
The implementation of Directive 96/71/EC in the Member States
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Commission Communication

on the implementation of Directive 96/71/EC

1. INTRODUCTION

Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services was adopted on 16 December 1996. It aims to abolish the obstacles and uncertainties that impede implementation of the freedom to supply services, by improving legal certainty and facilitating identification of the employment conditions that apply to workers temporarily employed in a Member State other than the Member State whose legislation governs the employment relationship. It endeavours to strike a balance between the economic freedoms bestowed by the EC Treaty and employees' rights during their period of posting.

Since the Directive is a supranational legal instrument whose transposal in one Member State directly affects employers and workers in other countries, the manner in which it is actually implemented is particularly important for all Member States. Article 8 provides that the Commission shall review the operation of the Directive with a view to proposing the necessary amendments to the Council where appropriate.

In preparation for this review, the Commission services have taken a number of steps: the first was to draft a report on the transposal of the Directive in the 15 Member States, designed to ascertain the present situation as regards national legislations and collective agreements. At the same time, the national administrations were sent a questionnaire asking them to describe the practicalities of applying the Directive and any difficulties encountered. The results of the transposal study and the replies to the questionnaire were discussed by a group of government experts.

The purpose of this Communication is to draw the conclusions from all this preparatory work concerning the transposal and practical implementation of Directive 96/71/EC in the Member States, and to define the Commission's position as to whether the 1996 Directive needs revising.

The Communication does not seek to judge the compatibility with the Directive and the Treaty of the national transposing measures mentioned herein, nor does it prejudge what position the Commission will take in its monitoring of the application of Community law.
2. D IRECTIVE 96/71/EC – ITS CONTEXT IN COMMUNITY LAW, ITS KEY CONTENT AND ITS ADDED VALUE

2.1. The context of the Directive

With the achievement of the single market, in particular as regards freedom to supply services between Member States, a new form of worker mobility has emerged, quite distinct from the mobility of migrant workers explicitly addressed in the EC Treaty and in secondary legislation concerning the free movement of workers. The dynamic environment created by the single market, with its economic freedoms, is encouraging undertakings to develop their transnational activities and increasingly to provide transnational services. The situation of employees posted temporarily to another Member State to perform work under a service contract on behalf of their employer has raised all sorts of legal questions.

As these are transnational situations, questions often arise as to which law is applicable to the employment relationship. On this subject, the Convention of Rome of 19 June 1980 on the law applicable to contractual obligations\(^1\) provides, as a general rule, for freedom of choice as regards the law applicable by the parties. In the absence of choice, the employment contract is governed, pursuant to Article 6(2), by the law of the country in which the employee habitually carries out his work, even if he is temporarily employed in another country. If the employee does not habitually carry out his work in any one country, the law applicable is that 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. According to Article 6(1) of the Convention, the choice of law made by the parties must not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice. Article 7 provides that, under certain conditions, effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular those of the Member State within whose territory the worker is temporarily posted.

As regards posted workers within the context of the EC Treaty, the Court of Justice has been requested on several occasions to clarify their situation in the context of the freedom to supply services as referred to in Article 49 of the Treaty. In a number of cases the Court of Justice has taken the opportunity to develop criteria, first and foremost to distinguish between freedom to supply services and freedom of movement of workers. On this point, the Court has emphasised that – unlike migrant workers – posted workers who are sent to another country to perform a service return to their country of origin after completing their mission, without at any time joining the labour market of the host Member State. Given this specific situation, the rules of primary and secondary Community law devised for migrant workers would not therefore resolve the specific problems of posting. In particular, as regards the employment conditions applicable during the period of posting, the Court has recognised that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established, on condition that the rules of the EC Treaty, and in particular Article 49 are complied with.\(^2\)

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\(^1\) OJ No L 266 of 9.10.1980, p.1

In order to facilitate the free movement of services it was deemed necessary and advisable to coordinate the laws of the Member States affected by this Court of Justice case law and thus lay down, at Community level, a nucleus of mandatory minimum protection rules to be observed in the host country by employers who post workers to perform temporary work in the territory of the Member State where the services are provided. Directive 96/71/EC concerning the posting of workers, which is based on Articles 47 (ex 57), paragraph 2 and 55 (ex 66) of the EC Treaty establishes this Community catalogue of minimum rules deemed mandatory. This Directive takes account of the specific situation of posted workers and ties in with the legal context outlined above.

It should be stressed that the Directive's scope does not extend to social security; the provisions applicable with regard to benefits and social security contributions are those laid down by Council Regulation (EEC) No 1408/71 of 14 June 1971.

2.2. The key content of the Directive

The Directive applies to undertakings which post workers to work temporarily in a Member State other than the State whose laws govern the employment relationship. It covers three transnational posting situations, namely:

- posting under a contract concluded between the undertaking making the posting and the party for whom the services are intended,
- posting to an establishment or an undertaking owned by the group,
- posting by a temporary employment undertaking to a user undertaking operating in a Member State other than that of the undertaking making the posting,

with the proviso, in all three situations, that there is an employment relationship between the undertaking making the posting and the posted worker.

Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State. In this context, Recital 20 of the Directive indicates that the 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. The Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers.

Whatever the law applicable to the employment relationship, the Directive seeks to guarantee that posted workers will enjoy the application of certain minimum protective provisions in force in the Member State to which they are posted. To this end, Article 3(1) of the Directive lays down the mandatory rules to be observed by employers during the period of posting in regard to the following issues: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; and 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. These rules must be laid down by the legislations of the host country and/or by collective agreements or arbitration

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3 OJ No L 149 of 5.7.1971
awards which have been declared universally acceptable in the case of activities in the building work sector, while Member States are left the choice of imposing such rules laid down by collective agreements in the case of activities other than building work. They may also, in compliance with the Treaty, impose the application of terms and conditions of employment on matters other than those referred to in the Directive in the case of public policy provisions.

For the purposes of implementing the Directive, Member States must designate liaison offices and make provision for administrative cooperation regarding the provision of information. The Directive also contains a jurisdiction clause which states that judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

2.3. **The added value of the Directive**

2.3.1. *What does this Directive add as regards private international law?*

2.3.1.1. **The Rome Convention**

The Rome Convention lays down the general criteria for determining the law applicable to contractual obligations. It also permits the judge – exceptionally – to set aside the law that would normally be applicable to the contract and instead apply the mandatory rules within the meaning of private international law ["règles impératives", also known in French as "lois d'application immédiate" or "lois de police"] that obtain at the place where the work is carried out (Article 7). These mandatory rules are not defined by the Rome Convention. Directive 96/71 designates at Community level mandatory rules within the meaning of Article 7 of the Rome Convention in transnational posting situations. These rules thus constitute a nucleus of minimum protection for posted workers, while respecting the principle of equality of treatment between national and non-national providers of services (Article 49 of the EC Treaty) and between national and non-national workers.

The choice-of-law rules provided for by the Rome Convention for determining the law applicable offer a general legal framework, whereas the Directive specifically concerns the situation of posted workers and is thus able to refine this legal framework.

The Directive in no way seeks to amend the law applicable to the employment contract, but it lays down a number of mandatory rules to be observed during the period of posting in the host Member State, *whatever the law applicable to the employment relationship*.

2.3.1.2. **Jurisdiction**

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴ establishes Community rules on jurisdiction and the recognition of judgments in civil and commercial matters. With regard to individual employment contracts, Article 19 of this Regulation provides that an employer domiciled in a Member State may be sued in the courts of the Member State where he is domiciled, or in another Member State in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he habitually carried out his work. This rule thus introduces, in the worker's favour, an

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⁴ OJ No L 012 of 16/01/2001, p. 1
exemption from the general principle that judicial proceedings against persons domiciled in the territory of a Member State must be instituted in that same Member State.

Article 6 of Directive 96/71/EC adds to these rules, in favour of posted workers employed *temporarily* in another Member State, a new specific jurisdiction clause tailored to the specific situation in which posted workers find themselves. In order to allow the right to the terms and conditions of employment guaranteed in Article 3 of the Directive to be enforced, Article 6 provides that judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted.

This clause constitutes a provision governing a specific matter, as authorised by Article 67 of Regulation 44/2001, and is without prejudice to the right to institute judicial proceedings in another State pursuant to the above-mentioned provisions of the Regulation or pursuant to international conventions on the subject of jurisdiction.

2.3.1.3. What does this Directive add as regards the Court's case law?

The Court of Justice has held that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. This case law thus makes it *possible* for Member States to extend, in compliance with the Treaty, certain rules to employees posted on their territory, whereas the Directive makes it *obligatory* to guarantee that certain mandatory rules concerning the terms and conditions of employment of posted workers are observed.

In addition, the case law does not specify the legislative provisions or collective labour agreements in question. The Directive therefore seeks to coordinate Member States' laws with a view to compiling a list of the mandatory rules which undertakings posting workers temporarily to another country must observe in the host country. It does not harmonise the material content of the rules categorised as "mandatory", but it identifies them and makes them binding on undertakings posting workers to a Member State other than the State in whose territory these workers habitually work.

3. THE IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

3.1. The key legislative provisions (Articles 1 to 3)

Even before Directive 96/71/EC was adopted, several Member States had already established their own national legislation concerning the posting of workers in connection with the transnational provision of services. These include Germany\(^5\), Austria\(^6\) and France\(^7\). When the Directive was finally adopted, these States adapted their legislations to bring them into line with the requirements of the Community Directive\(^8\).

\(^6\) Bundesgesetzblatt I 1995/895.
\(^8\) Cf. in Germany, the Law of 19 December 1998 amending the Law of 26 February 1996 on the posting of workers; in Austria, adaptation of the AVRAG which entered into force on 1 October 1999; in France, the decrees of 4 September and 29 May 2000, amending the provisions of the French Labour Code relating to postings in connection with the international provision of services.
More conventionally, other Member States, such as Spain\(^9\), Denmark\(^10\), Finland\(^11\), Greece\(^12\), Italy\(^13\), the Netherlands\(^14\), Portugal\(^15\), Sweden\(^16\), Belgium\(^17\) and Luxembourg\(^18\), transposed the Directive by passing laws after the Community instrument was adopted.

All the Member States oblige undertakings established abroad and posting workers to their territory to observe their transposition legislation. The principle whereby undertakings established in a non-member State must not be given more favourable treatment than Community undertakings is observed.

**In Ireland**, no specific measure transposing the Directive has been adopted, but a provision contained in the Protection of Employees (Part-Time Work) Act, transposing another Community Directive, clarifies that certain provisions of Irish law apply to posted workers in Ireland.

**In the United Kingdom**, it was not deemed necessary to adopt a specific Act to transpose the Directive, since UK law applies to all employees regardless of their situation. The UK has simply amended certain more restrictive texts in order to extend their scope to posted workers.

Most Member States have defined, in their legislation, the posted worker situations covered by the Directive, and some have adopted the Directive's definitions word for word. Some legislations have also adopted the Directive's definition of "posted worker", while in other Member States the content of the concept of "posted worker" derives from the relevant legislation as a whole.

As regards determining which terms and conditions of employment established by legislative provisions apply to posted workers, the Member States fall into three categories:

- some Member States have essentially reproduced the terms of the Directive, without indicating to which provisions of their national legislation the matters covered by the Directive correspond;
- others have sought to identify the applicable national provisions and have inserted references to these national provisions;
- two Member States have not adopted any specific transposition legislation concerning the national provisions applicable to posted workers; one of them has simply adopted a single provision making it clear that its labour legislation applies to workers posted on its territory.

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12 Presidential Decree No 219 of 28 August 2000, which entered into force on 31 August 2000.
13 Legislative Decree No 72 of 25 February 2000.
17 Law of 5 March 2002 (Moniteur belge of 13.03.02) and Royal Decree of 29.03.2002 (Moniteur belge of 17.04.02)
The question of the applicability of collective agreements is particularly important, since wages are chiefly determined by collective bargaining. Most Member States' legislations provide for the application or extension of universally applicable collective agreements to posted workers. Some Member States do not have universally applicable collective agreements. Consequently, the only rules that these States apply to posted workers are those contained in the law or in other legislative texts.

As regards the exception, the derogation options and the other options provided for by the Directive, the situation can be summarised as follows:

Not all Member States have adopted the exception for assembly work - excluding activities in the field of building work - that does not exceed eight days (Art. 3(2)). It should be remembered, however, that this exception does not apply to the activities in the field of building work listed in the Annex to the Directive.

Most Member States have not made use of the derogation options offered in the Directive (Article 3(3), 3(4) and 3(5)). Two Member States have combined the exception for assembly work with all the derogation options in such a way as to render their transposition legislation inapplicable to postings that do not exceed eight days.

Several Member States have made use of the option provided for in Article 3(10), first indent, of applying to the undertakings concerned terms and conditions of employment other than those referred to in Article 3 of the Directive.

Pursuant to Article 3(10), second indent, the terms and conditions of employment of the host State as laid down in universally applicable collective agreements or arbitration awards, and concerning activities other than those referred to in the Annex\textsuperscript{19}, may be imposed on national undertakings and undertakings from other States on a basis of equality of treatment.

The following Member States have made use of this extension option: Austria, Belgium, Spain, Finland, France, Greece, Italy, Portugal and Luxembourg. In these countries, all sectors are covered.

In Germany, the extension of collectively agreed terms and conditions of employment to activities other than building work is limited to services to assist maritime navigation, as regards minimum pay, duration of paid leave, holiday pay and the additional holiday bonus. In the Netherlands, application of collectively agreed terms and conditions of employment is limited to the activities listed in the Annex to the Directive. In Denmark, the United Kingdom and Sweden, which do not have universally applicable collective agreements, this option does not apply.

3.2. The implementation of cooperation on information (Article 4)

Article 4 of Directive 96/71/EC obliges Member States to designate one or more liaison offices or national bodies and to notify these to the other Member States. Article 4 also

\textsuperscript{19} The Annex mentions all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: excavation, earthmoving, actual building work, assembly and dismantling of prefabricated elements, fitting out or installation, alterations, renovation, repairs, dismantling, demolition, maintenance, upkeep, painting and cleaning work, improvements.
provides for cooperation between the public authorities responsible for monitoring the terms and conditions of employment referred to in Article 3 of the Directive.

Three different types of cooperation on information are mentioned in Article 4: cooperation between the public authorities responsible for monitoring the terms and conditions of employment referred to in the Directive; cooperation to examine any difficulties which might arise in the application of Article 3(10); and cooperation to ensure that the information on the terms and conditions of employment is generally available.

Interested parties need to have advance information about the terms and conditions of employment applicable in the host country in order for them to be able to perform the services required and comply with the mandatory provisions applicable to employees during their period of posting. The temporary nature of posting and the concomitant clashes between different Member States' legal systems can make it difficult to apply the provisions resulting from the transposal of the Directive and to monitor observance of these provisions. The administrative cooperation which the Directive provides for between Member States in this context is therefore especially important.

All Member States have designated bodies to ensure the cooperation provided for by the Directive. These are generally the responsible departments of the relevant Ministries, the Labour Inspectorate or employment offices.

In order to facilitate access to information on the terms and conditions of employment applicable, a good few Member States have produced brochures or vade-mecums, which are also available on their websites.

3.3. Measures designed to ensure compliance with the Directive (Articles 5 and 6)

Two types of measures are used by Member States to ensure compliance with the provisions of the Directive: measures to monitor the legality of postings and measures to penalise possible irregularities ascertained.

Besides the usual inspections of undertakings or workplaces, certain States have adopted two other types of methods to facilitate monitoring of compliance with the transposition rules: the keeping of records at the place where the services are provided and the declaration of the provision of services to the national authorities.

As regards penalties, some Member States have not introduced any new penalties to cover posting situations. In these countries, the remedies and penalties applicable are the same as those applicable under domestic law.

As required by Article 6 of the Directive, most of the Member States have made it possible to institute judicial proceedings in their territory when a worker is or has been posted there, in order to allow enforcement of the right to the terms and conditions of employment guaranteed by the Directive. This jurisdiction of the courts of the country of posting is recognised either in the legal instruments transposing the Directive or in the codes of procedure in force. Two countries have not introduced explicit provisions entitling posted workers to institute proceedings in the courts of the country of posting.
4. **ASSESSMENT OF THE SITUATION**

4.1. **Transposition of the Directive in the Member States**

According to studies by independent experts, transposition of the Directive by the Member States has, generally speaking, been satisfactory. However, the Commission would like to mention three categories of transposition problems encountered in certain Member States.

4.1.1. **The method**

The Commission considers that the method used in the two countries which have not adopted a specific transposal instrument (see 3.1. above) needs to be assessed in the light of the criteria established by the Court of Justice in cases C-365/93\(^{20}\) and C-144/99\(^{21}\). In these two cases the Court pointed out that it is settled law that "whilst legislative action on the part of each Member State is not necessarily required in order to implement a directive, it is essential for national law to guarantee that the national authorities will effectively apply the directive in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and, where appropriate, may rely on them before the national courts." The Court added that this last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States (Commission v Greece, Case 365/93, point 9 and Commission v The Netherlands, Case 144/99, point 18).

It should be pointed out that in these two countries, the posting situations covered and the rights deriving from the provisions of the Directive are not clearly defined and the jurisdiction clause contained in Article 6 of the Directive has not been implemented.

Insofar as the absence of identification of "mandatory rules" is to be interpreted as meaning that the totality of the legislation in the field of labour law applies to posting situations, it should be pointed out that the Directive in no way permits Member States to extend all their legislative provisions and/or collective agreements governing terms and conditions of employment to workers posted on their territory, and that the application of such rules must be in compliance with the EC Treaty, in particular Article 49. As regards the matters covered, the Directive lays down a catalogue of mandatory rules (listed in Article 3) applicable to posted workers, to which Member States may add only public policy provisions in the international context (see below).

4.1.2. **The nature of the standards applicable**

According to Article 3(1) of the Directive, Member States must ensure that undertakings covered by the Directive guarantee workers posted to their territory the terms and conditions of employment established by law, regulation or administrative provision and/or by universally applicable collective agreements or arbitration awards. Thus, the Directive first determines the **nature** of the standards which Member States must apply, and then the **content** of these standards.

\(^{20}\) Judgment of 23 March 1995, Commission/Greece, ECR I-499, point 9

\(^{21}\) Judgment of 10 May 2001, Commission/Kingdom of the Netherlands, ECR I-3541, point 17
4.1.2.1. Collective agreements

Not all the transposing legislation has addressed the question of determining the collective agreements applicable to posting situations. The Commission intends to look into this more closely and examine the criteria used for determining the collective agreements applicable to national undertakings on the one hand and undertakings from other countries on the other. As the Court of Justice emphasised in the Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/9822, these criteria may have different practical consequences in the case of "mixed" businesses, i.e. businesses which carry out activities in a variety of sectors.

Collective agreements as referred to in Article 3(1) of the Directive must, for the purposes of implementation of the Directive, be declared universally applicable within the meaning of Article 3(8). The first subparagraph of Article 3(8) of the Directive refers to *erga omnes* collective agreements, which must be observed by all undertakings in the geographical area and in the profession or industry concerned in order to guarantee equality of treatment between domestic undertakings and undertakings established in another Member State providing services in the territory of a Member State.

In the absence of a system for declaring collective agreements to be of universal application, the second subparagraph of Article 3(8) offers Member States options designed to guarantee equality of treatment. The group of experts which prepared the transposal of the Directive was of the opinion that if Member States, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, decide to base themselves on the two other categories of collective agreements referred to in Article 3(8), i.e. generally applicable collective agreements or collective agreements concluded by the most representative employers' and labour organisations, they must make explicit mention thereof in their legislation implementing the posted workers Directive. If their implementing legislation makes no reference to this effect, Member States may not oblige undertakings established in another Member State which post workers to their territory to observe the collective agreements referred to in the second subparagraph of Article 3(8).

Since no Member State's transposing legislation makes any mention of the options offered by the second subparagraph of Article 3(8), the Commission concludes that those Member States which do not have collective agreements declared to be universally applicable within the meaning of the first subparagraph of Article 3(8) of the Directive do not apply the terms and conditions of employment laid down in collective agreements to workers posted on their territory. In these countries, therefore, only the terms and conditions of employment laid down in legislative provisions apply to workers posted on their territory.

4.1.2.2. The nature of the legislative standards applicable concerning matters other than those explicitly referred to in the Directive

The first indent of the first subparagraph of Article 3(10) stipulates that the 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.

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As regards the meaning of public policy provisions, the Commission would point out that, at the time of adoption of the Directive, the Council and the Commission stated (Statement 10) that "the expression 'public policy provisions' should be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions". As explicitly stated in Article 3(10), the application of public policy provisions has to be carried out in compliance with the Treaty and on a basis of equality of treatment.

The Commission considers that the first indent of Article 3(10) has to be interpreted bearing in mind the objective of facilitating the free movement of services within the Community. Thus, the Directive lays down a nucleus of minimum rules for the protection of the rights of workers in the host State, with which undertakings posting workers must comply. Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State. They must comply with the rules of the EC Treaty, and in particular Article 49, as interpreted by the Court of Justice (c.f. the Portugaia Construções and Mazzonel judgments).

The concept of public policy within the meaning of Directive 96/71/EC must be interpreted in the light of the case law of the Court, which has ruled on this concept on several occasions. The case law, while not giving a precise definition of the concept of public policy, which appears, inter alia, in Articles 46 and 56 of the EC Treaty, recognises that this concept may vary from one country to another and from one period to another, thus leaving the national authorities an area of discretion within the limits imposed by the Treaty. However, the Court has ruled that the concept of public policy must be interpreted strictly and should not be determined unilaterally by each Member State. It has ruled that recourse to the concept of public policy must be justified on overriding general interest grounds, must presuppose the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society and must be in conformity with the general principles of law, in particular fundamental rights and the general principle of freedom of expression.

As regards the classification of the national provisions at issue as public-order legislation, the Court of Justice ruled, in its judgment in the Joined Cases C-369/96 and C-376/96, that "the term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State."

To illustrate the difference between domestic public policy provisions on the one hand and public policy provisions and mandatory provisions ["lois de police"] in the international context on the other, we can cite the example of the rules concerning dismissal, which in some countries are domestic public order provisions. These are national mandatory rules from

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which the parties may not derogate by contract, and which are intended to protect a "weak" party (the worker). In these countries, any contract between an employer and employee in which the employee waived his rights to redundancy pay or agreed to shorter than normal periods of notice without compensation would be null and void in regard to national contract law. However, these same rules are not considered to be international public policy provisions or mandatory rules within the meaning of Article 7 of the Rome Convention, which would apply *whatever the law applicable to the contract*. Accordingly, when the employment contract is validly subject to a foreign law, the domestic public policy provisions regarding dismissal do not apply automatically.

Some of the provisions of the Rome Convention might offer Member States valuable guidance in the application of Article 3(10) of the posted workers Directive. For example, pursuant to Article 10 of the Convention the consequences of breach of a contractual obligation are governed by the law applicable to the contract by virtue of Articles 3 to 6 and Article 12 of the Convention: in posting situations this will normally be the law of the home State. This confirms that the rules of the host State concerning the consequences of breach of an employment contract (e.g. termination of the employment contract) could not be applied under Article 3(10) of the Directive.

Finally, the group of experts which prepared the transposal of the Directive considered that the concept of "public policy provisions" referred to in Article 3(10) covers provisions concerning fundamental rights and freedoms as laid down by the law of the Member State concerned and/or by international law, such as freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and elimination of exploitative forms of child labour, data protection and the right to privacy.

Consequently, Member States whose transposing legislation obliges foreign undertakings, during the period of posting, to comply with the labour law of the host country in its totality, are clearly exceeding the framework established by the Community legislation. Other Member States which, in their transposing legislation, explicitly add to the list of mandatory rules their own domestic public policy provisions, must also revise their legislation in the light of the above.

### 4.2. Practical application

#### 4.2.1. Difficulties encountered by the Member States' authorities

Most of the difficulties encountered by the Member States have to do with monitoring compliance with the law. The particular nature of transnational postings, i.e. their temporary nature and the clash between different legal systems, makes such monitoring tricky and difficult.

Language barriers are the first problem. In some Member States, the inability of the monitoring services to read documents drafted in the national language of the posted workers has resulted in Member States requiring such documents to be drafted in the language of the country in which the services are provided.

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24 The right to organise and collective bargaining are dealt with in ILO Conventions 87 and 98. Conventions 29 and 105 cover the prohibition of forced labour, while Convention 111 establishes the principle of non-discrimination. Convention 182 covers the worst forms of child labour.
Another source of difficulties is the need to compare different countries' legislations. In certain fields the competent services are not allowed simply to verify compliance with the provisions of domestic labour law but must also verify in advance whether the employer is complying with an equivalent piece of legislation in force in the country in which the undertaking is established. However, in order to compare legislations it is necessary not only to be familiar with the legislations of other Member States but also to be able to assess their equivalence to the domestic law applicable in the host country.

Particular difficulties have been encountered in trying to compare paid leave schemes for workers in the building sector. In some Member States these schemes are implemented via a system of paid leave funds under which workers' leave entitlements acquired with different employers in the course of a given year are aggregated. With a view to dividing the financial burden between the employers concerned, employers in the building sector must pay into the leave funds contributions calculated on the basis of the relevant national provisions. Insofar as employers established abroad are obliged to participate in the paid leave funds scheme in force in the host country and must pay contributions during the workers' period of posting, two different situations may arise.

If the system of paid leave funds exists in both the countries concerned, i.e. in the country of origin of the undertaking and in the host country, the question of the equivalence of the two Member States' schemes must be decided. To address the problems involved in comparing these schemes, the paid leave funds in several Member States have set up a system of cooperation extending beyond the cooperation provided between national authorities. The aim is to ensure mutual recognition of paid leave schemes and to avoid employers being faced with having to pay double contributions when they post workers.

Comparisons are, however, more complicated if the system of paid leave funds exists in only one of the two countries concerned. It was this situation which gave rise to the judgment in the Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, in which the Court examined the question as to whether Articles 49 and 50 (ex 59 and ex 60) of the EC Treaty preclude a Member State from imposing national rules relating to the system of paid leave funds on a business established in another Member State not possessing such a system which provides services in the first Member State and posts workers there.

The Court points out that the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest, one of which is the protection of workers, and that it is for the national court to check whether, viewed objectively, the rules in question promote the protection of posted workers. According to the Court, it is necessary to check whether those rules confer a genuine benefit on the workers concerned which significantly adds to their social protection. After considering the potential benefits of a paid leave funds scheme, the Court states that it is for the national court "to consider whether such potential benefits confer real additional protection on posted workers. That assessment must take account, first, of the protection as to paid leave that workers already enjoy under the law of the Member State where their employer is established."

The Court concludes that Articles 49 (ex 59) and 50 (ex 60) of the Treaty do not preclude a Member State from imposing national rules such as those examined in this Case on a business established in another Member State, "on the two-fold condition that: (i) the workers do not
enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued."

It is clear that all these difficulties cannot be resolved without effective cooperation between Member States' administrations. Such cooperation should be the means for the monitoring services to obtain rapid information on the content of the legislation in the undertaking's country of establishment. It should also be the means for obtaining information on the situation of the service provider established in another State.

As regards monitoring compliance with the terms and conditions of employment, the Commission would also point out that the Court of Justice emphasised the importance of administrative cooperation in the context of transnational postings in the Joined Cases C-369/96 and 376/96, although these Cases did not relate to the interpretation of Directive 96/71/EC. In these two Cases the Court was called upon to consider whether Articles 49 (ex 59) and 50 (ex 60) of the Treaty must be interpreted as meaning that they preclude a Member State from requiring an undertaking established in another Member State and temporarily carrying out work in the first State to retain certain social and labour documents with an agent in the country in which the work is performed.

On the principle of keeping social and labour documents in the country of posting, the Court ruled that the imposition of this obligation on undertakings from another Member State constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty, which can be justified only if it is necessary to provide effective protection for workers. The Court held that the effective protection of workers in the construction industry may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71.

On certain arrangements for the keeping and retention of such documents, the Court also referred to the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, will shortly render superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.

This case law first of all invites the Member States to take all necessary measures for the setting up of an organised and effective system of cooperation in the context of the transposal of the Directive which, according to the Court of Justice, must replace certain requirements regarding the keeping and retention of social documents at the place of work. After the implementation of Directive 96/71, arguments based on differences in the form or content of the documents between those of the host country and those of the country of establishment will no longer be accepted to justify the imposition of certain obligations in this field on undertakings established in another Member State. In any assessment of the justification of these measures, it must be expected that the Court will take fully into account the cooperation provided for in Article 4 of Directive 96/71, which should enable Member States to obtain all the information necessary in connection with transnational postings.
4.2.2. Difficulties encountered by service provider undertakings and posted workers

The undertakings concerned could encounter difficulties arising from the fact that the Directive obliges them to comply with the law of a State other than the State in which they are established and the relevant provisions are often difficult to understand and sometimes also difficult to obtain. The legal instruments implementing the Directive are often complicated because they contain a multiplicity of references to other instruments. This legislative method means that the texts cannot be understood without consulting other texts to which reference is made. Furthermore, access to the applicable collective agreements may prove difficult in some Member States. Service providers also have to contend with the absence of translations of the applicable texts.

The Commission would point out in this respect that Article 4(3) of Directive 96/71/EC explicitly provides that 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. The Commission is pleased that some Member States have taken measures to facilitate access to the provisions applicable to posting situations, for example by publishing information brochures or creating websites with relevant information, and encourages Member States to continue along this path.

It should also be pointed out that the Commission listed the difficulties mentioned by service providers in connection with the cross-border provision of services, notably as regards the posting of workers, in its report on the state of the internal market for services\(^{32}\), adopted on 30 July 2002.

4.3. The acceding countries

As regards the situation in the acceding countries, it should be remembered that these countries are obliged to transpose the provisions of the Directive prior to joining the European Union. Most of them have already adopted new provisions and/or adapted existing legislation with a view to transposing the Directive on the posting of workers.

Transposal is seemingly well under way in some countries, while in others a great deal of work remains to be done. This applies in particular to Article 3(1), whereby, as host States, they must lay down the rules to be followed by foreign undertakings providing services on their territory.

In order to get the acceding countries swiftly involved in the work of the government experts group, experts from these countries will be invited to participate in the group's meetings in 2003.

\(^{32}\) COM(2002) 441 final
5. **CONCLUSION**

**Revision of Directive 96/71/EC**

The results of the studies of the transposition of Directive 96/71/EC, as outlined above, are broadly corroborated by the Member States' answers to a questionnaire on the practical application of the provisions arising from the Directive, and by the conclusions of the group of government experts.

This group's conclusions can be summarised as follows:

- None of the Member States has encountered any particular legal difficulties in transposing the Directive.

- Implementing the Directive may pose practical difficulties, but most of these should disappear in the course of time thanks to better information and better administrative cooperation between public authorities (Article 4 of the Directive).

- It seems premature to consider amending the Directive. With regard to Article 4, on which the effective implementation of the Directive primarily depends, it is clear that the information circuits and the cooperation networks will take time to build up.

These opinions and positions indicate to the Commission that it is not necessary to amend the Directive. The difficulties encountered in implementing it have so far tended to be more of a practical nature than a legal nature. Consequently, as things stand at present the Commission will not be presenting a proposal for a directive amending the arrangements for implementing the posted workers Directive.

**Identification of the problems**

The problems identified can be divided into three groups:

- The situation in the Member States which have not deemed it necessary to adopt specific and explicit transposal measures does not conform to the criteria established by the Court's case law regarding the transposal of Community directives. The mandatory provisions within the meaning of the Directive have not been identified and the rights and obligations arising from the Directive have not been clearly defined. The jurisdiction clause of Article 6 has not been explicitly transposed.

- The provisions which several Member States have made applicable to posting situations under the first indent of Article 3(10) need to be reviewed in order to verify which of these provisions can be deemed to be public policy provisions within the meaning of private international law. Public policy provisions or mandatory provisions ["lois de police"] in private international law are provisions to which a State attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract or the employment relationship.

- The practical difficulties mentioned at point 4.2., namely the obstacles encountered in seeking information, in monitoring compliance with national implementing provisions and in implementing penalties are such as to limit the effectiveness of the Directive.
Proposed solutions to the problems

The first two groups of difficulties mentioned above are problems connected with transposing the Directive into Member State's legal systems, and as such need to be resolved at national level. There will be contacts on these matters between the Member States concerned and the Commission.

As regards the third group of difficulties, the Commission will continue to assess what it can do to help improve the dissemination of information and cooperation between Member States' administrations. At this stage, it is considering taking and encouraging the following measures:

- A group of government experts of variable composition, set up under the Commission Decision of 27 March 2002\(^\text{33}\), will need to meet at least twice a year in order to discuss the subjects addressed under 4.1. and 4.2. and any other practical difficulties which national administrations may have encountered. The members of the Group of Directors-General for Industrial Relations created by the aforementioned Decision are asked to nominate experts from the different competent administrations, cooperation bodies, liaison offices or Labour Inspectorates depending on the subjects to be discussed. The group will need first of all to clarify the allocation of the various cooperation tasks mentioned in Article 4 of the Directive and exchange information on the organisation and functioning of such cooperation.

- The group of experts will need to examine ways of facilitating access to information on the provisions applicable to posted workers in the host Member States, for example through clear and simple brochures, website access to information on the laws and collective agreements applicable to posting situations, and contact persons in the liaison offices, with links to the websites of the other Member States and the Commission.

- The Commission services will be instructed to collect all the relevant information from the Member States, make it accessible to the public on the Commission's websites and create links to the Member States' sites (laws and collective agreements, liaison offices).

- As regards the problems of monitoring compliance with the mandatory provisions within the meaning of the Directive, the group will be asked to identify various essential items of information which must be supplied (by the undertakings concerned) to the monitoring authorities in the host country. Exchanges of information and good practice within the experts group could help to simplify and bring into closer alignment the practical arrangements so far developed by Member States, particularly as regards statements to the competent administrations. The Commission considers that this group will also be the appropriate body for seeking solutions to the language problems mentioned in this context.

- In addition, it appears necessary not only to improve transnational cooperation via the mechanisms set up under Directive 96/71/EC, but also to evaluate the possibilities of the various forms of collaboration established outside the Directive.

\(^{33}\) Decision concerning the creation of a group of Directors-General for Industrial Relations (2002/260), OJ L 91/30
In the context of the implementation of the Internal Market Strategy for Services decided upon at the Lisbon European Council\(^{34}\), the Commission is reflecting on ways of improving the systems of administrative cooperation and will be proposing concrete measures on this matter in 2003.

Finally, the Commission would point out that the "Justice, Home Affairs and Civil Protection" Council of 8 May 2003 reached an agreement on a framework decision concerning the application of the principle of mutual recognition to financial penalties. In the future, therefore, a simple and effective system will facilitate the cross-border enforcement of financial penalties once the provisions of this framework decision have been implemented by the Member States.