



**COUNCIL OF  
THE EUROPEAN UNION**

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## **PROGRESS REPORT**

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| from:           | Presidency   |
| to              | Permanent Representatives' Committee/Council (EPSC0)   |
| No. Cion prop.: | 8040/12 + COR 1 - COM(2012) 131 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<br>- Progress Report |

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## **I. INTRODUCTION**

1. On 21 March 2012, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC<sup>1</sup> concerning the posting of workers in the framework of the provision of services. This proposal forms part of the 12 priority proposals that are set out in the Single Market Act.

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<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

2. The proposal for a Directive aims 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 for applying national control measures;
  - 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 the 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 is based on Articles 53(1) and 62 TFEU, which are identical to those on which Directive 96/71/EC is based and which allow for the adoption of directives under the ordinary legislative procedure.
4. The European Parliament and the Committee of the Regions have not yet delivered their Opinions. The Economic and Social Committee delivered its Opinion on 19 September 2012.

5. The Social Questions Working Party started examining the proposal at the end of March under the Danish Presidency. Under the Cyprus Presidency, the proposal has been discussed on six occasions<sup>2</sup>.
6. As a result of the discussions held under the Cyprus Presidency, major progress has been achieved on the text of the draft Directive in particular as regards Chapters I, II, III, VI and VII, as set out in the Addendum to this Report.
7. AT, CZ, DE, EE, IE, LT, LV, MT, PL, PT, SK and UK maintain general scrutiny reservations. IT maintains a reservation on the legal basis, requesting that the proposal be additionally based on Title X Social Policy of the Treaty (Article 153 TFEU).

In addition, DK, FR, IE, MT, SI and UK have entered parliamentary scrutiny reservations.

All delegations maintain linguistic scrutiny reservations pending availability of the text in their own languages.

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<sup>2</sup> 17 July, 21 September, 9 October, 24 October, 7 November and 20 November.

## II. THE COUNCIL'S WORK UNDER THE CYPRUS PRESIDENCY

### 1. General remarks

Taking up on the discussions that were held during the Danish Presidency (see Progress Report, doc. 10571/12), the Cyprus Presidency set out to complete a thorough, full reading of the proposal. Subsequently, with a view to paving the way for substantive advancement of this dossier, and in light of the European Council's call for rapid progress on this priority proposal, the Presidency concentrated on an in-depth examination of specific Chapters of the proposal. Discussions took place on the basis of working documents, including steering questions and text proposals submitted by the Presidency, as well as contributions by a number of delegations.

Extensive in-depth discussions were held in the Working Group on Chapters I, II, III, VI and VII. As regards Chapter VI, relating to cross-border enforcement of administrative fines and penalties, intensive and lengthy discussions were held with the participation of the delegations' legal experts, as the content involved administrative law and the issues raised during the discussions were of a highly technical and complex nature. During the discussions the delegations had the chance to clarify, amongst others, practical implementation issues and thoroughly analyse the interaction of the provisions of this Chapter with those of the Council Framework Decision 2005/214/JHA and other EU instruments. Notable progress has been achieved in respect of these Chapters although delegations maintain scrutiny reservations, especially on the provisions of Chapter VI.

As a result of these discussions and after listening carefully to the views of the delegations' experts, the Commission representatives' responses, and studying the proposals submitted, the Presidency made drafting suggestions in order to improve the content of the proposal, to reflect on the delegations' requests for enhancing clarity and legal certainty and to seek a compromise on controversial issues.

Text proposals were put forward on Chapters I, II, III, VI and VII, and on recitals 5 and 13 as they relate to Article 4 (former Article 3 in the Commission proposal) and Article 6 respectively, as set out in the Addendum to this Report. Delegations' positions are outlined in footnotes.

## **2. Chapter I (General Provisions):**

Chapter I sets out the general provisions, including a framework for preventing abuse and circumvention of the rules on posted workers under Council Directive 96/71/EC. In particular, Article 1 outlines the subject matter of the proposal, Article 2 lays down some key definitions, Article 3 deals with the designation of competent authorities and Article 4 is concerned with preventing abuse and circumvention. To this end, in order to avoid the use of Directive 96/71/EC for situations that are not proper posting cases in the sense of the Directive, Article 4 includes an indicative description of elements of the notion of posting to determine whether a worker temporarily carries out his work in a Member State other than the one he or she normally works, as well as criteria for assessing whether a service provider genuinely performs substantial activities in a given Member State.

The discussion of this Chapter highlighted the following issues:

a) **Articles 2 and 3:**

A large number of delegations and CION are in agreement with the Presidency's proposal with regard to the definition of "competent authority" in Article 2a (*"competent authority means any authority or body designated by a Member State to perform functions under this Directive"*) as this would provide Member States with flexibility in choosing their competent authorities, including the choice to designate social partners. The proposal also provides for the respect of Member States' choices on this matter and lays down the principle that Member States remain ultimately responsible for ensuring data protection.

A number of delegations retain reservations on the Presidency's proposal as they consider that the definition should only refer to "public authorities" or "public bodies" in view of the need for consistency with Article 4 of Directive 96/71/EC and in order to maintain sufficient guarantees as regards data protection.

According to the CION, all necessary guarantees with regard to the protection of personal data are provided by this Directive and by Regulation 1024/2012 (EC)<sup>3</sup> on administrative cooperation through the Internal Market Information System ("the IMI Regulation") and the importance of the role of the social partners in the area of posting should be acknowledged in this respect.

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<sup>3</sup> Regulation (EU) No 1024/2012 of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Information System as regards the protection of data; OJ L 316, 14.11.2012, p. 1.

**b) Article 4 (former Article 3 in CION proposal) and recital 5:**

Good progress has been achieved in relation to the criteria for assessing whether a given service provider genuinely performs substantial activities in a given Member State, as well as whether a worker is indeed a posted one. However, a large group of delegations still maintain scrutiny reservations on the question of the consequences of a negative assessment of the indicative list of qualitative criteria/constituent elements provided for in this Article. In particular, questions have been raised in relation to the terms and conditions of employment which would apply for workers falling outside the scope of this Directive and the relation of this Directive with Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the Rome I Regulation).

In relation to this issue, the Presidency has proposed modifications to recital 5 indicating that, in principle, the law of the host Member State should apply (where the work is performed by the posted worker), without prejudice to the Rome I Regulation. Some delegations explicitly wish this law to apply, notwithstanding the Rome I Regulation. CION, on the other hand, argues that the applicable law would always have to be established in accordance with Rome I Regulation. A written Opinion by the Council Legal Service has been requested on this matter and is pending. Several delegations have indicated that while basically in agreement with the Presidency's proposal, their position on Article 4 will ultimately depend on this Opinion. Certain delegations have stated that if the Opinion concludes that the applicable law would always have to be established in accordance with the Rome I Regulation, they would wish the inclusion of a provision laying down the principle of equal treatment for workers performing temporary work with nationals in the Member State where the work is carried out.

### 3. **Chapter II (Access to information)**

In order to improve access to information for workers and service providers in relation to their rights and obligations under the Directive, Chapter II (Article 5) lays down detailed requirements that need to be satisfied in relation to the availability, accessibility and clarity of this information. To this end, with a view to achieving consensus between delegations, the Presidency has proposed amendments to the Commission's proposal, namely, in respect to the languages in which the information must be provided and on ensuring information for workers and service providers in respect of terms and conditions that are laid down in collective agreements.

All delegations are in agreement with the text of this Chapter as modified by the Presidency.

### 4. **Chapter III (Administrative cooperation)**

Chapter III contains provisions on cooperation between the national authorities responsible for the implementation of the proposed Directive. The general principles, rules and procedures needed for effective administrative cooperation and assistance are set out in Article 6, while the role of the Member State of establishment of the service provider is laid out in Article 7. Article 8 provides for accompanying measures to facilitate and improve administrative cooperation and monitoring compliance with and enforcement of the applicable rules.

On Article 6, progress has been achieved in relation to such issues as the principles of administrative cooperation, the use of the IMI and the time limits for transmitting information. On this last issue (Article 6(5)), the Presidency submitted a number of proposals in successive meetings, procuring broad agreement on an issue in which initially delegations' views appeared particularly divergent. However, certain delegations retain some reservations.



Views amongst delegations still differ on the need for a provision stating that the cooperation of the Member States may also include the sending and service of documents of the requesting authority, as suggested by the Presidency, upon request from a number of delegations (see Article 6(2a) in the addendum) on the basis of the European Convention on the Service Abroad of Documents relating to Administrative matters (CETS No. 094). A large number of delegations have raised scrutiny reservations on this provision and consider that the advice of the Council Legal Service should be sought. CION also questions the need for such a provision.

An overall agreement was reached on Article 7 on the basis of a Presidency's text proposal. No particular reservations have been expressed in relation to Article 8, which was discussed mainly under the previous Presidency.

## **5. Chapter VI (Cross-border enforcement of administrative fines and penalties)**

The objective of this Chapter is to set up a system for the mutual recognition and enforcement of administrative fines/penalties imposed on a service provider established in a Member State for failure to comply with the applicable rules on the posting of workers in another Member State.

This system is intended to cover fines/penalties which are not covered by existing EU instruments such as the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties<sup>4</sup> and the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>5</sup> It is also meant to use the IMI system for the necessary mutual assistance and cooperation between the competent authorities.

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<sup>4</sup> OJ L 76, 22.03.2005, p. 16.

<sup>5</sup> OJ L 12, 16.01.2001, p. 1.

In view of its particularly complex nature, especially as regards its legal dimension, this Chapter has been the object of extensive discussions with a view to clarifying its legal implications and modalities for implementation. It should be noted that, currently, non-compliance with the obligations under Directive 96/71/EC is sanctioned differently across Member States (such sanctions being of a penal or criminal nature or governed by administrative law or being a combination of the two).

Stressing the importance of creating effective enforcement mechanisms at EU level to tackle unlawful behaviour, most delegations welcome the general purpose of this Chapter. However, a significant number of delegations still maintain general scrutiny reservations on the Chapter as a whole.

In the light of the discussions, substantive changes and additions have been suggested by the Presidency aiming at:

- Clarifying the scope of the Chapter (Article 13). The Presidency proposes limiting the scope to financial administrative penalties/fines as they would be easier to practically apply than other administrative penalties. While most delegations broadly agree with this suggestion, two delegations and CION are concerned that the scope would be too restrictive. A number of delegations consider that the text should be clarified further with regard to the type of sanctions falling within the scope of the Chapter and have entered scrutiny reservations.
- Introducing provisions regarding the determination of competent authorities for the purposes of the application of the Chapter (Article 13a). A large number of delegations are in agreement with the Presidency's proposal for new Article 13a. However, some delegations have expressed reservations regarding the relationship between “competent authorities”, “central authorities” and “relevant authorities” which are referred to in the text of that provision.

- Laying down general principles on mutual assistance and recognition (Article 13b). A large number of delegations are in agreement with the Presidency's proposal for new Article 13b. However, a small number of delegations consider that the text could be improved further in relation to the distinction between the rules for recovery of a penalty/fine and the rules for notification of a decision imposing a penalty/fine.
- Laying down clear (information) requirements that must accompany requests for notification and requests for recovery (Article 14) and making a distinction between the information requirements for each of the two types of requests. Most delegations are in agreement with the Presidency's text proposal, while a few delegations maintain reservations.
- Introducing clear grounds for refusal of a request for recovery or notification (Article 14a). Most delegations are broadly in agreement with the Presidency's text for new Article 14a, including on a threshold for the amount of financial penalty/fine. Some delegations consider that further elements should be added to this list, while two others would be in favour of removing certain items.
- Determining where proceeds from recovery of penalties/fines will accrue and who bears the costs of recovery (Article 16). In this respect the Presidency concentrated its efforts on achieving consensus by proposing several options to the Member States, ultimately resulting in the principle that the requested competent authority retains the amounts recovered and also bears the costs of recovery. The majority of Member States agree with this principle while a few delegations maintain reservations.

- Introducing a specific review clause for this Chapter (Article 16a). In view of the innovative character of Chapter VI, the Presidency suggests introducing a review clause on the model of the review clause as set in Council Regulation (EC) No 987/2009, laying down a procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems. Most delegations can agree with this new Article.

While considering that in view of these proposals, the text of Chapter VI has considerably improved and moves in the right direction, a few delegations are of the view that the text could be further improved by introducing additional provisions in respect of issues such as periods of limitation, languages and exchange rates on the basis of the content of the Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures<sup>6</sup> and its Implementing Regulation No 1189/2011/EU<sup>7</sup>. CION argues that such additions, with the exception of prescription deadlines, would not be necessary taking into consideration the suggested system of distribution of costs by the Presidency (Article 16) and the implementation of the relevant provisions of this Chapter through IMI.

Another issue that remains of concern is the possible interaction with the Council Framework Decision 2005/214/JHA and the Brussels I Regulation, although CION has provided further information in this respect, clarifying that the provisions of this Chapter only apply to infringements and non-respect of the applicable rules on posting which are not covered by other existing EU instruments. The Council Legal Service has been asked to provide a written Opinion on this issue.

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<sup>6</sup> OJ L 84, 31.3.2010, p. 1.

<sup>7</sup> Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU; OJ L 302, 19.11.2011, p. 16.

## 6. Chapter VII (Final Provisions)

Chapter VII lays down a number of final provisions. These include, *inter alia*, provisions on penalties in case of non-compliance with the draft Directive (Article 17), the legal basis for the use of the Internal Information System (IMI) and the continuation of application of bilateral agreements (Article 18), necessary technical amendments to the IMI Regulation (Article 19), transposition dates (Article 20), and reporting from the Commission on the implementation of this Directive, five years after the expiry of the Directive's deadline for transposition (Article 21).

The remaining substantive issues on this Chapter mainly concern Article 18 (Internal Market Information System), in particular with regard to the application of bilateral arrangements, where a small number of delegations maintain scrutiny reservations.

## III. OTHER ISSUES

### Articles 9 (national control measures) and 12 (joint and several liability)

Discussions on these two provisions were held on the basis of steering questions that were put forward by the Presidency. Divergent views continue to exist in relation to Article 9, which provide for national control measures that may be imposed by the administrative authorities of the host Member State and Article 12, which lays down the principle of joint and several liability in the construction sector in respect of direct subcontractors.

With respect to Article 9, a number of delegations would prefer an exhaustive list of administrative measures, as per the Commission's proposal. One of the concerns in this respect is to ensure legal certainty and sufficient transparency for the service providers. At the same time, another group of delegations prefer a non-exhaustive list. A consideration in this respect, is the need for adequate flexibility in imposing control measures in order to ensure proper compliance with the applicable rules, as the case law on posting cases has not been exhaustive and there should be adequate space for reflecting future developments. Blocking minorities exist on both sides.

On Article 12 there is also divergence amongst delegations, some of which favour this provision, while others wish that it is removed. Additionally, there are reservations on the provision for the concept of “due diligence” which is laid down in this Article and could exempt service providers from liability. Furthermore, some delegations would wish the principle of joint and several liability to extend beyond the construction sector, as well as to all of the levels of the liability chain.

### **Request by the French delegation with regard to the transport sector**

Stressing that the effective implementation of the 96/71 Directive, notably its provisions regarding wages, is a key element for fair competition between road transport undertakings within the EU, FR requests:

- the addition of a new recital 26a<sup>8</sup> to specify that the Directive applies to the transport sector, with the exception of merchant navy, as stated in Directive 96/71/EC;
- a new text in Article 9(1)(a)<sup>9</sup> thereby, in situations under the scope of the 96/71/EC Directive, road drivers should be informed about the wage levels they are entitled to through a specific mention on the documents that have to be carried for any international transport coming under the scope of the Directive and cabotage.

A few delegations have indicated that they share FR's concerns.

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<sup>8</sup> "This directive, pursuant to the 96/71 directive, shall apply to transport undertakings, except merchant navy undertakings as regards seagoing personnel, performing any transnational provision of services, particularly any cabotage operation in accordance with regulation n°1072/2009 of the European Parliament and the Council of 21 October 2009 on common rules for access to the international road haulage market or Regulation n°1073/2009 of the European Parliament and the Council of 21 October 2009 on common rules for access to the international market for coach and bus services."

<sup>9</sup> Which would read: "for each carriage, the employers deliver to those mobile workers a document specifying the wage rate applying to their on-going duties."

While understanding the underlying reasons for FR's position, CION stresses the complexity of the issue as some situations in international transport may not be qualified as posting situations and refers to the Council and Commission Statement in the Minutes regarding Article 1(3)(a) of Directive 96/71/EC (doc. 10048/96) ADD 1. It recalls that the enforcement Directive should not in any way lead to a reopening of the scope of the current Directive.

With respect to FR's proposal for a new point b) in Article 9(1), CION recalls that the current Directive does not provide for such an obligation and questions its practical implications.

This issue will have to be examined further in the light of a written opinion to be given by the Council Legal Service.

## V. CONCLUSION

The level of progress that has been achieved on the dossier should facilitate future discussions and pave the way for further progress with a view to reaching agreement on the overall text of the draft Directive, within the Council (EPSCO) in the near future, a necessary objective in view of the implementation of the Single Market Act.

At the same time, it is recognised that detailed discussions still need to be held on a number of issues, namely on national control measures (Article 9), inspections (Article 10), defence of rights, facilitation of complaints and back payments (Article 11) and subcontracting and joint and several liability (Article 12).

The Committee is invited to take note of this progress Report and to forward it to the EPSCO Council on 6 December 2012 for consideration in parallel to its orientation debate regarding Article 9 (national control measures) and Article 12 (joint and several liability) on the basis of the Presidency's steering note (doc. 16637/12).

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