Application of Directive 96/71/EC on the posting of workers

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PURPOSE: to present a Communication to assess the application of Directive 96/71/EC on the posting of workers in the framework of the provision of services.

CONTENT: on 4 April 2006 the Commission adopted the Communication 'Guidance on the posting of

workers in the framework of the provision of services' which aimed to assist Member States in achieving the results required by the Directive and in particular as regards administrative requirements and control measures imposed on service providers.

The present Communication responds to the commitment taken by the Commission in its Communication to monitor developments in the Member States4 with respect to all matters addressed in that Communication.

The present Communication is based on a detailed examination of the situation in the Member States and also takes into account the information provided and the concerns expressed by the European Parliament in its Resolution of 26 October 2006 on the application of the Directive.

There are no precise figures or estimates of posted workers in the EU. However, the overall number of posted workers is estimated to be just under 1 million or about 0.4% of the EU working age population in 2005. They represent significant numbers in some Member States (Germany, France, Luxembourg, Belgium or Poland) but the phenomenon is increasingly widespread and affects now all Member States as sending and/or as receiving countries. The economic importance of posting exceeds by far its quantitative size, as it can play a crucial economic role in filling temporary shortfalls in the labour supply in certain professions or sectors (e.g. construction, transport). On the other hand, employment conditions, wages in particular, offered to posted workers, if not subject to proper control and enforcement, may diverge from the minimal conditions established by law or negotiated under generally applicable collective agreements. If such divergence takes place on a large scale this might undermine the organization and functioning of local labour markets. At the same time, on a more general level, restrictions on labour market access may exacerbate resort to undeclared work. When accompanied by lacunae in enforcement of Community legislation already in place, this phenomenon leads to undesirable social consequences both for undeclared workers and the regular labour force.

Guidelines provided for in the Commission's Communication of April 2006

In its Communication of April 2006, the Commission explained and clarified how the Community acquis, and in particular Article 49 EC as interpreted by the ECJ, had to be observed and how the results required by the Directive could be achieved in a more effective manner. Among the control measures applied by Member States in the context of supervising the posting of workers, it explicitly focussed upon the following types of administrative requirements:

- to have a representative established on the territory of the host Member State ;
- to obtain a prior authorisation in the host Member State or to be registered with them, or any other equivalent obligation;
- to make a prior declaration to the authorities of the host Member State;

- to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory;
- measures which apply specifically to posted workers who are nationals of third countries.

Control measures applied by the Member States: in the light of the available information and pending further assessment, a number of control measures applied by Member States do not seem to be in conformity with Article 49 EC as interpreted by the ECJ. A final assessment of the situation will, however, depend on an assessment as to whether certain legitimate monitoring needs can be fulfilled by improved access to information and/or more effective administrative cooperation between the host Member State and the Member State of origin.

Control measures used: the main categories of control measures used by the Member States are as follows:

- the requirement imposed on the posting undertaking to have a representative in the host country is explicitly made in 6 Member States (and implicitly in 3 others);
- a specific authorisation/registration regime for posting of workers exists in two Member States;
- the requirement to make a declaration prior to the commencement of the work by the service provider exists in 16 Member States19; whereas one Member State imposes such an obligation on the recipient of the service;
- requirements to keep and maintain certain social documents on the territory of the host country and /or under the conditions which apply in its territory are imposed in 14 Member States in varying ways and concerning different types of documents.

Member States and Social Partners have divergent views as to whether certain control measures are needed as well as to whether these are compatible with Community law. In October 2006, the European Parliament adopted a Resolution which alleges the right of the host Member State to impose certain formalities to employers that post workers so as to make it possible for the authorities of that country to ensure compliance with the terms and conditions of employment. For a number of Member States this constitutes a highly sensitive issue, touching upon key characteristics of their social model. Control measures imposed by Member States are embedded in their legal and institutional frameworks, and in some Social Partners can also be entrusted with control and monitoring tasks of terms and conditions of employment. Lack of information on the identity and/or legitimacy of service providers, the temporary and often very short-term nature of posting operations, the perceived risks of "social dumping" or distortion of competition, as well as the cultural and physical distance between controlling authorities, are mentioned as justification for the use of certain control measures by host country authorities. On the other hand, these are often perceived as excessive by service providers and authorities in sending countries, and pursuing goals that go beyond the protection of posted workers' rights.

Assessment: the inventory of control measures used by Member States shows their striking diversity. As a matter of principle, the Commission does not intended to put into question the different social models chosen by Member States nor the way they organise their system of labour relations and collective bargaining, provided that it is implemented and applied in a way which is fully compatible with the obligations under the Treaty.

Furthermore, the necessity for preventive actions and appropriate sanctions aimed at countering illegal employment and undeclared work, including in the form of disguised self-employment, as well as combating unlawful activities by fictitious foreign temporary employment agencies, is indisputable. In this context, Member States need to strike the right balance between, on one side, the necessity to provide and safeguard the effective protection of workers and, on the other, the need to ensure that the formal requirements and control measures used or imposed in order to guarantee the respect of overriding reasons of general interest (such as protection of posted workers), including the way these are effectively applied, exercised or performed in practice, are justified and proportionate in view of the objectives pursued and

aims to be achieved. This situation may well be related to, if not caused by, the virtual absence of administrative cooperation, the still unsatisfactory access to information as well as cross-border enforcement problems. These problems cannot be solved unless Member States improve the way they cooperate with each other and, in particular comply with their obligations regarding administrative cooperation and access to information as stipulated in the Directive. In complying with their obligations, Member States would substantially contribute to a reduction of administrative burdens in line with the objectives set by the European Council. Improved administrative cooperation could also constitute an important element when aiming to improve and increase effective compliance with and enforcement of Community law. Adequate and effective implementation and enforcement are key elements in the protection of posted workers rights.

Future measures: the Commission considers that urgent action is required and envisages the following measures:

1. adopt a Commission Recommendation (on the basis of Article 211 EC), to be endorsed by Council conclusions in order to reinforce administrative cooperation amongst Member States through the use of the Internal Market Information System (IMI)43 and to clarify the role of liaison offices;
2. adopt a Commission Decision setting up a high level Committee, in order to support and assist the Member States in identifying and exchanging good practices, to institutionalise the current, informal Group of Government Experts by identifying with greater precision its role, tasks and responsibilities, and to formally involve social partners regularly;
3. ensure effective compliance with the fundamental freedoms of the EC-Treaty, as interpreted by the ECJ, by those Member States which impose administrative requirements and control measures considered incompatible with prevailing Community law (such as the requirement to have a representative established in the host Member State, or an obligation to keep certain social documents on its territory, without any exception and/or time limitation, when information can be obtained via the employer or the authorities in the Member State of origin within a reasonable delay) on a case by case basis, including, if necessary, launching infringement proceedings under Article 226 EC;
4. ensure the conformity with Community law, as interpreted by the ECJ notably in the judgement "Vander Elst", with respect to those Member States which still require work permits and other conditions to posted third country nationals who are legally staying and are legally employed in another Member State, by launching infringement procedures under Article 226 EC;
5. continue monitoring the Member States' national transposition measures and their application on all other matters not dealt with in this Communication, including those situations where, contrary to Article 4(3), accessibility and transparency of information remains a problem, and, if necessary, take the appropriate measures, including launching infringement procedures under Article 226 EC;
6. engage, for example in the above-mentioned high level Committee, with the Member States and Social Partners in an in-depth examination of cross-border enforcement problems (sanctions, fines, joint and several liability).

On the basis of this examination, the Commission will take appropriate action.