

**Ms
Marianne Thyssen,
Commissioner for Employment, Social Affairs,
Skills and Labour Mobility**

Dear Commissioner Thyssen,

We would like to express our position with regard to the *targeted review of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, planned according to the Work Programme of the European Commission for 2015.

The Directive 96/71/EC expresses the social dimension of the freedom to provide services, which constitutes one of the fundamental principles of the EU internal market. The freedom to provide services can contribute to the economic development of the Member States and competitiveness throughout the European Union. The Union legislator had to strike a very delicate balance between this fundamental freedom and the protection of workers' rights and this was achieved when Directive 96/71/EC was adopted. In this respect we fully share the Commission's approach expressed during the negotiations leading to the adoption of the so-called Enforcement Directive (2014/67/EU), i.e. that Directive 96/71/EC *already provides very clear safeguards to protect the social rights of posted workers*¹.

It is important to recall that the Enforcement Directive was adopted after very lengthy and difficult negotiations and significant compromises by many Member States.

We attach great importance to the fundamental principles at the heart of the Directive 96/71/EC and of the Enforcement Directive – the protection of workers' rights as well as the freedom of businesses to provide services and access opportunities anywhere in the EU's internal market. There is no evidence that potential weaknesses could lay in the basic rules established in the Directive 96/71/EC but in the arrangements across the EU for their enforcement. The Union legislator rose to this challenge by adopting the Enforcement Directive, which provides for much more robust and effective enforcement of the posting rules in the whole EU through a range of measures including much closer cooperation between national authorities and more effective cross-border measures to ensure the proper application of the Directive 96/71/EC.

Given that the Enforcement Directive was adopted only last year and Member States are currently working towards its implementation with the European Commission's assistance

¹European Commission, http://europa.eu/rapid/press-release_MEMO-13-1103_en.htm (accessed: 7 July 2015)

within the Expert Group on the Transposition of the Enforcement Directive, a discussion concerning revision at this stage is premature. Indeed, it must await the results of the targeted review as well as implementation of the Enforcement Directive in Member States and then a reasonable period of time to allow for a proper assessment of how the new regime (under the Enforcement Directive) is operating in practice. We would also suggest that, given how difficult it was to reach an agreement on the Enforcement Directive, a revision at this stage has the potential to be very divisive.

There is a danger that a revision will be used to undermine some of the fundamental principles of the EU, including the freedom to provide services. In this respect, we consider any references to equal pay for equal work in the same place as being misguided and incompatible with a genuine single market, in which sustainable economic development is driven by efficient, innovative and competitive enterprises in a market underpinned by robust regulatory arrangements. A revision of the Directive 96/71/EC would be incompatible with the work being undertaken by the European Commission to strengthen the single market with a particular focus on the Services Directive (2006/123/EC).

One additional relevant legal instrument which should be taken into account is Regulation (EC) no 883/2004 on the coordination of social security systems. Pursuant to this Regulation posted workers remain under the legislation of the sending Member State. This rule respects the social rights of workers, namely that their insurance history – and as a consequence sometimes also the insurance history of their family members – remains continuous in a given Member State. The elimination of this possibility would put mobile workers and their family members at a serious disadvantage, especially when they are in need of social benefits (the most striking are pensions). No action can be legitimate if it is in contradiction with the spirit of the Treaties and the fundamental freedoms. Consequently, it is not possible for us to support any changes in the rules on applicable legislation. In turn, we do not see the need to align the Directive 96/71/EC with the rules on social security coordination, the two regimes being completely different in their scope and purpose. Full implementation of “lex loci laboris” would then mean definitive end of posting in the EU.

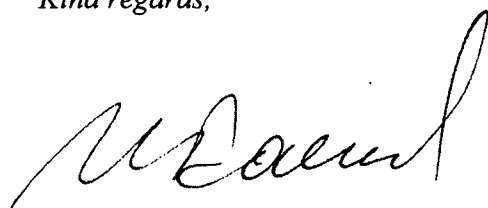
In conclusion, we submit that the priority at this stage should be for the European Commission to carry out a targeted review and further for both, European Commission and Member States to concentrate their efforts on ensuring that the existing rules are implemented fully and the Enforcement Directive is transposed by Member States.

We understand the desire to discuss any issue related to the implementation of the principle of free movement of services. Still, we should also identify the barriers that exist on the internal market in this regard. For this reason, we believe that any review should be conducted on the basis of solid and comprehensive data and impact assessment taking into account the specificities of cross-border service provision in the EU, which will allow for an analysis of the situation in the area of posting and for the identification of the scale and nature of the existing barriers.

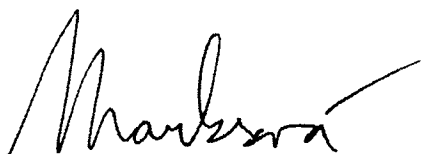
We should also be aware that any legislative provisions respect the fundamental freedoms of the single market and take into account the objectively existing differences between Member States, which result from different levels of economic development, tax systems, labour law regulations and social welfare systems.

In this context, it is important to emphasize that pay rate differences existing among Member States do not constitute an unfair competition when the freedom to provide services is concerned and there should be no obstacle for service providers to profit from a competitive advantage resulting from the differences between the national rates of pay, an advantage which was safeguarded so far by the EU law, including especially the case law developed by the Court of Justice of the European Union.

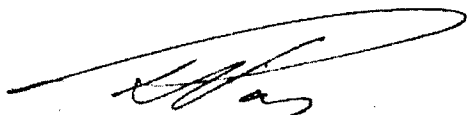
Kind regards,



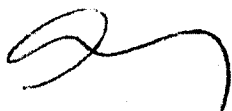
Ivailo KALFIN,
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