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From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Draft Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services **(first reading)**

- Adoption of the legislative act
- Statements

Statement by the Commission

Article 3(7), second subparagraph, of Directive 96/71/EC as amended by the Directive adopted today, lays down that 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. It also provides that “[t]he employer shall, without prejudice to point (h) of the first subparagraph of paragraph 1, reimburse the posted worker for such expenditure in accordance with the national law and/or practice applicable to the employment relationship”.

The Commission understands that the “national law and/or practice applicable to the employment relationship” is in principle the national law and /or practice of the home Member State, unless otherwise determined in accordance with EU rules on private international law. In the light of the Court's judgment in Case C-396/13 (paragraph 59), reimbursement also covers the situation where the employer defrays costs of the workers without the latter having first to pay them and then seek to have them reimbursed.

The Commission notes that the Directive adopted today foresees that, because of the highly mobile nature of work in international road transport, the revised rules on posting will apply to that sector only from the date of application of a legislative act 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/EC for posting drivers in the road transport sector.

The Commission calls on the European Parliament and the Council to adopt that act swiftly in order to adapt the rules to the specific needs of posted workers in the sector while ensuring proper functioning of the internal road transport market.

Until the date of application of the sector-specific legislative act, Directive 96/71/EC and Directive 2014/67/EU remain in force in road transport. These legislative acts do not apply to road transport operations which do not constitute posting.

The Commission will continue to closely monitor the proper enforcement of the current rules in particular in the road transport sector and where appropriate take action.

Statement by Croatia, Latvia and Lithuania

Croatia, Latvia and Lithuania support the aim to improve the situation of posted workers. However, despite some improvements that have now been included in the *proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of service*, we consider that the text has not reached the right balance between the protection of workers and the freedom to provide services.

In addition to the concerns expressed in the statement annexed to *the minutes of the 3569th meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), held in Luxembourg on 23 October 2017*, on the concept of remuneration, the impact on competitiveness as well as potential adverse consequences of this proposal, we believe that the compromise text with the European Parliament contains several provisions which exceed the scope of the directive and cause legal uncertainty and consequently might lead to a restriction of freedom to provide cross-border services within the European Union.

Besides, we are of the opinion that the transposition period of 2 years without a proper transitional period fails to acknowledge the practical implications of adaptation to a substantially new set of rules, especially for SMEs.

Statement by the Czech Republic, Slovakia and Portugal

The EPSCO Council, in its General Approach reached in October 2017 recognised that sufficient time was necessary for adaptation of companies (especially SMEs) to the new rules for posted workers (particularly to the newly introduced concept of remuneration) and agreed on 4 years of deferred applicability of the revised Directive. This was also accepted by the European Commission.

Being aware of the concessions that the co-legislators made in the process of negotiations, the final compromise reached in the trilogues resulted, regrettably, in a significant shortening of the period of deferred applicability to mere 2 years, making it identical with the period for transposition of the Directive.

In this respect, the Czech Republic, Slovakia, Portugal call on the Member States and the European Commission to take these circumstances (as well as the complexity of the issues that this revision aims to introduce) duly into consideration when making assessment if the new rules on posting of workers are observed and complied with and what sanctions are proportionate, primarily during the initial period after the revised Directive enters into effect in 2020.

Statement by Hungary and Poland

We are committed to the protection of workers, to combatting fraud and abuses, as well as safeguarding the integrity of the Internal Market. We believe that Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereafter: Directive 96/71/EC) created a delicate balance between the protection of workers and the freedom to provide services. We regret that the modification of that Directive was proposed before the effects of the application of its Enforcement Directive (2014/67/EU¹) could be seen.

We are of the opinion that the amendment of Directive 96/71/EC will restrict the freedom to provide services in an unjustified and disproportionate manner. Instead of being an instrument for the protection of workers it will likely be a tool for protectionist measures. With all likelihood it will render the legal institution of posting itself meaningless and will be highly detrimental to the competitiveness of the Union as a whole.

We are also concerned about the legal uncertainty of several provisions. In particular small and medium-sized enterprises (SMEs) will be affected negatively by the legal uncertainty and the increased administrative burden. The 2-year long transition period does not provide sufficient time to adapt to the new rules in particular for SMEs.

We are of the position that the amendment to Directive 96/71/EC and the separate proposal on laying down special posting rules in the road transport sector (*lex specialis*) should have been treated as a package. The negotiations on the *lex specialis* are still ongoing; therefore, the amendment to Directive 96/71/EC by definition cannot be considered as a balanced text. While only the Court of Justice of the European Union is entitled to interpret EU law, nevertheless we are of the view that application of the current posting rules to the road transport sector is doubtful. It is our understanding that this legal interpretation will be unaffected by the amendment to Directive 96/71/EC either.

¹ Directive 2014/67/EU 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