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PROGRESS REPORT

from: Presidency
to Permanent Representatives' Committee/Council (EPSCO)

No. Cion prop.: 8040/12 + COR 1 - COM(2012) 131 final
8042/12 - COM(2012) 130 final

Subject: Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
and
Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services
- Progress Report

I. INTRODUCTION

1. On 21 March 2012, the Commission submitted the above-mentioned proposals, the first one on the enforcement of Directive 96/71/EC¹ on the posting of workers (proposal for an "enforcement Directive"), and the second on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (also referred to as proposal for a Monti II Regulation). These proposals are part of the 12 priority proposals set out in the Single Market Act.

¹ OJ L 18, 21.01.1997, p. 1.

2. The proposal for an enforcement Directive is intended to clarify and improve the implementation, application and enforcement of Directive 96/71/EC in practice. In particular, the proposal aims:
- to set more ambitious standards for the information of workers and companies about their rights and obligations;
 - establish clearer rules for cooperation between national authorities in charge of posting;
 - clarify the elements of the notion of posting;
 - clarify the possibilities of applying national control measures and define the possibilities and responsibilities of national inspections;
 - improve the enforcement of rights, including the handling of complaints and the introduction of a limited system of joint and several liability at EU level;
 - facilitate cross border enforcement of administrative fines and penalties imposed for the non-respect of the Posting of Workers Directive by introducing a system of mutual assistance and recognition.
3. The proposal for a Monti II Regulation confirms the fundamental right to collective bargaining and to take collective action, including the right to strike, and economic freedoms of equal importance. It lays down general principles with respect to the exercise of the right to strike within the context of the freedom of establishment and the freedom to provide services. It also sets out a new alert mechanism for industrial conflicts in cross-border situations.

4. The proposal for an enforcement Directive is based on Articles 53(1) and 62 TFEU, which are identical to those on which Directive 96/71/EC is based and allow for the adoption of directives under the ordinary legislative procedure.
5. The proposal for a Monti II Regulation is based on Article 352 TFEU which requires unanimity and the consent of the European Parliament. This Article also requires that, using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) TEU, the Commission shall draw national Parliaments' attention to proposals based on this Article.
6. The European Parliament, the Economic and Social Committee and the Committee of the Regions have not yet delivered their Opinions on the proposal for an enforcement Directive.
7. Substantive discussions have been held in the Social Questions Working Party on the main issues raised by the proposal for the enforcement directive on the basis of steering notes and proposals submitted by the Presidency, as well as contributions from a number of delegations.
8. All delegations maintain general scrutiny reservations on both proposals and a number of delegations on specific Articles. DK, FR, IE, MT, SI and UK have entered parliamentary scrutiny reservations and HU and SI linguistic scrutiny reservations.

II. PROPOSAL FOR AN ENFORCEMENT DIRECTIVE : MAIN OUTSTANDING ISSUES

9. Article 3 (Preventing abuse and circumvention)

a) Commission proposal

According to the definition in Article 2(1) of Directive 96/71/EC, to be read in combination with Articles 1(1) and 1(3), "*posted worker*" means, for the purposes of the Directive, a worker who, *for a limited period*, carries out his or her work in the territory of a Member State *other than the Member State in which he or she normally works*.

A worker qualifies as posted by virtue of his or her factual situation and the circumstances in which he or she is expected to carry out his or her activities, including:

- the temporary nature of the activities to be performed;
- the existence of a direct employment relationship between the undertaking making the posting and the worker during the whole period of posting;
- the country in which the worker normally works, and
- the existence of a genuine link between the employer and the worker's country of origin.

However, Directive 96/71/EC does not contain any further indication as to how to determine whether the employer is established in a Member State, nor does it contain more specific criteria as to how to determine the temporary nature of the work to be performed by the posted workers of the Member State in which the workers concerned normally work.

To avoid circumvention of rules and combat abuse of the application of Directive 96/71 EC, Article 3 provides for an indicative, non-exhaustive list of qualitative criteria characterising both the temporary nature inherent to the notion of posting as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.

b) Delegations' positions

Most delegations are in favour of an indicative and non-exhaustive list of criteria which would allow taking national circumstances into account while a few delegations are in favour of an exhaustive list as they are concerned that a non-exhaustive list might give rise to disproportionate requests for information.

A number of delegations see the list as sufficient, whereas others point to the need for further clarification on some criteria and/or need to coordinate the criteria with the ones applied in the area of social security.

Whereas a few delegations have raised concerns that the provisions could lead to legal uncertainty, others have expressed doubts about whether Article 3 would help in preventing abuse and stressed the importance of strengthening controls.

Some delegations consider that Article 3 is unclear about the consequences of non-fulfilment of the criteria and creates legal uncertainty for those workers who, by definition, fall outside the definition of posting. It was equally stressed that, in view of its relationship with Article 6, Article 3 could lead to an additional burden for inspection authorities. While recognising that clarifications might be needed in this respect, several other delegations and CIION nevertheless stress that any solution should be in accordance with Council Regulation (EC) N° 593/2008 on the law applicable to contractual obligations (Rome I)². CIION suggested that a possible solution could be adding a recital stating that in case the criteria are not fulfilled, national legislation applies without prejudice to the applicable obligations under the Union *acquis*.

CIION stresses that this Article should be seen in conjunction with Articles 6, 7, 10 and 11. In its views, a clearer, more easily enforceable indicative description of the constituent elements of the notion of posting for the provision of services, as well as the criteria relating to what constitutes a genuine establishment of the service provider in a Member State, are crucial to avoid the use of Directive 96/71/EC for situations that are not proper postings in the sense of the Directive. The list would provide clarity, not only for public authorities but also for service providers and posted workers and should be open ended as it would be impossible to cover all possible situations.

² OJ L 177, 4.07.2008, p. 1.

10. **Article 5 (improved access to information)**

a) Commission proposal

Access to advance information about the terms and conditions of employment applicable in the host country is a prerequisite for interested parties to be able to provide services in compliance with Directive 96/71/EC. Article 5 therefore contains a number of important more detailed measures to help ensure easily accessible and generally available information on the terms and conditions to be respected, including where these are laid down in collective agreements (paragraph 4).

b) Delegations' positions

While most delegations welcome this Article, questions have been put as to how many languages the information to be made available to workers and service providers under Article 5(2)(c) should be translated into.

A large majority of delegations, as well as CION, agree with the Presidency's suggested option to specify that translation should be in the most relevant languages. A broad number of these delegations are of the view that the choice should be left to the hosting Member State account being taken of the country of origin of the posted workers.

A few delegations consider that it would be difficult to impose the obligations laid down in the fourth paragraph to the social partners or have expressed concerns about the possible impact of these provisions on their national systems.

With regard to Article 5(4), CION stresses the importance of covering collective agreements providing for higher protection. While respecting the autonomy of the social partners, it would be in their interest to provide the information in a transparent and accessible manner in order to avoid the risk that they would not be applied in practice.

11. **Articles 6 and 7 (mutual assistance and role of the Member State of establishment)**

a) Commission proposal

Article 6 provides for the general principles, rules and procedures necessary for effective administrative cooperation whereas the role of the Member State from which the posting takes place is covered by Article 7.

b) Delegations' positions

A large number of delegations are of the view that the deadlines laid down in Article 6(5) are too short.

Most delegations support a Presidency's compromise suggestion to introduce the following three different deadline categories:

- a very short deadline for requests that are very urgent and relate to proof of establishment and can be answered by simple means such as consulting a business register or checking a VAT number;
- a deadline for other requests that do not require an on the spot control;
- a longer deadline for other requests that do require an on the spot control.

However, views still diverge on which concrete deadlines should apply to these different situations. Some delegations are in favour of the deadlines as laid down in the Commission proposal while a few others consider that it would be preferable not to provide for deadlines and to use formulas such as "as soon as possible" as in Directive 2006/123/EC (the "Services Directive")³.

A number of delegations are in favour of counting the deadlines as working days.

CION stresses the importance of having ambitious deadlines and considers that the terms "as soon as possible" in the current text with deadlines together with Article 6(4) should already bring a sufficient degree of flexibility to take account of the complexity of requests and of the need for inspections. CION could go along with the principle of differentiated deadlines as suggested by the Presidency and has made it clear that it is not in favour of setting any concrete deadlines.

A few delegations consider that further clarifications are needed on the type of registers referred to in Article 6(6).

Some delegations have expressed concerns that Article 6 could be used to make requests which are not directly linked with the enforcement of Directive 96/71/EC.

A few delegations have expressed concerns with regard to the treatment of personal data. CION stresses that the provisions are fully in accordance with the rules on the protection of personal data as explained in recital n° 13 as well as the recently agreed text of the IMI Regulation.

³ OJ L 376, 27.12.2006, p. 36.

With regard to Article 7 a number of delegations are of the opinion that the respective competences of the host Member State and of the Member State of establishment should be clarified further, including the inter-linkage of these provisions with the provisions on national control measures and inspections (Articles 9 and 10).

CION stresses that Article 7 clearly states that the Member State responsible is not only the host Member State but also the Member State of establishment. Although the main part of checks and controls would normally be carried out by the authorities of the host Member State, there are important elements that could better be checked in the Member State of establishment (i.e whether the company is genuinely established there).

A number of delegations support a compromise Presidency's text proposal for Article 7(4), as set out in doc.10487/12, to make clear that the provision is part of the administrative cooperation mentioned in Article 6 and is without prejudice to rights and obligations of the authorities of the host Member States.

A few delegations continue to stress the need for consistency between Articles 6 and 7.

12. **Article 9 (national control measures)**

a) Commission proposal:

Article 9 contains an exhaustive list of control measures or administrative formalities that may be imposed on undertakings posting workers for the provision of services in order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected.

b) Delegations' positions

A number of delegations welcome that Article 9 contains an exhaustive list of allowed control measures in order to establish legal certainty while a group of other delegations are in favour of a non-exhaustive list as they consider the current list represents a too restrictive interpretation of the ECJ case-law.

Some of the delegations that support an exhaustive list have indicated that they can support a modified wording of Article 9 to allow for more flexibility.

Some delegations consider that the list should also include documents concerning health and safety at work as well as the designation of a contact person for the competent authorities.

CION has indicated that Article 9 reflects the most important control measures and that Recital No 16 reflects prevailing EU law obligations as interpreted by the CJEU.

13. **Article 12 (subcontracting-joint and several liability)**

a) Commission proposal

Article 12 provides for specific provisions concerning contractors' obligations and (joint and several) liability with respect to compliance with the applicable minimum wages of posted workers by direct subcontractors in the construction sector. Member States which so wish may maintain or implement more far-reaching systems of joint and several or chain liability and extend them to other sectors.

b) Delegations' positions

A number of delegations have taken a positive stance towards these provisions, or are in agreement with the principle of joint liability subject to further discussions. Some of these delegations consider that they should not be limited to construction activities but should cover all sectors.

A number of delegations are positive towards the concept of "due diligence" in Article 12(2) while other delegations have expressed doubts about it. In doc. 9438/12, the Presidency has pointed to the fact that the vast majority of postings take place to countries that already have a system for joint and several liability in place and has asked whether public authorities could play a role with regard to due diligence.

A number of delegations – on the other hand - question these provisions as they feel they could lead to obstacles to the free provision of services and to free movement. One delegation further raised concerns about the impact assessment analysis, which was discussed in a working group meeting, in particular as regards the actual financial impact of the proposal and the single market consequences of introducing different rules for companies using posted workers compared with companies using domestic workers, which, it thought, would impact adversely on SMEs and new businesses, in particular. This issue has been specifically dealt with at a working group meeting.

CION stresses the importance of this Article for the protection of workers' rights and points out to the assessment elements with respect to administrative costs and benefits in the accompanying documents to the proposal and in the explanatory memorandum.

14. **Chapter VI (cross-border enforcement of administrative fines and penalties)**

a) Commission proposal

Chapter VI (Articles 13-16) sets out a system for the cross-border enforcement of administrative fines and penalties on the basis of systems already established for the recovery of social security claims by Regulation 987/2009⁴ laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems and for tax claims by Directive 2010/24/EU⁵ concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. The IMI system will be used for the necessary mutual assistance and cooperation between the competent authorities.

b) Delegations' positions

While a number of delegations have expressed interest in this Chapter and indicated elements for further discussion for the purposes of clarification, the text as a whole, in view of its complexity, still has to be examined in detail with participation of experts in the field of Justice and Home affairs, if need be.

III. PROPOSAL FOR A "MONTI II" REGULATION

Many delegations have reservations about the added value of this proposal or have raised concerns regarding the content.

A number of delegations stress the importance of the social partners' positions in view of the sensitivity of the issue.

⁴ OJ L 284, 30.10.2009, p. 1.

⁵ OJ L 84, 31.3.2010, p. 1.

CION has stated that the proposal does not provide for an obligation to introduce dispute resolution mechanisms for those Member States not having them. However, for those Member States in which such mechanisms exist, it does establish the principle of equal access for cross-border cases and provides for adaptations by Member States in order to ensure its application in practice.

CION has informed that it has received reasoned opinions by National Parliaments constituting more than one third of the votes allocated to Parliaments in Protocol No 2 to the TEU on the application of the principles of subsidiarity and proportionality and has confirmed that the so-called 'yellow card' procedure has been triggered

IV. CONCLUSION

Delegations have taken positive views on the overall objectives of the proposal for an enforcement Directive, and in particular there seems to be general agreement on the added value of the proposal.

Except for the issue of cross-border enforcement of administrative fines and penalties (Chapter VI), substantive discussions have taken place on most parts of the proposal and considerable progress has been made in the discussions on some of the issues.

There is a need for further examination of chapter VI of the proposal, and for in depth further discussion on the issues of national control measures, the length of the deadlines (a general agreement on the need for a differentiated approach having been established), as well as the proposed system of joint and several liability. As regards the other main outstanding Articles, many aspects have been dealt with in detail and therefore seems to be a sufficient basis for making substantive progress on some of these issues in the near future also in view of the implementation of the Single Market Act.

On the proposal for the "Monti II" Regulation, according to Protocol N° 2 to the TEU on the application of the principles of subsidiarity and proportionality, CION will have to review the proposal and may subsequently decide to maintain, amend or withdraw it.

The Committee is invited to take note of this Report and to forward it to the EPSCO Council on 21 June 2012.
