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DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Position of the Council at first reading with a view to the adoption of a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012

– Draft Statement of the Council's reasons

I. INTRODUCTION

1. On 31 May 2017, the European Commission adopted a proposal for a Directive of the European Parliament and of the Council amending Directive 2006/22/EC as regards enforcement requirements and laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector.
2. This proposal was presented as part of the Mobility Package I, and the legislative procedure was organised in conjunction with two other legislative proposals, one on the access to the occupation of road transport operator and to the road haulage market, and one on driving times, rest rules and tachographs.
3. The Council (Transport, Telecommunications and Energy) agreed on a general approach on 3 December 2018.¹

¹ document ST 15084/18.

4. The European Parliament adopted its first reading position on 4 April 2019.
5. Between October and December 2019, negotiations took place between the European Parliament, the Council and the Commission with a view to reaching an agreement on the proposal. On 11 December 2019, the negotiators agreed on a compromise text, which was subsequently endorsed by the Committee of Permanent Representatives on 20 December 2019.²
6. The European Parliament Committee on Transport and Tourism (TRAN) confirmed the political agreement on 21 January 2020, and the Council gave its confirmation on 20 February 2020.³
7. In carrying out its work, the Council took account of the opinions of the European Economic and Social Committee of 18 January 2018 and of the Committee of the Regions of 1 February 2018.
8. Taking this agreement into account and following legal and linguistic revision, the "General Affairs" Council on 24 March 2020 has been invited to adopt the Council's position at first reading, in accordance with the ordinary legislative procedure laid down in Article 294 of the Treaty on the Functioning of the European Union.

II. OBJECTIVE

9. The general objective of the proposal is, on the one hand, to ensure decent working conditions and appropriate social protection of drivers, and, on the other, to clarify, harmonise and reduce administrative requirements on operators, enabling them to provide services in an environment of fair competition.
10. The proposal also responds to the need, expressed during the revision of the Posting of Workers Directive through Directive (EU) 2018/957, to establish sector-specific posting rules with regard to drivers in the road transport sector.

² document ST 15083/19.

³ document ST 5424/20 + ADD 1-4.

III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

A) General

11. On the basis of the Commission proposal, the Parliament and the Council have conducted negotiations with the aim of concluding an agreement at the stage of the Council's position at first reading. The text of the draft Council position fully reflects the compromise reached between the two co-legislators.

B) Key policy issues

12. The compromise reflected in the Council position at first reading contains the following key elements:

a) Exemptions from the posting regime for workers engaged in international road transport

13. Two key elements of the Council's position concern the introduction of an exemption from general posting rules owing to the high degree of mobility, and the scope of that exemption. The Commission proposal had identified the duration of a driver's presence in another Member State as a decisive criterion, while both the Parliament and the Council preferred to make the distinction according to the character of the carriage performed. As regards the scope of exemption, the Commission proposal favoured an exemption limited to two elements of the national rules applicable to posted workers⁴, while both the Parliament and the Council preferred a complete exemption from the substantive and procedural provisions on posting.
14. The Council's text (Article 1(1) to (7)) largely corresponds to the Parliament's position (amendments 765, 787-789, 791, 792, 837 (partly), 838-842). In particular, Council accepted the limitation of the exemption to the situation where a service contract exists between the employer sending the driver and a party operating in the host Member State (Article 1(2)); own account operations not covered by service contracts are therefore not excluded.

⁴ Minimum paid annual holidays and minimum rates of pay / remuneration.

15. As regards the activities exempted from posting rules, these comprise in particular "bilateral transport operations" (Article 1(3) and (4)), both in goods and passenger transport, and entail a very limited flexibility for additional carriage-related stops. The high degree of mobility justifying an exemption is thus characterised by the driver travelling between the Member State where the driver's company is established and another Member State, or third country. For control purposes, the limited flexibility for additional carriage-related stops depends on the recording, in the vehicle, of border crossings, and in a subsequent step also on the recording of loading and unloading activity.
16. Consequently, delivering national transport in another Member State (cabotage) is characterised as a situation in which the driver is posted (Article 1(7)).
17. For clarification purposes, the compromise states that a driver transiting another Member State is not a posted worker. For combined transport operations, the road section of the journey is analysed separately, following the logic of the exempted activity (Article 1(5) and (6)).

b) Transparency on terms and conditions of employment

18. The Council accepted the Parliament's request for a special rule on the host Member State's duty to provide transparency about its terms and conditions of employment, including those determined by certain collective agreements (Article 1(9)). As such, amendments 794 and 837 (paragraph 2f) are maintained with reformulation in the Council's text.

c) Third-country operators

19. Both Parliament and Council considered that reinforcing posting rules for EU drivers should not lead to a competitive advantage for operators from third countries having access to the EU's road transport market. The Council accepted incorporating this aspect into the *lex specialis* (Article 1(10)), underpinned by a series of recitals (number 15 to 17) explaining available tools. Therefore, amendments 829 and 837 (paragraph 2g) were partly retained.

d) Administrative requirements for posting, control and enforcement

20. The Council's text builds on the Commission proposal as regards a closed and, compared to Directive 2014/67/EU, shortened list of administrative requirements that accompany the posting of drivers (Article 1(11)). In agreement with the Parliament's position and supported by the Commission, the transport operators will be able, and obliged, to use the Commission's Internal Market Information (IMI) System for sending posting declarations and requested information. This harmonised procedure will make self-standing national information systems redundant. As regards the information to be stored in the posting declaration, the Council's text builds on the Commission proposal and adds some elements requested by the Parliament.
21. The control provisions maintain the structure in the Commission's proposal, according to which a distinction is made between control at the roadside and control after the posting. In agreement with the Parliament's position, the Council did not pursue the idea of additional documentation on board about the driver's employment contract and payslips. However, this information may be requested from the transport operator directly, after the posting. This after-posting control phase, into which the host Member State may involve the Member State of establishment, is further developed in the Council's text, to accommodate amendments made by the Parliament, too. In particular, the IMI system will be the central communication tool for the transport operator, and a Member State has the opportunity to involve social partners.
22. The Council accepted incorporating into the Directive an obligation for Member States to lay down penalties against infringing rules of the *lex specialis*, and to sanction actors of the logistics chain if they know or ought to know about the infringements (Article 5). Finally, the Council also accepted a provision on "smart enforcement", obliging Member States to embed the control of posting rules within an overall control strategy (Article 6).
23. In summary, amendments 838-847, 850, 853-855, 857, 862 and 864 were retained in part, with shortening or redrafting, while amendments 848, 849 and 852 were not.

e) Incorporating Directive 2002/15/EC into enforcement standards for social legislation

24. Directive 2002/15/EC supplements the Regulation on driving time, breaks and rest periods of drivers engaged in the transport sector⁵, for instance by limiting the overall weekly working time of drivers and by limiting night work.
25. Directive 2006/22/EC introduced Union standards for the control and enforcement of rules relating to driving time, breaks and rest periods, and of rules on tachographs. However, it excluded Directive 2002/15/EC from its scope. The Council's position now accepts the incorporation of that Directive into the control standards, in agreement with the Commission proposal and the Parliament's position.
26. That incorporation concerns several aspects: the national checking systems, the minimum number of checks and outcome reporting (Article 2(1), (3), (3a) and (4), Annex I of the amended Directive), the triggering of checks at premises following serious infringements (Article 6(1) of the amended Directive), the national risk rating systems (Article 9(1) of the amended Directive), and information exchange (Articles 7(1)(d) and 8 of the amended Directive). In view of the large scope of the working time Directive, the Council's position prefers a risk-based approach to targeting checks over a quantitative minimum target (Article 2(3a) of the amended Directive). As such, amendments 806 and 835 were retained with reformulation, while amendment 810 was not.

⁵ Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, OJ L 102, 11.4.2006, p. 1

f) Administrative cooperation in enforcement matters

27. The rules concerning administrative cooperation are amended to better distinguish them from the information exchange under Regulation (EU) No 1071/2009 which is carried out already using a dedicated electronic system. For the remaining occasions, the Council's text provides for the use of the IMI system and sets response deadlines for the national authorities. As such, amendments 812-814 and 816-818 were retained and partly reformulated, while amendments 815 and 819 were not.

g) Reviewed enforcement standards for social legislation

28. The risk rating system, apart from being extended to national rules under the working time directive, undergoes two more important changes (Article 9 of the amended Directive): first, the Commission will introduce a common formula for the risk rating of an undertaking, and, second, the national information on risk rating will be available to control authorities throughout the EU, including in the context of carrying out roadside checks. Therefore, amendments 821, 824 and 825 were partly accepted by way of compromise.
29. The Council accepts that Member States endeavour to extend concerted checks to checks at premises of the undertaking, finding a compromise on a related request from the Parliament (Article 5 of the amended Directive, amendment 809). The future role of the European Labour Authority is also being highlighted, in accordance with the mandate given to this new body which was created in 2019 (recital 29).
30. The Council's text endorses the Commission's proposal, and partly the Parliament's amendment 826, to develop a common approach towards the control of 'other work' which adds to the working time of drivers when they do not drive, and at the same time to abolish the requirement of additional attestation forms (Article 11(3) of the amended Directive).

h) Empowerments to the Commission

31. A compromise had to be found, too, on the choice of procedures empowering the Commission to adopt legal acts, which was achieved across the files being negotiated in parallel. The Council's text contains two empowerments for delegated acts in respect of updating Annexes to the amended Directive, and three new empowerments for implementing acts, namely on a common formula for risk rating, on a common approach to the recording and controlling of periods of 'other work', and for developing the functionalities of the IMI communication tool to be used for posting declarations.

i) Transposition and first policy evaluation

32. The two legislators updated their positions on the transposition deadline. Following an ambitious approach which is linked to the availability of the new IMI communication tool, Member States need to transpose the Directive within 18 months after entry into force (Article 9). A Commission evaluation of the implementation of the Directive, and in particular of the special provisions on posted drivers, is scheduled for the end of 2025 (Article 7).

j) Other elements of the Council position

33. The following other elements, which were added by the Council to the Commission proposal, entered the final text of the Council position:

- a) A clarification that interrupted presences of a driver in a host Member State do not add up to a long-term posting situation (Article 1(8));
- b) A provision on the checking approach when a driver does not have a posting declaration, meaning that the driver may be using an exemption to posting rules (Article 1(11) last subparagraph).

34. The Council accepted, fully or in principle, the following other Parliament amendments to the Commission proposal:
- a) Safeguards aiming at efficient roadside checks without undue delay for the driver in Article 2(1) of the amended Directive and in Article 1(15) (amendments 807 and 859);
 - b) A general obligation for Member States' cooperation in Article 1(16) (amendment 860) and an obligation for Member States and for employers to provide education and training to control authorities and drivers, respectively, in Article 8 (amendment 867);
 - c) Editorial improvements by updating outdated references (amendments 811, 821-823, 827, 828, 832-834).

IV. CONCLUSION

35. The Council's position at first reading fully reflects the compromise reached in the negotiations between the Council and the European Parliament, facilitated by the Commission. This compromise is confirmed by the letter of the Chair of the European Parliament's TRAN Committee to the Chair of the Permanent Representatives Committee (23 January 2020). In this letter, the Chair indicated that she will recommend to the members of the TRAN Committee, and subsequently to the Plenary, that they accept the Council's position at first reading without amendments at Parliament's second reading, subject to verification by the lawyer-linguists of both institutions.
36. The Council therefore believes that its position at first reading represents a balanced result and that, once adopted, the sector-specific posting rules for drivers will improve working conditions while guaranteeing the freedom to provide cross-border transport services, and amendments to the Directive on enforcement requirements will render control and enforcement more comprehensive, more effective and better coordinated.