



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 December 2013

17075/13

**Interinstitutional File:
2012/0061 (COD)**

**SOC 1000
MI 1107
COMPET 881
CODEC 2777**

REPORT

from: Presidency
to: Council (EPSCO)

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
- General approach

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/EC¹ concerning the posting of workers in the framework of the provision of services.
2. The proposal was the subject of Progress Reports submitted to the EPSCO Council under the Danish (doc.10571/12), Cyprus (doc. 16540/1/12 REV 1) and Irish Presidencies (doc. 10430/13) on 21 June, 6 December 2012 and 20 June 2013, respectively.

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.

3. Under the Lithuanian Presidency, good progress has been achieved on outstanding issues other than Articles 9 and 12 (the remaining reservations are mentioned in footnotes in doc. 13942/1/13 REV 1).
4. Following discussions in Coreper on 18 September and 4 October, the Presidency submitted an overall compromise proposal, as set out in doc. 14435/13, to the EPSCO Council with a view to the Council reaching a general approach at its session on 15 October.
5. A joint proposal by a group of delegations (doc. 14476/13) was also submitted outlining an alternative compromise proposal for Article 9, based on the Services Directive, for discussion by the October EPSCO Council .
6. In spite of extensive discussions on the basis of Presidency's revised compromise proposals submitted during the EPSCO Council after consultations with delegations, and of alternative compromise proposals presented by a group of delegations with regard to Article 9, as well as by a few other delegations with regard to Article 12, the conditions could not be met for the Council to reach a general approach on the Directive.

II. STATE OF PLAY (following discussions in the October EPSCO Council)

7. While very tangible progress could be made in reconciling positions on Article 9, no overall compromise agreement could be reached as a number of delegations were of the view that these provisions could only be acceptable in the light of an appropriate balance to be struck with Article 12 which should be made compulsory in the sectors most concerned by fraud and abuse, while it was optional in the Presidency's text.

8. Following intensive consultations which have been taking place between delegations since then and taking account of the particular political importance of this directive, the Presidency submitted an overall compromise proposal to the Permanent Committee's meeting on 29 November (doc.16440/13) with the aim of identifying a possible way for the Council (EPSCO) reaching a general approach on 9 December.
9. This compromise proposal included some elements presented in the EPSCO Council on 15 October regarding Article 9 and recital 25 (in connection with Article 12).
10. With a view to the Committee's discussions, a group of five delegations submitted a joint proposal supporting the Presidency's compromise proposal on Article 9 (with the exception of Article 9(1a) for which they presented an amendment) and recital 16; another group of ten delegations, including those five, presented a joint proposal on Article 12 (doc.16867/13).
11. While retaining the Presidency's text in Article 12(1) regarding the application, on a voluntary basis, of measures on subcontracting liability, the joint proposal provides in Article 12(2) that such measures should apply on a compulsory basis in the construction sector in two situations, whereby the amounts were left for further discussion:
 - when the services provided are over an amount of [3000 euros];
 - when the outstanding net remuneration is over a maximum amount of [750 euros].

Article 12(2a) of the joint proposal clarifies the scope of liability and Article 12(3c) provides for monitoring and evaluation of these provisions by the Commission.

III. OUTCOME OF COREPER (meeting on 29 November 2013)

12. In view of the significant progress already achieved in the October EPSCO Council, all delegations stressed the importance of reaching an overall agreement in the EPSCO Council on 9 December, in particular including a balanced compromise package on Articles 9 and 12. A very large number of delegations considered the Presidency's compromise proposal as a good basis for Council's discussions.
13. A number of these delegations stressed that this compromise proposal should be improved further by reintroducing some compromise elements already presented in October, such as the principle of non-discrimination in Article 9(1) and the ex-ante examination by the Commission of the compatibility of any new and existing control measures with Union law in Article 9 (2a).

One of these delegations stated that its position on Article 9 would be established in the context of other provisions, in particular Article 3(2)(e) which was a cause of concern to the extent that it might render more difficult to replace a posted worker by another posted worker.

14. With regard to Article 12, this group of delegations reiterated their position that any such measures should be optional. They felt that the joint proposal on Article 12 (doc. 16867/13, Annex II) was not acceptable. It would lead to restrictive measures across the board as well as to discrimination between national and external service providers resulting in a negative impact on the free provision of services. In their view, the issue of fraud and abuse, such as unpaid wages, could be dealt with in specific provisions and should not entail a compulsory system of joint and several liability.
15. Two other delegations could be flexible and accept either the Presidency's compromise proposal or the joint proposal on Articles 9 and 12.

16. Stressing the importance of giving priority to the fight against fraud and abuse in the implementation of the Posting of Workers Directive, a large number of other delegations stated that this could not be achieved through an optional joint and several liability mechanism and referred to the joint proposal (Annex II in doc. 16867/13). While Article 9 could be adjusted to take account of fundamental principles, Article 12 should provide for an effective means to combat fraud and abuse without restricting the free provision of services.
17. CION stressed the political importance of reaching a compromise agreement in EPSCO on this priority file and, supporting the Presidency's efforts, offered its assistance to the Presidency.

IV. PRESIDENCY'S APPROACH FOR THE COUNCIL DISCUSSION

18. The Presidency's compromise proposal on Articles 9 and 12 and the joint proposals by two groups of delegations on these two Articles, as submitted to the Permanent Representatives' Committee on 29 November, are to be found in Annexes I, II and III.
19. In the light of the discussions, the Presidency considers that its proposal on Articles 9 and 12, which is part of its overall compromise text (as set out in the Addendum to this Report) should constitute the appropriate basis for the Council (EPSCO) reaching an overall compromise agreement on the text of the Directive as a whole.

**PRESIDENCY COMPROMISE PROPOSAL AS PRESENTED TO THE PERMANENT
REPRESENTATIVES' COMMITTEE ON 29 NOVEMBER**

(Extract from doc.16440/13)

- 16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain control measures or administrative formalities to undertakings posting workers for the provision of services. **According to the case law of the CJEU, such measures and requirements may be justified by overriding reasons of general interest, which include the effective protection of workers' rights, provided they are appropriate for securing the attainment of the objective pursued and do not go beyond what is necessary to attain it.** Such measures and administrative requirements may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and/or less restrictive measures would not ensure that the objectives of the national control measures deemed necessary are attained.
- (24) 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 and should be ensured through appropriate measures in accordance with national law and/or practice and complying with Union law. Such measures may include the introduction on a voluntary basis , after consultation of the relevant social partners, of a mechanism of direct subcontractor liability, in addition to or in place of the employer, with respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreements insofar as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis. [...]

- (25) **Member States that have introduced measures to ensure compliance with the applicable rules in subcontracting chains should have the possibility to provide that a (sub)contractor shall not be liable in specific circumstances or that their liability may be limited in cases where they take due diligence measures. These measures should be defined by national law, taking into account the specific circumstances of the Member State concerned, and they may include inter alia measures taken by the contractor concerning documentation of compliance with administrative requirements and control measures in order to ensure effective monitoring of compliance with the applicable rules on posting of workers.**

Article 9

Administrative requirements and control measures

1. Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71/EC **provided that these are justified and proportionate** in accordance with Union law.

For these purposes Member States may in particular impose the following measures:

- (a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, containing the relevant information necessary in order to allow factual controls at the workplace, including:
 - i) the identity of the service provider;
 - ii) the anticipated number of clearly identifiable posted workers;
 - iii) the persons referred to under (ca) and (d);

- iv) the anticipated duration, envisaged beginning and end date of the posting;
 - v) the address(es) of the workplace; and
 - vi) the nature of the services justifying the posting;
- (b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector, the operations base or the vehicle with which the service is provided;
- (ba) an obligation to deliver the documents referred to under (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;
- (c) an obligation to provide a translation of the documents referred to under (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the Member State;
- ca) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be

- (d) an obligation to designate a contact person, if necessary, with whom the relevant social partners may seek to induce the service provider to enter into collective bargaining within the host Member State, in accordance with national legislation and practice, during the period in which the services are provided. This person may be a different person than the person referred to under (ca) and does not have to be present in the host Member State;
- 1a. Member States may impose other administrative requirements and control measures should situations or new developments arise **for which** existing administrative requirements and control measures are not sufficient or efficient in order to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate.
- 1b. Nothing in this Article shall affect other obligations deriving from the EU legislation and/or national law regarding worker's protection or employment of workers provided that they are equally applicable to companies established in the Member State concerned and that they are justified and proportionate.
2. Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed easily by undertakings, at a distance and by electronic means as far as possible.
- 2a. Member States shall **notify** the Commission and **inform** service providers of any measures referred to in paragraphs 1 and 1a that **they apply or that** have been implemented by them. **The Commission shall communicate the provisions concerned to the other Member States.** The information for the service providers shall be made generally available on a **single national website** in the most relevant language(s), as determined by the Member State.

The Commission **shall** monitor the application of the measures referred to in paragraph 1 and 1a **closely**, evaluate their compliance with Union law **and shall, where appropriate, take the necessary measures** in accordance with its competences under the Treaty.

3. Within three years after the date referred to in Article 20, the appropriateness and adequacy of the application of national control measures shall, **in consultation with Member States**, be reviewed in the light of the experiences with and effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.

Article 12

Subcontracting liability

1. Member States may, after consultation of the relevant social partners, in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer/service provider covered by Article 1 (3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.

The liability referred to in the present paragraph shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

2. (deleted)
3. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontractor liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC.

Member States may in the cases referred to in paragraphs 1 and 3 provide that a contractor that has taken due diligence obligations as defined by national law shall not be liable.

3a [...]

3b. Member States shall inform the Commission about the measures taken under this Article and shall make the information generally available in the most relevant language(s), the choice being left to the Member State.

4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.

JOINT PROPOSAL BY A GROUP OF DELEGATIONS ON ARTICLE 9 AND RECITAL

16

(as submitted to the Permanent Representatives' Committee on 29 November)²

(Extract from doc. 16867/13)

Article 9 and recital 16 should be read as follows

- (16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain control measures or administrative formalities to undertakings posting workers for the provision of services. **According to the case law of the CJEU, such measures and requirements may be justified by overriding reasons of general interest, which include the effective protection of workers' rights, provided they are appropriate for securing the attainment of the objective pursued and do not go beyond what is necessary to attain it.** Such measures and administrative requirements may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and/or less restrictive measures would not ensure that the objectives of the national control measures deemed necessary are attained.

Article 9

Administrative requirements and control measures

2. Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71/EC **provided that these are justified and proportionate** in accordance with Union law.

² These delegations support the last Presidency compromise text on Article 9.

For these purposes Member States may in particular impose the following measures:

- (a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, containing the relevant information necessary in order to allow factual controls at the workplace, including:
 - i) the identity of the service provider;
 - ii) the anticipated number of clearly identifiable posted workers;
 - iii) the persons referred to under (ca) and (d);
 - iv) the anticipated duration, envisaged beginning and end date of the posting;
 - v) the address(es) of the workplace; and
 - vi) the nature of the services justifying the posting;

- (b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector, the operations base or the vehicle with which the service is provided;

- (ba) an obligation to deliver the documents referred to under (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;
 - (c) an obligation to provide a translation of the documents referred to under (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the Member State;
 - ca) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be
 - (d) an obligation to designate a contact person, if necessary, with whom the relevant social partners may seek to induce the service provider to enter into collective bargaining within the host Member State, in accordance with national legislation and practice, during the period in which the services are provided. This person may be a different person than the person referred to under (ca) and does not have to be present in the host Member State;
- 1a. Member States may impose other administrative requirements and control measures should situations or new developments arise ~~for which~~ **allowing the assumption that** existing administrative requirements and control measures are not sufficient or efficient in order to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate.
- 1b. Nothing in this Article shall affect other obligations deriving from the EU legislation and/or national law regarding worker's protection or employment of workers provided that they are equally applicable to companies established in the Member State concerned and that they are justified and proportionate.

2. Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed easily by undertakings, at a distance and by electronic means as far as possible.
- 2a. Member States shall **notify** the Commission and **inform** service providers of any measures referred to in paragraphs 1 and 1a that **they apply or that** have been implemented by them. **The Commission shall communicate the provisions concerned to the other Member States.** The information for the service providers shall be made generally available on a **single national website** in the most relevant language(s), as determined by the Member State.

The Commission **shall** monitor the application of the measures referred to in paragraph 1 and 1a **closely**, evaluate their compliance with Union law **and shall, where appropriate, take the necessary measures** in accordance with its competences under the Treaty.

3. Within three years after the date referred to in Article 20, the appropriateness and adequacy of the application of national control measures shall, **in consultation with Member States**, be reviewed in the light of the experiences with and effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.

JOINT PROPOSAL BY A GROUP OF DELEGATIONS

ON ARTICLE 12 AND RECITALS 24 AND 25

(as submitted to the Permanent Representatives 'Committee on 29 November)

(Extract from doc. 16867/13)

- (24) 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 and should be ensured through appropriate measures in accordance with national law and/or practice and complying with Union law. Such measures may include the introduction on a voluntary basis , after consultation of the relevant social partners, of a mechanism of direct subcontractor liability, in addition to or in place of the employer, with respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreements insofar as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis. [...]
- (25) **Member states that have introduced measures to ensure compliance with the applicable rules in subcontracting chains should have the possibility to provide that a (sub) contractor shall not be liable in specific circumstances or that their liability may be limited in cases where they take due diligence measures. These measures should be defined by national law, taking into account the specific circumstances of the Member State concerned, and they may include inter alia measures taken by the contractor concerning documentation of compliance with administrative requirements and control measures in order to ensure effective monitoring of compliance with the applicable rules on posting of workers.**

Article 12
Subcontracting liability

1. Member States may, after consultation of the relevant social partners, in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer/service provider covered by Article 1 (3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.

2. **In order to tackle abuses and frauds and to protect workers' rights in the construction activities referred to in the Annex to Directive 96/71/EC, Member States shall provide in this sector for appropriate measures ensuring that posted workers can enforce their lawful rights in accordance with Article 3 of Directive 96/71/EC, in addition to or in place of the employer, to the contractor of which the employer is a direct subcontractor, in two cases at least:**
 - (a) **when the services provided are over an amount of [3 000 euros];**

 - (b) **when the outstanding net remuneration as defined in paragraph 1 is over a maximum amount of [750 euros].**

- 2a. **The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.**

3. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC.

Member States may in the cases referred to in paragraphs 1, 2 and 3 provide that a contractor that has taken due diligence obligations as defined by national law shall not be liable.

3a [...]

- 3b. Member States shall inform the Commission about the measures taken under this Article and shall make the information generally available in the most relevant language(s), the choice being left to the Member State

- 3c. **The Commission shall closely monitor the application of this Article.**

As appropriate, Member States shall report on any difficulties that would occur while implementing paragraph 2.

4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.
