



*Committee on Legal Affairs
The Chair*

15.6.2017

Mr Thomas Händel
Chair
Committee on Employment and Social Affairs
BRUSSELS

Subject: Opinion on the legal basis of the Commission proposal for a Directive concerning the posting of workers (COM(2016)0128 – C8-0114/2016 – 2016/0070(COD))

Dear Mr Chair,

By letter of 24 March 2017 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 12 June 2017.

Posting of workers is regulated by Directive 96/71/EC which was adopted on the basis of Article 57 TEC and Article 66 TEC. These articles now correspond to Article 53(1) TFEU and Article 62 TFEU, on which articles the Commission has based its proposal for amending the directive.

The draft report by the co-rapporteurs in the EMPL committee seeks to introduce Article 151 TFEU and Article 153(1) TFEU, points (a) and (b) as additional legal bases, and amendments have been tabled that seek to add to the legal basis Article 46 TFEU, Article 56 TFEU or Article 153 as a whole or to replace Article 53(1) with 54 and 56 TFEU.

At its meeting of 12 June 2017 the Committee on Legal Affairs accordingly decided, by 13 votes to 11, with 1 abstention¹, to recommend that you should retain the legal bases proposed

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Laura Ferrara (Vice-Chair), Max Andersson, Joëlle Bergeron, Dominique Bilde (for Marie-Christine Boutonnet, pursuant to Rule 200(2)), Antanas Guoga, Heidi Hautala, Mary Honeyball, Danuta Jazłowiecka (for Tadeusz Zwiefka, pursuant to Rule 200(2)), Sylvia-Yvonne Kaufmann, Katerina Konečná (for Jiří Maštálka, pursuant to Rule 200(2)), Merja Kyllönen (for Kostas

by the Commission, Article 53 TFEU and Article 62 TFEU as they are appropriate as legal bases for the proposed amending directive. Article 153(2) TFEU should be considered as an additional legal basis, in particular, if the emphasis on the protection of the rights of posted workers is further reinforced by the Parliament. If Article 153 TFEU would be added as a legal basis it would be recommendable to refer, in this case, to Article 153(1) TFEU, points (a) and (b) in conjunction with Article 153(2) TFEU.

1. Background

Posting of workers is regulated by Directive 96/71/EC which was adopted on the basis of Article 57 EC and Article 66 EC. These articles now correspond to Article 53(1) TFEU and Article 62 TFEU, that is to say, the articles on which the Commission has based its proposal for amending the directive.

Directive 96/71 sets the EU regulatory framework for promoting and facilitating the cross-border provision of services through the temporary posting of workers in another Member State. More recently the Enforcement Directive 2014/67/EU has been adopted with a view to strengthen the instruments available to fight and sanction circumventions, fraud and abuses in the field of posting of workers.

Under the current rules, posting companies need to comply with a core set of rights of the host country, including *minimum rates* of pay. This provision causes significant wage differentiation between posted and local workers in host countries, estimated to range from 10% up to 50% depending on countries and sectors, thus distort the level playing field among companies, by conferring a labour cost advantage to sending companies over local companies in host Members States.

According to the Explanatory Memorandum to the proposal Directive 96/71 sought 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”, a balance that was not currently achieved. In order to ‘rebalance’ the directive the proposal would introduce the principle “equal rules on pay for equal work”, and no longer only require the paying of minimum wages and extend to all sectors of the reference to universally binding collective agreements.

The proposal would establish that labour law of the host Member State would apply to long-term postings over 24 months through a presumption that this would be the habitual place of work. The choice of 24 months is justified, i.e., by this being in line with social security coordination rules. The proposal also seeks to establish equal remuneration between posted workers in subcontracting chains and workers at the main contractor through applying the latter’s working conditions, including from company-level agreements, if any, and the compulsory application of equal terms and conditions to posted temporary agency workers as agency workers recruited locally.

2. Relevant treaty articles

The Commission’s proposal is based on Articles 53 and 62 TFEU, which read as follows:

Chrysogonos, pursuant to Rule 200(2)), Gilles Lebreton, Victor Negrescu, António Marinho e Pinto, Emil Radev, Dariusz Rosati (for Rosa Estaràs Ferragut, pursuant to Rule 200(2)), Virginie Rozière, Sajjad Karim, Elly Schlein (for Evelyn Regner, pursuant to Rule 200(2)), József Szájer, Axel Voss, Kosma Złotowski.

Article 53

(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

Article 62

(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

The draft report seeks to add Articles 151 and 153(1), which read as follows:

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

Article 153

(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

Amendments tabled in the lead committee seek to introduce Articles 46, 54, 56 TFEU as additional or alternative legal bases, which articles read as follows:

Article 46

(ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 54

(ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.)

Article 56

(ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

3. The case-law on legal basis

It is settled case law of the Court of Justice that: “the choice of legal basis for a Community (now Union) measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure”¹. The choice of an incorrect legal basis may therefore justify the annulment of the act in question.²

As regards multiple legal bases, if examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.³ However, where a measure has several contemporaneous objectives or

¹ Case C 411/06 *Commission v Parliament and Council* [2009] E.C.R. I 7585, para. 45 and Case C 130/10 *Parliament v Council* [2012] E.C.R., para. 42, and the case law cited therein.

² Opinion 2/00 on the *Cartagena Protocol* [2001] E.C.R. I-9713, para. 5.

³ Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; Case C-411/06 *Commission v Parliament and Council*, [2009] E.C.R. I-7585, para.46 and the case-law cited there; C-490/10 *Parliament v Council*

components which are indissolubly linked with each other without one being secondary and indirect in relation to the other(s), the measure must be based on the various relevant Treaty provisions.¹

Recourse to a dual legal basis is nevertheless not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament.²

4. The aim and content of the proposal

Directive 96/71/EC does not contain an article which would make the aim and purpose of the directive explicit, neither does the Commission propose to introduce any changes in this respect. However, in particular the first four recitals of the proposal can be used as an indication. They read as follows:

(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 on the Functioning of the European Union (TFEU). The implementation of those principles is further developed by the Union aimed at guaranteeing a level playing field for businesses and respect for the rights of workers.*

(2) *The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there.*

(3) *According to Article 3 TEU, the Union shall promote social justice and protection. Article 9 TFEU gives the Union the task to promote a high level of employment, to guarantee an adequate social protection and to combat social exclusion.*

(4) *Almost twenty years after its adoption, it is necessary to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.*

Whereas the first and second recitals emphasise the aspect of the freedom to provide services, the third and fourth recitals add the aspects of social justice and the need to 'assess' whether the directive still "strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers."

An analysis of the content of the proposal shows that the aim of the proposal effectively at least includes the aspect of 'rebalancing' the promotion of the freedom to provide services with the protection of workers' rights.

As outlined above, proposal aims to introduce equal rules on remuneration for long-term posting and to extend to all sectors of reference to universally binding collective agreements.

EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

¹ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-411/06 *Commission v Parliament and Council*, [2009] E.C.R. I-7585, para. 47; Case C-178/03 *Commission v European Parliament and Council* [2006] E.C.R. I-107, paras 43-56.

² Case C-178/03 *Commission v European Parliament and Council* [2006] E.C.R. I-107, para. 57; Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] E.C.R. I-1139, para. 14; Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] E.C.R. I-2867, paras. 17-25; Case C-338/01 *Commission v Council* [2004] E.C.R. I-4829 (Recovery of Indirect Taxes), para. 57.

Equal rules on remuneration will contribute to increase the wages earned by posted workers, reduce pay differentials with local workers, and establish a level playing field between companies in the host countries.

In addition, equal treatment rules on long-term postings over 24 months and on subcontracting chains can also reduce the role of labour costs as a competition factor by reducing the competitiveness of companies located in Member States with lower wage conditions, especially in labour-intensive sectors.

Specifically, the new Article 2a added to the Directive 96/71/EC -as the proposal states- “deals with the labour law to be applied to posted workers when the anticipated or the effective duration of posting exceeds twenty-four months”, and furthermore stresses that “(t)he Court of Justice has consistently held that the distinction between the freedom of establishment and the freedom to provide services on a temporary basis needs to be made on a case by case basis, taking into account not only the duration but also the regularity, periodicity and continuity of the provision of services.”

Furthermore, as the aim of the proposal Directive is also to “prevent the circumvention of the rule set out in paragraph 1, paragraph 2 clarifies that, in case of replacement of a worker regarding the same task, calculation of the duration of posting must take into account the cumulative duration of the posting of workers concerned. The rule of paragraph 1 will apply whenever the accumulated duration exceeds 24 months but, in order to respect the principle of proportionality, only to the workers posted for at least six months.

The proposal also introduces several changes to Article 3, point (a) of the Directive namely when it comes to “impos(ing) an obligation to publish information on the constituent elements of remuneration”, and a new rule at point (b) is added in order to offer “the faculty to Member States to oblige undertakings to subcontract that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements.”

As per the new paragraph in Article 1(3)(c) of the Directive, it “specifies that the conditions to be applied to cross-border agencies hiring out workers must be those that are, pursuant to Article 5 of Directive 2008/104/EC, applied to national agencies hiring out workers. Contrary to Article 3(9) of the Directive, this would be a legal obligation imposed on Member States.”

5. Determination of the appropriate legal basis

As mentioned above, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include in particular the aim and content of that measure. In addition, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament.

Beyond and before this it has to be verified that a proposed treaty provision actually qualifies as a legal basis. It follows from the principle of conferral, enshrined in Article 5 TEU that the Union shall act only when the treaties provide it with the competence to do so. Furthermore, Article 289 TFEU must be understood as requiring that the procedure for the adoption by the Union of a legal act covering a specific field is explicitly referred to in a treaty provision. A provision in the treaties which does not refer to a procedure for the adoption of an act cannot, therefore, constitute a legal basis for a directive. Furthermore, the provision in the treaties used as a legal basis must, obviously, also permit the adoption of a measure, the aim and

content of which corresponds to the competence conferred in the provision used as a legal basis for the act.

The provisions proposed by the Commission clearly satisfies not only the general requirements of legal bases but are also appropriate with a view to the aim and content of the proposal, in so far as this remains - as is the case with Directive 96/71/EC - the promotion of the freedom to provide services with the help of the posting of workers.

In this case the use of a double legal basis is a purely technical issue, the reason being that the Chapter 3 of Title IV on services in the TFEU does not include an appropriate legal basis for the kind of measures that Directive 96/71/EC regulates and that the proposal seeks to regulate. However, Article 62 TFEU extends the applicability of Articles 51 to 54 TFEU to the chapter on services, thus making it possible to use the provisions in Article 53 TFEU, read in conjunction with Article 62 TFEU, as the legal basis.

As the request from the Committee on Employment and Social Affairs for an opinion on the legal basis mentioned not only the amendments in this respect proposed in the draft report but also in amendments tabled in the lead committee these will also be considered. Two of the provisions proposed as legal basis, Article 54 TFEU and Article 151 TFEU cannot be used as legal basis due to the fact that they do not contain any reference to a legislative procedure, wherefore they do not need further consideration.

Article 46 TFEU and Article 56 TFEU do refer to the ordinary legislative procedure. However, an examination of the measures that said articles allow the Union to adopt shows that they do not correspond to the aim and content of the proposal. Article 46 TFEU lists a number of actions which aim at the promotion of the free movement of workers through facilitating the functioning of a common labour market, none of which correspond to the aim and content of the directive in force, nor to the aim and content of the proposal. Article 56 TFEU allows for the extension of the freedom to provide services to nationals of third countries who are established within the Union, which clearly is not the subject of the proposal. In order for either article to be applicable as legal basis, a wholly different piece of legislation would have to be envisaged.

The remaining question is whether Article 153 TFEU could be added as what essentially would be a second legal basis. Paragraph 2 of the article provides the legal basis for adopting directives laying down “minimum requirements” in the fields of social policy which enumerated in paragraph 1 of the article. Points (a) and (b) of paragraph 1, which have been proposed as an additional legal basis refer to the “improvement in particular of the working environment to protect workers' health and safety” and to “working conditions”, respectively. Directives pursuing the objectives defined in points (a) and (b) are to be adopted in the ordinary legislative procedure.

Having regard to the aim of the proposal, as expressed, notably, in the introductory recitals, as well as to the content of the amendments proposed to the articles of Directive 96/71/EC, one can conclude that there is an increased emphasis on the protection of workers' rights in the proposal compared to the directive in force, which, if adopted, would shift the “balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers” referred to in recital 4 of the proposal towards the protection of the rights of posted workers.

The reference in recital 4 of the proposal to the necessity “to assess whether the Posting of Workers Directive still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers “ also appears to signal

that the latter aspect has been one of the reasons behind the Commission's decision to propose the amendments to the directive, although the ensuring of a "level playing field for businesses" referred to in recital 1 is also likely to have been relevant in this respect.

Thus, while the promotion of the freedom to provide services through the posting of workers remains an objective of the proposal which justifies the legal bases proposed by the Commission, it could be argued that the proposal's increased emphasis on the protection of the rights of posted workers justifies considering this as a separate and equally important aim, reflected in the content of the proposal, in which case a dual legal basis could be appropriate.

However, the evaluation of the appropriateness of adding Article 153 TFEU as a, *de facto*, second legal basis would also need to take the position adopted by the Parliament into account. The draft report by the co-rapporteurs in the lead committee obviously gives an indication in this respect, and it arguably seeks to shift the balance further towards the protection of the rights of posted workers. There are, nevertheless, almost 500 amendments to the draft report, with two committees providing opinions to the report, wherefore a final opinion would need to consider also the adopted report.

As regards Article 153 TFEU as a legal basis it should be noticed that paragraph 1 of the article cannot, as such, be referred to alone, as the procedural references are to be found in paragraph 2 of the article. Thus, if Article 153 is used, a reference should be made to paragraph 2 of the article.¹ It should also be noted that paragraph 2 refers to two different procedures, the ordinary legislative procedure and a special legislative procedure, depending on which objective(s), specified in the points in paragraph 1 of the article, an act pursues. Therefore, it would not be recommendable to refer to Article 153 TFEU as whole, and if the objectives pursued are those expressed in point (a) and (b) of paragraph 1 of the article, it should be clear that those provisions must be read in conjunction with paragraph 2 of the article.

6. Conclusion

The legal bases proposed by the Commission, Article 53 TFEU and Article 62 TFEU are appropriate as legal bases for the proposed amending directive. Article 153(2) TFEU should be considered as an additional legal basis, in particular, if the emphasis on the protection of the rights of posted workers is further reinforced by the Parliament. If Article 153 TFEU would be added as a legal basis it would be recommendable to refer, in this case, to Article 153(1) TFEU, points (a) and (b) in conjunction with Article 153(2) TFEU.

Yours sincerely,

Pavel Svoboda

¹ The Commission traditionally has referred just to paragraph 2. As a recent example see, for instance, the proposal for amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (COM(2016) 248 final).