive and would not present a disproportionate cost. However, requiring companies posting workers to Ireland to designate a contact person with whom workers' representative bodies may seek to engage for the purpose of possibly entering into collective bargaining is excessive. Such engagements can be lengthy and protracted, and go beyond what is necessary to secure compliance with the Directive and enforcement of the statutory employment rights of posted workers.

6. Do you consider that there are specific elements included in Article 9(1) that do not need to be required of service providers?

Ibec respectfully submits that Article 9(1)(f) should not be required of service providers for reasons outlined above.

7. If so, please provide a list of the specific elements within Article 9(1) that should not be required?

One item as outlined above – Article 9(1)(f).

8. Do you consider that there are other administrative and control measures that could or should be introduced in accordance with the provisions of Article 9(2) to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and the Enforcement Directive? If so, please provide details of the specific measures?

Ibec does not consider that there are any additional administrative and control measures which should be introduced in accordance with the provisions of Article 9(2). Ibec believes that the introduction of any further administrative and control measures over and above those provided in Article 9(1)(a) to (e) inclusive would risk being considered disproportionate to the aim of the Directive and offensive to the principle of the free movement of services.

9. What are your views on the proposal to comply with Article 9(4) by providing for an online notification facility?

Ibec welcomes the introduction of an online notification facility. We would need the opportunity to examine the facility before being in a position to comment as to

whether it meets the aims outlined in Article 9 (4), namely the extent to which it will be “user friendly”.

Article 12 Subcontracting liability

This is the aspect of the Enforcement Directive which has caused Ibec most concern. While we recognise that the aim of the article is to guard against the possibility of posted workers not being paid their wages, we firmly believe that this could have been secured by means other than visiting liability on a body which is likely to have little knowledge or control over the employer’s compliance with local employment rights legislation. It has the very unhelpful consequence of rewarding rogue employers while punishing their customers.

10. Do you agree/disagree with the preferred policy option that the subcontracting requirements in Article 12 should be limited to the construction sector?

11. If you agree, please outline the reasons why you consider the subcontracting requirements in Article 12 should be limited to the construction sector.

12. If you disagree please outline the reasons why you consider that the subcontracting requirements in Article 12 should be extended to other sectors and specify the sectors.

Ibec notes that the provisions of Article 12 give Member States little scope but to introduce some form of involvement of contracting authorities, referred to as “contractors” within the Enforcement Directive, in the compliance and enforcement of employment rights insofar as they are due to posted workers under the Posted Workers’ Directive. Ibec is gravely concerned at the prospect of joint and several liability for contracting authorities and believes it is a very unhelpful precedent which carries with it the considerable risk that it will allow construction companies with little regard for compliance escape the rigours of employment rights legislation, passing the liability instead to a company entirely innocent of whatever breaches arise.

That being the case, Ibec believes that this provision should be limited to companies within the construction sector, so as to limit the impact of this injustice as far as is possible. For the avoidance of doubt, Ibec does not consider that the subcontracting requirements should be extended to other sectors. Ibec also submits that such arrangements should exist only for construction companies in respect of whom the workers are “posted” workers. In other words, Ibec does not believe that joint and several liability should be introduced in legislation for all workers in respect of whose work there may exist a contractor who has commissioned the work. Ibec believes that direct employers, and no other third party, should be responsible and held

accountable for compliance with employment rights. Ibec submits that any derogation from this position serves only to encourage non-compliance by rogue employers.

13. Do you agree/disagree with the preferred policy option that the subcontracting liability should be limited to the contractor immediately above the direct employer in the supply chain?

14. If you agree, please outline your views why you consider that the subcontracting liability should be limited to the contractor immediately above the direct employer?

15. If you disagree please outline your views on how far down the subcontracting chain the main contractor should be held liable.

Ibec believes that Ireland should implement Article 12 in as limited a form as possible, for the reasons set out above. We believe that it is already unjust and unfair to fix a company other than the employer with employment rights liabilities. That being the case, we believe that the legislation transposing the Enforcement Directive should opt to restrict any liability which may be capable of being imposed to that of the contractor immediately above the direct employer. We also take the view that any due diligence process beyond this point becomes so onerous as to be unrealistic for companies two or more steps removed from the sub-contractor/direct employer.

16. Do you agree/disagree with the preferred policy option to introduce subcontracting liability in the construction sector and therefore not to exercise the option of implementing the measures provided for in Article 12(6)?

17. If you agree please outline your views as to why Ireland should not exercise the option of implementing the alternative measures provided for in Article 12 (6)?

18. If you disagree please outline what other enforcement measures should be introduced and how they would be operated and enforced in practice?

Ibec disagrees with the preferred policy option to introduce subcontracting liability in the construction industry in legislation to transpose the Enforcement Directive into Irish law. Instead, the option provided in Article 12 (6) should be considered. This option allows Member States to introduce other enforcement measures in the form of sanctions to penalise contracting authorities for the use of subcontractors who have breached employment rights statutes, specifically to tackle fraud and abuse under the Posted Workers' Directive. Ibec believes that this should be the preferred route, as we firmly believe that enforcement of employment rights should be sought against the employer and no other body.

However, we recognise that Article 12 aims to raise awareness and secure greater enforcement of the employment rights of posted workers; aims which we believe can be achieved through the use of sanctions imposed on contracting authorities when no due diligence has been carried out and where breaches are identified within the subcontractor they have engaged to carry out work through the use of fraud or other abuses.

19. If you disagree with the intention to introduce the defence of due diligence, outline the reasons why the due diligence provision should be exercised, how it would be implemented in practice and what it would mean for employees seeking payment of unpaid wages?

20. What measures might a contractor reasonably be expected to undertake to demonstrate due diligence?

21. How would the contractor prove this?

Ibec agrees with the proposal to introduce the defence of due diligence for contractors as provided by Article 12(5). In practice, this may take the form of contractors requesting written confirmation from the subcontractor that the measures outlined in Article 9(1)(a) to (e) as referred to above have been carried out.

This means that the subcontractor will need to submit to the contractor upon request a copy of the declaration made to the national competent authority (in this case the Workplace Relations Commission) which will include the identity of the service provider, the number of posted workers, the identity of the designated contact person for the purpose of liaising with competent authorities in Ireland and the address of the workplace. It would be useful if a standard form of information to be sought from subcontractors could be made available to contractors potentially seeking to avail of the services of subcontractors within the construction industry. The standard form should also include a declaration from the subcontractor that they have informed themselves on the employment rights requirements with which they must comply and a commitment to comply with same.

A contractor might reasonably be expected to require the subcontractor to submit the above information to them in writing at the latest at the date of commencement of the service provision. Any further requirements of the contractor would, we respectfully suggest, go beyond the measures proposed in Article 12 and risk the measures being considered discriminatory or disproportionate.

With regard to question 21 above, the presentation by the contractor of the declaration made to the Workplace Relations Commission and the commitment from the subcontractor to comply with local employment rights legislation should be sufficient proof of their due diligence in any proceedings which arise.

22. Do you agree/disagree with the proposal that subcontracting liability should apply equally to posted workers and non-posted workers in the construction sector?

23. If you disagree, outline the reasons why it should not apply to non-posted workers?

Ibec believes that if subcontracting is to be introduced (in favour of sanctions as provided in Article 12(6)) it should be limited to posted workers within the construction industry only. Ibec recognises some of the practical issues which have arisen in the past with regard to securing compliance and enforcement of employment rights for posted workers. These can include difficulty in serving proceedings and enforcing decisions of third parties and are alluded to in Article 11 of the Enforcement Directive. However, these practical difficulties do not arise where both contractor and subcontractor are based in Ireland and as such there is no need to introduce the concept of joint liability more broadly.

Conclusion

Ibec understands the aim to ensure full compliance with the Posted Workers' Directive. However, it is vital that Irish businesses and consumers generally continue to benefit from the free movement of services. The transposition of the Enforcement Directive can be done in such a way as to limit the encroachment on this fundamental freedom. Ibec respectfully suggests that this should be a guiding principle when transposing the Directive into Irish law, particularly Article 12 which introduces the possibility of a shift in core employment rights policy by introducing the prospect of joint liability.

Ibec requests that careful consideration is given to how best to implement the principles of the Directive without visiting the responsibilities of other non-compliant companies on Irish contractors and consumers of other services.

END