

RESOLUTION
of the Sejm of the Republic of Poland

of 13 April 2016

declaring the 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 as incompatible with the principle of subsidiarity

The Sejm of the Republic of Poland, pursuant to Article 148cc of the Standing Orders of the Sejm, finds that the 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 is incompatible with the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union. This proposal infringes the principle of subsidiarity as the proposed Directive does not guarantee that the objectives of the proposed action would be better achieved at the European Union level than as a result of measures taken at the national level. The reasoned opinion stating the reasons why the Sejm considers that the proposal does not comply with the principle of subsidiarity is annexed to this Resolution.

Annex to the Resolution
of the Sejm of the Republic of Poland
of 13 April 2016

The reasoned opinion of The Sejm of the Republic of Poland of ... stating reasons why the Sejm considers that the 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 does not comply with the principle of subsidiarity

The Sejm of the Republic of Poland considers that the 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 (COM(2016) 128 final) does not comply with the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union (TEU). This proposal infringes the principle of subsidiarity as the proposed Directive does not guarantee that the objectives of the proposed action would be better achieved at the European Union level than as a result of measures taken at the national level.

The stated aim of the proposed Directive is addressing the problem of unfair practices and promoting the principle that the same work at the same place should be remunerated in the same manner. These aims are to be achieved through the introduction of the obligation to apply the labour law of the state to which the worker is posted when the duration of posting exceeds twenty-four months, the change of the remuneration of such workers from the minimum rate of pay including overtime rates to the remuneration including overtime rates, and the establishment of the same remuneration for posted workers employed in subcontracting chains and employees of the main contractor by applying the conditions of employment applied by the main contractor.

According to the assessment of the Sejm, the proposal does not guarantee that these objectives will be better achieved – within the meaning of Article 5(3) of the TEU and Article 5 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality enclosed to TEU and the Treaty on the Functioning of the EU (TFEU) – than by the Member States applying their national regulations. In the opinion of the Sejm, the principle, currently in force in European Union law, of applying the minimum wage of the Member State to which the worker is posted, ensures appropriate social protection of workers, while at the same time taking into account natural differences in the level of economic development between the Member States, which translate into differences in wages. For this reason, the Sejm considers that further alignment of wage levels in the Member States should come as a consequence of further economic development of individual Member States, and not from the European Union’s legislative action.

The proposal lacks any justification of compliance of the proposed Directive with the principle of subsidiarity. The only sentence stating that “an amendment to an existing Directive can only be achieved by adopting a new Directive” cannot be considered as such justification.

In the opinion of the Sejm, this sentence can in no way be considered as justification of compliance of the proposed Directive with the principle of subsidiarity. The fact that a Directive can be amended by adopting a new Directive does not mean that the measures proposed as amendments to the existing Directive have to be implemented at all at European Union level. The Commission did not state any reasons justifying that the objectives of the proposed amendments to the Directive cannot be better achieved through regulations at the national level. Lack of such justification, in particular lack of any quantitative and qualitative indicators, constitutes an infringement of Article 5 of Protocol (No 2). Furthermore, it makes it extremely difficult, if not impossible, for the national parliaments to use their right to scrutinise the respect for the subsidiarity principle (Article 5(3), Article 12(b) of the TEU and Article 6 of Protocol (No 2)). As a result, it can also be considered as an infringement of Article 4(3) of the TEU which states that, pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

Article 3 (1) of Directive 96/71/EC stipulates that the Member States ensure that, whatever the law is applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters: maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertaking, health, safety and hygiene at work, 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, equality of treatment between men and women and other provisions on non-discrimination. This provision is applicable when the issues listed therein are governed in the Member State where the work is carried out, by:

- laws, regulations or administrative provisions, or
- collective agreements or arbitration awards which have been declared universally applicable, insofar as they concern the activities referred to in the Annex.

The proposed new Article 3 (1) of Directive 96/71/EC provides for, among others, the removal of the reference to “the activities referred to in the Annex”. Removing the reference to the Annex means that universally applicable collective agreements shall apply to employees posted in all sectors of the economy, regardless of whether these activities are listed in the Annex to the Directive (now this requirement applies only to the building sector).

The Sejm wishes to point out that Article 3 (10) of the Directive 96/71/EC clearly allows the Member States to extend the application of terms and conditions of work and employment laid down in collective agreements or arbitration awards to activities performed by employees other than those referred to in the Annex. The adoption of the proposed provision will result in obligatory extension of the scope of universally applicable collective agreements to all posted employees, in all sectors of the economy.

According to the information presented in the working document accompanying the proposed directive: Impact Assessment (SWD(2016)52 final; item 4.3.2), the adoption of the proposed measure may have an impact on only four Member States. The remaining States either used the option of extension of the scope of universally applicable collective agreements to all sectors of the economy (11 Member States) under Article 3 (10) of the Directive, or did not make collective

agreements universally applicable within the meaning of the Directive (14 countries, including Poland).

The Directive gives the Member States the freedom to decide whether to make collective agreements universally applicable and whether to apply their provisions - in relation to posted workers – to all sectors of the economy or only to the sectors set out in the Annex to the Directive. The information presented in Impact Assessment indicates that Member States use these options. Over one third of the Member States introduced the regulations proposed by the Commission in their territory. The remaining countries used the option not to introduce the proposed measures.

The Commission has not demonstrated that the purpose of its action cannot be sufficiently achieved by the Member States, all the more so because, as indicated in information presented by the Commission itself, the proposed changes will have an impact on a narrow minority of the Member states.

They will also not translate into the adoption of a uniform standard in terms of applying equal rights for all posted workers within the entire EU, as the Directive leaves the decision regarding the introduction of universally applicable collective agreements with the Member States.

Therefore, in the Sejm's opinion, it should be recognised that the proposed change of Article 3 (1) of the Directive 96/71/EC with regard to removing the reference to the Annex is a breach of the subsidiarity principle.

The proposed Article 3 (1b) of the Directive 96/71/EC is intended to replace Article 3 (9) of the Directive, which is currently in force. Under the current state of law, the Member States may provide that undertakings posting workers temporarily must guarantee the terms and conditions of employment applicable to temporary agency workers in the Member State in whose territory the work is carried out. The information presented in the Impact Assessment indicates that 15 Member States used this option. The remaining states, including Poland, did not introduce any regulation in this regard (item 2.4.2 of the Impact Assessment).

According to the proposed provision, the Member States will be obliged to guarantee that undertakings posting workers temporarily guarantee the terms and conditions of employment foreseen in Article 5 of the Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency

work (Article 5 refers to the principle of equal treatment), therefore that they will guarantee the terms and conditions of employment applicable to temporary agency workers hired out by temporary work agencies having their registered offices in the Member State in whose territory the work is carried out.

The Sejm wishes to point out that the existing laws in the European Union give the Member States the option to align the rights of workers posted temporarily to another Member State with the rights of temporary agency workers hired out by temporary work agencies having their registered offices in the Member State in whose territory the work is carried out. There are no obstacles in place that would prevent the Member States from adopting such provisions on the basis of the labour market analysis in relation to protecting interest of undertakings and workers. If the Member States assume that such provisions are necessary in order to ensure equal terms and conditions for undertakings operating in their territory, they may introduce them. As indicated in the data presented by the European Commission, over half of the Member States have introduced such provisions. It should be concluded that the States which have not introduced such measures assume that they are not necessary to secure interests of undertakings and workers.

In the Sejm's opinion, it should be concluded that the assessment of the necessity to align the rights of temporarily posted workers may be better achieved by the Member States, rather than by the European Commission. There is no need for this issue to be regulated in a uniform way in all the EU Member States. The Commission has not demonstrated that the goal envisaged by the Commission cannot be sufficiently achieved by the Member States themselves.

Therefore, it should be concluded that the proposed Article 3 (1b) of the Directive 96/71/EC is a breach of the subsidiarity principle.

To summarise: in the Sejm's opinion the 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 (COM(2016) 128 final) is in breach of the subsidiarity principle.