

# BRIEFING NOTE

## Two EFBWW complaints against Slovenia for alleged illegal state aid and not respecting the fair internal market rules

### Introduction

The fundamental objective of EU competition rules is to prevent distortion of competition. This is not, however, an end in itself. It is rather a condition for achieving a free and dynamic internal market and is one of several instruments promoting general economic welfare. This objective is set out expressly in Article 3 TFEU and integrated in the term ‘internal market’.

Article 3 TFEU clearly stipulates that the EU shall establish an internal market based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and **social progress**, and a high level of protection and improvement of the quality of the environment. In addition, **the EU shall combat social exclusion and discrimination, and shall promote social justice and protection**, equality between women and men, solidarity between generations and protection of the rights of the child. **It shall promote economic, social and territorial cohesion, and solidarity among Member States.** In accordance with Article 9 TFEU, the Union, in defining and implementing its policies and activities, is to take into account requirements linked to, inter alia, the promotion of a high level of employment, **the guarantee of adequate social protection, the fight against social exclusion**, and the promotion of a high level of education, training and the protection of human health.

The European Pillar of Social Rights was jointly proclaimed by the European Parliament, the Council and the Commission at the Social Summit in Gothenburg on 17 November 2017. That Summit recalled **the need to put people first, in order to further develop the social dimension of the Union, and to promote convergence through efforts at all levels**, as confirmed during the conclusions of the European Council of 14 December 2017.

Today, we observe not only a competition between companies, but also amongst Member States, trying to provide “competitive advantages” for their domestic companies when they offer their services in another EU Member State.

According to the European Treaty, competition on the Internal Market, must take place in a European “**level playing field**”.

The two EFBWW formal complaints address the fundamental problem of “legislative engineering” by Slovenia with the objective of promoting unfair competition. Other EU Member States are also using “legislative engineering” techniques to provide a “competitive advantage” for their domestic companies.

## I. The EFBWW complaints?

On 1<sup>st</sup> February 2019, the EFBWW lodged two complaints to the European Commission against Slovenia. One complaint was submitted to EU Commissioner Margrethe Vestager, who is responsible for EU Competition. Another complaint was submitted to EU Commissioner Elżbieta Bieńkowska, responsible for Internal Market, Industry, Entrepreneurship and SMEs.

## II. Who is the EFBWW?

The European Federation of Building and Woodworkers (EFBWW) brings together 76 affiliated unions from the construction and construction material, woodworking and forestry industries, with around 2 million members in 34 countries. It is active in all EU Member States. The EFBWW represents its members at European level in all areas affecting workers in the industries it represents, in particular labour and social legislation, labour market policy, health and safety and social dialogue.

In this role, the EFBWW regularly investigates the enforcement of EU legislation, in particular within the areas of labour, social rights, as well as health and safety legislation. Harmonised legislation in this area is a prerequisite for the efficient operation of the internal market, for the freedom of movement of workers, and for securing a level fair playing field.

## III. What is the problem?

In Slovenia, in principle, every employer is required to pay social security contributions for its workers into the Slovenian social security system. (§ 14 para 3, Slovenian Law on pensions and invalidity insurance scheme, ZPIZ-2<sup>1</sup>). However, in the case of posted workers, the social security contribution is calculated on the basis of the wage the posted worker would receive for the same or comparable work in Slovenia. Hence, the social security contribution does not correspond to the real remuneration of the posted worker but is calculated on the basis of the fictitious lower income in Slovenia ( § 144 para 2 ZPIZ-2). Companies that post workers are therefore exempt from part of the social security contributions, which they normally would have to pay.

Due to the more favourable (lower) social security contributions for posted workers when they are temporarily posted, the upward convergence and principle of “equal treatment” of working conditions sought by the EU Posting of Workers Directive 96/71 and 2018/957 are being undermined. Although the Posting of Workers Directive does not apply to the national social security systems, it seeks to standardise cross-border labour costs, which includes social security contributions. EU Regulation 883/2004 also aims to improve living standards and working conditions by coordinating the national social security systems as part for workers. It seeks to enforce the general principle of equal treatment for workers who do not reside in the Member State of employment and, as far as possible, achieve equal treatment in terms of benefits, income and social security matters.

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<sup>1</sup> <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6280#>

The explicit calculation method in Slovenia of social security contributions for posted workers, means that they can be “exported” to another Member State. This counteracts the objective of this EU legislation, namely to curb regulatory arbitrage. Although the principle of “equal treatment” of all EU workers has not yet been achieved and the Posting of Workers Directive implicitly accepts that employers from different Member States may gain an advantage by means of lower social security contributions, this advantage may only result from the general structure of the system, and not from regulations that explicitly aim to provide artificially low favourable social security contributions for the companies that post workers.

Such national legislation significantly favours employers from Member States with a specific calculation of social security contributions for posted workers over employers from the state of destination. The labour market is highly competitive in industries where workers are posted, in particular the construction sector. The EFBWW believes that the exposure of employed persons within the EU labour market to such regulatory arbitrage is unacceptable and contrary to EU law.

## IV. What are the complaints?

### A. As to the alleged illegal state aid

The EFBWW considers that Slovenian calculation rules for social security contribution payments are not compatible with the European horizontal social clause (Article 9 TFEU).

Considering that cross-border social security abuse by corporations and businesses has a negative impact on the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. All EU Member States have an obligation (Article 9 TFEU) to realise and maximise their economic and social rights, including the obligation to confront social security and protection abuse that threatens national and EU social governance.

Each EU Member State must also seek to strive for coherence between fiscal, social and human rights laws and policies – both at a domestic and EU level.

The right to take full advantage of all national and European legal means available to minimise their social security burden is not compatible with the European horizontal social clause. This is particularly the case when companies temporarily post workers abroad in Member States with higher social security contributions.

The Slovenian regulations significantly favour employers from Slovenia with a specific calculation method when they post workers over employers from the state of destination. The labour market is highly competitive in industries where workers are posted, in particular the construction sector. Moreover, according to Article 107 of the TFEU, it is sufficient that the aid threatens to distort competition where there is no actual need to distort competition.<sup>2</sup>

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<sup>2</sup> CJEU, Rs T-214/95

The aid therefore strengthens the position of companies in certain business activities (temporarily posting workers to another Member State) of industries involved in intra-community trade and improves the opportunities of the favoured companies by reducing the social security contributions that all other domestic companies have to bear.

Moreover, it is a partial exemption from costs that a company would normally have had to bear in the course of its day-to-day operations; in other words, operating aid. Such aid fundamentally distorts competitive conditions.<sup>3</sup> They favour companies in Slovenia that temporarily post workers to all other EU Member States that have not set-up a low cost social security.<sup>4</sup>

Here it is appropriate to refer to the fact that the legal temporary notion of posting in the field of social security is very long and can last up to 24 months. This maximum period, during which the low-cost social security regimes is applicable, exceeds by far the average duration of posting<sup>5</sup>, which implies that the financial gain applies through the whole duration of posting. Furthermore, the aid is linked to an establishment within the Member State of origin, which means that companies not established in Slovenia cannot benefit from the low-cost social security 'posting bonus'. In this respect, competition is also distorted between companies established in Slovenia and those who post workers but have no establishment in these countries. These companies have to pay the social security contributions for their posted workers in the country of origin without the low-cost social security 'posting bonus'.

In principle, the possibility that the aid will stabilise or increase domestic supply and therefore reduce the chances that companies established in other Member States will offer their services on the market of that Member State is sufficient to qualify as an impairment to trade between Member States within the meaning of Article 107 of TFEU.<sup>6</sup>

The EFBWW believes that the low-cost social security granted by Slovenia constitutes aid ('posting bonus' ) within the meaning of Article 107 of the TFEU.

It is selective because the conditions for low-cost social security only apply to very specific business activities (posting of workers) of industries and companies, when they operate in another member State.

It constitutes a state resource as the social security systems in question are under state control and the state determines the level of contributions and how they are controlled.

The low-cost social security 'posting bonus' almost exempts the companies in question from the day-to-day operating costs that their domestic competitors in the host Member States have to bear. As such, it constitutes operating aid, which is incompatible with the internal market and liable to affect trade between Member States.

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<sup>3</sup> CJEU, Rs 459/83

<sup>4</sup> ECJ, Rs 259/85

<sup>5</sup> Posting of workers Report on A1 portable documents issued in 2015, Jozef Pacolet & Frederic De Wispelaere, December 2016

<sup>6</sup> CJEU, Rs T-55/99 - Decision of The General Court (first instance, Art 256 TFEU)

The EFBWW therefore requested EU Commissioner Margrethe Vestager, that the measures described be declared as unlawful state aid or misuse of aid.

## **B. As to the breach of the European internal market rules**

The EFBWW considers the Slovenian calculation rules for social security contribution payments, a flagrant discrimination. The calculation of the social security contribution payments of Posted workers from Slovenia should be calculated on the basis of the real remuneration, that the worker receives in the country of destination and not on the basis of the wage the posted worker would receive for the same or comparable work in Slovenia. This discrimination is incompatible with Article 18 and Article 45(2) of the TFEU.

The aim of Article 18 TFEU is to ensure that the principle of equal treatment is upheld so as to allow the free movement of individuals to be effectuated. This is because the free movement of workers (as provided for under Article 45) is one of the most important rights that is provided to individuals within the European Union. In Case C-300/04 *Eman and Sevinger* it was recognised by the court that Article 18 aims to ensure that 'comparable situations are not treated differently and different situations are not treated the same unless such treatment can be objectively justified.' In the *Maribel* case Court of Justice of the EU(C-75/97) clearly rejected the argument of a social security system logic to justify an unfair competitive advantage.

Article 45 of the Treaty on the Functioning of the European Union (TFEU) deals with both labour mobility and the rights of the individual. It secures the free movement of workers within the Union, with the intention that this will abolish any discrimination based on nationality with respect to employment, remuneration, and other conditions of work and employment. Both the Court of Justice of the European Union and the EU legislature have developed the scope of the rights conferred upon migrant workers. Thus, independently of the notion of citizenship created by the Maastricht Treaty, this means that every individual has an extensive range of rights, first, to move freely between Member States to take up employment and, second, to enjoy non-discriminatory access to social protection once installed in the host Member State. This chapter examines the scope of the worker's right to free movement under Article 45 of the TFEU.

The EFBWW asked Commissioner Bieńkowska, to initiate infringement proceedings for the violation of Article 18, Article 26 of the TFEU in conjunction with Article 45(2), Article 120 of the TFEU, and Article 3(3) of the TFEU to eliminate the discriminatory regulatory arbitrage at the expense of workers provided for in national legislation, and thus prevent the disintegration of the European internal market.

## **V. Statistical posting data from Slovenia.**

According the recent study commissioned by the European Commission on the number of portable documents A1<sup>7</sup>, Slovenia is the second largest country in absolute terms with 190,976

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<sup>7</sup> Posting of workers, Report on A1 Portable Documents issued in 2017, Frederic De Wispelaere, Prof Dr Jozef Pacolet, University of Leuven (KU Leuven).

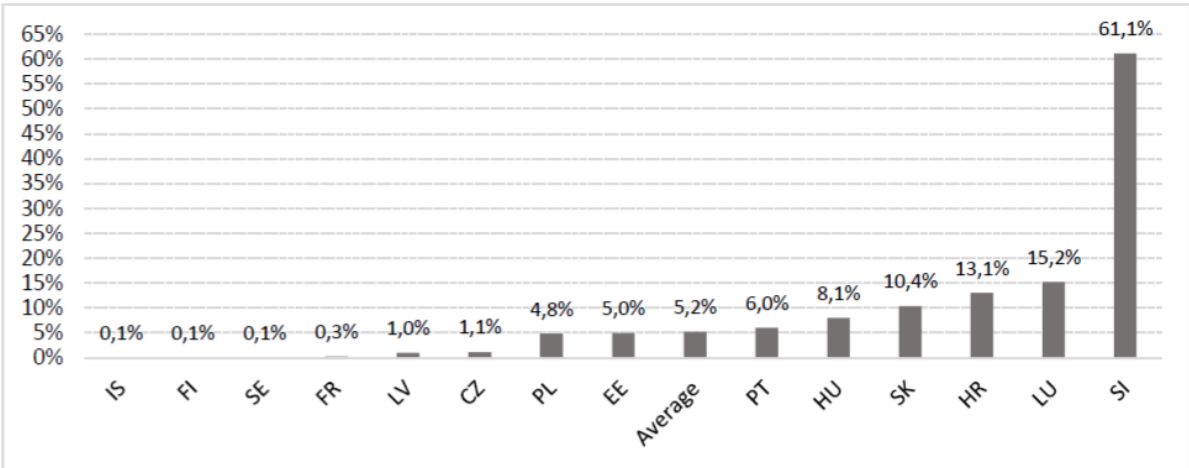
PDs A1 issued. In relative terms, Slovenia (20%) was in 2017 the main sending Member State. Some 5% of the Slovenian population of working age provided services abroad under Article 12 Regulation 2004/883. Compared to an average of 0.4% of EU employment. Almost 47% of the persons which were sent abroad in accordance with Article 12 work in the construction sector. Some 6 out of 10 employed persons in the Slovenian construction sector were sent abroad to provide services.

## VI. The sectoral impact of the Slovenian measures on the construction industry

Some sectors are more affected by posting of workers, than others. The construction sector is responsible for more than one-third of all temporary cross-border postings. Within the construction industry the local impact of posting can be significant. Unfortunately, only a few Member States publish the outgoing postings by sector. But among those that do, one can take the example of Slovenia where the number of full-time equivalent posted workers accounts for 46% of all construction employment. In other words, nearly every second Slovenian construction worker is posted abroad.

The findings for the construction sector, which is the most popular sector for such activities, are shown in figure below for 14 reporting Member States from a sending perspective. The reported figures are calculated on the basis of the reported number of persons involved and thus not on the number of PDs A1 issued. A remarkable high number of some 6 out of 10 employed persons in the Slovenian construction sector were sent abroad.

**Figure 9** Estimated share of individual persons falling under Article 12 of the Basic Regulation in total employment in construction, by sending Member State, 2017



Source Administrative data PD A1 Questionnaire 2018 and Eurostat [lfsa\_egan2]

A very plausible argument for the high number of postings from Slovenia, is that Slovenia serves as a transit country for re-posted workers from Western Balkans countries. Bosnia and Herzegovina is the country with one of the high percentage of emigrants to the EU. 56,4

percent of the population moved out of BiH. Behind BiH is Albania with 38.8 percent of people who emigrated, then Albania 43.6%.<sup>89</sup>

The figures of the posting report show that the construction sector is by far the most 'popular' sector to which workers from Slovenia are posted.

**Table 9 PDs A1 issued according to Article 12 of the Basic Regulation, from a sending perspective, breakdown by sector of activity, 2017 (row %)**

Sending MS	Agriculture, hunting and fishing NACE A	Industry NACE B to F			Services NACE G to T								
		Industry Total	of which Construction NACE F	Services Total	Wholesale and retail trade NACE G	Accommodation and food service activities NACE I	Transportation and storage; Information and communication NACE H and J	of which Freight transport by road NACE H - Group 49.4	Financial and insurance; Real estate; Professional, scientific and technical activities; Administrative and support service activities NACE K, L, M and N	of which Temporary employment agency NACE N - Group 78.2	Education, health and social work, arts and other services NACE P, Q, R and S	of which Human health and social work activities NACE Q	
BE*	0.8%	20.0%	17.2%	79.1%	0.4%	0.4%	13.4%	0.0%	14.4%	0.0%	41.3%	n.a.	
BG													
CZ	1.4%	67.5%	46.2%	31.1%	3.2%	0.4%	3.9%	3.0%	23.0%	n.a.	n.a.	n.a.	
DK													
DE													
EE	4.5%	86.3%	57.7%	9.2%	0.6%	0.7%	0.3%	0.0%	1.4%	0.2%	6.1%	3.0%	
IE													
EL													
ES													
FR	0.0%	46.4%	7.9%	53.6%	6.4%	1.1%	7.1%	0.2%	21.2%	3.9%	17.8%	0.6%	
HR	0.1%	87.9%	46.4%	12.0%	1.9%	0.4%	1.9%	0.1%	6.0%	1.1%	2.1%	0.3%	
IT													
CY	0.0%	60.5%	1.2%	39.5%	4.9%	6.2%	7.4%	0.0%	18.5%	0.0%	2.5%	0.0%	
LV	0.3%	60.0%	42.8%	39.7%	1.6%	0.0%	23.5%	0.2%	13.2%	1.4%	0.8%	0.0%	
LT	0.3%	58.1%	44.8%	41.6%	0.1%	7.7%	0.5%	0.5%	0.0%	0.0%	0.0%	0.0%	
LU	0.0%	51.6%	38.0%	48.4%	3.9%	0.1%	2.4%	0.1%	38.6%	16.7%	3.2%	0.4%	
HU	0.0%	85.4%	56.5%	14.6%	3.1%	2.1%	4.3%	1.7%	2.1%	0.0%	3.6%	1.0%	
MT	0.0%	23.4%	0.0%	76.6%	0.0%	0.0%	1.4%	0.0%	66.9%	0.0%	8.3%	0.0%	
NL	0.9%	33.2%	1.3%	65.9%	5.0%	3.5%	3.5%	1.0%	22.1%	20.8%	31.8%	0.2%	
AT	1.3%	74.4%	52.5%	24.4%	8.2%	0.7%	1.7%	0.2%	4.8%	0.9%	9.0%	1.0%	
PL	2.1%	68.4%	50.6%	29.5%	1.4%	0.2%	3.5%	3.0%	7.0%	5.1%	17.3%	3.6%	
PT	0.3%	79.0%	55.7%	20.6%	1.9%	0.1%	0.4%	0.2%	18.0%	5.7%	0.2%	0.0%	
RO	0.9%	81.4%	51.6%	17.7%	1.2%	0.1%	8.2%	0.0%	5.4%	0.0%	0.0%	2.9%	
SI	0.2%	98.4%	68.4%	1.4%	1.0%	0.0%	0.2%	0.0%	0.0%	0.0%	0.1%	0.0%	
SK	0.9%	78.3%	43.5%	20.9%	2.1%	0.3%	2.0%	1.4%	1.8%	0.9%	14.3%	3.9%	
FI	0.3%	53.5%	12.5%	46.2%	1.5%	0.2%	4.5%	1.5%	13.2%	0.5%	26.4%	0.0%	
SE	0.4%	34.7%	13.7%	64.9%	5.4%	0.1%	7.7%	n.a.	36.7%	n.a.	15.0%	0.8%	
UK													
IS	2.0%	0.0%	7.3%	98.0%	0.0%	0.0%	6.7%	0.7%	17.3%	0.0%	74.0%	0.0%	
LI													
NO													
CH													
Total	0.9%	72.5%	46.5%	26.7%	2.5%	0.7%	3.1%	1.1%	9.6%	3.8%	9.6%	1.7%	

\* BE : Only figures for self-employed persons are reported.

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<sup>8</sup> Labour Mobility in the EU, Kristina Toplak, Mojca Vah Jevšnik, 2018, p 113, <https://balkaninsight.com/2017/08/08/half-of-all-bosnians-live-outside-bosnia-08-07-2017/>, <https://balkaninsight.com/2015/05/18/mass-depopulation-threatens-bosnia-s-future/>

## VII. Additional background briefings

### ***Case from the Fair Mobility practice:***

It is dark and late in the night as the bus with Slovenian number plates finally turns off the engine and the passengers begin to wake up. Suddenly, it becomes noisy and one could feel uneasiness among the passengers as the most of them have already realized that their bus has just parked in front of the only building their eyes were able to catch on the endless dark field. “This cannot be Dortmund”, shouts somebody in the crowd and almost everybody shouts approval. “Where are we?” asks another one of the group. Confused and tired of the journey, they take their modest possessions out of the bus and head to the only building they see. On the entrance they are greeted by the landlord, who explains he has been expecting them earlier that day and seems to be angry the bus arrives that late in the night. He explicates in fast German that each of them will share the room with five other colleagues and there will be one bathroom for the entire floor. Hardly a few of the group could partially understand those statements and while the best German speaker in the group is collecting question from the others, the landlord was already gone. The last information they caught was that a bus coming at 5 a.m. will bring them to the construction site the next day.

The crowd of about twenty grown men is in a middle of a flustered discussion, looking for answers. Only an expert in South-Eastern European languages could tell which languages are used to communicate in the group. One hears Serbian, Macedonian, Bosnian, Croatian and Bulgarian, which is not hard to imagine, having regard to the fact that a significant percentage of the Slovenian construction sector consists of migrant workers from the neighbouring countries. Having no other choice and having in mind that the first working day starts in a couple of hours, the group decides to take a rest and see if the next day will bring an explanation.

Before they got on the bus in Ljubljana, their new Slovenian employer (whom they have not work for before being posted to Germany) told them that they should work on a construction site in Dortmund, a bigger industrial city in Germany, 8 hours a day, receiving the German minimum wage for the construction sector. In reality, they landed in a decayed overcrowded accommodating facility, trapped in the middle of nowhere, with no other inhabitants in the next 30 km, being forced to travel two unpaid hours by the bus every day. The entire group has been working under these conditions two whole months and for that period they have only received single advance payments of ridiculously small amounts. Since their rent has consequently remained unpaid, the landlord was threatening the workers that they will be expelled, as long as they are not able to pay for it. At that point they contacted a counselling office of the trade union based “Fair Mobility Project”.

Source : <https://migrationonline.cz/en/posting-of-workers-strengthening-labour-rights-while-securing-free-movement-services>



### *Economic effects of posting: The case of Slovenia*

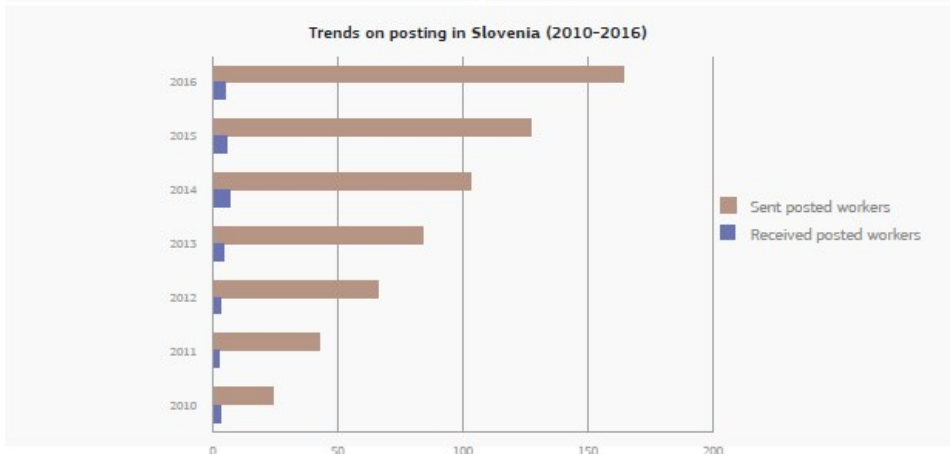
If we estimate that around 100,000 posted workers were sent abroad in 2015 from Slovenia, that would give 50,000 full-time equivalent postings.\* Almost three-quarters of Slovenian posted workers are sent to either Austria or Germany where the average wage is 1.8 and 1.6 times higher than in Slovenia. Let's assume for simplicity that Slovenia's posted workers are earning at least the Slovenian average annual wage of €25,000\*\* when working abroad. Consequently, posted workers provide €1.25 billion of taxable income to the Slovenian state, which translates into more or less €300 million in taxes,\*\* corresponding to almost 1% of GDP or 2% of annual government revenues. Moreover, as social security contributions of the employee and employer are also paid in the home country, the loss to the Slovenian state could potentially reach around €500 million.\*\*\*

If postings were to be substantially restricted or made unprofitable, a large chunk of these revenues and social security contributions would disappear, since not all of those workers would be easily absorbed by the Slovenian economy in the short run. This would leave a sizable hole in the budget balance and social security system, over and beyond the rise in expenditure due to increased unemployment. Logically, other countries would gain in turn.

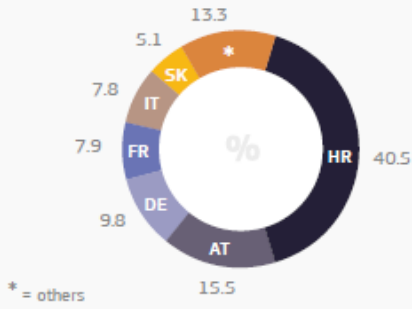
\* We derive this estimate by combining information from the number of A1 forms issued and the average length of posting per A1 form (Posted workers country fiche, Slovenia: <http://ec.europa.eu/social/BlobServlet?docId=15207&langId=en>).

\*\* Calculated on the basis of applying tax rates/social security rates to the average wage in Slovenia. If one were to apply the minimum wage of Germany (one of the two main recipients) of €18,000 the figures would be slightly lower, but studies have shown that posted workers on average earn significantly above-minimum wages.

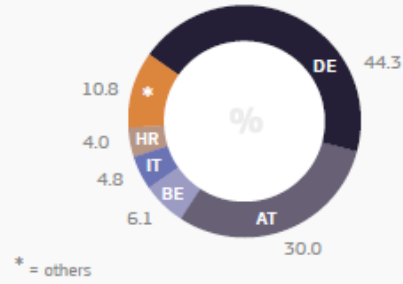
\*\*\* For a similar exercise, see F. De Wispelaere (2015), "Posting of workers: The impact of social security coordination and income taxation law on welfare states", HIVA Working Paper.



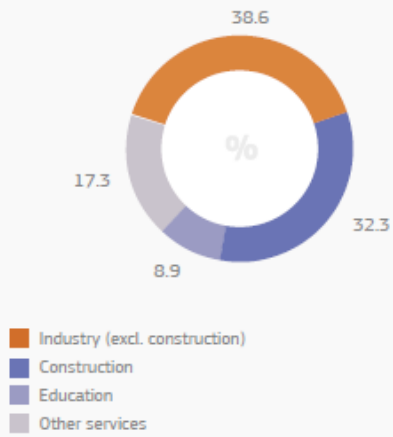
**Main origin of workers posted TO Slovenia in 2016 (%)**



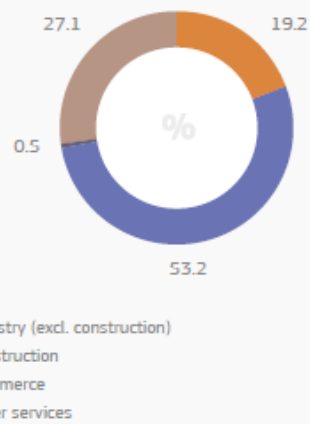
**Main destination of workers posted FROM Slovenia in 2016 (%)**



**Main employment sectors of workers posted TO Slovenia in 2016 (%)**



**Main employment sectors of workers posted FROM Slovenia in 2016 (%)**



<sup>1</sup> Data on received posted workers only include figures related to postings to single Member States  
<sup>2</sup> These figures include data on workers posted to one Member State  
<sup>3</sup> EU28, Switzerland and Norway



## State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion

Brussels, 30 August 2016

**The European Commission has concluded that Ireland granted undue tax benefits of up to €13 billion to Apple. This is illegal under EU state aid rules, because it allowed Apple to pay substantially less tax than other businesses. Ireland must now recover the illegal aid.**

Commissioner Margrethe Vestager, in charge of competition policy, said: *"Member States cannot give tax benefits to selected companies – this is illegal under EU state aid rules. The Commission's investigation concluded that Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses over many years. In fact, this selective treatment allowed Apple to pay an effective corporate tax rate of 1 per cent on its European profits in 2003 down to 0.005 per cent in 2014."*

Following an in-depth state aid investigation [launched in June 2014](#), the European Commission has concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991. The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a "head office". The Commission's assessment showed that these "head offices" existed only on paper and could not have generated such profits. These profits allocated to the "head offices" were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force. As a result of the allocation method endorsed in the tax rulings, Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.

This selective tax treatment of Apple in Ireland is illegal under EU state aid rules, because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules. The Commission can order recovery of illegal state aid for a ten-year period preceding the Commission's first request for information in 2013. Ireland must now recover the unpaid taxes in Ireland from Apple for the years 2003 to 2014 of up to €13 billion, plus interest.

In fact, the tax treatment in Ireland enabled Apple to avoid taxation on almost all profits generated by sales of Apple products in the entire EU Single Market. This is due to Apple's decision to record all sales in Ireland rather than in the countries where the products were sold. This structure is however outside the remit of EU state aid control. If other countries were to require Apple to pay more tax on profits of the two companies over the same period under their national taxation rules, this would reduce the amount to be recovered by Ireland.