



**CONSULTATION OF  
THE SUBSIDIARITY EXPERT GROUP AND  
RELEVANT DECISIONS OF NATIONAL AND REGIONAL PARLIAMENTS  
ON  
SUBSIDIARITY AND PROPORTIONALITY RELATED ASPECTS OF THE DRAFT  
DIRECTIVE CONCERNING THE POSTING OF WORKERS**

**SYNTHESIS AND ANALYSIS**

**Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM (2016) 128 final**



<http://subsidiarity.cor.europa.eu>

**Disclaimer:**

*This document does not seek to reproduce all the contributions to the consultation and the decisions of national/regional parliaments, but rather to synthesise the main points. It is not binding on the Committee of the Regions and does not prejudice the final content of its relevant opinion/s.*

## 1. Introduction/background

### 1.1 Consultation of the Subsidiarity Expert Group

The proposal for a Directive is included in the CoR Subsidiarity Work Programme 2016 in the framework of proposals in the area of labour mobility.

Therefore, the Subsidiarity Expert Group<sup>1</sup> was consulted and asked to contribute to the subsidiarity and proportionality analysis of relevant aspects of the proposal<sup>2</sup>. The consultation ran from 13 April to 4 May 2016 and received four contributions of respondents from Austria<sup>3</sup>, Germany, Italy and the United Kingdom.

Two regional parliaments (the Bavarian State Parliament and the Regional Parliament of Marche) have issued a position which each has been uploaded on the [REGPEX database](#)<sup>4</sup>.

In the framework of the Early Warning System (deadline was 10 May), **14 national parliaments/chambers thereof**<sup>5</sup> (from 11 Member States) have issued reasoned opinions<sup>6</sup>. They represent one third of all votes allocated to national parliaments, and in consequence a "**yellow card**" was issued for this proposal. This is the third time the yellow card procedure has been triggered. It obliges the Commission to review the proposal; this can result in maintaining, amending or withdrawing the proposal. If the Commission chooses to maintain the proposal, it will have to justify why it considers the proposal to comply with the principle of subsidiarity.<sup>7</sup>

It has to be noted that in their reasoned opinions, national parliaments/chambers thereof should assess the proposal in question from a subsidiarity point of view. However, the reasoned opinions concerning the legislative proposal at stake also refer to other aspects, such as proportionality and the choice of the legal basis. For triggering the yellow card, only the number of reasoned opinions counts, it is thus sufficient that the national parliaments/chambers qualify their decision as reasoned opinions, and the content of the latter is not assessed in this context. It is up to the European Commission to assess the arguments presented in the reasoned opinions when deciding about its reaction to the yellow card (i.e. maintain/amend/withdraw the proposal at stake).

The following summary and analysis of the contributions and of relevant decisions of national and regional parliaments as well as the additional information will be forwarded to **Yoomi Renström**

---

<sup>1</sup> The CoR Subsidiarity Expert Group currently includes 13 members from institutions that are members of the Subsidiarity Monitoring Network.

<sup>2</sup> COM (2016) 128 final.

<sup>3</sup> Austrian expert nominated by REGLEG.

<sup>4</sup> <http://portal.cor.europa.eu/subsidiarity/Pages/DocumentDetails.aspx?docnum=128&docyear=2016&docpart=COM>

<sup>5</sup> Bulgarian National Assembly, Croatian Parliament, Czech Senate, Czech Chamber of Deputies, Danish Parliament, Estonian Parliament, Hungarian National Assembly, *Saeima* Parliament of Latvia, Seimas of the Republic of Lithuania, Polish Senate, Polish Sejm, Romanian Senate, Romanian Chamber of Deputies, National Council of the Slovak Republic

<sup>6</sup> Published on IPEX, <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160128.do>

<sup>7</sup> Article 7 Protocol No 2

(SV/PES), rapporteur of the relevant CoR opinion, for her to take into account for the drafting of her opinion, particularly for the **assessment of compliance with the principles of subsidiarity and proportionality**.

Rule 55.2 of the Rules of Procedure of the CoR specifies the following:

*"Committee opinions on proposals for legislative acts in areas not falling within the Union's exclusive field of competence shall express a view on the proposal's compliance with the principles of subsidiarity and proportionality."*

Consequently, the draft opinion will have to contain such an assessment.

## 2. Synthesis and analysis of contributions and parliamentary decisions

### 2.1 Legal basis

Several national parliaments/chambers thereof<sup>8</sup> put into question the legal basis chosen by the European Commission (Articles 53 and 62 TFEU, freedom to provide services), as they believe that it does not correspond with the proposal's content. For the proposal amending the Posting of Workers Directive the Commission chose the same legal basis as for the original Directive. However, in the explanatory memorandum the Commission itself argues that its objective is to protect workers and "promote the principle that the same work at the same place should be remunerated in the same manner". This is perceived by national parliaments as contradictory.

The German Bundesrat (without issuing a reasoned opinion) considers Art.153 TFEU as the right legal basis in order to highlight the objective of the protection of workers. According to Article 153 (2) b), only minimum requirements could be established, which is also highlighted by the German Bundesrat which wants the Member States to be able to ensure higher standards through national legislation.

The Bavarian State Parliament puts forward the argument that the European Union has no competence in the area of remuneration Art. 153 (5), so it believes any action in terms of harmonisation is not admissible. This view is also shared by the Danish Parliament and the Hungarian National Assembly, in which states in its reasoned opinion that for social policy aspects, the Union has only supporting competences.

The issue of the right legal basis has not been raised by the respondents participating in the consultation.

#### SUGGESTION FOR THE DRAFT OPINION

The rapporteur might also wish to raise the issue of the legal basis. It could be stressed in this context that the main objective of the revision is the protection of workers and therefore Art.153 TFEU should have been chosen as legal basis. It should be highlighted that Art. 153 provides for the mandatory consultation of the CoR (which is not the case with the legal basis chosen by the Commission – only optional consultation).

<sup>8</sup> Romanian Senate, National Council of the Slovak Republic, Czech Senate, Romanian Chamber of Deputies

## 2.2 Subsidiarity<sup>9</sup>

### 2.2.1 Formal aspects

The justification put forward by the European Commission in the explanatory memorandum of the proposal that "an amendment to an existing Directive can only be achieved by adopting a new Directive" is, according to the respondent representing regions with legislative powers, "strongly reduced to a formal statement" and "not satisfying" as "the Commission has to explain directly in the explanatory memorandum why the existing instruments cannot meet the objectives" and not only in the IA accompanying the proposal.

The reasoned opinions of national parliaments/chambers thereof<sup>10</sup> reflect the view that also in the case of a revision of existing EU legislation the Commission should justify in detail the proposed measures in the sense of Article 5 Protocol No 2<sup>11</sup>, so that parliaments can properly assess the proposal. Even if a more thorough explanation is contained in the impact assessment (which exists only in English), formally seen the proposal does not comply with the procedural requirements laid down in Article 5 Protocol No 2.

The reason for the requirement to justify draft legislative acts is to provide EU citizens and their elected representatives sufficiently detailed information for them to understand the qualitative and quantitative reasons leading to a conclusion that "a Union objective can be better achieved at Union level". Moreover, the European Commission has committed itself in its Better Regulation Agenda<sup>12</sup> to including "a more thorough explanation of how the initiative meets the twin tests of subsidiarity (why the goal cannot be achieved by the Member States alone) and proportionality (why the measure proposed does not go further than what is needed to meet its goal) and considered this as "essential to promote accountability".

### CONCLUSION

When revising existing legislation it is necessary for the Commission to justify in an adequate and substantiated manner its proposed measures, particularly if the proposal includes significant new elements as is the case for this draft Directive.

### SUGGESTION FOR THE DRAFT OPINION

The rapporteur might wish to highlight the very poor justification in terms of subsidiarity and

<sup>9</sup> Art.5 (3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

<sup>10</sup> Bulgarian National Assembly; Hungarian National Assembly; Romanian Chamber of Deputies, Romanian Senate, *Saeima* Parliament of Latvia, Parliament of Lithuania, Croatian Parliament, Czech Senate, National Council of the Slovak Republic

<sup>11</sup> By virtue of Article 5 of Prot. No 2 "any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. (...) The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, whenever possible, quantitative indicators." The requirement for the detailed statement to be within the **draft legislative act** implies that it should be contained in the Commission's explanatory memorandum, which forms part of the draft legislative act and which is translated into all official languages of the EU. This is to be contrasted with the Commission's **impact assessment**, which is not contained within a draft legislative act, and which exists only in English.

<sup>12</sup> [COM \(2015\) 215](#), para 2.2

proportionality in the draft Directive and the need for a better explanation. This is also important for the CoR which should be able to respond to its specific responsibility in terms of subsidiarity monitoring.

### 2.2.2 Material aspects

Regarding a potential material breach of subsidiarity, the question about the general necessity and added value of EU action in this area is raised by several national parliaments/chambers, but not by members of the Subsidiarity Expert Group participating in the consultation or by the two regional parliaments<sup>13</sup>.

Several reasoned opinions<sup>14</sup> consider that the proposal does not present any added value and is even in conflict with the objectives provided in the Treaty (Article 56 TFEU) by undermining them and creating obstacles to the free movement of services and to labour mobility<sup>15</sup>. Some parliaments<sup>16</sup> argue that by extending the scope of collective labour agreements to include posted workers in all economic sectors, the Commission ignores that action at Member State level can sufficiently achieve the intended objectives. In this context, several national parliaments/chambers thereof<sup>17</sup> and the Regional Assembly of Marche believe that industrial relations (including the scope of collective agreements) could be best regulated at national level, due to the specificities of national collective bargaining systems.

Several national parliaments/chambers thereof<sup>18</sup> consider that existing legislation, including the Enforcement Directive (COM (2014) 67 final) which will be fully implemented in June 2016, is sufficient and provides adequate protection of posted workers and that the new proposal is therefore not necessary.

The view of national parliaments/chambers, all but one from Eastern and Central Europe<sup>19</sup>, is not shared by the respondents participating in the consultation, who, on the contrary, do not see a breach of the subsidiarity principle in material terms and rather believe that the proposal has added value, as it simultaneously promotes fair competition between companies of different Member States providing services on and the fair treatment of posted workers<sup>20</sup>.

---

<sup>13</sup> Bavarian State Parliament raised subsidiarity concerns, but in fact, it referred to the choice of the legal basis; this point is discussed in chapter 2.2.1

<sup>14</sup> Czech Senate, Czech Chamber of Deputies, Romanian Chamber of Deputies, Romanian Senate, Lithuanian Parliament, Croatian Parliament

The Czech Senate highlights in this framework: "The European Union's aim is to promote the well-being of its people which includes also the equalisation of living conditions and wages across the Member States to which the elimination of obstacles on the internal market should contribute; contrary to the article 56 of the TFEU, the proposed Directive creates obstacles of free movement of the services thereby undermining the aforementioned aim."

<sup>16</sup> Hungarian National Assembly, Lithuanian Parliament

<sup>17</sup> Danish Parliament, Czech Senate, Czech Chamber of Deputies, National Council of the Slovak Republic

<sup>18</sup> Saeima Parliament of Latvia, Romanian Chamber of Deputies

<sup>19</sup> Except Danish Parliament's reasoned opinion, the rest is from Central and Eastern European countries' parliaments.

<sup>20</sup> Respondents from Italy and Austria

## CONCLUSION

The reasoned opinions confirm that the principle of subsidiarity is not a purely legal principle, but rather a concept open for political and subjective interpretation according to specific national interests. The parliamentary decisions concerned are guided by the relevant national political contexts. The large majority of reasoned opinions (13 out of 14) originate from Central and Eastern Europe and the presented arguments for a subsidiarity breach should be seen in their political context: where national parliaments/chambers concerned perceive the draft Directive of as a threat to their competitive advantage of lower labour cost and want to protect their national interests in this framework.

## SUGGESTION FOR THE DRAFT OPINION

The assessment of the material aspects of subsidiarity by the rapporteur will thus depend on her political approach in this context. However, it is obligatory to refer to the yellow card in the draft opinion.

### 2.3 Proportionality<sup>21</sup>

In case of a revision of existing legislation, the question of how the EU should act is of particular relevance as it touches upon aspects of proportionality.

Several national parliaments/chambers thereof<sup>22</sup> raise proportionality concerns as they see potential unnecessary administrative burden resulting from the proposal which they feel does not sufficiently take into account potential impacts, in particular on SMEs. Some of them believe that the proposed changes are disproportionate, as in their view the posting of workers refers only to a small percentage of labour force, whereas according to the Commission, the posting of workers plays an essential role in the internal market.

Furthermore, several national parliaments<sup>23</sup> believe that the submission of the proposal is premature and that the Commission should have waited for the full implementation of the Enforcement Directive (COM (2014) 67 final) by 18 June 2016 and evaluated its impact before suggesting the revision of the Posting of Workers Directive. The Croatian Parliament considers that such revision "leads to overregulation and creates an environment of legal uncertainty for employees and companies". This view is shared by other national parliaments/chambers who see a contradiction between the draft Directive and the Commission's commitment to better regulation. They consider that in its proposal the Commission introduces "unclear" terms like "remuneration" (instead of minimum rate of pay)<sup>24</sup> and that it does not take sufficient account of the proposal's potential financial and administrative impacts<sup>25</sup>.

---

<sup>21</sup> The proportionality principle stipulates that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties, i. e. the means proposed by the EU must be suitable and appropriate.

<sup>22</sup> Bulgarian National Assembly, *Saeima* Latvian Parliament

<sup>23</sup> Senate of Romania, *Saeima* Latvian Parliament, Croatian Parliament, National Council of the Slovak Republic, Lithuanian Parliament, Czech Senate

<sup>24</sup> As stated in reasoned opinion of Hungarian National Assembly

<sup>25</sup> As stated in reasoned opinion of *Saeima* Latvian Parliament

Respondents participating in the consultation<sup>26</sup> argue that the proposal is complementary to the Enforcement Directive, as it pursues different objectives, so its publication does not depend on the full implementation of the Enforcement Directive.

#### **2.4 Proper consultation (Article 2 Prot. No 2)**

Finally, several national parliaments/chambers thereof<sup>27</sup> believe that the Commission has not consulted widely enough, the results of the consultations have not been considered properly and regional and local impacts of the proposal were not taken into account.

According to some parliaments<sup>28</sup>, the proposal ignores the diversity of collective labour relations in the EU and does not sufficiently respect the autonomy of social partners as laid down in Article 152 TFEU

#### **CONCLUSION**

The proportionality concerns have been put forward by parliaments from Central and Eastern Europe, respondents participating in the consultation process and representing different geographical blocks do not share these concerns, so similarly to the case of subsidiarity, the political dimensions of the interpretation and application of the proportionality principle has to be taken into account.

Moreover, it appears that the draft Directive is in contradiction with Commission's commitment to Better Regulation.

#### **SUGGESTION FOR THE DRAFT OPINION**

The rapporteur might wish to discuss the proposed changes in light of the Commission's commitment to Better Regulation.

### **3. Additional information**

For the obligatory assessment of compliance with the principles of subsidiarity and proportionality in the draft opinion - as required by the rule 55.2 of the RoP - , the rapporteur might wish to refer to the arguments highlighted above.

The Subsidiarity team (in the CIVEX commission secretariat) is at the disposal of the rapporteur in case of any inquiries and can be contacted via email [subsidiarity@cor.europa.eu](mailto:subsidiarity@cor.europa.eu) .

---

<sup>26</sup> Respondents from Italy and Austria

<sup>27</sup> Hungarian National Assembly, National Council of the Slovak Republic, *Saeima* Latvian Parliament, Lithuanian Parliament, Romanian Chamber of Deputies, Romanian Senate, Czech Senate

<sup>28</sup> National Council of the Slovak Republic, Danish Parliament, Croatian Parliament