



EUROPEAN COMMISSION

Brussels, 20.7.2016

C(2016) 4831 final

Dear President,

The Commission would like to thank the Senat 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 the European decision-making process is a priority for this Commission.

In line with this commitment, the Commission carefully analysed the reasoned opinions received, including that submitted by the Senat. It engaged directly with representatives of 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 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 raised by the Senat as well as by other national Parliaments in their reasoned opinions, on the principle of subsidiarity. 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 its proposal.

All arguments and concerns expressed in the Senat's reasoned opinion relating to the principle of subsidiarity have been addressed in the Communication.

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In addition, the Commission would like to provide the following further elements, related to the opinion issued by the Senat.

In its opinion, the Senat considers that the Commission has not given adequate justification for adopting the proposal before the expiry of the deadline for transposing the 2014 Enforcement Directive¹ into national law.

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 2014 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.

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 Commission proposal and the Enforcement Directive are therefore complementary to each other and mutually reinforcing.

The Senat argues that the proposal introduces additional administrative burden for companies without clarifying what could be the actual benefit for posted workers.

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 ('the IMI Regulation'), OJ L 159, 28.05.2014, p. 11.

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 will 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 Senat also argues that the proposal would not ensure greater transparency and clarity, in particular when the duration of posting exceeds 24 months.

The Commission believes that its proposal would indeed bring legal clarity and certainty to service providers, posted workers and monitoring authorities, essentially by replacing the notion of "minimum rates of pay" by the more intuitive notion of "remuneration", but also when it proposes to align the provisions of the Directive with other EU legal acts. This is particularly the case for the alignment with the Regulation on social security coordination², which also provides for different rules whenever posting exceeds 24 months.

The Senat notes that both Article 3(1)(a), which poses new obligations with respect to subcontractors, and Article (3)(1)(b), which addresses posted workers employed by temporary work agencies, restrain the Members States' regulatory discretion to decide with regard to both issues

The Commission would like to recall that the proposal does not call into question Member States' competence to decide, subject to the existing provisions of EU law and notably Directive 2008/104/EC on temporary agency work, on pay as well as on the terms and conditions for temporary agency workers. Rather, it is the aim of the proposal to oblige Member States to align the basic working and employment conditions applicable to workers hired out by a temporary work agency in a domestic context with those applicable to posted temporary workers.

Finally, the Senat is concerned about the impact of the proposal on small and medium-sized enterprises (SMEs).

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

² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.04.2004, p. 1.

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 Polish government is represented.

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

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Marianne Thyssen
Member of the Commission*