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NOTE

From: To:	General Secretariat of the Council Working Party on Social Questions (Employment Policy and Related Legislation)
N° Cion doc.:	6987/16 SOC 144 EMPL 97 MI 142 COMPET 118 CODEC 279 + ADD 1 +ADD 2 - COM(20160 128 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending 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

Delegations will find attached a note from the FR, DE, NL, BE, LU and AT delegations, with a view to forthcoming meetings of the Social Questions WP.

05.09.17

Note from France, Germany, The Netherlands, Austria, Belgium and Luxemburg

1) Introduction

The European single market is one of the major successes of the European Union. We therefore want to preserve its integrity and further strengthen its meaning: an internal area of prosperity and freedom.

To reach this goal, we need to strongly reinforce the social dimension of the internal market. We need in particular to strengthen the European rules on posting in the 1996 directive and in the 883/2004 and 987/09 regulations. These two instruments share a common objective: ensuring the free movement of persons and protecting the rights of the European citizens.

This is why we need to go forward in coming to a revised 1996 directive on the posting of workers as well as revised rules on applicable legislation (including posting) in the 883/2004 and 987/09 regulations. Even though the two instruments are autonomous and follow specific rules and objectives, it could be envisaged that a partial general approach on the posting-related part of the social security regulations is achieved together with the general approach on the posting of workers directive at the next EPSCO meeting. This would ensure to get a broader and coherent view on these different aspects.

2) Suggested drafting

2.1. Part A. Proposals concerning the revision of the Directive on the Posting of Workers:

Changes in relation to the relevant recitals and articles of doc. 11762/17 are indicated as follows: new text is in **bold underlined** and deletions are marked "**[...]**".

I. Ensure the temporary nature of posting

Recitals 8 and 9:

(8) Posting is of a temporary nature and the posted worker usually returns to the country of origin after the completion of the work for which he […] has been posted. However, in view of the long duration of certain postings, and in acknowledgment of the link between the labor market of the host country and the workers posted for such long periods, it is necessary to

provide that, in case of posting lasting for periods longer than **12 months within a reference period of 24 months,** host countries should ensure that undertakings posting workers to their territory guarantee an additional set of terms and conditions that are mandatorily applicable to workers in the Member State where the work is carried out.

(9) Ensuring greater protection of workers is necessary to safeguard the freedom to provide services on a fair basis in both the short and the long term, notably by preventing abuse of the rights guaranteed by the Treaties. Rules ensuring such protection of workers, however, cannot affect the right of undertakings posting workers to the territory of another Member State to invoke the freedom to provide services also in cases where the posting **exceeds 12 months within a reference period of 24 months.** Any provision applicable to workers posted in the context of a posting exceeding **12 months in a reference period of 24 months** must thus be compatible with that freedom. It is settled case law that restrictions to the freedom to provide services are […] admissible only if justified by overriding reasons in the public interest and if they are proportionate and necessary.

Article 1 (2) (aa) is amended as follows:

(aa) The following paragraph is added:

"1(-a) When the effective duration of a posting exceeds 12 months within a reference period of 24 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that the undertakings referred to in Article 1(1) guarantee workers posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down, in the Member State where the work is carried out:

…"

Rationale:

Posting of workers is a consequence as well as a key element of the freedom to provide services within the EU. Thus, posting is temporary by nature and its duration is defined in order to provide employers and workers with legal clarity and certainty.

In application of Directive 96/71/EC, a worker is considered to be posted when he provides a

service “for a limited period” in a Member State other than the one in which he is usually employed. Yet the maximum duration of the posting of the worker by the employer is not specified in the directive.

This means that posting can be of a duration where a strong link is created between the labour market of the host Member State and the posted worker as well as between the posted worker’s living environment and the host Member State. In such a situation, it is necessary to apply more elements of the host Member State’s employment conditions. This is already acknowledged by the European Commission’s proposal.

However, when determining the duration after which the link becomes sufficiently strong, the average duration of posting within the European Union must be taken into account. The average duration of a posting being less than four months, the duration after which the proposed provisions on long-term posting apply should be limited to 12 months within a reference period of 24 months; such postings exceed the average duration of postings by 8 months.

The proposed duration is proportionate and the reference period takes into account the necessary flexibility for calculating the total amount of posting. The concept of a “reference period” is important to avoid circumventions of the directive due to the absence or the replacement of a posted worker by another one. It also provides a solution for cases in which posting periods are interrupted; this issue of “times of absence” has been discussed in great detail without a solution and the concept of a reference period should solve this problem.

II. Enhance the rights guaranteed for posted workers

Recital (7a) is modified as follows:

(7a) The competent national authorities, in accordance with their national law and/or practice, should have the right to verify that the conditions of ~~collective~~ accommodation for posted workers provided by employers are in line with the relevant national provisions.

New Recital (12c)

“Allowances specific to posting often serve several purposes. Insofar as their purpose is the reimbursement of expenditure incurred on account of the posting, such as expenditure on travel, board and lodging, Directive 96/71/EC provides that they shall not be considered as part of remuneration. In view of the relevance of allowances specific to posting, uncertainty as to which parts of allowances specific to posting are

allocated to reimbursement of expenditure should be avoided. Such allowances should be considered to be paid in reimbursement of expenditure unless the terms and conditions resulting from law, regulation or administrative provision, collective agreements or contractual agreements that apply to the employment relationship define which parts of the allowance are allocated to the reimbursement of expenditure. In any case, expenditure incurred on account of the posting, such as expenditure on travel, board and lodging shall not be borne by workers and reimbursement of such expenditure must be adequate."

Article 1 (2) (a) concerning the replacement of Article 3 (1) of Directive 96/71/EC is amended as follows:

(a) Paragraph 1 is replaced by the following:

1. Member States shall ensure, irrespective of which law applies to the employment relationship, that the undertakings referred to in Article 1 (1) guarantee workers who are posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or

- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination;

(ga) conditions of ~~collective~~ accomodation for workers;

(gb) allowance rates to cover travel, board and lodging expenses for workers away from home for professional reasons; this point applies exclusively to travel, board and lodging incurred by a posted worker when he is required to travel to and from his regular place of work in the Member State to which territory he is posted, or when he is temporarily sent by his employer from this workplace to another workplace.

Article 1 (2) (ca) concerning the replacement of Article 3 (7) of Directive 96/71/EC is amended as follows:

"(ca) Paragraph 7 is replaced by the following:

> **"7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.**
>
> **Allowances specific to the posting shall be considered to be part of remuneration, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. If it does not result from the terms and conditions of employment applicable to the employment relationship whether and in that case which elements of an allowance specific to the posting are paid in reimbursement of expenditure or are part of remuneration, then the entire allowance shall be considered to be paid in reimbursement of expenditure actually incurred on account of the posting."**"

Rationale:

The proposed changes to Article 3 (7) of directive 96/71/EC as proposed in doc. 11762/17 and

the corresponding new recital deal with the issues that arise in practice when posted workers receive lump-sum daily allowances that do not specify the purpose of the allowance. In such cases it can be difficult to ascertain which part of the allowance is paid in reimbursement of expenditure actually incurred on account of the posting (e.g. travel, board and lodging) and which part is paid for other reasons, e.g. to balance wage differences in the home and the host Member State. This differentiation is important because pursuant to Article 3 (7) of directive 96/71/EC (including the amendments in doc. 11762/17), allowances specific to the posting shall not be considered to be part of remuneration if they are paid in reimbursement of expenditure actually incurred.

The proposed amendments provide the legislator and/or the social partners of the home Member State and/or the parties to the employment contract the task of defining which elements of an allowance are allocated to reimbursement of expenditure. The amendments seek to create greater certainty and transparency for employers, posted workers and control authorities. Technically, the amendments foresee that terms and conditions of employment that apply irrespective of Article 3 (1) of directive 96/71/EC must clearly define which elements of an allowance are allocated to reimbursement of expenditure. The terms and conditions of employment applicable irrespective of Article 3 (1) of directive 96/71/EC will be, as a rule, those of the home Member State legislation due to Article 8 (2) (2) of Regulation (EC) No. 593/2008 (Rome I Regulation).

If the allocation of the allowance is not clearly defined, then the proposed changes would lead to an assumption that the entire allowance is allocated to reimbursement of expenditure and thus, the entire allowance cannot be considered to be part of remuneration.

III. Guarantee the total implementation on the posting rules in the transport sector

Delete recital 10:

~~(10) **Due to** the highly mobile nature of work in international road transport, the implementation of the **Directive 96/71/EC** raises particular legal questions and difficulties**,** especially where the link with the concerned Member State is insufficient. It would be most suited for **those** challenges to be addressed through sector-specific legislation together with other **Union** initiatives aimed at improving the functioning of the internal road transport market.~~

Rationale:

We are determined to ensure that the provisions of Directive 96/71/EC apply to all sectors, including carriage of goods in the road sector.

Regardless of this, there is no need for recital 10 in the proposed directive and it has no link to the provisions or aims of the proposed directive.

Pursuant to the interinstitutional agreement dated 22 December 1998 on common guidelines for the quality of drafting of Community legislation, the purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms. They shall not contain political exhortations.

The question of whether and in which context possible challenges in the application of Directive 96/71/EC might arise is not related to the proposed revision of that Directive. There is also no need to announce possible sector-specific provisions regarding the application of Directive 96/71/EC in this context, as the European Commission has already proposed such changes in the Road Initiatives that it presented on 31 May 2017. Thus, the proposed recital 10 is obsolete.

IV. Set up an instrument at the EU level to enable effective coordination between Member States

New Recital 17

In the context of fighting fraud related to posting, the European Platform to enhance cooperation in tackling undeclared work can participate in the monitoring and the evaluation of cases of fraud which should be anonymised as appropriate, ensures implementation and efficiency of administrative cooperation between Member States, develops alert mechanisms and brings assistance and support to reinforced administrative cooperation and information exchanges between the liaison offices. In doing so, the Platform will work in close cooperation with the Committee of Experts on Posting of Workers.

New Recital 18

The transnational nature of certain situations of fraud or abuses related to posting is a

justification for concrete measures aiming at reinforcing the transnational dimension of inspections, inquiries and exchanges of information between the competent authorities of the concerned Member States. To this end, in the framework of administrative cooperation provided for in this Directive and in Directive 2014/67/EU, in particular Article 7 paragraph 4, the national competent authorities should have the necessary means for alerting on such situations and exchanging information aiming at preventing and repressing these frauds. The European Platform is the relevant framework for facilitating the exchange of information and cooperation between Member States.

"In Article 4 the following paragraphs are added:

"5. In the framework of the implementation of this Directive and of Directive 2014/67/EU, the European platform tackling undeclared work set up by decision (EU) 2016/344 of 9 March 2016 is informed by senior representatives of Member States on situations of manifest abuses and of posting-related frauds. The European Platform shall provide the European Commission every year with a specific report on these situations, accompanied by recommendations aiming at putting an end to the frauds and abuses identified.

6. In case of absence of supply of information from the competent authorities of the sending Member State to the competent authorities of the host Member State within the time limits set up in Article 6 (6) of Directive 2014/67/EU, the host Member State may inform the European Platform on the absence of respect of this time limit and in particular on the frequency of non-respect of the time-limit.

7. The report defined in Article 8 (3) of decision (EU) 2016/344 of 9 March 2016 shall in particular include an analysis of the implementation of the provisions regarding the cooperation between the liaison offices or the national bodies and between the competent authorities, including the respect of the time limits set in Article 6 (6) of Directive 2014/67/EU and an analysis of the follow up of recommendations on situations of manifest abuses and of posting-related frauds submitted to the European Platform.""

Rationale:

Article 4 of Directive 96/71/EC provides for cooperation between the competent public administrations of the Member States for the monitoring of the working and employment conditions referred to in article 3. For this purpose, the Member States designate one or more liaison offices or one or more national bodies.

Yet, it has been noticed that the exchanges between those bodies are not always fast enough

and that the information shared is sometimes incomplete, especially when it comes to fraud and abuses.

A proper application of the 96/71 and 2014/67 Directives implies that a close and efficient cooperation between the authorities and official bodies of the Member States is developed, built on the principles of efficiency, active assistance, fast provision of information and easy access to it.

Thus, it is proposed:

- to build on an existing instrument, the European platform on undeclared work, to fight posting-related fraud and abuses at European level by exchanging information on these situations ; an annual report and recommendations would give a better view on these frauds and the way to tackle them ;
- to allow the host Member States to inform the Platform if the administration of the sending country fails to provide the information requested within the time limits set up in Directive 2014/67/EU.
- The abovementioned report should also be an instrument of analysis of the cooperation between the liaison officers, national bodies and competent authorities.

2.2. Part B: Proposals concerning the revision of regulations 883/2004 and 987/2009

The proposed amendments are based on the texts of Regulations 883/2004 and 987/2009, which are in force.

V. Ensure a period of social security coverage of 3 months prior to posting

Article 14 (1) of regulation (EC) n° 987/2009 is modified as follows:

"The words: "immediately before the start of his employment, the person concerned is already subject to the legislation of the Member State in which his employer is established" are replaced by the words :"**immediately before the start of his employment has already been subject to the legislation of the Member State in which his employer is established for a period of at least three months**."

"The paragraph is supplemented by the following sentence: "**Once a worker has ended a period of posting (continuously or with interruptions) of 24 months, no fresh period of posting for the same employed or self-employed person and the same Member State can start until at least three months have elapsed from the end of the previous posting period.**"

Rationale:

Posting under social security Regulations is an exception to the general rule of the application of the legislation of the Member State of activity. Immediate consequence is that social security contributions are not due in this State. This derogation entails strict conditions in order for the posting situation to be valid.

In order to avoid artifical determination of the applicable legislation, there must be a consistent and sufficient link between the employee and the legislation to which he remains subject during the posting. It is therefore proposed that the employee is posted when he/she for at least three months has already been subject to the legislation of the Member State in which the employer is established.

Furthermore, to limit possible circumventions of the 24-month limitation for article 12 (1) of the basic Regulation, a period of 3 months between 2 postings should be required.

As these two sets of periods are a condition for the validity of postings, they have to be laid down in the Regulations.

VI. Clarification of the condition of substantial activity of the undertaking

« Article 14 (2) of regulation (EC) n°987/2009 is amended as follows:

"After the term: « taking account of all criteria characterizing the activities carried out by the undertaking in question » the following words are inserted : « **such as the turnover achieved in the posting State, which should be of at least 25% of the total annual turnover** ».

« Article 14 (3) of Regulation (EC) n° 987/2009 is amended as follows: in the second sentence, the words:« his activity" are replaced by the following words: "**a sufficient activity**".

Rationale:

Regulations state the principle that undertakings must carry out a substantial activity in the posting State. This is to avoid again factice determination of applicable legislation, which can arise from the practice of so called letter-box companies.

A significant share of turnover in the posting State is a clear indicator (25 %) materializing the reality of the business operated, which is particularly relevant to conduct the assessment of the situation. Therefore, notwithstanding all other relevant criteria necessary in this exercise, it is proposed to lift this indicator, which is already used, up to the level of the Regulations.

In the same spirit as for amendment 5, some rules that have been in practice left up to the administrative commission to be decided should actually be laid down in the Regulations, when they relate to essential definitions.

As regards self-employed persons, the introduction of "sufficient" activity aims at ensuring that the self-employed can justify of a consistent link with the legislation of the Member State he/she remains subject to.

VII. Better regulation of the pursuit of activities in more than one Member State

"Article 13 (1) of regulation (EC) 883/2004 is replaced by the following provisions:

"**A person who normally pursues an activity as an employed person in two or more Member States shall be subject:**

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:

(i) to the legislation of the Member State in which the registered office of the undertaking(s) or employer(s) is/are situated and the undertaking(s)/employer(s) pursue(s) substantial activity if he/she is employed by one undertaking or employer or more than one undertaking or employer situated in the same Member State; or

(ii) to the legislation of the Member State in which the employee predominantly pursues his/her activity or activities in situations where (i) is not applicable.

"Article 13(3) of regulation (EC) 883/2004 is amended as follows:

"**A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject :**

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence to the legislation of the Member State in which the he/she predominantly pursues his/her activity or activities."

"Article 14(10) of regulation (EC) 987/2009 is supplemented as follows:

"The determination of applicable legislation under article 13 of regulation (EC) 883/2004 shall be for a maximum period of 24 months. It shall then be revised on the basis of the employee's situation."

Rationale:

It is constant in the social security coordination that activity is the main driver to determine the rules applicable (lex loci laboris). Only in very particular situations have other rules been put in place.

Besides posting, activity in two or more Member States gives rise to complex situations

which are extremely difficult to control. Yet cross-border flows are more and more challenging habitual work patterns. The current legal framework is too loose, compared to posting, and has to be revised as it does not provide for sufficient legal certainty and allows for easy circumventions.

Amendment 7 therefore aims at ensuring that the criteria used in order to determine the applicable legislation when an activity is pursued in more than one Member States give more importance than today to the reality of the activity conducted and where it is actually taking place. It is therefore proposed to use, as for posting situations, the concept of "substantial part of the activity".

It also aims at the same time at simplifying and making the current combined provisions in the Basic and in the Implementing Regulations more coherent.

In the same spirit, it is also proposed to endorse these concepts of "substantial part of the activity" or "predominant activity" when a person pursues a salaried activity and a self-employed activity in several Member States.

Finally, the amendments provides for a period of validity of the forms issued in these situations in order to secure the legal situation of the worker.

VIII. Enhancing the dialogue and conciliation procedure

Article 5 (4) of regulation (EC) n°987/2009 is supplemented as follows :

"In accordance with Article 75a of the Basic Regulation, the competent authorities who request the conciliation of the Administrative Commission commit to comply with its decision and if necessary withdraw or declare invalid the documents issued."

Rationale:

Loyal cooperation and smooth exchanges between social security institutions are cornerstones in social security coordination in order for it to work effectively. Since 2010, Regulations 883/2004 and 987/2009 have put in place procedures in order to organize administrative processes.

The dialogue and conciliation procedure which takes place within the remit of the administrative commission does not, in its current form, necessary come to a conclusion, which deprives it from any operational effect. In addition, when a case is brought to the

administrative commission, previous exchanges between competent institutions and authorities have already occurred and long periods have already elapsed. In the meantime, the case is still not solved, to the detriment of the persons, businesses and Member States.

As applicable legislation is the starting point of all social security coordination rules, efficient and accelerated conflict solving mechanisms are crucial.

The very existence of the administrative commission derives from the principle of loyal cooperation. As recalled by the ECJ, administrative cooperation procedures are the main tool at the disposal of Member States. Therefore, it is proposed that the competent authorities who request the conciliation of the Administrative Commission commit to comply with its decision and if necessary withdraw or declare invalid the documents issued.