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

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The Committee on Employment and Social Affairs adopted the report by Danuta JAZLOWIECKA (EPP, PL) on the 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.

The committee recommended that Parliament's position in first reading following the ordinary legislative procedure should amend the Commission proposal as follows:

Objective: Members emphasised that the Directive aims to ensure that the **enforcement of the terms and conditions of employment that apply in the place where the service is to be performed** in accordance with Article 3 of Directive 96/71/EC and to support the functioning of the internal market while facilitating the exercise of the freedom to provide services.

Set of enforcement provisions to prevent abuse and circumvention: the report stated that for the purpose of enforcing Directive 96/71/EC, the competent authorities must make an overall assessment of **all factual elements** that are deemed to be necessary, including, including:

- the place where the undertaking has its registered office and administration, uses office space, **pays taxes and social security contributions** and where it has a professional licence or is registered with professional bodies;

- the place where the undertaking performs its business activity the assessment of which, in a wider time-frame, is **not limited to purely internal management** and/or administrative activities, where it employs administrative staff and in which sector the posted worker is employed;

- the **number of contracts performed and/or the size of the turnover** realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs, as well as the differences in the purchasing power of currencies in different Member States;

- possession of a **valid A1 form**, issued in respect of the posted worker.

Those elements were intended to assist competent authorities when carrying out checks and controls and where they have reason to believe that a worker may not qualify as a posted worker under Directive 96/71 /EC. These elements were **indicative factors in the overall assessment to be made and should not be considered in isolation**, but should be adapted to each specific case. Whilst failure to satisfy one or more of these elements should not automatically preclude a situation from being a posting, it might be used by competent authorities to assist them when assessing whether the posting is genuine.

Member States **may apply additional elements** to be verified by the competent authority provided that they are justified, proportionate and non-discriminatory, and they must inform the Commission of such elements.

If the competent authority concluded, on the basis of the factual elements mentioned above, that there was no genuine posting situation, the terms and conditions of employment applicable to the worker would be those established by the law determined in accordance with the rules of Regulation (EC) No 593/2008 on the law applicable to contractual obligations **(Rome I Regulation).**

Three years after entry into force of the directive, the **necessity and appropriateness** of the elements referred to above must be reviewed in the light of defining possible new elements to be taken into account in order to **determine whether the undertaking is genuine** and a posted worker temporarily carries out his or her work.

The text stressed that **posted workers must not falsely be declared as self- employed**. The following elements must be taken into account when verifying self-employed status:

- fulfilment of business requirements in the Member State of establishment such as registration as self- employed, maintenance of an office, payment of taxes, possession of a VAT number, registration with chambers of commerce;

- remuneration, the existence of a relationship of subordination between a self-employed person and an undertaking and the existence of financial responsibility for the undertaking's results;

- self- employment activities before moving to the host Member State.

Member States that discover that workers are being recruited to work, falsely, as self-employed persons shall **inform the competent authorities** in the host Member State without delay.

National control measures: the report gives Member States the **power to impose any administrative requirements and control measures that they deem to benecessary** for the effective enforcement of Directive 96/71/EC and this Directive (the Commission proposal listed a restricted set of measures), including in particular:

- an obligation to designate a contact person in the host Member State, acting as the mandated representative of the posting company, who can be contacted by the competent authorities of the host Member State, who is authorised to receive any official notices and documents and who is also authorised to negotiate and conclude binding agreements;

- measures aiming at combating undeclared labour;

- an obligation throughout the period of posting to keep, in an accessible and clearly identified place such as the workplace or the building site, copies in paper or electronic form of documents including proof of identity, the employment contract, payslips, time-sheets and social security documentation.

Joint and several liability in subcontracting chain: whilst the Commission proposal had limited joint and several liability to construction activities, the committee felt that abuse of subcontracting chains was not unique to the construction sector and that **joint and several liability should be extended to all sectors.** Requirements for **due diligence were deleted**.

Furthermore, the Commission proposal referred to the liability only of the direct subcontractor but the report **ensured responsibility from the entire chain of subcontractors**.

The text simply stated that Member States must take measures on a non–discriminatory basis, to ensure that a company that instructs another company directly or indirectly to provide services on its behalf could be held liable in addition to or in place of any subcontractor for due entitlements to employees and/or due social security contributions to common funds or institutions of social partners. Liability would be limited to workers' rights acquired during the contractual relationship between the contractor and his subcontractors.

Member States may provide for more stringent liability rules.

Improved access to information: the committee proposed the creation of a **single national website** for each Member State with all the necessary information on binding terms and conditions of employment.

In addition, Member States must **establish contact points** or indicate other bodies or authorities to which workers and undertakings could turn for information, advice and support concerning their rights and obligations. This applied both to the host Member States and Member States of establishment. Member States must indicate a **contact person at the liaison office** in charge of dealing with requests for information and take measures to make necessary information available for the posting companies and posted workers, and keep the information in the country fiches up to date.

In addition, information must be made available **free of charge in English and the national language of the Member State of origin of the worker** and service provider or upon request in other official languages of the Union, and not only in the national language(s) of the country in which the services are provided. It must describe the procedures for lodging complaints and judicial proceedings as well as sanctions applicable in case of non-compliance.

Administrative cooperation: the report strengthened the provisions on mutual assistance. It specified that in the event of any persisting problems between Member States in the exchange of information or a permanent refusal to supply information, the Commission shall be informed and, where it considered it to be justified, it shall **initiate an infringement proceeding**. Cases of long-term refusal to provide requested information shall be recorded by the Commission, with a view inter alia to creating a publicly accessible list of authorities reported to have permanently refused to provide information.

It also clarified the role of Member States, and stated that the inspection of the terms and conditions of employment that were to be complied with according to Directive 96/71/EC was the **responsibility of the authorities of the host Member State** in cooperation with the Member State of establishment. The host Member State shall therefore control, monitor and take all the necessary supervisory or enforcement measures with respect to workers posted to its territory. Checks and controls shall be carried out by the authorities of the host Member State on their own initiative or at the request of the competent authorities of the Member State of establishment.

Within three years after entry into force of the directive, the Commission should **review the application of provisions on cooperation**, in particular in the light of the experiences with and effectiveness of the system of cross-border enforcement of administrative penalties and/or fines with a view to proposing, where appropriate, any necessary amendments or modifications.

The administrative cooperation and mutual assistance between the competent authorities of Member States should be implemented **as far as possible through the Internal Market Information System (IMI),** and other established means of cooperation such as bilateral agreements.

Data protection: Member States should remain ultimately responsible for safeguarding data and the legal rights of affected persons and put in place appropriate protection mechanisms in this respect.

The competent authorities in the host Member State and in the Member State of establishment should be encouraged to collect data specific to the posting process and evaluate it, while respecting Union and national law on data protection. Member States were equally encouraged to forward the collected data to the Commission for summaries.

Lastly, the report stated that all measures introduced by this Directive should be justified, proportionate and non-discriminatory, so as not to create administrative burdens or to limit the potential that companies, in particular small and medium enterprises, had to create new jobs, while protecting posted workers.