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Subject : Proposal for a Directive of the European Parliament and of the Council on services in the internal market
- Explanatory note from the Commission Services on the provisions relating to the posting of workers with a particular emphasis on Article 24

Delegations will find in the Annex to this Note an explanatory note from the Commission Services on the provisions of the proposal for a Directive on services in the internal market relating to the posting of workers with particular emphasis on Article 24.

The temporary provision of services into another Member State frequently implies that the service provider posts its employees to that Member State to provide the service in question. Numerous obstacles of a legal and administrative nature relating to the posting of workers were identified in the Commission's report on the State of the Internal Market for Services adopted in July 2002¹. These obstacles were also mentioned in the conclusions of the November 2002 Competitiveness Council² as amongst those which should be addressed in the framework of the Internal Market Strategy for services. This is why the proposal for a Directive on Services in the Internal Market (the Services Proposal) contains several provisions which specifically deal with the posting of workers.

These provisions do not affect the existing Community acquis on posting of workers, i.e. Directive 96/71/EC, providing that certain minimum employment terms and conditions in force in the country to which the worker is posted have to be complied with. The Services Proposal ensures coherence with Directive 96/71 by exempting all the matters coming under Directive 96/71 from the application of the country of origin principle (see point 1 below).

In addition, Article 24 of the Services Proposal addresses some issues which are not comprehensively dealt with by Directive 96/71 and is thus complementary to Directive 96/71 (see point 2 below.)

1. The derogation from the country of origin principle for matters relating to the posting of workers

Directive 96/71 stipulates that companies posting workers within the EU shall, whatever the law governing to the employment relationship, guarantee the terms and conditions of employment applicable in the Member State into which the workers are posted (the "host" Member State) with respect to all matters listed in its Art. 3.1. Host MS laws thus apply in any case as regards working

¹ COM (2002) 441.

² Conclusion on obstacles to the provision of services in the internal market at the 2462nd Council meeting on Competitiveness (Internal Market, Industry, Research), Brussels, 14 November 2002, 13839/02 (Press 344).

conditions covered by Directive 96/71 and they are subject to control in the host MS. In order to maintain this system, the Services Proposal in Article 17 (5) provides for a clear derogation from the country of origin principle for the matters covered by Directive 96/71. This derogation concerns not only the applicable working conditions, but also enforcement of them by the host Member State. Several issues might need further clarification in that regard, among which the exact scope of Directive 96/71 (and therefore the scope of the exemption from the country of origin principle), and the extent to which the derogation applies to terms and conditions of employment not laid down in law but in collective agreements.

a. Matters covered by Directive 96/71

What constitutes a posting?

Directive 96/71 defines a posted worker as a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works. The Directive sets out three scenarios which are considered to constitute a posting of a worker:

- a company posts a worker to another Member State under a contract concluded between this company and another party for which the services are intended;
- a company posts a worker to another establishment or undertaking owned by the same group in another member State; or
- a temporary employment undertaking or placement agency hires out a worker to a user company in another Member State.

In all these three scenarios the posting must take place in the context of a cross-border provision of a service and an employment relationship must exist between the company posting the worker and the posted worker during the time of posting. There is no fixed time limit for the length of a posting. Along the lines of the ECJ's jurisprudence on what is a temporary service provision,³ it

³ See, e.g., Case C-215/01, "Schnitzer", judgement of 11.12.2003, in particular para. 28: *The Court has held that the temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity*; and para. 31: *No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty.*

depends on the circumstances of the particular case in question whether a company provides cross-border services and whether workers are to be considered as posted workers, taking into account arrangements in the employment contract as well as the factual circumstances of the service in question (continuity and periodicity of the work in another Member State, etc.).

Who is a worker?

Directive 96/71 itself does not provide a Community definition of “worker”. Instead it explicitly states in Art. 2 (2) that it is the host MS which determines who is to be regarded as a worker. This rule is intended to ensure that the same rules of protection apply to the same group of persons, thus preventing unfair competition. Since all the matters covered by Directive 96/71 are exempted from the application of the country of origin principle, the host MS remains entirely competent to define in its legislation who qualifies as a worker. This is particularly important with respect to the so-called “false independents”: it is the legislation of the host MS which determines the criteria according to which a worker is to be regarded as a worker or as a self-employed person. It is also important to recall that Directive 96/71 covers the case of temporary workers who are hired out by a temporary work agency in one Member State to a user company in another Member State and thus ensures that these workers, too, are protected by the rules in the host MS.

Which employment conditions are covered?

Directive 96/71 contains in its Art. 3 (1) a list of matters in which the host MS rules apply. Those matters are more precisely:

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- minimum rates of pay, including overtime rates,
- conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings,
- health, safety, and hygiene at work,
- protective measures regarding pregnant women, women who have recently given birth, children, and young people,
- equality of treatment between men and women and non-discrimination.

It appears from this list that virtually all of the areas relevant to posted workers are covered by Directive 96/71 and are thus exempted from the country of origin principle. Specifically salaries, vacation, and working hours are determined by the rules in the host MS regardless of in which Member State the employer is established. It should also be noted that many working conditions are harmonised by Community Directives, for example Directive 93/104 on working time (holidays, rest periods, etc.), Directive 92/85 on protection of pregnant women at work, Directive 76/208 on equality of treatment as to working conditions, Directive 89/391 on safety at workplace and all related specific directives (including posted workers and mobile building works).

Worth noting is that also not only the terms and conditions which apply to temporary workers are covered by Directive 96/71 (Art. 3 (9)), and thus exempt from the application of the country of origin principle, but also the conditions of hiring-out of workers, including the conditions regarding supply of workers by temporary employment agencies. This means that the host MS's legislation applies as regards possible restrictions or prohibitions in this respect, e.g. concerning the use of hired-out workers, limitations as to the maximum length of temporary employment, etc. This could be explained in a recital.

b. The applicability of working conditions laid down in collective agreements

Pursuant to Article 3 (1) second indent of Directive 96/71 not only those host MS's conditions of employment must be applied to posted workers which are laid down by law, regulation, or administrative provision, but regarding the construction sector⁴ also those conditions laid down by collective agreements which have been declared universally applicable. Moreover, pursuant to Article 3 (10), MS may unilaterally decide to apply terms and conditions of employment laid down in such universally applicable collective agreements also in other sectors. All of these working conditions laid down in collective agreements the respect of which must or may be imposed in the case of the posting of workers are exempted from the country of origin principle.

⁴ The activities listed in the Annex of Directive 96/71 concern the construction sector and other related sectors such as industrial cleaning, etc.

What is a collective agreement which is universally applicable?

Directive 96/71 defines collective agreements which are declared universally applicable in its Art. 3 (8). Generally speaking there are two types of such agreements: in those Member States which have a system to (formally) declare collective agreements universally applicable, only those agreements which have been the subject of such a declaration are covered. Member States which do not have such a system and where therefore no formal mechanism exists to extend the effects of a collective agreement to parties other than those who have negotiated the agreement and are directly bound by it may base themselves, if they so decide, on collective agreements which are de facto universally applicable. There are two scenarios of such a de facto universal application: collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and collective agreements which have been concluded by the most representative social partners at national level and which are applied throughout the national territory. With respect to such collective agreements, Directive 96/71 leaves it to Member States whether they want them to be applied also in the case of posting of workers by service providers from other Member States.

It follows from this, that in particular the Nordic countries may apply collective agreements to workers posted into their territories as long as they are of such a de facto universal application. The Services Directive does not affect this possibility offered by Directive 96/71. However, it goes without saying that Member State measures ensuring application of such collective agreements need to be in conformity with the EC-Treaty, in particular with Art. 49.

In which sectors may collective agreements be applied?

Conditions of employment in collective agreements which meet the conditions set out above (i.e. universally applicable either de facto or because they have been declared to be applicable) must be applied in activities relating to the construction, repair, upkeep, alteration or demolition of buildings (Art. 3 (1) second indent together with the Annex of Directive 96/71). Consequently, in the construction sector not only minimum working conditions laid down by law but also those set out in universally applicable collective agreements are mandatory in all the Member States for posted workers.

In addition to that, Art. 3 (10) second indent, of Directive 96/71 allows Member States to apply working conditions in universally applicable collective agreements to posted workers in other sectors than construction. It is up to each Member State to decide whether it wishes to do so and the Services Directive does not affect this possibility. In practice, many Member States have made use of this possibility. This could be explained in a recital.

2. The impact of Art. 24 of the Directive

As explained above, the Services Proposal exempts all the matters covered by Directive 96/71 from the country of origin principle. Hence, in particular the definition of who is a worker, the application of terms and conditions of employment in matters covered by the Directive, and the application of universally applicable collective agreements in these areas are not affected by the country of origin principle. The host MS continues to be responsible for the necessary controls in all these matters. The host Member State remains responsible for carrying out all the necessary checks and controls in its territory in particular on building sites. The additional responsibility of the Member State of origin does not substitute the responsibility of the host Member State, but complements it and makes sure that control can take place not only at the place of work of the posted worker but also at the place where the company is located. This is important since the host Member State has no possibility to carry out controls in the country where the company is located and has no direct access to its offices, its books, accountancy, etc.

a. The host Member State is responsible to ensure compliance with its working conditions

The Services Proposal, in Art. 24 (1) subpara.1, states explicitly that the host MS has a duty to carry out the necessary checks, inspections, and investigations on its territory to ensure compliance with its working conditions applicable under Directive 96/71. This reflects that it is the host MS which has the obligation to ensure application of its working conditions pursuant to Directive 96/71. It does so on the basis of the control and enforcement

mechanisms that it has provided for in its national legislation and administrative practice, including application of any administrative, civil or criminal sanctions its legal system foresees. This means in particular that the host MS is free to directly carry out all on the spot controls and request all necessary information from the service provider, including the submission of employment documents, pay-rolls, time-sheets, etc. It is also free to impose sanctions on the service provider in case of non-compliance with its terms and conditions of employment under Directive 96/71 and there is no obligation to first contact the Member State of origin of the service provider and request its assistance.

b. The host Member State can however not impose any more certain particularly burdensome administrative requirements

The Services Proposal provides for the abolition of four specific administrative requirements in the host MS. Those are:

- authorisation or registration requirements in the host MS relating to the posting of workers;
- declaration requirements, except in the construction sector, where declarations may be maintained until 1 year after transposition of the Directive;
- obligations to have a representative domiciled in the host MS;
- obligations to hold and keep employment documents in the host MS's territory.

Those requirements which are the subject of many complaints were identified in the report on "The State of the Internal Market for Services"⁵ as being particularly burdensome especially for SME's and micro enterprises. They result in complications, delays and costs which are disproportionate. It is important to realize that not all Member States currently have these types of requirements in their legislation and that they are not the only means to exercise an efficient control of compliance with working conditions.

⁵ COM(2002) 441.

It has to be called to mind that according to the jurisprudence of the Court of Justice⁶ in particular administrative requirements which are imposed in order to ensure an “a priori control” are disproportionate if there are possibilities to ensure efficient “ex-post” control.

There are indeed other enforcement and control possibilities, such as easy access to justice for posted workers (including arbitration or mediation procedures), possibilities for workers to complain directly to the host Member State’s labour authorities, on-site controls and enforcement prompted by complaints by workers or competitors. In particular regarding the construction sector, the host Member States authorities may be aware of the existence of construction sites, through the granting of a building permit, and can then carry out sample checks on those sites (which already is current practice in the fight against illegal labour). In addition, better co-operation between different administrations in the host Member State could considerably improve the efficiency of control. Another important aspect in this regard is to ensure information of the posted workers about their rights in case of posting and the applicable working conditions in the host Member State. Member States should make sure that this information is available to posted workers. The strengthened co-operation mechanisms established by the Services Proposal would allow checks to be carried out simultaneously in the host Member State and the Member State of origin (and preventing circumvention of the controls).

However, some points might need to be further clarified:

Which declaration requirements would be removed by the Services Proposal?

The Services Proposal aims at avoiding that a service provider has to comply with a set of systematic administrative procedures before it can post workers to another Member State, often requiring respect of deadlines or resulting in practice in delays before a company can actually post its workers. This makes it difficult if not impossible for companies to quickly react to demands for providing a particular service and can result in the loss of business opportunities or disproportionate costs. For instance, sometimes heavy fines are imposed just because a service provider had to start a day before the date notified to the relevant authorities

⁶ Case C-390/99, “Canal Satélite”, judgement of 22.01.2002.

in order to use favourable weather conditions or on the contrary had to postpone an activity because of unfavourable weather and thus began the service provision slightly later than the notified date. In some Member States declarations are required for any type of service and regardless of the duration of the service provision, meaning that, e.g., a marketing consultancy firm sending an employee to a client in another member State for half a day is in violation of the law and could be subject to fines if it does not file a prior declaration concerning the posting of this employee.

The abolition of such declarations only concerns the requirements of systematic notification of each and every posting of workers to authorities in the host Member State. However, the objective is not to prevent Member States from requiring that workers or their employers provide information during a control or fill in forms for specific purposes and necessary to ensure that specific working conditions in the host MS are complied with, such as information to be given concerning the affiliation to a holiday payment fund. Declarations and information on specific issues which are indispensable to manage such funds or similar mechanisms and which can be made after the beginning of the service provision are therefore not prohibited. This could be explained in a recital.

Why is the requirement to have a representative in the host MS's territory to be removed?

The prohibition to require a service provider to have a representative in the host MS is supposed to avoid that MS impose on service providers an obligation to find (and to pay) someone who is permanently established in the host MS and who then acts as their representative towards the host MS authorities. It has to be recalled that the appointment of such a representative is particularly burdensome. It is also worth noting that for a similar reason the requirement to appoint a "tax representative" in another MS' territory has been abolished by the 6th VAT Directive⁷. However, it follows from that rationale that Art. 24 (1) subpara. 2 lit. c, is not supposed to prevent Member States from requiring that a service provider posting workers has to appoint one of his workers who for the duration of posting is present in the host MS to represent the service provider and to whom requests for information, demands and correspondence can be addressed. This could be clarified in a recital.

⁷ 77/388/EEC, OJ L 145, 13.6.1977, p. 1, as last amended by Council Directive 2004/15/EC of 10 February 2004 L 52, 21.2.2004, p.61.

What type of employment documents may not be required to be kept in the host Member State?

The prohibition of obligations on a company posting a worker to keep employment documents in the host MS concerns employment documents which are normally kept at the company's place of establishment and which should not be systematically shipped to all the places where the worker concerned is posted. In some legislations the type of documents to be kept at the place of posting is not specified but seems to refer to all employment documents and sometimes it is required that all the documents be originals and/or be systematically translated into the language of the host MS. These obligations apply regardless of whether there actually is a control carried out or a concrete request to inspect these documents. It is obvious that that type of obligation creates considerable costs and sometimes practical or even legal difficulties, when documents are supposed to be kept at the company's place of establishment which at the same time would be required to be sent to the host MS (in their original version).

Art. 24 (1) subpara. 2 lit. d) covers documents such as employment contracts and the like, which are normally kept at the company's place of establishment. It does not concern those documents which are normally established at the (temporary) workplace, such as time sheets.

Requirements relating to the systematic shipping of employment documents to the place of posting are often justified by the need to be able to verify on the spot whether the host MS's working conditions are applied or not. However, firstly the Services Proposal does not prevent the host MS authorities from demanding that documents be submitted in the event of a control and from enforcing that demand in case of non-compliance. Transfer of documents can be done via express mail, copies can be transmitted by fax or e-mail in a very short time if this is necessary for a control. Secondly, the host MS has an enforceable right to demand assistance from the authorities in the Member State of origin of the service provider and these authorities must provide assistance and information to the host MS. They are much better placed to verify employment documents at the service provider's place of establishment and assess their accuracy. In order to make these controls more efficient even after the period of posting, the Directive obliges Member States to ensure that the service provider keeps relevant documents until at least two years after the end of the posting, Art. 24 (2).

In this regard the ECJ ruling in “Arblade”⁸ should be borne in mind. The ECJ based its reasoning that a requirement to keep documents in the territory of the host MS could be justified, among other aspects, on the absence of a system of administrative co-operation. The Directive is perfectly in line with the rationale expressed in that judgement in that it reinforces that co-operation.

c. Obligations on the Member State of origin

The Services Proposal aims at reinforcing the protection of workers pursuant to Directive 96/71 by adding control in the Member State of origin to control in the host MS. In practice, the authorities in the host MS are often not in a position to check the facts and circumstances at the place of establishment of the company. They are neither capable of verifying whether a company is really and legally established in another Member State or just maintains a letter box firm there, nor do they have access to the offices of the company, its books or accountancy in cases of doubts about the authenticity and correctness of the documents provided at the workplace. They, therefore, need the assistance of the authorities in the Member State where the company is located. This is particularly important in cases where the posting is terminated and workers have returned before investigations are completed. To overcome these difficulties, the Services Proposal obliges the Member State of origin to assist the authorities of the host Member State in the supervision of its companies operating in other Member States. It does that by reinforcing the obligation of cooperation between Member States in order to make controls more efficient and to ensure that violations of the host Member State’s laws can be dealt with more efficiently even after the end of the posting. The objective is to diminish burdens for law-abiding companies while strengthening control of

⁸ Joined cases C-369/96 and C-376/96, judgement of 23.11.1999, in particular para. 61 et seq.: *The effective protection of workers in the construction industry, particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71. 62 Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules.*

rogue employers. This means in particular that

- at the request of the host Member State, the authorities in the country of origin will have to carry out checks and controls at the offices of the company or impose sanctions on companies who do not co-operate with the authorities of the host Member State and in particular do not provide them with all the relevant information;
- the Member States of origin must oblige its service providers to keep relevant documents at the disposal of the authorities of the host Member State until at least two years after the end of the posting;
- the Member State of origin shall on its own initiative communicate information on the posting (among others identity of the posted workers, place of posting, start and end dates for the posting, employment conditions applied) if it is aware of specific facts which indicate possible irregularities in relation to employment conditions.

Conclusions

- **It could be explained in a recital that the derogation from the Country of Origin principle for matters covered by Directive 96/71 includes:**
 - **the host Member States' right to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including "false self-employed persons";**
 - **working conditions which are not laid down by law but by collective agreements which are declared universally applicable within the meaning of Directive 96/71;**
- **It could be explained in a recital that the Services Proposal only prevents Member States from imposing requirements of systematic prior declarations on each posting of workers but does not prevent Member States from requiring service providers to file declarations or complete forms relating to specific employment conditions which must be respected such as forms relating to contributions to funds dealing with the payments of holidays, provided that such declarations may be made after the beginning of the service provision;**

- **It could be explained in a recital that the Services Proposal does not prevent Member States from requiring a service provider who posts workers into their territory to designate one of the workers to represent the service provider for the duration of the service provision;**

 - **It could be explained in a recital that the Services Proposal prevents Member States from imposing on service providers posting workers on their territory to systematically ship all employment documents which are normally kept at the place of establishment of the company to their territory and keep them there but that this does not concern documents which in the normal course of work are established and kept at the work place such as time-sheets, etc.**
-