

Posting of Drivers

The EU wants to clarify the application of the Posting of Workers Directive in the transport sector

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In 2017, the EU Commission proposed a Directive on posting drivers. Meanwhile, the Council and the EU Parliament have established their positions. This cepAdhoc presents the positions of the three EU institutions, assesses them and makes suggestions for the Trialogue.

- The application of the Posting of Workers Directive in the international transport sector disproportionately restricts the freedom to provide services.
- The Posting of Workers Directive should only apply to cabotage, but not to bilateral transport, cross-trade or transit operations.
- During cabotage, only the statutory minimum wage of the host country should apply.
- The enforcement powers of Member States should be conclusively regulated and kept to an absolute minimum.

1 Introduction

In May 2017, the EU Commission proposed a Directive on the posting of drivers [see [cepPolicyBrief 11/2018](#)].¹ The proposal is part of the mobility package “Europe on the Move”. The proposed Directive aims to clarify the controversial question to what extent the Posting of Workers Directive [96/71/EC]² applies to drivers in the international transport sector. The proposal contains sector-specific provisions which supplement the Posting of Workers Directive and in some cases diverge from it. The proposed Directive is therefore also described as “lex specialis” in relation to the “general” Posting of Workers Directive. In future, the Posting of Workers Directive will only apply to posted drivers if and insofar as the sector-specific Directive does not contain any provisions to the contrary. The EU Council established its position on 3 December 2018. The EU Parliament established its position on 4 April 2019 following long negotiations. Now the informal Trialogue negotiations between the EU Commission, Council and EU Parliament can begin. This cepAdhoc presents the positions of the three EU institutions, assesses them and makes suggestions for the Trialogue.³

2 Background

2.1 Transport categories in the international transport sector

In its proposal, the EU Commission distinguishes between three transport categories:⁴

- **Cross-border transport in the wider sense:** The transport of goods between two Member States (Country A and B), with or without transit through a third Member State (Country C).
In this regard, the Council and EU Parliament are proposing to distinguish between two sub-categories:⁵
 - **Bilateral transport:** The transport of goods between one Member State, in which the transport company is established (Country A), and another Member State (Country B).
 - **Cross-trade:** The transport of goods between two Member States (Country B and C), by a transport company established in a third Member State (Country A).
- **Cabotage:** The transport of goods within a Member State (Country B) by a transport company established in another Member State (Country A) following cross-border transport in the wider sense.
- **Transit:** The transport of goods through a Member State (Country B), in which no freight is loaded or unloaded, by a transport company established in another Member State (Country A).

¹ Proposal COM(2017) 278 of 31 May 2017 for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector.

² 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. Regarding the reform of the Posting of Workers Directive in 2018, see below.

³ This cepAdhoc only looks at the proposed provisions for freight transport. The proposed provisions on passenger transport are not considered.

⁴ Cf. Art. 2 Regulation (EC) No. 1072/2009 of the European Parliament and of the Council on common rules for access to the international road haulage market.

⁵ These sub-categories will be proposed by the Council and the EU Parliament in the current legislative procedure.

2.2 Application of the Posting of Workers Directive in the transport sector

2.2.1 Content of the Posting of Workers Directive

The posting of workers within the EU has been regulated by the Posting of Workers Directive since 1996. Posting within the meaning of this Directive occurs when, for a limited period, a worker carries out his work in a Member State (host country) other than the one in which he normally works.⁶ This is the case, for example, where a worker with an employment contract with a company in Member State A, temporarily works for a branch of the same company in Member State B. However, posting also occurs when an employee of a company established in Member State A, fulfils a service contract in Member State B, which the company has concluded with the recipient of the service in Member State B. The Posting of Workers Directive provides inter alia that the minimum wages prescribed in the host country by law and, in the construction sector, by universally applicable collective agreement, also apply to posted workers.⁷

2.2.2 Reform of the Posting of Workers Directive

In 2016, the EU Commission proposed a reform of the Posting of Workers Directive [see [cepPolicyBrief 35/2016](#)].⁸ It proposed, among other things, that in future, the principle of “equal pay for equal work” would apply. This means that, in future, in all sectors, the wages prescribed in the host country by law or universally applicable collective agreement, will also apply to posted workers.⁹ The EU Parliament and the Council agreed on a corresponding change to the Posting of Workers Directive in 2018.¹⁰ The reformed Posting of Workers Directive [2018/957/EU] must be transposed into national law by the Member States by the end of June 2020.¹¹

2.2.3 General applicability of Posting of Workers Directive to drivers

Generally, the Posting of Workers Directive also applies to workers who are employed as drivers. Therefore, if a driver, who has an employment contract with a transport company established in Member State A, temporarily works for a branch of the same transport company in Member State B, he is currently entitled inter alia to the statutory minimum wage and in future also to universally applicable collectively agreed wages, in Member State B, during this period.

2.2.4 Applicability of the Posting of Workers Directive to different transport categories disputed

Up to now, however, there has been disagreement on the extent to which the Posting of Workers Directive applies to drivers who carry out bilateral transport, cross-trade, cabotage or transit operations.

In Germany, for example, the statutory minimum wage, that was introduced in 2015, was originally intended to apply to all drivers operating in Germany. It therefore also aimed to include all drivers carrying out one of the aforementioned types of transport for a transport company established in another Member State.

⁶ Art. 1 et seq. Posting of Workers Directive.

⁷ Art. 3 (1) (c) Posting of Workers Directive.

⁸ Proposal COM(2016) 128 of 8 March 2016 for a Directive of the European Parliament and of the Council amending 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.

⁹ Previously, collectively agreed wages only applied to posted workers in the construction sector.

¹⁰ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

¹¹ Art. 3 Directive 2018/957/EU.

The EU Commission takes the view that the Posting of Workers Directive and thus the respective national minimum wage is not applicable to all operations by foreign drivers.¹² This would represent a disproportionate restriction of the freedom to provide services. According to the EU Commission, when a driver is only in transit through a Member State, this does not constitute posting. And, in the EU Commission's view, cross-border transport in the wider sense does not always constitute posting either.

In 2015, therefore, the EU Commission instituted infringement proceedings against Germany due to the application of German minimum wage law to foreign drivers.¹³ The EU Commission also brought infringement proceedings against France¹⁴ and Austria¹⁵ because it took the view that these Member States were applying their respective minimum wage law to foreign drivers in a way that disproportionately restricted the freedom to provide services.

2.2.5 Powers of Member States to enforce the Posting of Workers Directive

The Enforcement Directive on Posted Workers [2014/67/EU]¹⁶ stipulates that, with respect to companies that post workers, Member States can provide for all the administrative requirements and control measures as are necessary to enforce the Posting of Workers Directive.¹⁷ The Enforcement Directive provides, for example, that Member States can require companies to register every posting, stating the worker's name as well as the beginning and end of the posting, to submit wage-related documents and to designate a contact person for the domestic authorities. Furthermore, the list of enforcement powers is not conclusive. The Enforcement Directive makes it clear that Member States may also prescribe additional administrative requirements and control measures insofar as this is necessary to enforce the Posting of Workers Directive.

3 Positions of the three EU institutions in the current legislative procedure

3.1 Proposal of the EU Commission

In view of the differences of opinion between the EU Commission and the Member States (Section 2.2.4), the sector-specific Directive proposed by the EU Commission will precisely regulate the conditions under which the Posting of Workers Directive applies to drivers in the international transport sector.¹⁸ The EU Commission proposes that, when applying the Posting of Workers Directive, a distinction should be made between cross-border transport in the wider sense, cabotage and transit.

- **Cross-border transport in the wider sense:** As soon as a driver from a transport company established in Member State A crosses the border to Member State B, Member State B being the departure or destination point of a cross-border transport, the Posting of Workers Directive will apply, with the exception of the provisions on wages and minimum paid annual holiday. The provisions of the Posting of Workers Directive regarding wages and paid minimum annual holiday will only apply where the duration of the cross-border transport in the wider sense, in the relevant host country, is longer than

¹² http://europa.eu/rapid/press-release_IP-15-5003_en.htm

¹³ http://europa.eu/rapid/press-release_IP-15-5003_en.htm

¹⁴ http://europa.eu/rapid/press-release_IP-16-2101_en.htm

¹⁵ http://europa.eu/rapid/press-release_IP-17-1053_en.htm

¹⁶ Directive 2014/ 67/ EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

¹⁷ Art. 9 Enforcement Directive

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0278&qid=1555573167389&from=EN>

three days during one calendar month.¹⁹ In order to calculate the three-day period, daily working hours of less than six hours are deemed to be half a working day and of more than six hours a whole working day, whereby breaks and periods of availability are included as working hours.²⁰

- **Cabotage:** The Posting of Workers Directive will apply.²¹
- **Transit:** The Posting of Workers Directive will not apply.²²

The EU Commission also proposes that the powers of Member States to enforce the provisions on the posting of drivers be conclusively regulated in the Directive.²³

3.2 Position of the Council

The Council differentiates between bilateral transport, cross-trade, cabotage and transit.²⁴

- **Bilateral transport:** The Posting of Workers Directive will not apply.²⁵
- **Cross-trade:** The Posting of Workers Directive will not apply if (1) a vehicle is equipped with a smart tachograph that automatically records border crossings²⁶ and if (2) a driver
 - in addition to a bilateral transport, at the same time undertakes a cross-trade in the Member States through which he is driving, or
 - following a bilateral transport beginning in the company's home Member State and in relation to which no cross-trade has taken place, undertakes up to two cross-trades in addition to a bilateral transport back into the home Member State.²⁷
- **Cabotage:** The Posting of Workers Directive will apply.²⁸
- **Transit:** The Posting of Workers Directive will not apply.²⁹

The Council also takes the view that the powers of Member States to enforce the provisions on the posting of drivers be conclusively regulated in the sector-specific Directive.³⁰

3.3 Position of the EU Parliament

Except as regards cross-trade, the EU Parliament has aligned itself with the position of the Council.³¹

- **Bilateral transport:** The Posting of Workers Directive will not apply.³²
- **Cross-trade:** The Posting of Workers Directive will not apply as soon as (1) drivers have to record the time of a border crossing manually pursuant to the Tachograph Regulation³³ and if (2) a driver

¹⁹ Art. 2 (2) Proposal of the EU Commission.

²⁰ Art. 2 (3) Proposal of the EU Commission.

²¹ P. 12 Proposal of the Commission.

²² According to information from the EU Commission.

²³ Art. 2 (4) Proposal of the EU Commission.

²⁴ https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15084_2018_INIT&from=EN

²⁵ Art. 2 (2) Position of the Council.

²⁶ The question of when vehicles in cross-border transport will have to be equipped with these so-called second-generation smart tachographs, forms the subject matter of the reform of the Tachograph Regulation, which is also currently under way [COM(2017) 277, see [cepPolicyBrief 31/2017](#)].

²⁷ Art. 2 (2a) Position of the Council.

²⁸ Art. 2 (2d) Position of the Council.

²⁹ Art. 2 (2e) Position of the Council.

³⁰ Art. 2 (4) Position of the Council.

³¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2019-0339+0+DOC+PDF+V0//EN>.

³² Art. 2 (2) Position of the EU Parliament.

³³ The question of when a border crossing has to be recorded manually forms the subject matter of the Tachograph Regulation, which is also currently under way [COM(2017) 277, see [cepPolicyBrief 31/2017](#)].

- undertakes a bilateral transport and at the same time undertakes a cross-trade operation in the Member States through which he is travelling, or
- following a bilateral transport beginning in the company's home Member State and in relation to which no cross-trade has taken place, undertakes a bilateral transport into the home member state and at the same time up to two cross-trade operations.³⁴

As soon as new vehicles have to be equipped, under the Tachograph Regulation, with a smart tachograph, which automatically records border crossings,³⁵ these rules on cross-trade will only apply to vehicles that are equipped with these smart tachographs.³⁶

- **Cabotage:** The Posting of Workers Directive will apply.³⁷
- **Transit:** The Posting of Workers Directive will not apply.³⁸

The EU Parliament is also of the opinion that the monitoring powers of Member States should be conclusively regulated in the sector-specific Directive.³⁹

3.4 Overview of the Positions on the Applicability of the Posting of Workers Directive

Transport Category	EU Commission	Council	EU Parliament
Bilateral transport	+	–	–
Cross-trade	Provisions on wages and holiday from 4th day, other provisions from 1st day	– if border crossing is automatically recorded	– if border crossing has to be recorded manually or automatically
Cabotage	+	+	+
Transit	–	–	–

4 Assessment

The law is currently unclear as to the conditions under which the Posting of Workers Directive applies in the international transport sector. The Posting of Workers Directive is therefore applied differently from one Member State to another. This results in legal uncertainty and a great deal of red tape for transport companies that offer their services in the various Member States. It is therefore appropriate to clarify the legal situation in the international transport sector.

The Posting of Workers Directive restricts the freedom to provide services because, in future, it will oblige companies to comply with universally applicable collectively agreed wages and extensive administrative requirements of the host Member State. The Posting of Workers Directive should only therefore be applied in a modified way to the international transport sector.

³⁴ Art. 2 (2a) Position of the EU Parliament.

³⁵ The question of when vehicles in cross-border transport will have to be equipped with these so-called second-generation smart tachographs, forms the subject matter of the reform of the Tachograph Regulation, which is also currently under way [COM(2017) 277, see [cepPolicyBrief 31/2017](#)].

³⁶ Art. 2 (2a) Position of the EU Parliament.

³⁷ Art. 2 (2c) Position of the EU Parliament.

³⁸ Art. 2 (2d) Position of the EU Parliament.

³⁹ Art. 2 (4) Position of the EU Parliament.

4.1 Price Competition

As of mid-2020, under the Posting of Workers Directive, the principle of “equal pay for equal work” will apply to posted workers. In future, therefore, posted workers will not only have to receive the statutory minimum wage but also the wages prescribed by universally applicable collective agreements. This restricts price competition within the EU ([cepPolicyBrief 35/2016](#)) and is particularly true in the transport sector where labour costs are the primary cost factor. The application of the Posting of Workers Directive to drivers in the international transport sector would thus result in a significant increase in the price of transport services as of mid-2020. This will reduce the efficiency of the internal market (see [cepPolicyBrief 11/2018](#)).

The restriction of the freedom to provide services due to the application of the Posting of Workers Directive can only be justified if there is a sufficiently close link between the service and the host country. This depends on the extent to which the service is carried out within the relevant Member State.

In the case of transit, there is certainly no sufficiently close link to the transit country. Neither loading nor unloading takes place in the transit country and thus, strictly speaking, no service is provided at all. It is therefore appropriate that, in future, the three EU institutions expressly want to exclude transit operations from the scope of the Posting of Workers Directive.

In the case of bilateral transport, there is also no sufficiently close link to the host country. Only loading or unloading is carried out in the host country. The departure and destination points of the transport are in different Member States, one of those two states being the transport company’s home country. Thus, only part of the service is carried out in the host country. The application of the Posting of Workers Directive cannot therefore be justified. Consequently, it is also appropriate that - contrary to the EU-Commission’s proposal - the Council and the EU Parliament want to exclude this transport category from the scope of the Posting of Workers Directive completely.

As regards cross-trade operations, the Council and EU Parliament only want to exclude them from the scope of the Posting of Workers Directive if they are accompanied by a bilateral transport. This is unconvincing. Cross-trade operations do not have a sufficiently close link to the Member State in which they take place either, as only either loading or unloading takes place in that Member State. Cross-trade operations should therefore also be excluded from the scope of the Posting of Workers Directive even if they are not accompanied by a bilateral transport. This – in line with the position of the EU Parliament - should apply as soon as the drivers are obliged to record the border crossing manually and not – according to the position of the Council – only when the respective vehicle is equipped with a smart tachograph, which records border crossings automatically. This is because the identification of the transport category is already possible by way of the manual recording of the border crossing together with the loading documents.

A sufficiently close link to a Member State may be said to exist where a transport company provides cabotage operations because this is a purely domestic transport. The entire transport service is carried out within the host country. Foreign transport companies thus compete with all domestic transport companies offering the same services.

Nevertheless, even in the case of cabotage, prescribing the application of wages under universally applicable collective agreements constitutes a disproportionate restriction of price competition. These wages are not at the disposal of the affected employees and employers. Nevertheless, universally applicable collective agreements require, for one thing, a corresponding agreement between the relevant social partners. Even universally applicable collective agreements are thus an expression of the freedom of contract of the relevant social partners. The social partners can therefore agree on a wage level, that ensures the competitiveness of the national transport sector within the internal market.

However, the statutory minimum wage places a limit on this freedom of contract. A statutory minimum wage that is significantly higher than the statutory minimum wage levels in other Member States, is detrimental to the competitiveness of the companies that are bound by this minimum wage. This is particularly true in the transport sector where labour costs are the primary cost factor. Domestic transport companies that have to pay a statutory minimum wage that is up to six times that of the statutory minimum wage in other Member States⁴⁰ will hardly be able to compete with transport companies from these countries. Drivers providing cabotage should therefore be subject to the statutory minimum wage but not to a universally applicable collectively agreed wage that goes beyond that. This should be expressly specified in the new sector-specific Directive.

4.2 Administrative Requirements

Under the Enforcement Directive on Posted Workers, every Member State can prescribe the administrative requirements and control measures expressly specified in the Enforcement Directive and also prescribe additional administrative requirements and control measures where they consider this to be necessary. Posting companies may therefore have to comply with varying administrative requirements in each host country. This red tape may be proportionate where workers are posted to one location for several months. For transport companies, however, whose drivers cross borders between Member States on a daily basis, possibly even several times, the application of the Enforcement Directive results in a disproportionate administrative burden.

It is therefore appropriate that all three EU institutions want to conclusively regulate the powers of the Member States to enforce the sector-specific Directive. The list of the powers of the Member States should not only be conclusively regulated but also defined as precisely as possible and kept to the absolute minimum necessary in order to prevent a disproportionate or even arbitrary burden being placed on foreign transport companies. The declaration of the posting should be as easy as possible. Drivers should only be obliged to carry a copy of the posting declaration. Only the transport companies should be required to submit all the additional mandatory documents for the purposes of monitoring the posting. The transmission of all relevant information and documents should be possible electronically and in English.

5 Recommendations for the Trialogue

In the Trialogue, the EU Parliament, Council and EU Commission should agree on a sector-specific Directive, which removes the existing legal uncertainty about the applicability of the Posting of Workers Directive on drivers and has the least possible impact on the freedom to provide services. We therefore make the following recommendations:

- Like transit operations, bilateral transport and cross-trade should be completely left out of the scope of the Posting of Workers Directive. The Posting of Workers Directive should thus only apply to cabotage.
- During cabotage, the Member States should only be permitted to prescribe the statutory minimum wage.
- The powers of Member States to enforce the sector-specific Directive should be conclusively regulated and kept to the absolute minimum necessary.

⁴⁰ On the range of minimum wages in the EU see: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Minimum_wages,_January_2008_and_January_2018_\(EUR_per_month_and_%25\)_FP18-de.png](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Minimum_wages,_January_2008_and_January_2018_(EUR_per_month_and_%25)_FP18-de.png).