



24.1.2017

DRAFT OPINION

of the Committee on the Internal Market and Consumer Protection

for the Committee on Employment and Social Affairs

on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
(COM(2016)0128 – C8-0114/2016 – 2016/0070(COD))

Rapporteur: Christel Schaldemose

SHORT JUSTIFICATION

I. Introduction

On 8 March 2016, the Commission put forward the long awaited proposal amending Directive 96/71/EC on posting of workers in the framework of the provision of services. The suggested targeted revision aims to address issues, which could not be sufficiently solved by the original directive or have emerged due to ECJ-case law, such as unfair practices and promotion of the principle that the same work at the same place is remunerated in the same manner. The aim is to facilitate the posting of workers within a climate of fair competition and respect for the rights of workers.

The 1996 Directive sets out the EU regulatory framework to establish a balance between the objective of facilitating cross-border service provision on the one hand and providing protection of posted workers as well as ensuring a level-playing field between foreign and local competitors on the other.

The targeted revision put forward by the Commission introduces changes in three main areas: (1) remuneration of posted workers, including in situations of subcontracting; (2) rules on temporary agency workers; and (3) long-term posting. This revision would complement the 2014 Enforcement Directive, which set out to fight fraud and abuse and to improve administrative cooperation between national authorities in charge of posting.

II. Position of the Rapporteur

The Rapporteur shares the overall objective of the Commission's proposal, and welcomes the Commission's acknowledgement of the need to address certain fundamental problems with the current legal framework through a revision of the Posting of Workers Directive rather than through enforcement measures alone.

The Commission proposal is a welcome step in the right direction. In the Rapporteur's view, it provides a balanced and proportionate approach and does not unduly infringe the principle of freedom to provide services in the internal market. In this context, the Rapporteur considers it necessary to extend the **legal basis** to not only Articles 53(1) and 62 but also to Articles 151 and 153. This would reflect more appropriately the purpose of the instrument in balancing the objectives of free movement of services and the protection of workers. She has not tabled amendments to that effect, as it would be more appropriate to address this in the lead committee.

The Rapporteur proposes a series of amendments to overcome certain shortcomings with the Commission's proposal. This include in particular:

1. Duration of posting

The Rapporteur supports the Commission approach of setting a fixed time limit after which the labour law conditions of the host Member States would have to be applied. However, the Rapporteur considers the **proposed 24 months as being too long** and as risking undesired effects, such as a decrease of the overall wage level in certain sectors.

To address this, the Rapporteur proposes to **shorten the period to 6 months**, to be aggregated from the first day in order to avoid potential abuse. This would reflect more adequately the average length of posting, currently 4 months. It would also align the Directive with the existing practice as regards applicable income tax rules.

The Rapporteur considers that further work is required to clarify Recital 8 and its legal consequences in the legislative text.

2. Remuneration

The Rapporteur cannot accept the Commission's proposal to put forward an EU-level definition of "remuneration" as this risks not taking into account the broad diversity in Member State approaches. Already under the current legislative framework, Member States are obliged to provide detailed information on what "remuneration" means and consists of in their respective laws and practices. This information has to be available on a dedicated website. The introduction of a new, EU-level definition would lead to legal uncertainties for workers and companies alike and probably induce a series of court cases. Further, this issue raises questions of subsidiarity, a concern that has also been expressed by several Member States.

Thus, the Directive should instead clarify that the host Member State is exclusively competent to determine the constituent elements of remuneration, based on his national law and practice.

AMENDMENTS

The Committee on the Internal Market and Consumer Protection calls on the Committee on Employment and Social Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 8

Text proposed by the Commission

(8) In view of the long duration of certain posting assignments, it is necessary to provide that, in case of posting lasting for periods higher than **24** months, the host Member State is deemed to be the country in which the work is carried out. In accordance with the principle of Rome I Regulation, the law of the host Member States therefore applies to the employment contract of such posted workers if no other choice of law was made by the parties. In case a different choice was made, it cannot, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the host Member State. This should apply from the start of the posting assignment whenever it is envisaged for more than **24** months and from the first day subsequent to the **24** months when it effectively exceeds this duration. This rule does not 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. The purpose is merely to create legal certainty in the application of the Rome I Regulation to a specific situation, without amending that Regulation in any way. The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation.

Amendment

(8) In view of the long duration of certain posting assignments, it is necessary to provide that, in case of posting lasting for periods higher than *six* months, the host Member State is deemed to be the country in which the work is carried out. In accordance with the principle of Rome I Regulation, the law of the host Member States therefore applies to the employment contract of such posted workers if no other choice of law was made by the parties. In case a different choice was made, it cannot, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the host Member State. This should apply from the start of the posting assignment whenever it is envisaged for more than *six* months and from the first day subsequent to the *six* months when it effectively exceeds this duration. This rule does not 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 *six* months. The purpose is merely to create legal certainty in the application of the Rome I Regulation to a specific situation, without amending that Regulation in any way. The employee will in particular enjoy the protection and benefits pursuant to the Rome I Regulation.

Or. en

Amendment 2

Proposal for a directive Recital 10

Text proposed by the Commission

(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.

Amendment

deleted

Or. en

Amendment 3

Proposal for a directive Recital 12

Text proposed by the Commission

(12) It is within Member States' competence to set rules on remuneration in accordance with their law and practice. ***However, national rules on remuneration applied to posted workers must be justified by the need to protect posted workers and must not disproportionately restrict the cross-border provision of services.***

Amendment

(12) It is within Member States' ***exclusive*** competence to set rules on remuneration in accordance with their law and practice.

Or. en

Amendment 4

Proposal for a directive

Article 1 – point -1 (new)

Directive 96/71/EC

Article 1 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

(-1) In Article 1, the following paragraph is added:

“4a. This Directive shall be without prejudice to the Member States’ ability to apply or introduce laws, regulations and administrative provisions which are more favourable to workers or allow or promote the use of collective agreements provisions that are more favourable to workers.”

Or. en

Amendment 5

Proposal for a directive

Article 1 – point 1

Directive 96/71/EC

Article 2a – title

Text proposed by the Commission

Amendment

Posting exceeding **twenty-four** months

Posting exceeding **six** months

Or. en

Amendment 6

Proposal for a directive

Article 1 – point 1

Directive 96/71/EC

Article 2a – paragraph 2

Text proposed by the Commission

Amendment

2. For the purpose of paragraph 1, in case of replacement of posted workers performing the same task at the same

2. For the purpose of paragraph 1, in case of replacement of posted workers performing the same task at the same

place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, ***with regard to workers that are posted for an effective duration of at least six months.***

place, the cumulative duration of the posting periods of the workers concerned shall be taken into account.

Or. en

Amendment 7

Proposal for a directive

Article 1 – point 2 – point a

Directive 96/71/EC

Article 3 – paragraph 1 – subparagraph 2

Text proposed by the Commission

For the purpose of this Directive, remuneration ***means 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*** the Member State to whose territory the worker is posted.

Amendment

For the purpose of this Directive, remuneration ***shall be defined by the national law and/or practice of*** the Member State to whose territory the worker is posted.

Or. en

Amendment 8

Proposal for a directive

Article 1 – point 2 – point d

Directive 96/71/EC

Article 3 – paragraph 9

Text proposed by the Commission

(d) ***Paragraph 9 is deleted.***

Amendment

deleted

