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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL amending Directive 96/71/EC of The European Parliament
and of the Council of 16 December 1996 concerning the posting of workers
in the framework of the provision of services

With a view to the Social Questions Working Party on 27 March, delegations will find attached a Presidency compromise proposal.

The changes in relation to the Commission proposal are marked by **bold**; deletions are marked by [...]. The changes in relation to the previous Presidency compromise proposal (doc. 6002/17) are marked by **bold underline**, deletion are marked by [...].

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p. .

Whereas:

- (1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation of those principles is further developed by the Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.
- (2) The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there.
- (3) According to Article 3 TEU, the Union shall promote social justice and protection. Article 9 TFEU gives the Union the task to promote a high level of employment, to guarantee an adequate social protection and to combat social exclusion.
- (4) Almost twenty years after its adoption, it is necessary to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.
- (5) The principle of equal treatment and the prohibition of any discrimination based on nationality are enshrined in EU law since the founding Treaties. The principle of equal pay has been implemented through secondary law not only between women and men, but also between employees with fix term contracts and comparable permanent workers, between part-time and full-time workers or between temporary agency workers and comparable workers of the user undertaking.

- (6) [The Rome I Regulation generally permits employers and employees to choose the law applicable to the employment contract. However, the employee must not be deprived of the protection of the mandatory rules of the law of the country in which or, failing that, from which the employee habitually carries out his work. In the absence of choice, the contract is governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.]
- (7) [The Rome I Regulation provides that the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.]
- (7a) The protection of posted workers is more effective if the hard core of protective rules is extended to cover the conditions of accommodation for workers in the host Member State as such workers are, for a limited period, required to work in the territory of a Member State other than the State in which they normally work. Verifications of such conditions should be made by the competent national authorities in accordance with national law and / or practices.**
- (8) **Posting is of a temporary nature and the posted worker often returns to the country of origin after the completion of the work for which he or she has been posted. However,** in view of the long duration of certain posting assignments, **and acknowledging the link between the labour market of the host Member State and workers posted for such long periods, it is necessary to provide that, in case of posting lasting for periods longer than 24 months, host Member States should ensure that undertakings posting workers to their territory guarantee an additional set of terms and conditions that are mandatorily applicable to workers in the Member State where the work is carried out.**

- (9) **Ensuring greater protection of workers is necessary to safeguard the freedom to provide services on a fair basis in both short and long term, notably by avoiding abuse of the rights guaranteed by the Treaties. Such rules cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services in circumstances also where the posting exceeds 24 months. Any provision applicable to workers posted in the context of a posting exceeding 24 months must thus be compatible with that freedom.** It is settled case law that restrictions to the freedom to provide services are only admissible if justified by overriding reasons in the public interest and must be proportionate and necessary.
- (9a) **The additional set of terms and conditions should also cover workers posted replacing other workers to ensure that such replacements are not used to circumvent the otherwise applicable rules. However, it would be disproportionate to apply the extended hard core of protective rights, affecting more aspects of a worker's employment conditions, to workers effectively posted for a period of 6 months or less.**
- (9b) **[The effective duration of posting should be counted continuously except for the periods of absence, which suspend the employment relationship in accordance with the law of the Member State to which the worker is posted.]**
- (9c) **As it is the case with Directive 96/71/EC, this Directive should not prejudice the application of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council.**
- (10) Because of the highly mobile nature of work in international road transport, the implementation of the posting of workers directive raises particular legal questions and difficulties (especially where the link with the concerned Member State is insufficient). It would be most suited for these challenges to be addressed through sector-specific legislation together with other EU initiatives aimed at improving the functioning of the internal road transport market.

(11) In a competitive internal market, service providers compete not only on the basis of labour costs but also on factors such as productivity and efficiency, or the quality and innovation of their goods and services.

(11a) This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and at Union level, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and/or practice. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and /or practice.

(12) It is within Member States' competence to set rules on remuneration in accordance with their law and /or practice. [...]

(12a) The concept of 'remuneration' should include, but should not be limited to, all the elements of minimum rates of pay developed by the Court of Justice of the European Union.

(12b) The remuneration that must be granted to posted workers during the period of posting is set in accordance with Article 3(1) of Directive 96/71/EC as amended by this Directive. When comparing the remuneration paid to the posted worker and the remuneration due in accordance with that Article, the gross amounts of remuneration must be taken into account. As provided for in Article 3(7) of Directive 96/71/EC, allowances specific to the posting shall be considered to be part of the minimum wage and thus of remuneration. Such allowances must therefore be taken into account for the comparison, unless they cover expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

- (13) The elements of remuneration **and other terms and conditions of employment** under national law or universally applicable collective agreements should be clear and transparent to all service providers **and posted workers**. **In addition to the requirements under Article 5 of the Enforcement Directive**, it is therefore justified to impose on Member States the obligation to publish the constituent elements of remuneration, **the additional set of terms and conditions applicable to long term posting, and methods for calculation of periods of absence of relevance to such postings**, on the single website provided for by **that Article**.
- (14) [Laws, regulations, administrative provisions or collective agreements applicable in Member States may ensure that subcontracting does not confer on undertakings the possibility to avoid rules guaranteeing certain terms and conditions of employment covering remuneration. Where such rules on remuneration exist at national level, the Member State may apply them in a non-discriminatory manner to undertakings posting workers to its territory provided that they do not disproportionately restrict the cross-border provision of services.]
- (15) Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work gives expression to the principle that the basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job. This principle should also apply to temporary agency workers posted to another Member State.
- (16) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents², Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

² OJ C 369, 17.12.2011, p. 14.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 96/71/EC

Directive 96/71/EC is hereby amended as follows:

(1) [...]

(2) Article 3 is amended as follows:

(a) Paragraph 1 is replaced by the following:

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
 - by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:
 - (a) maximum work periods and minimum rest periods;
 - (b) minimum paid annual holidays
 - (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
 - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
 - (e) health, safety and hygiene at work;

- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination;
- (ga) **conditions of [...] accomodation for workers.**

For the purpose of this Directive, **the concept of remuneration shall be determined by national law and/or practice of the Member State to whose territory the worker is posted and mean** all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in **that** Member State [...].

Without prejudice to Article 5 of Directive 2014/67/EU, Member States shall publish in the single official national website [...], **referred to in that Article, information on:**

- (a) **the constituent elements of remuneration in accordance with Article 3(1)(c);**
- (b) **all the terms and conditions of employment in accordance with Article 3(1)(-a);**
- (c) **the method on how to count the periods of absence, which suspend the employment relationship in accordance with the law of the Member State to which the worker is posted.**

(aa) The following paragraph is added³:

1(-a) When the anticipated or the effective duration of posting exceeds 24 months, Member States shall ensure, whatever the law applicable to the employment relationship, that the undertakings referred to in Article 1(1) guarantee workers posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which, in the Member State where the work is carried out are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8.

Subparagraph 1 of this paragraph shall not apply to the following matters:

- (a) supplementary occupational retirement pension schemes; and
- (b) the procedures, formalities and conditions of the conclusion and termination of the employment contract.

The anticipated duration of posting shall be determined, in particular, on the basis of a simple declaration, where applicable, to the responsible national competent authorities, as provided for by Article 9 (1)(a)(iv) of Directive 2014/67/EU, information given by the employer to the posted worker in accordance with Article 4 of Council Directive 91/533/EEC and, where applicable, of any information given to the competent authorities in accordance with Article 15(1) of Regulation 987/2009. In case of divergence, the anticipated duration shall be the longest period above.

³ Clarification: following paragraph 1, and preceding paragraph 1a (new) of Article 3.

Where a posted worker is replaced by another posted worker performing the same task at the same place by the undertaking referred to in Article 1(1), the duration of the posting shall, for the purposes of this paragraph, be the cumulative duration of the posting periods of the individual workers concerned. This paragraph shall not apply to workers that are posted for an effective duration of 6 months or less.

For the purposes of this Article, the concept “the same task at the same place” shall be determined, taking into consideration inter alia the nature of the service to be provided, work to be performed and the address(es) of the workplace.

(b) The following paragraph is added:

[1a. If undertakings established in the territory of a Member State are obliged by law, regulation, administrative provision or collective agreement, to sub-contract in the context of their contractual obligations only to undertakings that guarantee certain terms and conditions of employment covering remuneration, **including those set by any collective agreements binding on the contracting undertaking, the Member State may, on a non-discriminatory and proportionate basis, provide that such undertakings shall be under the same obligation regarding subcontracts with undertakings referred to in Article 1 (1) posting workers to its territory **provided that such a measure is justified and proportionate and applied in a non-discriminatory manner.**]**

[Without prejudice to Article 5 of Directive 2014/67/EU, Member States making use of the option provided for in this paragraph shall ensure that an undertaking concluding subcontracts with an undertaking referred to in Article 1(1) informs that undertaking in writing about the terms and conditions of employment covering remuneration which have to be guaranteed before the parties enter into the relevant contractual relationship.]

- (c) The following paragraph is added

1b. Member States shall provide that the undertakings referred to in Article 1(3)(c) guarantee posted workers the terms and conditions which apply pursuant to **Article 5 of Directive 2008/104/EC** of the European Parliament and of the Council of 19 November 2008 on temporary agency work to temporary workers hired-out by temporary agencies established in the Member State where the work is carried out.

Member States shall ensure that the user undertaking informs the undertakings referred to in Article 1(3)(c) on the terms and conditions that it applies regarding the working conditions on remuneration.

- (d) Paragraph 9 is **amended as follows**:

Without prejudice to Article 3(1b), Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions, **other than those referred to in paragraph 3(1b)**, which apply to temporary workers in the Member State where the work is carried out.

- (e) The second **indent** of paragraph 10 is deleted.

- (3) The first paragraph of the Annex is amended as follows:

The activities mentioned in Article 3 include all building work related to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two years after **entry into force**] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

Derogating from the first sub-paragraph of this paragraph, Member States shall apply the measures transposing Article 3(1)(c) of Directive 96/71/EC as amended by this Directive from [4 years after the entry into force]. Until that date, Article 3(1)(c) of Directive 96/71/EC shall remain applicable in its wording prior to the amendments introduced by this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.
3. **The Commission shall review the application and implementation of this Directive. By [5 years after the entry into force], the Commission shall submit a report on the application and implementation of this Directive to the European Parliament, the Council and the European Economic and Social Committee.**

Article 3

This Directive shall enter into force on the [twentieth] day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President