

**COUNCIL  
OF THE  
EUROPEAN UNION**

Brussels, 17 JUN 1996

Mr Klaus HÄNSCH  
President of the  
European Parliament  
Case Postale 1601  
LUXEMBOURG

**COMMON POSITION**  
C4-0327/96  
00/0346 (COD)

Sir,

Please find enclosed the common position adopted by the Council on 3 June 1996 with regard to the proposal for a Directive of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (94/0346 COD).

Please note the conditions in which the Council took this decision, namely with the United Kingdom delegation voting against and the Portuguese delegation abstaining. Explanations of the voting are attached.

I also enclose the Council's reasons for adopting this common position.

Yours faithfully,  
For the Secretary-General

H. BRUNMAYR  
Deputy Director-General

Enclosures: - 6689/2/96 REV 2 + REV 2 ADD 1  
- explanations of voting

**SEC(96)1109**  
**EN**

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Explanation of voting

The Portuguese delegation stated:

"The Portuguese delegation intimated at the appropriate time its intention of reviewing, favourably, its position on this proposal for a Directive, provided the following conditions were met:

- application of the principle of equal treatment at the place of work as regards essential conditions of employment for national and foreign undertakings and for the provision of the same service;
- application to all sectors of activity without discrimination;
- adaptation of equality of treatment, particularly as regards the fixing of the level of remuneration and the time from which the principle is to apply.

The Portuguese delegation notes that the text of this common position departs significantly from those principles and fails in the end to take account of the desired objectives, namely harmonization and equality of treatment.

Specifically:

- the Directive does not apply equally to all sectors of activity, since it lays down further requirements for the building trade;
- a range of derogations is provided for, which Member States have the option of applying; this is likely to give rise to inequality of treatment between the various sectors of activity, between undertakings and between workers;

- as worded, the definition of collective agreements or arbitration awards which have been declared universally applicable, and of the arrangements to be applied in the absence of such declaration, are likely not to guarantee equality of treatment between national and foreign undertakings capable of providing the same service.

The Portuguese delegation is consequently unable to support the present text of the common position".

The United Kingdom delegation stated:

"The United Kingdom hereby registers its opposition to the provisions contained in the Council's common position on the draft Directive on the posting of workers in the framework of the provision of services. The United Kingdom believes that the Directive is bureaucratic and, most importantly, that it runs counter to the principles of the single market by hampering freedom to provide services between Member States.

The United Kingdom would not have opposed a proposal for a Directive which facilitated the provision of services by laying down clear, simple and common rules on the terms and conditions which Member States were entitled to impose, after a sensible threshold period, on workers posted into their territory. The proposal for a Directive contained in the common position sets no limit to the conditions which Member States can impose on posted workers, nor does it contain a sensible threshold period.

The European Union has declared that the reduction of unemployment and the creation of jobs should be its top priority. Yet this proposal for a Directive will make it more difficult for companies to maintain their competitiveness and to create jobs.

For these reasons, the United Kingdom votes against the common position."

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Brussels, 3 June 1996

Interinstitutional  
File No 00/0346 (SYN)

6689/2/96  
REV 2

LIMITE

SOC 107  
CODEC 235

COMMON POSITION (EC) No /96  
ADOPTED BY THE COUNCIL ON 3 JUNE 1996  
WITH A VIEW TO ADOPTING  
DIRECTIVE 96/ /EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
CONCERNING THE POSTING OF WORKERS  
IN THE FRAMEWORK OF THE PROVISION OF SERVICES

**DIRECTIVE 96/ /EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of**

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the Opinion of the Economic and Social Committee <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 189b of the Treaty <sup>(3)</sup>,

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<sup>(1)</sup> OJ No C 72, 15.3.1993, p. 78.

<sup>(2)</sup> OJ No C 49, 24.2.1992, p. 41.

<sup>(3)</sup> Opinion of the European Parliament of 12.2.1993 (OJ No C 72, 13.3.1993, p. 85), Council Common Position of (not yet published in the Official Journal) and Decision of the European Parliament of (not yet published in the Official Journal).

- (1) Whereas, pursuant to Article 3(c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services constitutes one of the objectives of the Community;
- (2) 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;
- (3) Whereas the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed;
- (4) Whereas the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract;
- (5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;
- (6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

- (7) Whereas the Rome Convention of 19 June 1980 on the Law applicable to Contractual Obligations <sup>(1)</sup>, signed by twelve Member States, entered into force on 1 April 1991 in the majority of Member States;
- (8) Whereas Article 3 of that Convention establishes, as a general rule, the free choice of law made by the parties; whereas, in the absence of choice, the contract is to 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 is to be governed by the law of that country;
- (9) Whereas, according to Article 6(1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice;
- (10) Whereas Article 7 of the said Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted;
- (11) Whereas, according to the principle of precedence of Community law stated in its Article 20, the said Convention does 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;

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(<sup>1</sup>) OJ No L 266, 9.10.1980, p. 1.

- (12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, 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 observance of those rules by the appropriate means;
- (13) Whereas 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;
- (14) Whereas a "hard core" of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting;
- (15) Whereas it should be laid down that, in certain clearly defined cases of assembly and/or installation of goods, the provisions on minimum rates of pay and minimum paid annual holidays do not apply;
- (16) Whereas there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays; whereas, when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements; whereas, where the amount of work to be done is not significant, Member States may derogate from the provisions concerning minimum rates of pay and the minimum length of paid annual holidays;



- (17) Whereas the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;
- (18) Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld;
- (19) 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;
- (20) Whereas this Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to 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;
- (21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community <sup>(1)</sup> lays down the provisions applicable with regard to social security benefits and contributions;

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<sup>(1)</sup> OJ No L 149, 5.7.1971, p. 2. Regulation as last amended by Regulation (EC) No 3096/95 (OJ No L 335, 30.12.1995, p. 10).

- (22) Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions;
- (23) Whereas competent bodies 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;
- (24) Whereas it is necessary to guarantee proper application of this Directive and to that end to make provision for close collaboration between the Commission and the Member States;
- (25) Whereas five years after adoption of this Directive at the latest the Commission must review the detailed rules for implementing this Directive with a view to proposing, where appropriate, the necessary amendments,

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

##### Scope

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.
2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

- (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking of origin and the worker during the period of posting, or
- (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking of origin and the worker during the period of posting, or
- (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

## Article 2

### Definition

- 1. For the purposes of this Directive, "posted worker" means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.
- 2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

### Article 3

#### Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
  - (a) maximum work periods and minimum rest periods;
  - (b) minimum paid annual holidays;
  - (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
  - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment agencies;
  - (e) health, safety and hygiene at work;
  - (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

- (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1(b) and (c) shall not apply, if the period of posting does not exceed 8 days.

This provision shall not apply to activities in the field of building work listed in the Annex.

3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) when the length of the posting does not exceed one month.

4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1(c) in the cases referred to in Article 1(3)(a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.

5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1(b) and (c) in the cases referred to in Article 1(3)(a) and (b) on the grounds that the amount of work to be done is not significant.

Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as "non-significant".

6. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.

In calculating the one-year period, account shall be taken of any previous periods for which the post has been filled by a posted worker.

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement or expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. "Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

9. Member States may provide that the undertakings referred to in Article 1(1) must guarantee workers referred to in Article 1(3)(c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

#### Article 4

##### Cooperation on information

1. For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.
2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational supply of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.
4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.



## Article 5

### Measures

Member States shall take appropriate measures in the event of failure to comply with this Directive.

They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

## Article 6

### Jurisdiction

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

## Article 7

### Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... (\*) at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

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(\*) Three years after adoption of the Directive.

## Article 8

### Commission review

By ... (\*) at the latest, the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council where appropriate.

## Article 9

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

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(\*) Five years after adoption of the Directive.

The activities mentioned in Article 3(1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

- 1) excavation,
  - 2) earthmoving,
  - 3) actual building work,
  - 4) assembly and dismantling of prefabricated elements,
  - 5) fitting out or installation,
  - 6) alterations,
  - 7) renovation,
  - 8) repairs,
  - 9) dismantling,
  - 10) demolition,
  - 11) maintenance,
  - 12) upkeep, painting and cleaning work,
  - 13) improvements.
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**Interinstitutional  
File No 00/0346 (SYN)**

**6689/2/96**

**REV 2 ADD 1  
LIMITE**

**SOC 107  
CODEC 235**

**COMMON POSITION OF THE COUNCIL  
ON 3 JUNE 1996  
WITH A VIEW TO ADOPTING DIRECTIVE 96/ /EC  
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL CONCERNING  
THE POSTING OF WORKERS  
IN THE FRAMEWORK OF THE PROVISION OF SERVICES**

**STATEMENT OF THE COUNCIL'S REASONS**

## **I. INTRODUCTION**

1. By letter dated 28 June 1991, the Commission submitted to the Council a proposal for a Directive, based on Articles 57(2) and 66 of the EEC Treaty, on the posting of workers in the framework of the provision of services.
2. The European Parliament delivered its Opinion on 10 February 1993; the Opinion of the Economic and Social Committee was delivered on 18 December 1991.

In the light of those Opinions the Commission submitted an amended proposal by letter dated 16 June 1993.

3. On 3 June 1996, the Council adopted its common position in accordance with Article 189b of the Treaty.

## **II. OBJECTIVE**

The proposed Directive seeks, in the interests of implementing freedom to provide services within the Community, to increase legal certainty, to ensure the conditions for fair competition between firms and to protect workers, by

- determining the applicable rules governing the terms and conditions of employment which undertakings established in a Member State must guarantee the workers they post to the territory of another Member State in the framework of the provision of services;
- providing for the competent national bodies to cooperate on information matters;
- requiring guarantees as to application of the terms and conditions of employment covered by the Directive, including in the areas of the procedures available to workers and jurisdiction.

### **III. ANALYSIS OF THE COMMON POSITION**

#### **1. General comments**

The Council's common position incorporates the bulk of the terms and conditions of employment listed in the amended Commission proposal.

On the issue of making some of these conditions non-applicable to short-term postings, the Council chose optional non-application except for the initial assembly and/or first installation of goods. It has also made non-application an option where the amount of work to be done is not significant, irrespective of the length of the posting.

The Council has added new provisions on aspects such as the equal treatment of undertakings established in a Member State and those established in a non-Member State, and jurisdiction.

#### **2. Specific comments**

##### **2.1 Main changes made by the Council to the amended Commission proposal**

The Council's main changes to the amended Commission proposal are in the following areas:

##### **(a) Treatment of undertakings established in a non-Member State** (Article 1(1) and (4))

While making the Directive applicable to undertakings established in Member States only, the Council agreed that firms established in non-Member States could not receive more favourable treatment.

(b) Non-application of the Directive to merchant navy undertakings as regards seagoing personnel (Article 1(2))

The Council has added a new paragraph to the effect that the Directive does not apply to such cases.

(c) Provision of services under a contract (Article 1(3)(a))

The Council has specified that the posting must be under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in the host Member State.

(d) Definition of "posted worker" and "worker" (Article 2)

The Council has added a new Article providing a definition of "posted worker" and specifying that the definition of "worker" is that which applies in the law of the host Member State.

(e) List of terms and conditions of employment (Article 3(1) and (10) first indent)

The amendments to the Commission's proposed list include the following:

— in points (a) and (b) (work periods, rest periods and paid annual holidays):

\* a more general wording has been used;

\* re paid holidays: it has been specified that these are annual holidays;

— in point (c) (minimum rates of pay):

\* the reference to allowances has been dropped;

\* point (c) has been made non-applicable to occupational retirement pension schemes;

- in point (f) (protective measures):
  - \* "terms" has been added to "conditions of employment";
  - \* the reference to other groups of people has been dropped;
- in point (g) (non-discrimination provisions): a more general wording has been used.

The Council has also added a new provision whereby Member States may expand the list of terms and conditions in the case of public policy provisions.

(f) Terms and conditions of employment laid down by collective agreements or arbitration awards (Article 3(1) and (10) second indent, and the Annex)

With regard to terms and conditions of employment laid down by collective agreements or arbitration awards, the Council:

- has kept those connected with the building industry;
- agreed that Member States should be allowed to include other sectors.

(g) Non-application of the provisions on minimum paid annual holidays and minimum rates of pay (Article 3(2) to (5))

On the question of exemption, under certain conditions, from application of the provisions on minimum paid annual holidays and minimum rates of pay, the Council struck a compromise between the position of the Commission and some delegations, which sought mandatory non-application for postings lasting less than a given period, and the positions of the other delegations, which wanted either mandatory application from the first day of the posting or optional non-application to short-term postings.



The main points of the compromise worked out by the Council are as follows:

- mandatory non-application of the provisions on minimum paid annual holidays and minimum rates of pay to the initial assembly and/or first installation of goods, where these activities do not relate to the building industry and the period of posting does not exceed 8 days (Article 3(2));
- optional non-application to the posting of workers on the account of the undertaking and under its direction or within a group:
  - \* of the provisions on minimum rates of pay if the period of posting does not exceed one month, after consultation of employers and labour or on the basis of a collective agreement (Article 3(3) and (4));
  - \* of the provisions on minimum paid annual holidays and minimum rates of pay, on the grounds that the amount of work to be done is not significant (Article 3(5));

Optional non-application therefore:

- \* does not concern temporary workers;
- \* concerns the provisions on paid annual holidays only if the amount of work is not significant.

(h) Relationship between allowances specific to the posting and minimum wage (Article 3(7) second subparagraph)

To make the comparison of conditions possible, the Council has introduced a new subparagraph clarifying the relationship between the allowances specific to the posting and the minimum wage.

- (i) Absence of a system for declaring collective agreements or arbitration awards to be of universal application (Article 3(8) second and third subparagraphs)

The Council has clarified the drafting or made additions in certain places; in particular:

- it has replaced the concept of universal applicability by "generally applicable to all similar undertakings" in the industry concerned;
- to the collective agreements mentioned, it has added those concluded by the most representative employers' and labour organizations and applied throughout national territory;
- it has introduced a definition of equality of treatment of the undertakings concerned.

- (j) Guarantee that posted temporary workers benefit from the terms and conditions applying in the host Member State (Article 3(9))

The Council has introduced a provision whereby Member States may require that posted temporary workers must enjoy the same terms and conditions as apply to temporary workers in the host Member State.

- (k) Cooperation on information (Article 4)

The Council has opted for a more general wording with regard to:

- the bodies responsible for implementing the Directive;
- the purpose of cooperation between public authorities;
- the scope of the information provided by the Member States.

The Council has made specific provision for the Commission and the public authorities to cooperate on the subject of the application of terms and conditions of employment

- on matters other than those referred to in the Directive, where public policy provisions are concerned;
- arising from collective agreements or arbitration awards in sectors other than the building industry.

Given the breadth of coverage, the Council has dropped the requirement that information be published by the competent authority; however, it agreed that information on terms and conditions of employment should be made generally available.

(l) Jurisdiction (Article 6)

The Council has inserted an Article conferring jurisdiction on the host Member State's courts.

(m) Implementation (Article 7)

The Council has put back the proposed date for implementation of the Directive from two years to three years after its adoption.

It has also inserted the customary clause that when Member States adopt the provisions necessary to comply with the Directive, they must contain a reference to it.

## 2.2 European Parliament amendments

(a) Amendments accepted by the Commission

Of the amendments accepted by the Commission, the Council has incorporated the following in full, in part or with textual amendments: 2, 4, 6, 7, 8, 12, 24, 30, 31, 32 (second part) and 33.

It rejected amendments 3, 10 (first part), 16, 17, 18 (second part) and 20.

(b) Amendments not accepted by the Commission

Like the Commission, the Council rejected amendments 1, 5, 9, 10 (second part), 11, 15, 18 (first part), 19, 21, 22, 23, 26, 27, 28 and 29.

However, the Council has incorporated amendment 14, with textual changes, in connection with Article 3(4) and amendment 25 (first part).



# COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.06.1996  
SEC(96) 1109 final - COD 346

## COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

**CONCERNING THE COMMON POSITION OF THE COUNCIL  
ON THE PROPOSAL AMENDED ON THE COUNCIL DIRECTIVE ON THE  
POSTING OF WORKERS CARRIED OUT IN THE FRAMEWORK OF THE PROVISION OF  
SERVICES**

## **COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT**

### **IN ACCORDANCE WITH ARTICLE 189B OF THE EC TREATY CONCERNING THE COMMON POSITION OF THE COUNCIL ON THE PROPOSAL AMENDED ON THE COUNCIL DIRECTIVE ON THE POSTING OF WORKERS CARRIED OUT IN THE FRAMEWORK OF THE PROVISION OF SERVICES**

#### **1 BACKGROUND**

The Commission sent the proposal for a Directive on the posting of workers in the framework of the provision of services, by letter to the Council dated 28 June 1991.

The Economic and Social Committee delivered its opinion on 16 December 1991.

On 13 May 1992 the European Parliament adopted 31 amendments to the initial proposal for a Directive on the basis of a report and a legislative resolution from its Committee on Social Affairs; the Commission accepted 14 of them. However, the legislative resolution was not adopted and instead the European Parliament sent the dossier back to its Committee on Social Affairs to examine more closely the question of the three month threshold for application of certain provisions of the Directive proposal, which the Commission wished to retain.

On 10 February 1993, the European Parliament adopted 31 amendments in the light of another report and the Commission accepted 17 in full or in part. In particular, the Commission agreed to reduce the threshold from three months to one month and to specify the nature of collective agreements applicable to posted workers.

The amended proposal for a Directive was adopted by the Commission on 16 June 1993.

The question of the one month threshold for application of provisions relating to minimum rates of pay and the minimum length of paid annual holidays has continued to fuel an important debate, especially in the European Parliament where the Commission has stated repeatedly that it is prepared to accept the threshold's being reduced by one month as long as this is part of a genuinely constructive and realistic compromise.

On 3 June 1996 the Council of Ministers adopted a Common Position on the proposal for a Directive in accordance with Article 189b of the EC Treaty.

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The Common Position was adopted by a qualified majority; two Member States voted against. The Commission has emphasised the importance and value of this decision.

## **2 GENERAL ASSESSMENT OF THE COMMON POSITION**

The Commission regards the Common Position as a realistic text suited to the various types of postings in connection with service provision and thinks it represents real added value at Community level.

The text is realistic as it maintains an essential balance between economic freedoms and the rights of workers. This balance relies on a clear principle: any undertaking which exercises its right to the freedom to provide services on the territory of a Member State and posts workers for this purpose whatever their nationality, must observe a range of minimum and essential requirements of the labour law in force there. This principle is accompanied by the necessary flexibility in its implementation. For example, Member States need not immediately apply provisions relating to minimum rates of pay within the limits and the conditions of the text. Such flexibility can be given effect in accordance with national legislation and/or practice by means of collective agreements; the principle is thus put into practice by the social partners, who are in touch with business realities. The text is also flexible in that it avoids or allows the avoidance of making very short postings for initial assembly work and/or installation and postings for small-scale work immediately subject to some of its provisions. Flexibility is also shown in specifying the types of postings for the provision of transnational services which are covered by Article 1(3)(a) in order to take account of realities in particular those inherent in intrinsically mobile activities.

The Council has made it possible to arrive at a balanced compromise acceptable to a large majority of Member States by introducing flexibility which does not affect the protection of seconded workers but allows adaptation to the realities of posting carried out as part of the free provision of services.

The text offers undoubted added value as it meets objectives which could not be achieved by the individual Member States alone.

This is the case as the proposal for a Directive seeks to determine a 'hard core' of imperative rules applicable to posted workers or to specify the nature of collective agreements likely to be implemented.

The proposal also introduces an important and innovative article relating to jurisdiction which aims to help seconded workers exercise their right to institute legal proceedings. The same applies to the Directive's provisions for co-operation and administrative assistance on information with the aim of allowing the Directive to be properly implemented in a spirit of cooperation.

A Community approach is also more convenient for determining the law under which the concept "worker" is defined, as laid down in Article 2(2) of the text.

At this time when the number of national laws on the posting of workers is increasing, this text is a single Community solution which addresses the problems common to the Member States and is open to uniform interpretation by the Court of Justice of the European Communities.

Finally, this text is an indication of the progress made in giving substance to the social dimension of the European Union.

For these reasons the Commission invites the European Parliament to associate itself with the existing consensus in the new reading which follows on from the Common Position of the Council.

### **3 DETAILED ASSESSMENT OF THE COMMON POSITION**

While there may be some discrepancies between the Parliament amendments accepted by the Commission at the first reading and the content of the Common Position, the latter does indisputably seek to follow these amendments.

#### **3.1 Parliament amendments accepted**

##### **\* *Recitals***

Amendments No 2 and No 4 are adopted in recitals 5 and 17 of the Common Position respectively.

The first part of amendment No 6 is reflected in recitals 23 and 24 of the Common Position.

The last half of amendment No 6 is adopted in recital 20 of the Common Position.

Amendment No 7 is reflected in recital 19 of the Common Position.

Amendment No 8, in conjunction with amendment No 31, is reflected in recital 25 of the Common Position.

##### **\* *Articles***

Articles 4 and 5; Article 3(2)(6) and Article 3(8) of the Common Position incorporate the main points of the substantive amendments by the European Parliament; namely amendments No 30, 32 and 33 respectively.



- a) Articles 4 and 5 of the Common Position deal with cooperation on information and also measures to be taken in the event of failure to comply with this Directive.

The wording on cooperation and administrative assistance has been simplified. It is preferable to leave it up to the Member States to fill in the necessary details of how the rules established in Article 4 of the Common Position may best be put into practice. Nor should excessive bureaucracy be created at Community level: this would in any case be likely to harm the spirit of cooperation which informs this Article.

Article 5 adopts the substance of § 4 and 5 of Parliament's amendment No 30.

- b) Article 3(2-6) is the heart of the compromise, as it deals with the threshold for implementing certain provisions of the Directive.

Parliament's amendment No 32 is adopted in Article 3(2-6) of the Common Position. Yet this Article does not allow exemption from the paid holiday provisions or in the case of the supply of workers by businesses such as temporary employment agencies. The same applies to Article 3(4) of the Common position, which under certain conditions allows exemption under collective agreements from the requirement for minimum rates of pay to apply immediately.

However, the restrictive nature is tempered by flexibility. Article 3(5) allows Member States to derogate from the immediate implementation of minimum rates of pay and paid annual holidays on the grounds that the amount of work to be done is not significant. In addition Article 3(2) provides for exemption for postings not exceeding eight days, in the case of initial assembly and/or initial installation. This is only applicable if certain well defined conditions are fulfilled (work forming part of a contract for the supply of goods, essential work, work carried out by the skilled and/or specialist workers of the supplying undertaking, work other than building work).

This Article is conducive to realistic implementation of the Directive in the context of the freedom to provide services.

- c) Article 3(8) of the Common Position responds to the wishes expressed by Parliament in its amendment No 33.

On this point, the Common Position achieves a difficult compromise which takes into account both the needs linked with

exercising the freedom to provide services and the nature of the industrial relations system deeply rooted in the traditions of the Member States.

- d) Parliament's amendments No 24 and 31 correspond to Article 2(7)(1st paragraph) and Article 8 respectively of the Common Position.

### 3.2 Points of difference

#### Scope

- a) The Common Position has not adopted Amendment No 10 of the European Parliament as it stands and instead adopts a new approach towards its application to third countries.

It is no longer a matter of regulating the posting of workers by undertakings operating in third countries, but of laying down the principle that undertakings in a non-Member State cannot receive more favourable treatment than those in a Member State. This principle is also set out in recital 21 of the Common Position.

- b) Amendment No 12 is not adopted in Article 1(3)(b) of the Common Position but this is without consequence as the wording of this Article provides more clarity than the previous Article 1(3)(c) of the amended proposal.
- c) Amendments 16 and 17 have not been adopted, as Article 3(1)(a) and (b) has been more broadly worded. Declaration No 5 of the Council and the Commission, to be recorded in the minutes, provides useful details regarding 'periods of rest'.
- d) Amendment No 18 concerning benefits under occupational schemes has not been taken over in the Common Position, however Declaration No 6 of the Council and the Commission, to be recorded in the minutes, contains very useful and explanatory information on this area.
- e) Amendment No 20 which supplements Article 3(1)(g), adding sexual orientation to the other types of discrimination, has not expressly been adopted in the Common Position. The terms 'other provisions on non-discrimination' are sufficiently broad to cover these situations.
- f) Finally, amendment No 14 by the European Parliament which had not been accepted by the Commission, is essentially taken over in Article 3(4) of the Common Position.

- g) The Commission emphasises that the Common Position allows the Member States (Article 3(10)) to extend the list of matters applicable to posted workers, to include matters relating to public order as defined by the Commission in Declaration 10 to be recorded in the minutes. The amended proposal did not, explicitly mention such an extension, which forms part of the new provisions on which Parliament naturally did not express a view directly. Parliament should therefore be fully informed of the provisions of the amended proposal which do not appear in the Common Position.

### 3.3 New provisions and removal of provisions

#### \* *Recitals*

- a) Several of the recitals of the amended proposal which were not linked to any article in the enacting terms of the Directive were removed by the Common Position. This applies to recitals 3, 9, 10, 11, 16, 12 (first sentence), 18, the deletion of which Parliament had asked at the first reading, and 21.
- b) On the other hand, new recitals have been introduced into the Common Position. Recital 4 clarifies the new provision concerning the scope of Article 1(3)(a) whilst recital 7 usefully completes the reference made in the recitals to the 1980 Rome Convention and recital 16 covers possible exemptions from the immediate implementation of minimum rates of pay and paid annual holidays.

Recitals 18, 21<sup>1</sup> and 22 also clarify the scope of the directive.

#### \* *Articles*

##### — Scope

- a) The Directive does not apply to merchant navy undertakings as regards seagoing personnel.

The Commission recognises that postings in these activities within the meaning of the Directive, are fairly rare as in general they would require the posting of workers from a vessel flying the flag of one Member State to a vessel flying the flag of another Member State.

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<sup>1</sup> Translator's note: "21 bis" in the original, but there seems to be no such recital in the Common Position.

- b) The scope of Article 1(3)(a) as modified by the Common Position has been clarified. This modification is accompanied by an explanatory declaration No 3 by the Council and the Commission, to be recorded in the minutes.
- c) Collective agreements within the meaning of Article 3(8) in principle cover postings in building work as referred to in the Annex, without prejudice to the possibility of Member States' extending such agreements to include other activities (Article 3(10)).

– Definition

Article 2 contains a new paragraph 2 which anticipates that 'for the purposes of this Directive, the definition of a worker is that which applies in the law of the Member States to whose territory the worker is posted'.

This Article provides a solution to practical problems arising from divergent definitions of "worker" in the national law of the different Member States.

– Conditions of work and employment

- a) Minimum rates of pay. A new provision has been incorporated as Article 3(1), last paragraph which states: 'For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.' Declaration No 5 paragraph 1 of the Council and the Commission further clarifies this point.
- b) Exemption from the immediate implementation of minimum rates of pay and paid annual holidays. Although mostly new, the provisions of Article 3(2-6) are linked to the question of the threshold which has already been discussed in section 3 - 1 b) of this Communication.
- c) A new provision has been incorporated as the second paragraph of Article 3(7) of the Common Position. It seeks to facilitate the comparison between the minimum wage provisions in force in the home country from which workers are posted and in the host country where the services are provided. In the interests of realism this new provision allows what is comparable in the matter to be compared.
- d) The Common Position contains a new Article 6 relating to jurisdiction. In principle its content aims to make it easier for the

posted worker to exercise his right to institute legal proceedings by allowing him to assert his rights under the Directive (Article 3) in the Member State where he is or was posted. This is without prejudice to any possibility of instituting legal proceedings in another State under international conventions on jurisdiction (Brussels Convention of 1968, as amended). This article completes and reinforces the legal coherence of the Common Position.

### Implementation

The modified proposal provided for a period of two years for implementation whilst the Common Position stipulates three years.

### Conclusions

The Commission considers the Common Position to be the result of a difficult compromise on a complex matter with important economic and social as well as legal and political implications.

Overall, the Commission considers that this Common Position achieves a remarkable balance between its elements, substantially improves the content of the amended proposal and affords real added value at Community level. This Common Position fully contributes to furthering the social dimension in the European Union.



COMMISSION OF THE EUROPEAN COMMUNITIES

CORRIGENDUM

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COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 b (2) of the EC-Treaty

CONCERNING THE COMMON POSITION OF THE COUNCIL ON THE  
AMENDED PROPOSAL OF THE EUROPEAN PARLIAMENT AND COUNCIL  
DIRECTIVE ON THE POSTING OF WORKERS CARRIED OUT IN THE  
FRAMEWORK OF THE PROVISION OF SERVICES