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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 - Progress report

I. INTRODUCTION

On 8 March 2016, the Commission adopted a proposal amending the Directive 96/71/EC¹ concerning posting of workers. The proposal is a targeted revision aiming at ensuring a level playing field for service providers and at the same time protecting the posted worker. According to the Commission, the twenty-year old Directive does not any more reflect properly the developments since 1996 and the current situation on the labour markets, such as a considerably increased wage differentiation in sending and host countries.

¹ 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. 1–6.

On 10 May 2016 the eight week period for the consultation of national parliaments ended. By this date, national parliaments of 11 Member States had sent reasoned opinions accounting for 22 votes. Thus, the threshold of one third of the votes required to trigger the so called yellow card procedure has been reached. Under Article 7 (2) of the Protocol No 2² annexed to the Treaties, the proposal must be reviewed by the Commission which may decide to maintain, amend or withdraw the proposal.

The Social Questions Working Party (SQWP) discussed the proposal on five occasions, the last SQWP meeting took place on 2 June 2016. In the SQWP on 13 May, a group of delegations asked for suspending any work at technical level. The majority of delegations however supported the Presidency's approach to continue the work in order to finish ongoing business and to further clarify issues at technical level, such as the relationship between the proposal and the Rome I Regulation, while fully respecting the national parliaments reasoned opinions and the Commission's reflection period.

The European Parliament has not yet delivered its position in the first reading. On the proposed legal basis of Articles 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU), the Council is required to act in accordance with the ordinary legislative procedure with the European Parliament.

The European Economic and Social Committee, requested by the Commission for an opinion on an optional basis, has not yet delivered its opinion on the proposal.

At this stage, all delegations are considered to have general scrutiny reservations on the proposal. EE, DK, HU, MT, RO and UK have entered parliamentary scrutiny reservations, PL, HU and SE linguistic reservations. LV and DK have each a specific scrutiny reservation.

² Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ C 326, 26.10.2012, p. 206-209.

II. THE COUNCIL'S WORK UNDER THE NETHERLANDS PRESIDENCY

1. Discussion in the responsible SQWP

In general, delegations agreed that free movement of workers and free provision of services are fundamental principles of the EU which contribute to economic growth and prosperity in the EU. They also agreed that fraud and illicit practices on posting need to be addressed and tackled. Delegations did however have opposing views on the Commission proposal.

A group of delegations was of the view that it was premature to propose modifications to Directive 96/71 before the deadline for transposition of the 2014 Enforcement Directive³ has expired (June 2016) and has brought tangible outcomes. They rejected all elements of the proposal mainly with the argument that it undermined the Internal Market and, in particular, the free movement of services. On the other hand, another group of delegations welcomed the initiative as a good basis for improving current rules, increasing legal certainty for employers and workers, and contributing to a more equal position of workers and to a competition based on innovation and skills (and not on wages only). A third group of delegations raised various questions and concerns about the proposal to be answered and addressed before taking a final position.

Examination of the Impact Assessment (IA)

On 22 March, a questionnaire was sent to delegations to which 22 Member States replied. The Impact Assessment (IA) was thoroughly analysed and discussed by the SQWP on 28 April and the Presidency reported to COREPER, in line with the indicative guidance as set out in doc. 16024/14. The report on the examination of the IA can be found in the Addendum to doc. 9309/16.

³ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014, p. 11-31.

2. Discussion in other Council configurations

A group of delegations asked for discussions of the proposal at the Competitiveness Council on 26 May. In preparation of that Council, the Commission presented the proposal and its impact assessment also to the Working Party on Competitiveness and Growth on 12 May. The Presidency reported on the outcome of this discussion in the SQWP on 13 May.

There were opposing views as to the possible effects of the proposal on the free movement of services and competitiveness in the internal market, on the one hand, and the need to apply compulsory rules equally to all workers and companies operating in the same market on the other.

Furthermore, the proposal was discussed in the Working Party on Civil Law on 11 May. In particular, the delegations raised concerns on the possible relationship between the Rome I Regulation (mainly Article 8), the Brussels I Regulation and the new Article 2a of the proposal. The Presidency reported on the outcome of the discussion in the SQWP on 13 May.

III. MAIN ISSUES DISCUSSED IN THE SQWP

The discussions in the SQWP reflected the controversy as described under Chapter I. In this light, they concentrated on clarifications regarding the Impact Assessment and the proposal itself. On a number of issues (e.g. subcontracting, temporary work agencies and collective labour agreements) several Member States raised questions and concerns and some made suggestions to address these concerns. On other issues (e.g. long-term postings and remuneration) discussions were more profound.

(a) Legal basis (Articles 53(1) and 62 of the TFEU)

The proposal has the same legal basis as Directive 96/71, which it amends, and Directive 2014/67/EU. Still, the main issues discussed include the appropriateness of the legal basis chosen by the Commission. Some delegations considered that in order to cover rules relating to working conditions including remuneration it was desirable to add a legal basis under the Social Policy Chapter. Some delegations considered that the relationship with the Rome I Regulation, would imply that the proposal entered in the area of Title V.

The Presidency considers that further scrutiny would be needed before drawing any conclusions about the need to change or broaden the legal basis.

(b) Long-term postings (new Article 2a) and the relation to the Rome I Regulation

The proposal introduces a rule that provides that where the anticipated or effective duration of posting exceeds 24 months, the host Member State is deemed to be the country in which the work is habitually carried out. The intention of the Commission is not to amend the Rome I Regulation but to create legal certainty in its application in the specific situation of posting.

The main issues discussed include the consistency of the proposed Article 2a with the Rome I Regulation, as many delegations considered that it changes the meaning of Article 8(2) of that regulation in the situations covered by Directive 96/71. The Council Legal Service issued an opinion on the possibility to introduce a conflict-of-law law rule in the Posting of Workers Directive (9544/16). This opinion was presented at the working party and discussed. Many delegations welcomed the legal clarifications and solutions provided. An in-depth discussion did not take place given that many delegations were still analysing its content and/or considered that it should be left for future meetings.

The Presidency considers that further exploration of the opinion of the Council Legal Service could help clarifying the relation with the Rome I Regulation.

(c) Remuneration (Article 3(1))

The proposal replaces the notion of ‘minimum rates of pay’ by the notion of ‘remuneration’ in the context of the "hard core" provisions of host Member States that apply to posted workers, thus making the rules and legislation on remuneration provided for in national law or universally applicable collective agreements also applicable to posted workers.

On remuneration, the main issues discussed include whether it was sufficiently clear that the definition of remuneration and the related rules on its setting remains within the competence of the Member States and the social partners. Another important issue was whether the concept of remuneration was sufficiently clear, in relation to the concept of minimum rates of pay in the present Directive.

The Presidency considers that the Commission made clear in its proposal as well as its statements that the proposal did not aim to have effect on national competence, concerning the definition of remuneration and including competence of social partners in wage setting. Some delegations submitted proposals for additional text that would explicitly confirm this, in particular possible (re)introduction of a sentence along the lines of the last sentence in Article 3(1) of the Directive 96/71. The Presidency considers that these could be further explored. Furthermore, the Presidency considers that a comparison could be made between the concepts of remuneration and minimum rates of pay in national contexts in selected cases for illustrative purposes.

(d) Collective agreements (deletion of text in Article 3(1) 2nd indent, and paragraph 10, 2nd indent)

This provision makes universally applicable collective agreements applicable to posted workers in all sectors of the economy. Under the present Directive 96/71/EC, this is only mandatory for the construction sector and optional for other sectors.

The main issues raised include whether the proposed provision adequately guarantees the exercise of fundamental rights such as freedom to strike, to negotiate, conclude and enforce collective agreements. Another important issue was the availability of information on applicable collective agreements and their content.

The Presidency considers that scrutiny could focus on ways to express more explicitly, e.g. in the recitals, the full respect of fundamental rights.

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

The proposal introduces a new provision on subcontracting. This provision provides that Member States, who oblige undertakings to subcontract only to those undertakings which grant workers certain conditions on remuneration, including those resulting from non-universally applicable collective agreements, may also provide that this obligation also applies to enterprises posting workers to their territory.

Issues raised include whether this proposal might prejudice bargaining competences of social partners, as well as how posting enterprises could obtain up to date information about applicable rules on remuneration.

The Presidency considers that further work would be needed to clarify the exact scope and effects of this provision.

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

This provision makes the terms and conditions under Article 5 of Directive 2008/104/EC⁴ ("Temporary Agency Work Directive - TAWD") mandatory for posted workers, applying the principle of equal treatment between temporary agency workers and comparable workers of the user undertakings.

⁴ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14

The main issues raised include the relation with Article 5 of the TAWD. Delegations differed in their assessment on how the replacement of Article 3(9) by a reference to Article 5 TAWD affects the scope of the equal treatment of agency workers.

The Presidency considers that further analysis of this element could include a comparison of the scope of Article 5 TAWD in relation to the present wording of Article 3 (9) of Directive 96/71.

IV. CONCLUSIONS

Once the Commission has taken a decision on the "yellow card", and in the light of this decision, it is up to the next Presidency to continue the deliberations of the Council and its preparatory body.

On the basis of the work under the Netherlands Presidency, including the clarifications provided by the Commission and depending on its decision on the "yellow card", it can be expected that more in-depth discussions on the issues outlined above will allow the next Presidencies to move to drafting of the Council's position on the proposal.
