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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

on the implementation of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers

1. INTRODUCTION

1.1. The Directive

The free movement of workers is a fundamental freedom of citizens of the European Union and one of the pillars of the internal market. It is enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). This right has been further developed through secondary law, in particular Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. It has also been developed further by the case-law of the European Court of Justice.

Despite a relatively stable and complete set of rules, as confirmed by a number of reports[1], Union citizens may continue to face practical problems in exercising their rights as EU workers. To try to close the gap between the law and its application in practice, on 16 April 2014 the European Parliament and the Council adopted Directive 2014/54/EU on measures facilitating exercise of rights conferred on workers in the context of freedom of movement for workers[2] (hereinafter 'the Directive').

The Directive does not create new substantive rights for workers and/or their family members in addition to those provided under Article 45 TFEU and Regulation 492/2011. It only seeks to achieve more effective and uniform application and enforcement of existing rights.

1.2. The report

In accordance with Article 9 of the Directive, this report discusses the Directive's implementation. Insofar as the available information allows, the report also reflects on the effectiveness of the Directive in practice. In addition, it explores whether any amendment to the Directive is necessary to guarantee better enforcement of Union law on free movement of workers.

The report is mainly based on information about the measures to transpose the Directive that Member States have communicated to the Commission under Article 8 of the Directive. References to the national laws transposing the Directive can be found on the Eur-Lex webpage[3]. The Commission has also consulted the members of the Advisory Committee on the Free Movement of Workers[4] by sending them a detailed questionnaire[5] (hereinafter 'the questionnaire') and, afterwards, the draft report. Where necessary, the Commission also requested clarifications on implementation measures from the members of the Technical Committee on the Free Movement of Workers[6]. It should be noted that the information received varied considerably in terms of content and detail. The Commission has also used information collected by its network of legal experts on the free movement of workers and social security coordination[7].

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[1] See in particular pages 3-4 of the explanatory memorandum of the proposal for a directive https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0236

[2] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32014L0054

[3] http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0054&qid=1525688983864

[4] Committee established under Article 21 of Regulation 492/2011.

[5] The questionnaire focused on the practical implementation of the Directive and its effectiveness. Fourteen Member State governments and four national trade union organisations provided replies (by June 2018).

[6] Committee established under Article 29 of Regulation 492/2011.

[7] http://ec.europa.eu/social/main.jsp?langId=en&catId=1098.

2. TRANSPOSITION PROCESS

In accordance with Article 8 of the Directive, Member States had to transpose the Directive by 21 May 2016.

To help Member States with the transposition, in November 2015 the Commission presented a non-paper explaining the Directive's key provisions in more detail. The implementation of the Directive was discussed at several meetings of the committees mentioned above between 2015 and 2018.

However, by the transposition deadline, only seven Member States[8] had notified measures that completely transposed the Directive.

In September 2016 the Commission started infringement procedures against 12 Member States[9] that had still failed to notify complete transposition of the Directive. In November 2017 the last two countries[10] notified complete transposition. The infringement proceedings were therefore closed.

The Commission is now finalising its analysis of the conformity of national measures to ensure that the Directive is correctly implemented. As part of the ongoing conformity check it is in contact with the Member States on the issues identified in this report.

3. IMPLEMENTATION OF THE DIRECTIVE

The Directive was transposed in a variety of ways. Most Member States made amendments to their national legislation. However, the volume of amendments varied substantially — from one specific act (Malta, Cyprus, Greece, Portugal) to amendments of dozens of legal acts (Lithuania, Romania). Denmark, France, Spain, Italy, the Netherlands and the United Kingdom considered that their national legislation already complies with the Directive and that no further legislative measures are necessary. In Austria and Belgium, the Directive is transposed through acts at both federal and regional levels. No Member State mentioned implementing any of the Directive's provisions through collective agreements.

In general, Member States envisaged non-legislative measures to implement provisions related to, in particular, functioning of the bodies (see 3.3) and/or improving access to (quality) information (see 3.5).

3.1. Personal and material scope (Articles 1 and 2)

Even before adoption of the Directive, Member States had to ensure that their legislation on free movement applied to all categories of people and encompassed all the matters covered by Article 45 TFEU on a non-discriminatory basis. Given that Articles 1 and 2 of the Directive retain the scope of Article 45 TFEU and of Regulation 492/2011, both of which are directly applicable, they did not generate new obligations for Member States in terms of transposition.

[8] FI, DE, IE, IT, MT, NL, SE.
[9] AT, CY, CZ, DK, EE, FR, EL, HU, LT, LU, PT, RO.
[10] CZ and LU.

Nevertheless, both Articles did encourage some Member States[11] to verify that their existing national rules indeed complied with the personal and material scope of the above provisions.

3.2. Defence of rights (Article 3)

All Member States ensure access to judicial procedures enabling Union workers and members of their families to defend their rights conferred by Article 45 TFEU and Regulation 492/2011 when they consider that these have been violated. Mostly, this is ensured through procedural rules on non-discrimination in general that existed even before the Directive entered into force. In some countries[12] there is specific legislation on access to courts by foreign workers. As required under the Directive, there are no limitations on defending violated rights even after the relationship in which the alleged restriction and obstacle or discrimination occurred has ended.

Associations, organisations (including social partners) or other entities that have a legitimate interest under national law in ensuring that the Directive is complied with have a right to engage in judicial and/or administrative proceedings on behalf of or in support of Union workers. This is the case in all Member States except Italy where trade unions appear to be able to engage in proceedings only in case of collective discriminations.

Regarding protection against victimisation, in most countries measures to protect Union workers from adverse treatment or adverse consequences are stipulated in national anti-discrimination laws or employment laws. Only Malta and Cyprus have adopted special provisions on victimisation after transposing the Directive. It appears that in Lithuania and Portugal protection is limited to labour relations only, so it does not protect, for example, jobseekers who potentially may be victimised by public authorities.

Information about the implementation in practice of the provisions of Article 3 is very limited. In reply to the questionnaire, only the reply from Lithuanian trade unions mentioned four cases that have been brought recently before national courts concerning matters covered by the Directive. Estonia referred to two complaints that were dealt with by non-judicial authorities in 2017. They related to certain practices of public institutions on the recognition of professional qualifications and the granting of a right to reside for a family member of a Union national. Germany and Lithuania indicated that there have been cases where organisations have engaged in judicial/administrative procedures to support workers.

The lack of information is explained by the fact that the Directive has been put in place only recently, that free movement bodies (Article 4) have not collected such information yet or that such cases are not grouped on the basis of discrimination against Union workers according to nationality.

[11] For example, AT, BG, CY, LT, MT, RO.

[12] BG and ES.

3.3. Body (or bodies) to promote equal treatment (Article 4)

The Directive is innovative in the way that it obliges Member States to designate a structure/body to promote equal treatment of Union workers and members of their family on the grounds of nationality, as well as to tackle unjustified restrictions and obstacles to their right to free movement.

Designation of a body and performance of the tasks

Since November 2017, free movement bodies have been designated in all Member States, although in France, Italy and the United Kingdom this appointment has not been publicised in line with the requirements of Article 6(1). These Member States have not adopted any legal act implementing the Directive. There is also no mention on the bodies' websites that they are the bodies for the purposes of the Directive or that they carry out the tasks mentioned in the Directive. The list of bodies is made available online by the European Commission[13].

In the vast majority of Member States existing structures have been attributed the role of free movement body, the only exceptions being Germany and Slovenia where a new structure has been established. Regarding the type of body, the remit of equality institutions in 20 Member States has been extended to address issues of discrimination against Union workers and members of their family on grounds of nationality. Labour market authorities (such as public employment or EURES services, and labour inspectorates) and labour ministries are the second most common type of bodies. Atypically, in Austria the federal and regional chambers of labour are among the bodies, while in Sweden it is the National Board of Trade, the country's internal market authority.

Regarding the bodies' tasks, some Member States claim that the body performs all the tasks listed under the Directive even though certain tasks are not explicitly mentioned in the body's statute and there are no concrete examples of the body performing them. Tasks not mentioned include conducting surveys and analysis concerning obstacles to free movement, and making recommendations on any issue relating to unjustified restrictions and obstacles or to discrimination. It appears that in Italy, Latvia, Slovakia and the United Kingdom not all the tasks are included in the responsibilities of the bodies.

Moreover, besides discrimination on grounds of nationality, EU rules on free movement of workers also prohibit unjustified restrictions on or obstacles to free movement. It remains to be seen whether the bodies appointed in implementation of the Directive cover this issue in practice.

[13] http://ec.europa.eu/social/main.jsp?catId=1277&langId=en

As the replies to the questionnaire suggest, the main activities that the bodies carry out in practice coincide with the tasks set out under the Directive. Most countries focus on: (1) providing assistance, mainly consisting of information and legal advice; (2) raising awareness about free movement rights and the activities of the bodies using various information channels; and/or (3) strengthening cooperation with other stakeholders. Some countries[14] use social media applications (or plan to do so) to reach people in need of information.

Best practice in the Netherlands: use of social media applications

In the Netherlands, the Public Information Service replies to questions posed via Twitter, Facebook and WhatsApp.

However, to date information on how often bodies provide legal and/or other assistance is scarce. In reply to the questionnaire, only a few countries[15] provided some indication of how frequently they provide such assistance.

Surveys, analyses or reports on free movement of workers issues have been carried out (or are planned) in only seven Member States[16]. It is important that information on obstacles, restrictions and discrimination is collected, assessed and disseminated publicly. This can not only improve general awareness of rights and the procedures to defend them but also deter other employers and administrations from engaging in such practices.

Best practice in Denmark: Survey on obstacles

In Denmark, the body is conducting a survey of the relevant authorities regarding obstacles/discrimination cases in their field of competence.

The ability to ensure that the tasks stipulated in points a), c) and d) of paragraph 2 of Article 4 are performed independently is a crucial element of the protection of mobile Union workers.

As mentioned above, in more than half the Member States equality bodies are designated as free movement bodies. There are still significant differences between them in terms of their mandate, competences, structures and resources[17].

The bodies' independence is particularly relevant in countries where they are not stand-alone structures that per se would ensure at least some degree of independence. Particular attention has to be paid to the independence of legal assistance provided to persons covered by the Directive. It appears that in Bulgaria, Croatia, Cyprus, Hungary, Latvia, Poland, Slovakia, Spain and the United Kingdom the independence of the bodies can be questioned.

The replies to the questionnaire only point to two bodies[18] that so far have dealt with complaints on free movement.

[14] DE, MT, NL.

[15] DE, DK, EE, HR, MT, SI.

[16] AT, DE, DK, EL, FI, SE, SI.

[17] For more information, see Joint report on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC (COM(2014) 2 final, 17.1.2014) and Report on the application of Council Directive 2004/113/EC (COM)2015)190 final, 5.5.2015.

The Directive requires Member States to ensure free assistance in legal proceedings, on a non-discriminatory basis, to people who lack sufficient resources. In Croatia foreign nationals who temporarily reside there are eligible to free legal aid subject to the principle of reciprocity. France has not provided the clarification requested about how it implements this provision. Only Austria, Estonia, Greece and a trade union in Lithuania pointed to independent assistance in legal proceedings actually being provided.

Proper functioning of the bodies

For the bodies to perform their tasks properly it is important that they are allocated sufficient resources. This is particularly important where the Directive has been implemented by assigning additional tasks to existing bodies (paragraph 1 of Article 4 read in conjunction with recital 18). This issue has been raised with most of the countries. Many countries are facing financial constraints and are trying to 'do more with less'. The bodies' additional workload varies substantially depending on the number of incoming and outgoing mobile workers. Moreover, in some Member States the bodies had been carrying out tasks similar to those under the Directive even before their designation.

Only a few Member States[19] unequivocally mentioned that they had allocated additional resources for the performance of the new tasks.

Best practice in Slovenia: ESF Project

In Slovenia, the European Social Fund project 'Development of services to facilitate the transnational mobility of workers' is helping to strengthen the bodies' capacities.

The Commission will follow up on the cases where the lack of additional resources implies that a body is not in a position to perform the tasks envisaged under the Directive properly.

In 11 Member States several bodies have been designated. It is therefore essential that, as required under paragraph 5 of Article 4, their tasks are adequately coordinated.

Most Member States either have formal rules obliging national authorities to cooperate or provide relevant information to each other, or else nominate one of the authorities as 'coordinating body'. However, in some Member States[20] no such measures seem to have been taken.

[18] DE and LT.

[19] Such as CZ, DE, EL, SE, SI.

[20] For example, AT, LT, PL, SK, UK.

The Directive obliges Member States to ensure that their bodies not only cooperate with bodies in other Member States but also make use of the existing information and assistance services at Union level. These include Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Point of Single Contact. Most replies to the questionnaire confirm that such contacts do take place[21]. However, they seem to be limited and/or to happen ad hoc as there seem to be no concrete procedures or developed practices yet on how cooperation is carried out.

Best practice Germany: Regional cooperation

In Germany, a specific project aiming to improve the procedures in the public employment agencies when dealing with EU citizens and to promote regional cooperation between migration and employment services in the area of access to employment services has been carried out.

Many Member States are working on improving the way the bodies function, trying to address difficulties they face in performing their tasks and building their capacities. This includes drawing up work programmes/strategic plans; setting up partnerships with national stakeholders and bodies in other countries; improving access to information and services; and organising seminars and training for officials to strengthen their expertise in free movement of workers.

3.4. The promotion of dialogue with social partners and NGOs (Article 5)

Member States' legislative frameworks provide for the possibility of dialogue with stakeholders. In many countries, however, such dialogue rarely relates specifically to the free movement of workers (except, for example, in Bulgaria), is not regular or does not explicitly involve non-governmental organisations[22].

3.5. Better provision of information at national level to Union workers and members of their family (Article 6)

Information on free movement rights is available in all countries. However, given the relatively high quality standards established by the Directive (paragraph 2), ensuring that such information is comprehensive, up to date, clear and available in several languages remains a challenge in most cases. In some instances, information is scattered across many national websites, making it difficult to access and fragmented[23]. In many countries the provision of information is still an ongoing process, with new websites being established or existing ones revamped, information leaflets being prepared or information campaigns being conducted.

[21] AT, FI, LV and NL underlined the importance of contacts in particular within EURES, SOLVIT and Undeclared Work Platform activities. Equinet, European Network of Equality Bodies (http://www.equineteurope.org/), in which 18 bodies participate, was also mentioned as a proper platform to build on contacts in particular with bodies in other Member States.

[22] For example in HR, HU, IT, MT, PL, SK, UK.

[23] For example in HR, LT.

Member States should continue making sure that persons concerned are aware of the bodies and the support they provide. This source of information should complement existing platforms, such as EURES advisers[24], SOLVIT[25] and Your Europe Advice[26], which can assist the more than 11.8 million mobile Union citizens of working age who live outside their country of citizenship[27,28]. This information may also encourage mobile citizens to report cases of discrimination and defend their rights.

3.6. Other provisions (Article 7, recitals 15 and 28)

Article 7, paragraph 2 expressly states that Member States have the discretion to extend the competence of the bodies to include non-discrimination on grounds of nationality for all Union citizens and their family members exercising their right of free movement as enshrined in Article 21 TFEU. As mentioned above, in more than half of the countries equality bodies that already covered all Union citizens have been designated as the free movement bodies under the Directive. Some countries[29] have broadened the bodies' competence so that they cover all Union nationals following the implementation of the Directive. Overall, in most Member States the competence of the bodies covers all Union citizens[30].

Recital 15 of the Directive invites Member States to examine the implementation of common principles for injunctive and compensatory collective redress mechanisms, as provided for in the Commission's Recommendation of 11 June 2013[31]. Only three replies to the questionnaire[32] confirmed that such redress mechanisms exist, though it is not always clear whether they cover matters falling under the scope of the Directive. A Commission report of 26 January 2018[33] provides more details about the progress made by Member States in implementing collective redress measures.

In accordance with recital 28, the Commission has also looked into the possible difficulties faced by young graduates looking for employment across the Union and by third-country spouses of Union workers.

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[24] EURES advisers who are available in all Member States provided assistance to Union workers and employers on more than 45 000 occasions in 2016 (http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eures/index_en.htm).

[25] SOLVIT dealt with 34 cases related to the free movement of workers in 2016 http://ec.europa.eu/solvit/

[26] Your Europe Advice provided advice on matters related to work, family rights and welfare benefits in 2016 in more than 2 500 cases http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm

[27] https://ec.europa.eu/futurium/en/system/files/ged/2017_report_on_intra-eu_labour_mobility.pdf

[28] The number of Union citizens living or working in a Member State other than that of their nationality amounts to around 17 million (Eurostat Migration statistics [migr_pop1ctz] 2017).

[29] For example, BG and SI.

[30] Except in DE, DK, HR, LV, SE.

[31] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013

[32] DK, LT and SI.

[33] http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49502

In their replies to the questionnaire, respondents mentioned the recognition of qualifications as the main difficulty faced by young graduates. Other issues raised are not directly related to free movement rules, such as low wages for those who lack experience and a need to have practical skills in order to find a job. Regarding third-country spouses, long processes or excessive administrative requirements (such as an obligation to 'legalise' marriage certificates, and language requirements) in order to obtain visas, residence permits and/or social security numbers, or to obtain access to public services in general, were identified as common difficulties. So were the spouses' lack of knowledge of the local language. Additionally, the complexity of national rules was singled out as an overarching issue.

Some of these difficulties that Union workers face result from the misapplication of EU law by national authorities and/or private entities. This is exactly one of the problems that the Directive aims to address by improving the possibilities for people to defend their rights, making available assistance by the bodies and improving access to information.

4. POSSIBLE AMENDMENTS AND OTHER IMPROVEMENTS

The questionnaire asked Member States' authorities as well as social partners whether they consider that amendments to the Directive (or other legislation on free movement of workers) are necessary. All those who replied stated that no legislative amendments are necessary at this stage and that efforts should be concentrated instead on properly implementing the current regulations. In this regard, the Commission recalls its proposal to establish a European Labour Authority[34], presented as part of the Social Fairness Package on 13 March 2018. The aim of this proposal is to strengthen the fairness of cross-border labour mobility in Europe. Among other objectives, the Authority is intended to facilitate the choice of individuals and employers to exercise their right to free movement by providing more comprehensive and easily accessible information and services. It will also focus on creating better and more efficient conditions to accompany labour mobility in Europe through closer cooperation between national authorities. Likewise, therefore, the Commission does not consider it necessary to propose amendments to the Directive at this stage.

5. CONCLUSIONS

The analysis of national transposition measures reveals that a number of the provisions of the Directive have already been complied with through national instruments that already existed when the Directive entered into force. Legislative amendments in many countries have been limited to transposing Article 4 on the designation of the body to promote equal treatment.

The Directive is already operational and the Commission has not detected major problems of non-conformity among the national transposition measures. However, a lot remains to be done in practice to ensure the Directive's aims are attained. It remains a challenge for many Member States to ensure that tools established under the Directive, such as the bodies, generate results on the ground.

[34] Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (COM(2018) 131 final, 13.3.2018).

Given many countries' delays in transposing the Directive and the relatively short period it has applied in practice, robust conclusions on its impact cannot be drawn at this stage.

Nevertheless, the replies to the questionnaire suggest that the Directive has had a positive impact for all stakeholders. This is mainly because it has provided more legal certainty and clarity for workers, employers and administrations by laying down free movement rights, together with rules for better enforcement. It has also made support by the bodies available to those in need and underlined that correctly implementing EU legislation on free movement of workers is an important task of national administrations.

It is difficult, if possible at all, to assess to what extent the implementation of the Directive has helped raise Union citizens' awareness of their rights regarding free movement. A Eurobarometer survey[35] shows that increasing numbers of citizens are more aware of their rights in the EU. Recent Union initiatives[36] in this field as well as the proposal to establish a European Labour Authority should further help to maximise awareness of the key free movement rights.

The Commission will keep monitoring the implementation of the Directive. In doing so, it will also make use of data gathered in the annual report on intra-EU mobility, which provides an overview of cross-border mobility within the EU and may reveal obstacles to it (see footnote 27). The Commission will continue working with the Member States to ensure that the Directive is completely and correctly transposed and implemented in all of them.

The Commission will support Member States' efforts to implement the Directive properly. In particular it will promote cooperation between the bodies; ensure synergies between existing information and assistance services at Union level; and help Member States to improve the quality of information they provide on national websites and to raise awareness among Union workers of their rights.

[35] http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/chartType/lineChart//themeKy/50/groupKy/268/savFile/867

[36] See also Proposal for a Regulation establishing a single digital gateway to provide information, procedures, assistance and problem-solving services (COM(2017) 256 2.5.2017).