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From:	Presidency
To:	Permanent Representatives Committee
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Subject:	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 - preparation for the trilogue

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With a view to the meeting of the Permanent Representatives Committee on 14 March 2018, delegations will find attached the current state-of-play of the interinstitutional negotiations with the European Parliament and the Commission.

## **A. INTRODUCTION**

On the basis of the Council's general approach (doc. 13612/17), the Presidency entered into negotiations with the European Parliament on the proposal for a revision of Directive 96/71 on Posting of Workers. Following several rounds of negotiations, a common understanding on the main elements for a possible final compromise has been reached on 28 February.

The Presidency considers that this common understanding would uphold the most important elements of the Council's general approach and ensure that its delicate balance is preserved. Most importantly, it would keep the Council's position on the matters it identified as crucial in a final compromise, namely transport, subcontracting and long-term posting. It would also maintain a single legal basis and most of the elements of the Council's position regarding the allowances.

The following elements were subject to a package deal: subcontracting; transport; long-term posting; transposition/application period and review clause; legal basis; fundamental rights; allowances and non-genuine posting. The Presidency is convinced that the suggested compromise text and solutions represent a balanced package that could be acceptable to the co-legislators and the Commission.

## **B. MAIN ELEMENTS OF THE COMPROMISE PACKAGE**

### **1. REMUNERATION**

The central element of the revised Directive, the replacement of the terms "minimum rates of pay" by the term "remuneration" is preserved in line with the positions of both co-legislators and the Commission's proposal (ROW 64). The concept of remuneration would be determined by national law and/or practice of the Member State to whose territory the worker is posted and would mean all elements rendered mandatory by means of different instruments (law, regulation, administrative provision, collective agreements or arbitration awards) (ROW 71).

2. WEBSITES AND INFORMATION TO EMPLOYERS

The provisions on the single official national website would combine elements of the EP and Council positions and would include the constituent elements of remuneration and the terms and conditions of employment of long-term posting (ROW 72). Should the website not indicate this information, then this circumstance shall be taken into account following national law and/or practice when determining penalties, but only to the extent necessary to ensure the proportionality of such penalties (ROW 73). The corresponding explanatory recital (ROW 34) also combines elements of the EP and Council texts.

3. COLLECTIVE AGREEMENTS

The current Article 3.8 of Directive 96/71 would be modified with the terms "*or in addition to*" added to the second subparagraph (ROW 87). This would mean that, if a Member State so decides, the number of potential collective agreements that they may apply, would increase in those Member States which have a system for declaring collective agreements or arbitration awards to be of universal application.

4. TEMPORARY WORK AGENCIES

The Council's provisions on the information obligations of the user undertaking are maintained (ROW 81 and 82). ROW 89 contains provisions that aim at tackling the phenomenon of chain posting, including information obligations of the user undertaking.

5. MONITORING AND SANCTIONS

The European Parliament's amendments to the monitoring and sanctions provisions (ROW 94) would be accepted in a modified, improved drafting.

6. CORE EMPLOYMENT CONDITIONS

A few modifications would be introduced into Article 3.1. of Directive 96/71 (*hardcore* rights). Aside from Article 3.1.c (ROW 64) on remuneration (see above on remuneration) and Article 3.1(gb) (ROW 70; see below on allowances), the main modification would be the introduction of a new Article 3.1(ga) into the list of hardcore rights relating to *the conditions of workers' accommodation when provided by the employers to workers away from their regular place of work.*

7. PUBLIC POLICY PROVISIONS

The EP's amendments to the public policy provisions would be dropped; the Council's position on ROW 90 and 91 would thus be preserved.

8. COOPERATION ON FRAUD AND ABUSE

The provisional understanding on this matter would be to revise the text of the 96/71 Directive in its articles 4.2 (first subparagraph) (ROW 93) and 5 (ROW 94). All these provisions would seek to reinforce such cooperation. In ROW 94, the EP constantly insisted to include an operative provision on non-genuine posting and made it a part of the package deal. The corresponding recitals in ROW 42 and 43 keep the thrust of the Council's general approach, and ROW 15 takes up an EP amendment.

9. POSTING ALLOWANCES

The EP agreed to work on the basis of the Council's text on allowances, which would be kept with some modifications. In Article 3.1(gb) (ROW 70), the sentence "*It shall not apply to... the Member State in which he normally works*" would be dropped; accordingly, recital 7b (ROW 22) would be adapted with the deletion of the second last phrase. In Article 3.7 (ROW 86), the thrust of the Council's text would be maintained, with some additions from the EP amendment. An interpretative declaration from the Commission would bring greater clarity to the text. In addition, the EP amendment on double payments (ROW 74) would be deleted.

10. LONG-TERM POSTING

After several rounds of negotiations on this key element for both institutions, the EP agreed to accept all the elements of the Council's general approach on long-term posting as part of the overall package. ROW 53, 54 and 55 (Article 3.1(-a)) would be maintained; ROW 56 (EP amendment) would be consequently deleted.

This would imply that a worker would be considered to be long-term posted after a duration of 12 months, plus the possibility of 6 months extension upon motivated notification. The terms and conditions of employment as provided for in Article 3.1(-a) would apply after that period. The negative list would be composed of (a) the procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses and (b) supplementary occupational retirement pension schemes. The concept of "*anticipated duration of posting*" would be deleted. The Council's position as regards the replacement rule and cumulative periods, including the deletion of the 6 months period, would be preserved. Similarly for the clarifications as regards the concept of the "*same task at the same place*".

11. SUBCONTRACTING

After several rounds of negotiations, and despite expectations from the EP to reach a different outcome, the EP eventually accepted the Council's general approach with the deletion of the provisions on subcontracting. This would imply the deletion of the articles in ROW 76, 77 and 78. To facilitate the deletion, mention would be made in the review clause to an assessment of whether further measures are required to ensure a level playing field and protect workers in the case of subcontracting (ROW 102).

## 12. LEGAL BASIS

On the legal basis, it was clear from the outset of the negotiations that both institutions had opposite positions. As this matter was a strong point for both sides, maintaining the Council line without any modifications proved not to be possible. At the last trilogue, both institutions identified a way out: the compromise proposal would maintain the Council's general approach as regards the legal basis (ROW 6). However, a new paragraph putting emphasis on the social aspects of the Directive would be added to Article 1 of the 96/71 Directive in ROW 47 ter, which would now be entitled "*Subject matter and scope*".

## 13. FUNDAMENTAL RIGHTS

As regards the exercise of fundamental rights (ROW 49), a new paragraph would be added in the article relating to "*Subject matter and scope*" which reproduces Article 1.2 of the Enforcement Directive<sup>1</sup> and Recital 11a (Row 29) of the Council general approach.

## 14. ROAD TRANSPORT

On this matter, taking into account the robust positions expressed by delegations, the Presidency repeatedly defended the Council's position and rejected the EP proposal to introduce a *sunset clause*. At the last trilogue, the EP in the end accepted the Council's position without a *sunset clause*. The reference in Article 2(-a) new, introduced in the general approach (ROW 100), linking the application of the amending Directive to the *lex specialis* on the road transport would therefore be maintained. Again, mention would be made in the review clause to an assessment of whether further measures are required to ensure a level playing field and protect workers in the case of the road transport sector (ROW 102).

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<sup>1</sup> Directive 2014/67/EU of the EP and of the Council of 15 May 2014, OJ L 159/11 of 28 May 2015

15. TRANSPOSITION, APPLICATION AND REVIEW

The EP identified the period for transposition as a political priority. On several occasions, the EP powerfully rejected the Council's approach on both, the longer period and the deferred application. As the Parliament accepted other key aspects of the Council position, the Presidency had no other subjects for compensation. We were bound to accept a shorter period for transposition and the same period for application (ROW 97 and 98). Both would be two years after the entry into force of the Directive. National measures which transpose the Directive would start to apply two years after the entry into force. The EP considered this alignment of the application period as a significant concession.

The report on the review (ROW 102) would be due by five years after the entry into force, and would include a specific assessment regarding subcontracting and transport (see above).

These elements establish, in the view of the Presidency, a well-adjusted and reasonable package. A reopening of these core elements risks jeopardising the overall balance achieved in this package.

**C. CONCLUSIONS**

The Permanent Representatives Committee is invited to examine the provisional package of the common understanding presented above and approve the elements presented therein with a view to concluding the negotiations with the European Parliament on this basis.