

**Initial assessment of the European Commission's legislative proposals
concerning the introduction of a services e-card**

Version: 23 January 2017

On 10 January 2017, the European Commission published a number of legislative initiatives as part of its Single Market Strategy "Upgrading the Single Market: more opportunities for people and business COM(2015) 550 final" .

They include a Directive (COM(2016) 823 final) and a Regulation (COM(2016) 824 final) introducing a European services e-card.

In EFBWW's view, this legislation does not contribute to the creation of a fair single market. Rather, the services e-card will simply promote bogus self-employment and undeclared work. The European Commission is creating new bureaucracy, impractical procedures between authorities in countries of origin and destination and is effectively introducing the country of origin principle through the back door.

EFBWW, together with other construction trade unions in Europe, had repeatedly called on the Commission not to put forward legislative proposals introducing a services e-card. The Commission ignored these concerns and has done nothing to allay them with the legislative proposals that it has presented. EFBWW is also critical of the fact that the European Commission has still not presented the results of the public consultation on the services e-card (which in summer 2016 was still known as the services passport).

Furthermore, the legislative proposals on the services e-card will not achieve their objectives. They are intended to boost productivity in the construction sector and promote the cross-border provision of services.

In fact, they will do the opposite. The way to enhance productivity in construction and other sectors is by introducing new technologies and ensuring a skilled and well-trained workforce, not by competing for the lowest standards, which will only make life easier for disreputable contractors. It is also far from clear how the services e-card will make a positive contribution to the cross-border provision of services, alongside the Point of Single Contact.

EFBWW rejects on principle the idea that the home country should be given a say in enforcing, monitoring and inspecting working conditions in the host/destination country or even in registering establishments. This is a step in the entirely wrong direction.

EFBWW's main criticisms are as follows:

- The services e-card will make it harder to carry out checks on service providers in the host country.
- It will promote bogus self-employment as natural persons are also able to apply for a card.

- The services e-card will allow establishments to be set up in a fully electronic way. This will facilitate the actions of disreputable undertakings and promote the creation of letterbox companies.
- The legislative proposals will cause significant problems in administrative practice.
- The legislative proposals provide for the long-term inclusion of information on posted workers.
- The legislative proposals include no dissuasive penalties for abuse of the services e-card.
- The legislative proposals give the European Commission considerable powers over implementation, thereby allowing it to impede the monitoring of working conditions and the supervision of service providers, for ideological reasons.

Both on grounds of principle and owing to a variety of individual problems that cannot be resolved in a legislative procedure, EFBWW has come to the conclusion that the services e-card should not be introduced. The services e-card will not achieve its objectives and could cause considerable damage.

Particularly in the construction sector, undeclared work, false posting, bogus self-employment, violations of posted workers legislation, wage dumping and social dumping are issues of daily concern. EFBWW has therefore repeatedly called for better framework conditions for enforcing existing rules and improving employment conditions. In other sectors too, such as building cleaning, there is a substantial need to improve working conditions and the supervision of service providers.

The services e-card runs counter to these concerns and will weaken, rather than strengthen, confidence in the European Union.

Criticisms of individual provisions:

Introduction of the country of origin principle

When they adopted the Services Directive (2006/123/EC), European legislators opted against the introduction of the country of origin principle. When they adopted the Posting of Workers Enforcement Directive (2014/67/EU), they upheld the principle that monitoring the working conditions of posted workers and supervision of cross-border service providers is the responsibility of the destination country. In this respect, the services e-card is to be understood as a change of system, something that IG BAU rejects on principle.

Under the legislative proposals, authorities in the home country (i.e. the country of origin) will also be involved in issuing services e-cards both for the establishment of branches (see Articles 11 and 13 of the Directive) and for cross-border service providers (see Articles 12 and 13 of the Directive).

Upon expiration of specified time limits, the services e-card will be deemed to have been issued (see, for example, Article 13(6) of the Directive).

The German Bundestag has already opposed the introduction of the country of origin principle in its decision concerning the European Union's Single Market Strategy (see Bundestag resolution of 21 June 2016; printed paper 18/8867).

Even now that the legislative proposals have been presented, it is still not fully clear how the process of applying for, renewing, revoking and monitoring the services e-card etc. would work in practice. The proposals have significant regulatory gaps as regards their practical implementation. The European Commission says that it will adopt delegated acts (see for example Article 11(4), Article 12(6), Article 13(6), Article 17(7) of the Directive) in order to clarify implementation of the services e-card. The fear is that the European Commission will use these powers to pursue its ideological goals. These might include, for example, limiting the ability of the host country to supervise cross-border service providers, relaxing national prior notification procedures for posted workers, cutting regulations governing skilled trades in Germany, and so on.

Scope (sectors)

The European Commission had previously announced that it would be introducing the services e-card for the construction sector and business services. 'Business services' originally meant a limited number of economic sectors such as architecture, legal and auditing services. Incidentally, none of the targeted sectors had previously called for such a card.

However, the scope has now turned out to be much wider (see Article 2(1) and

annex of the Directive). It also includes building cleaning, facility management, horticulture and landscaping, etc. This means that the overwhelming majority of workers that IG BAU represents are directly affected by the legislative proposals. Moreover, the reasons given for introducing the services e-card, as set out in the explanatory memorandum, are erroneous and unconvincing.

The reference (see Article 2(2) of the Directive) to the derogations defined in the Services Directive (see Article 2(2) and (3) of 2006/123/EC) is contradictory. For example, the Services Directive includes derogations for temporary work and security services, which contradict the overview of sectors contained in the annex to the Services E-Card Directive.

Application to posted workers

Article 2(3) of the Directive states that the rights of posted workers under the Posting of Workers Directive 96/71/EC and the Posting of Workers Enforcement Directive 2014/67/EU as well as the powers of Member States to supervise service providers shall not be restricted. This is an important qualification from a trade union perspective but one that is repeatedly called into question in many places.

Firstly, there is an option whereby Member States can include information about posted/seconded workers in the services e-card (see Article 6(3) of the Regulation). Secondly, Article 19 of the Regulation contains a review clause whereby the review mechanisms of the Posting of Workers Enforcement Directive (see Article 24 of 2014/67/EU) are to be used to evaluate whether the electronic procedures associated with the services e-card could contribute positively to the registration and control procedures under Article 9 of Directive 2014/67/EU.

The long-term recording of information about posted workers is thus already contained in the legislative proposals for the services e-card, which IG BAU finds unacceptable.

Article 6(iii) of the Directive also refers to information used for registration with social insurance schemes, which could be included in the services e-card. What exactly this is referring to remains unclear.

Status of the services e-card

Article 4 of the Directive states that the services e-card shall constitute proof that a service provider has an establishment in his home country and carries on a certain activity legally in that country.

As natural persons are also entitled to apply for a services e-card, this could mean that possession of such a card is taken as evidence of self-employment during inspections at construction sites or other workplaces in the host country, even if the service provider has never worked in the sector in question in his home country and is working for an employer in the host country. This is because the services e-card contains no information about actual previous self-employment.

Problematic contents of the services e-card

According to Article 4(1) of the Regulation, the services e-card is voluntary for service providers and should contain the following information:

a) Identification of the provider.

A fully-electronic identity verification process may prove problematic.

b) Identification of the service sector and the type of card applied for.

Even the allocation to certain sectors in the services e-card may be problematic, because it may entail application of different minimum working conditions and universally applicable collective agreements under posting of workers legislation in Germany.

It is also questionable how authorities are supposed to determine the sector allocation based solely on the documents submitted. What would happen, for example, if the home country were to agree during the application process that a service provider was active in sector A but the authorities in the host country then discovered during inspections that he was actually active in sector B?

Providers could tell their home country that they worked in a sector covered by the scope of the legislative initiatives solely in order to obtain a services e-card. They could then actually work in a related sector in the host country without this immediately coming to light during inspections.

- c) Indication whether provision of information society services is envisaged. It is not clear what is meant by 'information society services' and how this information would help to facilitate cross-border activities.
- d) Information pertaining to establishment of the provider in the home country and other EU Member States.
- e) Requirements to which the applicant is subject for the provision of the service in its home Member State, such as professional qualifications.

Firstly, it is totally unclear why information and evidence applying in the home country should be included in the services e-card. How is the host country involved in the application procedure supposed to verify the authenticity and validity of submitted documents if they only apply in the home country?

The added value of this information for cross-border service provision is also unclear.

In addition, the definition of the term 'requirements' refers to the definition of this term in Article 4(7) of the Services Directive 2006/123/EC.

In that Directive it is defined as follows:

'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

This results in an extremely broad definition, which in theory could include everything except requirements laid down in collective agreements. Article 4(3) of the Regulation entitles the European Commission to shape the services e-card in detail by means of delegated acts. In theory, this means that it could include an unlimited number of categories in the services e-card.

Presumably a procedure for mutual recognition of professional qualifications and other requirements is to be established and the services e-card is to be expanded into a harmonisation instrument.

Moreover, this could, in future, restrict the ability of host countries to carry out control measures under Article 9 of 2014/67/EU if a service provider can refer to documents already submitted as part of the procedure for issuing a services e-card.

f) Information on the good repute of the provider within the meaning of Article 33 of the Services Directive 2006/123/EC.

It remains entirely unclear who should keep track of this information and enter it into the services e-card system. There is also a risk that companies with negative entries will simply dissolve and restart under a different name, thereby wiping the slate clean.

g) Information on any existing professional indemnity insurance of the provider. Information about insurance is problematic because once a services e-card has been issued it will no longer be possible to tell whether the insurance policy is still valid.

h) Information about previously issued services e-cards.

Prohibition of prior notifications

Under Article 5(1) of the Directive, host countries are not allowed to impose prior notifications or similar on a service provider wanting to engage in cross-border activity. That means that all prior notifications must be made before the cross-border service provision takes place. A detailed analysis of whether prior notifications for posted workers are effectively excluded from the scope is still needed, as Article 5 of the Directive does not explicitly refer to prior notifications of posted workers, which could create ambiguity.

Electronic formation of branches

Article 5(2) of the Directive prohibits Member States from imposing prior notifications for formation of an establishment if they are in possession of a services e-card for that establishment. This again raises some of the problems associated with the proposal for a Directive on single-member private limited liability companies (COM(2014) 212 final).

Because the issuing of a services e-card is supposed to take place fully electronically (see Article 8 of the Regulation), the card offers plenty of opportunities for fraudsters, e.g. to set up letterbox companies. Article 5(3)(v) of the Directive does state that disclosure obligations under national law on the formation of companies continue to apply. The Directive refers to derogations for companies specified in

The services e-card is supposed to be issued fully electronically. However, the

Directive refers to Article 2 of Directive 89/666/EEC, which defines the documents, particulars and information which a Member State can force a branch to disclose. If such documents/particulars/information have already been provided to the authorities for the issuing of a services e-card, it is questionable whether the inspection authorities in the host state can demand to see the original documents.

This is because Article 6 of the Directive prohibits Member States from requiring holders of a services e-card to furnish any information already provided for the issuing of the services e-card ('once-only' principle).

EFBWW believes that Member States themselves must be left to decide what procedures they use to register establishments. In this context, verification of identities and detailed examination of original documents are key to preventing disreputable and criminal undertakings from gaining a foothold. Involving the home country in a complicated procedure for establishing a branch in the host country will bring no added value and is rejected by the EFBWW.

Bogus self-employment

Article 7 of the Regulation makes it clear that natural persons are also entitled to apply for a services e-card. In many EU countries, the construction sector in particular contains a large proportion of self-employed individuals. The risk is that the services e-card will be abused to enable bogus self-employment in the provision of construction services in another Member State.

Validity of the services e-card

The services e-card is valid throughout the entire host state. It is also valid for an indefinite duration, according to Article 7(2) of the Directive. The Directive contains no convincing procedure for keeping the information contained on the card up to date. This will allow disreputable firms, for example, to take out insurance policies required for the provision of a service before applying for the services e-card and then to terminate them immediately afterwards once the card has been issued.

It is doubtful whether disreputable service providers will keep the information contained on the card up to date of their own accord. It is now the responsibility of the inspection authorities in the host country to prove that the basic premises on which a services e-card was issued have altered.

There is also a risk of creating a 'data graveyard'. Over the years, large volumes of data will be collected which will soon be out of date and thus cease to be relevant.

The services e-card will therefore lead to significant administrative costs for authorities.

Procedure for applying for a services e-card for cross-border providers

Member States are required to set up a coordinating authority to implement the procedures associated with the services e-card. Any national Services E-Card Office, say, that might be set up in a MS could well result in unjustified additional bureaucracy. Furthermore, processing the services e-card via a central authority would have a profound impact on Germany's federal administrative structure.

As regards the introduction of the once-only principle, there is also no guarantee that all the authorities responsible for the supervision of service providers in a MS would actually have access to the relevant up-to-date information.

The 'coordinating authority' of the home country only has one week to check all of an applicant's documents and if necessary request additional information and documents. If additional information is required, the time limit is moved back. It is highly doubtful whether reliable document checks can be carried out in one week. Each case is different and, even if all the required documents have been submitted correctly, more time may be needed to examine them.

Moreover, because any problems will occur in another Member State, the authorities in the home country are quite likely not to scrutinise the documents submitted all that carefully when carrying out their checks.

According to Article 12 of the Directive, the host country then has two (or at most four) weeks to examine the information and express any concerns.

The host country is thus formally involved in the procedure. However, it has to rely entirely on the information supplied by the home country, as it is not in direct contact with the applicant. Only the authorities in the home country have such direct contact.

To what extent the host country will be able to understand the information supplied is open to question. The idea that in the age of the internet any information can be translated in a standardised way sounds wonderful in theory. However, in EFBWW's view, this is idealistic wishful thinking far removed from the realities of administrative practice.

It is also unclear what exactly happens if the host country has concerns and doubts about the application for a services e-card. There does not appear to be any right to reject the application if there are reasonable grounds for suspicion.

All in all, the procedure for applying for a services e-card has not been properly thought through and is unsuited to the realities of administrative practice.

Consequently, fraudsters could exploit any uncertainties to the detriment of working conditions and high consumer protection and quality standards.

Procedure for applying for the services e-card for establishment

According to Article 13 of the Directive, the application for establishment should be made directly to the authorities of the host country. They then have four (or at most six) weeks to examine the application and must inform the applicant about any registration procedures and explain why such registration requirements are necessary and proportionate (see Article 13(1) of the Directive).

If the authority of the host country does not react, the services e-card shall be issued (see Article 13(2) of the Directive).

Once the initial reaction of the host country authorities has been received, the applicant can submit the necessary documents with the assistance of the home country authorities (see Article 13 (3)).

The host country only has one week to actually examine the documents, unless it asks for additional information, in which case the time limit is suspended. The host country can express concerns, to which the applicant is entitled to respond in turn. If the authority of the host country does not react, the services e-card shall be issued (see Article 13(6) of the Directive).

In this procedure, it is unclear how exactly efficient communication between the authorities and between the applicant and the host state is supposed to take place. An authority in a MS will certainly not be able to communicate with a foreign company in another MS. The idea that establishment can take place via standardised electronic procedures alone is unrealistic. Based on the IMI experiences we know very well that the standard exchange of information –even translated – is not an efficient communication tool and has many flaws.

Checks on and revocation of the services e-card

Article 15 of the Directive sets out the conditions under which a services e-card can be revoked or denied. These include:

- the provision of false information and/or falsified documents (see Article 5(2)(i));
- if the applicant is a worker and not a self-employed person within the meaning of Article 2(2) of the Posting of Workers Directive 96/71/EC. That paragraph states that the definition of a worker is determined by the host country. This clear provision is contradicted by the services e-card because the procedures for issuing the services e-card give the home country a say in determining the employment status.

The establishment of bogus self-employment and false posting also requires a 'final decision'. In other words, only after a lengthy procedure with possibilities of appeal etc. can bogus self-employment and false posting be established and the entitlement to a services e-card be revoked. This form of protection against abuse is far too weak as it is unsuitable for practical implementation.

If a Member State determines during inspections that a services e-card has to be withdrawn, it must give the card holder the opportunity to be heard.

Article 17(3) of the Directive allows the holder of a services e-card to mount a legal appeal against the decision to revoke the card. The exact procedure for revoking a services e-card is left to the discretion of the European Union via delegated acts (see Article 17(7) of the Directive).

In practice, this will mean that services e-cards are used as a free passport for unscrupulous practices, as each inspection would be followed by a lengthy procedure to revoke the services e-card – with an uncertain outcome. Given that the European Commission reserves the right to determine the exact details of the revocation procedure, nothing good is to be expected on this score. As a result, the services e-card will significantly hamper the enforcement of good working conditions in the host country.

Updating of the services e-card

Article 17 of the Directive specifies no time limits for when and how services e-card holders are required to update information on their cards. If information is found to be erroneous, they could always argue that they were just about to update their card.

The procedures are not therefore practical for quickly revoking a services e-card in case of irregularities and speedily excluding disreputable service providers from the marketplace.

Moreover, significant penalties for e-card fraud are entirely absent.

Monitoring mechanisms

Article 20 of the Directive introduces a monitoring mechanism for assessing the impacts of the Directive with the involvement of the social partners.

However, the aim is only to examine whether the costs of cross-border service provision have been reduced and not whether working conditions in the sectors concerned have got better or worse.

Translations of documents

Article 9 of the Regulation requires Member States to accept documents for the issuing or revocation of a services e-card in a simple copy form and not legalised or certified in any other way. This would severely restrict opportunities for monitoring and control and is not in accordance with Article 9 of Directive 2014/67/EU.

It is also hard to imagine that, for example, the identity of a company representative could be verified without their original identity card being presented or that all authorisation procedures could be completed with copies alone.

