

Opinion

Of the European Affairs Committee of the Saeima, 5 May 2016

On COM (2016) 128 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

According to Article 185¹ (1) of the Rules of Procedure of the Saeima, the Saeima shall participate in EU affairs through the European Affairs Committee unless the Saeima has ruled otherwise. At its meeting held on 5 May 2016 the European Affairs Committee of the Saeima decided to submit to the European Commission (hereinafter - Commission) a reasoned opinion on Proposal of 8 March 2016 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 (hereinafter - Proposal).

Upon conducting a subsidiarity check pursuant to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, the European Affairs Committee of the Saeima has identified several flaws in the Proposal and considers that it does not comply with the principle of subsidiarity:

1. According to Article 2 of the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality to the Treaty on the Functioning of the European Union, "Before proposing legislative acts, the Commission shall consult widely". However, in this case the consultations cannot be considered as conducted widely. Furthermore, the results of the consultations have not been considered properly. The European Affairs Committee of the Saeima believes that the consultations with the EU member states and social partners that are especially concerned about the dismissive attitude on the part of the Commission towards social dialogue, have been insufficient both in terms of quantity and quality. The Commission has indicated in the Explanatory Memorandum that it has collected a variety of opinions;

however, consultations with member states had been limited to letters from two groups of countries, where one group urged the Commission to devise a proposal for amending Directive 96/71/EC¹, while the other group of countries urged to carefully evaluate the impact of implementing Directive 96/71/EC² before taking rush decisions. Nevertheless, the Commission has prepared a Proposal which only considers the position of some member states, while ignoring a considerable number of member states holding an opposing opinion, thus, according to The European Affairs Committee of the Saeima, undermining the unity of EU member states in further discussions. Likewise, social partners also have diverse views on the Commission's published Proposal. The European Affairs Committee of the Saeima believes that such a fundamental change in approach to the scope of posted workers' rights requires in-depth consultations with social partners in order to achieve a consensus among the stakeholders.

The justification regarding compliance with the principle of subsidiarity is insufficient. Article 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality provides that "Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality". The subsidiarity check is aimed at determining whether the justification of the Commission's initiative and the added value is clearly derived from the proposal and whether it is sufficiently reasoned. The Proposal includes just one sentence on subsidiarity, which does not provide sufficient information to conduct a proper subsidiarity check.

In addition, the Proposal includes changes that are perceived as rather contradictory among member states. Until now the issues in question have been regulated at the national level. Therefore, the Commission should have provided a proper substantiation, which would exceed the currently brief reference to the previous legal act and the statement that the directive is amended by adopting a new directive. Since the adoption of Directive 96/71/EC of the European Parliament and of the Council on 16 December 1996 the European Union has undergone substantial changes due to the enlargement, and thus the reasoning behind the Proposal should reflect the changed circumstances.

¹ 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

² Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')

2. The European Affairs Committee of the Saeima supports the fight against unfair practices in posting of workers and is of the opinion that Directive 2014/67/EU, as well as the recently established European Platform to improve cooperation in prevention of undeclared work will significantly contribute to improving the situation. The Saeima is currently examining amendments to the Labour Law that will transpose the requirements of Directive 2014/67/EU, the goal of which is to solve practical problems in posting of workers. Due to the fact that all regulatory and administrative acts necessary to fulfil the requirements of Directive 2014/67/EU must take effect in EU member states by 18 June 2016, the European Affairs Committee of the Saeima is of the opinion that new and extensive amendments to regulations regarding posting of workers should be made only after the results of implementation of Directive 2014/67/EU have become available and have been analysed.

It must be noted that in the 2012 impact assessment, which was published together with the proposal for Directive 2014/67/EU, the Commission acknowledged that revision of the rules for posting of workers would be a disproportionate solution with an adverse effect on the functioning of the internal market. Likewise, the Commission noted that rules regarding equal remuneration for posted workers and local worker would have an adverse impact on low-wage countries, and would increase the risk of undeclared employment, whilst also reducing the flow of legally posted workers.³ Therefore, the European Affairs Committee of the Saeima is of the opinion that the Proposal is premature, and there are doubts whether the Commission has a reasoned and evidence-based strategy for dealing with posting of workers in a complex manner.

3. The European Affairs Committee of the Saeima is of the opinion that the Proposal contradicts the Commission's politically declared principle of focusing on important EU level action and better regulation, which is crucial in examining the proportionality aspect of the Proposal. The Explanatory Memorandum of the Proposal states that posting of workers plays an essential role in the Internal Market. At the same time, the Memorandum also notes that in 2014 only 0.2 – 0.7% (depending on methodology, as also mentioned in the Commission's impact assessment) of the total EU labour force were posted to work in another member state. The European Affairs Committee of the Saeima has serious doubts whether the fundamental amendments (going beyond "minimum requirements" approach, which has so far been

³ *Impact assessment, Revision of the legislative framework on the posting of workers in the context of provision of services Accompanying the document Proposal for a Directive of the EP 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*, p. 63-64.

considered a balanced solution protecting the rights of workers and ensuring the functioning of the single market) to rules governing the posting of workers as contained in the Proposal will achieve the stated objective of improving the Internal Market and promoting the freedom to provide services.

4. Regarding the content of the Proposal, which is essential in assessing its compliance with the subsidiarity principle, the European Affairs Committee of the Saeima considers that it is disproportionate to change the provisions of the existing Directive 96/71/EC and to move from the minimum salary requirements to implementation of the principle of equal wages for posted workers without considering the additional costs the employer would incur from posting employees in the framework of the provision of services. Equal pay principle in itself is welcome, provided that the circumstances are equal and no obstacles are created to the free provision of services in the European Union; however, in the case of posting of workers, posted workers and local workers are in different positions. Residence and employment of posted workers in the host member state are temporary, and they do not form a lasting relationship with the host country. Moreover, businesses posting employees, in addition to wages also bear other costs related to posting employees, such as transport costs, employee subsistence expenses, and administrative costs. Thus, by introducing the principle of equal pay for local and posted workers, posting companies are placed in a less favourable position than local companies, which not only does not contribute to fair competition, but even threatens it.

The European Affairs Committee of the Saeima considers that the Commission's arguments for a just and fair competition are neither farsighted nor objectively justified, taking into account the socio-economic differences between member states, as well as the fact that sustainable convergence in terms of wages is a lengthy process and should be executed over a longer timeframe with a longer transitional period.

5. The European Affairs Committee of the Saeima believes that the provisions regarding posting of workers that will come into force in June 2016 are sufficient and provide employees with adequate protection of their interests. In addition, the existing rules, contrary to the Proposal, do not present the problems of unreasonable application; in particular, that applies to the Commission's intention to set a 24-month period after which the laws of the host country should apply. Workers are usually posted for a short period of time (4 months on average), but in some cases exceptions are possible; this aspect is also taken into account in

the *acquis* dealing with the issues of posting of workers, including social security and civil rights.⁴ Thus, the European Affairs Committee of the Saeima has doubts whether the Proposal complies with other legal acts of the European Union.

The European Affairs Committee of the Saeima calls on the Commission to take into account the above considerations and to revise the Proposal.

⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations