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UNICE REPLY TO CONSULTATION ON THE COMMISSION'S SERVICES REPORT ON THE IMPLEMENTATION OF DIRECTIVE 96/71/EC CONCERNING THE POSTING OF WORKERS

Introduction

In 2003, the Commission issued its report on implementation of the posting of workers directive. It concluded that there was no need to revise the directive but signalled possible problems, mainly linked to practical implementation, in some Member States. In its 2004 resolution on this Commission communication, the European Parliament highlighted that it considered that directive 96/71 remained necessary and identified five categories of issues to be looked at more closely:

- questions relating to the legal meaning of terms used in the posting of workers directive,
- requests for information concerning the effect of optional exemptions allowed by the directive,
- impact of enlargement,
- availability of information on terms and conditions of employment, and
- administrative cooperation.

The draft report needs to be improved

UNICE fully agrees that there is no need to revise the posting of workers directive and that the focus should be on improving information on its practical implementation. It can support the broad thrust of this report. However, the draft submitted to social partners contains no new information, brings no added value compared with the Commission communication of 2003 and is difficult to understand for non-specialised audiences.

UNICE very much hopes that the country fact sheets currently being prepared by the group of governmental experts will make it possible to bridge the information gap and recommends postponing the Commission's report in order to be able to enrich its content with information provided in these country fact sheets.

Furthermore, UNICE regrets that the report contains political statements or general judgement values on issues such as working time, gender equality, temporary agency work, paid leave funds or economically dependent workers

which do not belong in a technical report on the posting of workers directive. The text of the report should be reviewed and elements which do not belong in a technical report on the implementation of the posting of workers directive should be removed.

Finally, UNICE believes that the legal meaning of the directive and the implications for its practical implementation should be explained in a much more user-friendly way in order to reach a non-specialist audience. The introduction of practical examples corresponding to real-life situations to illustrate theoretical legal explanations would greatly improve the text.

The posting of workers directive does not need to be revised ...

UNICE believes that the posting of workers directive remains valid. Both the general approach and the provisions of the posting of workers directive make it possible to address the issues related to cross-border posting of workers in the European Union.

The directive's starting point is that the employment relationship between a posted worker and his/her employer remains unaffected (country of origin principle), except for well identified domains for which the host country rules should apply (health and safety, working time, minimum pay levels guaranteed by law or universally applicable collective agreements, supply of workers by temporary employment undertakings, etc.) with possibilities for

- derogations for short-term postings, and
- the host Member States to go beyond the legal requirement of the directive.

Provided that there is no breach articles 49-50 of the Treaty, the directive allows Member States to broaden the list of matters for which the host country rules apply. It also allows countries which do not have universally applicable collective agreements to impose compliance with "generally applicable collective agreements" or agreements concluded by "the most representative employer and labour organisations".

The directive offers a balanced and flexible EU framework of mandatory rules to be observed during the period of posting. Problems that may occur can be solved in the countries concerned and do not require changes in the EU text itself. This remains true after enlargement of the EU.

... but companies need more accessible information

That being said, companies wishing to post a worker in one of the 25 EU countries lack easily accessible information on their obligations. The website

created by the Commission is a good start. However, further progress needs to be made in the development of national websites with information on legal requirements for posting of workers in several languages. FIEC and EFBWW, the social partners of the construction sector, are currently developing a data base with legal and collectively agreed conditions applying to posted workers. Equivalent information on compulsory national legal and collectively agreed requirements needs to be gathered for the other economic activities. Improving information is a pre-condition to ensure good compliance.

Similarly, administrative cooperation is crucial to facilitate control. It also has to be improved significantly.

Detailed comments on legal terms

With regard to the legal meaning of terms used, the scope of directive 96/71 pre-supposes a transnational provision of services and the temporary posting of an employee linked by an employment contract to the service provider. Otherwise, the directive does not apply. There are then two possible scenarios. The terms and conditions of employment can be simply those of the country of origin - and relevant international or EU rules - as is the case for example for mobile staff in international transport activities. Alternatively, it can mean that the terms and conditions of employment in the host country fully apply as is the case, for example, for staff engaged in internal cabotage operations.

In the public debate, concerns exist with regard to the legal situation of self-employed workers. Entrepreneurship is essential for Europe's growth and jobs. UNICE fully agrees that bogus self-employment cannot be accepted and needs to be fought. However, it is essential to avoid demonising self-employment per se.

UNICE supports the Commission's analysis that directive 96/71 is not the appropriate context in which to address concerns with regard to the legal situation of self-employed workers and that adoption of an EU definition of worker would not increase protection. Furthermore, genuine self-employed people wishing to engage in transnational provision of services cannot be subject to rules designed for employees which do not apply to self-employed in the host country as this would be discriminatory and against the fundamental Treaty freedom to provide services.

UNICE agrees that, even though designation of a worker is carried out in accordance with the law of the country in which he/she normally works, this does not have a bearing on his/her being covered by the rules on protection in the country in which he/she is posted. Moreover, ECJ jurisprudence sets out criteria to assess the existence of an employment link to avoid abuse (subordination, payment of a salary, power to dismiss).

With regard to the issue of joint and several liability, UNICE shares member states' reluctances. Existing national rules differ widely and these notions are totally absent in the legal systems of several Member States. Moreover, introducing EU rules on this issue would not be in line with subsidiarity and proportionality.

Finally, concerning the temporary nature of the posting, UNICE believes that the key is to determine its temporary nature (as opposed to a stable activity exercised on a continuous basis in the host country) and agrees that arbitrarily setting a duration in the posting of workers directive is not the solution.

Conclusion

To conclude, the posting of workers was designed to deal with social aspects in case of cross-border provision of services and specify which domains should be governed by the rules of the host country and which areas should remain subject to the rules of the country of origin. Its content remains valid. There is no reason to modify it. However, a lot of work needs to be done to improve the quality and accessibility of information on the rights and obligations stemming from the transposition of directive in the 25 Member States as well as administrative cooperation. Making progress in those two areas should be the focus of attention and is in the interest of companies, workers and society as a whole.

A Commission services report could bring added value if it provided factual and up-to-date information on practical implementation issues, explained the legal meaning of the directive in a user-friendly way and made it possible to publicise the information contained in the country fact sheets currently being prepared by Member States.