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Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

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DIRECTIVE 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 1996 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 (1),

Having regard to the opinion of the Economic and Social Committee (2),

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

(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 (4), signed by 12 Member States, entered into force on 1 April 1991 in the majority of Member States;

(8) Whereas Article 3 of that Convention provides, as a general rule, for 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 laid down 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;
- (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 undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings 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 (5) lays down the provisions applicable with regard to social security benefits and contributions;

(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 making the posting 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 making the posting 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 undertakings;

(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 eight 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.

For the purpose of such calculations, 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 of 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 hiring-out 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 adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 16 December 1999 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.

Article 8

Commission review

By 16 December 2001 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, 16 December 1996.

For the European Parliament

The President

K. HÄNSCH

For the Council

The President

I. YATES

(1) OJ No C 225, 30. 8. 1991, p. 6 and

OJ No C 187, 9. 7. 1993, p. 5.

(2) OJ No C 49, 24. 2. 1992, p. 41.

(3) Opinion of the European Parliament of 10 February 1993 (OJ No C 72, 15. 3. 1993, p. 78), Council common position of 3 June 1996 (OJ No C 220, 29. 7. 1996, p. 1) and Decision of the European Parliament of 18 September 1996 (not yet published in the Official Journal). Council Decision of 24 September 1996.

(4) OJ No L 266, 9. 10. 1980, p. 1.

(5) OJ No L 149, 5. 7. 1971, p. 2; Special Edition 1971 (II), p. 416. Regulation as last amended by Regulation (EC) No 3096/95 (OJ No L 335, 30. 12. 1995, p. 10).

ANNEX

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.