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NOTE

from: The Presidency
to: The Working Party on Social Questions
on: 9 October 2012

No. Cion prop.: 8040/12 + COR 1 - COM(2012) 131 final

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

Delegations will find attached Presidency's text proposals regarding provisions in Chapters I - III and VII, for discussion at the next meeting of the Social Questions Working Party, on 9 October 2012.

Changes with regard to the Commission proposal are indicated as follows: new text is in **bold** and deletions are marked "[...]".

Text proposals by the Presidency on provisions in Chapters I – III and VII

The Presidency proposes that the provisions in Chapters I-III and VII which are not included here are left unchanged as per the original proposal

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

...

Whereas:

...

- (5) Therefore, the constituent factual elements characterising the temporary nature inherent to the notion of posting, [...] **and the requirement** that the employer [...] **is genuinely established** in the Member State from which the posting takes place, **need to be further clarified. Where it appears from the assessment of the factual elements that a case does not fall under the provisions of [...]** Directive 96/71/EC, **in principle the legislation of the host Member State should be applied, without prejudice to the application of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (hereinafter the ‘Rome I Regulation’)¹ and/or other EU instruments, and provided that this is compatible with EU law on the free movement of workers, freedom of establishment and the freedom to provide services [...].**

...

¹ OJ L 177, 4.7.2008, p. 6.

(13) Administrative cooperation and mutual assistance between the Member States should comply with the rules on the protection of personal data laid down in Directive 95/46/EC, and **in accordance with Member States' national data protection rules implementing EU legislation.** [...] With regard to administrative cooperation through the Internal Market Information System (IMI), it should also comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data² and Regulation (EU) xxx (IMI Regulation) on administrative cooperation through the Internal Market Information System (IMI)".

CHAPTER I

GENERAL PROVISIONS

Article 2

Definitions

For the purposes of this Directive,

- (a) 'competent authority' means any authority **or body** designated by a Member State to perform functions under this Directive;

² OJ L 8, 12.1.2001, p. 1.

Article 3 (moved from Article 4)
Competent authorities and [...] liaison offices

For the purposes of this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more competent authorities, which may include the liaison office(s) referred to in Article 4 of Directive 96/71/EC. **When designating their competent authorities Member States shall have due regard for the need to ensure the data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Each Member State's choice of competent authorities shall be respected by all other Member States and the European Union institutions.**

Contact details of the competent authorities shall be communicated to the Commission and the other Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.

Article 4 [...]
Preventing abuse and circumvention

1. (e) the [...] number of contracts performed and/or [...] turnover realised **ordinarily** in the Member State of establishment.

[...]

2. (e) any [...] previous periods during which the post was filled by the same or another (posted) worker.

[...]

3. **All the factual elements enumerated in paragraphs 1 and 2 above are indicative factors in the overall assessment to be made and may not therefore be considered in isolation. The assessment of these elements shall be adapted to each specific case and take account of the specificities of the situation.**

CHAPTER II

ACCESS TO INFORMATION

[...] (Article 4 moved above and renumbered as Article 3)

Article 5

Improved access to information

- 2.(c) make the information available to workers and service providers in **the most relevant** languages, **the choice being left to the host Member State [...]**, if possible in summarised leaflet form indicating the main labour conditions applicable and upon requests in formats accessible to persons with disabilities;
4. Where, in accordance with national law, traditions and practices, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3 paragraphs 1 and 8 of that Directive, Member States **shall encourage [...]** the social partners to [...] identify these and make the relevant information **available in an accessible and transparent way for service providers from other Member States and posted workers, unless such an information is made available by the authorities of the Member States where the posting takes place. The relevant information referred to concerns** in particular [...] the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and the qualifying criteria for classification in the different wage categories [...].

CHAPTER III

ADMINISTRATIVE COOPERATION

Article 6

Mutual assistance — general principles

2. The cooperation of the Member States shall in particular consist in replying to reasoned requests for information and to carry out checks, inspections and investigations from competent authorities with respect to the situations of posting referred to in Article 1(3) of Directive 96/71/EC, including investigation of any **circumvention or** abuses of applicable rules on the posting of workers [...].

4. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall **promptly [...]** inform the requesting Member State with a view to finding a solution.

5. Member States shall supply the information requested by other Member States or the Commission by electronic means **within the following time limits [...]**:
 1. **Urgent cases requiring the consultation of registers for the purpose of checking an establishment in another Member State: two working days from the reception of the request.**

The reason for the urgency should be clearly indicated in the request with some details to substantiate its existence.

2. **All other requests for information: maximum 25 working days from the reception of the request.**

[...]

6. Member States shall ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States, **for the purposes of implementing this Directive and Directive 96/71/EC, in so far as these registers are available in the IMI.**

Article 7

Role of the Member State of establishment

2. [...] The Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and this Directive. **This responsibility shall not in any way reduce the possibilities of the Member State where the posting takes place to monitor, control and take any necessary supervisory or enforcement measures in accordance with this Directive and Directive 96/71/EC. [...]**
3. **Where there is reasonable suspicion of possible irregularities, the Member State of establishment of the service provider shall, on its own initiative, communicate to the Member State to which the posting takes place any relevant information. This information shall be used solely for the purpose it is provided for, and be destroyed upon closure of the case unless considered necessary in the context of further investigation, legal proceedings, or information exchange between the two competent authorities concerned.**
4. Competent authorities of the host Member State may equally ask the competent authorities of the Member State of establishment, for each instance where services are provided or for each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 6.

5. The obligation laid down in **previous** paragraphs [...] shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State **in which** [...] the service is provided. Such checks and controls shall, if need be, be carried out by the authorities of the host Member State [...], in accordance with Article 10 and in conformity with the powers of supervision provided for in the host Member State's national law, practice and administrative procedures and which respect Union law.

CHAPTER VII

FINAL PROVISIONS

Article 18

Internal Market Information System

2. Member States may continue to apply bilateral arrangements concerning administrative cooperation between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers referred to in Article 3 of Directive 96/71/EC. [...].
3. In the context of bilateral agreements referred to in paragraph 2, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall be used for any follow-up required. [...].

Article 19

Amendment to [IMI Regulation]

The following point shall be added to **the Annex [...] of the Regulation of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Informations System as regards the protection of data (the IMI Regulation)**:

1. Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services³: Article 4;
2. Directive xxxx/xx/EC 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 services⁴: Articles 6, 7, 10(3), 13, 14 and 15.

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 2 years after its entry into force. They shall forthwith communicate to the Commission the text of those provisions.[...].

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.

³ OJ L18, 21.1.1997.

⁴ OJ reference