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**NOTE**

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From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a Directive of the European Parliament 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  - Yellow card

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**I. INTRODUCTION**

For the third time, a yellow card has been delivered on a legislative proposal and for the first time on a file under the Ordinary Legislative Procedure (co-decision)<sup>1</sup>. The threshold of 1/3 required in Protocol no. 2 to the Treaties has been reached as 14 chambers of national parliaments from 11 Member States, representing 22 votes out of 56 in total, have given reasoned opinions.

Following the yellow card, the Commission is now obliged to review its proposal, which may take some time.

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<sup>1</sup> The two previous cases were both proposals for Council regulations: "Monti II" (proposal on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services) and "EPPO" (proposal on the establishment of the European Public Prosecutor's Office).

## II. THE COMMISSION PROPOSAL<sup>2</sup>

The Commission refers to the proposal as a "targeted revision" of the Posting of workers directive from 1996<sup>3</sup>, in order to "address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner". The 1996 directive aims "to establish a balance between the objectives of promoting and facilitating the cross-border provision of services, providing protection to posted workers and ensuring a level-playing field between foreign and local competitors". It sets out a "core set" of terms and conditions of employment of workers that are posted to another Member State for a limited period. These include guarantees of the "minimum rates of pay" applicable in the host Member State to the posted workers.

The revision was foreseen in the Commission Work Programme to be part of a "Labour Mobility Package" together with notably a revision of Regulation 883/2004 (co-ordination of social security systems).

In its explanatory memorandum under the heading **Subsidiarity**, the Commission states:  
*"An amendment to an existing Directive can only be achieved by adopting a new Directive."*

On **Proportionality**, it is stated:

*"The present proposal complies with this requirement since it does not harmonise the labour costs in Europe and is limited to what is necessary to guarantee conditions adapted to living costs and standards of the host Member State for the duration of the assignment of the posted workers."*

*In a highly competitive internal market, competition is based on quality of the service, productivity, costs (of which labour costs are but one part) and innovation. The present proposal does not therefore go beyond what is necessary to achieve its objective."*

## III. THE SUBSIDIARITY PRINCIPLE AND PROTOCOL NO. 2

Article 5 (3) TEU sets out the subsidiarity principle:

*"3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."*

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<sup>2</sup> Document 6987/16.

<sup>3</sup> Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L 018, 21.01.1997).

Protocol no. 2 on the application of the principles of subsidiarity and proportionality sets out the Commission's obligations in relation to subsidiarity. The Commission should inter alia:

- carry out wide consultations, where appropriate taking into account the regional and local dimension;
- justify its proposal with the regard to the principle of subsidiarity (and proportionality). A proposal must be accompanied by a detailed statement enabling an assessment of compliance with the subsidiarity and proportionality principles, including some assessment of the financial impact and impact on national legislation in case of directives. The justification must be substantiated by qualitative and, wherever possible, quantitative indicators.

#### IV. OVERVIEW OF THE REASONED OPINIONS

The 14 reasoned opinions come from the parliaments of 11 Member States (BG, HR, CZ (Senate and Chamber of Deputies), DK, EE, HU, LV, LT, PL (Senate and "Sejm"), RO (Senate and Chamber of Deputies) and SK). The Annexed table lists the reasoned opinions received<sup>4</sup>.

The reasoned opinions put forward a number of arguments of both procedural and substantial nature. The following arguments are the most reoccurring:

- the Commission has not, as required, provided a **detailed statement on subsidiarity**. Basing itself, as the Commission does, on the purely formal argument that the subsidiarity principle is respected because amendments to an existing EU directive can only be made through an amending directive, is not sufficient justification in accordance with the requirements laid down in Protocol no. 2;
- linked to the above, the Commission has **not consulted widely enough all stakeholders, such as social partners**, including at local and regional levels, to demonstrate that the issue cannot be better solved at the national level;
- further - and mostly referring to specific aspects where provisions are made obligatory instead of as currently optional, e.g. application of collective agreements in the host state - the **necessity of this proposal and the scale of the problem is not sufficiently backed up** by impact studies and data (e.g. arguing that the envisaged legislation will only affect a small percentage of workers and few Member States). A concrete example of this, according to the

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<sup>4</sup> Four chambers have also sent opinions in the "political dialogue" framework but these have no status within the framework of Protocols no. 1 and 2 to the Treaties.

Commission's own information is that, a large number of Member States have used the option in the current directive to extend the scope of collective agreements to more sectors than construction) and therefore the changes will only affect a small number of Member States. Further, as concerns collective agreements, some also argue that the proposal will unduly interfere in the autonomy of the parties (e.g. social partners)/Member States to choose whether to use such agreements;

- the proposal (de facto) aims at **equalising pay between local and posted workers**, without taking into account the additional costs related to posting, thereby removing the competitive advantage of service providers in **contravention with the principles of the Single Market** and to the disadvantage of less developed European economies (almost all parliaments argue along these lines). Equalising pay should/can not be done through EU legislation but through progressive convergence of economies;
- this **legislation is premature** and not proven to be necessary in a situation where the transposition deadline of the so called Enforcement directive<sup>5</sup> has not yet expired. That directive specifically aims at fighting unfair practices in the area. One should await and see the effects of this directive.

One parliament, while welcoming the efforts to fight "social dumping", specifically finds that the deletion of two existing provisions, that spell out the Member States' competence in the area cause problems in relation to subsidiarity and more specifically raises doubts about the division of competences between the EU and Member States (pay is defined by national practice and that Member States may ensure that posted temporary workers are guaranteed the same terms and conditions as national temporary workers).

## V. THE YELLOW CARD PROCEDURE

*Commission (originator of the proposal)*

According to Protocol no. 2, the originator of the proposal, in this case the Commission, is obliged to review its proposal, when the reasoned opinions represent at least one third of the votes allocated

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<sup>5</sup> Directive 2014/67/EU 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, 28.5.2014.

to national parliaments. As a result of this review, the Commission may decide to maintain, amend or withdraw the proposal.

It is recalled that the Monti II proposal was withdrawn, whereas the Commission decided to maintain the EPPO proposal.

There are no time limits for this review. In Monti II, the Commission responded after three months (June - September 2012) and in the case of EPPO after one month (end October - end November 2013).

#### *The European Parliament and the Council*

Protocol no. 2 contains a general obligation to take into account reasoned opinions from national parliaments, regardless of whether the threshold for a yellow card has been reached. It is silent on how the legislator(s) should proceed while the Commission is reviewing its proposal.

## **VI. EXAMINATION OF THE PROPOSAL IN THE COUNCIL AND THE EUROPEAN PARLIAMENT**

Following the yellow card, discussions within the Council at technical level have been limited to finishing ongoing business and to further clarify issues<sup>6</sup>.

According to its rules of procedure (rule 42), the Parliament shall not take a decision until the Commission has reviewed its proposal. The Parliament is at the very early stages of its examination of the proposal. Rapporteurs were only appointed on 10 May 2016 (Morin-Chartier (EPP, FR) and Jongerius (S&D, NL)). The proposal itself has not yet been discussed in substance by the responsible Committee (Employment and Social Affairs, EMPL).

On 24 May 2016, the Legal Affairs Committee (JURI), that is responsible for respect of the subsidiarity principle in the Parliament, held a first exchange of views on the yellow card. The JURI Committee may decide to make recommendations to the responsible Committee.

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<sup>6</sup> See also progress report (document 9309/16).

## Overview on national Parliaments opinions on 2016/0070 COD<sup>7</sup>

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

Subsidiarity deadline: Tuesday, 10 May 2016

### Reasoned opinions

Country	National Parliaments opinions	Council doc.	votes
BG	Bulgarian Parliament	8884/16	2
CZ	Czech Chamber of Deputies	8392/16	1
CZ	Czech Senate	8612/16	1
DK	Danish Parliament	8760/16	2
EE	Estonian Parliament	8798/16	2
HU	Hungarian Parliament	8837/16	2
HR	Croatian Parliament	8761/16	2
LV	Latvian Parliament	8759/16	2
LT	Lithuanian Parliament	8762/16	2
PL	Polish Sejm	8277/16	1
PL	Polish Senate	8763/16	1
RO	Romanian Chamber of Deputies	7994/16	1
RO	Romanian Senate	8756/16	1
SK	Slovakian Parliament	8797/16	2
<b>TOTAL</b>	<b>14</b>		<b>22</b>

### **YELLOW CARD PROCEDURE**

**Total of votes allocated to National Parliaments: 56**

**Threshold required to trigger the procedure: 19 votes**

### Opinions received within the political dialogue (non-reasoned opinions)

Country	National Parliaments opinions	Council doc.	votes
ES	Spanish Parliament	8555/16	0
IT	Italian Senate	8757/16	0
IT	Italian Chamber of Deputies	9600/16	0
PT	Portuguese Parliament	8758/16	0
<b>TOTAL</b>	<b>4</b>		<b>0</b>

Total number of opinions received: 18

<sup>7</sup> COM(2016)128