

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93)225 final - SYN 346

Brussels, 15 June 1993

Amended proposal for a

COUNCIL DIRECTIVE

concerning the posting of workers
in the framework of the provision

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

Parliament and the Economic and Social Committee have delivered opinions on the proposal for a Council Directive concerning the posting of workers in the framework of freedom to provide services. The amended proposal, which the Commission is submitting pursuant to Article 149 of the Treaty, takes account of Parliament's amendments approved on 10 February 1993, the Economic and Social Committee's opinion adopted on 16 December 1991 and the developments of discussions in the Council Working Group on Social Questions. A number of technical improvements have been incorporated for the sake of legal certainty and consistency.

Article 1

The wording of Article 1 has been rephrased to clarify its meaning and to emphasize the fact that the undertaking referred to therein may be established either in a Member State or in a third country. This amendment is in line with the wishes expressed by Parliament and responds to a broad consensus within the Council Working Group on Social Questions.

Article 2

Point (c) has been amended at the request of Parliament. By replacing the original term "located" with the Parliament's recommended expression "carrying out work" the new text becomes clearer, broader and more adequate.

Article 3

The amendment to paragraph 1, point (a) and the new paragraph 4 have been introduced to take account of the wishes overwhelmingly expressed by Parliament. They have a two-fold objective: First of all, to clarify the original text by deleting the term "erga omnes" which is unknown in some Member States and to ensure the application of collective agreements at national, regional or other levels which must be observed by all national undertakings operating in the occupation or industry concerned and, secondly, to allow Member States, in the absence of the abovementioned collective agreements (or awards), to include those which are complied with by the great majority of national-level undertakings in the occupation or industry in question. The fact that an economically insignificant number of national-based undertakings do not observe the collective agreements (or awards) in question, would not necessarily impede their application to the undertaking referred to in Article 2. A key factor will be the extent to which those undertakings are real potential competitors relative to undertakings referred to in Article 2. The term "national-based undertakings being in a similar position" should be construed as enterprises established in the Member State concerned, which undertake similar activities or operations and are equivalent in volume or size.

Furthermore, in order to guarantee legal certainty, Article 4 (3) provides that Member States must ensure that information is officially published and easily available to foreign undertakings in order to

enable them to identify the collective agreements which are generally applicable within the meaning of Article 3(4). In the absence of such information the abovementioned collective agreements cannot be imposed upon foreign providers of services.

Paragraph 1, point (b) has been changed in response to three amendments made by Parliament, by adding the terms "Saturdays" and "shift work", "public holidays" and "sexual orientation" to (I), (II) and (VII) respectively.

Paragraph 1, point (b)(III) has been modified, at Parliament's request, by deleting the words "but excluding benefits provided for by private occupational schemes". It is now clear that bad weather payments, payments relating to annual holidays and public holidays are the responsibility of the employer where the national law of the host country so establishes. Whether or not he should pay contributions to special funds laid down by laws or the collective agreements referred to in Article 3 will depend on the circumstances of the case and on the rule that persons providing services should be neither discriminated against nor required to comply with obligations which are incompatible with the provision of services as laid down in Article 59 of the Treaty (Joined Cases 62 and 63/81 Seco SA).

Paragraph 2 has been amended at the request of Parliament. It reduces to one month the original three-month threshold. The new threshold allows for the necessary flexibility, may be regarded as more favourable to workers and is in line with Article 4(3) of Council Directive 91/533/EEC of 14 October 1991 concerning the employer's obligation to inform workers on the conditions applicable to their contracts of employment. The said Article allows the employer not to give a new written statement to a posted worker where the posting lasts less than one month.

Paragraph 3 has been inserted to reflect the opinion of Parliament and is designed to guarantee the application of the more favourable working conditions provided for by the law applicable, usually the law of the home country.

Article 4

Article 4 has been introduced in light of the views of Parliament and the Economic and Social Committee.

Paragraph 1 ensures cooperation between public authorities of both the home and the host country in matters relating to the application of the Directive. It states that liaison offices must be designated to channel such cooperation.

Paragraph 2 contains a non-exhaustive list of matters on which information should be provided to a requesting public authority. Such a list includes information concerning the working conditions applicable to posted workers in accordance with Article 3 and the cross-border supply of workers, including apparent abuses or possible cases of unlawful cross-frontier activities.

Paragraph 3 is clarified in Article 3 (1)(a).

Article 5

This Article reflects the opinion of Parliament and the Economic and Social Committee and is in line with other Commission proposals. It provides for appropriate remedies in the event of failure to comply.

Article 6

Article 6 modifies the date referred to in the original Article 4 which is no longer viable.

Article 7

This Article was added to take into account Parliament's wishes. It provides for a review of the operation of the Directive five years after the expiry of the period referred to in Article 6.

Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services

ORIGINAL PROPOSAL

Proposal for a Council Directive concerning the posting of workers in the framework of the provisions of services

Amended proposal for a Council Directive concerning the posting of workers in the framework of the provisions of services

The Council of the European Communities,

The Council of the European Communities,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Unchanged

Having regard to the proposal from the Commission, (1)

Unchanged

In cooperation with the European Parliament, (2)

Unchanged

Having regard to the opinion of the Economic and Social Committee, (3)

Unchanged

Whereas, pursuant to Article 3(c) of the EEC Treaty, the abolition as between Member States of obstacles to freedom of movement for persons and services constitutes one of the objectives of the Community;

Unchanged

Whereas for the provision of services any restrictions based on nationality or residence requirements are prohibited under the Treaty with effect from the end of the transitional period;

Unchanged

(1) OJ No.
(2) OJ No.
(3) OJ No

Not foreseen

Whereas the free provision of services in the framework of the Single Market is a fundamental principle of the EEC Treaty as interpreted by the Court of Justice. Whereas, however, certain restrictions may be introduced where justified on grounds of public interest.

Whereas the realization of the internal market offers a dynamic environment for the provision of services and transnational subcontracting by inviting a growing number of undertakings to post their employees abroad temporarily to perform work on the territory of a Member State other than the State in which they are habitually employed;

Unchanged

Whereas the provision of services may take the form either of performance of work by the provider of the service or the provision of manpower for use by an undertaking in the framework of a public or a private contract;

Unchanged.

Whereas any such promotion of the transnational provision of services requires a climate of fair competition to exist which cannot be attained without measures ensuring respect for the rights of workers;

Whereas any such promotion of the transnational provision of services requires fair competition to exist which cannot be attained without measures guaranteeing respect for the rights of workers;

Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship and that it is in the best interests of the parties to lay down the conditions governing the employment relationship envisaged;

Unchanged

Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by both sides of industry to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the respect of those rules by the appropriate means;

Unchanged

Whereas Council Directive 71/305/EEC of 26 July 1971, concerning the coordination of procedures for the award of public works contracts,⁽⁴⁾ as last amended by Council Directive 89/440/EEC,⁽⁵⁾ lays down strict rules on the verification of the aptitudes of bidders on the basis of their economic, financial or technical capacities;

Unchanged

Whereas Council Directive 89/440/EEC and Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁽⁶⁾ introduced a transparency clause whereby the contracting authority may provide tenderers with the necessary information concerning working conditions applicable to the work envisaged;

Unchanged

Whereas ILO Convention 94 concerning social clauses in public contracts came into force on 20 September 1952;

Unchanged

Whereas the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980⁽⁷⁾ by eight Member States came into force on 1 April 1991 in the majority of Member States;

Unchanged

(4) OJ L 185 of 16.8.1971, p. 5.

(5) OJ L 210 of 21.7.1989, p. 1.

(6) OJ L 297 of 29.10.1990, p. 1

(7) OJ L 260 of 9.10.1980.

Whereas its Article 3 establishes, as a general rule, the free choice of law made by the parties; whereas, in the absence of choice, the contract shall be governed according to Article 6(2), by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country;

Unchanged

Whereas, according to Article 6(1) of the said Convention, the choice of law made by the parties shall not have the result of depriving the employees of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice;

Unchanged

Whereas, according to the principle of precedence of the Community law stated in its Article 20, the said Convention shall not affect the application of provisions which, in relation to a particular matter, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts;

Unchanged

Whereas a minimal approximation of the labour laws of the Member States has already taken place; whereas, however, there are still differences as to the social rights guaranteed by the national laws and the collective agreements in force;

Unchanged

Whereas, to this end, the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided;

Whereas until such time as these differences in social rights have converged, the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; whereas such coordination can be achieved only by means of Community law;

Whereas the stability of employment relationships for short-term postings should not be hampered with respect to minimum rates of pay and minimum paid holidays; whereas, therefore, an exception to certain provisions of the Directive should be provided for;

Unchanged

Whereas, however, a "hard core" of protective rules, clearly defined, should be observed by the provider of the services notwithstanding the duration of the worker's posting;

Unchanged

Not foreseen

Whereas, however, the mandatory rules for minimum protection in force in the host country must not prevent application of the terms and conditions of employment provided for by the law applicable which are more favourable to workers;

Whereas, to attain the aims and objectives envisaged by this Directive, undertakings established outside the Community must be subject to the same "hard core" of protective rules with respect to their workers who carry out temporary work in the territory of a Member State;

Unchanged

Whereas this Directive is without prejudice to national laws relative to the hiring out of workers, notably to the functioning of temporary employment business, as well as to the entry, residence and employment of third country workers.

Not foreseen

Not foreseen

HAS ADOPTED THIS DIRECTIVE :

10

Whereas, without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment businesses, nor does it prejudice the application by Member States of their laws concerning the hiring out of workers and temporary employment businesses to undertakings not established in their territory but operating therein in the framework of the provision of services;

Whereas this Directive shall affect neither the agreements concluded by the Community with third countries nor the laws of Member States concerning the access to its or their territory of third-country providers of services; whereas this Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers;

Whereas competent authorities in different Member States must cooperate with each other in the application of this Directive; whereas Member States must provide for appropriate remedies in the event of failure to comply with this Directive;

Whereas five years after the date set for the implementation of this Directive, the Commission must review its operation with a view to proposing, where necessary, the adequate amendments;

Article 1

This Directive shall apply to undertakings, regardless of the State in which they are established, which exercise their activities in the framework of the provision of services within the meaning of the Treaty.

Article 1

This Directive shall apply to employment relationships carried out in the framework of the provision of services referred to in Article 2 whether the undertaking providing them is established in a Member State or in a non-Member country.

Article 2

This Directive applies to the extent that an undertaking referred to in Article 1:

(a) in the course of carrying out a contract for work or services posts a worker to the territory of a Member State on behalf of and under the direction of that undertaking; or

(b) being a temporary employment business places a worker with a user undertaking established or having a place of business in a Member State, in so far as there is an employment relationship between the temporary employment business and the worker during the period of posting; or,

(c) places a worker with one of its establishments, or with another undertaking located in a Member State, in so far as there is an employment relationship between the former undertaking and the worker during the period of posting.

Article 2

1. Unchanged

(a) Unchanged

(b) Unchanged

(c) places a worker with one of its establishments or with another undertaking carrying out work in a Member State, in so far as there is an employment relationship between the former undertaking and the worker during the period of posting.

Article 3

1. Member States shall see to it that, whatever the law applicable to the employment relationship, the undertaking does not deprive the worker of the terms and conditions of employment which apply for work of the same character at the place where the work is temporarily carried out, provided that:

(a) they are laid down by laws, regulations and administrative provisions, collective agreements or arbitration awards, covering the whole of the occupation and industry concerned having an "erga omnes" effect and/or being made legally binding in the occupation and industry concerned, and

(b) they concern the following matters:

(i) maximum daily and weekly hours of work, rest periods, work on Sundays and night work;

(ii) minimum paid holidays;

(iii) the minimum rates of pay, including overtime rates and allowances, but excluding benefits provided for by private occupational schemes;

(iv) the conditions of hiring out of workers, in particular the supply of workers by temporary employment businesses;

(v) health, safety and hygiene at work;

Article 3

1. Member States shall see to it that, whatever the law applicable to the employment relationship, the undertaking referred to in Article 2 does not deprive the worker of the terms and conditions of employment which apply for work of the same character at the place where the work is temporarily carried out, provided that:

(a) they are laid down by laws, regulations and administrative provisions or by collective agreements or arbitration awards within the meaning of paragraph 4.

(b) they concern the following matters :

(i) maximum daily and weekly hours of work, rest periods, work on Saturdays and Sundays, night work and shift work;

(ii) public holidays and minimum paid holidays

(iii) the minimum rates of pay, including overtime rates and allowances;

(iv) unchanged

(v) unchanged

(vi) protective measures with regard to the working conditions of pregnant women or women who have recently given birth, children, young people and other groups enjoying special protection;

(vii) equality of treatment between men and women and prohibition of discrimination on the grounds of colour, race, religion, opinions, national origin or social background.

2. Paragraphs 1(b) (ii) and (iii) shall not apply to employment relationships referred to in Article 2 when the length of the posting of the workers is less than three months, within a reference period of one year from the beginning of the posting. In calculating the three-month period, account should be taken of any previous periods for which the post has been filled by a posted worker.

3. Not foreseen

(vi) unchanged

(vii) equality of treatment between men and women and prohibition of discrimination on the grounds of colour, race, religion, opinions, national origin, social background or sexual orientation.

2. Paragraph 1(b) (ii) and (iii) shall not apply to employment relationships referred to in Article 2 when the length of the posting of workers is less than one month, within a reference period of one year from the beginning of the posting. In calculating the one-month period, account shall be taken of any previous periods for which the post has been filled by a posted worker.

3. Paragraph 1 shall not prevent application of the terms and conditions of employment provided for by the law applicable which are more favourable to workers.

4. Not foreseen

4. For the purposes of paragraph 1 point (a), collective agreements or arbitration awards mean those which must be observed by all undertakings in the geographical area and in the profession or industry concerned. In the absence thereof, Member States may include those collective agreements or awards which are generally applicable in the area or in the profession or industry in question, provided that their application to the undertaking referred to in Article 2 ensures equality of treatment on matters itemised under paragraph 1 point (b) between that undertaking and national-level undertakings being in a similar position.

Article 4

Not foreseen

Article 4

1. Member States shall provide for cooperation between public authorities in matters relating to the application of this Directive. To this end they shall designate liaison offices. The relevant details shall be notified to the other Member States and to the Commission.

2. Not foreseen

2. The assistance referred to in paragraph 1 shall consist in particular in replying to any reasoned request for information concerning the working conditions applicable to posted workers in accordance with Article 3 and the cross-border supply of workers, including apparent abuses or possible cases of unlawful cross-frontier activities. Mutual administrative assistance shall be provided free of charge.

3. Not foreseen

3. Member States shall ensure that official information on the collective agreements which are generally applicable within the meaning of Article 3(4) is published by a competent authority and readily available to the undertaking referred to in Article 2. Failing such information the undertaking in question shall not be bound by the abovementioned collective agreements.

Article 5

Article 5

Not foreseen

Member States shall provide for appropriate remedies in the event of failure to comply with this Directive and in particular shall ensure that adequate procedures exist at the suit of workers and/or their representatives for the enforcement of obligations under this Directive

Article 4

Article 6

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992 at the latest. They shall immediately inform the Commission thereof.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive two years after its adoption at the latest. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive, or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Unchanged

Article 7

Not foreseen

Article 7

Five years after the period referred to in Article 6 the Commission shall review the operation of this Directive with a view to proposing, where necessary, suitable amendments.

Article 5

This Directive is addressed to the Member States.

Article 8

This Directive is addressed to the Member States.

17
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