

FIEC is the European Construction Industry Federation, representing via its 29 National Member Federations in 26 countries (23 EU & EFTA and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.  
Recognised "Sectoral Social Partner" (employers)



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## FIEC position paper on the European services e-card

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1. FIEC supports the principle of a well-functioning Internal Market with all its freedoms and all measures aimed at ensuring this effectiveness. It is also positive that the European Commission recognises possible outstanding problems within the Internal Market for services.
2. However, FIEC has a number of concerns with the European services e-card proposed by the European Commission, which has not been requested by the social partners of the construction industry and is based on a misunderstanding of the specific nature of the construction industry and its cross-border activity within the Internal Market.
3. FIEC is concerned about the (non-)voluntary nature of the e-card.
4. FIEC has major concerns with the principle of "tacit approval" by the host Member State, which creates, in practice, the risk of reintroducing the principle of "country of origin" through the back door.
5. FIEC disagrees that the European services e-card should be valid for an indefinite period, without any guarantees that it will be updated when necessary.
6. FIEC is concerned by the complex, even unrealistic administrative procedures to deliver and administer the European services e-card, which are based on the Internal Market Information (IMI) system.
7. FIEC is opposed to the level of power that the European Commission grants itself through the numerous delegated and implementing acts.
8. FIEC is concerned by the impact on national posting procedures (notification and control).
9. FIEC warns the European legislators and interested parties that the proposed system – which is applicable to establishment and natural persons – will ultimately facilitate the establishment of letterbox companies and bogus self-employees.

With the above in mind, FIEC has fundamental criticisms about the legislative proposal for a European services e-card and doubts about its real added value, in terms of strengthening the Internal Market for construction companies.

**In conclusion, we urge the European legislators to exclude construction<sup>1</sup> from the scope of the European services e-card proposal, allowing the European services e-card to be tested on less complex and fraud-sensitive sectors.**

If, and only if, the implementation of the European services e-card proves to be a success for all parties (businesses and public administration), then any future deliberations regarding the eventual inclusion of construction must be made in agreement with the social partners of the construction industry.

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<sup>1</sup> NACE Rev. 2 Section F

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## ■ 1. Support for the Internal Market

FIEC supports the principle of free movement of services and workers within the Internal Market, which is based on a level playing field, fair competition and fair working conditions. When and where possible, remaining legal or administrative burdens and obstacles for companies should be reduced or even abolished.

## ■ 2. From the start, the proposal is based on a fundamental misunderstanding of the construction industry

This proposed tool has never been requested as a possible useful cross-border solution by the social partners of the construction industry<sup>2</sup> and the draft Regulation and Directive confirm that the European Commission has failed to make a case for it based on the real needs of the construction sector.

Indeed, FIEC believes that the proposed European services e-card is based on a misunderstanding of the specific circumstances and the way the construction industry functions, which are different from manufacturing industries and pure business services. Therefore, benchmarking construction with other sectors in terms of cross-border mobility is the wrong approach and the proposed European services e-card is based on incorrect assumptions.

The production unit (i.e. the construction company with its workers, construction equipment and building materials) has to move to where the final product is produced. Most of the legal and administrative burdens are not only linked to the company itself but also to the three other elements. On top of that, basic aspects like limited human capacity, language, cultural habits, customer relations, etc. need to be dealt with for each new market. This makes operating cross-borders very complex.

As a result, the vast majority of construction companies - which are SMEs - operate and will continue to operate mainly at local or regional level.

As for those companies which choose to work abroad, some of them might be interested in the European services e-card. But most of them generally work in neighbouring countries – where bilateral solutions sometimes exist.

Therefore, the European services e-card – as it is proposed now – would only have a marginal impact on addressing the existing barriers and would do very little to enhance the mobility of most construction companies.

## ■ 3. Concerns about the (non-)voluntary nature of the e-card

For FIEC, such an e-card has to remain voluntary, but there is a risk that it becomes de facto obligatory. There is also a risk of gold-plating by Member States who might impose the European services e-card on economic operators, in their national requirements.

According to the legislative proposal, the European services e-card must be recognised by the host Member State once issued (art. 4 and 5 Dir.), which could prove problematic when it comes to public procurement (art. 6 (i) Dir.) for instance. Here, the principle of specialty of the public procurement directives (2014/23/EU,

<sup>2</sup> FIEC-EFBWW joint letters dated 09/06/2016, 21/11/2016 and 23/12/2016

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2014/24/EU and 2014/25/EU) must be reaffirmed. However, the European services e-card - based on the once-only principle - might end-up competing against the European Single Procurement Document (ESPD). This will cause control problems regarding qualification criteria and lead to increasing litigation.

#### ■ 4. Major concerns with the principle of "tacit approval" by the host Member State

Under the present legislative proposal, when a company or a self-employed worker applies for a European services e-card and the target host Member State does not react, then the e-card is issued anyway, so that the applicant receives the e-card without any control enforced by the host Member State and without making sure that he complies with all requirements of the host Member State.

The issued e-card must then be recognised by the host Member State (art. 4 Dir.) which cannot impose further national requirements to the "holder of a previously issued European services e-card" (art. 5 § 1, 2 and 3 Dir.).

The tacit approval is a matter of major concern for FIEC. In order to avoid any kind of abuse, it is necessary that all applications for a European services e-card be effectively controlled by the host Member State before the e-card is formally issued - within a reasonable verification period. Indeed, there is also a risk that the proposed deadlines might be used as a "waiting period" by the host Member State coordinating authority, thereby adding to the administrative burden.

#### ■ 5. Rejection of the indefinite validity of the e-card

The European services e-card is valid throughout the entire host Member State. It is also valid for an indefinite duration (art. 7 § 2 Dir.). However, the draft Directive contains no convincing procedure for keeping the information provided by the card up to date. In particular, article 17 of the draft Directive specifies no time limits for when and how European services e-card holders are required to update information on their e-cards. This situation could prove problematic for both companies with bad and companies with good intentions. Moreover, the e-card cannot be suspended or revoked until all legal appeal opportunities have been exhausted. Therefore, the procedures are not practical for quickly revoking a European services e-card in case of irregularities and/or excluding disreputable service providers from the marketplace as quickly as possible.

So, these shortcomings in the legal framework could prove burdensome for honest companies willing to keep their e-card up-to-date. At the same time, they could also lead to fraud on the part of dishonest companies as they will have no reason at all to update their e-card. Furthermore, there are absolutely no penalties for e-card fraud.

This is a major concern in terms of fair competition in the Internal Market.

#### ■ 6. Complex and unrealistic procedures for administering the e-card

The administration of the European services e-card (i.e. issuing, updating, revoking, cancelling, etc.) relies on procedures which seem to be quite complex or even unrealistic and are based on the existing Internal Market Information (IMI) system.

The IMI is an EU tool for communication between competent national authorities, based on standardised multilingual questions and answers. It requires optimal cooperation between Member States. If used and

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applied properly, it can have added value. However, as such, it does not seem to be a suitable tool for the purpose of the e-card. It lacks modern and efficient features such as data matching, data mining and data processing. The European Court of Auditors also gave the system a negative evaluation<sup>3</sup>. Creating efficient and secure cross-border procedures to allow access to relevant official data (such as the Business Registers Interconnection System created pursuant to Directive 2012/17/EU) is a much better approach.

In addition, the assessment procedures foreseen in art. 11, 12 and 13 of the draft Directive rely on trust and cooperation between Member States, as well as on the principle of mutual recognition. However, EU Member States do not all have the same administrative capacities, so a Member State may have good reasons to sometimes question the reliability of the information received by another one. Therefore - and contrary to what recital 35 of the draft Directive states - the host Member State should keep full control of all information received, including that which is supposedly validated by the home Member State.

It is also unclear what exactly happens if the host Member State has concerns and doubts about the application for a European services e-card. There does not appear to be any right to reject the application if there are reasonable grounds for suspicion. Article 10 of the draft Directive only refers to the right to invoke those overriding reasons of public interest in accordance with Directive 2006/123/EC, which are very restrictive.

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

All in all, the European services e-card cannot work without a high level of digitalisation in the Member States. Many Member States are far from the level of digitalisation that appears to be necessary to make the proposed system work. To be a reliable tool, the European services e-card would need a complex and sophisticated interconnected digital infrastructure that makes real-time checks possible in order to protect the system from fraudulent and bogus companies. As long as such reliable interconnected infrastructure is not in place, the European services e-card will not be workable.

A further step in the direction of the digitalisation of administrative procedures for businesses is already foreseen in the legislative proposal for a Single Digital Gateway (COM(2017)256). Interactions between these two initiatives should be carefully analysed.

At this stage, FIEC considers that the Single Digital Gateway should be made operational as a priority, to support Member States in their efforts to implement e-government procedures.

## ■ 7. Excessive power of the European Commission via the delegated and implementing acts

It is not clear in the legislative proposal how the process of issuing, monitoring, updating, revoking or cancelling the European services e-card will work in practice. There are significant gaps as regards the practical implementation of these aspects.

<sup>3</sup> European Court of Auditors, 2016 special report, Has the Commission ensured effective implementation of the Services Directive?, observations 60, 61 and 63

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According to the proposed provisions, the European Commission grants itself significant legislative powers via numerous delegated and implementing acts.

In particular, the European Commission is expected to adopt implementing and delegated acts (art. 4 § 2 and 3 Reg.) in order to create a standard form for applying for an e-card, as well as all related technical details of its content. This means that the European Commission empowers itself to define the concrete conditions for issuing a European services e-card, which goes beyond the scope of what can be covered by such technical acts and which would require standard legal adoption.

## ■ 8. Concerns about the impact on posting procedures (notification and controls)

Article 2 § 3 of the draft 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. However, this statement is called into question by the proposed legislative initiative.

Article 19 of the draft Regulation contains a review clause whereby the review mechanisms of the Posting of Workers Enforcement Directive (Article 24 of 2014/67/EU) are to be used to evaluate whether the electronic procedures associated with the European services e-card could contribute positively to the registration and control procedures under Article 9 of Directive 2014/67/EU.

The proposed European services e-card is valid for an unlimited period. As the mobility of the workforce in the construction industry is high, the workers' data to which the e-card is going to refer will need to be adapted accordingly. The current proposed provisions do not take this aspect into account.

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

In line with Article 9 of the Enforcement Directive 2014/67, several Member States have smart prior notification tools in the construction industry to ensure that there is proper control and monitoring of posting companies. In addition, in many host Member States the national social partners of the construction industry have developed complementary social ID or comparable tools<sup>4</sup>. Despite the fact that the European Commission was informed about these developments – which are still ongoing – it is now proposing a new additional EU standardised e-tool. In the longer term there is a genuine danger that the proposed European services e-card will replace the national prior notification schemes and jeopardise the existing national social ID card schemes in the different host Member States.

Under Article 5 § 1 of the draft Directive, host Member States are not allowed to impose prior notification or similar measures on a service provider wanting to engage in cross-border activity. The proposed provision does not clarify whether or not prior notification for posted workers is effectively excluded from the scope, as Article 5 of the draft Directive does not explicitly refer to prior notification of posted workers. This creates ambiguity.

<sup>4</sup> <http://www.efbww.org/default.asp?Issue=Social%20ID%20in%20construction&Language=en>

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## ■ 9. A red carpet for letterbox companies and bogus self-employment

Self-employed natural persons will be eligible to apply for a European services e-card (art. 7 Dir.). The procedure for submitting a declaration of professional qualifications via the electronic platform will replace a declaration under Article 7 of Directive 2005/36/EC on the recognition of professional qualifications, which currently allows host Member States to request additional documentation to prove that a service provider is legally established in the home Member State, to pursue the activity concerned. In the case of non-regulated professions, the service provider may be asked to provide proof that the activity in question has been pursued for at least two years.

Also, information provided under Article 7 of Directive 2005/36/EC has to be resubmitted annually. However, since the European services e-card will replace elements of the notification procedure this will no longer be the case. As the proposed e-card has unlimited validity – and as long as there is no automatic real-time update of the e-card - host Member States may no longer be able to regularly verify some of the information provided.

Considering this, along with some other elements – for example the diversity in legal definitions for self-employed workers across Member States – it seems likely that the new proposed scheme will create additional loopholes that will lead to bogus self-employment, which is already an issue of great concern in the construction industry.

In the same way, as the establishment of a branch, agency or office in a host Member State will also be facilitated (art. 13 Dir.), the e-card will make it easier for letterbox companies to set up in any Member State.

Finally, the current wording of art. 8 of the draft Directive appears to create a risk of an unintended cascading effect, whereby a company could apply for a European services e-card in one country, start operating in that country on receipt of its services e-card, then apply in the same country for another European services e-card, to operate in yet another (third) country and so on. This seems to be against the spirit of the draft legislation and to avoid this unintended outcome, this article should be reworded, so that the meaning is clear.