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NOTE

from: The Presidency
to: Permanent Representatives Committee (Part I) / Council (EPSCO)
Subject: 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
- Orientation debate

Delegations will find attached a note from the Presidency in view of the EPSCO Council on 6/7 December outlining the context of the orientation debate and presenting a set of questions with regard to Articles 9 and 12 of the proposal for a Directive.

Enforcement of the Posting of Workers Directive: the way forward

Presidency steering note for the orientation debate

Context

The EU's single market gives companies the freedom to provide services in other Member States, including the possibility to temporarily post workers to other Member States to carry out specific projects. In this context, each year, around one million workers are posted by their employers across EU borders to provide services (0.4% of the EU workforce).

The 1996 rules on the posting of workers, define a core set of employment conditions which the service providers have to comply with during the posting in the host Member State, such as minimum rates of pay, working time and health and safety provisions. However, minimum employment and working conditions are often not respected for the one million or so posted workers in the EU. In practice, the existing rules on posted workers are often incorrectly applied or not enforced in the host Member State, while posting is also being abused by letter-box companies artificially established abroad, just to benefit from more favourable social security obligations or lower levels of labour protection.

The long awaited Commission's proposal for an enforcement directive presented at the end of March 2012, constitutes one of the 12 key initiatives of the Single Market Act, aiming to make the EU single market work better for workers and for businesses. The proposed enforcement directive aims to guarantee the protection of workers' rights while at the same time ensure fair competition. The proposal, amongst others, clarifies the elements of the notion of posting, sets more ambitious standards for the information of workers and companies about their rights and obligations, establishes clearer rules for effective administrative cooperation between Member States, lays down the possibilities for applying national control measures, introduces a limited system of joint and several liability in subcontracting at EU level, as well as a system of mutual assistance and recognition in the cross-border enforcement of administrative fines and penalties.

Bearing in mind the need to enhance the enforcement of the legal framework of posted workers and having a clear mandate by the European Council (18-19 October 2012) calling for rapid progress on the proposal, the Presidency attached utmost priority to advancing the discussions and worked intensively with a view to paving the way for substantive progress.

As outlined in the Progress Report (doc. 16540/12 + ADD 1), substantial progress was achieved on most parts of the proposal, specifically so on Chapters I, II, III, VI and VII. As regards Chapter VI (Cross-border enforcement of administrative fines and penalties), notable progress was made through in-depth discussions as it required extensive work in view of its complexity and far reaching legal implications.

Discussions on Article 9 relating to the national control measures necessary to carry out the general supervisory task of authorities in monitoring compliance with the rules on the terms and conditions of employment to be respected, and Article 12 relating to contractors' obligations and (joint and several) liability with respect to compliance with the applicable minimum rates of pay by direct subcontractors in the construction sector, have revealed divergences amongst delegations.

Discussions on the list of national control measures as proposed by the Commission have tentatively suggested that, it might be sufficient and in accordance with the ECJ's case law and that for reasons of legal certainty as well as for avoiding unnecessary or excessive administrative burdens for service providers this should remain as it currently is, albeit perhaps in an expanded form. However, at the same time the Commission's interpretation of the ECJ's case-law has been characterised by some delegations as too restrictive to the extent that it limits the possibilities of control by labour inspectorates and lacks flexibility in incorporating future developments.

As regards the provisions on joint and several liability, while these may be considered to add significant value to the proposal, at the same time it must be noted that such a system does not exist in all industrial relations systems and that there is a wide diversity among the existing systems. Further, the concept of due diligence, as proposed by the Commission, has been initially met with concerns as regards its content and the need for legal certainty.

Discussions on these critical issues have shown the need for political guidance. In this context, the Presidency considers that an orientation debate on these two major elements of the proposal would be a great opportunity for Ministers to express their views and should allow for bringing out the constituent elements which would serve as a basis for future discussions at technical level, with a view to paving the way for the Council reaching a general approach in the near future. It would also be a good opportunity for Ministers to send a strong message reiterating the importance of guaranteeing the protection of posted workers' rights, while at the same time respecting the needs of service providers and the principles underlying the single market, as well as the diversity of the various labour systems in the Member States. An appropriate balance should be sought in this respect.

Against this background, the Presidency would like to invite Ministers to reflect during their interventions on the following three questions:

1. Which administrative requirements and control measures do Ministers deem fundamentally important in respect to Article 9? What could provide a way out of the current obstacles in reaching a consensus on a list of requirements and measures? How could the need for flexibility for the Member States' competent authorities be combined with transparency for service providers and posted workers in this respect?
2. Bearing in mind the main concerns on the provisions of Article 12, could Ministers suggest any means for overcoming these? Would a gradual, and/or voluntary introduction of the proposed system of joint and several liability help? Would the involvement of social partners help and if so in which respect?
3. What role could due diligence play in simplifying/facilitating the implementation of the provision of joint and several liability? Would alternative measures to due diligence have to be considered in this respect and if so which ones?

Ministers are kindly requested to limit their interventions to three minutes.