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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.

The Social Questions Working Party (SQWP) discussed the proposal on five occasions under the NL Presidency, the progress report of which is to be found in doc. 9309/16 + ADD1. Since the beginning of the discussions, a group of Member States opposed the Commission proposal, considering it premature at the stage of implementing the enforcement Directive. Another group of Member States welcomed, on the contrary, the initiative as a good basis for improving current outdated rules on posting. A third group has not yet reached a position at national level.

On basis of the solid exploratory work of the NL Presidency and building on the five main issues identified, the SQWP continued discussing the file under the SK Presidency. The progress made is summarised under Chapter II below. The drafting proposals with different options of the Slovak Presidency is to be found in the Annex to this Report. The changes in relation to the Commission proposal (doc. 6987/16) are marked by ***bold italics***; the changes in relation to the last Presidency compromise proposal (doc. 14348/16) by ***bold italics*** ***underlined***.

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 has not yet delivered its opinion on the proposal, as requested by the Commission on an optional basis.

II. THE COUNCIL'S WORK UNDER THE SLOVAK PRESIDENCY

On the basis of the replies by delegations to a Presidency questionnaire (doc. 11489/16), the Presidency presented, end of September, a set of options for the five main topics. These options were discussed at four occasions and the SQWP explored different approaches to overcome the divergent views of delegations.

At the last Working Party meeting on 21 November, there was a consensus that any outcome of the Council work should be legally clear and enforceable, easily applicable, understandable to the stakeholders and should not increase costs for small businesses. It should restrict neither the rights of workers nor the provisions of services in Europe.

Several delegations further stressed that the Council should follow attentively the European Parliament's work on the file and await its position.

MAIN ISSUES/OPTIONS DISCUSSED IN THE SQWP

The discussions reflected the controversial positions and concentrated mainly on the issues of long-term posting, remuneration and subcontracting. As the discussions progressed, the Presidency was narrowing the number of options proposed. The last results of the discussions concerning the **five main issues** of the proposal are as follows :

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

The Commission proposal contains, in new Article 2a, 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.

(a) Anticipated duration of posting and the same task at the same place:

The Presidency has proposed a cross-cutting recital concerning the concept of "*the anticipated duration of posting*"² and a provision concerning the concept of "*the same task at the same place*"³. These proposals were received with great interest and generally welcomed, subject to possible future editing, as they increase the legal certainty.

² See the Annex, Section 1

³ See the Annex, Section 1

(b) Different options suggested by the Presidency

As Option A, would maintain the Commission proposal (Article 2a and 3(1))⁴.

In Option B⁵, a text would introduce a self-standing conflict-of-law rule in the Posting of Workers Directive. The Presidency is of the view that the substance of this option corresponds to the Commission proposal and would not change its spirit. Another proposal is amending the definition of remuneration in order to make clear that the determination of the scope of the concept of remuneration is within the competence of the host Member State, as well as Article 6 to clarify the competent jurisdiction in relation to Article 2a.

In Option C⁶, the proposal is adding, after Article 3 of 96/71 Directive, a new paragraph Article 3(1-a) replacing Article 2a of the Commission proposal. It applies remuneration from day one; but, unlike the Commission proposal, it provides a list of additional labour law rules which would apply after 24 months. The Presidency considers this approach more transparent and legally clear and is of the view that its composition could be further explored.

As an alternative solution, the FI delegation proposed that, after 24 months, a posted worker shall be granted at least the same level of protection concerning the terms and conditions of employment as the local workers on the basis of labour legislation and applicable collective agreements, while excluding supplementary pension schemes and the procedures, formalities and conditions of the conclusion and termination of the employment contract (see doc. WK 814/20016).

⁴ See the Annex, Section 1(a)

⁵ See the Annex, Section 1(b)

⁶ See the Annex, Section 1(c)

Several delegations maintained their support to the Commission proposal (Option A), as they considered it the most appropriate, simple and thus the best fit for purpose. Nevertheless, Option B also met interest of some Member States, as it was legally sounder, albeit more complex as to drafting. Another group of delegations preferred the idea of making a transparent list of labour law rules.

Apart of the options suggested by the Presidency, a number of delegations would have preferred to go along the Finnish proposal. The Presidency did not include this proposal in its compromise text, as it is of the view that this solution is hardly feasible due to the inclusion of company level collective agreements and the difficulty to compare the host and sending Member States' labour law regarding the more favourable conditions.

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

The Commission proposal replaces, under Article 3(1)(c), 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.

As Option A⁷, the Presidency has suggested maintaining the Commission proposal, while amending the definition of remuneration to make reference to national law and practices.

⁷ See the Annex, Section 2(a)

As an alternative Option B⁸, the Presidency's has introduced the notion of "*a dual system*" which is a combination of the Presidency's suggestion under Point 1, Section B, in relation to long term posting, and of Presidency's suggestion concerning the differentiation between short-term and long-term posting with regard to remuneration. Minimum pay rates would be applicable to any worker posted for an anticipated or effective duration of less than 6 months or less than 3 months where posted workers have been replaced to perform the same task at the same place for a cumulative duration of 12 months.

The Presidency also suggests introducing, in Article 3(1), collective accommodation for workers in order to guarantee equivalent conditions for posted and local mobile workers, and further inserting a provision explaining the concept of the '*same task at the same place*'. For posting of individuals longer than 6 months (effective or anticipated) or posting per worker longer than 3 months, exceeding cumulatively 12 months per service, additional terms and conditions of employment would apply, corresponding to Option C in Section 1, as well as, importantly, all mandatory provisions relating to remuneration that would have applied under the Commission proposal.

In relation to this option, the Presidency has proposed recitals concerning the notion of '*minimum rates of pay*' as interpreted by the ECJ, the calculation of the remuneration within the meaning of this Directive and the concept of mandatory elements of remuneration, and a recital concerning collective accommodation. The Presidency has also suggested inserting a recital inspired by Recital 13 of the Enforcement Directive 2014/67/EU to make clear the link between this Directive and Regulations No 883/2004 and No 987/2009 concerning the coordination of social security.

A group of delegations stressed that they cannot accept a differentiated remuneration depending on the length of the posting, and strongly supported Option A, the Commission proposal. On the other hand, another group of delegations could not accept remuneration from day 1 and considered Option B to be worth exploring, subject to discussing more in depth the possible time limits.

⁸ See the Annex, Section 2(b)

The Presidency notes that with this approach, it has sought to find a middle ground between the two groups, and considers that it could be further explored in future discussions.

- (3) **Collective agreements** (deletion of text in Article 3(1) 2nd indent, and paragraph 10, 2nd indent)⁹

The Commission proposed making universally applicable collective agreements applicable to posted workers in all sectors of the economy. Under the existing Directive 96/71/EC, this is only mandatory for the construction sector and optional for other sectors.

The Presidency suggests maintaining the Commission proposal (doc. 6987/16), while being of the view that this is not the most challenged issue.

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

The Commission proposal introduces a new provision on subcontracting. This provision sets out that Member States, which 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.

While maintaining the same legal content, the Presidency has suggested, in Option A¹⁰, making reference to the definition of remuneration under Article 3(1), 2nd subparagraph, and, at the same time, taking out, from that definition, reference to only certain norms. Company level collective agreements would thus be included in the scope of the proposed new provision. Remuneration as referred to in Article 3(1) would however not include such company level agreements given the general limitation of Article 3(1) to only certain collective agreements.

⁹ See the Annex, Section 3

¹⁰ See Annex, Section 4(a)

Under Option B¹¹, it is suggested deleting Article 3(1a) new, as proposed by the Commission, which would mean that the general rules would be applicable in case of subcontracting.

While a group of delegations supported maintaining the Commission proposal as amended (Option A) to create the possibility for Member States to ensure that foreign enterprises in subcontracting chains are bound by all rules on remuneration, including those stipulated by company level collective agreements, another group of delegations would have preferred Option B, claiming that it was a legally more sound solution as this provision would have a negative impact on business, in particular the small ones. While narrowing down the issue into two possible solutions, the Presidency considers that it has to be further discussed, taking into account the outcome of discussions on the other two open issues, in particular the remuneration issue.

(5) **Temporary agency workers** (new Article 3(1b) and deletion of Article 3(9))¹²

The Commission proposal makes the terms and conditions under Article 5 of Directive 2008/104/EC¹³ (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.

The Presidency suggests maintaining the Commission proposal, e.g. new Article 3(1b), in combination with an amended Article 3(9) of the 96/71 Directive. The principle of equal treatment to the agency workers could be then applied, on an optional basis, also with regard to terms and conditions other than those covered by Article 5 of Directive 2008/104/EC.

¹¹ See Annex, Section 4(b)

¹² See Annex, Section 5

¹³ 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

In the last SQWP, there was a broad agreement on this text, although some delegations noted that they would have preferred a full mandatory equal treatment of temporary agency workers with the local ones.

III. RESERVATIONS

At this stage, all delegations are considered to have general scrutiny reservations on the Commission proposal and all other proposals.

EE, DK, HU, MT, RO and UK have entered parliamentary scrutiny reservations, PL, HU and SE linguistic reservations.

IV. CONCLUSIONS

The Slovak Presidency invested considerable efforts to progress on the main issues of the Directive. In its view, the collective agreements applying to all sectors and temporary agency workers do not represent issues hindering the progress towards final agreement. However, there is still a need for further technical work and political discussions on the issues of long-term posting, remuneration and subcontracting.

The Presidency considers that the outcome of its work marks an important step in clarifying crucial topics and concepts of the Directive and represents a good basis for future discussions.

Drafting proposals by the Slovak Presidency

(The changes in relation to the Commission proposal are marked by *bold italics*; the changes in relation to the previous Presidency drafting proposal by *bold italics underlined*).

1. LONG-TERM POSTING

New Recital:¹⁴

The anticipated duration of posting shall be determined, in particular, on the basis of a simple declaration, where applicable, to the responsible national competent authorities, as defined in Article 9 (1)(a)(iv) of Directive 2014/67/EU, [...] information given by the employer to the posted worker in accordance with Article 4 of Council Directive 91/533/EEC and, where applicable, of any information given to the competent authorities in accordance with Article 15(1) of Regulation 987/2009.

New paragraph in the relevant Article¹⁵

For the purposes of this Article, the concept “the same task at the same place” shall be determined, taking into consideration the nature of the service to be provided, work to be performed and, where applicable, the address(es) of the workplace as defined in art. 9(1), (a)(v), (a)(vi) of Directive 2014/67/EU.

- (a) **OPTION A:** Commission proposal (see doc. 6987/16)¹⁶
- (b) **OPTION B:** Conflict-of-law provision - Article 3 and amendment to Article 6 of 96/71 Directive,¹⁷

¹⁴ See Report, Point II(1)(a)

¹⁵ See Report, Point II(1)(a)

¹⁶ See Report, Point II(1)(b)

¹⁷ See Report, point II(1)(b)

Article 2a (new)

**Applicable law to individual employment contracts in cases of posting
exceeding [24] months**

- 1. Member States shall ensure that the law applicable to an individual employment contracts is determined in accordance with the conflict-of-law rules set out in paragraphs 2 to 5 of this article where the anticipated or the effective duration of posting exceeds [24] months. Derogating from Article 3(6), the duration of posting referred to in the first sub-paragraph shall, where a posted worker is replaced by another posted worker performing the same task at the same place [by the undertaking referred to in Article 1(1)], [...] be the cumulative duration of the posting periods of the individual workers concerned. The conflict-of-law rules set out in paragraphs 2 to 5 of this Article shall not apply to individual employment contracts of workers that are posted for an effective duration of [6] months or less. The duration such a worker is posted shall, where applicable, be counted for the purposes of establishing the cumulative duration of the posting periods of individual workers in accordance with the second sub-paragraph.*
- 2. An individual employment contract shall be governed by the law chosen by the parties where such a choice is made in conformity with the conflict-of-law rules that would have applied if the anticipated or effective duration of the posting did not exceed [24] months. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 3 and 4 of this Article.*
- 3. Without prejudice to paragraph 4, to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the Member State where the work is carried out.*
- 4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraph 3, the law of that other country shall apply.*

5. *The law applicable to questions of overriding mandatory provisions, consent and material validity, formal validity, scope of the applicable law, incapacity, voluntary assignment and contractual subrogation, legal subrogation, multiple liability, set-off, burden of proof and public policy of the forum in relation to an individual employment contract shall be determined in accordance with the conflict-of-law rules that would have applied to the contract if the anticipated or effective duration of the posting did not exceed [24] months. In the application of those rules, any reference to the law which governs the substance of the contract shall be understood as a reference to the law determined in application of paragraphs 2 to 4 of this Article.*

New recitals:

- (x) *The Rome I Regulation establishes conflict-of-law rules that ensure compatibility of the conflict-of-law rules between the Member States. While the Rome I Regulation offers some protection for employees it is necessary to establish specific conflict-of-law rules for postings exceeding [X] months in order to create legal certainty and to ensure the appropriate level of worker protection necessary to safeguard the freedom to provide services on a fair basis in both the short and long term, notably by avoiding abuse of the rights guaranteed by the Treaties. Such rules cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services in circumstances also where the posting exceeds [X] months. Any provision applicable to workers posted in the context of a posting exceeding [X] months must thus be compatible with that freedom.*

(xx) *The conflict-of-law rules applicable to the particular matter of postings exceeding [X] months established in this Directive should apply instead of the more general rules of the Rome I Regulation or the Rome Convention. The conflict-of-law rules in this Directive should however draw inspiration from the provisions of the Rome I Regulation and should, where relevant, be consistently interpreted with those provisions to ensure a harmonious relationship between them and avoidance of legal doubts where the conflict-of-law rules of this Directive become applicable to an employment relationship. Therefore, the rules to determine, for example, valid choice of law by the parties, formal validity and incapacity should be the same under this Directive as under the conflict-of-law rules that would have applied in the absence thereof.*

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
 - by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:
 - (h) maximum work periods and minimum rest periods;
 - (i) minimum paid annual holidays
 - (j) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
 - (k) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

- (l) health, safety and hygiene at work;
- (m) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (n) equality of treatment between men and women and other provisions on non-discrimination.

For the purpose of this Directive, *the concept of "remuneration" shall be determined by national law and/or practice of the Member State to whose territory the worker is posted and* mean all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in *that* Member State [...].

Member States shall publish in the single official national website referred to in Article 5 of Directive 2014/67/EU the constituent elements of remuneration in accordance with point (c).

Article 6

Jurisdiction

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3 *or in order to enforce rights enjoyed by a worker under an individual employment contract where the applicable law of the contract is determined in accordance with Article 2a*, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

- (c) **OPTION C:** new paragraph Article 3(1-a) to be added after Article 3 of 96/71 Directive instead of Article 2a of the Commission proposal¹⁸

¹⁸ See Report, Point II(1)(b).

Article 3(1-a)¹⁹(new)

1(-a) When the anticipated or the effective duration of posting exceeds 24 months Member States shall ensure, whatever the law applicable to the employment relationship, that the undertaking referred to in Article 1(1) guarantee workers posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- *by law, regulation or administrative provision, and/or*
- *by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:*

- (a) *other mandatory rules relating to leave and holiday entitlements, in addition paragraph 1(b)²⁰;*
- (b) *parental and paternal leave;*
- (c) *other mandatory rules relating to working hours and rest periods, in addition to paragraph 1(a)²¹*

Where a posted worker is replaced by another posted worker performing the same task at the same place [by the undertaking referred to in Article 1(1)], the duration of the posting shall for the purposes of this paragraph be the cumulative duration of the posting periods of the individual workers concerned.

This Article shall not apply to workers that are posted for an effective duration of 6 months or less.

¹⁹ Following paragraph 1, and preceding paragraph 1a (new) of Article 3.

²⁰ e.g. Article 3(1)(b) of Directive 96/71: 3(1)(b) minimum paid annual holidays.

²¹ e.g. Article 3(1)(a) of Directive 96/71: 3(1)(a) maximum work periods and minimum rest periods.

[For the purpose of this Directive, ***the concept of "remuneration" shall be determined by national law and/or practice of the Member State to whose territory the worker is posted and*** mean all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in ***that*** Member State [...].]²²

[...]

2. **REMUNERATION AND WAGE ISSUE**

(a) **OPTION A:** Art 3(1)) according Commission proposal and definition of remuneration²³

Article 3

Terms and conditions of employment

1.(text as proposed by the Commission (see doc. 6987/16))

For the purpose of this Directive, ***the concept of "remuneration" shall be determined by national law and/or practice of the Member State to whose territory the worker is posted and mean*** all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in that Member State [...].

²² See footnote 4.

²³ See Report, Point II(2)

Member States shall publish in the single official national website referred to in Article 5 of Directive 2014/67/EU the constituent elements of remuneration in accordance with point (c).

(b) **OPTION B:** Dual system²⁴

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:
 - (a) maximum work periods and minimum rest periods;
 - (b) minimum paid annual holidays
 - (c) *the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
 - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
 - (e) health, safety and hygiene at work;
 - (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
 - (g) equality of treatment between men and women and other provisions on non-discrimination.
 - (ga) *conditions of collective accommodation for workers.*

²⁴ See Report, Point II(2)

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

New recital:

In accordance with the ECJ case-law minimum rates of pay may, inter alia, include daily allowances intended to ensure the social protection of the workers concerned, making up for the disadvantages entailed by the posting as a result of the workers being removed from their usual environment and compensation for daily travelling time for workers when he is required to travel to and from place of work in the Member State to which territory the worker is posted.

Article 3(1-a)²⁵(new)

1(-a) Member States shall ensure, whatever the law applicable to the employment relationship, that the undertaking referred to in Article 1(1) guarantee workers posted to their territory in the context of a longer posting, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- *by law, regulation or administrative provision, and/or*
- *by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:*

(a) other mandatory rules relating to leave and holiday entitlements, in addition paragraph 1(b)²⁶;

²⁵ Following paragraph 1, and preceding paragraph 1a (new) of Article 3. The wording of this option corresponds to the Option C under Section 1 on longer postings with the inclusion of "remuneration".

²⁶ e.g. Article 3(1)(b) of Directive 96/71: 3(1)(b) minimum paid annual holidays.

- (b) *parental and paternal leave;*
- (c) *other mandatory rules relating to working hours and rest periods, in addition to paragraph 1(a)²⁷*
- (d) *remuneration, including overtime rates, in addition to paragraph 1(c); this point does not apply to supplementary occupational retirement pension schemes;*

For the purposes of this paragraph, paragraph 6, second subparagraph shall not apply.

For the purposes of this paragraph, "workers posted in the context of a longer posting" shall mean:

- (a) *any worker posted for an anticipated or effective duration of at least 6 months; and*
- (b) *where a posted worker is replaced by another posted worker performing the same task at the same place by the undertaking referred to in Article 1(1) and the cumulative duration of the posting periods of the individual workers concerned exceeds 12 months, any worker posted for a duration of at least 3 months.*

For the purpose of this Directive, *the concept of "remuneration" shall be determined by national law and/or practice of the Member State to whose territory the worker is posted and* mean all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in *that* Member State [...].

²⁷ e.g. Article 3(1)(a) of Directive 96/71: 3(1)(a) maximum work periods and minimum rest periods.

Member States shall publish in the single official national website referred to in Article 5 of Directive 2014/67/EU **information about working conditions in this Article, including information about** the constituent elements of remuneration in accordance with point (f).
[...]

New recitals:

- (x) *In view of the context of longer duration of certain posting assignments, it is necessary to provide that , in case of posting lasting for periods longer than 12 months, additional working condition and equal rules for remuneration shall apply on posted workers. This should apply from the first day of posting when the anticipated duration of the posting period would exceed 12 months or from the first day when posting exceeds effectively 12 months, without this having been anticipated.*
- (xx) *For the calculation of the remuneration within the meaning of this Directive, minimum rates of pay and other mandatory elements (such as bonuses or allowances or increasing of pay according to seniority), laid down by law or universally applicable collective agreements or arbitration awards, are to be taken into account, provided that these elements do not alter the relationship between the service provided by a workers and the consideration which the worker receives in return. The mandatory elements are the elements which apply to all workers and that are not optional or dependent on certain events or factors. Member States should specify in a transparent way the different elements of remuneration applicable on their territory. Posted worker should be entitled to the gross amount of remuneration which does not have to comply with the all mandatory elements but to the amount required.*

(xxx) *In order to ensure that the standard of accommodation arranged by an employer for posted workers is equivalent to the standard of accommodation for local mobile workers guaranteed by national law or practice, provisions relating to collective accommodation should be added to the terms and conditions of employment under Article 3(1). This Directive does not preclude that the posted worker might be required to pay a rent for the accommodation in question.*

(iv) *As it is the case with Directive 96/71, this Directive should not prejudice the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council.*

3. **Collective agreements in sectors other than construction** (Art. 3(1), deletion of Art. 3(10), second subpara, and amendment to the Annex, first para)²⁸

The Presidency suggests maintaining the Commission proposal (doc. 6987/16).

4. **Subcontracting (new Art. 3(1a))** - addition of new sub-paragraph in paragraph 1a)

(a) **Option A:** amendment of the definition of remuneration in Article 3 and addition of new sub-paragraph in paragraph 1a, as proposed by the Presidency²⁹

Article 3

Article 3(1), second subparagraph

For the purpose of this Directive, *the concept of "remuneration" shall mean* all the elements of remuneration *that are* mandatory in accordance with the *national law and/or practice of the Member State to whose territory the worker is posted [...].*

²⁸ See Report, Point II(3)

²⁹ See Report, Point II(4)

Article 3(1), new paragraph 1a

- 1a) If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to sub-contract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration *as defined in Article 3(1), second subparagraph*, the Member State may [...] provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1 (1) posting workers to its territory *provided that such a measure is justified and proportionate and applied in a non-discriminatory manner*.

Without prejudice to Article 5 of Directive 2014/67/EU, Member States making use of the option provided for in this paragraph shall ensure that an undertaking concluding subcontracts with an undertaking referred to in Article 1(1) informs that undertaking in writing about the terms and conditions of employment covering remuneration which have to be guaranteed before the parties enters into the relevant contractual relationship.

- (b) **Option B:** deleting of Article 3(1a) new as proposed by the Commission³⁰

5. **Temporary agency workers** (new Article 3(1b) and maintaining Article 3(9))³¹

The Presidency proposed maintaining Commission proposal, e.g. new Article 3(1b), in combination with Article 3(9) of 96/71 Directive, as amended:

Article 3(9)

9. *Without prejudice to Article 3(1b)*, Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions, *other than those referred to in paragraph 3(1b)*, which apply to temporary workers in the Member State where the work is carried out.

³⁰ See Report, Point II(4)

³¹ See Report, Point II(5)