

Amended proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services ⁽¹⁾

(2000/C 311 E/11)

(Text with EEA relevance)

COM(2000) 271 final — 1999/0012(COD)

(Submitted by the Commission pursuant to Article 250(2) of the EC Treaty on 8 May 2000)

⁽¹⁾ OJ C 67, 10.3.1999, p. 12.

INITIAL PROPOSAL

AMENDED PROPOSAL

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Unchanged

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

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), and 55 thereof,

Having regard to the proposal from the Commission,

Unchanged

Having regard to the opinion of the Economic and Social Committee ⁽¹⁾,

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

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) Whereas, pursuant to point (c) of Article 3 of the Treaty, the abolition, between Member States, of obstacles to the free movement of services constitutes one of the objectives of the Community.

(1) Pursuant to point (c) of Article 3(1) of the Treaty, the abolition, between Member States, of obstacles to the free movement of services constitutes one of the objectives of the Community.

(2) Whereas the free movement of services includes the right for service providers to post their staff even if the persons in question are not citizens of the Union but third-country nationals legally present in the Community. Whereas the staff also includes the managers of companies.

(2) The free movement of services includes the right for service providers to post their staff even if the persons in question are not citizens of the Union but third-country nationals legally present in the Community. The staff also includes the managers of companies.

(3) Whereas the freedom to provide services neither creates direct rights for the workers concerned nor affects rights already recognised at Community or national level or under international agreements, including those guaranteed by the Convention for the Protection of Human Rights, particularly as regards family life.

(3) The freedom to provide services neither creates direct rights for the workers concerned nor affects rights already recognised at Community or national level or under international agreements, including those guaranteed by the Convention for the Protection of Human Rights, particularly as regards family life.

⁽¹⁾ OJ C 209, 22.7.1999, p. 5.

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- (4) Whereas service providers who need to post a worker who is a third-country national encounter such difficulties that they are often obliged to withdraw from providing the service or put up with damaging delays. Whereas the preventive checks carried out by the Member States in which the services are provided before any workers are posted duplicate both the checks they make after the event and those made in the country of establishment.
- (5) Whereas The authorities of a Member State in which services are provided have no guarantee of the lawfulness, in the Member State in which the provider is established, of the situation of the service provider and worker to be posted. Furthermore, the Member States have no guarantee that the workers posted will return to the Member State in which they chiefly work when the services have been completed.
- (6) Whereas A document known as an 'EC service provision card', to be issued by the Member State in which the service provider is established, should be the instrument that facilitates postings so that a provider can react with a view to current or potential postings in connection with normal activities even if his staff includes one or more third-country nationals; whereas it should be for the service provider to decide whether to apply for the EC service provision card;

Whereas This Directive, similarly, does not affect the undertakings of the Community and its Member States, given in the context of the General Agreement on Trade in Services (GATS) ⁽¹⁾. whereas The EC service provision card should include only the data required under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽²⁾.

- (7) Whereas the Member State issuing the EC service provision card should take account of public policy aimed at combating clandestine immigration by certifying the lawfulness of the situation in the Member State in which the service provider employs the third-country national. whereas The document should ensure that the main activity of the posted worker takes place in the Member State in which the service provider is established. whereas The document should be safeguarded against falsification. whereas It is therefore no longer necessary to require an entry visa.

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- (4) Service providers who need to post a worker who is a third-country national encounter such difficulties that they are often obliged to withdraw from providing the service or put up with damaging delays. The preventive checks carried out by the Member States in which the services are provided before any workers are posted duplicate both the checks they make after the event and those made in the country of establishment.
- (5) The authorities of a Member State in which services are provided have no guarantee of the lawfulness, in the Member State in which the provider is established, of the situation of the service provider and worker to be posted. Furthermore, the Member States have no guarantee that the workers posted will return to the Member State in which they chiefly work when the services have been completed.
- (6) A document known as an 'EC service provision card', to be issued by the Member State in which the service provider is established, must aim to eliminate the legal uncertainty associated with postings and thus facilitate the free movement of services. The service provider must be entitled to ask for a service provision card in his Member State of establishment with a view to providing one or more services in other Member States. The card must be valid, depending on the application, in one or more or all of the other Member States.

- (6a) This Directive, similarly, does not affect the undertakings of the Community and its Member States, given in the context of the General Agreement on Trade in Services (GATS) ⁽¹⁾. The EC service provision card should include only the data required under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽²⁾.

- (7) The Member State issuing the EC service provision card should take account of public policy aimed at combating clandestine immigration by certifying the lawfulness of the situation in the Member State in which the service provider employs the third-country national. The document should ensure that the main activity of the posted worker takes place in the Member State in which the service provider is established. The document should be safeguarded against falsification. It is therefore no longer necessary to require an entry visa.

⁽¹⁾ OJ L 336, 23.12.1994, p. 190.

⁽²⁾ OJ L 281, 23.11.1995, p. 31.

⁽¹⁾ OJ L 336, 23.12.1994, p. 190.

⁽²⁾ OJ L 281, 23.11.1995, p. 31.

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- (8) Whereas the EC service provision card issued by a Member State should thus provide the guarantee necessary to ensure that all other Member States in which services are to be provided will allow persons to enter and reside in the country in order to provide one or more services, namely during and at the time of the provision of services. whereas This guarantee should include the obligation not to consider the posting as an interruption of the period of residence and of the permitted paid activity, and in particular not, under any circumstances, to refuse readmission of the person posted, whereas Consequently, the Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry, residence and access to a temporary paid activity. whereas This Directive does not affect the binding rules on conditions of work and employment prevailing in the Member State in which a service is provided, those rules having been laid down by 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 ⁽¹⁾.
- (9) Whereas each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the posted worker into the territory, his intended presence and the service or services for which he is to be posted. Whereas A compulsory prior declaration should enable the Member State in question to take measure in specific cases on grounds of public order, public security or public health, within the limits set by this Directive. Whereas Each Member State in which a service is provided should also be able to make it obligatory to obtain, after entry, a temporary residence permit if the time required for the service or services for which the posted worker will reside exceeds six months out of a period of twelve months.
- (10) Whereas each Member State should thus be able to check, particularly if a temporary residence permit is issued, that the residence of the worker posted is for the purpose of providing a service or services in the Member State. Whereas the freedom to provide services should always be of a temporary nature which must be determined on the basis of the continuity, frequency, and duration of the service. Whereas the validity of the temporary residence permit should be capable of limitation to the period of validity of the EC service provision card on the grounds that the Member State intends to issue, in conformity with the freedom to provide services, a residence permit in accordance with its own national provisions for postings exceeding six or twelve months.
- (8) The EC service provision card issued by a Member State should thus provide the guarantee necessary to ensure that all other Member States in which services are to be provided will allow persons to enter and reside in the country in order to provide one or more services, namely during and at the time of the provision of services. This guarantee should include the obligation not to consider the posting as an interruption of the period of residence and of the permitted paid activity, and in particular not, under any circumstances, to refuse readmission of the person posted, for instance when the employment contract with the service provider is terminated. Consequently, the Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry, residence and access to a temporary paid activity. This Directive does not affect the binding rules on conditions of work and employment prevailing in the Member State in which a service is provided, those rules having been laid down by 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 ⁽¹⁾.
- (9) Each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the posted worker into the territory, his intended presence and the service or services for which he is to be posted. A compulsory prior declaration should enable the Member State in question to take measure in specific cases on grounds of public order, public security or public health, within the limits set by this Directive. The same applies when the employment relationship is suddenly terminated and the posted worker's stay on the territory of that Member State is thus no longer required for the provision of a service. Each Member State in which a service is provided should also be able to make it obligatory to obtain, after entry, a temporary residence permit if the time required for the service or services for which the posted worker will reside exceeds six months out of a period of twelve months.
- (10) Each Member State should thus be able to check, particularly if a temporary residence permit is issued, that the residence of the worker posted is for the purpose of providing a service or services in the Member State. The freedom to provide services should always be of a temporary nature which must be determined on the basis of the continuity, frequency, and duration of the service. The validity of the temporary residence permit should be capable of limitation to the period of validity of the EC service provision card on the grounds that the Member State intends to issue, in conformity with the freedom to provide services, a residence permit in accordance with its own national provisions for postings exceeding six or twelve months.

⁽¹⁾ OJ L 18, 21.1.1997, p. 1.

⁽¹⁾ OJ L 18, 21.1.1997, p. 1.

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- (11) Whereas for this Directive to be effective, there must be equality of treatment between third-country nationals and citizens of the Union posted as workers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community. Whereas under this Directive, this equality of treatment should be invoked only by service providers who employ third-country nationals. whereas This equality of treatment should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State.
- (12) Whereas Member States should not be able to confer more favourable treatment on service providers established outside the Community than on those established within the Community. whereas The Member States may derogate from this Directive on grounds of public order, public security or public health. whereas The limits of such derogation must be determined with respect to service providers as employers and the workers who are third-country nationals on the basis of the coordination provided for in Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health ⁽¹⁾, as last amended by Directive 75/35/EEC ⁽²⁾, in order to establish a uniform framework for the service provider regardless of the nationality of his staff.
- (13) Whereas it is vital for the implementation of this Directive to ensure close cooperation between the competent authorities of the Member States. whereas It would be useful for the competent authorities of the Member States to adopt a uniform format for the EC service provision card. whereas The Commission should be empowered to lay down this format and other procedures in connection with the EC service provision card, acting in accordance with the procedure set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas ⁽³⁾.

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- (11) For this Directive to be effective, there must be equality of treatment between third-country nationals and citizens of the Union posted as workers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community. Under this Directive, this equality of treatment should be invoked only by service providers who employ third-country nationals. This equality of treatment should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State.
- (12) Member States should not be able to confer more favourable treatment on service providers established outside the Community than on those established within the Community. The Member States may derogate from this Directive on grounds of public order, public security or public health. The limits of such derogation must be determined with respect to service providers as employers and the workers who are third-country nationals on the basis of the coordination provided for in Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health ⁽¹⁾, as last amended by Directive 75/35/EEC ⁽²⁾, in order to establish a uniform framework for the service provider regardless of the nationality of his staff.
- (13) It is vital for the implementation of this Directive to ensure close cooperation between the competent authorities of the Member States. It would be useful for the competent authorities of the Member States to adopt a uniform format for the EC service provision card. The Commission should be empowered to lay down this format and other procedures in connection with the EC service provision card, acting in accordance with the procedure set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas ⁽³⁾.
- (13a) Since the measures needed to implement this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽⁴⁾ these measures should be adopted according to the regulatory procedure set out in Article 5 of that Decision.

⁽¹⁾ OJ 56, 4.4.1964, p. 850.

⁽²⁾ OJ L 14, 20.1.1975, p. 14.

⁽³⁾ OJ L 164, 14.7.1995, p. 1.

⁽¹⁾ OJ 56, 4.4.1964, p. 850.

⁽²⁾ OJ L 14, 20.1.1975, p. 14.

⁽³⁾ OJ L 164, 14.7.1995, p. 1.

⁽⁴⁾ OJ L 184, 17.7.1999, p. 23.

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- (14) Whereas this Directive does not affect the competence of the Member States to decide which third-country nationals are to be admitted for the purpose of a paid activity, the conditions on which such admission should be extended or which professional activities are regulated on national territory, and which are not.
- (15) Whereas in accordance with the principle of proportionality as set out in the third paragraph of Article 3b, this Directive does not go beyond what is necessary for achieving the objective of the free movement of services. Whereas it covers only the checks that precede the provision of cross-border services, but not the checks made afterwards in the Member State in which the service is provided. Whereas it is limited to postings for periods of not more than twelve months and to the recognition of diplomas, certificates and other qualifications acquired within the Community.
- (16) Whereas, for the purpose of implementing this Directive, Member States should lay down an appropriate system of sanctions.
- (17) Whereas, not later than four years after the date of transposition of this Directive, the Commission must examine its application with a view to proposing any necessary amendments,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

This Directive applies to service providers established in a Member State who, in connection with the provision of cross-border services, post workers who are nationals of a third country to the territory of another Member State.

Article 2

1. When a provider of services proposes, in the ordinary course of his business, to post an employed worker who is a national of a third country Member States on account of one of the situations set out in points (a) and (b) of Directive 96/71/EC, the Member State in which the service-provider is established shall be obliged to issue to him, at his request, a document to be known as an 'EC service provision card'.

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- (14) This Directive does not affect the competence of the Member States to decide which third-country nationals are to be admitted for the purpose of a paid activity, the conditions on which such admission should be extended or which professional activities are regulated on national territory, and which are not.
- (15) In accordance with the principle of proportionality as set out in the third paragraph of Article 5, this Directive does not go beyond what is necessary for achieving the objective of the free movement of services. It covers only the checks that precede the provision of cross-border services, but not the checks made afterwards in the Member State in which the service is provided. It is limited to postings for periods of not more than twelve months and to the recognition of diplomas, certificates and other qualifications acquired within the Community.
- (16) For the purpose of implementing this Directive, Member States should lay down an appropriate system of sanctions.
- (17) Not later than four years after the date of transposition of this Directive, the Commission must examine its application with a view to proposing any necessary amendments,

Unchanged

Article 2

1. When a provider of services proposes, in the ordinary course of his business, to post an employed worker who is a national of a third country, for the provision of one or more services to be carried out in one or more or all of the other Member States, the Member State in which the service-provider is established shall be obliged to issue to him, at his request, a document to be known as an 'EC service provision card'.

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he is affiliated to the social security scheme in the Member State responsible for the risk of sickness or industrial accident, or else is insured against the risk of sickness or industrial accident during his posting to one or more other Member States.

2. The EC service provision card shall be valid for the period during which the worker is in lawful actual employment which may not exceedmay not exceed.

(a) twelve months in the case of lawful actual employment for more than twelve months before the card is issued; or

(b) six months in the case of lawful actual employment for more than six months before the card is issued.

'Lawful employment' means work carried out under Community or national regulations or with the authorisation of the Member State issuing the EC service card, which permits access to a job either with the applicant service provider or with another employer established in the Member State in question.

1a. A posted worker is one whom the service provider intends to post, for his account and under his direction, either under one or more contracts with one or more parties for whom the services are intended, operating in another Member State, or to an establishment or to an undertaking owned by the same group but established in another Member State. The card may be issued only if the service provider in question provides evidence

(a) that he is not a temporary employment undertaking hiring out the worker to another user undertaking;

(b) that the worker is legally resident in that Member State in accordance with its national legislation for a period of 12 months or more, excepting persons possessing documents which confirm that their presence in that Member State is only accepted pending their expulsion.

(c) that the worker is insured against the risk of sickness and industrial accident at the time of his posting to the other Member State(s) concerned by the social security institution of the Member State in which the service provider is established, or by a private insurance scheme.

2. The EC service provision card shall be valid for the period during which the worker is in lawful employment. The period of validity may not exceed the period of lawful employment preceding the issue of the card, and may under no circumstances exceed 12 months. The period of preceding lawful employment may not be less than six months.

Deleted

'Lawful employment' means a paid activity which may be carried out by virtue of a provision of Community law or of legislative, regulatory or administrative provisions of the Member State in which the service provider is established, by a worker who legally resides in that Member State, excepting persons possessing documents which only confirm that their presence in that Member State is only accepted pending their expulsion.

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'Actual employment' means the work actually carried out on the territory of the Member State issuing the EC service provision card.

3. The EC service provision card shall be renewable only if the conditions as to its issue set out in paragraphs 1 and 2 are fulfilled once more.

4. The EC service provision card shall be a separate document belonging to the service provider, which he puts at the disposal of the posted employed worker described therein. Shall contain the following data:

(a) details of the service provider and the posted worker;

(b) the period of validity;

(c) the issuing authority and issuing Member State;

The precise details, a specimen of the document to be issued, and the technical specifications designed to prevent falsification shall be laid down in an implementing regulation in accordance with the procedure provided for in Article 6 of Regulation (EC) No 1683/95.

5. The Member State issuing the EC service provision card may not regard posting for the provision of services in another Member State as being an interruption of the posted worker's period of residence or paid activity.

The issuing Member State may not refuse, under national regulations, the readmission to its territory of the posted worker, for any reason whatsoever.

Deleted

3. The EC service provision card shall be renewable only if the conditions as to its issue set out in paragraphs 1, 1a and 2 are fulfilled once more.

3a. The EC service provision card shall lose its validity if one of the conditions set out in paragraphs 1, 1a and 2 is no longer met because of events occurring after the issue of the card.

4. The EC service provision card shall be a separate document belonging to the service provider, which he puts at the disposal of the posted employed worker described therein. If the card is no longer valid, the Member State in which the service provider is established shall require him to return the card immediately to its responsible authorities. The card shall contain the following data:

Unchanged

(d) the Member State(s) for which the card is valid.

4a. The precise details, a specimen of the document to be issued, and the technical specifications designed to prevent falsification shall be laid down in an implementing regulation in accordance with the procedure provided for in Article 5a(2).

Unchanged

The issuing Member State may not refuse, under national regulations, the readmission to its territory of the posted worker, for any reason whatsoever, including the termination of the employment relationship between the service provider and the worker in question.

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Article 3

1. Any Member State in which services are provided shall permit the entry and residence of a worker who is a third-country national to its territory for the purpose of one or more provisions of services, if such person is in possession of the EC service provision card, an identity card or passport valid for the period during which the services are to be provided.

2. No Member State in which a service is provided may require from the posted worker or the service provider in his capacity as employer

(a) an entry or exit visa;

(b) a residence permit other than that specified in paragraph 3; or

(c) a work permit or permit for access to a job; or

(d) impose any obligation equivalent to those in points (a), (b) and (c).

3. Any Member State in which a service is provided may require the service provider to declare, before the worker enters the territory, the intended presence of the posted worker, the period of presence provided for and the service provision or provisions for which he is to be posted;

If the total period required for the service provision or provisions in question exceeds six months out of a period of twelve months, the Member State shall issue, after entry of the posted worker, a temporary residence permit showing that residence is authorised.

4. In order to facilitate the provision of services, any Member State in which a service is carried out shall ensure equality of treatment between third-country nationals and citizens of the Union posted as workers for the purpose of provision of services as regards the recognition of diplomas, certificates and other qualifications acquired within the Community with a view to performing the activity concerned, and issued by a competent authority of a Member State. The Member State shall ensure that legal remedy under national law is available to the service provider in his capacity as employer in connection with decisions that fail to observe this equality of treatment.

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Unchanged

1. Any Member State in which services are provided shall permit the entry and residence of a worker who is a third-country national to its territory for the purpose of one or more provisions of services, if such person is in possession of the EC service provision card, an identity card or passport valid for the period during which the services are to be provided, and a statement from the service provider entrusting him with the provision of a service, showing the probable duration of the stay.

Unchanged

3. Any Member State in which a service is provided may require the service provider to declare, before the worker enters the territory, the intended presence of the posted worker, the period of presence provided for and the service provision or provisions for which he is to be posted; that Member State may also require the service provider to notify immediately the termination of the employment contract.

Unchanged

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Article 4

1. Member States shall not give more favourable treatment to service providers established outside the Community than to those established within the Community.

2. Member States may not derogate from this Directive except on grounds of public order, public security or public health, in which case Directive 64/221/EEC shall apply *mutatis mutandis*.

Article 5

1. The Member States shall designate the authorities responsible for issuing the EC service provision card and the temporary residence permit, and for receiving the information referred to in Article 3(3). They shall provide the Commission and the other Member States with a list of such authorities. They shall take the necessary measures for simplifying as far as possible the formalities, deadlines and procedures for obtaining the above-mentioned documents, which shall be issued free of charge or on payment of a sum not exceeding the duties and taxes payable for the issuing of identity cards to national citizens.

2. Member States shall provide for cooperation between the public administrations responsible under national legislation for matters connected with the implementation of this Directive.

Cooperation shall in particular entail replying to any reasoned request for information. Such cooperation shall be provided free of charge and without delay.

Article 5a

1. The Commission shall be assisted by the committee set up by Article 6 of Regulation (EC) No 1683/95.

2. If reference is made to this paragraph, the procedure set out in Article 5 of Decision 1999/468/EC shall apply, while respecting the provisions of Article 7(3) and Article 8 of that Decision.

3. The period provided for in Article 5(6) of Decision 1999/468/EC is fixed at three months.

Article 6

Member States shall lay down the penalties applicable to infringements of national rules adopted for the implementation of this Directive and shall take all necessary measures to ensure their enforcement. The penalties shall be effective, proportionate and deterrent. Member States shall notify the Commission of these provisions not later than the date specified in Article 8, and as soon as possible in the event of any subsequent changes.

Unchanged

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Article 7

No later than four years after the date specified in Article 8, the Commission shall report to the European Parliament and the Council on the implementation of this Directive in the Member States and shall propose any necessary changes.

Article 8

The Member States shall adopt and publish no later than 30 June 2002 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 9

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

Article 10

This Directive is addressed to the Member States.
