Parliament of Romania
Chamber of Deputies

Decision
approving the 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

Pursuant to Articles 67 and 148 of the Romanian Constitution, republished, Law No 373/2013 on cooperation between Parliament and the Government in the area of European affairs, and Articles 160 to 185 of the Rules of Procedure of the Chamber of Deputies, republished,

The Chamber of Deputies hereby adopts this Decision.

Sole Article - Having regard to Reasoned Opinion No 4 c-19/371, adopted by the Committee for European Affairs at its meeting of 5 April 2016,

1. We find that the conditions laid down by the Treaties for the Proposal to be subject to parliamentary scrutiny of subsidiarity are fulfilled, because it is a legislative instrument and it is not the exclusive competence of the European Union, within the meaning of Article 4(1) and Article 5(2) TEU and Article 2(6) TFEU.

2. We consider that the transnational aspects are obvious, which would justify action at EU level in order to reach the set goals, if those goals were really in line with the Union's values, principles and Treaties, and with the major political commitments made by the Member States to achieve economic and social convergence throughout the Union.

3. We find that the arguments for the utility of the Proposal are valid and sufficient in terms of the insufficiency of national action, but not also in the light of the principle of added value.

4. We find that the Proposal's legal basis does not fully match its regulatory content, because the proposed amendments are based on Articles 56 and 59 TFEU, which refer to removing restrictions on the freedom to provide services within the Union, in respect of nationals of Member States who are established in another Member State, while the Proposal actually relates, at least in declaratory terms, to the protection of workers.

5. We consider that any amendment to current rules must comply with Article 56 TFEU, which requires removing any provisions that may hinder or make less attractive the services of providers established in a Member State other than the one where where they provide their services. This also applies even if the provisions in question are applied without discrimination both to national providers of services and to providers in other Member States of the EU.

6. We recall that the judgments of the Court of Justice of the European Union have acknowledged the protection of workers as an imperative of general interest that may justify barriers to the provision of services, but only provided that such barriers are appropriate and proportionate so as to ensure achievement of the legitimate objectives pursued, which means that they should not exceed what is necessary in order to reach those goals.

In this context, we consider that it is necessary first to assess the effects of transposition in the Member States of the European Union, of Directive 2014/67/EU, before proposing,

depending on the conclusions of such assessment, any amendments and/or additions to the text of Directive 96/71/EC.

7. We recall that the case law of the Court of Justice of the European Union has established that discrimination means cases where persons in similar situations are treated differently, and that posted workers are in a different situation compared to local workers.

We would stress, therefore, that any differences in rates of pay between posted and local workers cannot be regarded as discrimination.

8. Recalling that posted workers represent only 13 % of all mobile workers, and most of them are posted lawfully, that workers posted from countries with wages under the EU average represent only 0.3 % of all employees, and that workers posted from low-wage countries represent only 50 % of all posted workers, we would express very serious reservations as to the Commission's arguments justifying the need for the proposed regulatory act and, implicitly, to the added value thereof.

9. We recall that the current provisions of Directive 96/71/EC referring to minimum rates of pay already provide the necessary framework to ensure fair competition between employers who post workers and other providers in the host country.

We consider that differences arising from bonuses, compensations, allowances, and other similar emoluments are not so large as to justify the Commission's regulatory initiative, and this results in a deficit of added value.

10. We note that, although the Commission has based its proposal on Article 31 of the Charter of Fundamental Rights, which lays down the right to working conditions which respect the worker's health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave, it has ignored Article 15 of the Charter, which refers to the freedom to choose an occupation and the right to engage in work.

We would point out that workers cannot exercise their rights under Article 15 if in practice they are not allowed to accept a certain payment for the services provided.

11. We consider that Articles 2 and 5 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, referring to the Commission's obligation to consult widely with the stakeholders and to take into account the regional and local dimension of the action envisaged, and the obligation to give reasons demonstrating compliance with the principle of subsidiarity based on qualitative and quantitative indicators, have not been complied with.

In this respect, we find that even the impact assessment indicates a lack of sufficient statistical data for many of the proposals, including the number of workers posted for more than 24 months, and for the proposed measures relating to subcontracting. The available data are just estimates.

We note that the impact assessment has not demonstrated the presence of a wide-ranging phenomenon requiring action at EU level.

We note, and express our surprise, that despite the repeated demands made by European social partners that they be consulted before the adoption of the Proposal, the Commission has not responded yet.

We find that the impact assessment shows that the Proposal may have adverse effects, especially with regard to the loss of services contracts for providers from low-wage countries, or a general increase in the cost of transnational services, but it does not examine such aspects and does not provide a comprehensive analysis of the financial implications for the internal market of the EU.

We note that the impact assessment has ignored the additional costs relating to transport, housing, providing information on applicable rules, translation of documents, etc., which are to be covered by the service providers who post workers.

We find that, although the impact assessment mentions the intention to ensure equal treatment for posted and local workers, so that posted workers are treated as EU mobile workers within the meaning of Article 45 TFEU in the host Member State, it does not contain any analysis of the way in which the proposed amendments will interfere with Regulation (EU) No 492/2011 on freedom of movement for workers or Directive 2014/54/EU on measures facilitating the exercise of their rights, or any explanation as to how posted workers would receive the same treatment as local workers when they are prohibited from willingly accepting certain pecuniary rights.

12. We find that, in accordance with the rules in force, Member States may take appropriate measures to ensure that temporary posted workers receive the same treatment as temporary national workers.

We note that, according to the impact assessment, to date 15 Member States have decided to use this option. Therefore, we consider that amending the EU legal provisions in this area is neither justified nor necessary.

13. We consider that the new rule on subcontracting will lead to the use of collective agreements that do not meet the criteria of universal applicability. Furthermore, it may become necessary to use non-universal collective agreements in the Member States that have already declared that they use collective agreements with universal applicability. Therefore, we consider that intervening at EU level, to extend the scope of the Proposal for a Directive, is neither justified nor necessary.

14. We recall that, with regard to the mandatory application of the general posting rules applying when posting workers via a temporary agency, the host Member State has the option to impose the same rules on temporary agencies in other Member States as on national temporary agencies. Therefore, we consider that the impact of the Proposal for a Directive is unclear and does not seem to fit the purpose.

15. We note that, under the current provisions of Directive 96/71/EC, Member States have the option to extend the scope of collective agreements or arbitration awards that have been declared universally applicable to all sectors. The impact assessment indicates that only four Member States have decided not to use this option.

We consider, therefore, that it is not necessary to impose such obligation at EU level.

16. We point out that replacing the term 'minimum rates of pay' by 'remuneration' may cause legal uncertainty, because the latter is open to wide interpretation and it is not clear whether remuneration is regarded as an amount resulting from the mandatory remuneration elements that workers should receive, or as an imposition of an obligation on providers from other Member States to comply with the pay structure in the host country.

We consider that in the former case the conclusions of the assessment and the relevant case law of the Court of Justice of the European Union would not be used to their full extent, while in the latter case there would be problems where providers would have an obligation, under the law of the host country, to comply with other remuneration elements.

We would caution that this may cause discrepancies between Member States, given that each country will have to set out in its own legislation the definition and structure of such remuneration.

We note that the notion of calculation base, to be determined for the payment of taxes, charges and social contributions by undertakings that post workers to other Member States, is not sufficiently clear.

17. In conclusion, we consider that, should the Commission's proposals be adopted, they will erect barriers to the freedom of providing services and workforce mobility.

18. We would stress that the remarks and reservations in the Opinion adopted following the substantive analysis supplement this Reasoned Opinion.

19. We consider that the Proposal for a Directive does not bring sufficient added value and, therefore, conclude that it breaches the principle of subsidiarity, in particular in respect of the utility of the regulatory initiative.

This Decision was adopted by the Chamber of Deputies at its sitting of 13 April 2016, in compliance with Article 76(2) of the Romanian Constitution, republished.

Valeriu Ştefan Zgonea
President of the Chamber of Deputies

Bucharest, 13 April 2016
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