Posting of workers in the framework of the provision of services: enforcement of Directive 96 /71/EC

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The Council took **note of a progress report** regarding enforcement of the posting of workers directive and the right to collective action regulation.

From the discussions in the Council's working party, it seems that delegations recognise the added value of the proposal for an enforcement directive and have positive views on its overall objectives.

Except for the issue of **cross-border enforcement of administrative fines and penalties** (chapter VI), substantive discussions have taken place on most parts of the proposal and considerable progress has been made in the discussions on some of the issues.

There is a need for further examination of chapter VI, and for further in-depth discussion on :

- the issues of national control measures,
- the length of the deadlines,
- as well as the proposed system of joint and several liability.

As regards the other main outstanding articles, many aspects have been dealt with in detail and there therefore seems to be a sufficient basis for making substantive progress on some of these issues in the near future also with a view to implementation of the Single Market Act.

The delegations' positions may be summarised as follows:

Definition of "posted worker" : this shall mean, for the purposes of the Directive, a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the Member State in which he or she normally works. A worker qualifies as posted by virtue of his or her factual situation and the circumstances in which he or she is expected to carry out his or her activities, including:

- the temporary nature of the activities to be performed;
- the existence of a direct employment relationship between the undertaking making the posting and the worker during the whole period of posting;
- the country in which the worker normally works, and
- the existence of a genuine link between the employer and the worker's country of origin.

However, Directive 96/71/EC does not contain any further indication as to how to determine whether the employer is established in a Member State, nor does it contain more specific criteria as to how to determine the temporary nature of the work to be performed by the posted workers of the Member State in which the workers concerned normally work. To avoid circumvention of rules and combat abuse of the application of Directive 96/71 EC, Article 3 provides for an indicative, non-exhaustive list of qualitative criteria characterising both the temporary nature inherent to the notion of posting as well as the existence of a genuine link between the employer and the Member State from which the posting takes place.

Most delegations are in favour of an indicative and non-exhaustive list of criteria which would allow taking national circumstances into account while a few delegations are in favour of an exhaustive list as

they are concerned that a non-exhaustive list might give rise to disproportionate requests for information. A number of delegations see the list as sufficient, whereas others point to **the need for further clarification on some criteria and/or need to coordinate the criteria with the ones applied in the area of social security**.

Whereas a few delegations have raised concerns that the provisions could lead to legal uncertainty, others have expressed doubts about whether Article 3 would help in preventing abuse and stressed the importance of strengthening controls. The Commission suggests that a possible solution could be adding a recital stating that in case the criteria are not fulfilled, national legislation applies without prejudice to the applicable obligations under the Union acquis. This Article should be seen in conjunction with Articles 6, 7, 10 and 11. In its views, a clearer, more easily enforceable indicative description of the constituent elements of the notion of posting for the provision of services, as well as the criteria relating to what constitutes a genuine establishment of the service provider in a Member State, are crucial to avoid the use of Directive 96/71/EC for situations that are not proper postings in the sense of the Directive. The list would provide clarity, not only for public authorities but also for service providers and posted workers and should be open ended as it would be impossible to cover all possible situations.

Improved access to information: access to advance information about the terms and conditions of employment applicable in the host country is a prerequisite for interested parties to be able to provide services in compliance with Directive 96/71/EC. Article 5 therefore contains a number of important more detailed measures to help ensure easily accessible and generally available information on the terms and conditions to be respected, including where these are laid down in collective agreements (paragraph 4).

While most delegations welcome this Article, questions have been put as to how many languages the information to be made available to workers and service providers. A large majority of delegations, as well as the Commission, agree with the Presidency's suggested option to specify that translation should be in the most relevant languages. A broad number of these delegations are of the view that the choice should be left to the hosting Member State account being taken of the country of origin of the posted workers.

Mutual assistance: the Commission proposal provides for the general principles, rules and procedures necessary for effective administrative cooperation.

A large number of delegations are of the view that the deadlines laid down in Article 6(5) are too short. Most delegations support a Presidency’s compromise suggestion to introduce the

following three different deadline categories:

- a very short deadline for requests that are very urgent and relate to proof of establishment and can be answered by simple means such as consulting a business register or checking a VAT number;
- a deadline for other requests that do not require an on the spot control;
- a longer deadline for other requests that do require an on the spot control.

The Commission stresses the importance of having ambitious deadlines and considers that the terms "as soon as possible" in the current text with deadlines together with Article 6(4) should already bring a sufficient degree of flexibility to take account of the complexity of requests and of the need for inspections. It could go along with the principle of differentiated deadlines as suggested by the Presidency and has made it clear that it is not in favour of setting any concrete deadlines.

Role of the host Member State: a number of delegations are of the opinion that the respective competences of the host Member State and of the Member State of establishment should be clarified further, including the inter-linkage of these provisions with the provisions on national control measures and inspections (Articles 9 and 10). The Commission stresses that Article 7 clearly states that the Member State responsible is not only the host Member State but also the Member State of establishment. Although

the main part of checks and controls would normally be carried out by the authorities of the host Member State, there are important elements that could better be checked in the Member State of establishment (i.e whether the company is genuinely established there).

A number of delegations support a compromise Presidency's text proposal for Article 7(4), as set out in doc.10487/12, to make clear that the provision is part of the administrative cooperation mentioned in Article 6 and is without prejudice to rights and obligations of the authorities of the host Member States.

National control measures: Article 9 contains an exhaustive list of control measures or administrative formalities that may be imposed on undertakings posting workers for the provision of services in order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected.

A number of delegations welcome that Article 9 contains an exhaustive list of allowed control measures in order to establish legal certainty while a group of other delegations are in favour of a non-exhaustive list as they consider the current list represents a too restrictive interpretation of the ECJ case-law. Other delegations call for more flexibility on the issue.

Subcontracting-joint and several liability: specific provisions concerning contractors' obligations and (joint and several) liability are provided with respect to compliance with the applicable minimum wages of posted workers by direct subcontractors in the construction sector. Member States which so wish may maintain or implement more farreaching systems of joint and several or chain liability and extend them to other sectors.

A number of delegations have taken a positive stance towards these provisions, or are in agreement with the principle of joint liability subject to further discussions. Some of these delegations consider that they **should not be limited to construction activities but should cover all sectors**.

Border enforcement of administrative fines and penalties: Chapter VI (Articles 13-16) sets out a system for the cross-border enforcement of administrative fines and penalties. While a number of delegations have expressed interest in this Chapter and indicated elements for further discussion for the purposes of clarification, the text as a whole, in view of its complexity, still has to be examined in detail with participation of experts in the field of Justice and Home affairs, if need be.