COMMISSION OF THE EUROPEAN COMMUNITIES

COM(75) 653 final
Brussels, 28 April 1976

Amended proposal for a Regulation of the Council on the provisions of conflict of laws on employment relationships within the Community

(Submitted to the Council by the Commission pursuant to the second paragraph of Article 149 of the EC Treaty

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V/622/75-E

EXPLANATORY MEMORANDUM

A. GENERAL

Freedom of movement for workers within the Community was brought about by Council Regulation (EEC) No 1612/68 (1) of 15 October 1968. The international mobility of workers that this has largely made possible means that an increasing number of contracts of employment which are to be performed in a Member State other than the State of origin of the worker ("intra-Community employment relationships") may be governed by the labour laws of several States.

The same legal situation also arises when undertakings which have their registered office in a Member State set up establishments or branches in other Member States within the framework of the provisions on freedom of establishment in Article 52 et seq. of the EEC Treaty and employ therein not only nationals but also workers seconded from the parent undertaking.

In all these cases the question arises as to which national labour legislation should be applied to the intra-Community employment relationship. In the present legal situation within the European Communities the solution to this question depends on which criteria are laid down by the conflict of law rules of the Member States for determining the applicable labour laws. These criteria determine whether an intra-Community employment relationship should be governed by national labour laws, i.e. the labour laws of the State where the court before which the dispute is brought is situated (lex fori), or by the labour laws of another State.

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(1) OJ No L 257, 19 October 1968

The application of these criteria varies greatly under the existing rules of Member States on conflict of laws and in the decisions of the courts. In particular there are two opposing systems. Under one system the binding provisions of national labour law are considered as far as possible to be "lois de police et de sûreté", so that precedence is given to the application of national labour law to intra-Community employment relationships.

Under the other system, however, precedence is given to the ability of parties to choose which labour law is to apply. Insofar as "lois de police et de sûreté" do not make application of the lex ford mandatory, the conflict of law rules of the Member States lay down widely differing criteria for determining the applicable labour laws. These criteria include the law governing performance (the applicable law is the labour law in force at the place where the contract of employment is to be performed), the law governing the establishment (the applicable law is the labour law in force in the place where the establishment is located), the law of the place of origin (the applicable law is the labour law governing the contracting parties by virtue of their common nationality) and the law governing the contract (the applicable law is the labour law in force in the place where the contract of employment was concluded).

In the event of a legal dispute venues can be established in several Member States both under the codes of civil procedure of the Member States and on the basis of the Convention of the Member States of the European Communities of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (venue established by the registered office of the undertaking, the branch or the place of performance, venue by agreement or through the entering of an appearance). Since each court must establish the applicable labour law according to the conflict of law rules of the lex fori, it is evident that similar cases of dispute affecting other States may be decided differently depending on the State in which the court seised of the matter is located.

The need to regulate conflict of law rules with regard to labour law is further shown by the fact that although Regulation (EEC) No 1408/71 (1) on social security for migrant workers laid down uniform rules for the application of social security schemes within the European Communities, the rights of the worker under labour law, which are frequently closely connected with rights under social security law (e.g. in the field of sickness benefits, maternity benefits, compensation for accidents at work) are governed not by the provisions of Regulation No 1408/71 but by the differing national conflict of law provisions.

Freedom of movement within the Community is a basic right of workers in accordance with the principle of equality of treatment. It is one way of achieving an improvement in living and working conditions. In order that the right to freedom of movement may be exercised in accordance with objective criteria, equality of treatment must extend de facto and de jure to everything connected with the actual pursuit of an activity for a wage or salary. The application of laws to employment relationships within the Community, which varies from one Member State to another, must therefore be reconciled with the idea and aim of freedom of movement, by determining the labour laws applicable to employment relationships within the Community in accordance with uniform criteria through the alignment of national conflictof law rules.

On the adoption of Regulation (EEC) No 1612/68, the Council instructed the Commission to examine thoroughly the problems raised by conflict of law rules with regard to labour laws, in order to find the most suitable solutions as soon as possible".

The proposal for a Regulation meets this objective, in that it :

1. stipulates the place of work as the binding criterion in all cases, precluding in principle the autonomy of the parties.

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(1) OJ No L 149, 5 July 1971

The resulting application of valid norms to uniform cases is in accordance with the Community law principle of equal treatment of workers, as set out in Article 48 of the Treaty and laid down by Regulation (EEC) No 1408/71 on the application of social security systems, which also proceeds from the basic rule of the application of the law of the Member State in which the worker is employed.

2. allows a free choice of law, within certain limits, by the contracting parties, but binds it to certain objective criteria and at the same time guarantees that in cases where labour legislation other than that in force at the place of work is applied, the minimum protective provisions in force at the place of work shall be valid.

Article 49 of the Treaty empowers the Council to take all necessary measures through directives and regulations to bring about freedom of movement of workers within the meaning of Article 48. These measures would however be limited to workers who were nationals of a Member State. For workers from third countries who were carrying on an occupation on the territory of a Member State, the respective national conflict of law rules would be applied. In this way, two different laws would be created within the European Communities, which would be dangerous from both a social and a legal point of view. By applying Article 235 of the Treaty the scope of the Regulation is therefore extended to all employment relationships, the obligations of which are to be fulfilled on the territory of the European Economic Community.

B. INDIVIDUAL PROVISIONS

Article 1

This provision establishes the scope of the Regulation. The inclusion of nationals from third countries appeared to be necessary in the interest of uniform conflict of law rules for all employment relationships within the Community. Article 1 therefore establishes as a criterion the fulfilment of the obligations of employment relationships within the Community. The nationality of the contracting parties and the place where the contract was concluded are immaterial. This therefore meets the requirement of equal treatment of workers from third countries laid down in the Social Action Programme of the Council of 21 January 1974 (1).

A substantive legal definition of the term "employment relationship" has not been included. Each Member State determines, through its own legislation, which legal relationships should be considered as employment relationships.

Article 2

Article 2 (1) establishes the principle of the application of a uniform law in conflicts of labour law rules. Although Articles 3-7 determine which of several possible systems of labour laws should be applied to an employment relationship, application should not be restricted to the labour legislation enacted by the Member State concerned, but should embrace all sources of labour law. This includes among other things the case law of the State concerned. This is of particular significance in view of the formation of labour law through common law in Great Britain and in Ireland, but is also not without importance as regards the interpretation of labour law by the supreme courts in the Member States of Continental Europe.

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1) OJ No C 13, 12 February 1974.

A qualification is necessary as regards the application of collective agreements. The laws of the Member States on collective agreements lay down different conditions governing the obligation of the contracting parties to honour the collective agreements. This Regulation, which lays down rules for conflict of laws, cannot intervene, by way of harmonization, in the substantive laws of the Member States on collective agreements. Therefore Article 2(1) clearly states that collective agreements come into consideration as sources of labour law only insofar as the labour law applicable pursuant to this Regulation lays down that the contracting parties are bound by a particular collective agreement.

Article 2(2) excludes conflict of laws questions concerning capacity to enter into contracts of employment from the scope of this Regulation. Capacity to enter into contracts is so closely associated with general civil law that it would be a mistake from the point of view of legal policy to divide this complex of legal rules into a civil law section and a labour law section.

The laws governing the capacity under civil law to conclude a contract of employment therefore continue to be determined in accordance with the general provisions of private international law.

Article 3

Paragraph 1 lays down the basic principles governing conflict of rules with regard to labour law :

- In accordance with the aim of treating all workers of an establishment equally in law, the applicable law should be the labour law of the State in which the work is usually carried out. In order to avoid a situation in which the slightest change in the actual place of work results each time in a change of the applicable labour law, the criterion for determining the applicable law should be the place at which the greatest part of the work is carried out in the context of the employment relationship. This concept is expressed by the word "usually". For example, an engineer from a construction company in State A who spends two days a week inspecting construction sites in State B should remain wholly subject to the labour laws of State A even on the two days when his actual place of work changes.
- The definition of ships as places of work is based on the previous practice on conflict of rules for sea transport; the applicable law is that of the

Member States under whose flag the ship sails.

- Workers employed in international transport as members of the travelling or flying personnel shall be governed by the labour laws of the Member State in which their employing undertaking has its registered office or place of business. Workers employed in a branch or permanent representation situated in the territory of another Member State, shall be governed by the labour laws of that Member State.

  In certain exceptional cases it may not be advisable to implement the basic rules laid down in Paragraph 1. For this reason a reservation is made in favour of the exceptions given in Articles 4 to 6. However in view of the binding nature of this regulation and its attempt to harmonise laws applicable to employment relationships with a foreign element, criteria other than those specified in Articles 4 to 6, may not be applied.

- Paragraph 2 lays down that the basic rules of Paragraph 1 relating to the regulations for the realisation of a Community transport policy are not to be affected.

Article 4

This provision deals with the temporary sending of workers to other States in accordance with the provisions on social security for migrant workers adopted pursuant to Article 51 of the Treaty. The labour laws in force at the place where the establishment sending the workers is located are still to be applied, but the duration of the work as laid down under Article 14 (1) (a) of Council Regulation (EEC) No 1408/71 1) of 14 June 1971 may not exceed 12 months. This ensures conformity with the legal situation in respect of social security. However, in order to avoid a situation where Community rules on labour laws have to be changed each time there is an amendment to Community rules in respect of social security, Article 4 contains a blanket reference to the

1) OJ No L 149, 5 July 1971

relevant current Community rules on social security adopted pursuant to Article 51 of the Treaty establishing the European Economic Community. This legal provision is binding and therefore cannot be circumvented by an agreement in the contract of employment.

Article 5

This provision gives the parties to the contract of employment a limited freedom of choice as to the applicable law where an undertaking owns establishments in several Member States. In the interests of a continuous staff policy it should be possible, where a worker is transferred from one Member State to another, for the partners to a contract of employment, contrary to the rule in Article 3 that the labour laws of the usual place of work are to be applied, to continue to apply the labour laws applied hitherto. Such an agreement may be made at any time, i.e. not only when the contract of employment is concluded but also later, when the worker has already been transferred.

This freedom to choose the applicable laws is, however, subject to certain restrictions :

Firstly, to be valid, the choice requires a written agreement or at least a written confirmation from one of the contracting parties. This is to avoid a situation where subsequently the parties to the contract of employment lack the necessary evidence.

Moreover such an agreement may only be contemplated where the transfer is not merely temporary within the meaning of Article 4; for in such a case the previous labour laws would remain applicable under the binding provisions of Article 4. The transfers must therefore be for a period of more than 12 months.

Such an agreement is admissible only when the previous establishment and the establishment to which the worker is transferred belong to the same undertaking.

This means that the employer, whether a natural or a legal person, must not undergo any change as a result of the transfer.

Finally, an agreement to retain the previous labour laws is possible only if the establishments concerned are situated in Member States of the European Communities. This is to prevent a situation in which, in the case of transfers of workers from a third country to a Member State, labour laws are retained and brought into the Community which are not as socially advanced as those of the Member States and which undermine the effects of the same. This means that Article 3 alone is applicable to transfers from third countries to a Member State, subject to the exceptions made in Articles 4 and 7.

Article 6

This provision covers cases in which a particular usual place of work does not exist and the basic rule in Article 3 therefore cannot be applied. Here, too, it seems objectively justifiable to allow the contracting parties a limited freedom to choose the applicable laws. The possibilities of making an agreement to apply laws other than those specified in Article 3 are based on the principles underlying Article 14(1)(c) of Council Regulation (EEC) No 1408/71 1) of 14 June 1971. However, it does not seem appropriate to take over the rules in Regulation No 1408/71 as they stand since the scope of the present Regulation, in contrast with Regulation 1408/71, also extends to nationals of third countries. Further, Article 6 also restricts the possible choice of laws to labour laws of Member States, in order to prevent a situation where the labour laws of Member States are undermined through the contractual infiltration of labour laws which are not as socially advanced.

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1) OJ No L 149, 5 July 1971

Article 7

Article 7 permits an unrestricted free choice of applicable laws by agreement between the contracting parties in cases where this is justified by the special position of the worker in the establishment or by the special nature of his work. It is a kind of "mopping-up" rule for cases in which the strict application of Articles 3 to 6 would have socially or economically undesirable results, and where the category of persons concerned did not require such rigourous social protection as the normal worker.

Specific examples of workers who may qualify for the right to choose the applicable laws are given in Article 7 (2). On the one hand there are persons employed in a managerial or advisory capacity. This will be the case for example with works superintendents legal advisors, economic planners or executive staff. The second group consists of workers with a high degree of specialization, as is usually the case with highly qualified skilled workers. Covered in particular are cases in which highly qualified foreign workers can be acquired by an undertaking only if they are allowed to retain or apply labour laws other than those provided for in Articles 3 to 6.

In view of the many different ways in which companies are organized the concepts employed in Article 7 cannot be defined more closely. This would also place an unnecessary restriction on the desired flexibility of this provision. However, before this Article is applied, it should always be verified that the position or the work of the employee concerned is such that he is in a position to negotiate on an equal footing with the employer with regard to the labour laws to be applied.

Article 8

Under the laws in force there are already certain protective provisions of labour laws the application of which at the place of work cannot be affected by the precedence of foreign labour laws under conflict of law rules. As regards social objectives, no great importance attaches to whether the binding nature of these provisions is based on their being "lois de police et de sûreté", or is laid down by public law. Article 8 (1) contains a comprehensive list of legal provisions the application of which cannot in any event be precluded by an agreement to apply laws other than those of the place at which the work is carried out. This list represents the average state of the national labour laws currently in force. Article 8 (1) thus ensures that the protective provisions in force at the place where the work is carried out must be respected everywhere in the Community, i.e. even if a legal dispute is settled in a Member State other than that in which these provisions are in force.

This list is valid for all cases in which under Articles 4 to 7 the labour laws applicable under conflict rules are not identical with those of the State in which the worker usually carries out his work. An exception has been made in paragraph 2 to the binding application of the provisions in force at the place of work concerning the invalidity of restraints on competition in the cases referred to in Article 7 only. In view of the special interests with which Article 7 is concerned there must be a justified interest in retaining the restraints on competition agreed under the applicable labour laws chosen.

The legal provisions which must be enforced at the place of work represent a minimum social protection. It should not be thought that the worker thereby loses a better protection available to him through the laws applicable under Articles 4 to 7. This is clearly stated in paragraph 3.

Article 9

Article 9 contains the implementing clause required under the second paragraph of Article 189 and the first paragraph of Article 191 of the Treaty establishing the European Economic Community.

V/622/75-E

AMENDED PROPOSAL FOR A REGULATION OF THE COUNCIL ON THE PROVISIONS ON CONFLICT OF LAWS ON EMPLOYMENT RELATIONSHIPS WITHIN THE COMMUNITY

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 49 and 235 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas Council Regulation (EEC) No 1612/68 of 15 October 1968 and Council Directive No 68/360/EEC of 15 October 1968 have largely brought about freedom of movement for workers; whereas the application of social security schemes to workers and their families moving within the Community is governed by Council Regulation (EEC) No 1408/71 of 14 June 1971;

Whereas, furthermore, the freedom of establishment and the freedom to provide services guaranteed in the Treaty have led undertakings to transfer their activities to a greater extent to other Member States;

Whereas this freedom to move across frontiers leads to a situation in which various national laws may be applied to employment relationships the obligations of which are to be fulfilled in a country other than the country of origin of the worker;

Whereas the criteria laid down in the conflict of laws of Member States for determining the applicable laws show differences which must be removed in order to prevent the social situation of those workers who make use of their freedom of movement being affected adversely;

Whereas this aim will be achieved by laying down the place of work as the standard criterion and by permitting exceptions, including the free choice of applicable laws by the contracting parties, only subject to certain objective criteria; whereas this takes account not only of the equality of treatment provision in Article 48 of the Treaty as defined in Articles 7 to 9 of Regulation No 1612/68, which provide for a uniform application of standards at the place of work, but also of Regulation No 1408/71 on the application of social security schemes, in that it ensures that closely connected social security and contract of employment claims arising from the same event are to be governed by the same criteria;

Wheras the scope of a Regulation based on Article 49 of the Treaty alone would be restricted exclusively to nationals of Member States of the Community; whereas in the interests of a uniform application of laws it is advisable to include nationals of third countries in the scope of the Regulation, insofar as they are employed on the territory of a Member State of the Community; whereas for this reason Article 235 of the Treaty should also be invoked;

has adopted this regulation :

Article 1

This Regulation shall apply to all employment relationships the obligations of which are to be fulfilled on the territory of a Member State of the European Economic Community.

Article 2

1) The term "labour laws" means all laws and administrative provisions applicable to employment relationships, collective agreements insofar as the contracting parties are bound by them, established employment practices and case law insofar as it is the law in force.

2) Capacity to enter into contracts of employment shall be subject to laws applicable under general conflict rules.

Article 3

1) Save in the cases specified in Articles 4 to 6, employment relationships within the meaning of Article 1 shall be governed by the following laws relating to employment :

- in principle, workers will be subject to the laws relating to employment of the Member State within which they normally carry out their employment ;

- Workers employed on board a ship sailing under the flag of a Member State shall be subject to the laws relating to employment of that State ;

- Workers employed in international land or water transport as travelling personnel shall be subject to the laws relating to employment of the Member State within which their employing undertaking has its registered office. However, where such workers are employed by a branch or permanent representation of such an undertaking within another State, they shall be subject to the laws relating to employment of the latter State.

2) Paragraph 1 shall not affect those provisions of Community Regulations which lay down standard ~~norms~~ NORMS as part of the Common transport policy.

Article 4

Workers who are sent by their undertaking to other Member States to carry out temporary activities within the meaning of the provisions on the social security of migrant workers adopted pursuant to Article 51 of the Treaty establishing the European Economic Community shall continue to be governed by the labour laws in force at the place where the establishment sending the workers is located.

Article 5

If an undertaking possesses establishments in two or more States, the contracting parties may at any time make a written agreement, or a verbal agreement confirmed in writing, to the effect that the labour laws applicable originally shall continue to apply if the worker is transferred from one of these establishments to another.

Article 6

If the worker usually carries out his work on the territory of two or more States and if at least one of these is a Member State of the Community, than the contracting parties may at any time make a written agreement, or a verbal agreement confirmed in writing, as to the labour laws to be applied to their employment relationship. The laws chosen shall be the labour laws of one of the Member States in which the worker carries out his work or the Member State in which he has his permanent residence or in which the residence of the employer or the registered office of the undertaking is located.

Article 7

1. By way of derogation from Articles 3 to 6 the applicable labour laws may be freely agreed by the contracting parties in writing or through a verbal agreement confirmed in writing, insofar as this is justified by the special position of the worker in the establishment or by the special nature of his work.

2. A special position of the worker in the establishment exists where the latter carries out managerial or advisory functions. Work of a special nature means activities which require a high degree of specialization on the part of the worker.

Article 8

1) Under no circumstances shall the application of the following provisions in force at the place where the work is carried out be precluded by Articles 4 to 6 :

a) provisions concerning time off per week and public holidays, provisions concerning work on Sundays and public holidays and night work;

b) provisions relating to the maximum daily and weekly working hours and permission to depart therefrom;

c) provisions relating to minimum holidays;

d) provisions concerning minimum guaranteed wages and similar guaranteed payments by the employer, and payment of wages;

e) provisions on accident prevention at work and occupational medicine and hygiene;

f) provisions concerning prohibitions and restrictions and other protective provisions with regard to the employment of children, adolescents, women and mothers and protective provisions for certain categories of workers, in particular severely handicapped people;

g) provisions concerning the protection of employees' representatives;

h) provisions concerning official approval of the termination of employment relationships;

i) provisions concerning the business of hiring out workers;

j) provisions concerning the invalidity of restraints on competition, or similar clauses in contracts of employment which seek to restrain or prevent employment of the worker.

2) Paragraph 1 a) to i) shall also apply where Article 7 is invoked.

3) Insofar as provisions applied pursuant to Articles 4 to 7 offer better protection for the worker, they shall remain in force.

Article 9

1. This Regulation shall enter into force on ...

2. It shall be binding in its entirety and directly applicable in all Member States.