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

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The Council discussed a proposed Directive intended to improve implementation and enforcement of the 1996 Directive on the posting of workers for the provision of services in another Member State. The aim of the proposed Directive is to guarantee the protection of workers' rights, clarify the regulatory framework and ensure fair competition. Such an enforcement Directive is necessary because experience has shown that the rules of the 1996 Directive are not always properly enforced and that posting is also being abused by letter-box companies artificially established abroad to benefit from lower levels of labour protection or social security obligations.

Ministers took note of **progress** made in the ongoing work on the proposal and held a debate on **two key issues of the proposal** on the basis of a **presidency steering note** (see Council doc 16637/12):

(1) under Article 9 of the proposal, in order to monitor compliance with the rules, Member States may **impose national administrative requirements and control measures** on undertakings posting workers. While a group of delegations voiced support for an exhaustive list of such measures on the grounds of transparency and legal certainty, another group advocated an open list in order to give Member States more flexibility and to allow them to maintain the current levels of national controls;

(2) the proposal provides for **joint and several liability of contractors in respect of subcontractors** for compliance with applicable minimum wages, as far as the construction sector is concerned (Article 12). Several delegations would prefer to remove this provision, arguing that only a small number of Member States currently have such a system of liability and that its EU-wide introduction could create barriers to the trans-frontier provision of services. A significant number of delegations, however, stressed the importance of having such a system in order to **protect workers' rights and fight fraud**. Some Member States would favour a gradual introduction in order to avoid possible distortions in the internal market for the provision of services, whilst others could accept a provision which would make it optional for each Member State to apply a joint and several liability system.

Some Member States stressed the need to strike the right balance on these two issues and that compromise solutions should be sought for ensuring the protection of workers' rights while, at the same time, avoiding hampering the freedom of provision of services and the single market.

Progress under the Cypriot Presidency: the progress report presented by the Presidency to the ministers points out that in the discussions held within the Council and its preparatory bodies under the Cypriot Presidency, **considerable progress** has been achieved on various issues of the proposed directive, such as:

- a clearer definition of the notion of "posting" through criteria for assessing the genuineness of posting cases;
- better information of workers and companies concerning their rights and obligations;
- enhanced cooperation between national authorities;
- cross-border enforcement of administrative fines and penalties imposed for non-compliance by introducing a system of mutual assistance and recognition.

However, further work will be needed on some of these issues as well as on a number of other issues, including **inspections to be carried out by Member States** and the provisions on **handling of complaints and back-payments**.

Main discussions: extensive in-depth discussions were held in the Working Group on Chapters I, II, III, VI and VII.

- Chapter I (General Provisions): Chapter I sets out the general provisions, including a framework for preventing abuse and circumvention of the rules on posted workers under Council Directive 96/71/EC. Discussions on this Chapter highlighted the need to clarify: (i) the definition of "competent authority" as this would provide Member States with flexibility in choosing their competent authorities, including the choice to designate social partners. A number of delegations retain reservations on the Presidency's proposal as they consider that the definition should only refer to "public authorities" or "public bodies".

As regards the **criteria for assessing whether a given service provider genuinely performs substantial activities in a given Member State, as well as whether a worker is indeed a posted one**, a large group of delegations still maintain scrutiny reservations on the question of the consequences of a negative assessment of the indicative list of qualitative criteria/constituent elements provided for in Article 4 of the amended proposal. In particular, questions have been raised in relation to the terms and conditions of employment which would apply for workers falling outside the scope of this Directive and the relation of this Directive with Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the Rome I Regulation). In relation to this issue, the Presidency has proposed modifications to recital 5 indicating that, in principle, **the law of the host Member State should apply (where the work is performed by the posted worker)**, without prejudice to the Rome I Regulation. Some delegations explicitly wish this law to apply, notwithstanding the Rome I Regulation. Certain delegations wish the inclusion of a provision laying down the principle of equal treatment for workers performing temporary work with nationals in the Member State where the work is carried out. Views still diverge among delegations on whether the **list of criteria should be indicative**, on the basis of the Commission proposal, or **exhaustive**.

- **Chapter II (Access to information)**: in order to improve access to information for workers and service providers in relation to their rights and obligations under the Directive, Chapter II lays down detailed requirements that need to be satisfied in relation to the availability, accessibility and clarity of this information. To this end, with a view to achieving consensus between delegations, the Presidency has proposed amendments to the Commission's proposal, namely, in respect to the languages in which the information must be provided and on ensuring information for workers and service providers in respect of terms and conditions that are laid down in collective agreements. All delegations are in agreement with the text of this Chapter as modified by the Presidency.

- **Chapter III (Administrative cooperation)**: this Chapter contains provisions on cooperation between the national authorities responsible for the implementation of the proposed Directive. Views amongst delegations still differ on the need for a provision stating that the cooperation of the Member States may also include **the sending and service of documents of the requesting authority**, as suggested by the Presidency. However, a large number of delegations have raised scrutiny reservations on this provision.

- **Chapter VI (Cross-border enforcement of administrative fines and penalties)**: the objective of this Chapter is to set up a system for the mutual recognition and enforcement of administrative fines/penalties imposed on a service provider established in a Member State for failure to comply with the applicable rules on the posting of workers in another Member State. In view of its particularly complex nature, especially as regards its legal dimension, this Chapter has been the object of extensive discussions with a view to clarifying its legal implications and modalities for implementation. It should be noted that, currently, noncompliance with the obligations under Directive 96/71/EC is sanctioned differently across

Member States (such sanctions being of a penal or criminal nature or governed by administrative law or being a combination of the two). Stressing the importance of creating effective enforcement mechanisms at EU level to tackle unlawful behaviour, most delegations welcome the general purpose of this Chapter. During the discussions the delegations had the chance to clarify, amongst others, **practical implementation issues** and thoroughly analyse the interaction of the provisions of this Chapter with those of the Council Framework Decision 2005/214/JHA and other EU instruments. As a result of these discussions, the Presidency made drafting suggestions in order to improve the content of the proposal, to reflect on the delegations' requests for enhancing clarity and **legal certainty** and to seek a compromise on controversial issues.

In particular, these aim to:

- limit the scope to financial **administrative penalties/fines** as they would be easier to practically apply than other administrative penalties;
- **lay down clear information requirements** that must accompany requests for notification and requests for recovery;
- fix a **threshold for the amount of financial penalty/fine**;
- stipulate the principle according to which the requested competent authority retains the amounts recovered and also bears the costs of recovery;
- introduce a specific **review clause** for this Chapter, given its importance;
- enhance the interaction with the Council Framework Decision 2005/214/JHA and the Brussels I Regulation.

- Chapter VII (Final Provisions): the remaining substantive issues on this Chapter mainly concern Article 18 (Internal Market Information System), in particular with regard to the application of bilateral arrangements, where a small number of delegations maintain scrutiny reservations.

- Other issues: Articles 9 (national control measures) and 12 (joint and several liability) were discussed. **With respect to Article 9**, a number of delegations would prefer an exhaustive list of administrative measures, as per the Commission's proposal. One of the concerns in this respect is to ensure legal certainty and sufficient transparency for the service providers. At the same time, another group of delegations prefer a non-exhaustive list. A consideration, in this respect, is the need for adequate flexibility in imposing control measures in order to ensure proper compliance with the applicable rules, as the case law on posting cases has not been exhaustive and there should be adequate space for reflecting future developments. **Blocking minorities exist on both sides**.

On Article 12, there is also divergence amongst delegations, some of which favour this provision, while others wish for it to be removed. Additionally, there are reservations on the provision for the concept of " **due diligence**" which is laid down in this Article and could exempt service providers from liability. Furthermore, some delegations would wish the principle of joint and several liability to **extend beyond the construction sector**, as well as to all of the levels of the liability chain.

Lastly, there was a request by the French delegation with regard to the transport sector. Stressing that the effective implementation of the Directive 96/71/EC, notably its provisions regarding wages, is a key element for fair competition between road transport undertakings within the EU, France requests a new text in Article 9(1)(a) thereby, in situations under the scope of the Directive 96/71/EC, road drivers should be informed about the wage levels they are entitled to through a specific mention on the documents that have to be carried for any international transport coming under the scope of the Directive and cabotage. The Commission recalls that the current Directive does not provide for such an obligation and questions its practical implications.

Conclusion: the level of progress that has been achieved on the dossier should facilitate future discussions and pave the way for further progress with a view to reaching agreement on the overall text. At the same time, it is recognised that detailed discussions still need to be held on a number of issues, namely on national control measures (Article 9), inspections (Article 10), defence of rights, facilitation of complaints and back payments (Article 11) and subcontracting and joint and several liability (Article 12). The intention was to provide a solid basis for the future work under the incoming Irish Presidency, thereby paving the way for the Council to reach a **general approach on this proposal**.

It should be noted that AT, CZ, DE, EE, IE, LT, LV, MT, PL, PT, SI, SK and UK maintain general scrutiny reservations. IT maintains a reservation on the legal basis, requesting that the proposal be additionally based on Title X Social Policy of the Treaty (Article 153 TFEU). In addition, DK, FR, MT, SI and UK have entered parliamentary scrutiny reservations.