COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 1 August 1991

Proposal for a

COUNCIL DIRECTIVE

concerning the posting of workers in the framework of the provision of services

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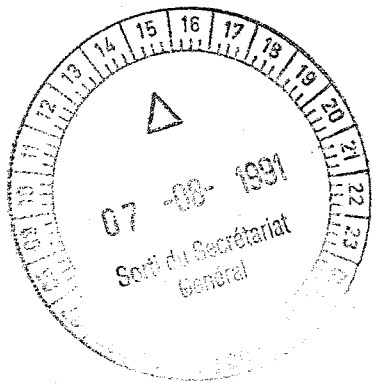
(presented by the Commission)



EXPLANATORY MEMORANDUM

Introduction

1. In its Action Programme relating to the implementation of the Community Charter of Basic Social Rights for Workers, the Commission, under the chapter concerning the freedom of movement, referred to a "proposal for a Community instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a subcontracting undertaking".

The Commission considered that the free movement of services, capital, goods and persons will increase considerably with the completion of the single market bringing about a considerable number of employment relationships which are to be temporarily performed in a Member State other than the State in the territory of which they are habitually performed. Thus, a new intra-Community mobility of workers within their jobs, different from the traditional mobility in search for new employment, is increasingly growing within the European Community(1) in the framework of the economic freedoms, in particular, of the freedom to provide services.

2. In all these cases the question arises as to which national labour legislation should be applied to undertakings which post a worker to carry out temporary work in a Member State. 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 law. As the application of these criteria varies under the existing rules of Member States, the outcome may be that the determination of the applicable law gives rise to legal uncertainty, and may give rise to distortions of competition between national and foreign undertakings making it difficult to anticipate the working conditions applicable to the undertakings involved.

3. To increase legal certainty, to ascertain in advance the working conditions applicable and to erradicate practices which may be both detrimental to a fair competition between undertakings and prejudicial to the interests of the workers concerned, a coordination of the law of the Member States is needed. In doing so the Commission is in effect reaffirming its commitment to the principle of subsidiarity for, given the dimension, nature and effects of the task involved, the objectives concerned can be undertaken more effectively in common than by the Member States acting separately.

(1) A. Lyon-Caen. "Le droit, la mobilité et les relations du travail : quelles perspectives". Rev. Marché Commun No 334, 1991. Pg 108-113.

I. The internal market and the temporary mobility of manpower

4. The completion of the internal market and particularly the full realisation of the freedom to provide services and the freedom of establishment may increasingly lead undertakings to establish activities to a greater extent in other Member States and in this context to post their workers to carry out temporary work therein.

5. One of the prime sectors for the transnational externalization of labour is the services industry, which already accounts for half of the Community's production, 40% of jobs and a third of exports. The services sector covers an increasingly wide range of activities, such as building maintenance and cleaning, tourism, security, telecommunications and information systems etc. Transnational subcontracting is also developing in the construction sector, public works and the automobile industry. There are more and more instances of firms based in one Member State and moving with their staff to another State to provide a service, or of firms sending their workers from their country of origin to another Member State to work for a legally distinct undertaking.

6. According to a report published recently for the Commission of the European Communities(2) small and medium-sized enterprises (SMEs) are playing an increasingly influential role in international subcontracting. These may be "satellite" SMEs working for a small number of major clients, specialist SMEs in sectors requiring a high level of skills, or "competitive" SMEs producing in competition with major companies on highly diverse markets (e.g. informatics, capital equipment, etc.). The play of market forces at Community level is a major factor for such small and medium-sized firms. One has only to consider the opportunities offered by the single market in promoting the access of SMEs to public contracts through subcontracting arrangements(3).

7. Used as an "external flexibility" instrument for firms, international subcontracting divides the process of producing a final product up into distinct operations carried out in a number of Member States. The "international segmentation of production processes" encourages multiple subcontracting and may require a new set of relations between clients and subcontractors, e.g. "partnership"-form arrangements.

8. The internal market is, according to Article 8a of the EEC Treaty, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty'. The dismantling of internal frontiers is already resulting in major corporate reorganisations within the Community, involving a significant increase in mergers, takeovers, transfers and joint ventures, and leading to the growing concentration

(2) Subcontracting and integration of production processes in European industry. Commission of the European Communities 1989.
(3) COM(90) 166 - Promoting SME participation in public procurement in the Community.

of company ownership. The total number of acquisitions (majority holdings or mergers) effected by the top 1000 European industrial enterprises is constantly growing. A recent Commission report(4) shows that, over the 1980s, the number of such operations has doubled every three years, rising from 208 in 1984-85 to 492 in 1988-89. This kind of process is liable to stimulate the temporary expatriation of workers within groups of companies or within companies with multiple operations throughout Europe.

9. For a number of years, the problem of the conflict of law rules mainly concerned this type of worker, the problem being how to decide which law was applicable to an employment relationship which was subject to international mobility and had links with different legal systems.

9.bis Fair competition. Many factors have an effect on the competitive situation of individual firms : eg. the attractiveness of the goods or services it offers, the technical support it can provide, and its costs. Among the influences on the latter are the level of investment, the productivity of both capital and the latter. Although pay can be an important element of a firm's costs, it is one element among many, and is not normally considered as affecting fair competition.

A particular problem arises, however, where a Member State places obligations, notably with regard to pay, on firms based in and working on its territory, and these firms are faced with competition - for a specific task carried out within that same Member State - from a firm based elsewhere and not subject to the same obligations. Legitimate competition between firms is then overlaid by potentially distortive effects between national requirementes.

The question is therefore one of finding a balance between two principles which find themselves in contradiciton. On the one hand, free competition between firms, including at the level of subcontracting across borders, so that the full benefits of the Single Market can be realised, including by firms based in Member States whose main comparative advantage is a lower wage cost. On the other, Member States may decide to set and apply minimum pay levels applicable on their territory in order to ensure a minimum standard of living appropriate to the country concerned.

10. The question of which law is applicable to the employment relationship would become meaningless if completion of the single market brought with it unification of national social laws. The fact is, though, that considerable disparities and divergences still exist.

(4) 'The impact of the internal market by industrial sector : the challenge for the Member States', Special edition of European Economy / Social Europe, 1990.

11. National differences in pay levels and working time are brought out by the following tables:

Table 1: Hourly earnings of manual workers in ecus by industrial groups (April 1989)

	All industry	Mining and quarrying	Manufact. industry	Metal manufact.	Food drink & tobacco ind.	Textile industry	Building & civil engin.
Belgium	7.3	8.0	7.3	7.5	7.1	6.4	7.2
Denmark	11.1	10.7	11.1	11.0	11.8	10.1	:
FR Germany	9.1	9.7	9.1	9.5	8.1	7.3	9.0
Greece	3.1	4.3	3.0	3.5	3.0	3.1	:
Spain	5.3	8.3	5.6	6.0	5.3	4.4	4.5
France (a)	5.9	6.3	5.9	6.1	5.8	4.9	5.8
Ireland	6.5	7.9	6.4	6.3	6.6	5.6	:
Italy (b)	6.2	:	:	:	:	:	:
Luxembourg	8.1	7.4	8.7	7.4	6.2	:	6.8
Netherlands (c)	7.7	9.9	7.7	7.3	7.9	7.0	7.8
Portugal	1.6	1.8	1.6	1.9	1.6	1.3	1.4
United Kingdom	7.3	:	7.3	7.5	7.4	5.6	7.2

(a) France : April 88
(b) Italy : Eurostat estimates
(c) Netherlands : October 88
Source : Eurostat

In the construction industry there are a considerable number of posted workers. Recent figures provided by the European trade unions on wages in the construction industry are in line with these provided by Eurostat:

Table 2 : Hourly wages in ecu in 1990 in the construction industry

Country	Lowest level in coll.agreements	Highest level in coll. agreements
Belgium	6.46 ecu/hour	7.88 ecu/hour
Netherlands	6.69	8.44
Denmark	13.32	18.39
FR Germany	7.11	10.97
France	5.57	:
Portugal	1.50	3.00
Italy	5.70	7.95
Ireland	5.00	5.47
Luxembourg	5.23	8.53
United Kingdom	4.10	4.93
Spain	5.25	8.00
Greece	2.12	2.52

Source : European Federation of building and wood workers. April 1991.

Minimum Wages

There are three main systems of regulating minimum wages in the Member States. The first system, applied in France, Spain,the Netherlands, Portugal and Luxembourg, is based on a statutory national minimum wage.

In the second system, the minimum wage level is laid down by collective bargaining, either by national-level collective agreements establishing a general minimum wage - Belgium and Greece - or by industry-level collective agreements fixing specific minimum levels of pay - Denmark, Italy and the Federal Republic of Germany.

In the United Kingdom and Ireland a different type - the third system - prevails whereby specific minimum wages for certain sectors of industry are laid down by Wages Councils (the United Kingdom) or Joint Labour Committees (Ireland).

The minimum wage for a single person in 1991 in a number of Member States is set out in the following table, which has been drawn up by the Commission:

Table 2a: Minimum wage for a single person per month (gross)

Country	In national currency	In Ecu
Belgium	Depends on occupational category and age: ranging from Bfrs 21 389 to 57 780	from 505 to 1364
Luxembourg	Unskilled worker: Lfrs 32 599	769
	skilled worker: Lfrs 39 119	923
Netherlands	Hfl 2 204 (including 8% holiday allowance)	950
France	FF 5 285.32	757
Spain	Pta 50 010	392
Portugal	Industry and commerce: Esc 35 000	200
	Agricultural workers: Esc 34 500	191
Greece	Depends on occupational category, seniority and family status: ranging from Dra 69 105 to 87 768 (private sector only)	from 310 to 394

The differences in other working conditions related to working time are not so remarkable as the differences in wages but should not be neglected. The following two tables give an indication of the situation.

Table 3. Statutory regulation of working time in the Member States

Country	Working week	Overtime	Night work hours
Belgium	40 hours	65 hours per 3 months	20 to 6
Denmark	no legislation	governed by collective agreement	no legislation
Federal Republic of Germany	48 hours	2 hours a days for up to 30 days a year on the basis of 48-hour week	20 to 6
Greece	5-days week 40 hours in private sector	3 hours a day, 18 hours a week, 150 hours a year	22 to 7
Spain	40 hours	80 hours a year	22 to 6
France	39 hours	9 hours a week, 130 hours a year plus more when authorized	22 to 5
Ireland	48 hours	2 hours a day, 12 hours a week, 240 hours a year	no legislation
Italy	48 hours	no legislation	24 to 6
Luxembourg	40 hours	2 hours a day	no general legislation nursing mothers and pregnant women, 22 to 6
Netherlands	48 hours	between ½ and 3½ hours a day	20 to 7
Portugal	48 hours	2 hours a day, 160 a year	20 to 7, at least 7 hours in this period
United Kingdom	no legislation	no legislation	no legislation

Source : SEC(89) 1137, Comparative Study on rules governing working conditions in the Member States.

Table 4. Statutory public holidays and paid annual leave in the Member States

Country	Paid Annual Leave		
	Public Holidays	Statutory	Collective agreements
Belgium	10	24 days	
Denmark	no legislation	30 days	
Federal Republic of Germany	10 - 14	18 days	5 to 6 weeks
Greece	13	24 days	4 weeks
Italy	4 national plus 11 others	no specific number of days	5 to 6 weeks
Luxembourg	10	25 days	26 to 28 days
Netherlands	6 plus one every five years	four weeks	5 to 6 weeks
Portugal	12	21 to 30	
United Kingdom	no legislation	no legislation	20 to 27 days

Source : SEC(89) 1137. Comparative Study on rules governing working conditions in the Member States.

12. National differences as to the material content of working conditions and the criteria inspiring the conflict of law rules may lead to situations where posted workers are applied lower wages and other working conditions than those in force in the place where the work is temporarily carried out. This situation would certainly affect fair competition between undertakings and equality of treatment between foreign and national undertakings; it would from the social point of view be completely unacceptable.

II. General legal framework and temporary postings

13. The criteria for determination of the law applicable to the employment contracts of workers posted abroad, which may favour, for example, the law chosen by the parties, the law of the place where the work is habitually carried out, or the law with which the contract has close connections, may vary from one State to another. Thus, the results differ according to the degree of distrust of those legal systems for the principle of freedom of choice in the determination of the applicable law or indeed according to the rigidity of the conflict of law rules of these systems : for example, the rigidity of the conflict rules in Portugal as opposed to the flexibility of the British system.

One point which is worth stressing is that it is difficult to achieve the completion of the internal market without unifying the conflict of law rules. The disparity of national systems may in fact prove to be an obstacle to the economic freedom envisaged by the Treaty.

14. With respect to the legal approach to the situation of temporarily-seconded workers, the following instruments should be taken into account :

- Council Regulation (EEC) No 1612(5) of 15 October 1968, the fourth recital of which expressly mentions workers "who pursue their activities for the purpose of providing services";

- Council Directive 68/360/EEC(6) of 15 October 1968 on the abolition of restrictions on movement and residence for workers of Member States and their families within the Community, based on Article 49 of the EEC Treaty, which also covers the situation of temporarily-seconded workers (Articles 6(3) and 8(1)(a));

- Regulation (EEC) No 1408(7) of 19 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, which responds to the need to unify the rules of conflict of law. This Regulation lays down uniform rules for the application of social security legislation.

With respect to labour law, the following should be considered :

- The Convention of Rome of 19 June 1980 on the law applicable to contractual obligations(8). Article 29 states that the Convention will come into force in the international legal order and in those States who have ratified it "on the first day of the third month following the deposit of the seventh instrument of ratification, acceptance or approval" with the Secretary-General of the Council of the European Communities. An intergovernmental convention, the Convention of Rome received its seventh ratification by the United Kingdom on 29 January 1991. With this ratification, and with the accession of Greece to the Convention of Rome in 1988, it came into force on 1 April 1991 and governs relations between those States

(5) OJ No L 257, 19.10.1968.
(6) OJ No L 257, 19.10.1968.
(7) OJ No L 149, 5.7.1971.
(8) OJ No L 266, 19.10.1980.

which have now deposited their instruments of ratification (i.e. France, Italy, Denmark, Luxembourg, Greece, the Federal Republic of Germany, Belgium and the United Kingdom).

- The proposal for an EEC Regulation presented to the Council on 23 March 1972 and the amended proposal presented to the Council on 28 April 1976. This proposal tried to introduce uniform conflict of law rules into the Community as far as employment relationships with a foreign element were concerned. The existence and entry into force of the Convention of Rome, which also provides a general legal framework for regulation of conflicts of law, prevented the adoption of this proposed Regulation in the future. In contrast, any proposal designed to deal with the particular position of seconded workers could be considered as an extension of the Rome Convention.

- ILO Convention No 94 concerning labour clauses in public contracts, in particular Article 2, which determines the content of the clauses of such contracts. The Conveniton has been ratified by France, Spain, Italy, the Netherlands, Denmark and Belgium.

The specific nature of problems in relation to the provision of services can be seen in numerous judgments of the European Court of Justice(9). In particular, the following sorts of questions have been raised : to what extent is the freedom to provide services subject to limitations ? (Case 270/80, John Webb); and, more recently, with respect to sub-contracting : can the conditions for hiring personnel in force in one Member State prevent a company situated in another Member State from offering services on the territory of the former Member State ? (Case C-113/89 Rush Portuguesa). Several general principles can be deduced from the case law of the Court :

- The essential requirements of Article 59 of the Treaty became directly and unconditionally applicable on the expiry of the transitional periods.

- These requirements abolish all discrimination by reason of nationality or place of establishment against the persons providing the services.

- The freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and imposed on all persons or undertakings operating in the Member States in which the service is to be provided.

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(9) CJ 3 December 1974 (Van Binsbergen 33/74) [1974] ECR 1309, para. 12; 24 October 1978 (Koestler 15/78) [1978] ECR 1975; 18 March 1980 (Debauve 52/79) [1980] ECR 833; 18 March 1980 (Coditel 62/79) [1980] ECR 881; 4 December 1986 (particularly "insurance", Commission v. FRG 20574) [1986] ECR 3765; 11 June 1987 (Bodin 241/86) [1987] ECR 2573 and others.
CJ 18 January 1979 (Van Wesemael 110 and 111/78) [1979] ECR 35; 17 December 1981 (Alfred John Webb 279/80) [1981] ECR 3305; 3 February 1982 (Seco SA 62 and 63/81) [1982] ECR 223; 27 March 1990 (Rush Portuguesa C-113/89) not yet published.

- The principle of equality of treatment laid down in Article 60 of the Treaty of Rome does not mean that all national legislation applicable to nationals of a Member State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other States.

- However, Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State.

- Whereas the activities of an undertaking providing services in another Member State are entirely or principally directed towards the territory of that Member State or have a permanent presence therein, that undertaking should not rely on the freedom guaranteed by Article 59 of the Treaty for the purpose of avoiding compliance with the working conditions which would be applicable to it if established within that State.

- The posting of Portuguese and Spanish workers to another Member State in the framework of the freedom to provide services is protected by Article 59 of the Treaty but is not covered (before 32.12.92) by Articles 1 to 6 of Council Regulation (EEC) No 1612/68 of 15 October 1968 relating to the free movement of workers within the Community. Workers seconded in the framework of a provision of manpower must be however provided with a work permit in as much as they are not Community nationals or they can not fully benefit from the free movement of workers.

15. The Convention of Rome is a necessary complement to the conventions relating to conflicts of jurisdiction, notably the Convention of Brussels of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters. The authors of a report(10) commissioned by the Commission of the European Communities have stated : "What is the purpose of unifying the rules of judicial competence if the courts of each Member State continue to apply different laws? How is it possible to avoid forum shopping, if not by adding a new element to the unification of the European law of jurisdiction : that of uniform rules on conflict of law".

16. Articles 6 and 7 of the Convention of Rome concern employment contracts. Article 6 lays down that, in the absence of a choice made by the parties, the contract of employment shall be governed :

- by the law of the country in which the employee carries out his or her work in performance of the contract, even if he/she is temporarily employed in another country, or

(10) Cf. M. Fallon, B. Nyssens, M. Verwilghen. "Les consequences sociales des mutations d'entreprises dans le droit des Communautés européennes". August 1990, p. 158.

- if the employee does not habitually carry out his or her work in any one country, by the law of the country in which the place of business through which he/she was engaged is situated, or

- if it appears from the circumstances as a whole that the contract of employment is more closely connected with the law of another country, by the law of that country.

At any rate, "a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice".

Article 7 of the Rome Convention does not provide any precise regulation; it provides for the application of mandatory rules, such as the public order rules of the forum State and the mandatory rules of the law of another country with which the situation has a close connection. Article 7 does not however indicate which rules are mandatory rules.

17. In order to judge the expediency of the present proposal for a Directive, it is necessary to measure what it offers over the Convention of Rome.

- The conflict rules laid down by the Convention of Rome provide a general legal framework, whereas the proposed Directive is specifically concerned with the situation of seconded workers and thus refines this legal framework.

- The Convention lays down general criteria to determining the law applicable and - more importantly - enables the judge to make the contract subject to mandatory rules sometimes referred to as "directly applicable rules" applying at the place where the work is carried out (Article 7). Such immediately applicable rules are not identified by the Convention of Rome. The proposal for a directive sets out to clarify this point by stipulating the body of rules covered by Article 7 of the Convention, i.e. the "public order rules" which constitute a hard core of minimum protection for workers on secondment.

- The universal nature of the Convention of Rome adds to this general nature : the proposed Directive only applies to employment relationships temporarily carried out within the Community; the Convention of Rome applies to all contractual relationships, whether or not they are carried out within the Community, as long as the matter is referred to a judge situated within the Community.

  The proposal for a Directive, by identifying a "hard core" of mandatory rules, makes it clear that these constitute a minimum threshold of protection only.

- The Convention of Rome does not lay down conditions for the application of collective agreements containing mandatory provisions. The proposal for a Directive does.

  In stating that "This Convention shall not affect the application of provisions which, in relation to particular matters, lay down conflict 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 harmonised in implementation of such acts", Article 20 of the Convention of Rome recognises the supremacy of Community law.

18. Notwithstanding the entry into force of the Convention of Rome, the need for legal certainty and the need to eradicate discrimination between national and non-national undertakings and workers with respect to the application of certain working conditions, justify a Community proposal which, aiming at clarifying Article 7 of the Rome Convention and with due respect for the principle of equality of treatment between national and non-national providers of services (Article 59, EEC Treaty) and between national and non-national workers (Article 7, EEC Regulation 1612), intends to create a hard core of mandatory rules laid down by statutes or by erga omnes collective agreements, without disrupting the labour law systems of the Member States and particularly their legislative or voluntaristic approach and their collective bargaining systems.

III. Aims, scope and material content of the proposal

Aims

19. The proposal for a Council Directive has the following objectives :

- to remove obstacles and uncertainties which may impede the implementation of the economic freedoms, particularly the free provision of services, by increasing legal certainty and allowing the clear identification of the working conditions applicable to workers who carry out temporary work in a Member State other than the State whose law governs the employment relationship;

- to coordinate the laws of the Member States with a view to setting up a list of mandatory rules which should be complied with in the host country by undertakings posting workers to perform temporary work. The proposal does not harmonize the material content of the rules classified as "mandatory" but identifies those rules making them compulsory for undertakings posting workers in a Member State other than the State in which they habitually work or where the establishment which engaged them is situated;

- to eradicate practices which may be both detrimental to fair competition between national and foreign undertakings and prejudicial in the long run to the implementation of the economic freedoms, by obliging foreign undertakings to observe a minimum 'hard core' of protective working conditions in force in the host country. On the other hand, by allowing foreign undertakings to be submitted to the the bulk of the labour law in force in the country of origin (in particular to rules concerning the form, suspension, modification, termination of the contract of employment and workers' representation) including social security legislation, the proposal respects the interpretation of Article 60 of the Treaty of Rome as provided for by the Court of Justice, in the sense that the principle of equality of treatment laid down by Article 60 does not mean that all national legislation applicable to nationals of a Member State, and usually applied to the permanent activities of

undertakings established therein, may be similarly appled in its entirety to the temporary activities of undertakings which are established in other Member States;

- to protect the workers concerned from practices which may develop within the international framework of an increasing use of external work and employment resources.

Scope

20. The proposal applies to undertakings which post a worker to carry out temporary work in a Member State other than the State, whether a Member State or otherwise, the law of which governs the employment relationship.

21. According to Article 2 of the proposal, the undertakings covered by its scope must fall within one of the following three categories :

- main contractor or subcontractors which, in the course of carrying out a contract for services, within the meaning of Article 60 of the Treaty, post a worker to carry out temporary work in the territory of a Member State on behalf and under the direction of that undertaking (the "Rush Portuguesa" situation);

- temporary employment businesses which place a worker with a user undertaking operating in a Member State to carry out temporary work in so far as there is an employment relationship between the temporary remployment business and the worker (the "Seco" situation);

- undertakings which place a worker with one of their establishments or with another undertaking whether an associated undertaking or not, established in another Member State to carry out temporary work (intra-firm or intra-group mobility).

No distinction is made between workers is posted by a main contractor or by a subcontractor; nor is there a difference of treatment between undertakings posting workers in the framework of a public contract or a private one.

22. The three situations have a common element : a worker posted by an undertaking to carry out temporary work in a Member State other than the State the law of which governs the employment relationship concerned.

The Commission believes that the three above-mentioned cases should be covered, not only because they share a common problem relating to the determination of the law applicable, but also because the exclusion of the third situation could make the whole Directive meaningless. It would suffice for an undertkaing to open an establishment or a subsidiary in another Member State and to place some of its workers with that establishment or subsidiary to perform temporary work to avoid the observance of the Directive. According to the Convention of Rome and international private law, the law applicable in that case may well be the law of the country of origin. However, the workers

concerned would be deprived of the mandatory protection provided for by the Directive, had Article 2(c) been deleeted.

23. The combination and interdependance of Articles 1 and 2 makes it unnecessary to incorporate a list of exclusions such as commercial travellers, members of the travelling personnel of an undertaking which operates international transport services for passengers or goods by rail, road, air, internal waterway or by sea, and civil servants and equivalent personnel employed by public administrative bodies.

Material content

24. Article 3, which is the proposal's central provision, does not intend to harmonize the material rules of the Member States concerning labour law and working conditions, but to coordinate their conficts of law rules in order to designate which mandatory rules in force in the host country must be respected by an undertaking posting workers to carry out temporary work in that country. In that sense, this is not a labour law instrument, but a proposal concerning international private law closely related to the freedom to provide services.

25. In drawing up the list of "hard core" protective working conditions to be observed by undertakings referred to in Articles 1 and 2, the Commission considered that a threefold requirement should be met :

- the rules ought to be mandatory or compulsory in all, or the majority, of the Member States. That is the case with the provisions concerning the matters referred to in Article 3(b);

- the rules ought to apply to all workers habitually employed in the same place, occupation and industry. It would not be in conformity with Community law to oblige a foreign provider of services to respect certain working conditions which are not binding on national or local undertakings. This requirement restricts the sources of law mentioned in Article 3(a) to "laws, regulations and administrative provisions, collective agreements or arbitration awards which apply to the occupation and industry concerned to the extent that they cover all workers employed in the same occupation and industry".

- the designation and application of the envisaged mandatory rules should be compatible with the temporary nature of the performance of work in the host country and consistent with the proposal's stated aims and objectives. In the light of this condition, mandatory rules concerning the form, suspension, alteration and termination of the contract of employment and workers' rights on information, consultation and participation are not delt with.

26. That is also the reason why the proposal excludes undertakings from the observance of rates of pay and paid leave in so far as the length of the posting of the workers is less than three months within a period of reference of one year. The marginal nature and number of such postings, as well as their limited relevance with respect to practices amounting to distortions of competition, justify the afore-mentioned exclusion.

Legal basis

27. The Commission proposal is based on Articles 57 (2) and 66 of the EEC Treaty in that they provide for "the coordination of the provisions laid down by law, regulation or adminstrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons" or as 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 Community.

In effect, the activities of the undertakings concerned consist of the provision of services, within the meaning of Article 59 of the Treaty, effected by an undertaking in a Member State other than the State in which it is established.

The usual legal base for the coordination in the field of the provision of services is Article 57, paragraph 2 to which Article 66 expressely refers.

The proposal's objective is not the harmonisation of labour law , but the determination of the law applicable to the above-mentioned situations. It is, therefore, intended to ensure legal certainty in the exercise of the provision of services. The provider of services has a clear interest in anticipating and identifying the working conditions applicable to his workers in the Member State where the services are provided.

Proposal for a

COUNCIL DIRECTIVE

concerning the posting of workers in the framework of the provision of services

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,

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

In cooperation with the European Parliament,(2)

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

Whereas, pursuant to Article 3(c) of the 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;

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;

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 State other than the State in which they are habitually employed;

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;

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

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 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;

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;

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 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;

Whereas 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;

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

(4) OJ No L 185, 16.8.1971, p. 5.
(5) OJ No L 210, 21.7.1989, p. 1.
(6) OJ No L 297, 29.10.1990, p. 1.

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 those Member States;

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;

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;

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;

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;

(7) OJ No L 266, 9.10.1980, p. 1.

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 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;

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;

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;

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,

HAS ADOPTED THIS DIRECTIVE :

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 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 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;

(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.

Article 4

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.

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.

Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

IMPACT ASSESSMENT FORM

IMPACT OF THE PROPOSAL ON UNDERTAKINGS WITH PARTICULAR REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs)

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

The proposal

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this field and what are the main aims?

The proposal for a Directive aims to coordinate the laws of the Member States with a view to establishing a "hard core" of binding rules to be observed by undertakings which post their workers to another Member State, generally termed the host country.

Such coordination, by its very nature, cannot be achieved by Member States acting individually, and thus falls primarily within the Community's sphere of competence.

The identification of binding provisions for minimum protection in force in the host country will counteract the legal uncertainty which surrounds the whole issue of posting abroad, the purpose being to create conditions of fair competition between undertakings and to meet the needs of the workers.

The impact on undertakings

2. Who will be affected by the proposal?

By specifically aiming to cover situations in which suppliers of services move with their employees to a Member State outside their country of origin, the proposal for a Directive directly targets a large number of SMEs to which such situations apply.

As there is clearly a structural link between the construction industry and the posting of employees, undertakings in this sector will be specifically targeted by the proposal for a Directive.

However, promotion of the provision of services in a widening variety of sectors calls for the scope of the proposal for a Directive to be extended to cover all areas of employment.

3. What will undertakings have to do to comply with the proposal?

The undertakings targeted by the proposal for a Directive will be required to observe all the binding rules concerning minimum protection in force in the Member State to whose territory their workers are to be posted and which form part of a "hard core" of provisions as set out in the proposal for a Directive, covering such aspects as working hours, health and safety requirements and wages.

Where such provisions are the result of collective bargaining agreements or of arbitrators' awards "in force within the trade or industrial sector concerned", they must cover "all the workers employed in the same trade and sector".

4. What economic effects is the proposal likely to have?

- on employment

The identification of mandatory protective rules applicable to posted workers should remove some of the uncertainty surrounding the mobility of employment relationships which, given the present lack of clarity, is not geared to providing satisfactory conditions for posting workers in the context of the completion of the internal market. The proposal for a Directive is designed to provide a more transparent legal framework for externalising employment relationships and thus to promote the mobility element in the employment of such workers;

- on investment and the creation of new businesses

New businesses especially those in the service sector, will need to take account of the new code of practice laid down by the proposal for a Directive, whose rules will provide the necessary legal framework for setting up and developing such businesses in the light of the completion of the Single Market;

- on the competitiveness of undertakings

By aiming to reduce differences in the costs of employing labour arising from existing disparities between national social laws, the proposal for a Directive is intended to lay down ground rules for undertakings. Although such rules may increase the social costs of certain undertakings, they are nevertheless necessary for creating conditions of fair competition between undertakings.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized enterprises (reduced or different requirements, etc.)?

No

Consultation

A. With employers and trade unions:

11.09.90 UNICE/CEEP - ETUC
18.10.90 UNICE/CEEP - ETUC
08.05.91 UNICE/CEEP - ETUC

22.10.90 Transport: rail
road
sea
inland navigation
civil aviation
Fisheries

5.11.90 Agriculture
HORECA (International Organisation of Hotel and Restaurant Associations)
Sugar

9.11.90 Textiles
Footwear

12.11.90 Banks
Insurance
Retail trade
Wholesale trade
Telecom

6.5.91 Construction - trade unions
8.5.91 - employers

B. With individual organisations

C.G.T. (France) (General Confederation of Labour)
CEC (European Confederation of Professional Staff)
Consultation of employers' organisations by DG XXIII:
Organisations consulted:
- AECM (Association Européenne des Classes Moyennes)
- Eurochambre
- Eurogroup
- UEAPME (Union of Crafts and SMEs)
- UNICE (Union of Industries of the EC)
- CECOP (European Committee of Workers' Production Cooperatives)
- EUROPMI (European Committee for Small and Medium-Sized Independent Enterprises)
- EMSU (Union Européenne des Classes Moyennes)
- CECD (European Retail Trade Confederation)
- FEWITA (Federation of European Wholesale and International Trade Associations)
- CEDI (European Documentation and Information Centre)
- CCACC (Com. Coord. des Associations des Coopératives de la Communauté Européenne)

The workers' trade union organisations support the action by the Commission. A majority of employers' organisations are uncertain of the need for Community legislation. Employers in certain sectors, such as the construction industry, which are faced with problems concerning the posting of workers, are in favour of Community action.

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