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Policy Briefing:

Does the Posted Workers Directive Revision Mean the Problem is Fixed?

This policy brief summarizes the findings of “Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO)”, VS/2016/0222.¹ We find that although the revision of the Posted Workers Directive (PWD) is a positive step, worker posting by its nature provides many opportunities for employers to evade and arbitrage national regulatory systems. As such, ensuring a level playing field and protecting workers’ rights will require an ongoing policy attention of EU, national and ground-level actors, if these objectives (set out in the PWD revision) are to be achieved.

Outline of the briefing:

- Recommendations for improving legislation at the EU level
- Recommendations for improving legislation at the national level
- Good practices for labour inspectorates to monitor and enforce the rights of posted workers
- Good practices for trade unions to represent and protect posted workers

PROMO involved research and a series of policy workshops during 2017 and 2018 that aimed to make recommendations to improve:

- national labour protection systems for posted workers;
- institutions, practices and channels for promoting industrial democracy for posted workers;
- the collection of data relevant for making informed posted worker policy decisions.

Based on research and policy discussions in these workshops, we make the following policy recommendations. The full research reports on which the recommendations are based are available on the SOLIDAR’s website.²

I. Recommendations for improving legislation at the EU level

1. Establishing a European Labour Authority (ELA)

Considering the complex and interrelated challenges that cross-border posting brings to national authorities, the most effective way to tackle them would be a comprehensive transnational approach. Also suggested by European Commission President Jean-Claude Juncker³, *we support the establishing of a European Labour Authority (ELA)*. We argue that, among other things, it should be a place where individual workers can go when they fall between the cracks in national protection systems and national

¹ The project has received financial support from the European Union programme for Employment and Social Innovation (EaSI) (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication reflects only the authors’ views and does not necessarily reflect the official position of the European Commission. The Commission is not responsible for any use that may be made of the information it contains.

² <http://www.solidar.org/en/activities/protecting-mobility-through-improving-labour-rights-enforcement-in-europe-promo>

³ http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm

authorities will not or cannot help. To be effective, the ELA must also be focused specifically on labour mobility and the rights of mobile workers. It is not clear yet how the ELA would operate. One possibility could be an EU inspector network, with labour inspectors employed jointly by EU and national authorities; this might harmonize inspection activities to some degree.

2. A common framework for determining self-employment

Labelling posted workers as self-employed is a common tactic used by employers to avoid labour law. In some countries, the definition of self-employment is too broad, encouraging abuse. Reducing ambiguity with a common EU standard would limit the possibilities for fraud. We recommend *harmonizing the definition of self-employment through an EU directive*, or failing that, each Member State should develop a clearer definition of self-employment, so that it is consistent with the ILO recommendation No. 198.

3. Ending the use of letterbox companies

For posted worker employers, the purpose of using letterbox companies is to make it more difficult to apply national laws on firms, by providing an extra corporate layer in an inaccessible jurisdiction. Letterbox companies can serve to avoid taxes, fines from enforcement agencies, and actions from potential litigants (such as, *inter alia*, the firm's own workers pursuing wage claims or seeking compensation for accidents). *We recommend EU legislation to restrict the creation of letterbox companies, based on a requirement that real headquarters activities be carried out in the place of incorporation.*

Failing an EU solution, we recommend that national enforcement and liability rules take into account the possibility (likelihood) of letterbox companies being used to circumvent the law in cases of posting: for example, if subcontracting liability extends two links down, by inserting two shell companies in the chain, main contractor liability can be avoided. Liability which extends the entire chain cannot be as easily circumvented.

4. Protecting the right to free association and to strike

The right to strike is a well-established fundamental right deriving from the freedom of association, and elaborated in the International Labor Organization (ILO) conventions, which has been curtailed by the decisions of the Court of Justice of the European Union (CJEU). We recommend *European-level legislation, or preferably a constitutional measure, explicitly setting out a right to strike (and take part in secondary industrial action).*

5. Collecting reliable data about postings

Accurate data is crucial for policy making and current sources are inadequate and/or incomparable. This is recognized in the PWD revision, and the goal of improving data collection has been set out. We agree *this should be meaningfully pursued.*

6. Fair wages for drivers on international journeys

International road transport workers have been exempted from the revised PWD, and the clarification of their status as posted workers will be subject to a specific mobility package that is currently negotiated. It is well documented that drivers on international journeys experience wage discrimination and poor working conditions. *We urge that the transport sector also be covered by a Directive which should 1) prevent wage-based competition between local and foreign drivers, and 2) be clear, easy to enforce, control and sanction.*

II. Recommendations for improving legislation at the national level

1. Ensuring posted workers an accessible right to join, be represented by and participate in trade unions (and works councils, where applicable)

Posted workers generally do not join host country trade unions 1) because they are highly mobile and have little incentive to join a particular host country union and 2) due to the fear that if their employer finds out, they will get fired, because in practice there is nothing preventing firing posted workers for union activities. *We recommend legislation protecting posted workers who attend union activities, including take part in industrial action and making it easier for them to register complaints with authorities.*

2. Extending unions' and works councils' right to represent workers throughout the subcontracting chains

Posted workers most often find themselves on work sites where supply chains are extensively fragmented. Firm-based worker representation systems and in particular those that depend on legally independent works councils tend to represent posted worker poorly. *We suggest that laws be changed to allow works council and union representatives to represent subcontractor workers under some circumstances, and works councilors and shop stewards should be encouraged to do so.*

3. Effective and dissuasive sanctions for wage theft and other violations

Many posted worker employers cheat workers, commit serious labour rights violations or fail to pay social security contributions and taxes. Crime pays, and has become a business model. The basic problem is twofold: 1) enforcement is too weak, and the chance of getting caught is small and 2) penalties are not sufficiently punitive. *We recommend higher fines and stricter liability schemes (like the German chain liability system). Collection of fines across national borders should improve.*

4. Access to the justice system

Posted workers should have practical access to host country's juridical system when they encounter labour violations. What barriers arise depend on the local context. In general *we recommend national legislation to improve practical access for hypermobile workers to labour courts. Possibilities for access should be improved – including making them more affordable and available to workers who might have to leave the country before a decision is made.*

In countries, such as Austria, *some sort of membership is needed for institutional support to be represented before court. This requirement should be waived for posted workers.* We also suggest, where it does not exist, countries should introduce *collective redress of claims*: often the claims are not in fact individual, although treated by the courts as such. In countries where trade unions have standing to pursue claims, it is more efficient, and more practical from the workers' standpoint to pursue a collective claim as it does not necessarily require all the workers are present in court.

Finally, *we recommend enforcement agencies, unions and NGOs consider establishing worker advising services, to which individual posted workers or other migrants can receive advice on workplace and migration related problems.*

5. Ensuring fair wage and other employment conditions for posted workers based on host country standards

At the national level:

To prevent extreme abuses, where there are no generally applicable collective agreements, there must be statutory minimum standards.

Collectively bargained legally extended wages, with wage categories appropriate to the skill level of the worker should be implemented wherever possible, consistent with the Laval and Sähköliitto CJEU decisions, and with the revised Posted Workers Directive.

At the European level:

European legislation should make clear that legal extension and minimum wage systems are not the only basis on which unions can bargain collectively, using strike threats if necessary, on behalf of posted workers.

III. Good practices for labour inspectorates to monitor and enforce the rights of posted workers

1. Enhancing a framework for joint cross-border inspections

Experience of national inspectors shows that inspecting workplaces with posted workers can be more effective when both receiving and sending state officials are involved. Barriers to expand cooperation include legal ones, financial constraints, differing organizational mandates and areas of responsibility, language differences and unwillingness to cooperate. *We urge a greater commitment by national governments and agencies to prioritize and facilitate labour inspection cooperation. We recommend that EU funding for inspection cooperation should continue.*

Posting of third-country nationals via EU states is a growing and particularly problematic form of posting. *To address posting of third-country nationals, inspectorates of non-EU sending states should be included in cooperation.*

2. Firewalls protecting the labour rights of posted non-EU citizens

Posted non-EU citizens have recently come to the fore as a growing issue in monitoring posted work. The uncertain status of these workers makes them particularly vulnerable to abuse. *We suggest establishing firewalls between labour rights inspections and immigration enforcement.*

IV. Good practices for trade unions to represent and protect posted workers

1. Informing posted workers about host country labour standards

The amount and quality of information about labour standards on the internet has increased in recent years, as has the commitment of unions to finding and informing posted workers on job sites, at information points and in other places. Some online information is better than none, but we recommend that unions should give the priority on personal contact channels. *Online information is helpful for posted workers to know what they should receive legally or morally, but too often this is quite far from what they are likely to get if they take risks and fight for their rights, and the latter can only be communicated through personal conversation.*

2. Recruiting/organizing posted workers into unions

A variety of approaches have been tried by unions for recruiting posted workers, some inspired by state-of-the-art organizing model techniques. In no case has anyone claimed that the money spent organizing them could possibly be recouped in union dues. However, there is evidence that union efforts to engage with posted workers have raised union consciousness among posted workers in many cases, and over the long term this is likely to have a positive effect. *We recommend that unions engage with posted workers, and that attempts be made to encourage union membership and union mentality, as targeted campaigns to organize posted workers may be situationally appropriate and successful.*

3. Building project-level representation

In sectors like construction, *where posting occurs in highly fragmented and long sub-contracting chains, agreements and union structures that cover the whole project and include responsibilities of different contractors and employment conditions for all workers in the chain is a good practice.* For example, worker inductions and job safety training through site-level arrangements are the unions' opportunity to make contact with the posted workers.

4. Fighting the “grey” economy in multiple ways

Firms that cheat their employees are often non-compliant with the law in many other ways as well. *We recommend unions make common cause with honest employers, government agencies and civil society organizations to fighting the grey economy through promotion of multiple measure designed to make difficult the operations of shady “fly-by-night” subcontractors.* These can include, for example improved labour inspection, and supporting the introduction of ID cards which give access to control to large work sites.

5. Using media campaigns and wider popular support to pressure non-law-abiding companies

For many unions, media exposure of serious labour rights abuses by service providers serve to embarrass and to “name and shame” the (main) contractors who have hired the posted workers' employers. *Media campaigns have proven effective to pressure negligent employers on projects with highly visible and politically vulnerable contractors.*

V. Conclusions

Improving the labour rights of posted workers and thus guaranteeing the level playing field for companies across the EU is a difficult, yet fundamentally important challenge, which is necessary to ensure the fair and efficient functioning of the European Single Market. Improving the situation requires multilevel intervention from different actors. EU and national level policy makers, social partners and labour inspection bodies should share information and cooperate. This has been one of the aims of the PROMO project.

The implementation of the Enforcement Directive and revised Posted Workers Directive are positive steps. Nevertheless, as suggested by the PROMO project research, the functioning of the posting of workers regime needs to continue to be improved through EU- and national-level steps, such as founding a European Labour Authority and guaranteeing more accessible right to seek collective representation and take part in industrial action. Furthermore, to ensure that the rights granted to posted workers are actually accessible to them assumes that labour inspection agencies and worker representation systems function in the interests of posted workers as well which they can do by adapting the practices highlighted in this paper.