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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE NATIONAL PARLIAMENTS

on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2

1. INTRODUCTION

In its Political Guidelines[1], the Commission undertook to promote a deeper and fairer Internal Market. The Union has established and ensures the functioning of an Internal Market which is based on a highly competitive social market economy, aiming at full employment and social progress.

Within this context and consistent with the Commission Work Programme 2016, the Commission adopted on 8 March 2016 a proposal[2] for a targeted revision of Directive 96/71/EC on Posting of Workers.[3] The reasons for action and for the policy choices made in the proposal are developed in the explanatory memorandum, the recitals of the proposed Directive and the Impact Assessment Report[4] accompanying the proposal.

In essence, the objective of the proposal is to ensure that the implementation of the freedom to provide services in the Union takes place under conditions that guarantee a level playing field for businesses and respect for the rights of workers. 20 years after its adoption, the Commission found that Directive 96/71/EC no longer ensures such conditions against the background of the current economic and social conditions in the Member States. Therefore, it tabled a proposal for legislative action. The Commission proposal aims to remedy the specific problems identified by a limited number of targeted amendments to Directive 96/71/EC.

Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality allows national Parliaments to issue reasoned opinions when they consider that a legislative proposal does not comply with the principle of subsidiarity.[5] Where reasoned opinions issued by national Parliaments represent at least one third of all the votes allocated to them,[6] the proposal must be reviewed by the Commission. On the basis of that review, the Commission may decide to maintain, amend or withdraw the proposal, and it must give reasons for its decision.

Within the deadline laid down in Article 6 of Protocol No 2, fourteen chambers of national Parliaments sent reasoned opinions to the Commission stating that the Commission proposal presented on 8 March 2016 does not comply with the principle of subsidiarity, thus triggering the procedure provided for in Article 7(2) of the aforementioned Protocol. The purpose of this Communication is to respond to these concerns as far as they relate to the principle of subsidiarity.

In this connection, the Commission would like to recall that strengthening ties and forging a new partnership with national Parliaments as a way of bringing the Union

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1 http://ec.europa.eu/priorities/docs/pg_en.pdf

2 Document COM(2016) 128 final, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0128&qid=1459769597959&from=EN.

3 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, OJ L 18, 21.01.97, p. 1.

4 Document SWD(2016) 52 final.

5 National Parliaments have eight weeks within which to issue a reasoned opinion on a draft legislative act from the date of its transmission in the official languages of the Union.

6 Each national Parliament has two votes. In the case of a bicameral parliamentary system, each chamber has one vote.

closer to its citizens is one of its priorities.[7] The Commission attaches great importance to deepening country-specific knowledge within the institution and building mutual understanding and effective channels of communication between the national and the European level.[8]

2. PROCEDURE

The procedure of Article 7(2) of Protocol No 2 is exclusively focused on the principle of subsidiarity as defined in Article 5(3) of the Treaty on the European Union (TEU).[9] Thus, in reasoned opinions within the meaning of Article 6 of Protocol No 2, national Parliaments need to state why they consider that a draft legislative act does not comply with that principle.

Within the time limit laid down in Article 6 of Protocol No 2, fourteen chambers of eleven Member States issued reasoned opinions, thus triggering the procedure laid down in Article 7(2) of Protocol No 2. The chambers are the following (number of votes in brackets): Romanian Chamber of Deputies (1), Romanian Senate (1), Czech Chamber of Deputies (1), Czech Senate (1), Polish Sejm (1), Polish Senate (1), Seimas of the Republic of Lithuania (2), Danish Parliament (2), Croatian Parliament (2), Latvian Saeima (2) Bulgarian National Assembly (2), Hungarian National Assembly (2), Estonian Parliament (2) and the National Council of the Slovak Republic (2). These reasoned opinions represent 22 votes.[10]

In addition, six national Parliaments (the Spanish Cortes Generales, the Italian Camera dei Deputati, the Portuguese Assembleia da República, the House of Commons of the United Kingdom, the French Sénat and the Italian Senato della Repubblica) sent opinions in the framework of the political dialogue mainly considering the proposal as compatible with the principle of subsidiarity.

The Commission publicly confirmed the triggering of the procedure laid down in Article 7(2) of Protocol No 2 on 11 May 2016, the day following the expiry of the time limit laid down in Article 6 of Protocol No 2.

In line with its commitment to ensure that national Parliaments have a strong voice in European decision-making, the Commission carefully analysed the reasoned opinions.

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[7] Political Guidelines of the Commission, point 10 "A Union of Democratic Change", last paragraph: *"The relationship with national Parliaments is of great importance to me, notably when it comes to enforcing the principle of subsidiarity. I will explore ways to improve the interaction with national Parliaments as a way of bringing the European Union closer to citizens."*

[8] In the Mission Letters to all the Members of the Commission, the President of the Commission indicated that *"I want all Commissioners to commit to a new partnership with national Parliaments: they deserve particular attention and I want (…) important proposals or initiatives to be presented and explained in national Parliaments by Members of the Commission. This should also allow us to deepen country-specific knowledge within our institution and to build mutual understanding and effective channels of communication between the national and the European level."*

[9] Article 5(3) TEU: *"Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".*

[10] The threshold required to trigger the procedure laid down in Article 7(2) of Protocol No 2 is 19 votes.

Before drawing its conclusions, it engaged directly with national Parliaments on the issues raised, in particular at the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) meetings of 13 June 2016, where a preliminary exchange focused on procedural aspects took place, and of 11 July 2016, where a substantive discussion took place in the context of a broader debate on the social dimension of the EU.

3. COMMISSION PROPOSAL FOR A DIRECTIVE AMENDING THE POSTING OF WORKERS DIRECTIVE

The Commission proposal of 8 March 2016 for a Directive amending the 1996 Directive on Posting of Workers is based on an Internal Market legal basis, namely Articles 53(1) and 62 of the Treaty on the Functioning of the European Union (TFEU). Posting, by definition, is of a cross-border nature. Any posting activity has effects in at least two Member States. The rules on posting necessarily create rights and obligations between persons in different Member States – that is to say between an employer in the Member State of origin and a worker who temporarily resides in another Member State. Under specific circumstances, the service recipient in the latter Member State may moreover be held jointly liable.

The posting of workers plays therefore an essential role in the Internal Market, particularly in the cross-border provision of services. The Commission is committed to strengthening the Internal Market, which means *inter alia* that the freedom to provide services in general and the freedom to provide services of undertakings posting workers in particular must be facilitated. This is only possible if the legislative framework within which posting takes place provides rules which are clear, fair and enforceable.

The Commission proposal introduces three main changes to the 1996 Directive:

- First, the proposal sets out that all mandatory rules on remuneration in the host Member State apply to workers posted to that Member State. Rules set by law or universally applicable collective agreements become mandatory for posted workers in all economic sectors. Where Member States in accordance with their national rules and practices require undertakings to subcontract only with undertakings that grant workers the same conditions on remuneration as those applicable to the contractor, the proposal allows Member States to apply such rules equally to undertakings posting workers to their territory.

- Secondly, the proposal provides that the conditions to be applied to cross-border agencies hiring out workers must be those that are, pursuant to Article 5 of Directive 2008/104/EC, applied to national agencies hiring out workers.

- Thirdly, the proposal provides that, whenever the anticipated duration of posting will be superior to 24 months or the effective duration of posting exceeds 24 months, the host Member State is deemed to be the country in which the work is habitually carried out. In application of the rules of the Rome I Regulation[11], the labour law of the host Member State will therefore apply to the employment contract of such posted workers if no other choice of law was made by the parties.

[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

The proposal does not address any issue touched upon by the 2014 Enforcement Directive aimed at strengthening instruments to fight and sanction circumventions and fraud related to posting of workers. Instead, it focuses on issues which pertain to the Union regulatory framework set by the original 1996 Directive. Therefore, the proposal for a targeted revision of the 1996 Directive and the Enforcement Directive are complementary to each other and mutually reinforcing.

4. SUBSIDIARITY REVIEW

4.1. The principle of subsidiarity and Protocol No 2

In accordance with the case law of the Court of Justice of the European Union,[12] the judicial review of compliance with the principle of subsidiarity requires a determination of whether the Union legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level. The Court thus recognises a certain margin of discretion to the Union institutions in assessing compliance with the principle of subsidiarity. The same legal determination is required when reviewing Commission legislative proposals under Protocol No 2.

Within the meaning of Article 6 of Protocol No 2, national Parliaments need to state in their reasoned opinions why they consider that a draft legislative act does not comply with the principle of subsidiarity. The present review is therefore limited to determining whether the objective of the proposed amending Directive can be better achieved at Union level.

Considering that all arguments raised by national Parliaments will play a role in the context of the legislative process, the Commission intends to address them in detail and separately by way of letters to the Parliaments concerned, under the "political dialogue".

4.2. Subsidiarity concerns raised by the national Parliaments

The subsidiarity arguments raised in the reasoned opinions of national Parliaments are the following:

- the existing rules are sufficient and adequate (point 4.2.1.)
- the Union is not the adequate level of the action (point 4.2.2.)
- the proposal fails to recognise explicitly Member States' competences on remuneration and conditions of employment (point 4.2.3.)
- the justification contained in the proposal with regard to the subsidiarity principle is too succinct (point 4.2.4.).

4.2.1. Existing rules are sufficient and adequate

Several national Parliaments argue that the rules currently in place are adequate at least whenever the current Directive gives Member States the possibility to go beyond the general rules (extension of collective agreements beyond the construction sector, temporary agency workers). The Estonian Parliament makes a similar argument as far as the working conditions of posted workers are concerned.

[12] Case C-547/14, *Philip Morris*, EU:C:2016:325, paragraph 218.

The objective of the proposal is to provide a more level playing field between national and cross-border service providers and to ensure that workers carrying out work at the same location are protected by the same mandatory rules, irrespective of whether they are local worker or posted workers, in all sectors of the economy. Member States having the option, but not the obligation, to apply such rules in sectors other than the construction sector does not fully achieve this objective. Indeed, Member States can under such circumstances choose not to do so, hence failing to provide a level playing field and an adequate protection of posted workers in such other sectors. The obligation for all Member States to apply the rules in all sectors of the economy cannot be established at national level but must be laid down at Union level. Therefore the Commission considers that the objective of the proposal on this point can be better achieved at Union level.

The same holds true for the obligation on Member States to apply the same conditions to cross-border temporary agency workers and national temporary agency workers.

The National Assembly of the Republic of Bulgaria, the Czech Senate, the Estonian Parliament, the Hungarian National Assembly, the Seimas of the Republic of Lithuania, the Latvian Saeima, the Romanian Chamber of Deputies and the National Council of the Slovak Republic argue that the alignment of wages across Member States should come as a consequence of further economic development and not from the Union's legislative action. In this regard, it should be noted that the proposal does not have the objective of aligning wages across Member States. The proposal merely ensures that mandatory rules on remuneration in the host Member State are applicable also to workers posted to that Member State. Moreover, the fact that economic development may bring more convergence in the wages over time does not exclude the need to ensure - also in the interim - a level playing field for companies and an appropriate protection for posted workers.

4.2.2. Adequate level of action

All reasoned opinions, with the exception of that of the Danish Parliament, argue that the objective of the action could be better achieved at Member State level or that the Commission has not sufficiently proved that the action should be achieved at Union level.

Some of the national Parliaments submitting reasoned opinions argue that this is particularly the case with some of the proposed rules: the extension of applicability of generally binding collective agreements outside the construction sector (Bulgarian National Assembly, Czech Chamber of Deputies and Senate) and the rules on subcontracting chains and on temporary agency workers (Polish Sejm and Senate). The Hungarian National Assembly considers that, by introducing the concept of "remuneration" instead of the current concept of "minimum rates of pay", the proposal does not provide any added value, because of the alleged lack of clarity of the notion of remuneration.

As recalled in section 3, the objectives of the proposal are to facilitate the correct functioning of the Internal Market, in particular to facilitate the freedom to provide services, while ensuring a better level-playing field between national and cross-border service providers, an adequate protection of posted workers and clarity and predictability in the legal framework applicable to posted workers. The Commission considers that these objectives are interdependent and can be better achieved at Union level. If the Member States acted unilaterally, at State level, on the targeted changes proposed by the

draft legislative act, their action could lead to a fragmentation of the Internal Market as regards the freedom to provide services.

Already by adopting the 1996 Directive and, once again, in 2014, by adopting the Enforcement Directive, the Union legislature decided that facilitating the freedom to provide services, while ensuring a better level-playing field between national and cross-border service providers and an adequate protection of posted workers, was better achieved at Union level. It established a regulatory framework for the posting of workers at Union level, taking into account the inherent cross-border nature of the posting of workers and taking into account that, if the Member States acted unilaterally, at State level, their action could lead to a fragmentation of the Internal Market as regards the freedom to provide services.

By making its proposal, the Commission facilitates the exercise of the rights enshrined in Article 57 TFEU, according to which any person providing a service may, in order to do so, temporarily pursue his or her activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Individual action by the Member States could not achieve another important objective of the measures: bringing legal consistency throughout the Internal Market and clarity to the legal framework applicable to posted workers since the protection afforded to them would vary depending on the host Member State's approach. Indeed, the fact that the legal framework at Union level is not sufficiently harmonised contributes to a lack of knowledge of the rights both by workers, user undertakings and temporary agencies.

For the aforementioned reasons, the Commission takes the view that the objectives of its proposal can best be achieved at Union level.

4.2.3. Lack of express recognition of Member States' competences

For the Danish Parliament, the subsidiarity concern is due to the fact that the proposal, contrary to Directive 96/71/EC, would not make explicit reference to the competence of Member States as far as the definitions of pay and terms and conditions of employment are concerned.

However, the Commission proposal fully and unequivocally respects the competence of the Member States to set the remuneration and other terms and conditions of employment, in accordance with their national law and practice and it states this explicitly. Recital No 12 confirms that "*it is within Member States' competence to set rules on remuneration in accordance with their law and practice*". In addition, the text proposed to amend Article 3(1), in its first paragraph, makes clear that the terms and conditions of employment to be applied to posted workers are those which are, in the Member State where the work is carried out, laid down by law or universally applicable collective agreements. The proposed change defines remuneration as referring to "*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*".

The proposal hence does not regulate remuneration, nor does it define remuneration or the constituent elements of remuneration at Union level. It merely provides that

mandatory rules on remuneration, as set by the Member States, should apply in a non-discriminatory manner to local and cross-border service providers and to local and posted workers.

The Danish Parliament also argues that the proposal raises doubts on the competence of the Member States to determine the terms and conditions that apply to temporary agency workers. The Danish Parliament does not contest the possibility for the Union to act in this matter or the fact that the option currently given by the 1996 Directive is made mandatory in the proposal. It is the approach consisting in making an express reference to Article 5 of Directive 2008/104/EC that according to the Danish Parliament could undermine national competence.

To facilitate cross-border service provision by temporary work agencies, whilst ensuring a level playing field and adequate protection of agency workers, it is adequate to provide that cross-border temporary agency workers are given the same rights as those provided for by Directive 2008/104/EC for national temporary agency workers. That principle leaves intact the competence of each Member State to determine those rights.

4.2.4. Lack of justification

Several national Parliaments argue that the Commission has failed to comply with the requirement of Article 5 of Protocol No 2 to the Treaty,[13] which provides that drafts legislative acts shall be justified with regards to the principles of subsidiarity and proportionality, considering that the justification in the explanatory memorandum of the proposal is too succinct.

This point has been made by the Bulgarian National Assembly, the Czech Chamber of Deputies, the Czech Senate, the Croatian Parliament, the Hungarian National Assembly, the Latvian Saeima, the Polish Sejm, the Romanian Senate and the National Council of the Slovak Republic.

According to the case law of the Court of Justice,[14] the obligation under Article 296, second subparagraph, TFEU to give reasons underpinning legal acts requires that the measures concerned should contain a statement of the reasons that led the institution to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Union institutions have applied the Treaty. In the same judgment, the Court accepted an implicit and rather limited reasoning as sufficient to justify compliance with the principle of subsidiarity. In a more recent judgment, the Court has made clear that compliance with the obligation to state reasons as regards respect for the principle of subsidiarity must be evaluated not only by reference to the wording of the contested act, but also by reference to its context and the circumstances of the individual case.[15] The Court examines, in

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[13] Article 5 of Protocol No 2 provides that *"draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation".*

[14] Case C-233/94, *Germany v Parliament and Council*, EU:C:1997:231, paragraph 25.

[15] Case C-547/14, *Philip Morris*, EU:C:2016:325, paragraph 225. See also the judgment in *Estonia v Parliament and Council*, C 508/13, EU:C:2015:403, paragraph 61.

particular, whether the Commission's proposal and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at Union level rather than at Member State level.[16]

In the present case, as regards subsidiarity, the explanatory memorandum stated: "An amendment to an existing Directive can only be achieved by adopting a new Directive." While this statement is succinct, it is completed by the recitals of the draft Directive and by the Impact Assessment Report accompanying it.

The recitals of the draft Directive make clear why action at Union level is required to improve the Union regulatory framework concerning the posting of workers in some regards.

As already stated, recital No 12 clarifies that it remains "within Member States' competence to set rules on remuneration in accordance with their law and practice".

Moreover, the Impact Assessment Report, which accompanies the proposal, gives a more detailed assessment of respect for the principle of the subsidiarity and proportionality of the proposal.[17]

The Commission considers that that information is sufficient to allow both the Union legislature and national Parliaments to determine whether the draft legislative act at issue complies with the principle of subsidiarity.

5. CONCLUSION

In the light of the above, the Commission concludes that its proposal of 8 March 2016 for a targeted revision of Directive 96/71/EC on the posting of workers complies with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal is not required. The Commission therefore maintains it.

The Commission will pursue its political dialogue with all national Parliaments on arguments going beyond compliance with the subsidiarity principle and is ready to

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16 Case C-547/14, *Philip Morris*, EU:C:2016:325, paragraph 226

17 Point 2.6 of that Report reads as follows: "*A regulative framework for posting of workers between Member States can only be established at EU level. The aims are to facilitate the cross-border provision of services through posting of workers by improving the clarity and transparency of applicable labour market rules in the host Member State(s) of posted workers; to ensure a level playing field for competition in the provision of services between posting companies and local companies in the host Member State, while ensuring that posted workers have an adequate level of protection while working in the host Member State. EU action in the form of a Directive is warranted to encourage the freedom to provide services across borders on the basis of Article 56 of the Treaty on the Functioning of the European Union (TFEU). The Directive currently provides for a uniform and EU-wide regulative framework setting a hard core of protective rules of the host Member State which need to be applied to posted workers, irrespective of their substance. Therefore, in full respect of the principle of subsidiarity, the Member States and the social partners at the appropriate level remain responsible for establishing their labour legislation, organising wage-setting systems and determining the level of remuneration and its constituent elements, in accordance with national law and practices. The envisaged initiative does not change this approach. It thus respects the principles of subsidiarity and proportionality and does not interfere with the competence of national authorities and social partners*".

engage in discussions with the European Parliament and the Council on these concerns in order to adopt the proposed directive.