

Non-paper from LO, TCO and Saco Amendments to the Proposal for Amending the Posting of Workers Directive

These draft amendments indicates the most urgent amendments to the proposal for amending the Posting of Workers Directive (PWD) presented by the Commission 8 March 2016.¹ This non-paper is work in progress, in particular concerning the proposed introduction of time-limits for the posted workers. However, what is needed in the upcoming legislative process are firstly, a clarification on the Member State competence on defining and setting the levels of remuneration, secondly, reducing the scope for interpretation for the European Court of Justice (ECJ) within the PWD and thirdly, transparency as to the conditions applicable.

1. Legal basis

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1) and 62 thereof,	Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62, 151 and 153 thereof,

Comments

Broadening of the legal basis to address the fact that objective of the PWD is to protect not only the service providers but workers as well.

2. The right to collective action

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
RECITAL 9 (9) It is settled case law that restrictions to the freedom to provide services are	RECITAL 9 (9) It is settled case law that restrictions to the freedom to provide services are

¹ 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 Document number: COM(2016)128/F1

only admissible if justified by overriding reasons in the public interest and must be proportionate and necessary.	only admissible if justified by overriding reasons in the public interest and must be proportionate and necessary. <i>This Directive shall not affect in any way the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.</i>
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Comments

It needs to be clear that the PWD doesn't restrict collective action. Therefore a so called Monti clause should be included, see for example the Services Directive.

3. Labour cost competition in the Internal Market

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
RECITAL 11 (11) In a competitive internal market, service providers compete <i>not only</i> on the basis of a labour costs but <i>also</i> on factors such as productivity and efficiency, or the quality and innovation of their goods and services.	RECITAL 11 (11) In a competitive internal market, service providers <i>should not</i> compete on the basis of a labour costs but on factors such as productivity and efficiency, or the quality and innovation of their goods and services.

Comments

The basis for competition should never be considered to be labour cost or wage competition. It's in direct contradiction with article 151 of the TEUF.

4. National competence on remuneration

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
RECITAL 12 (12) It is within Member States'	RECITAL 12 (12) It is within Member States'

competence to set rules on remuneration in accordance with their law and practice. However, national rules on remuneration applied to posted workers must be justified by the need to protect posted workers and must not disproportionately restrict the cross-border provision of services.	exclusive competence to set rules on remuneration in accordance with their law and practice. National rules must be applied in a transparent manner.
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Comments

There must be total certainty as to Member States exclusive competence in the area of wages and remuneration. See amendment to article 3.1 paragraph 2 as well.

5. Transparency

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
RECITAL 13 (13) The elements of remuneration under national law or universally applicable collective agreements should be clear and transparent to all service providers. It is therefore justified to impose on Member States the obligation to publish the constituent elements of remuneration on the single website provided for by Article 5 of the Enforcement Directive.	RECITAL 13 (13) The elements of remuneration under national law or universally applicable collective agreements should be clear and transparent to posted workers and service providers. It is therefore justified to impose on Member States the obligation to publish the constituent elements of remuneration on the single website provided for by Article 5 of the Enforcement Directive.

Comments

Transparency is important not only for the service providers but for the posted workers as well. This directive shouldn't only address the interest of the service providers.

6. Time limits for posting

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
NEW ARTICLE 2a Posting exceeding twenty-four months 1. When the anticipated or the effective	NEW ARTICLE 2a NO AMENDMENTS CURRENTLY

<p>duration of posting exceeds twenty-four months, the Member State to whose territory a worker is posted shall be deemed to be the country in which his or her work is habitually carried out.</p> <p>2. For the purpose of paragraph 1, in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers concerned shall be taken into account, with regard to workers that are posted for an effective duration of at least six months.</p>	
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Comments

The proposal contains a time limit regarding posted workers. However, the practical and legal effects of the proposed time limit are difficult to assess. However, we fear that the drafting of the provision, especially by making the time-limit dependent on 6-month-periods, makes it very easy to circumvent the regulation by periodically replacing the posted workers.

It is doubtful that the PWD should be used to solve problems directly linked to the Rome I Regulation and 883/04-Regulation. Rules on the conflict of laws of the individual employment contract are already included in the Rome I Regulation, the current PWD and the Enforcement Directive. The introduction of a fixed time limit seems to contribute to an unnecessary complex and more ambiguous legal situation, which also seems to contradict principles within Private International Law.

LO, TCO and Saco consider that further clarifications and a clear impact assessment is needed.

7. National competence on remuneration

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>ARTICLE 3.1 paragraph 2</p> <p>For the purpose of this Directive, remuneration means all the elements of remuneration <i>rendered mandatory</i> by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration</p>	<p>ARTICLE 3.1 paragraph 2</p> <p><i>It is the Member States' exclusive competence to set rules on and define the concept and levels of remuneration in accordance with their law and practice.</i> For the purpose of this Directive, remuneration means all the elements of remuneration <i>according to</i> national law, regulation or administrative provision, collective agreements or</p>

awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in the Member State to whose territory the worker is posted.	arbitration awards which have been declared universally applicable and/or, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, other collective agreements or arbitration awards within the meaning of paragraph 8 second subparagraph, in the Member State to whose territory the worker is posted.
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Comments

There must be total certainty as to Member States exclusive competence in the area of wages and remuneration. See amendments to recital 12 as well.

8. Transparency

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>ARTICLE 3.1 paragraph 3</p> <p>Member States shall publish in the single official national website referred to in Article 5 of Directive 2014/67/EU the constituent elements of remuneration in accordance with point (c).</p>	<p>ARTICLE 3.1 paragraph 3</p> <p>Member States shall, <i>with full respect for the autonomy of the social partners, and in co-operation with the social partners</i>, publish in the single official national website referred to in Article 5 of Directive 2014/67/EU the constituent elements of remuneration in accordance with point (c).</p>

Comments

Any introduction of obligations for the Member States when it comes to publishing elements of remuneration need to take into consideration that wages and many elements stemming from collective agreements are civil law instruments. Due respect should be taken to the parties behind the collective agreements. Respect and involvement therefore needs to be emphasised.

9. Clarification on annual holidays

TEXT OF THE PROPOSAL FOR AMENDING DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>Article 3.1</p> <p>1. Member States shall ensure that,</p>	<p>Article 3.1</p> <p>1. Member States shall ensure that,</p>

<p>whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers 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:</p> <p>– by law, regulation or administrative provision, and/or</p> <p>– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:</p> <p>(a) maximum work periods and minimum rest periods;</p> <p>(b) minimum paid annual holidays</p> <p>(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;</p> <p>(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;</p> <p>(e) health, safety and hygiene at work;</p> <p>(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;</p> <p>(g) equality of treatment between men and women and other provisions on non-discrimination.</p>	<p>whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers 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:</p> <p>– by law, regulation or administrative provision, and/or</p> <p>– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8:</p> <p>(a) maximum work periods and minimum rest periods;</p> <p>(b) <i>at least</i> minimum paid annual holidays</p> <p>(c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;</p> <p>(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;</p> <p>(e) health, safety and hygiene at work;</p> <p>(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;</p> <p>(g) equality of treatment between men and women and other provisions on non-discrimination.</p>
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Comments

The aim of the revision of the PWD is to restore the notion of equal treatment. As a consequence also remaining elements of the so called hard core in article 3.1 should be adjusted.