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REPORT

From:	Permanent Representatives Committee
To:	Council
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending 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 - General approach

I. INTRODUCTION

On 8 March 2016, the Commission submitted a proposal amending the Directive 96/71/EC¹ concerning the 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 workers. 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.

In the beginning of the discussions, a group of Member States opposed the Commission proposal to revise the Directive, considering it premature at the stage of implementing the 2014 Enforcement Directive. On the other side, a group of Member States welcomed the initiative as a good basis for improving the current outdated rules on posting. A third group considered that closer analysis and discussions were needed before reaching a definite position at national level.

On the proposed legal basis of Articles 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU), the Council acts with the European Parliament in accordance with the ordinary legislative procedure.

The European Parliament has not yet delivered its position in first reading.

At its session of 14 December 2016, the Economic and Social Committee delivered its opinion, requested by the Commission on an optional basis, on the proposal.

The Committee of Regions delivered an own initiative opinion at its session on 7 December 2016.

II. DISCUSSIONS IN THE COUNCIL PREPARATORY BODIES

The Social Questions Working Party (SQWP) began its discussions on the proposal under the NL Presidency; the progress report is to be found in doc. 9309/16 + ADD1. On the basis of this exploratory work and building on the five main issues identified in the proposal (long-term postings, remuneration, collective agreements, subcontracting, temporary agency workers), the SK Presidency continued discussing the file, clarifying the main issues and concepts of the Directive and discussing various drafting options; the progress report is to be found in doc. 14368/16.

The MT Presidency continued to clarify the main issues and concepts of this Directive, narrowing down the options for each of these, amending the Commission proposal on various issues and moving to negotiations on a single text. After successive compromise proposals aiming at balancing the different Member States' positions, it appeared that more time was needed to find a compromise; the progress report of the MT Presidency is to be found in document 9882/17.

The Estonian Presidency continued the discussions on the basis of the MT Presidency's last compromise proposal, with the objective to fine-tune the text and achieve a broader and more balanced text. The Presidency aimed at reaching greater clarity on technical provisions, whilst leaving the discussion on issues of political nature to Coreper and Council levels.

The Permanent Representatives' Committee discussed the matter at its meeting on 11 October. Delegations generally concurred that the file was nearly ripe to be agreed upon, and that efforts are needed to be stepped up by all sides for reaching an agreement at the October EPSCO. They broadly recognised that the compromise was overall balanced, and that the Presidency had undertaken intense efforts to put together a text which took greater account of their concerns and presented better drafting of the more technical aspects.

The discussions centred on the more political issues, namely the following:

- (1) Long-Term Posting: delegations are divided as to the number of months after which the terms and conditions of employment of the host Member State should apply. Whilst numerous delegations consider that 24 months strikes a good balance, with some additionally calling for possible exceptions to exceed this period, other delegations consider 12 months, or even less, to be more adequate.
- (2) Date of Application of the amending Directive: there are differing views on how long this period should be, with proposals ranging from 2 to 5 years.
- (3) Transport: numerous delegations consider that, given the intrinsic link between this proposal and the proposed *lex specialis* on posted drivers in the road transport sector, the relationship between both needs to be addressed in the current Posting Directive. Other delegations consider that the negotiations on the *lex specialis* should be kept separate.

Additionally, there were also discussions on the provisions on fraud and abuse, which some delegations consider should move into the operative part of the text, and on the latest technical changes introduced by the Presidency, which were considered broadly acceptable despite some alternative proposals being presented.

Taking into account the discussion in Coreper and the diverging views of delegations on the remaining political issues, the Presidency has decided to maintain its compromise proposal and to submit it to the Council (EPSCO) with a view to reaching an agreement. A technical amendment has been introduced in recital 14b new.

The latest Presidency compromise proposal can be found in the Annex to this Report. The changes in relation to the Commission proposal (doc. 6987/16) are marked in **bold**, deletions are marked by [...]; the changes in relation to the previous Presidency compromise proposal (Annex I of doc. 12595/17) are marked in **bold underlined**, deletions are marked by [...].

Outstanding Issues

The Presidency considers that the following issues need to be agreed upon:

- (1) long-term posting: the number of months after which rules on long term posting applies (recitals 8 and 9, article 3.1(-a)) has been bracketed at [24] months.
- (2) the date of application of the amending Directive has been bracketed at [3] years after the entry into force (article 2.1).
- (3) Posting in road transport: several delegations want to anticipate some rules of the *lex specialis* on road transport in this Directive, whilst others do not wish to regulate the issue here. In this respect, the Presidency is ready to explore options which would allow the Council to move forward with the current Directive, without prejudging the outcome of the discussions on *lex specialis* on road transport.

Furthermore, some delegations consider that the issue of combatting fraud and abuse should have a more prominent role, whilst others prefer the current Presidency compromise.

Reservations:

The Presidency understands that those parts of the text where broad agreement has already been reached depend on an overall agreement on the entire proposal. At this stage, all delegations, are considered to have scrutiny reservations on the new Presidency compromise proposal.

DK, HU, NL and UK maintain parliamentary scrutiny reservations.

HU, PL and SE maintain linguistic reservations.

III. CONCLUSIONS

The Council (EPSCO) is invited to examine the outstanding issues identified above, with a view to reaching a general approach on the text as set out in the Annex to this Report.

[...]

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of...**

**amending Directive 96/71/EC [...] concerning the posting of workers in the framework of the
provision of services**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular
Articles 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

² OJ C 75, 10.03.2017, p. 81.

Whereas:

- (1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market [...] enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation of those principles is further developed by the Union **and is** aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.
- (2) The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide [...] services there.
- (3) According to Article 3 **of the Treaty on European Union**, the Union **is to** promote social justice and protection. **According to** Article 9 **of the** TFEU, [...] the Union **is to take into account requirements linked to the promotion of** a high level of employment, **the** guarantee **of** adequate social protection and **the fight against** social exclusion **in defining and implementing its policies and activities**.
- (4) Almost twenty years after its adoption, it **has become** necessary to assess whether **Directive 96/71/EC of the European Parliament and of the Council**³ still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.
- (5) The principle of equal treatment and the prohibition of any discrimination based on nationality **have been** enshrined in **Union** law since the founding Treaties. The principle of equal pay has been implemented through secondary law not only between women and men, but also between employees with **fixed** term contracts and comparable permanent workers, between part-time and full-time workers **and** between temporary agency workers and comparable workers of the user undertaking.

³ **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) [...]
- (7) [...]
- (7a) **The competent national authorities, in accordance with their national law and/or practice, should be able to verify that the conditions of [...] accommodation for posted workers provided by employers are in line with the relevant national provisions in force in the host Member State that might apply also to posted workers.**
- (7b) **Posted workers that are temporarily sent from their regular place of work, in the territory of the Member State to which they have been posted, to another place of work, should receive at least the same allowances [...] or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State. The same should apply to costs incurred by a posted worker when he is required to travel to and from his regular place of work in the Member State to which territory he is posted. However, the hard core of protective rights should not be extended to allowances or reimbursement of expenditure related to [...] the fact that a worker who is posted within the meaning of Article 1 (3) of Directive 96/71/EC is away from the Member State in which he normally works. Double payment of travel, board and lodging expenses should be avoided.**
- (8) **Posting is of a temporary nature and the posted worker usually returns to the country of origin after the completion of the work for which he has been posted. However, in view of the long duration of certain postings, and in acknowledgment of the link between the labour market of the host country and the workers posted for such long periods, it is necessary to provide that, in case of posting lasting for periods longer than [24] months, host countries should ensure that undertakings posting workers to their territory guarantee an additional set of terms and conditions that are mandatorily applicable to workers in the Member State where the work is carried out.**

- (9) **Ensuring greater protection of workers is necessary to safeguard the freedom to provide services on a fair basis in both the short and the long term, notably by preventing abuse of the rights guaranteed by the Treaties. Rules ensuring such protection of workers, however, cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services also in cases where the posting exceeds [24] months. Any provision applicable to workers posted in the context of a posting exceeding [24] months must thus be compatible with that freedom. It is settled case law that restrictions to the freedom to provide services are [...] admissible **only** if justified by overriding reasons in the public interest and **if they are** proportionate and necessary.**
- (9a) **The additional set of terms and conditions to be guaranteed by the undertaking posting workers to another Member State should also cover workers who are posted to replace other posted workers, to ensure that such replacements are not used to circumvent the otherwise applicable rules.**
- (9b) **As is the case with Directive 96/71/EC, this Directive should not prejudice the application of Regulation (EC) No 883/2004⁴ and Regulation (EC) No 987/2009 of the European Parliament and of the Council⁵.**

⁴ **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).**

⁵ **Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).**

- (10) **Due to** the highly mobile nature of work in international road transport, the implementation of the **Directive 96/71/EC** raises particular legal questions and difficulties, especially where the link with the concerned Member State is insufficient. It would be most suited for **those** challenges to be addressed through sector-specific legislation together with other **Union** initiatives aimed at improving the functioning of the internal road transport market.
- (11) In a competitive internal market, service providers compete not only on the basis of labour costs but also on **the basis of** factors such as productivity and efficiency, or the quality and innovation of their goods and services.
- (11a) **This Directive should not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor should this Directive affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and /or practice.**
- (12) It is within Member States' competence to set rules on remuneration in accordance with their law and / **or** practice. [...]
- (12a) **The concept of 'remuneration' should include, but should not be limited to, all the elements of minimum rates of pay developed by the Court of Justice of the European Union.**

(12b) [...] When comparing the remuneration paid to the posted worker and the remuneration due in accordance with the laws and/or practices of the Member State to which territory the worker is posted, the gross amount of remuneration should be taken into account. The total gross amounts of remuneration should be compared, rather than individual elements of remuneration rendered mandatory as provided for in Article 3 (1) [...]. In order to ensure transparency and assist the competent authorities when carrying out checks and controls, it is nevertheless necessary that the elements, which are part of the remuneration, can be identified in enough detail according to national law and practice of the sending Member State. As provided for in Article 3(7) of Directive 96/71/EC, allowances specific to the posting should be considered to be part of the remuneration. Such allowances should therefore be taken into account for the comparison, unless they concern expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

(12c)(new) Allowances specific to posting often serve several purposes. Insofar as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging, Directive 96/71/EC provides that they shall not be considered as part of remuneration. In view of the relevance of allowances specific to posting, uncertainty as to which parts of allowances specific to posting are allocated to reimbursement of expenditure should be avoided. Such allowances should be considered to be paid in reimbursement of expenditure unless the terms and conditions resulting from law, regulation or administrative provision, collective agreements or contractual agreements that apply to the employment relationship define which parts of the allowance are allocated to the reimbursement of expenditure.

- (13) The elements of remuneration **and other terms and conditions of employment** under national law or universally applicable collective agreements should be clear and transparent to all service providers **and posted workers. In addition to the requirements under Article 5 of Directive 2014/67/EU of the European Parliament and of the Council**⁶, it is therefore justified to impose on Member States the obligation to publish the constituent elements of remuneration, **and the additional set of terms and conditions applicable to long term posting**, on the single website provided for by **that Article. [...]** The proportionality of any sanctions to a service provider for non-compliance with the terms and conditions of employment to be ensured to posted workers might take into account, in particular, whether the information in the single national website on the terms and conditions of employment is provided in conformity with Article 5 of Directive 2014/67/EU, including respecting the autonomy of the social partners. [...]
- (14) [...]
- (14a) [...]
- (14bnew) In the context of fighting fraud related to posting, the European Platform to enhance cooperation in tackling undeclared⁷ work created by Decision (EU) 2016/344 should, within its mandate, participate in the monitoring and the evaluation of cases of fraud, which should be anonymised as appropriate, improve the implementation and efficiency of administrative cooperation between Member States, develop alert mechanisms and bring assistance and support to reinforced administrative cooperation and information exchanges between the liaison offices. In doing so, the Platform is to work in close cooperation with the Committee of Experts on Posting of Workers.

⁶ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ L 159, 28.5.2014, p. 11).

⁷ Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work (OJ L 65, 11.03.2016, p.12).

(14c new) The transnational nature of certain situations of fraud or abuses related to posting justifies concrete measures aiming at reinforcing the transnational dimension of inspections, inquiries and exchanges of information between the competent authorities of the concerned Member States. To this end, in the framework of administrative cooperation provided for in Directive 96/71 and in Directive 2014/67/EU, in particular Article 7 paragraph 4, the national competent authorities should have the necessary means for alerting on such situations and exchanging information aiming at preventing and repressing these frauds. The European Platform is, within its mandate, the relevant framework for facilitating the exchange of information and cooperation between Member States.

(15) Directive 2008/104/EC of the European Parliament and of the Council⁸ on temporary agency work gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. **That principle should also apply to temporary agency workers posted to another Member State. Where that principle applies, the user undertaking should inform the temporary-work agency about the working conditions and remuneration it applies to its workers. Member States can under certain conditions provide for exceptions from the equal treatment/equal pay principle pursuant to Art. 5(2) and Art. 5(3) of the temporary agency work directive. When such an exception applies, the temporary work agency has no need for the information about the user undertaking's working conditions and the information requirement should therefore not apply. Member States should ensure that the user undertaking informs the temporary work agency about the posted workers that are temporarily working in a Member State other than the Member State to which they have been posted, in order to allow the employer to apply, as appropriate, the terms and conditions of employment that are more favourable to the posted worker.**

⁸ 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).

- (16) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁹, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 96/71/EC

Directive 96/71/EC is [...] amended as follows:

(1) [...]

(2) Article 3 is amended as follows:

(a) Paragraph 1 is replaced by the following:

1. Member States shall ensure, **irrespective of which law applies** to the employment relationship, **that** the undertakings referred to in Article 1 (1) guarantee workers **who are** 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:

⁹ OJ C 369, 17.12.2011, p. 14.

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) remuneration, 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) [...]
- (gb) allowances [...] or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons; this point applies exclusively to travel, board and lodging costs incurred by a posted worker when he is required to travel to and from his regular place of work in the Member State to which territory he is posted, or when he is temporarily sent by his employer from this workplace to another workplace. It shall not apply to allowances or reimbursement of expenditure related to the fact that the worker, during the posting referred to in Article 1(3), is away from the Member State in which he normally works.**

For the purposes of this Directive, **the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted and means** 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 [...].

Without prejudice to Article 5 of Directive 2014/67/EU, Member States shall publish in the single official national website [...], **referred to in that Article, information on:**

- (a) the constituent elements of remuneration in accordance with point c) of the first subparagraph of Article 3(1); and**
- (b) all the terms and conditions of employment in accordance with Article 3(1)(-a).**

Where the information on the single official national website does not indicate, in conformity with Article 5 of Directive 2014/67/EU, which terms and conditions of employment are to be applied, this circumstance may be taken into account, in accordance with national law and practice, in determining penalties in the event of infringements of the national provisions adopted pursuant to this Directive.

(aa) The following paragraph is added:

"1(-a) When the effective duration of a posting exceeds [24] months, Member States shall ensure, irrespective of which law applies to the employment relationship, that the undertakings 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, all the applicable terms and conditions of employment which are laid down, in the Member State where the work is carried out:

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

The first subparagraph of this paragraph does not apply to the following matters:

- (a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;**
- (b) supplementary occupational retirement pension schemes.**

Where the undertaking referred to in Article 1(1) replaces a posted worker by another posted worker performing the same task at the same place, 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.

For the purposes of this Article, the concept 'the same task at the same place' shall be determined taking into consideration inter alia the nature of the service to be provided, the work to be performed and the address(es) of the workplace."

(b) [...]

(c) The following paragraph is added

"1b. Member States shall provide that the undertakings referred to in point (c) of Article 1(3) guarantee posted workers the terms and conditions which apply pursuant to Article 5 of Directive 2008/104/EC [...] to temporary workers hired-out by temporary agencies established in the Member State where the work is carried out.

Member States shall ensure that the user undertaking informs the undertakings referred to in point (c) of Article 1(3) of:

1) the terms and conditions that it applies regarding the working conditions and remuneration to the extent covered by the first sub-paragraph of this paragraph and

2) posted workers that are temporarily carrying out work in a Member State other than the Member State to which they have been posted."

(ca) Paragraph 7 is replaced by the following:

"7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. If it does not result from the terms and conditions of employment applicable to the employment relationship whether and in that case which elements of an allowance specific to the posting are paid in reimbursement of expenditure or are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure actually incurred on account of the posting.

- (d) Paragraph 9 is **amended as follows**:

"Without prejudice to Article 3(1b), Member States may provide that the undertakings referred to in Article 1 (1) shall guarantee workers referred to in point (c) of Article 1 (3) 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."

- (e) [...] Paragraph 10 is **replaced by the following**:

"10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions."

- (3) The first paragraph of the Annex is amended as follows:

"The activities mentioned in Article 3 include all building work related to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:"

Article 2

1. Member States shall **adopt and publish, by 2 years after the entry into force of this Directive**, the laws, regulations and administrative provisions necessary to comply with this Directive [...]. They shall **immediately** communicate [...] the text of those **measures to the Commission**.

[...] They shall apply those measures from [3] years after the entry into force of this Directive. Until that date, [...] Directive 96/71/EC shall remain applicable in its wording prior to the amendments introduced by this Directive.

When Member States adopt those **measures**, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.
3. **The Commission shall review the application and implementation of this Directive. By 8 years after the entry into force of this Directive, the Commission shall present a report on the application and implementation of this Directive to the European Parliament, the Council and the European Economic and Social Committee and propose, where appropriate, necessary amendments and modifications to this Directive.**

Article 3

This Directive shall enter into force on the [twentieth] day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President