



**COUNCIL OF
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REPORT

from: Presidency

to: Council (EPSCO)

No. Cion prop.: 8040/12 + COR 1 - COM(2012) 131 final

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
- General approach

I. INTRODUCTION

1. On 21 March 2012, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC¹ concerning the posting of workers in the framework of the provision of services.

¹ 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, OJ L 18, 21.1.1997, p. 1.

2. This proposal forms part of the 12 priority proposals that are set out in the Single Market Act. The European Council has repeatedly indicated the high priority it attaches to the early completion of outstanding files under the SMA I package, including the enforcement of the Posting of Workers Directive.
3. The proposal for a Directive aims to clarify and improve the implementation, application and enforcement of Directive 96/71/EC in practice.
4. The proposal is based on Articles 53(1) and 62 TFEU, which are identical to those on which Directive 96/71/EC is based and which allow for the adoption of directives under the ordinary legislative procedure.
5. The Economic and Social Committee delivered its Opinion on 19 September 2012 and the Committee of the Regions on 29 November 2012.
6. The European Parliament's Committee on Employment and Social Affairs voted a draft report and a draft legislative Resolution on 20 June 2013. It agreed to entering into negotiations with the Council with a view to reaching an agreement in first reading.

II. DISCUSSIONS IN THE COUNCIL PREPARATORY BODIES

7. The Social Questions Working Party started the detailed examination of the Commission proposal in March 2012. The proposal was the subject of Progress Reports submitted to the EPSCO Council under the Danish (doc.10571/12), Cyprus (doc. 16540/1/12 REV 1) and Irish Presidencies (doc. 10430/13) on 21 June, 6 December 2012 and 20 June 2013, respectively.
8. An orientation debate on Articles 9 (regarding the conditions for applying national control measures) and 12 (laying down specific measures to ensure compliance with the relevant terms and conditions of employment of posted workers by subcontractors), based on a set of questions by the Cyprus Presidency (doc. 16637/12), was held on 6 December 2012.

9. On 27 March 2013, the Permanent Representatives Committee instructed the Working Party to undertake a detailed examination of Articles 9 and 12 and to report back in May. On 31 May, the Committee examined the compromise proposals on these two Articles (Presidency report doc. 9866/13 + COR 1). Although a number of delegations had taken a constructive stance, the Irish Presidency concluded that most of them were not, at that stage, in a position to demonstrate a sufficient degree of flexibility, in view of their positions of principle, to pave the way for a general approach at the Council (EPSCO) on 20 June 2013 (doc. 10430/13+ ADD 1).
10. Under the Lithuanian Presidency, good progress has been achieved on outstanding issues other than Articles 9 and 12 (see footnotes to doc. 10430/12 ADD 1). On 18 September 2013, the Permanent Representatives' Committee (doc. 13531/13) held a substantive discussion on the Presidency's compromise proposals on Articles 9 and 12. It instructed the Working Party to finalise the texts of these two articles, as well as of other outstanding provisions of the draft Directive, and to report back to the Committee in due time before the EPSCO Council meeting on 15 October.
11. In the light of discussions in Coreper, the Presidency submitted a revised compromise proposal on the text of the draft Directive, including Articles 9 and 12. The Working Party examined the text at its meeting on 27 September 2013 (doc. 13666/13).
12. Reiterating the position taken in Coreper on 18 September, the Commission stated that the Presidency's proposal constituted a good basis for making progress towards an overall compromise agreement. It called upon delegations to demonstrate a sufficient degree of flexibility instead of upholding positions of principle. Furthermore, it recalled that the chances for securing a qualified majority in favour of the Commission's proposal are very limited. It committed itself to support the Presidency in its efforts for achieving a general approach at the EPSCO Council meeting on 15 October.
13. With respect to Article 9, in the light of the outcome of the discussions at technical level, the Presidency notes that:

- a large number of delegations could work on the basis of the Presidency's revised proposal in the framework of an overall compromise agreement;
 - other delegations maintain their positions at that stage and cannot accept the Presidency's revised text. They have reiterated their positions of principle in favour of the Commission original proposal. According to them, a closed list is necessary to ensure the desired level of transparency and legal safety.
14. A large number of delegations have entered general scrutiny reservations on the Presidency compromise text for Article 12, or expressed a preference for the Commission original proposal, while one delegation reiterated its position in favour of a mandatory joint and several liability system covering all sectors. A few delegations expressed concerns about the due diligence and a large number was in favour of deleting Article 12(3a) while a smaller group was against. Most delegations, however, declared themselves ready to reconsider their positions in the framework of an overall compromise including an acceptable solution on Article 9.

III. OUTCOME OF COREPER'S MEETING ON 4 OCTOBER 2013

15. A large number of delegations expressed support for the Presidency's compromise proposals on Articles 9 and 12 which they felt provided for a proper level of balance. While in agreement with the compromise proposal on Article 9, one delegation stressed that it still had serious difficulties with the compromise proposal on Article 12 and that it would therefore take a strong position in Council on this in view of the political sensitivity of the issue of posting. While not entirely satisfied with that Article, another delegation nevertheless considered it as a good basis for discussion. In addition, concerns were raised by one delegation with regard to the issue of due diligence.

16. A joint proposal by a group of delegations (doc. 14476/13) was presented in this meeting outlining an alternative compromise proposal for Article 9 for discussion by the EPSCO Council. These delegations argued that this alternative proposal, which was based on the Services Directive, in particular with regard to the criteria of transparency and proportionality, thus involving notification procedures, aimed at ensuring a fair balance between the interests of workers' protection and the fundamental principles of the Single Market. They further stressed that this proposal should be seen as a compromise solution aimed at moving the discussions forward in order to reach a possible overall compromise agreement.
17. A number of delegations expressed reservations on this alternative proposal which they felt represented a step backwards and was therefore not of help in finding a balanced compromise. They considered that it would also go beyond the scope of the Commission original proposal. Stressing the importance of workers' protection and the purpose of the enforcement of the posting of workers Directive, they recalled that the Services Directive should not be used in this respect.
18. One delegation suggested restoring Article 12(3a) in the Presidency's compromise proposal and providing for more lenient, and not only for more stringent, provisions in relation to Article 12(1) (doc 14476/13).
19. The Commission expressed its support for the Presidency's compromise text. It stressed that it constituted a balanced approach and a good basis for making progress towards a general compromise agreement. It invited delegations to approach the EPSCO Council with greater flexibility, while recognizing the need for transparency and legal certainty. It considered the joint alternative proposal (largely inspired by the Services Directive, which excluded the posting of workers from its scope) at first sight to be more restrictive than the original Commission proposal and implying considerable additional administrative requirements and reporting obligations which could be seen as going against the objectives of better regulation and reduction of the administrative burden.

20. A number of delegations lifted scrutiny reservations on the text of the draft Directive. The remaining reservations are mentioned in footnotes in doc. 13942/1/13 REV 1.

IV. PRESIDENCY'S APPROACH FOR THE COUNCIL DISCUSSION

21. In view of the constructive spirit shown by a vast majority of delegations on other provisions of the draft Directive, the Presidency believes that its proposal on Article 9 and Article 12, which are part of the overall text (as set out in Annex), should constitute the appropriate basis for reaching an overall compromise agreement on the text of the Directive as a whole.
22. The Presidency reiterates its determination for an agreement to be reached in Council in order to enable the Council to start negotiating with Parliament as soon as possible with a view to possibly reaching an agreement in first reading by the end of the year, in accordance with the mandate given by the European Council.
23. The Presidency therefore invites the Council (EPSCO) to examine its overall compromise proposal, as set out in the Annex, with a view to reaching a general approach.

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
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

...

Whereas:

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

After consulting the European Data Protection Supervisor,

Acting in accordance with the ordinary legislative procedure,

² OJ C , , p. .

³ OJ C , , p. .

Whereas:

- (1) The free movement of workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market in the Union enshrined in the Treaty. The implementation of these principles is further developed by Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.
- (2) The free movement of workers gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other working conditions in comparison to nationals of that Member State. It needs to be distinguished from the freedom to provide services, which includes the right of undertakings to provide services in another Member State, for which they may send ('post') their own workers temporarily to carry out the work necessary to provide these services there.
- (3) With respect to workers temporarily posted to carry out work in order to provide services in another Member State than the one in which they habitually carry out their work, 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 services⁴ establishes a core set of clearly defined terms and conditions of work and employment which must be complied with by the service provider in the Member State to which the posting takes place to ensure the minimum protection of the posted workers concerned.
- (4) In order to prevent, avoid and combat circumvention and/or abuse of the applicable rules by companies taking improper or fraudulent advantage of the freedom to provide services enshrined in the Treaty and/or the application of Directive 96/71/EC the implementation and monitoring of the notion of posting should be improved.

⁴ OJ L 18, 21.1.1997, p. 1.

- (5) Therefore, the constituent factual elements characterising the temporary nature inherent to the notion of posting, and the condition that the employer is genuinely established in the Member State from which the posting takes place, need to be examined by the competent authority of the host Member State.
- (6) As is the case with Directive 96/71/EC, this Directive should not prejudice the application of the law which, under Article 8 of the Rome I Regulation, applies to individual employment contracts, or the application of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems⁵ and Regulation No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems⁶.
- (7) Respect for the diversity of national industrial relations systems as well as the autonomy of social partners is explicitly recognised by the Treaty⁷.
- (8) Trade unions play an important role in the context of the posting of workers for the provision of services since social partners may, in accordance with national law and/or practice, determine the different levels (alternatively or simultaneously) of the applicable minimum rates of pay⁸.

⁵ OJ L 166, 30.4.2004, p.1.

⁶ OJ L 284, 30.10.2009, p.1.

⁷ Article 152 of the Treaty on the Functioning of the European Union.

⁸ Cf. judgment 15.4.2008, case C-268/06, Impact, in particular points 123 and 129.

- (9) For the purpose of ensuring that a posted worker receives the correct pay and provided that allowances specific to posting can be considered part of minimum rates of pay, such allowances should only be deducted from wages if national law, collective agreements and/or practice of the host Member State provide for this.
- (10) Adequate and effective implementation and enforcement are key elements in protecting the rights of posted workers, whereas poor enforcement undermines the effectiveness of the Union rules applicable in this area. Close cooperation between the Commission and the Member States is therefore essential, without neglecting the important role of labour inspectorates and the social partners in this respect.
- (11) Mutual trust, a spirit of cooperation, continuous dialogue and mutual understanding are essential in this respect.
- (12) In order to facilitate better and more uniform application of Directive 96/71/EC, it is appropriate to provide for an electronic information exchange system to facilitate administrative cooperation and competent authorities should use the Internal Market Information System (IMI) as much as possible. However, this should not prevent the application of existing and future bilateral agreements or arrangements concerning administrative cooperation and mutual assistance.
- (13) Administrative cooperation and mutual assistance between the Member States should comply with the rules on the protection of personal data laid down in Directive 95/46/EC, and in accordance with Member States' national data protection rules implementing EU legislation. With regard to administrative cooperation through the Internal Market Information System (IMI), it should also comply with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the EU institutions and bodies and on the free movement of such data⁹ and Regulation (EU) No 1024/2012 (IMI Regulation) on administrative cooperation through the Internal Market Information System (IMI).

⁹ OJ L 8, 12.1.2001, p. 1.

- (14) Member States' obligations to make information on terms and conditions of employment generally available and to provide effective access to it, not only to service providers from other Member States, but also to the posted workers concerned, should be further concretised.
- (15) Member States should determine the way in which providers and recipients are provided with easily accessible relevant information, preferably by making this information accessible through a website, following web accessibility standards. Such websites should include in particular any website put in place pursuant to EU legislation with a view to promote entrepreneurship and/or the development of the cross-border of services.
- (16) In order to ensure the correct application of, and to monitor compliance with, the substantive rules on the terms and conditions of employment to be respected with regard to posted workers, Member States should apply only certain control measures or administrative formalities to undertakings posting workers for the provision of services. Such measures and requirements may only be imposed provided that the competent authorities cannot carry out their supervisory task effectively without the requested information and/or less restrictive measures would not ensure that the objectives of the national control measures deemed necessary are attained.
- (17) A comprehensive system of preventive and control measures, together with deterrent penalties to identify and prevent individual instances of bogus self-employed, should contribute to combat concealed employment effectively.
- (18) To ensure better and more uniform application of Directive 96/71/EC as well as its enforcement in practice, and to reduce, as far as possible, differences in the level of application and enforcement across the Union, Member States should ensure that effective and adequate inspections are carried out on their territory.

- (19) National labour inspectorates, social partners and other monitoring bodies are of paramount importance in this respect and should continue to play a crucial role.
- (20) In order to cope in a flexible way with the diversity of labour markets and industrial relations systems, by way of exception, other actors and/or bodies may monitor certain terms and conditions of employment of posted workers, provided these offer the persons concerned an equivalent degree of protection and exercise their monitoring in a non-discriminatory and objective manner.
- (21) Member States' inspection authorities and other relevant monitoring and enforcement bodies should avail themselves of the cooperation and exchange of information provided for in the relevant legislation in order to verify whether the rules applicable to posted workers have been respected.
- (22) Member States are particularly encouraged to introduce a more integrated approach to labour inspections. The need to develop common standards in order to establish comparable methods, practices and minimum standards at Union level should equally be examined.
- (23) To facilitate the enforcement of Directive 96/71/EC and ensure more effective application of it, effective complaint mechanisms should exist through which posted workers may lodge complaints or engage in proceedings either directly or through relevant designated third parties, such as trade unions or other associations as well as common institutions of social partners. This should be without prejudice to national rules of procedure concerning representation and defence before the courts and to competences and other rights of trade unions and other employee representatives under national law and/or practice.

- (24) Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and complying with Union law. Such measures may include the introduction on a voluntary basis, after consultation of the relevant social partners, of a mechanism of direct subcontractor liability, in addition to or in place of the employer, with respect of any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners regulated by law or collective agreements insofar as these are covered by Article 3(1) of Directive 96/71/EC. However, Member States remain free to provide for more stringent liability rules under national law or to go further under national law on a non-discriminatory and proportionate basis. The measures referred to may include preventive measures, such as due diligence obligations as defined by national law, providing that a (sub) contractor shall not be liable in specific circumstances or that their liability may be limited.
- (25) [...]
- (26) [...]
- (27) The disparities between the systems of the Member States for enforcing imposed administrative fines and/or penalties in cross-border situations are prejudicial to the proper functioning of the internal market and risk making it very difficult, if not impossible, to ensure that posted workers enjoy an equivalent level of protection throughout the Union.
- (28) Effective enforcement of the substantive rules governing the posting of workers for the provision of services should be ensured by specific action focusing on the cross-border enforcement of imposed administrative fines and penalties. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite in order to ensure a higher, more equivalent and comparable level of protection necessary for the proper functioning of the internal market.

- (29) The adoption of common rules for providing mutual assistance and support for enforcement measures and the associated costs, as well as the adoption of uniform requirements for the notification of decisions relating to administrative penalties and fines imposed, should resolve a number of practical cross-border enforcement problems and guarantee better communication and better enforcement of such decisions emanating from another Member State.
- (29a) The recognition of decisions imposing an administrative penalty/fine and requests to recover such a penalty/fine should be based on the principle of mutual trust. To that end the grounds for non-recognition or refusal should be limited to the minimum necessary.
- (30) Notwithstanding the establishment of more uniform rules with respect to the cross-border enforcement of administrative penalties and/or fines and the need for more common criteria for follow-up procedures in the event of the non-payment of these, they should not affect the Member States' competences to determine their system of penalties, sanctions and fines or the recovery measures available under their internal legislation. Therefore, the instrument permitting enforcement or execution of such penalties/fines may, if appropriate, and taking into account the national legislation and/or practice in the requested Member State, be completed accompanied or replaced with a title permitting its enforcement/execution in the requested Member State.
- (30a) The more uniform rules shall not have the effect of amending or modifying the obligation to respect fundamental rights and liberties as well as fundamental legal principles of defendants as enshrined in Article 6 of the Treaty of the European Union, such as the right to be heard and the right to an effective remedy and to a fair trial or the principle 'ne bis in idem'.

- (31) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, or the recognition and enforcement of decisions in civil and commercial matters, or to deal with applicable law.
- (32) Member States should take appropriate measures in the event of failure to comply with the obligations laid down in this Directive, including administrative and judicial procedures, and should provide for effective, dissuasive and proportionate penalties for any breaches of the obligations under this Directive.
- (33) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably protection of personal data (Article 8), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), the right to collective bargaining and action (Article 28), fair and just working conditions (Article 31), the right to an effective remedy and to a fair trial (Article 47), and the presumption of innocence, right of defence (Article 48) and the right not to be tried twice for the same offence (*ne bis in idem*)(Article 50) has to be implemented in accordance with those rights and principles.
- (34) Since the objective of this Directive, namely to establish a general common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty of the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

1. This Directive establishes a general common framework of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules, and without prejudice to the scope of Directive 96/71/EC.

This Directive aims to guarantee respect for an appropriate level of minimum protection of the rights of posted workers for the cross-border provision of services, while facilitating the exercise of the freedom to provide services for service providers and promoting fair competition between service providers.

2. This Directive shall not affect in any way the exercise of fundamental rights as recognised in Member States and by Union law, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States, in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

Article 2
Definitions

For the purposes of this Directive,

- (a) 'competent authority' means any authority or body designated by a Member State to perform functions under this Directive;
- (b) 'requesting authority' means the competent authority of a Member State which makes a request for assistance, information, notification or recovery concerning a penalty or fine as referred to in Chapter VI;
- (c) 'requested authority' means the competent authority of a Member State to which a request for assistance, information, notification or recovery is made.

Article 2a
Competent authorities and liaison offices

For the purposes of this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more competent authorities, which may include the liaison office(s) referred to in Article 4 of Directive 96/71/EC. When designating their competent authorities Member States shall have due regard for the need to ensure the data protection of exchanged information and the legal rights of natural and legal persons that may be affected. Member States shall remain ultimately responsible for safeguarding data protection and the legal rights of affected persons and shall put in place appropriate mechanisms in this respect.

Contact details of the competent authorities shall be communicated to the Commission and the other Member States. The Commission shall publish and regularly update the list of the competent authorities and liaison offices.

Other Member States and EU institutions shall respect each Member State's choice(s) of competent authorities.

Article 3

Factual elements of posting

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC the competent authorities shall take into account all factual elements characterising the activities carried out by an undertaking in the State in which it is established in order to determine whether it genuinely performs substantial activities, other than purely internal management and/or administrative activities. Such elements may include:
 - (a) the place where the undertaking has its registered office and administration, uses office space, pays taxes, has a professional licence or is registered with the chambers of commerce or professional bodies,
 - (b) the place where posted workers are recruited,
 - (c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand,

- (d) the place where the undertaking performs its substantial business activity and where it employs administrative staff,
- (e) the number of contracts performed and/or turnover realised in the Member State of establishment,

2. In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined.

Such elements may include:

- (a) the work is carried out for a limited period of time in another Member State;
- (b) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 and/or the Rome Convention;
- (c) the posted worker returns or is expected to resume working to the Member State from which he/she is posted after completion of the work or the provision of services for which he or she was posted;
- (d) travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done; as well as

- (e) any previous periods during which the post was filled by the same or another (posted) worker.
3. All the factual elements enumerated in paragraphs 1 and 2 above are indicative factors in the overall assessment to be made in case of doubt, and may not therefore be considered in isolation. The assessment of these elements shall be adapted to each specific case and take account of the specificities of the situation.

CHAPTER II ACCESS TO INFORMATION

Article 4
(moved to Article 2a)

Article 5
Improved access to information

1. Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC which are to be applied and complied with by service providers are made generally available in a clear, comprehensive and easily accessible way at a distance and by electronic means, in formats and by web standards that ensure access to persons with disabilities and to ensure that the liaison offices or the other competent national bodies referred to in Article 4 of Directive 96/71/EC are in a position to carry out their tasks effectively.
2. In order to bring about further improvements with respect to access to information, Member States shall:

- (a) indicate clearly, in a detailed and user friendly manner and accessible format on national websites which terms and conditions of employment and/or which parts of their (national and/or regional) legislation have to be applied to workers posted to their territory;
- (b) take the necessary measures to make generally available on internet sites information on which collective agreements are applicable (and to whom), and which terms and conditions of employment have to be applied by service providers from other Member States in accordance with Directive 96/71/EC, whereby, where possible, links to existing internet sites and other contact points, in particular the relevant social partners, shall be provided;
- (c) make the information available to workers and service providers in the most relevant languages, the choice being left to the host Member State, if possible in summarised leaflet form indicating the main labour conditions applicable and upon requests in formats accessible to persons with disabilities;
- (d) improve the accessibility of the information and clarity of the information provided on national websites;
- (e) indicate, if possible, a contact person at the liaison office in charge of dealing with requests for information;
- (f) keep the information provided for in the country fiches up to date.

3. The Commission shall continue to support the Member States in this area.

4. Where, in accordance with national law, traditions and practices, the terms and conditions of employment referred to in Article 3 of Directive 96/71/EC are laid down in collective agreements in accordance with Article 3 paragraphs 1 and 8 of that Directive, Member States shall ensure that these terms and conditions are made available in an accessible and transparent way to service providers from other Member States and to posted workers, and may involve the social partners in this respect. The relevant information should, in particular, cover the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration due and, where relevant, the qualifying criteria for classification in the different wage categories.

CHAPTER III

ADMINISTRATIVE COOPERATION

Article 6

Mutual assistance — general principles

1. Member States shall work in close cooperation and provide each other mutual assistance in order to facilitate the implementation, application and enforcement in practice of this Directive.
 2. The cooperation of the Member States shall in particular consist in replying to reasoned requests for information and to carry out checks, inspections and investigations from competent authorities with respect to the situations of posting referred to in Article 1(3) of Directive 96/71/EC, including investigation of any non compliance or abuses, of applicable rules on the posting of workers. Requests for information include information with respect to a possible recovery of an administrative penalty/fine, or notification of a decision imposing such a penalty/fine referred to in Chapter VI.
- 2a. The cooperation of the Member States may also include the sending and service of documents.

3. For the purpose of responding to a request for assistance from competent authorities in another Member State, Member States shall ensure that service providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws.
4. In the event of difficulty in meeting a request for information or in carrying out checks, inspections or investigations, the Member State in question shall without delay inform the requesting Member State with a view to finding a solution.
5. Member States shall supply the information requested by other Member States or the Commission by electronic means within the following time limits:
 - (a) Urgent cases requiring the consultation of registers for the purpose of checking an establishment in another Member State: up to a maximum of two working days from the receipt of the request.

The reason for the urgency shall be clearly indicated in the request with some details to substantiate its existence.
 - (b) All other requests for information: up to a maximum of 25 working days from the receipt of the request, unless a shorter time limit is agreed by common accord between the Member States.
6. Member States shall ensure that registers in which service providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States, for the purposes of implementing this Directive and Directive 96/71/EC, insofar as these registers are listed by the Member States in the IMI.

7. Member States shall ensure that the information exchanged to and/ or by bodies referred to in Article 2(a) shall be used only in respect of the matter(s) for which it was requested.
8. Mutual administrative cooperation and assistance shall be provided free of charge.
9. (deleted)

Article 7

Role of the Member State of establishment

1. The Member State of establishment of the service provider shall continue to control, monitor and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State.
2. The Member State of establishment of the service provider shall assist the Member State to which the posting takes place to ensure compliance with the conditions applicable under Directive 96/71/EC and this Directive. This responsibility shall not in any way reduce the possibilities of the Member State to which the posting takes place to monitor, control and take any necessary supervisory or enforcement measures in accordance with this Directive and Directive 96/71/EC.

- 2a. Where there are facts indicating possible irregularities, the Member State of establishment of the service provider shall, on its own initiative, communicate to the Member State to which the posting takes place any relevant information.
3. Competent authorities of the host Member State may equally ask the competent authorities of the Member State of establishment, for each instance where services are provided or for each service provider, to provide information as to the legality of the service provider's establishment, the service provider's good conduct, and the absence of any infringement of the applicable rules. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 6.
4. The obligation laid down in previous paragraphs shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the host Member State in which the service is provided. Such checks and controls may, if need be, be carried out by the authorities of the host Member State on their own initiative or at the request of the competent authorities of the Member State of establishment, in accordance with Article 10 and in conformity with the powers of supervision provided for in the host Member State's national law, practice and administrative procedures and which respect Union law.

Article 8

Accompanying measures

1. Member States shall, with the assistance of the Commission, take accompanying measures to develop, facilitate and promote the exchange between officials in charge of the implementation of administrative cooperation and mutual assistance as well as monitoring the compliance with and enforcement of the applicable rules.
2. The Commission shall assess the necessity for financial support in order to further improve administrative cooperation and increase mutual trust through projects, including promoting exchanges of relevant officials and training, as well as developing, facilitating and promoting best practice initiatives, including those of social partners at Union level, such as the development and updating of databases or joint websites containing general or sector-specific information concerning terms and conditions of employment to be respected.

CHAPTER IV MONITORING COMPLIANCE

Article 9¹⁰

Administrative requirements and control measures

1. Member States may only impose administrative requirements and control measures necessary in order to ensure effective monitoring of compliance with the obligations set out in this Directive and Directive 96/71/EC in accordance with Union law.

For these purposes Member States may in particular impose the following measures:

- (a) an obligation for a service provider established in another Member State to make a simple declaration to the responsible national competent authorities at the latest at the commencement of the service provision, containing the relevant information necessary in order to allow factual controls at the workplace, including:
 - i) the identity of the service provider;
 - ii) the anticipated number of clearly identifiable posted workers;
 - iii) the persons referred to under (ca) and (d);
 - iv) the anticipated duration, envisaged beginning and end date of the posting;
 - v) the address(es) of the workplace; and
 - vi) the nature of the services justifying the posting;

¹⁰ See Report.

- (b) an obligation to keep or make available and/or retain copies in paper or electronic form of the employment contract (or an equivalent document within the meaning of Directive 91/533, including, where appropriate or relevant, the additional information referred to in Article 4 of that Directive), payslips, time-sheets indicating the beginning, end and duration of the daily working time and proof of payment of wages or copies of equivalent documents during the period of posting in an accessible and clearly identified place in its territory, such as the workplace or the building site, or for mobile workers in the transport sector the operations base or the vehicle with which the service is provided;
- (ba) an obligation to deliver the documents referred to under (b), after the period of posting, at the request of the authorities of the host Member State, within a reasonable period of time;
- (c) an obligation to provide a translation of the documents referred to under (b) into (one of) the official language(s) of the host Member State, or into (an)other language(s) accepted by the Member State;
- ca) an obligation to designate a person to liaise with the competent authorities in the host Member State in which the services are provided and to send out and receive documents and/or notices, if need be
- (d) an obligation to designate a contact person, if necessary, with whom the relevant social partners may seek to induce the service provider to enter into collective bargaining within the host Member State, in accordance with national legislation and practice, during the period in which the services are provided. This person may be a different person than the person referred to under (ca) and does not have to be present in the host Member State;

- 1a. Member States may impose other administrative requirements and control measures should situations or new developments arise giving reasons to believe that existing administrative requirements and control measures are not sufficient or efficient in order to ensure effective monitoring of compliance with the obligations set out in Directive 96/71/EC and this Directive, provided that these are justified and proportionate.
- 1b. Nothing in this Article shall affect other obligations deriving from the EU legislation and/or national law regarding worker's protection or employment of workers provided that they are equally applicable to companies established in the Member State concerned and that they are justified and proportionate.
2. Member States shall ensure that the procedures and formalities relating to the posting of workers pursuant to this Article can be completed easily by undertakings, at a distance and by electronic means as far as possible.
- 2a. Member States shall inform the Commission and service providers of any measures referred to in paragraphs 1 and 1a that have been implemented by them. The information for the service providers shall be made generally available in the most relevant language(s), as determined by the Member State.

The Commission will monitor the application of the measures referred to in paragraph 1 and 1a and evaluate their compliance with Union law in accordance with its competences under the Treaty.

3. Within three years after the date referred to in Article 20, the appropriateness and adequacy of the application of national control measures shall be reviewed in the light of the experiences with and effectiveness of the system for administrative cooperation and exchange of information, the development of more uniform, standardised documents, the establishment of common principles or standards for inspections in the field of the posting of workers as well as technological developments, with a view to proposing, where appropriate, any necessary amendments or modifications.

Article 10
Inspections

1. Member States shall ensure that appropriate checks and monitoring mechanisms provided for by national legislation and practice are put in place and that the authorities designated by national legislation carry out effective and adequate inspections on their territory in order to control and monitor compliance with the provisions and rules laid down in Directive 96/71/EC and thus guarantee its proper application and enforcement. Inspections shall be based primarily on a risk assessment by the competent authorities. The risk assessment may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such risk assessment the realisation of big infrastructural projects, geographic proximity, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers may in particular be taken into account.
2. Member States shall ensure that inspections and controls of compliance with Directive 96/71/EC are not discriminatory and/or disproportionate.
3. If information is needed in the course of the inspections and in the light of the criteria in Article 3, the Member State where the service is provided and the Member State of establishment shall act in accordance with the rules on administrative cooperation, i.e. the competent authorities shall cooperate pursuant to the rules and principles laid down in Articles 6 and 7.

4. In Member States where, in accordance with national law and practice, the setting of the terms and conditions of employment of posted workers referred to in Article 3 of Directive 96/71/EC, and in particular the minimum rates of pay, including working time, is left to management and labour they may, at the appropriate level and subject to the conditions laid down by the Member States, also monitor the application of the relevant terms and conditions of employment of posted workers, provided that an adequate level of protection equivalent to that resulting from Directive 96/71/EC and this Directive is guaranteed.
5. Member States where labour inspectorates have no competence with respect to the control and monitoring of the working conditions and/or terms and conditions of employment of posted workers may, in accordance with national legislation and practice, establish or maintain arrangements guaranteeing the respect of these terms and conditions of employment, provided that the arrangements offer the persons concerned an adequate degree of protection equivalent to that resulting from Directive 96/71/EC and this Directive.

CHAPTER V

ENFORCEMENT

Article 11

Defence of rights — facilitation of complaints-back-payments

1. For the enforcement of the obligations under Article 6 of Directive 96/71/EC and this Directive, Member States shall ensure that there are effective mechanisms for posted workers to lodge complaints against their employers directly, as well as the right to institute judicial or administrative proceedings, also in the Member State in whose territory the workers are or were posted, where such workers consider they have sustained loss or damage as a result of a failure to apply the applicable rules, even after the relationship in which the failure is alleged to have occurred has ended.

2. Paragraph 1 shall apply without prejudice to the jurisdiction of the courts in the Member States as laid down, in particular, in the relevant instruments of Union law and/or international conventions.
3. Member States shall ensure that trade unions and other third parties, such as associations, organisations and other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the posted workers or their employer, with their approval in any judicial or administrative proceedings provided for with the objective of implementing this Directive and/or enforcing the obligations under this Directive.
4. Paragraphs 1 and 3 shall apply without prejudice to:
 - (a) national rules on prescription deadlines or time limits for bringing similar actions;
 - (b) other competences and collective rights of social partners, employees and employers representatives, where applicable, under national law and/or practice;
 - (c) national rules of procedure concerning representation and defence before the courts.
5. Member States shall ensure that the employer of the posted worker(s) is liable for any due entitlements resulting from the contractual relationship between the employer and the posted worker.

They shall in particular ensure that the necessary mechanisms are in place to ensure that the posted workers are able to receive:

- (a) any outstanding net remuneration which, under the applicable terms and conditions of employment covered by Article 3 of Directive 96/71/EC, would have been due;

- (b) any back-payments or refund of taxes or social security contributions unduly withheld from his/her salary;
- (c) a refund of excessive costs, in relation to net remuneration or to the quality of the accommodation, withheld or deducted from wages for accommodation provided by the employer.

This paragraph shall also apply in cases where the posted workers have returned from the Member State to which the posting took place.

Article 12¹¹

Subcontracting liability

1. Member States may, after consultation of the relevant social partners, in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer/service provider covered by Article 1 (3) of Directive 96/71/EC is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions due to common funds or institutions of social partners in so far as covered by Article 3 of Directive 96/71/EC.

The liability referred to in the present paragraph shall be limited to worker's rights acquired under the contractual relationship between the contractor and his subcontractor.

2. (deleted)

¹¹ See Report.

3. Member States may, in conformity with Union law, equally provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis in regard to the scope and range of subcontractor liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those contained in the Annex to Directive 96/71/EC.

Member States may in the cases referred to in paragraphs 1 and 3 provide that a contractor that has taken due diligence obligations as defined by national law shall not be liable.

3a [...]]

- 3b. Member States shall inform the Commission about the measures taken under this Article and shall make the information generally available in the most relevant language(s), the choice being left to the Member State.
4. Within three years after the date referred to in Article 20, the Commission shall, in consultation with the Member States and social partners at EU level, review the application of this Article with a view to proposing, where appropriate, any necessary amendments or modifications.

CHAPTER VI

CROSS-BORDER ENFORCEMENT OF ADMINISTRATIVE FINES AND PENALTIES

Article 12a

Scope

1. Without prejudice to the means which are or may be provided for in other Union legislation, the principles of mutual assistance and mutual recognition as well as the measures and procedures provided for in this Chapter shall apply to the cross-border enforcement of financial administrative penalties and/or fines imposed on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State.
2. This Chapter shall apply to financial administrative penalties and/or fines, including fees and surcharges, imposed by competent authorities or confirmed by administrative or judicial bodies, relating to the non-respect of the provisions of Directive 96/71/EC, as well as of this Directive.

This Chapter shall not apply to the enforcement of penalties which fall under the scope of application of Council framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters ('Brussels I')¹² or Council Decision 2006/325/EC of 27 April 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹² OJ L 12, 16.1.2001, p. 1.

Article 12b

Designation of the competent authorities

Each Member State shall inform the Commission through IMI which authority or authorities, under its national law, are competent for the purpose of this Chapter. Member States may designate, if it is necessary as a result of the organisation of their internal systems, one or more central authorities responsible for the administrative transmission and reception of requests and to assist other relevant authorities.

Article 13

General principles - mutual assistance and recognition

1. At the request of the requesting authority, the requested authority shall, subject to Articles 14 and 14a:
 - (a) recover an administrative penalty and/or fine imposed in accordance with the laws and procedures of the requesting Member State by competent authorities or confirmed by administrative or judicial bodies and which are not subject to further appeal, or
 - (b) notify a decision imposing such a penalty and/or fine, as well as
 - (c) notify any other relevant document related to the recovery of such a penalty and/or fine, including the judgment or (final) decision (or a certified copy of it) constituting the legal basis and title for the execution of the request for recovery.
2. The requesting authority shall ensure that the request for recovery of a penalty and/or fine or the notification of a decision imposing a penalty/fine is made in accordance with the laws, regulations and administrative practices in force in that Member State.

Such a request shall only be made when the requesting authority is unable to recover or to notify in accordance with its laws, regulations and administrative practices.

The requesting authority shall not make a request for recovery of a penalty and/or fine or notification of a decision imposing such a penalty and/or fine if and as long as the penalty and/or fine, as well as the underlying claim and/or the instrument permitting its enforcement in the requesting Member State, are contested or challenged in that Member State.

3. The competent authority in the Member State requested to recover an administrative penalty and/or fine or to notify a decision imposing such a penalty and/or fine which has been transmitted in accordance with the provisions of this Chapter and Article 18, shall recognise it without any further formality being required and shall forthwith take all the necessary measures for its execution, unless they decide to invoke one of the grounds for refusal provided for in Article 14a.
4. For the purpose of recovery of an administrative penalty and/or fine or notification of a decision imposing such a penalty and/or fine, the competent requested authority shall act in accordance with the national laws, regulations and administrative practices in force in the requested Member State applying to the same or, in the absence of the same, a similar infringement or decision.

The notification of a decision imposing a penalty and/or fine by the requested authority and the request for recovery shall, in accordance with the national laws, regulations and administrative practices of the Member State of the requested authority, be deemed to have the same effect as if it had been made by the requesting Member State.

Article 14

Request for recovery or notification

1. The request of the requesting authority for recovery of an administrative penalty and/or fine as well as the notification of a decision concerning such a penalty and/or fine shall be carried out by means of a uniform instrument through IMI and shall at least indicate:
 - (a) the name and known address of the addressee, as well as any other relevant data or information for the identification of the addressee,
 - (b) a summary of the facts and circumstances of the infringement, the nature of the offence and the relevant applicable rules;
 - (c) the instrument permitting enforcement in the requesting Member State and all other relevant information or documents, including those of a judicial nature, concerning the underlying claim, administrative penalty and/or fine; and
 - (d) the name, address and other contact details regarding the competent authority responsible for the assessment of the penalty and/or fine, and, if different, the competent body where further information can be obtained concerning the penalty and/or fine or the possibilities for contesting the payment obligation or decision imposing it.

In addition, the request shall indicate:

- (i) in the case of notification of a decision, the purpose of the notification and the period within which it shall be effected;

(ii) in the case of a request for recovery, the date when the judgment/decision has become enforceable or final, a description of the nature and amount of the penalty/fine, any dates of relevance to the enforcement process (including whether, and if so how the decision or judgment was served on defendant(s) and/or given in default of appearance, as well as a confirmation from the requesting authority that the penalty or fine is not subject to any further appeal) as well as the underlying claim in respect of which the request is made, and its different components.

2. The requested authority shall take all the necessary steps to notify the service provider of the request for recovery or of the decision imposing a penalty or a fine and the relevant document(s), where necessary, in accordance with its national law and/or practice as soon as possible, and at the latest within one month of receipt.

The requested authority shall as soon as possible inform the requesting authority of the action taken on its request for notification and recovery and, more specifically, of the date on which the addressee was notified.

The requested authority shall likewise inform the requesting authority of the grounds should it refuse to execute a request for recovery of an administrative penalty and/or fine or to notify a decision imposing an administrative penalty and/or a fine in accordance with Article 14a.

Article 14a

Grounds for refusal

The competent authorities in the requested Member State shall not be obliged to execute a request for recovery or notification of a decision if the request does not contain the information referred to in Article 14(1), or is incomplete or manifestly does not correspond to the underlying decision.

In addition, the competent authorities in the requested Member State may refuse to execute a request for recovery in the following circumstances:

- (a) following inquiries by the requested competent authority it is obvious that the envisaged costs or resources required to recover the penalty/fine are disproportionate in relation to the amount to be recovered or would give rise to significant difficulties;
- (b) the overall financial penalty/fine is below EUR [350] or the equivalent to that amount;
- (c) non respect of fundamental rights, liberties and legal principles of defendants, as laid down in the Constitution of the requested Member State.

Article 15

Suspension of the procedure

1. If, in the course of the recovery or notification procedure, the administrative penalty/fine and/or underlying claim is challenged or appealed by the service provider concerned or an interested party, the cross-border enforcement procedure of the penalty/fine imposed shall be suspended pending the decision of the appropriate national authority in the requesting Member State in the matter.

Any challenge or appeal shall be made to the appropriate national competent body or authority in the requesting Member State

The requesting authority shall without delay notify the requested authority of the contestation.

2. Disputes concerning the enforcement measures taken in the requested Member State or concerning the validity of a notification made by a competent authority of the requested Member State shall be brought before the competent body or judicial authority of that Member State in accordance with its laws and regulations.

Article 16

Costs

1. Amounts recovered with respect to the penalties/fines referred to in this Chapter shall accrue to the requested authority.

The requested authority shall recover the amounts due in its own currency, in accordance with its laws, regulations and administrative procedures or practices which apply to similar claims.

The competent authority of the requested State shall, if necessary, in accordance with its national law and practice convert the penalty into the currency of the requested State at the rate of exchange obtaining at the time when the penalty was imposed.

2. Member States shall not claim from each other the reimbursement of costs arising from any mutual assistance they grant each other pursuant to this Directive or resulting from its application.

Article 16a

Review clause

Within [five years] after the date referred to in Article 20, the Commission shall, in consultation with the Member States, review the application of this Chapter in particular in light of the experiences with and effectiveness of the system of cross-border enforcement of administrative penalties/fines with a view to proposing, where appropriate, any necessary amendments or modifications.

CHAPTER VII

FINAL PROVISIONS

Article 17

Penalties

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by [.....] date of transposition] at the latest. They shall notify without delay any subsequent amendments to them.

Article 18

Internal Market Information System

1. The administrative cooperation and mutual assistance between the competent authorities of the Member States provided for in Articles 6, 7, 10(3), 12b, 13, 14, 14a and 15 shall be implemented through the Internal Market Information System (IMI), established by Regulation (EU) No 1024/2012 of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Information System as regards the protection of data¹³.
2. Member States may apply bilateral agreements or arrangements concerning administrative cooperation and mutual assistance between their competent authorities as regards the application and monitoring of the terms and conditions of employment applicable to posted workers referred to in Article 3 of Directive 96/71/EC, in so far as these agreements or arrangements do not adversely affect the rights and obligations of the workers and companies concerned.

¹³ OJ L 316, 14.11.2012, p. 1.

Member States shall inform the Commission of the bilateral agreements and/or arrangements they apply and shall make the text of the agreements generally available.

3. In the context of bilateral agreements or arrangements referred to in paragraph 2, competent authorities of the Member States shall use IMI as much as possible. In any event, where a competent authority in one of the Member States concerned has used IMI, it shall where possible be used for any follow-up required.
4. No later than [5 years after the entry into force of this Directive] the interaction between IMI and the bilateral agreements or arrangements will be evaluated.

Article 19

Amendment to [IMI Regulation]

The following point shall be added to the Annex of Regulation (EU) No 1024/2012 of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Informations System as regards the protection of data (the IMI Regulation):

1. Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services¹⁴: Article 4;
2. Directive xxxx/xx/EC 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 services¹⁵: Articles 6, 7, 10(3), 12b, 13, 14, 14a and 15.

¹⁴ OJ L 18, 21.01.1997.

¹⁵ OJ reference.

Article 20
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 2 years after its entry into force. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21
Report

No later than 5 years after the expiry of the deadline for transposition, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

Article 22
Entry into force

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 23
Addressees

This Directive is addressed to the Member States.

Done at Brussels, 21.3.2012

For the European Parliament
The President

For the Council
The President
