



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Seimas for its reasoned opinion on 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}.

As the Commission received reasoned opinions from fourteen chambers in eleven Member States, it confirmed on 11 May 2016 the triggering of the procedure laid down in Article 7(2) of Protocol No 2 to the Treaties.

The Commission attaches great importance to its relationship with national Parliaments, notably when it comes to the principle of subsidiarity. Forging a new partnership with national Parliaments and ensuring that their voice is strong in European decision-making is a priority for this Commission.

In line with this commitment, the Commission carefully analysed the reasoned opinions received, including that submitted by the Seimas. It engaged directly with representatives of the national Parliaments at the COSAC meetings of 13 June 2016 and 11 July 2016 before drawing its conclusions.

The procedure laid down in Article 7(2) of Protocol No 2 is exclusively focused on the principle of subsidiarity. Therefore, the Commission has adopted on 20 July 2016 a Communication to the European Parliament, the Council and the national Parliaments on the proposal {COM(2016) 505 final}, in which it addressed the different concerns and arguments on subsidiarity raised by the Seimas, as well as by other national Parliaments in their reasoned opinions. The Commission concluded that its proposal complies with the principle of subsidiarity enshrined in Article 5(3) of the Treaty on European Union and decided therefore to maintain the proposal.

The Seimas included in its reasoned opinion also other arguments and concerns not related to subsidiarity. Given their political relevance, the Commission has analysed those arguments in detail as well and wishes to provide some elements in this regard. This letter should hence be read in conjunction with the Communication of 20 July 2016.

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The Seimas argues that convergence of wages is brought about by the economic growth of less-developed Member States and wage differences are determined by local factors, including demand for labour, staff qualifications and productivity.

As indicated in the Communication of 20 July 2016, the objective of the proposal is not to align wages across Member States. The problem which the proposal is addressing is not that wage levels in the home and the host Member State are different. The problem is that the rules on remuneration applying to local workers and posted workers in the host Member State are different: local workers are protected by comprehensive sets of mandatory rules on remuneration laid down by law and applicable collective agreements, while posted workers are only entitled to the "minimum rates of pay" applying in the host country. The Commission considers the existing situation to be unfair as posted workers are not protected by the same mandatory rules on remuneration as local workers for the same work carried out in the same location.

In other words, the proposal does not aim to ensure that work in Lithuania and in other Member States is remunerated with the same wages or according to the same rules. Rather, the objective is to ensure that work carried out within a Member State is remunerated according to the same rules, irrespective of whether that work is carried out by a local worker or by a posted worker. Wages and rules on remuneration may and would hence continue to differ between Member States.

The Commission would also like to underline that the proposal does not equalise pay between local and posted workers. Instead of an equalisation of pay, the proposal retains the option of applying to posted workers the rules on remuneration that are mandatory to all national workers, i.e., rules stemming from law or collective agreements made universally applicable. The proposal therefore strictly avoids any discrimination against cross-border service providers and improves the level playing field in the provision of services.

By doing so, the proposal does not in any way interfere with social partners' right to engage and eventually agree on a collective agreement, nor with the competence of the national Government to make such a collective agreement universally applicable or not.

Specific EU policies are in place to promote the economic development of individual Member States and to promote upwards convergence in economic and social conditions across the Union, such as the cohesion policy, social and employment policy and the European Semester. The Commission will continue to pursue these policies with vigour, in close cooperation with the Member States. However, the fact that economic development will bring more convergence in wages over time does not remove the necessity to ensure - also in the interim - a level playing field for businesses and appropriate protection of posted workers.

The Seimas also considers that the impact assessment accompanying the proposal lacks a detailed and objective evaluation of the proposal on economic and social sectors, including small and medium sized enterprises (SMEs) and administrative burden. According to the

Seimas, the impact assessment is not based on reliable data or on qualitative or quantitative indicators.

The Commission finds that the impact assessment report recognises, in a transparent way, the limitations of the available data on the number of posted workers, but also, for instance, on the earnings of posted workers. This being said, such limitations should not be overestimated. For example, the comparison between the EU data on the number of postings and the data at national level (in the few cases where they are available) shows that EU data based on the PD A1 forms do not distort the reality.

The impact of the proposal on SMEs has also been addressed in the impact assessment report. The proposal may indeed reduce, but will not entirely remove, the total labour cost advantages of SMEs in low wage countries given the differences which will continue to exist in social security contributions and taxation. In addition to the remaining scope for labour costs competition, SMEs will continue to be able to compete on quality of service, specialization and innovation and their services will continue to be required because of skills shortages and labour shortages in other Member States.

Furthermore, concerning the administrative burdens, the Commission would like to stress that the proposal would not add any administrative requirements to the ones foreseen in the 2014 Enforcement Directive. Under the 1996 Directive posting firms are obliged to verify the minimum rates of pay applicable in the sector concerned in the host country. Under the new proposal, posting firms would have to verify which rules on remuneration apply in the sector concerned in the host country, but it would be easy for them to do so as the host country is obliged to publish those rules on a single national website on posting.

The Seimas also considers that the proposal should not have been adopted before the implementation and evaluation of the 2014 Enforcement Directive¹.

As indicated in the explanatory memorandum and in the impact assessment report (see point 2.2 of the report, p. 9), the 2014 Enforcement Directive has provided for new and strengthened instruments to fight and sanction circumvention, fraud and abuses. It addresses problems caused by so-called "letter-box companies" and increases the Member States' ability to monitor working conditions and enforce the applicable rules. The deadline for Member States to transpose the Enforcement Directive into national law expired on 18 June 2016. The European Platform for the fight against undeclared work, which has recently been established and held its first meeting on 27 May 2016, provides national enforcement authorities with a new forum to exchange information and best practices and coordinate actions to tackle undeclared work and bogus self-employment, including in the context of posting.

¹ 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.

Whilst those instruments help to ensure that the rules on posting are complied with, they do not remedy the specific problems which the Commission identified in its impact assessment and which pertain to the rules laid down in the original 1996 Directive. Against the background of the current economic and social conditions in the Member States, the existing rules no longer ensure that the freedom to provide services in the EU takes place under conditions that guarantee a level playing field for businesses and the appropriate protection of workers' rights. As indicated in the impact assessment report (see point 2.3 of the Report, p. 13), the gap between Member States on minimum wages has constantly increased since 1996, from a ratio between the lowest and the highest minimum wage of 1:3 to 1:10. The structural differences in wage rules applying to posted and local workers are under certain circumstances substantial, which is a source of an un-level playing field and does not grant fair treatment to posted workers who are paid less for the same work at the same location. Moreover, the rules laid down in the 1996 Directive have proven not always to provide sufficient legal certainty, for example as regards the question when a posted worker is deemed to have moved his habitual place of work to the host Member State.

The current proposal and the 2014 Enforcement Directive are therefore complementary to each other and mutually reinforcing.

Finally, the Seimas points out that the Commission did not ensure adequate consultations and underestimated the objective differences and arguments of socio-economic partners. On this issue, the Commission would like to draw the attention to point 1.2 of the impact assessment report concerning the consultation process, as well as to Annex III to the report. The Commission's intention to propose a targeted revision of the Posting of Workers Directive was announced well in advance, was discussed with social partners and was extensively commented upon by stakeholders. The Commission has taken those comments into account in drawing up its proposal.

The points made in this reply and in the Communication are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council in which the Lithuanian government is represented.

The Commission hopes that the clarifications provided in the Communication and in this reply address the issues raised by the Seimas and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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First Vice-President*

*Marianne Thyssen
Member of the Commission*