

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 and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (Text with EEA relevance)

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

1 This Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of Directive 96/71/EC.

This Directive aims to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that apply in the Member State where the service is to be provided in accordance with Article 3 of Directive 96/71/EC, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers, and thus supporting the functioning of the internal market.

2 This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and/or practice.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

- (a) 'competent authority' means an authority or body, which may include the liaison office(s) as referred to in Article 4 of Directive 96/71/EC, designated by a Member State to perform functions set out in Directive 96/71/EC and this Directive;
- (b) 'requesting authority' means the competent authority of a Member State which makes a request for assistance, information, notification or recovery of a penalty and/or fine, as referred to in Chapter VI;

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- (c) ‘requested authority’ means the competent authority of a Member State to which a request for assistance, information, notification or recovery of a penalty and/or fine is made, as referred to in Chapter VI.

Article 3

Competent authorities and liaison offices

For the purposes of this Directive, Member States shall, in accordance with national law and/or practice, designate one or more competent authorities, which may include the liaison office(s) as referred to in Article 4 of Directive 96/71/EC. When designating their competent authorities Member States shall have due regard for the need to ensure data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in place appropriate mechanisms in this respect.

Member States shall communicate the contact details of the competent authorities to the Commission and to the other Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.

Other Member States and Union institutions shall respect each Member State's choice of competent authorities.

Article 4

Identification of a genuine posting and prevention of abuse and circumvention

1 For the purpose of implementing, applying and enforcing Directive 96/71/EC, the competent authorities shall make an overall assessment of all factual elements that are deemed to be necessary, including, in particular, those set out in paragraphs 2 and 3 of this Article. Those elements are intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71/EC. Those elements are indicative factors in the overall assessment to be made and therefore shall not be considered in isolation.

2 In order to determine whether an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities, the competent authorities shall make an overall assessment of all factual elements characterising those activities, taking account of a wider timeframe, carried out by an undertaking in the Member State of establishment, and where necessary, in the host Member State. Such elements may include in particular:

- a the place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional licence or is registered with the chambers of commerce or professional bodies;
- b the place where posted workers are recruited and from which they are posted;
- c the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other;
- d the place where the undertaking performs its substantial business activity and where it employs administrative staff;

- e the number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.

3 In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include in particular:

- a the work is carried out for a limited period of time in another Member State;
- b the date on which the posting starts;
- c the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention;
- d the posted worker returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted;
- e the nature of activities;
- f travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement;
- g any previous periods during which the post was filled by the same or by another (posted) worker.

4 The failure to satisfy one or more of the factual elements set out in paragraphs 2 and 3 shall not automatically preclude a situation from being characterised as one of posting. The assessment of those elements shall be adapted to each specific case and take account of the specificities of the situation.

5 The elements that are referred to in this Article used by the competent authorities in the overall assessment of a situation as a genuine posting may also be considered in order to determine whether a person falls within the applicable definition of a worker in accordance with Article 2(2) of Directive 96/71/EC. Member States should be guided, inter alia, by the facts relating to the performance of work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.