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THE DIRECTOR GENERAL

To the Deputy Permanent Representatives of the Member States to the European Union

5 October 2017

Dear Ambassadors,

We understand that the Estonian Presidency has the intention to try to reach a general approach at the EPSCO meeting in October on the revision of the **posting of workers directive** (Directive 96/71/EC).

For BusinessEurope, any compromise should be based on a broad consensus in the Council as it is crucial not to split Europe on such an important issue. Moreover, it is essential to avoid creating legal uncertainty or excessive burdens for companies and their posted employees.

We acknowledge that the Estonian presidency has put forward a number of proposals going in that direction. However more efforts are needed to limit negative impact on business.

We are **particularly concerned about the discussions on the law applicable to work contracts in case of longer postings**, and on the limit of the maximum duration of posting to 24 or even 12 months. The Council has moved away from the initial Commission's proposal which foresaw that after 24 months, the host country would automatically be deemed the habitual place of work and host country labour law would apply in full.

However, **the current compromise proposal would still *de facto* imply that a company would need to change the law applicable to the contracts of their employees.** Changing the applicable law would create unnecessary administrative burdens for companies and their employees. Many companies expect that in most cases their employees would strongly prefer to keep their familiar contract. Some employees would simply not agree to take up assignments abroad if their contracts would have to be governed by a law they do not know.

Furthermore, **Regulation 883/04 gives companies the possibility to extend - through bilateral agreements of authorities in a host and a sending country - the initial 24-month period of payments of social security contributions** in the country of origin up to a total of 5 years. In order not to hamper mobility and to ensure consistency between social security affiliation and labour law, a similar provision should be foreseen in the posting of workers directive.

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We would also like to underline that the duration of postings differs a lot between sectors and companies. Therefore, looking at an "average duration" can be misleading. Long-term mobility – beyond 12 or even 24 months – is a relatively common practice in sectors such as manufacturing or business services. At the same time, in these sectors, the concerns regarding "social dumping" or fraud are virtually non-existent. Limiting mobility would harm these high value-added activities, and aggravate the skills shortages we experience. Therefore, **any solution should take into account various needs and realities of different sectors.**

In the enclosed note, we highlight some practical examples of the negative effects of a time limit.

Our last concern is related to the proposal to change the term "minimum rates of pay" into "remuneration". This imprecise terminology increases legal uncertainty. We find that legal clarity would be best served by adding some elements to the existing definition of minimum rates of pay in Directive 96/71/EC, in line with ECJ rulings.

We remain at your disposal to discuss these issues in more detail.

Yours sincerely,

Markus J. Beyrer

Annex.

When companies post workers they normally keep the home state work contract of the posted worker, maybe adding some additional temporary elements linked to the posting. This works well for companies and posted employees as they can keep conditions with which they are familiar and can continue with after the posting ends.

Furthermore, if there is a dispute concerning the understanding of the work contract, cases can be brought to the home state legal system, which both the posted worker and the posting company are familiar with. If he/she is a member of a trade union, the employee can then also receive legal help from his/her organisation.

With the proposals being negotiated in Council the work contract in reality would have to shift to a work contract governed by the law of the host state after 24/12 months and then change back to home country conditions after the posting ended.

Longer postings are relatively common in some sectors and in case of intra-corporate transfers. Workers posted for longer periods are often highly skilled professionals in fields such as business services, IT, engineering and manufacturing. These workers are usually highly paid and have good working conditions. However, the Council proposal would mean that the law applicable to their contracts would still need to change if they are posted for more than 12/24 months. For example, a German company may post a manager for 3 years to set up and manage a new subsidiary in Poland. The law applicable to the contract of that manager would likely have to change during his posting. This will create additional administrative burden for the company but also will not be in the interest of the worker. In fact, many employees would simply not accept such postings anymore.

In addition, the proposed method of calculation of the total duration of posting, foreseeing to cumulate the posting times of different workers in case they replace each other doing the same work in the same place, leads to further problems of implementation.

For example, a company posting successively different sales persons, service personnel or trainees to the same location, will have to shift to a host country work contract when the cumulated duration of their postings reaches 24/12 months. The next posted person will see his/her work contract governed by host country law from the first day even in case of a very short posting. For example a wind mill industry company with service contracts running over many years and posting many service technicians to the same location will have to change work contract for each technician, even if it is a short posting. Furthermore, many companies run European trainee programmes for young people where they are posted 4-5 times to different European countries. If these are considered as replacements, such training opportunities will become unmanageable as such trainees will have to shift work contract for example 4- 5 times due to the cumulated calculation of all the posting periods.

Depending on the costs and complexity of setting up a work contract in the host country, this will entail costs for the posting companies. These are costs that their possible competitors in the host country may not have to bear. And frequent changes of the law applicable to the work contract is not in the interest of the workers either.

Finally, this complexity will increase the control burden for the host country. For example, verifying whether a posting is a replacement or not will require additional control capacities if the rule is to be enforced. Moreover, this is another factor of legal uncertainty as companies may end up in disputes with host country authorities on whether a posting is a replacement or not.