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From:	Social Questions Working Party
On:	11 April 2016
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending 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

I. Introduction

On 11 April 2016, the Social Questions Working Party continued the discussion on the above proposal.

A number of delegations opposed discussing in detail the proposal, before having a thorough examination of the Impact Assessment. Some of them raised doubts about the quality of the impact assessment, referring to insufficient data on the basis of which the Commission had reached unjustified conclusions. In particular, according to them, there was not sufficient data which would prove that the wage gap between local and foreign workers is widening and that the current rules were sufficient to prevent social dumping. Some also invoked the lack of consultation of social partners and raised concerns as to the breach of the principle of subsidiarity. Several of them shared the view that the impact assessment did not properly analyse the adverse effects on competitiveness. An opinion was expressed that it was not balanced and not in line with the Interinstitutional Agreement.

While acknowledging the concerns expressed, the Presidency assured the delegations that the aim of the discussion at that meeting was to clarify the main issues related to the proposal in order to gain more insight with the view to the in-depth discussion on impact assessment, to be held on 28 April 2016. The Presidency´s approach was supported by a delegation.

Following reservations have been entered:

a) Reservations on specific provisions

HU:

- specific scrutiny reservations:
    - the new Article 2a(1);
    - Recital 5;
    - deletion of Article 3(1)(a), second indent
    - deletion of Article 3(10);
- positive scrutiny reservation:
    - Article 3(1b);
- negative scrutiny reservations:
    - new Article 2a(2);
    - Recital 8;
    - Article 3(1)(c);
    - Article 3(1a) ;
    - deletion of Article 3(9);
- specific linguistic reservations:
    - new Article 2a(2);
    - Article 3(1a), second part of the sentence ("*the Member State may… to its territory*");

LV:

- specific scrutiny reservation on Article 3(1);

DK:

- specific scrutiny reservation on Recital 12;

SE:

- specific linguistic reservation on Article 3(1).

b) General and parliamentary scrutiny reservations

All delegations have maintained general scrutiny reservations. EE, DK, HU, RO and UK have raised parliamentary scrutiny reservations, PL and HU linguistic reservations.

II. Comments/questions and answers

1) Long-term posting (new Article2a)

a) Delegations' comments/questions

A number of delegations opposed this provision, considering that it lead to a disproportionate limitation of the freedom of provision of services. They were of the view that, if the law of the host Member States applied, the notion of posting was not met. These delegations noted that no data in the Impact Assessment justifies the period of 24 months set in the new Article 2a(1). It was underlined that the proposal was not in line with the case law. Furthermore, according to them, there was no justification for setting the same time period as in Regulation 883/2004, given there is no clear link in legal terms. It was also stressed that the proposal was not in line with the principles of smart regulation and proportionality.

Other delegations considered that this proposal went in the right direction. Some delegations questioned the duration of the period, while other suggested framing in 36 months to better calculate it.

The following questions and doubts have been raised:

- the way of assessing the anticipated period, and which elements should be taken into account for assessing whether it is one and the same job;

- alignment with the new proposal on Regulation 883;

- what is the trigger for applying the host Member State law, in particular in case of a replacement;

- the issue of possible discrimination, with some workers being considered subject to the law of the host Member State, while others, working on the same project, to the law of the home Member State;

- the possible impact on Rome I Regulation, with some delegations considering that the proposal was not legally sound as a Directive is to be transposed in national laws while a Regulation is directly applicable; moreover, according to them, the proposal was not in line with Rome as the notion of habitually working should not be changed if only temporarily working abroad;

- question whether the criteria in Article 4(3) of the enforcement Directive would prevail above the one on 24 months or vice versa.

b) Explanation by the Commission

Calculation of 24 months and cumulating of posting periods

The first paragraph of the new Article 2a deals with two situations:

1) the posting has, from the very beginning, been **anticipated for more than 24 months**: paragraph 1 will apply to the worker from the very beginning of the posting situation, irrespective of the effective duration of posting. If the posting was anticipated for 26 months but effectively only lasted 23 months, the posted worker should have been considered working habitually in the host Member State from the first day to the last day of the posting. In such a situation, there is no issue of calculation of the period of posting since the application of the rule **is triggered by the start of the posting**.

2) the posting was anticipated for less than 24 months, but effectively exceeds 24 months: the application of paragraph 1 **is triggered by the effective duration of posting exceeding 24 months**. The effective duration will correspond to the envisaged duration plus the additional posting period. In practice, in case that the envisaged period of posting has been exceeded, the service provider should have made a declaration to the host Member State for the additional period. The same logic applies to the posted worker sent in replacement of a posted worker to perform the same task at the same place.

How to determine whether a posted worker has replaced another posted worker? In all cases, this will be known to the employer who should act in accordance. As far as the labour law is concerned, the fact that the worker is posted in replacement of another posted worker **triggers the application of the law of the host Member State in case the cumulative duration exceeds 24 months and the period of posting of the newly posted worker is envisaged or effectively lasts for more than 6 months**.

It is up tot the national authorities to assess whether the service provided can be considered as the same job for the same period by the same worker.

Relation to Regulation 883/2004

Regulation No. 883/2004 provides that it is possible to derogate certain provisions of the Regulation, in particular the rule of Article 12 according to which a posted worker continues to be subject to the social security legislation of the home Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person. As far as labour law is concerned, **such derogation would make no sense since the Directive already provides (Article 3(7)** that it applies only insofar as it is more favourable to the worker.

Furthermore, in the field of social security, once a worker has ended a period of posting, no fresh period of posting for the same worker, the same undertakings and the same Member State can be authorized until at least two months have elapsed from the date of expiry of the previous posting period. That provision concerns two different postings, hence the 24 months period as proposed Article 2a does not apply in such a case.

Relation to Rome I Regulation

The Rome I Regulation applies in situations involving a conflict of laws, to contractual obligations in civil and commercial matters, hence including employment contracts. In 1996, the Posting of Workers Directive recognised the applicability of the (at the time) Rome Convention and intervened to coordinate the laws of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country. In fact, without interfering with the principles of the Convention, the Directive determined the "mandatory rules" which would need to be applied to posted workers, irrespective of the choice of law made or of which law was applicable to the employment contract.

The present proposal takes the same approach. It recognises that the Rome I Regulation applies and **it limits its intervention to qualify, exclusively for the posting situations, the criterion "habitually carried out" enshrined in Article 8 of the Rome I Regulation**. Nonetheless, in accordance with Article 3(7) of the 96 Directive, this cannot result in a situation less favourable to the worker. Moreover, this rule can be derogated by an agreement between the employer and the worker, subject to an explicit consent of the worker.

Equal treatment

The Commission stated that no discrimination was involved, as **the worker has still a possibility to explicitly agree with keeping the law of sending state or, if there are less favourable conditions, Article 3(7) applies**.

Third country nationals

The Directive applies **to all third country nationals legally residing in the Member States which are subject to posting**.

2) **Remuneration (Article 3(1))**

a) Delegations' questions/comments

Several delegations opposed this provision. They were of the view that the amendments would lead to a lack of competitiveness of the sending enterprises, as they have to bear also other costs, such as travel, board and accommodation, in particular, should these not be included in the remuneration. In this context, some of them pointed out that mandatory elements might also cover some allowances which are relevant for the local workers but not for posted workers which would hinder the provision of services. Furthermore, these delegations underlined that the rulings of the ECJ clearly interpreted which elements are part of the minimum wage, while this proposal leaves a wide room of interpretation and does not bring more clarity. As regards publishing remuneration on a website, some of them stressed that it was not inline with business policies on remuneration (often business secret) and pointed out the high costs involved and the difficulties related with running the website (frequent updating, separating professions etc.).

On the other hand, other delegations were of the view that the Commission was indeed trying to codify the case law, thus welcoming the proposal in this respect, as it would ensure more protection for workers.

The following issues have been raised:

- clarifying the issue legal basis of the proposal, asking the Legal Service for an opinion;
- clarifying the content of the website;
- implementation and transparency: in some countries as the levels of salaries depend on collective bargaining and updating the information would be difficult. Concerns were expressed about possible discrimination of national workers involved in public tenders;

- issues of equal treatment for workers in relation to different collective agreements applying in the same Member State and issues of level playing field for enterprises in relation to additional costs for travel and housing to be born by foreign enterprises..

- how the same remuneration for the same job should be assessed, taking into account different qualifications of workers and a lack of a European common definition of qualifications;

- calculation of the remuneration and including/not including particular allowances.
- question of possible definition of a remuneration;

- taking into account the (often deplorable) quality of accommodation and the necessity make the employer liable for decent conditions of accommodation;

- the aspect of health and safety of workers and the necessity to improve the conditions of workers in this respect, taking into account the great number of work-related accidents.

- The question weather all situations under article 3 (8) were covered by the paragraph on remuneration.

b) Explanation by the Commission

Calculation of remuneration (elements)

"*host Member State perspective*": Article 3(1) sets the he terms and conditions of employment from the host Member State that must be applied to posted workers if they are set by law or by collective agreements made universally applicable. This provision is amended in the new proposal.

"*home Member State perspective*": Article 3(7) sets which part of the amount effectively paid to the worker needs to be accepted by the host Member State as part of the minimum wage. As the proposal does not amend paragraph 3(7), the situation remains unchanged: **all the elements effectively paid to the workers which are currently considered as part of the minimum rates of pay are obviously considered as remuneration**.

Taking this distinction into account, according to the proposal, **all the elements of remuneration rendered mandatory by national law or universally-applicable collective agreement must be applied to the posted worker**. From the *host Member State perspective*, this can include daily allowances and other posting-specific indemnities but **only if they are mandatorily applied to local workers**. From the *home Member State perspective*, the question is, whether a per-diem, a housing allowance or any other specific allowance are taken into consideration for monitoring the compliance with the rules on remuneration of the host Member State. Since the Commission proposes no change to Article 3(7), the current situation on this matter remains unchanged.
The Commission undertook to provide a table with some examples of calculation of remuneration in order to better clarify this issue.

It was confirmed that all situations under article 3(8) were covered in the paragraph describing remuneration.

Coherence with the reference to 'minimum wage' in Article 3(7)

The reference to the allowances being part (or not) of the minimum wage could remain unchanged since there is no doubt that if it is part of the minimum wage, it is also part of the concept of "remuneration".

Definition of 'remuneration' at national level

Remuneration is a broad concept which is does not need an explicit definition at national level and the Commission proposal does not request one. The definition of what is mandatory is left to the Member States and to the specific wage-setting mechanisms set by them. No obligation is set upon the Member States to do so, but, insofar as they do it, they would have to apply it also to posted workers.

Equal treatment

All mandatory elements of the remuneration which apply to local workers, should equally apply to posted workers, such as seniority, hardship allowances etc.

Link between Article 5 of the enforcement Directive and Article 3

Under the applicable legislation, the Member States have to publish applicable terms and conditions of employment. Today these are the minimum rates of pay. **If this proposal was adopted, the Member States would have to publish mandatory elements of remuneration**. This information will need to be provided in the single website, for instance, by listing the elements of the universally applicable collective agreements that have an impact on the remuneration of the workers.

3) Collective agreements (deletion of text in Article 3(1) second indent, and paragraph 10, second indent

a) Delegations' questions/comments

Some delegations opposed this amendment which would, according to these delegations, distort competition and increase obstacles to the internal market. They felt that extending the scope to all sectors can have a significant impact on administrative capacity, be disproportionate and represent a great burden as to the obligation to provide information. According to them, it was compatible with neither the principle of subsidiarity nor with the principle of proportionality.

A case of a country was mentioned where not all sectors have universally applicable agreements and there is no minimum wage neither.

Finally, a question was raised as to the status of the Annex under the new proposal, reference being made to the difficult discussion concerning Article 12 of the enforcement Directive where a reference to the Annex is made.

b) Explanation by the Commission

The amendments **make the collective agreements universally applicable** within the meaning of Article 3(8) applicable **to posted workers in all sectors of the economy**. This must be done **on a non-discriminatory basis**, which means that it can only be applied to posted workers, insofar as it is applied to local workers. No obligation is put upon those Member States which have no industrial relations model to adopt these agreements. But if such agreements exist and insofar they are universally applicable within the meaning of Article 3(8), they should apply also to posted workers. This will increase accountability and transparency

The specific provisions on subcontracting liability in Article 12 of the Enforcement Directive, which are mandatory only for the activities mentioned in the Annex, will continue to apply since the Annex was kept for that purpose.

4) Subcontracting (new Article 3(1a))

a) Delegations' questions/comments

A group of delegations had negative views on this proposal which was, according to them, running against the principles of proportionality and subsidiarity. They felt that it was a protectionist measure which would lead to distortion of internal market and hinder the use of subcontractors from other Member States. Furthermore, they stressed that there was no assessment done on what would be the impact of this provision. An argument was put forward that, on company level, the wages might be even higher than in sectoral (universally applicable) agreements.

Following questions have been raised:

- A transparency issue in relation to non-universally applicable collective agreements, in particular in the absence of an obligation to publish on a website the content of all collective agreements (in contrast to universally applicable agreements);

- the issue of liability: is it applied or not throughout the subcontracting chain.

b) Explanation by the Commission

As far as subcontracting involves posting, this proposal modifies the legal framework since it would allow the **application to posted workers of terms and conditions of employment concerning remuneration which are not limited to minimum rates of pay and not limited to remuneration stemming from law or universally-applicable collective agreement**. In some countries, there are company level agreements which go beyond the universally applicable collective agreements and guarantee to workers better conditions. If these agreements apply to local workers, Member States would have the possibility to have them applied throughout all the subcontracting chain, including to posted workers.

The reason for introducing this provision is **to protect posted workers in subcontracting chains which are in a particularly vulnerable situation**. This was recognised by the legislator when adopting the enforcement Directive. Its Recital 36 clearly states that "*compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains*".

In any subcontracting chain, there is a main contractor which has committed itself vis-à-vis the final client to perform a certain task, being perfectly aware of the costs it represents.

This provision is a completely new model and, to the Commission´s knowledge, it is not yet in place in any of the Member States. This Directive gives the Member States the possibility to use this option. As it introduces a new legal situation, there is no case law to be assessed against. .

As for the transparency, **the first contractor is liable to inform the subcontractor about the applicable conditions** which were agreed by management and labour within the enterprise.

5) Temporary agency workers (new Article 3(1b)) and deletion of paragraph 9

a) Delegations´ questions/comments

Some delegations did not support this amendment, being of the view that it lead to an unequal treatment, as Article 5 of Temporary Agency Work Directive (TAWD) had a broader scope in terms of rights than the relevant provisions in this proposal. They expressed doubts in relation to the respect of principles of proportionality and subsidiarity. Others were in general supportive, some of them having in place a system in order to treat this category of workers equally with locals.

Following issues have been raised:

- clarification in connection to Article 3(1)(d);
- relation to the derogation in Article 5(2) of TAWD;
- clarifying different situations related to different types of contracts (open-ended, temporary etc);
- clarifying the issue of allowances;
- clarifying the issue of requirements and administrative rules in accordance with Article 9 of the enforcement Directive;
- clarifying the scope of Article 5 of TAWD in relation to this proposal;
- clarifying the competences of Member States relation to wages, equality, access to facilities etc.

b) Explanation by the Commission

The objective of coherence between the conditions applied to temporary agency workers sent to a user undertaking by agencies established locally or in another Member State is met. This is ensured **by making applicable to cross-border temporary agency workers the principle of equal treatment** (in that case, meaning equal treatment between temporary agency workers and a comparable worker of the user undertaking).

Article 5(4) of the Directive on Temporary Agency Work (2008/104/EC) deals with the situation of Member States in which there is no system for declaring collective agreements universally applicable. It provides that these Member States can establish arrangements concerning the basic working and employment conditions which derogate from the principle of equal treatment and may include a qualifying period for equal treatment. Member States which are in the situation covered by this Article and which have established arrangements (including or not a qualifying period) will have to apply it to cross-border temporary agency workers in the same way as to local temporary agency workers.

III. Conclusion

The Chair informed the delegations that the Impact Assessment will be discussed in detail at a next Working Party, and encouraged them to provide their input by the deadline on 15 April.