



European Economic and Social Committee
Section for the Single Market, Production and Consumption
Single Market Observatory



THE WORKINGS OF THE SERVICES DIRECTIVE IN THE CONSTRUCTION SECTOR

REPORT

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FOREWORD

The **Services Directive** (2006/123/EC of 12 December 2006) on the liberalisation of services in the Internal Market has had a massive influence on many aspects of cross-border mobility. This is probably one of the most controversial moves in recent EU history, as it triggered a very emotional debate among the broader public and the social partners. The **Posting of Workers Directive** (1996/71/EC), which was adopted before the enlargements to Eastern and Central Europe, is intrinsically linked to the provision of services. This is especially true in the construction sector. On the one hand, against the backdrop of the crises, both Directives have raised fears and stigmatised mobility from "manpower-exporting" Member States ("They're taking our jobs!"). On the other hand, the new rounds of enlargements have brought diversity, new challenges and opportunities within the Single Market. The social dimension of the Single Market – the European Social Model – must however remain the cornerstone of the European Union's identity.

In its opinion on *Developing a people-oriented, grass-root approach to Internal Market policy*¹, the *European Economic and Social Committee* (EESC) stated that "*the services sector in general (...) is where the shortfall in completing the internal market is most acute, but is also exactly where innovation is most needed, with regard not only to the measures but also to the instruments to be applied.*"

The *Single Market Observatory* (SMO) was set up within the EESC in 1994 with the support of the European Parliament, the Council of the European Union and the European Commission. Its role is to analyse how the Single Market operates, identify problems and obstacles and propose solutions from the civil society perspective with a view, in this particular case, to issuing conclusions before the European elections in May 2014.



¹ Opinion CESE 466/2012, [OJ C 143, 22.5.2012, p. 17](#).

1. KEY FINDINGS

The EU should gradually converge towards mutual recognition on a market-by-market basis. Society in general and the construction sector in particular would benefit from a coherent EU-wide strategy to combat international fraud networks. It has become urgent to agree on common definitions at the European level – this is a real challenge, especially with a view to solving long-standing problems. To achieve this objective, a number of steps need to be taken: European minimum standards for inspection services, a European compendium of tax and social concepts and a European social security number should all be adopted. Challenges cannot be properly addressed without institutional strength, ownership and correct implementation, as well as homogeneous social legislation.

Concerning the construction sector, we can highlight the following 10 key findings based on the contributions submitted by the relevant civil society organisations:

- 1 The principle of the country of destination should apply across the board²;
- 2 Competition must be based on quality and a level playing field and not on "social dumping";
- 3 The Single Market rules must be correctly transposed and implemented across the board³;
- 4 To achieve a truly common approach and coherence, we need common concepts and definitions;
- 5 Efficient and effective cooperation between national authorities is crucial;
- 6 Preserving the European Social Model is vital if we want public support and acceptance;
- 7 The card system seems to open practical and practicable options for better monitoring;
- 8 Institutional strength and the appropriate firmness in applying rules and checks⁴ as well as higher fines;
- 9 Genuine cooperation between public authorities and social partners is good governance;
- 10 The principle of subsidiarity must apply, so that Member States can use specific monitoring tools.

2. FINDINGS AND RECOMMENDATIONS

The following synopsis lists problems and shortcomings (findings) and possible solutions (recommendations). The content of the two sides of the tables may not always match.

SHORTCOMINGS (FINDINGS)	PROPOSED SOLUTIONS (RECOMMENDATIONS)
HEADING	
ITEM RELATED TO THE SERVICES DIRECTIVE	
Shortcomings, problems and obstacles highlighted by the various interlocutors in interviews, meetings and publications (12)	Proposals to remedy shortcomings, problems and obstacles
ITEM RELATED TO THE POSTING OF WORKERS DIRECTIVE	
Shortcomings, problems and obstacles highlighted by the various interlocutors in interviews, meetings and publications	Proposals to remedy shortcomings, problems and obstacles (34)

Source (page of the staff working paper where the statement is taken from)

Structure of the synopsis "Findings and recommendations".⁵

² Applying this principle means changing legislation.

³ From the national authorities to the socio-economic actors on the ground. If both Directives were applied correctly, they would reinforce each other.

⁴ From the "name and shame" principle (self-regulation, sectoral codes of conduct) to prosecution and market exclusion. Legal certainty is the bottom line.

SHORTCOMINGS (FINDINGS)	PROPOSED SOLUTIONS (RECOMMENDATIONS)
ADMINISTRATION	
A1 FORM⁶	
A1 forms are prone to fraud. Member States of origin do not verify A1 data or use in the Member States of destination (32)	<i>The verified A1 form to be delivered before work starts</i> <i>To be linked to the card scheme</i>
A substantial number of A1 forms are falsified, or contain errors and go unchecked (99)	<i>Determination of employment status should be the legal responsibility of the country in which the work is done. It must decide whether compliance/monitoring are apparent from the working circumstances and the contractual terms.</i> <i>The card scheme could prove useful in dealing with the risk of fraud</i>
CARD SCHEME⁷	
<p>The data protection issue appears to be problematic (or to be a vicious circle) since it might prevent access to certain pieces of information:</p> <ul style="list-style-type: none"> - The card does not prevent fraud e.g. counterfeiting or duplication (but makes it more difficult); - Has limited advantages, as many posted workers have very short contracts; - Requires computer-based declaration but these are in paper form⁸; - Existing card schemes in the MS have different purposes (35) 	<i>Using ID or a passport could prove to be a practical and practicable fall-back allowing the competent authorities to carry out checks (38)</i>
	<i>The card could contain a standard body of information. Other information would be optional, e.g. the holder's professional qualifications (43)</i>
	<i>Cross-border interoperability of (card) schemes is essential</i>
	<i>Implement the traffic light principle</i>
DECLARATIONS	
45% of all foreign workers without a declaration are found in the construction sector (34)	<i>Make sure that the 10 Member States that do not have a system of prior declaration implement one so that (32)...</i>
Declaration prior to posting does not exist in all Member States (36)	<i>... The declaration of activity can be used everywhere</i>
Correct looking declarations may mask double accounting	<i>Declarations to be in e-format</i>
LEGISLATIVE AND INSTITUTIONAL FRAMEWORK	
The legislative and institutional framework for checks appears to be limited. In other words, is the current legislative and institutional framework likely to solve problems (e.g. related to checks, data protection, the EU's social dimension, etc.)?	

⁵ Staff working paper: see <http://www.eesc.europa.eu/?i=portal.en.events-and-activities-services-directive>. No page indication means that the statement comes from discussions with contributors.

⁶ The A1 form gives proof of posted workers' social contributions status (http://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm).

⁷ FIEC and EFBWW have launched a study of existing card systems with a view to finalising one by June 2014. Sweden has this system already. Denmark and Norway are planning to introduce it.

⁸ This is a case for developing e-public services. Estonia and Austria, among others, could be examples to follow.

COOPERATION	
COMMUNICATION	
Relevant and useful websites are not easy to find, even by means of search engines; national companies and workers are not properly targeted, multilingualism is still not widespread, updates are not always timely, etc. The potential of the web remains therefore largely untapped ⁹ . In line with Article 4 of the Posting of Workers Directive, every Member State runs a liaison office dealing with the posting of workers	Relevant national and European websites should be updated by linking to online information sources in the Member States involved in the movement of posted workers ¹⁰
	Closer cooperation between public authorities (e.g. traffic lights, databases, etc.)
	Involve DG EMPL in information management
	Improve and speed up cooperation through networks between liaison offices and monitoring authorities on site, sharing information and data across institutions and borders (see e.g. SIRS in Belgium and DNLF in France ¹¹). Agreements between public authorities and the social partners are effective measures to be implemented (see the agreement signed on 22 June 2012 in Belgium between the relevant public authorities and the social partners in the construction sector)
COOPERATION	
Cooperation between public authorities is insufficient. The IMI ¹² and SOLVIT networks considered to be underused (40)	
Cooperation between economic operators and public authorities is key to addressing certain issues decisively (27)	Update of information on national requirements through cooperation between individual Points of Single Contact (PSCs) (46)
e-GOVERNMENT	
Disparity between Member States in terms of implementing e-government solutions	Implement fast, user-friendly (especially SME-friendly), multilingual and cheaper e-government solutions, harnessing the full potential of ICT (32)
Certain promising e-government solutions have turned out to be inefficient ¹³	
INTERNAL MARKET INFORMATION SYSTEM (IMI)	
IMI system possibly underused (75)	Make better use of IMI to communicate more rapidly and effectively ¹⁴
MUTUAL EVALUATION	
Mutual evaluation too burdensome for public authorities	Weigh up advantages of the mutual evaluation procedure and the consequent burden

⁹ See the following websites on practices such as bogus self-employment: <http://www.stopsocialdumping.eu/> and <http://www.faire-mobilitaet.de/>.

¹⁰ See the EFBWW/FIEC joint website on the posting of workers: <http://www.posting-workers.eu/>

¹¹ <http://www.emploi.belgique.be/sirs.aspx> and <http://www.economie.gouv.fr/dnlf>.

¹² See http://ec.europa.eu/internal_market/imi-net/. The Internal Market Information system (IMI) is a communication and information tool for public authorities, with a view to exchanging best practices in the implementation of the Directive (see Regulation (EU) 1024/2012). This covers services, the posting of workers and professional qualifications, among other areas.

¹³ This is said of the once highly-commended Simplex system in Portugal, which suffers from a lack of resources.

¹⁴ See EESC opinion CESE 1848/2011, [OJ C 43, 15.02.2012, p. 14](#).

MUTUAL RECOGNITION	
Mutual recognition of accreditations and authorisations issued on the basis of sector-specific EU directives (F-gases, energy performance of buildings, waste-related activities, etc.)	
POINTS OF SINGLE CONTACT (PSCs) ¹⁵	
PSCs are underused and little known and Information on how to contact PSCs is insufficient (46)	<ul style="list-style-type: none"> • A single EU portal would be helpful (this could help overcome the potential problems resulting from the disparity of competences and approaches – especially in relation to health and safety at work – or standards – for example concerning technical equipment such as cranes, large construction machinery, homologation, licences, etc. – at national level); (32) • PSCs should not only be online but also have a physical presence; • EU-wide promotion campaign
Problems with the workings of the PSCs include proof of identity, use of e-signatures etc. (75)	Improve information on the temporary provision of services and on technical aspects
PSCs insufficient to provide qualitative assistance and adequate service (75)	<ul style="list-style-type: none"> • Make a selection of the information that is really needed, e.g. providing appropriate and comprehensive information on national labour rights and tax arrangements (especially re VAT); (75) • Ensure that PSCs are genuine transactional platforms for completing procedures, thereby going far beyond passive information provision; • Improve user-friendliness and cut red tape (within PSCs and in terms of shortening procedures in general)
Vary from one Member State to the next (35)	PSCs must equal administrative simplification (75)
	PSCs must provide information on employment and social legislation in the various Member States
Awareness-raising and information campaigns are not taking place in line with the Services Directive ¹⁶ (81)	Dialogue and exchange of best practices between Member State PSCs on an equal footing in all Member States
	Timely information campaigns involving relays such as Chambers of Commerce;
Different sources coexist where a single portal (i.e. the ideal PSC) would provide obvious added value by making life easier for all parties (82)	Increase consistency between policies and outcomes or consequences on the ground
	Implement the "one-stop shop" concept throughout the process
Lack of multilingualism, whereas PSCs are supposed to facilitate cross-border activities (82)	At least English should be an option, but multilingualism would allow for a wider audience
	Member States to sign a "PSC Charter" with quantitative indicators (84)

¹⁵ http://ec.europa.eu/internal_market/eu-go/.

¹⁶ Eurochambres pointed out the lack of synchronisation between the implementation of the Directive and information campaigns in certain Member States.

REGIONAL AND LOCAL AUTHORITIES	
	Involvement of regional and local authorities in EU projects through administrative cooperation (76)
SOLVIT	
SOLVIT underused ¹⁷ (78)	More staff and a higher budget
	Better communication and information (including multipliers and media)

LABOUR MARKET	
MOBILITY	
Obvious social dumping has a negative impact on the EU's image (35)	Awareness-raising campaigns targeted at workers, to inform them about the framework conditions before they sign an employment contract
Revival of suspicion towards non-nationals, to the detriment of the primacy of law (35)	
OCCUPATIONAL ACCIDENTS	
The definitions of work accidents vary between Member States. This has an impact on the level of compensation and on certain national health systems	
POSTING OF WORKERS	
Declaration prior to posting does not exist in all Member States (36)	Create a database making it possible to track workers – IMI could be further developed to deal with this
Proof of qualifications is not compulsory in all Member States ¹⁸	An EU approach is needed
Belgium regulates interim agencies while other Member States do not (33)	Advertising illegal practices through interim agencies must be forbidden (33)
	Posted workers should be duly informed about the relevant legislation in the country of destination (44)
There is no such thing as a posted self-employed worker (this is a contradiction in terms) (20) ¹⁹	
SOCIAL DUMPING	
Social dumping is often "defined" according to one's own perception. Generally speaking, it is understood to create a situation where low-cost workers from a different Member State take the jobs of nationals. The European Commission describes the practice as a situation 'where foreign service providers can undercut local service providers because their labour standards are lower' ²⁰	"The sensitive balance between the freedom to provide cross-border services and the need for effective instruments to monitor and enforce labour standards in the host country, embodied in the final agreement on the Services Directive" must be maintained ²¹

¹⁷ See EESC opinions on IMI (CESE 1848/2011, [OJ C 43, 15.2.2012, p. 14](#)). See also the EESC opinions on the SMA (CESE 525/2011, [OJ C 132, 3.5.2011, p. 47](#), CESE 1583/2011, [OJ C 24, 28.1.2012, p. 99](#), CESE 1575/2012, [OJ C 299, 4.10.2012, p. 165](#), CESE 2039/2012, [OJ C 76, 14.3.2013 p. 24](#)) pointing at the fact that SOLVIT is under-staffed and lacks resources. SOLVIT is generally invisible (many civil society organisations and local Chambers of Commerce for example are fully unaware of its existence).

¹⁸ It is compulsory in France and Poland.

¹⁹ EESC opinion CESE 2063/2012, [OJ C 161, 6.6.2013, p. 14](#).

²⁰ <http://ec.europa.eu/social/main.jsp?catId=471>. M. Bernaciak, in "Social dumping: political catchphrase or threat to labour standards?", p. 40 (2012), suggests that "Social dumping can be defined as a strategy geared towards the lowering of social standards for the sake of enhanced competitiveness. It is prompted by companies but indirectly involves their employees and/or home and host country governments, and has negative implications in the social sphere."

²¹ <http://www.euractiv.com/socialeurope/business-backs-commission-dispat-news-218283>.

Whatever the definition of social dumping may be, there is a widespread perceived threat to the European Social Model and therefore dwindling support for EU integration (15, 25, 76, 104)	Article 3 TFEU and the Charter of Fundamental Social Rights must be implemented
Often, the jobs taken by foreign workers are precisely the ones nationals would not want to do and so this "taking our jobs" argument is largely polemic and populist	Endeavour to reconcile market freedoms and fundamental social rights
	Explore the idea of a 'European Social Interpol', supporting the activities of the labour inspectorates of the various Member States ²²
What is the function/position of the Social Charter in the Single Market? What about the social dimension of the EU's public order?	
SOCIAL SECURITY	
Although social security is excluded from the scope of the Services Directive, is it not "a politically impossible task to get Member States to implement services legislation without EU-wide harmonisation of social security, pay and conditions, etc.?"	Proper application of Regulation 883/04 (coordination of social systems) (11)
	Setting up a European compendium of tax and social concepts (26)
	Create a European social security number
Circumvention of rules and social obligations is widespread and leads to distortions in the construction market	Implement mechanisms aiming at enforcing conditions in the host country ²³

LEGISLATIVE ASPECTS

SELF-REGULATION

Self-regulation has proved useful and efficient in a number of sectors such as advertising or alcoholic beverages. It also allows for the type of flexibility and reactivity that legislation lacks. However, self-regulation in the construction sector seems difficult in view of the current characteristics of this sector	There are certainly lessons to be learnt from such schemes which basically require a "climate change" in terms of political courage and "positive self-determination" (28)
	Enforced self-regulation can be an option
Laws adapt slowly to new developments (e.g. away from a public-run economy to a private-run one)	Self-regulation is more reactive (and participative)
	A European code of conduct based on best practices would help set standards e.g. on the information/data to be supplied (44)
	Proper implementation and enforcement of existing legislation would be sufficient also in terms of the responsibility of the different relevant actors

SMEs

Pressure on SMEs (and very small enterprises) in the construction sector with long-time employees through low-cost workers from Eastern Member States (except in regulated professions such as funeral services)	
Excessively high social costs pave the way to fraud (35)	

²² The Enforcement Directive mentions the EESC's proposal from its opinion CESE 970/2010, [OJ C 44, 11.02.2011, p. 90](#).

²³ This implies that the Directive would need to be amended.

Do not access cross-border markets (language, insurance, etc.)	
Complexity of national labour laws and European legislation	<i>The EESC has repeatedly advocated applying the principles of Smart Regulation²⁴</i>

MISUSE	
ABUSIVE PRACTICES	
In certain extreme cases, workers are exploited, live in extreme poverty and are at times simply not (fully) paid so as to retain them on the building site (27)	<i>"Awareness-raising and codes of conduct; rotation of staff; strict observance of the 'four eyes' rules; clear regulations on sponsoring and the prohibition on accepting gifts; establishing centralised authorities for tender/awarding; precise description of the tender and control of estimates; organisation of tender procedures, including secrecy of bids and prevention of belated manipulation of the bids; increased use of e-procurement; documentation of adjudication and careful control by supervisory bodies; exclusion of enterprises found guilty of corruption offences and establishing black lists/corruption registers"²⁵</i>
BOGUS SELF-EMPLOYMENT	
<p>Huge variety of national definitions of self-employment. Cross-border abuses of the status of self-employed worker are difficult to assess and prosecute (99)</p> <p>Self-employment exists when it is established that the activities are being carried out:</p> <ul style="list-style-type: none"> • Outside any relationship of subordination concerning the choice of that activity; • Outside any relationship of subordination concerning the choice of conditions of remuneration, working under that person's own responsibility; • In return for remuneration paid to that person directly and in full. <p>While several Member States have already attempted to come up with a precise definition of the difference between employees and self-employed people, based on a set of criteria laid down in advance, the complex variety of people's actual situations means that, in practice, it has often proven difficult to produce such a definition</p>	<p>Establish a set of common European criteria, which would provide guidelines for determining the nature of the employment status. Respect the principle of subsidiarity. The 2006 ILO recommendation takes a broad approach to the concept of "employment relationship" to allow action against bogus self-employment (100)</p> <p>In determining whether or not there is an employment relationship, the primary focus should be on the facts concerning the activities and the remuneration of the employee, irrespective of how the relationship is characterised in, for example, contractual terms (100)</p> <p>The EESC calls for:</p> <ul style="list-style-type: none"> • Data-gathering on so-called "economically dependent self-employed work" in the EU; • Identifying common aspects in the definitions of employed persons in different EU Member States; <p>Promoting studies permitting a detailed analysis of national experiences, particularly in cross-border areas.²⁶</p>
A hidden employment relationship exists where the employer treats a worker in such a way as to conceal his or her true legal status as an employee, and where contractual terms can have the effect	<i>Reliable regulation and a definition of bogus self-employment would help bona fide self-employed and micro businesses. Bogus self-employment should be combated through better registration and</i>

²⁴ See EESC opinions CESE 1068/2005, [OJ C 24, 31.1.2006, p. 39](#) and CESE 984/2011, [OJ C 248, 25.8.2011, p. 87](#).

²⁵ European Commission anti-corruption report: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

²⁶ See EESC opinion CESE 639/2010, [OJ C 18, 19.1.2011, p. 44](#).

of taking away the protection to which employees are entitled (100)	<i>monitoring of the real position in the labour market</i>
Some schemes set up in Member States to develop entrepreneurship may distort competition for genuine self-employed, micro businesses and SMEs (101)	<i>It is important to carry out an impact assessment for all these categories</i>
	<i>Consideration should be given to how employees who become genuinely self-employed can benefit from joint facilities, including social security systems and pension schemes</i>
FRAUD	
Fraud through circumventing national employment laws (undeclared work or bogus self-employment) (76) ²⁷	<ul style="list-style-type: none"> - Prosecution - More efficient, flexible and simple framework for overtime in the construction sector; - Systematic use of invoices for construction materials; - Identification badge on building sites (see also the card scheme); - Departing from the sole criterion of the lowest bid in public procurement; - Linking public databases and the fight against fraud; - Pairing the reduction of social and fiscal charges with adequate alternatives to ensure budgetary balance; - Fostering sustainable construction and tax rebates (26)
The relative impunity of companies (in which the multinational market plays a major part) leads to a dismantling of the social fabric	
The nearly "sanction-free" environment in which fraud thrives is a real problem ²⁸ (31)	<i>"Name and shame" using the VIES database as a tool for choosing a subcontractor (32)</i>
	<i>Higher fines to discourage fraud</i>
	<i>Exclusion of convicted fraudulent firms from the market place²⁹ (27)</i>
FRAUDULENT COMPANIES/BEHAVIOUR	
Fraudulent firms move from member State to Member State, fleeing from possible prosecution	<i>Home country has a responsibility for putting an end to illegal activities</i>
	<i>Bad companies MUST be banned from the market. Fraud is an exclusion criterion</i>
Deficient law enforcement at national and cross-border level	<i>Proper enforcement of the law is a core issue</i>
Established cases of withdrawal of workers' passports and cases where only part of the wages is paid to retain workers on site (41)	Prosecution
The Posting of Workers Directive focuses on the "country A vs. country B" aspect and does not take into account the complexity of multiple State fraudulent companies (37)	

²⁷ See <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2055&furtherNews=yes>.

²⁸ E.g. the ridiculously low EUR 25 fine applied in Belgium per worker who is exploited...

²⁹ As is implemented in Austria, for example.

PRACTICAL ASPECTS	
CONSUMERS	
Consumer organisations did not show any particular interest in the EESC survey, despite the fact that construction processes and materials are potentially hazardous for third parties, both during work and after completion	
Consumers' responsibility in determining the terms of the contract	
INSURANCE	
Long-standing problem of insurance for companies (especially SMEs) operating in another Member State ³⁰	
INSURANCE OBLIGATIONS³¹	
Possible grey areas as far as professionals from other Member States are concerned (e.g. Poland)	
LATE PAYMENT	
The construction sector (and particularly SMEs) is under intense pressure due to late payments both by private and public clients	<i>Implement the Late Payment Directive (2011/7/EU) properly</i>
	<i>Monitoring and action by trade associations (private sector) and government (public sector)</i>
	<i>Member States with shorter deadlines must not extend them (the Directive does not forbid extending payment deadlines)</i>
LIABILITY	
There is a tendency to transfer risks down the line. Belgium for instance imposes liability on the main contractor (31)	<i>The Council and the European Parliament agreed on the liability of the contractor and the next subcontractor or to replace it, as appropriate, with equivalent measures (18)</i>
Due to intense competitive pressure, complexity and lack of transparency, liability and responsibility are diluted – especially along the cascading structure of companies (41)	<i>Subcontractor liability in particular (Article 12) was considered by France, among other Member States, to rank high on their wish list (ahead of the 09.12.2013 agreement on the Enforcement Directive), as a principle to be binding on the construction sector so as to thwart sophisticated fraudulent strategies (32)</i>

³⁰ See the European Commission's ELIOS Project (DG ENTR), which analyses how a reference system could support (re)insurers in the risk appraisal in a compatible way with the Internal Market objectives (<http://www.elios-ec.eu/en/introduction>). On 31 March 2014, the European Commission adopted a Staff Working Document (SWD) on access to insurance: http://ec.europa.eu/internal_market/services/services-dir/implementation/2012-communication/index_en.htm.

³¹ European Commission Staff Working Paper due in the first half of 2014. This refers to art. 23, § 1, of Directive 2006/123/EC and concerns activities that present a safety or health risk basically implying professional liability.

PUBLIC PROCUREMENT ³²	
Owners or contracting authorities always in search of the cheapest bid leads to fraud (35)	Lowest bidders should face extra requirements (or burden of proof) (38)
Certain larger building companies have moved towards being project management firms targeting a cheap and therefore less-qualified workforce so as to win tenders (28)	Promote the "Most Economically Advantageous Tender" together with a consistent approach to the rejection of abnormally low bids (60)
	Public procurement packages are often unnecessarily big. This prevents SMEs from being main contractors and limits competition too much

SERVICES IN THE SINGLE MARKET	
CONTROLS	
Exhaustive inquiries are necessary to trace back fraud (35)	Create an EU Labour inspection agency to assist Member States in dealing with cross-border fraud and provide case-based stimuli for the legislator while improving cooperation between national authorities (especially with those Member States that have structural problems)
	Or, opt for enhanced cooperation between national Labour Inspectorates so as to bypass such complex issues as national competences and sovereignty
Subsequent problems such as language, lack of documents on sites, proof of employment, etc. (35)	Look at the Belgian LIMOSA system ³³ when considering a system for information exchange and better controls
Transnational operators are active in a heterogeneous legal environment due to diverging national laws (35)	An EU wage document would be helpful if it was based on a database allowing Member States to check the veracity of data
Upstream cooperation (including the social partners) and anticipation still lacking, esp. in view of the importance of fraud	"Name and shame" using the VIES database ³⁴ as a tool for choosing a subcontractor (32)
Cooperation between national authorities including training schemes to be further developed especially due to diverging legal systems and references	The declaration of activity should be used everywhere (32)
Control instruments or organs are under-staffed and overrun while <i>bona fide</i> companies disappear from the market (31)	Member States should be allowed to apply current and additional monitoring measures or administrative formalities which are deemed to be effective and necessary – while avoiding "gold-plating"
The more complex the tasks, the more resources are needed	Look into new monitoring measures or formulas in conformity with the Directives

³² See EESC opinions CESE 979/2008, [OJ C 224, 30.8.2008, p. 32](#), CESE 416/2007, [OJ C 161, 13.7.2007, p. 40](#), CESE 1162/2011, [OJ C 318, 29.10.2011, p. 113](#).

³³ The LIMOSA declaration covers the posting of workers, services, the self-employed, i.e. cross-border labour in general.

³⁴ The EU VAT database: http://ec.europa.eu/taxation_customs/taxation/vat/traders/vat_number/index_en.htm. This would mean a paperless environment, user-friendliness (with e.g. red/green light) and national public administrations (e.g. Labour Inspectorates) being in charge of back office procedures.

IMPLEMENTATION OF THE SERVICES DIRECTIVE	
Fragmented interpretation and inadequate implementation of the Services Directive	<i>Effective enforcement – a smart and fast way of creating growth without public spending</i>
	<i>Consistency between peer review (under the Services Directive) and mutual evaluation (under the Professional Qualifications Directive)</i>
	<i>Identify areas where MS are disproportionately blocking access to certain professions</i>
	<i>Opt for mutual recognition when harmonisation does not apply</i>
	<i>Learn from border regions. Cross-border cooperation often provides valuable down sized example of how the Single Market can actually work.</i>
	<i>Fast track infringement procedures to be set up when breaches of the Directive are identified</i>
Service providers suffering from unjustified discriminatory practices (nationality, place of residence)	<i>Member States to enforce Article 20(2) of the Services Directive</i>
Inadequate cross-border coverage of insurance for service providers	<i>Dialogue between stakeholders³⁵</i>
	<i>The provisions of the Directive must be properly applied and enforced on the ground ("act as agreed" principle)</i>
The decision to abolish certain restrictions (Article 15 and 16), which may in some limited cases be justified under the Services Directive for an overriding reason of general interest, is left to Member States to take - grey areas/protectionism (83)	<i>Governments and responsible authorities must conduct a proper proportionality analysis for national rules and authorisation schemes</i>
	<i>A voluntary approach has its limits and it might be more helpful to further clarify the concepts of "proportionality" and what exactly constitutes an "overriding reason of general interest"</i>
	<i>Open debate on the proportionality analyses that have been carried out and the degree to which Member States have used their room for manoeuvre and kept certain restrictions which are at the very least questionable</i>
	<i>Member States must always respect the substance of a Directive or Regulation, avoid ambiguities and refrain from adding additional requirements (i.e. "gold plating"), which could lead to additional unnecessary costs for businesses</i>
Although its scope is broad, the Services Directive does not cover a whole series of important requirements that directly affect services providers	<i>The Commission should carry out further in-depth analysis of the practical functioning, including remaining problems and barriers of services markets in general and the real needs that exist on the ground (83)</i>
	<i>This analysis should also take into account all relevant areas not dealt with by the Services Directive, such as professional qualifications, posting of workers, the e-commerce Directive, consumer protection rules regarding the applicable law (the</i>

³⁵ See footnote 30.

	Rome 1 and Rome 2 Regulations ³⁶) or the jurisdiction of courts (the Brussels I Regulation) (83)
	Adopt a truly integrated approach to services in Europe (83)
Lack of pressure on the Member States to make progress (consistency, convergence, common public interest, etc.)	Reintroduce the formal reporting which the Commission (DG MARKT) provided (in 2009 and 2010) through regular detailed public "information notes" to the Competitiveness Council (and the European Parliament) on "the state of implementation of the Services Directive" (83)
	The recalibrated reporting should focus on the broader topic of the state of the Single Market for services (84)
	Beyond quantitative implementation data, it should also take into account the real results / functioning of services markets on the ground, as well as the barriers and problems faced by businesses and consumers, also to create more transparency on the outstanding issues and better benchmark the progress made (84)
Lack of a true Single Market perspective across the board (i.e. services covered by the SD and those that are outside its scope ³⁷)	Integrated approach to services in the Single Market through a horizontal instrument (83)
	Need for consistency with other EU directives and initiatives (integrated or holistic approach) (84)
MARKET SURVEILLANCE	
Nearly "sanction-free" environment facilitating fraudulent or criminal practices	Exclusion from the market place (27)
	Higher fines and sanctions (19)
The extreme complexity of the market makes it difficult for public authorities to control and easy for fraudulent firms to bypass laws or to escape any form of responsibility or liability	Deal with the pressing issue of multi-State hiring agencies (46)
Diffuse correlation between the regression of public presence (e.g. due to lack of resources or political commitment ³⁸) in areas where it was always expected to be providing directions and the deterioration of the general working, living and business conditions	Visibility of the public hand together with better cooperation between administrations at national level and cross-border (26)
	Development of e-government solutions

³⁶ http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16027_en.htm.

³⁷ Private security services, urban transport, taxi services, healthcare, social services and temporary employment agencies' services. Attention is also drawn to other issues such as the lack of recognition of professional qualifications, the number of regulated professions and specialisations, double insurance and the lack of mutual recognition as well as conflicting national standards.

³⁸ E.g. decrease in the number of labour inspectors, of public service contact points, etc. Basically the principle of "ever-fewer people to do an ever-more complex job" applies.

REGULATED PROFESSIONS³⁹	
The European Commission's stance on facilitating access to regulated professions (i.e. a form of deregulation) would jeopardize a number of sectors of activity, including the construction sector	<i>Regulating means bringing about a high degree of control (29)</i>
It could also lead to the blurring of professional boundaries and responsibilities, which will tend to undermine public confidence in service providers	
Beware of deregulation in certain sectors, including construction	<i>Effective implementation of the new Directive for the Recognition of Professional Qualifications</i>
Regulated professions vary between member States (38)	
SERVICES IN THE INTERNAL MARKET	
Absence of an integrated market for services explains part of the divergence in productivity between the US and the EU over the last 20 years	<i>Lower the barriers created by the costly patchwork of national regulations (78)</i>
Services markets tend to be heavily regulated. There are also significant divergences between national regulations that hamper cross-border service provision	
Failure of service providers to implement new organisational methods that maximise ICT benefits	
The Directive leaves governments with too much discretion to decide what constitutes a barrier to establishment or a barrier to the provision of services across borders. They can label such barriers 'proportionate' (78)	<i>The mutual evaluation exercise should become a permanent review of the services regulation to encourage regulators to get rid of superfluous rules and trust each other's rules</i>
Dysfunctions in the services markets impair the euro's capacity to absorb shocks and the proper functioning of monetary union (79)	
Barriers in services are more numerous than in goods, tradability is low and selective while SMEs may have a problem with the freedom of establishment (79)	
The removal of intra-EU barriers critically depends on the abolition or reform of the domestic services regulation (79)	<i>This implies deep domestic services reforms resulting in more competitive and better-functioning services markets everywhere, which are essential and far more important for EU growth than exposure to trade in cross-border intra-EU services for example.</i>

³⁹ See also the European Commission's transparency exercise on access to regulated professions: http://europa.eu/rapid/press-release_IP-13-897_en.htm?locale=en.

Services suffer from regulatory disparity or variation between Member States ⁴⁰ (79)	
The gains from completing a fully-fledged EU internal market for services (that is, far beyond the horizontal services directive) are still not fully understood (79). Reaping the gains from better-functioning services markets is not always just a matter of greater competition (80)	<p><i>In financial services, no new estimates seem available yet, whilst in network industries there are only some ad hoc attempts (pointing to fairly substantial gains); in professional services no reliable estimates are available. In all three of these areas, there is no such thing as a genuine single market, which is suggestive of considerable further gains; the manifold economic gains from the services Directive are beginning to be understood only now and the medium- as well as longer-term gains almost certainly add up to several percentage points of EU GDP, if not more. Adding to the long-neglected benefits of less regulatory heterogeneity in services, gains are much higher still</i></p>
Internal Market rules not being fully implemented ⁴¹ - deficient implementation/ administrative and procedural burdens hamper cross-border service provision for professionals (97)	

⁴⁰ "This 'regulatory heterogeneity' can be very costly to business with a European focus – for every country, fixed entry costs will be incurred separately, which will have to be earned back before the investment and entry become profitable. Such recurrent fixed entry costs are extremely discouraging for services SMEs and at the very least not a help for many other providers. (...) A limited reduction of regulatory heterogeneity in the OECD already yields substantial increases in incoming FDI". CEPS Special Report no. 67, p. 17.

⁴¹ See the SMO's Catalogue of Obstacles to the Single Market, <http://www.eesc.europa.eu/?i=portal.en.publications.24626>.

APPENDIX

OBJECTIVES AND METHODOLOGY

The EESC wishes to give a realistic picture of the state of affairs and of the instruments (either currently available or still to be developed) that are needed to resolutely remedy shortcomings. These findings are based on⁴²:

- The evaluation of relevant documents and data from various sources (institutions, media, academia, social partners, interest groups, think tanks, etc.);
- The evaluation of the interviews carried out by a delegation of EESC members⁴³ with social partners in the construction sector and the public authorities in 6 Member States (Belgium, France, Germany, Poland, Portugal and Romania) and with Brussels-based European social partners, institutions and think tanks;
- Relevant EESC opinions.

For various reasons⁴⁴, there may be divergences between the perceived shortcomings and the exact situation on the ground (some might rightly be tempted to say we are dealing with a moving target!) but the report aims to provide a number of potential solutions for policy-makers to choose from.

THE DIRECTIVES IN A NUTSHELL

Purpose of the Services Directive (2006/123/EC)	Purpose of the Posting of Workers Directive (96/71/EC)	Purpose of the Enforcement Directive (COM (2012) 0131) ⁴⁵
Facilitate the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. Simplify administrative procedures Remove discriminatory, redundant or disproportionate requirements Strengthen administrative cooperation between Member States Strengthen consumer rights	Enable the cross-border free provision of services while guaranteeing that the rights and working conditions of posted workers are protected throughout the European Union;	Enable a better and more uniform implementation, application and enforcement of Directive 96/71/EC, including measures to prevent and sanction any abuse or circumvention of the applicable rules. Ensure respect for an appropriate level of protection of the rights of posted workers, especially enforcement of the terms and conditions of employment that apply in the place where the service is to be performed, while facilitating exercise of the freedom to provide services for service

⁴² The evaluation of the replies to the questionnaire will be added to the report as an appendix at a later stage.

⁴³ Members of the *Single Market Observatory*: Ivan VOLEŠ, Ulrich SCHRÖDER (Group I), Christoph LECHNER, Martin SIECKER, president of the Section for the *Single Market, Production and Consumption* (INT, both Group II), Jorge PEGADO LIZ (Group III). Members of the *Labour Market Observatory* (LMO): Ana BONTEA (Group I), Denis MEYNENT (Group II, vice-president of the LMO), Eugen LUCAN (Group III).

⁴⁴ Reported problems may be the expression of certain economic interests, national contexts vary, etc.

⁴⁵ The European Parliament, Committee on Employment and Social Affairs, voted the Report on 18 March 2014. See also footnote 50.

providers and promoting fair competition between service providers.

THE SERVICES DIRECTIVE

This Directive establishes a **general legal framework promoting the exercise of the freedom of establishment for service providers and the free movement of services**. It is based on the following four pillars:

- To ease freedom of establishment for providers and the freedom of provision of services in the EU;
- To strengthen the rights of recipients of services as users of the latter;
- To promote the quality of services;
- To establish effective administrative cooperation among the Member States.

The Directive establishes a general legal framework for any service provided for economic return (with the exception of excluded sectors) while taking the specific nature of certain activities or professions into account. This Directive covers a wide group of service activities which account for around 40% of the EU's GDP and employment.

It covers sectors such as **construction** and craft industries (...), the majority of **regulated professions** (lawyers, architects, engineers and accountants, for example).⁴⁶

Article 17⁴⁷ of this Directive states that **Article 16** ("*Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory*") **shall not apply to (...) matters covered by Directive 96/71/EC** (the Posting of Workers Directive).

THE POSTING OF WORKERS DIRECTIVE

In the construction sector, the core conditions laid down in collective agreements and by laws apply.⁴⁸

- (a) Maximum work periods and minimum rest periods;
 - (b) Minimum paid annual holidays;
 - (c) The minimum rates of pay*, including overtime rates;
 - (d) The conditions for the hiring-out of workers, in particular the supply of workers by temporary employment undertakings⁴⁹;
 - (e) Health, safety and hygiene at work;
 - (f) Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
 - (g) Equality of treatment between men and women and other provisions on non-discrimination;
- * For the purposes of this Directive, the concept of minimum rates of pay is defined by the national law and/or practice of the Member State to whose territory the worker is posted;

⁴⁶ Other areas are retail trade, business services (office maintenance, management consultancy and publicity for example), tourism, real estate services, and private education.

⁴⁷ Article 17.6 says that Article 16 shall not apply to "*matters covered by Title II of Directive 2005/36/EC as well as requirements in Member States where the service is provided which reserves an activity to a particular profession*".

⁴⁸ <http://ec.europa.eu/social/main.jsp?catId=471>.

⁴⁹ See Directive 2008/104/EC on temporary agency work.

THE ENFORCEMENT DIRECTIVE

The purpose of the Enforcement Directive is to improve the implementation, application and enforcement of the Posting of Workers Directive.

Article 4 - Identification of a genuine posting and prevention of abuse and circumvention⁵⁰

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 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

⁵⁰ Article 4 of the European Parliament legislative resolution adopted on 16 April 2014 (P7_TA-PROV(2014)0415, provisional text).

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.

THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE ON THE DIRECTIVES

The EESC has issued a number of opinions in relation to services and the posting of workers. In its opinion on the social and environmental dimension of the Single Market⁵¹, it reiterated the fact that "labour market integration is the best safeguard against social exclusion." To this, one could add that while by definition the market is international, at present, labour remains national in nature. Logically enough, this raises the issue of consistency and coherence, or lack thereof, within the Single Market: EU policies targeting integration are bound to be problematic (or fail) if they lack a homogeneous cross-border base. In its opinion on the posting of workers in the framework of the provision of services⁵², the EESC had "called for strengthening of the rules regarding posting of workers, by among other things clarifying and improving the provisions of the directive on posting of workers and by enhancing cooperation between the authorities of the Member States." It also stated that there was still a clear need for "better implementation and effective administrative cooperation among Member States" in particular to prevent unnecessary administrative costs. "In order to promote transnational provision of services in a climate of fair competition, it is important to have equal minimum conditions of employment according to national laws and collective agreements."

The EESC addressed the issue of the Court of Justice rulings on the posting of workers directive in its opinions on *The Social Dimension of the Single Market*⁵³ and *The Single Market Act – Twelve Levers*⁵⁴. It called for:

- Clarification and improvement of the provisions of the directive on posting of workers;
- More effective cooperation between the authorities of the Member States;
- Implementation of the principle of non-discrimination with respect to work and remuneration conditions;
- Consultation with the social partners;
- Non-discrimination for companies in the Internal Market.

RELEVANT EESC OPINIONS		
EESC OPINIONS	REFERENCE	RAPPORTEUR
<i>The Services Directive</i>	CESE 137/2005, OJ C 221, 8.9.2005, p. 113	A. METZLER E. EHNMARK
<i>The Internal Market in Services – Requirements as regards the labour market and consumer protection</i>	CESE 793/2007, OJ C 175, 27.7.2007, p. 14	K. ALLEWELDT
<i>The social and environmental dimension of the Single Market</i>	CESE 36/2009, OJ C 182, 4.8.2009, p. 1	A. ADAMCZYK
<i>The social dimension of the Single Market</i>	CESE 970/2010, OJ C 44, 11.2.2011, p. 90	T. JANSON
<i>The Single Market for services</i>	CESE 1161/2011, OJ C 318, 29.10.2011, p. 109	M. SIECKER
<i>Professional qualifications</i>	CESE 1046/2012 OJ C 191, 29.6.2012, p. 103	A. METZLER

⁵¹ CESE 36/2009, [OJ C 182, 4.8.2009, p. 1](#).

⁵² CESE 1387/2012, [OJ C 351, 15.11.2012, p. 61](#).

⁵³ CESE 970/2010, [OJ C 44, 11.2.2011, p. 90](#).

⁵⁴ CESE 1583/2011, [OJ C 24, 28.1.2012, p. 99](#).

The posting of workers	CESE 1387/2012, OJ C 351, 15.11.2012, p. 61	T. JANSON
The European social mark	CESE 1820/2012, OJ C 76, 14.3.2013, p. 20	A. RODERT
The abuse of the statute of self-employed	CESE 2063/2012 OJ C 161, 6.6.2013, p. 14	M. SIECKER
New trends in self-employed work: the specific case of economically dependent self-employed work	CESE 639/2010, OJ C 18, 19.1.2011, p. 44	J.M. ZUFIAUR NARVAIZA
The competitiveness of the construction sector	CESE 2295/2012, OJ C 198, 10.7.2013, p. 45	L. PLOSCEANU

RELATED EESC OPINIONS

The Single Market Act - identifying missing measures	CESE 3154/2013, OJ C 67, 6.3.2014, p. 53	B. FEDERSPIEL, I. VOLEŠ & M. SIECKER
The Single Market Act II – Together for new growth	CESE 2039/2012, OJ C 76, 14.3.2013, p. 24	M. SIECKER, I. VOLEŠ & B. FEDERSPIEL
The Single Market Act - Twelve levers to boost growth and strengthen confidence	CESE 1583/2011, OJ C 24, 28.1.2012, p. 99	I. VOLEŠ, B. FEDERSPIEL & M. SIECKER
Key Actions towards a Single Market Act II	CESE 1575/2012, OJ C 299, 4.10.2012, p. 165	I. VOLEŠ, B. FEDERSPIEL & M. SIECKER
Towards a Single Market Act - For a highly competitive social market economy	CESE 525/2011 OJ C 132, 3.5.2011, p. 47	I. VOLEŠ, B. FEDERSPIEL & M. SIECKER
Small Business, Big World – a new partnership to help SMEs seize global opportunities	CESE 1293/2012, OJ C 229, 31.7.2012, p. 49	I. VOLEŠ
Developing a people-oriented, grassroots approach to Internal Market policy	CESE 466/2012, OJ C 143, 22.5.2012, p. 17	J. PEGADO LIZ