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REPORT

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
- Progress Report

I. INTRODUCTION

1. On 21 March 2012, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC¹ concerning the posting of workers in the framework of the provision of services. This proposal forms part of the 12 priority proposals that are set out in the Single Market Act.
2. The proposal for a Directive aims to clarify and improve the implementation, application and enforcement of Directive 96/71/EC in practice. In particular, the proposal aims to:

¹ 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, 21.1.1997, p. 1.

- set more ambitious standards for the information of workers and companies about their rights and obligations;
 - establish clearer rules for cooperation between national authorities in charge of posting;
 - clarify the elements of the notion of posting;
 - clarify the possibilities for applying national control measures;
 - improve the enforcement of rights, including the handling of complaints and the introduction of a limited system of joint and several liability at EU level;
 - facilitate the cross-border enforcement of administrative fines and penalties imposed for the non-respect of the Posting of Workers Directive by introducing a system of mutual assistance and recognition.
3. The proposal is based on Articles 53(1) and 62 TFEU, which are identical to those on which Directive 96/71/EC is based and which allow for the adoption of directives under the ordinary legislative procedure.
4. The European Parliament has not yet delivered its Opinion. The Economic and Social Committee delivered its Opinion on 19 September 2012 and the Committee of the Regions on 29 November 2012.
5. Under the Cyprus Presidency, major progress was achieved on the text, in particular as regards Chapters I, II, III, VI and VII, as set out in the Progress Report submitted to the Council (EPSCO) on 6 December 2012 (doc.16540/1/12 REV 1). An orientation debate on Articles 9 and 12, based on a set of questions by the Presidency (doc. 16637/12) was held at this session.

6. Discussions on two key Articles showed broad divergences among delegations:
- 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;
 - 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.
7. With regard to Article 9, the outcome of the orientation debate revealed that a large number of delegations was in favour of a closed list, as proposed by the Commission, in order to ensure transparency and legal certainty and so as to avoid employers having to face different requirements laid down by different Member States.

Another large group of delegations was in favour of an open list as they felt that Member States should be able to maintain their national control measures in order to effectively counter social dumping, and other risks.

8. With regard to Article 12, a large group of delegations was in favour of the principle of such a system, in particular for combating fraud and abuse, and stressed that a balanced approach should be found in order to avoid discrimination and barriers to the free provision of services.

Another considerable group was against this Article which they considered too prescriptive. They felt that it might have a negative impact on the free provision of services. Some of them, however, considered that the Directive could provide for the introduction of the joint and several liability system on a voluntary basis.

II. STATE OF PLAY

9. Bearing in mind the high priority which the European Council attaches to the early completion of outstanding files under the SMA I package, including the enforcement of the Posting of Workers Directive, the Presidency spared no efforts to facilitate discussions to enable the Council (EPSCO) reaching a general approach on 20 June. Eight meetings were held at technical level as well as intensive rounds of bilateral meetings with all delegations with a view to making decisive progress on outstanding issues.
10. As a result of these discussions, very significant progress has been made on Chapter VI regarding cross-border enforcement of administrative fines and penalties following several meetings of comprehensive discussions and clarifications. There is broad agreement on:
 - the scope of the Chapter as well as on the issues of the recovery of penalties and the notification of the decision to impose penalties;
 - the requirement that this Chapter may only be invoked after all appeals have been exhausted in the requesting Member State;
 - the contents of the request for recovery or notification.
11. Substantive progress has also been achieved on other parts of the Directive. It was only where linkages exist between Articles 9 and 12 and other Articles that the Working Party's ability to make progress was more limited.
12. On 27 March, the Permanent Representatives Committee took note of the state of play of the discussions on the proposal on the basis of a report by the Presidency (doc.7606/13). It instructed the Social Questions Working Party to undertake a detailed examination of Articles 9 and 12 and to report back in May.

13. The Social Questions Working Party revisited Articles 9 and 12 as well as the outstanding issues on the other provisions of the draft Directive, including Chapter VI, on the basis of delegations' and Presidency's proposals.
14. While further progress could be achieved on Chapter VI, no agreement could be reached on Article 9 which is generally considered the key issue of the Directive. The discussions focused on a joint proposal by 11 delegations which are in favour of an open list of administrative requirements and control measures (doc. 9305/13), on the joint position of nine other delegations which favour a closed list (doc. 9662/13) as well as on a compromise proposal by the Presidency (doc. 9411/1/13 REV 1).

As regards Article 12, various possible options arose on the basis of delegations' proposals.

15. In the light of the discussions, the Presidency submitted a report to the Permanent Representatives Committee with a view to its meeting on 31 May, accompanied by compromise proposals on Articles 9 and 12 (doc. 9866/13+ COR 1).
16. With regard to Article 9, the Presidency's compromise proposal was based on the following elements:
 - a list providing for some degree of flexibility by incorporating existing national control measures (paragraph 1(e));
 - an obligation to inform the Commission and service providers of the measures listed in paragraph 1;
 - a clause providing that obligations deriving from EU legislation and/or national law regarding workers' protection will apply in addition to the administrative requirements and control measures provided they are non discriminatory and respect Union law;

- a notification procedure regarding new laws, regulations or administrative provisions laying down administrative requirements and control measures.

17. In relation to Article 12, the Presidency suggested a compromise solution consisting in a simple and non binding Article, based on the following elements:

- joint and several liability is one of a number of measures Member States may apply in order to prevent abuse or circumvention of Directive 96/71/EC and it can play an important deterrent role in this regard;
- for posting situations covered by Directive 96/71/EC, the Member States may, in consultation with the national social partners, introduce a system of joint and several liability that provides that the contractor of which the employer is a direct sub-contractor, can be held liable for certain payments to and/or behalf of the posted worker.
- Member States may, in conformity with Union law, provide for more stringent liability rules; such liability may apply in sectors other than those contained in the Annex to Directive 96/71/EC. In these cases, Member States may provide that a contractor who has undertaken due diligence, as defined by national law, shall not be held liable.

III. OUTCOME OF THE PERMANENT REPRESENTATIVES COMMITTEE'S DISCUSSIONS ON ARTICLES 9 AND 12

Article 9

18. A number of delegations are generally in agreement with the Presidency's compromise proposal or could accept it in a spirit of compromise.

19. While expressing appreciation for the Presidency's efforts to submit a balanced text, a large number of delegations consider that it should be improved further as, in their view, it does not give enough flexibility to the Member States to impose other administrative requirements and control measures than those listed in Article 9(1) in order to tackle exceptional circumstances, account being taken of the various national situations. In particular, it would not guarantee that existing measures could be maintained without any restrictions. These delegations refer to the joint approach of the 11 like-minded delegations which they prefer to the Presidency text.

They are also not in favour of the proposed measures regarding the notification procedure in Article 9(3) as they consider that it should not be for the Commission but for the European Court of Justice to assess if the new administrative requirements and control measures are compatible with Union law. An information procedure is considered preferable in this respect.

20. Another large group of delegations cannot accept the Presidency's proposal which, in their opinion, contains restrictive elements which would be contrary to the Union's basic principles regarding the free movement of workers and the free provision of services, as interpreted by the ECJ jurisprudence. They stress that the option given to the Member States to maintain existing measures is in contradiction with a closed list approach which would provide the necessary legal certainty for service providers, especially SMEs. They therefore uphold their position in favour of the Commission proposal.

A number of delegations feel that the notification procedure is unclear as it does not lay down the criteria on the basis of which the Commission is to assess the compatibility of any future measures with Union law and does not contain sufficient guarantees for service providers.

A few delegations consider that Articles 9 and 12 should be seen in the framework of an overall compromise agreement which includes Article 4 on preventing abuse and circumvention.

21. While recalling the necessity to take account of wider developments such as the March 2013 European Council Conclusions regarding the need to reduce the administrative burden at EU and national levels and regretting the level of uncertainty for service providers which is inherent to some of the proposals, CION reserves its position at this stage of the negotiations.

Article 12

22. In a spirit of compromise, a few delegations could accept the Presidency's proposal. While being in favour of the Commission proposal, another delegation would be ready to consider it as part of a wider compromise agreement including Articles 4 and 9. A few other delegations are of the opinion that this Article is unnecessary but would also be willing to work on the basis of the Presidency's proposal in the framework of an overall compromise agreement. One delegation is flexible and could envisage either a voluntary or a binding solution.
23. A large number of delegations maintain their position that the Directive should lay down an obligation to establish joint and several liability systems, as provided in the Commission proposal. In addition, a few delegations consider that not only construction but all other sectors should be covered. Stressing the crucial importance of these provisions, two delegations have submitted a joint compromise proposal providing for binding provisions in case of severe abuse and fraud which has been received with interest by some delegations.
24. A few delegations are against any provisions regarding joint and several liability, be they binding or voluntary, as they consider that such provisions would be unconstitutional and might lead to discrimination against foreign service providers.

IV. OTHER OUTSTANDING ISSUES

Article 4 (preventing abuse and circumvention)

There are two outstanding issues on this Article:

- the issue whether the list of elements which should be taken into account by the competent authority should remain indicative or be exhaustive. A large group of delegations are in favour of an indicative list while a smaller group consider it should be exhaustive and a number of other delegations feel that further clarifications would be necessary;
- the issue of the applicable law in the event of a negative assessment by the competent authority of the list of constituent elements provided for in this Article.

Article 10 (inspections)

There is broad agreement on the text of the Article with the exception of the opening phrase ("*without prejudice to Article 9*"). A majority of delegations are opposed to that phrase as they do not accept the linkage between this Article and Article 9 while a smaller group is concerned that, in the absence of such phrase, some Member States could use Article 10 to impose obligations not provided for in Article 9.

Chapter VI (cross-border enforcement of administrative fines and penalties)

The main outstanding issue concerns the list of grounds for refusal of a request for recovery (Article 14a) which a small group of delegations consider should not be too long.

Article 18 (Internal Market Information System)

The joint proposal tabled by two delegations (doc. 9324/13) is supported by a very significant number of delegations while a few other delegations, together with CION, strongly disagree with the underlying thrust which is to continue to use bilateral agreements in parallel with the Internal Market Information System (IMI) as they consider that this could undermine the use and effectiveness of IMI.

V. CONCLUSION

The Presidency considers that, with the exception of Articles 9 and 12 and the related issues, the scope for divergence on other issues has been significantly narrowed down.

Regarding Articles 9 and 12 and related issues, although a number of delegations have taken a constructive stance and would be ready for further discussions with the aim of reaching a general approach at the EPSCO Council on 20 June, the Presidency has come to the conclusion that this objective would be unrealistic as most delegations are not, at this stage, in a position to demonstrate a sufficient degree of flexibility, in view of their positions of principle. Further work will therefore have to be done in the coming months in order to develop compromise solutions which would be acceptable to a qualified majority of delegations.

The results from the work on this draft Directive under the Irish Presidency, are contained in ADD 1 to this report.