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From:	Presidency
To:	Permanent Representatives Committee/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 - State of play

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Delegations will find attached the Presidency note concerning the above proposal with a view to the Coreper and Council meeting (COMPET).

## **Introduction**

On 8 March 2016, the Commission adopted a proposal amending the basic Directive 96/71/EC<sup>1</sup> ("basic Directive") concerning posting of workers. This proposal is a targeted revision of the basic Directive aiming to ensure a level playing field for service providers and at the same time protecting the posted workers. According to the Commission, the twenty-year old basic Directive does not anymore 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. Furthermore, it is complementary to Directive 2014/67/EU<sup>2</sup> ("enforcement Directive") dealing exclusively with enforcing the rules on posting of workers to counter bogus self-employment and other forms of fraud in relation to cross border posting.

## **Main elements of the proposal**

The relatively short proposal contains some substantial changes with regard to the legislation in force:

- it introduces a time limit of 24 months for the change of rules of the anticipated or effective duration of posting; after 24 months the host Member State is deemed to be the country in which the work is habitually carried out;
- it makes universally applicable collective agreements applicable to posted workers in all sectors of the economy, irrespective of whether the activities are referred to in the Annex to the Directive, which is currently the case only for the construction sector (under the basic Directive 96/71/EC);

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<sup>1</sup> 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.

<sup>2</sup> 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. 11-31.

- it replaces the notion of ‘minimum rates of pay’ by the notion of ‘remuneration’, thus making the rules and legislation on remuneration provided for in national law or universally applicable collective agreements also applicable to posted workers.
- it introduces a new provision on subcontracting; this provision gives Member States the possibility to oblige undertakings to subcontract only to those undertakings which grant workers certain conditions on remuneration, including those resulting from non-universally applicable collective agreements.
- it makes the terms and conditions under Article 5 of Directive 2008/104/EC<sup>3</sup> ("Temporary Agency Work Directive") mandatory for posted workers, applying the principle of equal treatment between temporary agency workers and comparable workers of the user undertakings.

### **State of play and process**

Within the Council, in line with the proceedings of the previous Directives on Posting of workers (1996 and 2014) and the related issues of the file, the new proposal has again been attributed to the field of employment and social policy, with the EPSCO Council as the lead configuration. Therefore, the competent preparatory body is the Social Questions Working Party (SQWP).

On 21 March, the Commission presented the proposal of the draft Directive and the related Impact Assessment in the SQWP, where delegations also presented their general comments and preliminary positions. On 11 April, the SQWP discussed five main issues related to the proposal in order to gain more insight with regard to the in-depth discussion on the impact assessment (IA). The proper examination of IA took place in the SQWP on 28 April 2016. It was based on the questionnaire sent to delegations on 22 March and in line with the indicative guidance as set out in doc. 16024/14. 22 Member States handed in their replies to questionnaires.

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<sup>3</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14

During these discussions, a number of Member States expressed the opinion that the proposal would lead to undermining their competitiveness and decrease cross-border provision of services. These delegations have asked for a discussion of the proposal within the Competitiveness remit.

On 15 March, the 8 weeks period for consulting national parliaments started to count, ending on 10 May 2016. By the deadline, reasoned opinions had been received from national parliaments in 11 Member States accounting for 22 votes. Consequently, the threshold of third of the votes triggering the so called yellow card procedure has been reached. Under Article 7 (2) of the Protocol No 2<sup>4</sup> annexed to the Treaties, the draft must be reviewed by the Commission which may decide to maintain, amend or withdraw the draft.

In the light of these circumstances, the Presidency envisages, at the next SQWP on 13 May 2016, to limit further work to finishing ongoing business and to further clarifying issues at technical level, such as the Rome I issue.

## **Conclusions**

Taking into account that the Council is single entity and that legislative files should be discussed in one Council configuration, in particular for the sake of unity and consistency, the Presidency is of the opinion that the file is again diligently being dealt with and scrutinised in its entirety within the EPSCO configuration.

Therefore, while acknowledging that there are interlinked matters, such as the area of competitiveness, the Presidency reiterates the objective that it is up to the Member States' delegations to coordinate internally the national positions (taking account of the nature of the proposal) to be presented and discussed within the SQWP, which is the designated lead preparatory body, and the EPSCO Council as the competent Council configuration.

Notwithstanding this decision, the Presidency will present the state of play to ministers at the COMPET Council.

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<sup>4</sup> Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ C 326, 26.10.2010, p. 206-209.