

Opinion of the European Economic and Social Committee on the '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'

COM(2012) 131 final — 2012/0061 COD

(2012/C 351/13)

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On 18 April 2012 the European Parliament, and on 25 April 2012 the Council, decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

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

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The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 27 June 2012.

At its 483rd plenary session, held on 18 and 19 September 2012 (meeting of 19 September 2012), the European Economic and Social Committee adopted the following opinion by 219 votes to 2 with 8 abstentions.

1. Conclusions and proposals

1.1 The Commission proposal for a directive on the enforcement of the directive on posting of workers is one of the proposals intended on the one hand to strengthen the rules on posting of workers and on the other to codify the existing legislation governing the right to take collective action in cross-border situations. These proposals represent a response to the debate following four EU Court of Justice judgments (Viking-Line, Laval, Rüffert and Luxembourg) about the balance between social rights and economic freedoms.

1.2 The EESC has in two opinions called for strengthening of the rules regarding posting of workers, by among other things clarifying and improving the provisions of the directive on posting of workers and by enhancing cooperation between the authorities of the Member States. The EESC welcomes the aims of the Commission's proposal for an enforcement directive, while stressing the importance of guaranteeing the protection of posted workers, respecting the various labour market models in the Member States and discouraging social dumping and unfair competition. The EESC therefore considers that the EU should put more emphasis on social aspects.

1.3 The EESC welcomes the intention to enforce the existing directive, focusing on better implementation and effective administrative cooperation among Member States. The original Directive plays a key role in promoting a climate of fair competition between all service providers (including those from other Member States) by guaranteeing both a level playing-field and legal certainty for service providers, service recipients, and workers posted for the provision of services.

1.4 In the EESC's view, it is important for the proposal to guarantee protection for posted workers and respect the Member States' different labour market models, but at the same time to increase the scope for cross-border trade, in particular by preventing unnecessary administrative costs.

1.5 In order to promote transnational provision of services in a climate of fair competition, it is important to have equal minimum conditions of employment according to national laws and collective agreements.

1.6 The elements in Article 3(1) of the directive should not be an exhaustive list but be used as part of an overall assessment where all the relevant factors are taken into account.

1.7 The directive should ensure greater respect for the autonomy of the social partners and the role played by them in various labour market models. The EESC reminds Member States of the responsibilities in terms of securing effective controls and considers it very important to review the list of measures after three years.

1.8 To protect the rights of workers the Member States should be able to oblige foreign service providers to designate a contact person with the necessary powers to negotiate on behalf of the company, and Article 11(3) should ensure that host country trade unions and other parties can defend the rights of posted workers in line with national practices.

1.9 The EESC finds the proposal on joint and several liability in subcontracting situations to be a crucial point in the proposed directive. It provides for protection of workers in the sector where subcontracting is most prevalent, while at the same time respecting employers' need for certainty with respect to their liabilities. The EESC stresses, however, that the proposal must respect existing systems for several and joint liability in the Member States. The EESC strongly recommends Member States that do not have such systems to introduce them after consultation with the social partners. The EESC encourages the Commission, together with the social partners, to provide a more precise definition of due diligence, as has been done in some Member States. The EESC understands the concept of due diligence to mean, without prejudice to the social dialogue at the national level, that companies that perform adequate checks and controls of subcontractors should not be held liable.

2. Gist of the Commission proposal

2.1 The Commission's proposal for a directive on the enforcement of the directive on posting of workers is part of a package of proposals. Together with the enforcement directive, the Commission has presented a proposal for a regulation codifying the existing legislation governing the right to take collective action in cross-border situations⁽¹⁾. The Commission states that the purpose of both proposals is to create more and better jobs and to increase the EU's competitiveness by updating and improving the single market without compromising the rights of workers.

2.2 The Commission's proposal for a directive on enforcement of the directive on posting of workers includes the following:

- Chapter I sets out a framework for preventing abuse and circumvention. The proposals include provisions on determining whether an undertaking genuinely performs substantial activities other than purely internal management and/or administrative activities. An indicative description is given of the constituent elements of the concept of posting for the provision of services, as well as the criteria determining what constitutes actual establishment of a service provider in a Member State. This is intended to prevent bogus postings or letter-box companies.
- Chapter II establishes rules on access to information, i.e. the information needs of employees and companies in relation to their rights and obligations. Article 5 contains more detailed measures for making information on labour market rules generally available, including where terms and conditions are laid down by collective agreements.
- Chapter III contains provisions on cooperation between the national authorities responsible for posting. The general principles, rules and procedures needed for effective

administrative cooperation and assistance are set out in Article 6, while requirements of the Member State from which the posting takes place are dealt with in Article 7.

- Chapter IV concerns the monitoring of posting and covers national control measures, where Member States may only impose certain administrative requirements and control measures.
- Chapter V regulates mechanisms for enforcing and ensuring application in practice, the lodging of complaints and the right to institute judicial or administrative proceedings. The provisions of Article 12 concern protection of workers' rights based on (1) joint and several liability for the remuneration of posted workers in the construction sector and (2) better handling of complaints. The provisions are limited to the construction sector as defined in the list of activities included in the Annex to Directive 96/71. Posting by a placement agency is included, provided the work is in the construction sector. However, the Member States may if they wish extend these provisions to include other sectors.
- Chapter VI sets out the rules on cross-border enforcement and administrative fines and penalties. Finally, penalties and provisions in relation to use of the Internal Market Information System are outlined in Chapter VII.

3. Background to the Commission proposal

3.1 The Commission notes that, although the number of posted workers represents a small proportion of the total EU workforce, there are a large number of posted workers in certain Member States and the phenomenon is becoming more and more common. There is a lack of reliable data, but it is estimated that around one million workers are posted each year. This is a very small proportion of the total workforce – less than 1 % of that of the current Member States – but it makes up around 20 % of cross-border labour mobility. The countries most affected are Germany, France, Luxembourg, Belgium and Poland.

3.2 The Commission proposal follows an intense debate, prompted by four EU Court of Justice judgments (Viking-Line, Laval, Ruffert and Luxembourg), about the balance between social rights and economic freedoms. In October 2008, the European Parliament adopted a resolution in response to the ECJ's judgments. The European social partners conducted a joint analysis of the Court of Justice rulings at the request of the Commission and the French presidency (in the second half of 2008).

3.3 These issues were also raised in the report on the relaunch of the Single Market presented by Professor Mario Monti in 2010. The report recommended guaranteeing and clarifying the application of the right to strike, and introducing a mechanism for informal solutions of labour disputes relating to application of the Directive.

⁽¹⁾ The Committee is drawing up a separate opinion on that proposal.

3.4 The EESC addressed the issue of the Court of Justice rulings on the posting of workers directive in two opinions: *The Social Dimension of the Single Market* ⁽²⁾ and *Single Market Act – Twelve Levers* ⁽³⁾.

The EESC called for the following in its opinions:

- clarification and improvement of the provisions of the directive on posting of workers;
- more effective cooperation between the authorities of the Member States;
- implementation of the principle of non-discrimination with respect to work and remuneration conditions;
- consultation with the social partners;
- non-discrimination for companies in the internal market.

4. Comments of the EESC

4.1 The EESC notes the Commission's proposal for a directive intended to improve the enforcement of the posting of workers directive by clarifying the conditions for posted workers and to improve facilities for the relevant national authorities, companies and workers to cooperate and exchange information. The Committee believes it is important that the proposal should guarantee the protection of posted workers, respect the various labour market models in the Member States and be effective in its purpose of discouraging social dumping and unfair competition, as well as increasing scope for cross-border trade, especially by preventing unnecessary administrative costs. In order to promote the transnational provision of services in a climate of fair competition, it is important to have equal minimum conditions of employment according to national laws and collective agreements.

4.2 The EESC finds legal certainty to be of the utmost importance and notes the legal uncertainty concerning foreign workers who are posted by a temporary agency. These workers are covered by the Posting of Workers Directive and by the Directive on Temporary Agency Work. In order to resolve this ambiguity, the EESC proposes that the Enforcement Directive provide that temporary workers fall within the scope of the Directive, unless more favourable terms and conditions of employment are concluded pursuant to Article 5(3) of the Directive on Temporary Agency Work.

4.3 The Committee's position is that cross-border services are very important to the development of the internal market. In order to create political acceptance for the EU and increase

solidarity within the Union, the EU should put more emphasis on the social aspects of its policies. For the full potential of the internal market to be realised, the EU must strengthen the social dimension. The proposal for a directive is a step in the right direction, but it does not do enough to satisfy the Committee's wishes. That would require further clarification and strengthening of the proposal.

4.4 The EESC supports the intention in Article 3(1) of the directive to address the issue of so-called letter-box companies, i.e. companies that have no real activities in the country where they are registered but exist for the sole purpose of avoiding obligations in the host country. In order to ensure clarity, legal certainty and consistency with Article 3(2), the assessment of whether an undertaking genuinely performs substantial activities in the country of establishment should be made through an overall assessment where **all** relevant factors are taken into account, which means that the list should not be seen as exhaustive.

4.5 Article 3(2) of the proposal for a directive is intended to clarify when a worker should be regarded as carrying out his or her work temporarily in another Member State. The distinction between temporary and permanent work in the host country is very important because it determines which country's labour law is to apply and whether the situation can even be considered a posting. The EESC welcomes the clarifications contained in the proposal, in particular the reference to the need for an overall objective assessment.

4.6 The EESC welcomes the new information rules, but considers that Article 5(4) should also express absolute respect for social partners' autonomy and the role played by the social partners in various labour market models. It is also necessary to ensure that the administrative burden of financing tasks such as translations is not transferred to the social partners. Initiatives taken by sectoral social partners in disseminating information should be supported.

4.7 It is important where checks are concerned (Article 7) that the authorities of the host country should have overall responsibility for monitoring abuse where a worker is posted temporarily from another country, and that the authorities in the country of origin should cooperate with the authorities in the host country. It should also be possible for these checks to be conducted on the initiative of the authorities in the host country and not just on that of the authorities where the company is established.

4.8 Article 9(1)(d) allows Member States to impose an obligation on foreign service providers to designate a contact person to negotiate, if necessary, on behalf of the employer with the relevant social partners in the Member State to which the posting takes place, in accordance with national law and practice. In some countries it may be sufficient to appoint a contact person, as the authorities can ensure compliance with

⁽²⁾ OJ C 44, 11.2.2011, p. 90.

⁽³⁾ OJ C 24, 28.1.2012, p. 99.

laws and agreements. In other countries, with different labour market models, the contact person should have the power to represent the undertaking with the authorities and trade unions. The directive should therefore allow for different labour market models. Article 11(5)(b) should include a requirement to provide information on social security contributions/taxes and where they were paid.

4.9 Article 11(3) states that the Member States shall ensure that trade unions and other organisations which have a legitimate interest in ensuring that the directive is complied with may engage on behalf of the posted workers or employer in judicial or administrative proceedings. This article should ensure that host country trade unions and other parties can defend the rights of posted workers according to national practices.

4.10 The EESC finds the proposal on joint and several liability in subcontracting situations to be a crucial point in the proposed directive. It provides for protection of workers in the sector where subcontracting is most prevalent, while at the same time respecting employers' need for certainty with respect to their liabilities. The EESC stresses, however, that the proposal must respect existing systems for several and joint liability in the Member States. The EESC strongly recommends Member States that do not have such systems to introduce them after consultation with the social partners. The EESC encourages the Commission, together with the social partners, to provide a more precise definition of due diligence, as has been done in some Member States. The EESC understands the concept of due diligence to mean, without prejudice to the social dialogue at the national level, that companies that perform adequate checks and controls of subcontractors should not be held liable.

Brussels, 19 September 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON
