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OUTCOME OF PROCEEDINGS

from:	The Working Party on Social Questions
on:	21 September 2012
No. prev. doc. :	13339/12 SOC 710 MI 536 COMPET 535 CODEC 2041
No. Cion prop.:	8040/12 + COR 1 - COM(2012) 131 final
Subject:	Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

I. INTRODUCTION

At its meeting on 21 September 2012, the Social Questions Working Party held a first, substantive discussion on Chapter VI (cross border enforcement of administrative fines and penalties, Articles 13-16) on the basis of a Presidency's questionnaire (doc. 13740/12) and of a note by the Spanish delegation (doc. 12575/12), a number of JHA experts also being present.

It also undertook to clarify a number of outstanding questions with respect to Articles 3, 4, 6 and 7, and bearing in mind the remarks and suggestions made by the European Data Protection Supervisor in its Opinion of 19 July 2012 (doc. 13303/12).

The outcome of the discussions is reported below.

The SQWP also took note of the information given by CION regarding:

- the Commission's intention to withdraw the proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services ("Monti II");

- the Opinion of the European Economic and Social Committee, as adopted on 19 September, on the enforcement proposal (SOC/460), in particular with regard to Article 12 (joint and several liability in subcontracting situations).

II. OUTCOME OF THE DISCUSSIONS ON CHAPTER VI

CION stated that the objective of this Chapter was to set up a system for the cross-border enforcement of administrative fines and penalties which are not yet covered by existing EU instruments. It did not aim to establish harmonised rules for judicial cooperation, jurisdiction, or the recognition and enforcement of decisions in civil and commercial matters, or to deal with applicable law.

The proposed provisions were based on the systems established for the recovery of social security claims by Regulation 987/2009 laying down the procedure for implementing Regulation (EC) N0 883/2004 on the coordination of social security systems[1] and for the recovery of tax claims by Directive 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[2].

They had to be seen in conjunction with existing EU instruments such as Council Framework Decision 2005/214 on the application of the principle of mutual recognition of financial penalties[3] and the Brussels I Regulation[4] which governs the recognition and enforcement of judgments with respect to underlying claims of a civil nature.

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1 OJ L 284, 30.10.2009.
2 OJ L 84, 31.3.2010, p. 1.
3 OJ L 76, 22.03.2005, p. 16.
4 Council Regulation (EC) N0 44/2001, OJ L 12, 16.01.2001.

CION further stated that, in view of the rather innovative character of the proposed provisions, the possibility of a review clause on the model of the one provided for in Council Regulation 987/2009 could be envisaged, should the Member States consider this appropriate. Other issues for consideration might involve the designation of a responsible central authority instead of using the IMI form and the possible addition of a new Article concerning grounds for refusing a request for information, recovery or notification.

General comments

Subject to further discussions and clarifications, AT, BE, BG, CZ, DE, DK, ES, EL, FI, IT, NL, PT, RO, SE, SK and UK welcomed the initiative to include specific provisions with respect to cross-border enforcement of administrative fines and penalties in the proposal stressing the importance of creating effective enforcement mechanisms at EU level to tackle unlawful behaviour.

AT, BG, DE, DK, EE, FI, FR, IT, LT, LV, NL, MT, PL,PT, SI, SK and UK entered general scrutiny reservations on this Chapter.

SE felt that the legal framework should be clarified further and that experience should be drawn from the application of EU rules regarding the recovery of social security and tax claims.

MT enquired whether Member States which did not apply administrative penalties would be obliged to introduce them and, if not, what would be the practical implications if those Member States were to receive requests for recovery from other Member States.

FI considered that any comprehensive assessment of the provisions in Article 13 would require more information to be given on the type of administrative penalties in use in the Member States. In its views, the choice should be left to the Member States to decide if they would apply the proposed system of administrative fines and penalties in accordance with mutual recognition.

LT sought further clarifications as it felt that the legal basis did not allow for the possibility to impose administrative penalties.

DE wondered how to make a clear distinction between mutual recognition and Framework Decision 2005/214 in order to avoid overlaps and to clarify the cases where a requested Member State would have the possibility of not applying administrative penalties according to its legal framework.

CION stressed that, as stated clearly in recital 31, the proposed provisions did not have the effect of imposing any requirement on Member States to introduce a particular category of penalties. Article 17 referred to penalties, which actually meant criminal or administrative sanctions or a combination of the two. In the Commission's views, the legal basis was sufficient to cover mutual recognition as in the case of the mutual recognition of qualifications Directive.

In reply to DE, CION agreed that the Framework Decision 2005/214 and the legal framework provided by the enforcement proposal should not apply in parallel. The Commission had a preference for the system set up by the Framework Decision as the possibility of cross border enforcement would not depend on the existence of similar claims under the respective national system. Even if no administrative penalties system existed in a particular Member State, that would not mean that that Member State would be able to elude another Member State's request for mutual assistance. Limiting the possibilities for recovery could reveal to be counterproductive and could in practice result in giving undertakings a free hand for infringing the rules of the directive.

PL felt that the scope of the Chapter was unclear and that the proposed rules would make it necessary for Poland to adopt new provisions on administrative fines and penalties at national level. In view of the lack of harmonised provisions, it considered that this very complex proposed framework would be very difficult to apply as the nature of penalties varied among Member States. EE shared PL's concerns about how the rules would apply and what would be their impact on individual rights and HU was of the view that the stated aims of the Directive could not be met if harmonised rules were not established.

With the support of RO, PL also questioned the appropriateness of using the IMI system in this context.

CION stated that as, under Polish legislation, penalties and sanctions are primarily of a penal/criminal character, the Framework Decision would then apply and the Polish authorities would therefore only be the requested authorities. In addition, the aim should be to first try to recover the penalty or fine at national level before requesting cross-border recovery.

BE took a very favourable stance on this Chapter in view of the difficulties resulting from implementation of the current Directive as well as on the Commission's efforts to look for practicable solutions for all Member States. It undertook to cooperate in a positive way. It felt that the notion of administrative penalties should be clarified further and that ES' proposal (doc. 12575/12) was a good basis.

UK stressed the importance of efficient enforcement rules to avoid jeopardising the objectives of the proposed directive. Recalling that the systems in force for taxation and social security were far more comprehensive than this Chapter, it stressed the need for more clarifications in order to ensure legal safety. In order to determine how the proposed system could work in practice, UK, with the support of CZ, EE, IT, PT, RO and SI, invited CION to provide a note explaining and clarifying further the interaction with the other relevant EU instruments, with practical examples.

NL was also very positive with regard to this Chapter as a whole but considered that there was a need to further discuss the issues of control and surveillance. It felt that there was a lack of consistency in the definitions. As for the recovery of fines, NL considered that the legislation of the requesting Member State should be the guiding element.

FR said that its legislation, which only provided for administrative penalties, would be covered by the Framework Decision but wondered what would be France's obligations if a Member State requested the recovery of administrative fines. It entered a general scrutiny reservation on this Chapter as it was not in a position to assess its impact on the French legislation and on the obligations which would result for France.

AT and FI wondered about the relationship with Chapter III (administrative cooperation) and asked if there would be a general obligation to enforce upon receipt of a request.

DE, ES, LV and UK stressed the importance of clearly laying down the grounds for refusal in Article 13. LV stated that the mutual recognition procedure should be streamlined for the sake of efficiency.

CION stated that the information requested by UK was already available and referred to page 21 of the explanatory memorandum and to a note circulated within the experts' group on the posting of workers. The guiding element was the comparability of the offences for cross-border enforcement. In the framework of mutual recognition, Member States would have to enforce decisions upon request by other Member States even if their systems did not provide for sanctions for the categories of offences for which the request was made. CION hinted that recital No 31 could be further clarified along these lines, stating that the Directive would not entail any obligation for the Member States to introduce administrative penalties but that they would have to provide assistance upon request.

Article 13

ES introduced its proposal for a mandatory uniform instrument which would only allow for enforcement in the case of final decisions involving financial penalties.

AT, BE, CZ, HU, NL, PT, RO, SE and SK took a favourable stance on ES' proposal which in their views included useful elements. HU entered a positive scrutiny reservation and MT a scrutiny reservation.

BG considered that ES' proposal might offer certain advantages but stressed that if such an approach was to be agreed, its implications would have to be carefully examined.

While being positive on the idea of limiting the scope of the Article to financial penalties in Article 13(1) as it felt that they be would be easier to apply than other penalties, CZ nevertheless that these terms should be clarified further.

AT, CZ, DE, FI, NL, PT and UK were in favour of ES' proposal to limit enforcement to final decisions. FI wondered about the legal implications. BE sought further clarification while IT and UK expressed doubts as they felt such limitation might interfere with Article 15 and thus hamper the aim of the proposed Directive. ES stated that final decisions should be understood as sanctions, such as financial penalties, for which an appeal could not be lodged. CION hinted that the term "enforceable" might be preferable in this respect.

With regard to Article 13(2), AT and NL were in favour of the removal of the last part of the sentence. IT was open to the suggestion while UK was against. BE felt that this had to be seen in relation to the comparability issue. FI entered a scrutiny reservation, HU a positive scrutiny reservation and DK a negative one.

AT referred to its proposal regarding Article 13(2) (doc. 9620/12).

NL could agree with ES' proposal with respect to Article 13(3) and (4). IT wondered if the legal basis of the IMI Regulation would be sufficient to meet the objectives set by ES' proposal. Along the same lines, PL and RO were concerned that this might entail going beyond the scope of the IMI system. DK entered a scrutiny reservation.

CION was against the idea of limiting the scope to financial penalties as this might be too restrictive. For instance, a breach of rules concerning health and safety would not always lead to financial penalties. It was also against the terms "final decisions" as it felt that this would limit the cases for cross-border enforcement to situations where all possibilities for appeals would have been exhausted and it shared BE and IT's views that this might interfere with Article 15. CION was in favour of using the IMI system and a uniform instrument permitting enforcement to be translated into the official language(s) of the requested Member State. It added that the relationship with the Articles regarding administrative cooperation could be made clearer, if need be.

Article 14

UK stressed that the Article should give a more complete picture and, in particular, that the provisions in Article 14(1) should be more detailed. Inspiration should be drawn from the system established for the recovery of tax claims. In Article 14(3), provisions should be added concerning grounds for refusal. UK could go along with ES' proposal with regard to the principle but felt it should be completed.

DE also considered that the structure of the Article should be strengthened taking account of the essential objective of Chapter VI and noted that ES' proposal on (c) was an interesting one.

AT, BE, BG, PT and RO stated that the Spanish proposal could constitute a useful complement to the Commission's proposal. EE took a positive stance on it, subject to further scrutiny. SK also shared these views while stressing that this would ultimately depend on the outcome of the discussions on Article 13. For their part, LT and NL felt that the Spanish proposal did not bring any added value.

FI also stressed that Article 14 should be clarified further and was in favour of the structure proposed by ES under c). It could go along with a common standard form and agreed with ES on the importance of applying to it the IMI's translation facilities. EL and IT also expressed interest in ES' proposal under c).

While in agreement with a summary of the facts and description of circumstances, CION nevertheless warned that referring to a legal classification might lead to practical problems.

III. OTHER PROVISIONS

Article 16

With respect to the possible scenarios regarding the deduction of costs of recovery as set out in the Presidency's questionnaire (doc. 13740/12), a number of delegations preferred either the Commission proposal foreseeing that the amounts recovered are remitted to the requesting Member State after deduction of costs (BG, HU, IT, RO and SE) or to the one underlying the Framework Decision 2005/214 (AT, BE, DE, LV and NL) according to which the Member State recovering the amounts may keep them.

PT indicated being able to accept b), c) or d), whereas UK preferred scenarios b) or c) but not d) which would require a case by case approach thus involving too much bureaucracy.

RO, with the support of HU and BG, asked what would happen if the costs for recovery would be higher than the value of the fine.

DE suggested that a ceiling should be set for Chapter VI beyond which requests could be refused on grounds of costs.

PL considered that the Article should be clarified further.

CION indicated being flexible with regard to the choice of options and suggested that variants could be introduced within each of these. In reply to BG, HU and RO, it suggested that in the few cases where the costs for recovery would be higher than the amounts of the fines, this might be considered a valid ground for refusal. Should delegations decide to take into account costs amounts, this would involve more details than actually necessary but CION , being flexible, would not be opposed to such an approach if necessary.

In reply to UK which emphasised that certain forms of mutual recognition might involve major costs, CION stated that, as a general rule, mutual assistance should be free. Where the costs were higher than average costs, a reimbursement could be provided according to the modalities set out in Article 16(2) which constituted the exception to the rule.

Article 3(2)

The main specific concerns put forward by delegations in relation to Article 3(2) containing a list of indicative elements to assess that a worker is a posted worker in the sense of the Directive related to the practical implications of not fulfilling the criteria and the relationship with Article 8 of the Rome Convention (AT, DE, FI and SE). FI and SE reiterated their position that, as the legal consequences of non-fulfillment of the criteria were not clear, the Article did create legal uncertainty for those workers who by definition fell outside the definition of posting. SE recalled its proposal in this respect (doc. 11065/12). IT considered this proposal an interesting one.

CZ, LV, PL and RO reiterated their preference for a closed list wondering in particular how to implement these provisions. CZ expressed concerns that an open list would have the effect of allowing Member States to add whatever criteria they might consider necessary, thus limiting the access of foreign companies to the labour markets of other Member States. However, as a large number of delegations were in favour of an open list, possible solutions might be to limit the possibility to add new criteria or to provide for a review clause. In the course of the discussions under the Danish Presidency, it had been said that this Article would only be applicable in case of reasonable doubt but this did not result from the Article. CZ also wondered about the relationship between this Article and Chapter VI. For these reasons, it entered a negative scrutiny reservation on the current wording of Article 3, with a particular focus on Article 3(2) while indicating that it was still examining these provisions.
RO, with the support of PL, stated that a closed list, accompanied with a review clause, would allow for equal treatment for all Member States. PL felt that the criteria set out in d) were unclear. LV stated that it should be clarified under d) that the employer would pay for the costs.

AT, BE, DE, DK, FR, IT, NL and MT recalled that they were in favour of an open indicative list on the basis of the Commission proposal.

FR was in favour of an evidence-based method allowing the competent authorities to assess the effective reality of posting while it would be for the national implementing rules to define the level of protection of the worker in terms of pay, working conditions, etc. A closed list might cause problems as the strategies of the companies were indeed very diverse. BE, DK and IT shared those views.

DE stated that the aim of Article 3 should be to ensure the protection of workers and to avoid situations of abuse. It still had to be convinced that this objective could be achieved. DE and FR expressed support for BE's proposal to establish a separate paragraph with the last indents in Article 3(1) and 3(2) in order to leave some room for manoeuvre to the competent authorities.

While having a preference for an open list, UK was , on the basis of the discussion, ready to reflect on the possibility of a duly justified threshold or a review clause. It stressed that Article 3 should only be used in case of doubt, if there were a suspicion that a company was circumventing the rules or if the situation was not a situation of posting. It agreed with CZ that this should be made clear in the text. HU shared UK's news.

AT hinted that the legal implications should be clarified for such cases where the assessment led to the conclusion that the situation was not a situation of posting.

CION indicated that the provisions in this Article were similar to those in Regulation 987/2009. A certain level of flexibility would be needed to include other pertinent criteria. Should the criteria not be fulfilled, this would mean that the Directive would not be respected and that in principle national legislation could be applied, without prejudice to the application of Rome I Regulation or other EU instruments which may imply that even more favourable conditions may have to be respected.

Article 4

BE and UK questioned the practical implications (data protection, access to registers, etc) of extending IMI to social partners by introducing the possibility to designate them as competent authorities. Those concerns were shared by BG, CZ, DE, ES, FR, IT, LT, MT, PL and RO.

Recognising that social partners should be involved at several levels, PT nevertheless considered that information exchange should take place between public bodies.

DK indicated having no problem to designate social partners as competent bodies bearing in mind their special role in monitoring working conditions. SE could accept the Article as it stood agreeing that it should be up to the Member States to decide whether or not social partners should be connected to IMI and under what conditions.

All intervening delegations could accept changing the title of Article 4 into "liaison offices and competent bodies" or indicated being flexible in this respect. HU entered a scrutiny reservation.

CION said that it would up to the Member States to decide who should act as competent authorities while access to the IMI could be subject to certain limitations.

Article 6(2) and (6)

Many delegations (AT, BE, BG, CZ, DE, EE, FR, HU, PL, PT, SE, SK and UK) were in favour of the European Data Protection Supervisor's recommendation to delete the final part of Article 6(2) ("or possible cases of unlawful transnational activities") (doc. 13303/12). DK indicated that it was flexible while IT and NL expressed doubts. IT felt that a more detailed wording would be preferable and NL was concerned that removing this part might have the effect of jeopardising the Directive.

With respect to Article 6(6), a very large number of delegations (AT, BG, CZ, DE, EE, ES, FI, FR, HU, IT, NL, MT, PT, SE and SK) agreed with the principle that the competent authorities of one Member State should be able to access registers of another Member State. BG, EE, MT, NL and SK stated that access should be limited to public registers and AT and FR that access should be granted to business registers to allow the competent authorities to check if the company was registered. BE felt that the Member States should be able to decide about the type of registers open for access on the basis of feasibility and cost/efficiency and considered, on a provisional basis, that a limitative list of registers could be an appropriate solution. DE stressed that it could only agree with the principle of granting access if detailed provisions concerning those registers were included in the Directive. DK and PT were in favour of limiting access to the registers covered by the IMI system, PT also stressing that access should not involve personal data. ES also considered that the type of registers should be specified clearly. FI stressed that the resisters should be accessible only for the purposes of the Directive.

PL raised the issue of registers for which no access to data was granted.

Referring to Article 6(7) FI stated that this clause would be unnecessary if the information was available and SE entered a reservation as it felt that this provision might be contrary to its Constitution.

Article 7

A considerable number of delegations (AT, BE, BG, FI, FR, HU, PT and UK) agreed with the European Data Protection Supervisor's recommendations (see paragraph 28 of doc. 13303/12) to clarify and limit to the minimum strictly necessary the period for which alerts are retained and to keep the information received in that respect confidential. BE recalled its proposal on Article 7(2) (doc. 10095/12). BG entered a scrutiny reservation on Article 7(2).

SE could show some flexibility with the exception of the confidentiality requirement which might be against the Swedish Constitution.

IT could accept recommendations 2 and 3 but not recommendation 1 as it was in favour of the Commission's proposal. DE could go along with recommendation 1 but not with the two others. NL could agree with recommendations 2 and 3 and undertook to submit a proposal with regard to recommendation 1. PL expressed doubts with regard to recommendations 2 and 3. SK could agree with recommendations 2 and 3. It expressed doubts with regard to recommendation 1 but indicated that it could be flexible.

CION entered a reservation as the compatibility of these EDPS' recommendations with the IMI system finally upheld would have to be verified.

IV. CONCLUSION

The Chair invited delegations to submit comments in writing with respect to Chapter VI by 8 October and indicated that the next meeting, scheduled for 9 October, would focus on the examination of Presidency's compromise text proposals on Articles 1-8 and on Chapter VII (final provisions).