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Reasoned opinion on the Commission proposal for a revision of the Posting of Workers Directive

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The Danish Parliament has considered the Commission proposal amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2016)128.

Ref. 16-000321-2

A majority in the Danish Parliament (the Social Democrats, the Danish People's Party, the Red-Green Alliance, the Alternative and the Socialist People's Party) finds that the proposal involves two problems in connection with the subsidiarity principle.

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The majority welcomes the Commission's initiative in proposing a revision of the Posting of Workers Directive with the purpose of ensuring equal pay for equal work. The majority supports the positive amendments of the Directive which enhance the efforts to prevent social dumping.

But the majority finds that the proposal involves a number of problems in connection with the subsidiarity principle in two particular connections. First, because the explicit passage in the current Directive to the effect that pay is defined by the national practice (Article 3(1), last sentence) is not included in the Commission proposal for a revision.

The same applies to Article 3(9) of the current Directive, according to which Member States may lay down provisions to ensure that posted temporary workers are guaranteed the same terms and conditions that apply to national temporary workers. The consequence of the Commission's proposal to delete this provision and replace it by a provision to the effect that posted temporary workers be guaranteed the same terms and conditions that apply to national temporary workers (in compliance with the Agency Workers Directive 2008/104/EC) is that it raises doubts as to the national competence in this area.

The definition of pay and terms and conditions for temporary workers falls under the competence of the Member States. As is the case for the current Directive, this should appear explicitly from the revised Directive. It is not, in this regard, sufficient that it appears from the explanatory memorandum to the proposal.

A minority of the Danish Parliament (the Liberal Party, Liberal Alliance, the Social-Liberal Party and the Conservative People's Party) recognises the EU's competence to establish a framework for terms and conditions applicable to posted workers, see the existing Posting of Workers Directive. When the European Commission wishes to introduce a principle of equal treatment for posted workers, a necessary formal prerequisite is an amendment of the existing Directive.

However, it is not within the EU's competence to regulate pay. What is important is thus not whether the provision is in compliance with the subsidiarity principle or not, but whether the EU has competence to regulate at all. The minority does not find it necessary to submit a reasoned opinion according to the protocol on subsidiarity, but finds instead that there is reason to submit a policy statement to the effect that the competence to regulate is questioned and that an explicit passage to this effect should be included in the current Directive.

The Commission proposes that Article 3(9) of the current Posting of Workers Directive be deleted. The provision stipulates that the Member States have competence to lay down rules governing posted temporary workers that go beyond the minimum rules which otherwise follow from the Directive. Instead, the Commission proposes that a general principle of equal treatment be introduced for posted temporary workers. The legal effects of deleting Article 3(9) are not clear. It is important to the minority that the Member States' competence to lay down terms and conditions governing posted temporary workers is not reduced by the proposal. It is consequently a matter of ensuring as much latitude as possible and of maintaining national competence to be able to regulate temporary worker's terms and conditions, and the government must work to have this specified during the negotiations.

The Danish Parliament does not take any position on the other elements of the proposal in this reasoned opinion.

Yours sincerely

Mette Gjerskov

Chair of the European Affairs Committee