

Amended proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community ⁽¹⁾

(2000/C 311 E/12)

(Text with EEA relevance)

COM(2000) 271 final — 1999/0013(CNS)

(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. 17.

INITIAL PROPOSAL

AMENDED PROPOSAL

THE COUNCIL OF THE EUROPEAN UNION,

Unchanged

Having regard to the Treaty establishing the European Community, and in particular the second paragraph of Article 59 thereof,

Having regard to the Treaty establishing the European Community, and in particular the second paragraph of Article 49 thereof,

Having regard to the proposal from the Commission,

Unchanged

Having regard to the opinion of the European Parliament ⁽¹⁾,

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

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. Whereas the free movement of services may be extended to self-employed persons who are not citizens of the Union but third-country nationals legally present in 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. The free movement of services may be extended to self-employed persons who are not citizens of the Union but third-country nationals legally present in the Community.

(2) Whereas the Treaty has provided for this extension for more than 40 years. Whereas it is not justifiable that a third-country national with an ongoing actual link with the economy of a Member State should be unable to enjoy the benefit of the freedom to provide services, otherwise than by setting up a company within the meaning of Article 58 of the Treaty, nor that self-employed third-country nationals cannot, in their capacity as natural persons, enjoy such freedom.

(2) The Treaty has provided for this extension for more than 40 years. It is not justifiable that a third-country national with an ongoing actual link with the economy of a Member State should be unable to enjoy the benefit of the freedom to provide services, otherwise than by setting up a company within the meaning of Article 48 of the Treaty, nor that self-employed third-country nationals cannot, in their capacity as natural persons, enjoy such freedom.

⁽¹⁾ Opinion given on 3.2.2000 (not yet published in the Official Journal).

⁽²⁾ OJ C 209, 22.7.1999, p. 5.

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- (3) Whereas employed workers who are third-country nationals may be posted whereas self-employed persons whose activities add to the value of the economy of a Member State are debarred from cross-border activities throughout the internal market. Whereas the extension of the freedom to provide services to self-employed third-country nationals does not affect the application of national provisions affording such persons a degree of social protection equivalent to that enjoyed by employed workers.
- (4) Whereas it is appropriate, therefore, to introduce such an extension at a time when, through European Parliament and Council Directive .../.../EC, the Community is clarifying the conditions for posting workers who are nationals of a third country for the provision of services. Whereas in view of Article 61(1) of the Treaty, the scope *ratione personae* of this Directive cannot be extended to service providers operating in the transport sector except by a specific act adopted under the Treaty provisions governing the common transport policy.
- (5) Whereas a self-employed person who is a national of a third country should enjoy no right of establishment in the Member State in which he provides his services. Whereas this Directive does not affect other 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.
- (6) Whereas the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. Whereas this does not mean that the provider of services may not equip himself with some form of infrastructure in so far as such infrastructure is necessary for the purposes of performing the service.

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- (3) Employed workers who are third-country nationals may be posted whereas self-employed persons whose activities add to the value of the economy of a Member State are debarred from cross-border activities throughout the internal market. The extension of the freedom to provide services to self-employed third-country nationals does not affect the application of national provisions affording such persons a degree of social protection equivalent to that enjoyed by employed workers.
- (4) It is appropriate, therefore, to introduce such an extension at a time when, through European Parliament and Council Directive .../.../EC, the Community is clarifying the conditions for posting workers who are nationals of a third country for the provision of services. In view of Article 51(1) of the Treaty, the scope *ratione personae* of this Directive cannot be extended to service providers operating in the transport sector except by a specific act adopted under the Treaty provisions governing the common transport policy.
- (5) A self-employed person who is a national of a third country should enjoy no right of establishment in the Member State in which he provides his services. This Directive does not affect other 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.
- (5a) A self-employed worker who is a third-country national may benefit from the freedom to provide services only if he maintains his principal establishment in a Member State and if his residence is authorised for at least twelve months. If there are doubts as to the self-employed status of a third-country national, it is essential for a person covered by this Directive to be properly identified.
- (6) The temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. This does not mean that the provider of services may not equip himself with some form of infrastructure in so far as such infrastructure is necessary for the purposes of performing the service.

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(7) Whereas the freedom to provide services entails as a corollary the right of entry into and residence on the territory of the Member State in which the service is provided. Whereas in the absence of uniform national documents covering the various aspects of movement, a document known as an 'EC service provision card' should be the instrument facilitating the provision of cross-border services with a view to current or potential movements in connection with normal activities. 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⁾.

(8) Whereas the Member State issuing the EC service provision card should take account of public policy factors aimed at combating clandestine immigration, by certifying the lawfulness of the situation in the Member State in which the service provider is established. Whereas this document should ensure that the main activity of a self-employed person is pursued in the Member State in which he is established. Whereas that document should be safeguarded against falsification. Whereas it is therefore no longer necessary to require an entry visa.

(9) Whereas the EC service provision card issued by the Member State in which the self-employed person is established should thus afford the necessary guarantee that any other Member State in which services are provided will permit the entry and residence of that person for the purpose of one or more services, namely residence during and at the time of the provision of the service. Whereas this guarantee should include the obligation not to consider the movement as an interruption of the period of residence and of the initially permitted self-employed activity, and in particular not, under any circumstances, to refuse readmission of the person concerned. Whereas the Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry and residence and access to a self-employed activity.

(7) The freedom to provide services entails as a corollary the right of entry into and residence on the territory of the Member State in which the service is provided. In the absence of uniform national documents covering the various aspects of movement, a document known as an 'EC service provision card' should be the instrument facilitating the provision of cross-border services with a view to current or potential movements in connection with normal activities. It should be for the service provider to decide whether to apply for the EC service provision card. 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⁾.

(8) The Member State issuing the EC service provision card should take account of public policy factors aimed at combating clandestine immigration, by certifying the lawfulness of the situation in the Member State in which the service provider is established. This document should ensure that the main activity of a self-employed person is pursued in the Member State in which he is established. That document should be safeguarded against falsification. It is therefore no longer necessary to require an entry visa.

(9) The EC service provision card issued by the Member State in which the self-employed person is established should thus afford the necessary guarantee that any other Member State in which services are provided will permit the entry and residence of that person for the purpose of one or more services, namely residence during and at the time of the provision of the service. This guarantee should include the obligation not to consider the movement as an interruption of the period of residence and of the initially permitted self-employed activity, and in particular not, under any circumstances, to refuse readmission of the person concerned. The Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry and residence and access to a self-employed activity.

⁽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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- (10) Whereas each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the provider concerned into the territory, his intended presence and the service or services for which he is moving. Whereas an obligation to make a prior declaration should enable the Member State in question to take measures 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 services for which the self-employed person is moving exceeds six months out of a period of twelve months. Whereas the period of validity of a residence permit should be limited to the period of validity of the EC service provision card on the grounds that the Member State intends to issue a residence permit in accordance with its own rules in the case of residence for a period of more than twelve months.
- (11) Whereas for this extension to be effective there must be equality of treatment between third-country nationals and citizens of the Union in their capacity as service providers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community. Whereas this equality of treatment should be restricted to the provision of services. Whereas it should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State.
- (12) Whereas the Member States should not be able to confer more favourable treatment on self-employed persons established outside the Community than on those established within the Community. Whereas the Member States should be able to derogate from this Directive on grounds of public order, public security or public health. Whereas the limits of such derogation should be determined with respect to the third-country national service providers concerned on the basis of the coordination provided for in Council 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⁾;
- (10) Each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the provider concerned into the territory, his intended presence and the service or services for which he is moving. An obligation to make a prior declaration should enable the Member State in question to take measures in specific cases on grounds of public order, public security or public health, within the limits set by this Directive. 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 services for which the self-employed person is moving exceeds six months out of a period of twelve months. The period of validity of a residence permit should be limited to the period of validity of the EC service provision card on the grounds that the Member State intends to issue a residence permit in accordance with its own rules in the case of residence for a period of more than twelve months.
- (11) For this extension to be effective there must be equality of treatment between third-country nationals and citizens of the Union in their capacity as service providers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community. This equality of treatment should be restricted to the provision of services. It should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State.
- (12) The Member States should not be able to confer more favourable treatment on self-employed persons established outside the Community than on those established within the Community. The Member States should be able to derogate from this Directive on grounds of public order, public security or public health. The limits of such derogation should be determined with respect to the third-country national service providers concerned on the basis of the coordination provided for in Council 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⁾;

⁽¹⁾ OJ 56, 4.4.1964, p. 850.

⁽²⁾ OJ L 14, 20.1.1975, p. 14.

⁽¹⁾ OJ 56, 4.4.1964, p. 850.

⁽²⁾ OJ L 14, 20.1.1975, p. 14.

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(13) Whereas it is vital 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 standard 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 in accordance with the committee procedures set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas ⁽¹⁾.

(14) Whereas this Directive does not affect the competence of the Member State to decide which third-country nationals are to be admitted for the purposes of a self-employed 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 of the EC Treaty, this Directive does not go beyond what is necessary for achieving the objective of the free movement of services. Whereas it allows Member States to make their checks to determine whether a third-country national is providing cross-border services on a temporary basis or is pursuing a permanent activity on the territory of a Member State other than the one in which he has his main establishment. Whereas it is limited to movements for periods of not more than twelve months for the purpose of providing services in another Member State, 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,

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(13) It is vital 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 standard 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 in accordance with the committee procedures set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas ⁽¹⁾.

(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 ⁽²⁾, these measures should be adopted according to the regulatory procedure set out in Article 5 of that Decision.

(14) This Directive does not affect the competence of the Member State to decide which third-country nationals are to be admitted for the purposes of a self-employed 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 of the EC Treaty, this Directive does not go beyond what is necessary for achieving the objective of the free movement of services. It allows Member States to make their checks to determine whether a third-country national is providing cross-border services on a temporary basis or is pursuing a permanent activity on the territory of a Member State other than the one in which he has his main establishment. It is limited to movements for periods of not more than twelve months for the purpose of providing services in another Member State, 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,

⁽¹⁾ OJ L 164, 14.7.1995, p. 1.

⁽¹⁾ OJ L 164, 14.7.1995, p. 1.

⁽²⁾ OJ L 184, 17.7.1999, p. 23.

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HAS ADOPTED THIS DIRECTIVE:

Unchanged

Article 1

1. Member States shall ensure that nationals of a third country established within the Community enjoy the freedom to provide services in accordance with the provisions of this Directive.

2. This Directive shall not cover nationals of a third country as recipients of cross-border services and provisions of services in the transport sector.

3. For the purposes of this Directive, 'service provider' means any natural person who is a third-country national and who, in the Member State of establishment,

(a) has lawfully set up his main establishment from which he has maintained an actual, continuous link as a self-employed person with the economy of that Member State; for at least twelve months.

(a) has lawfully set up his main establishment from which he has maintained an actual, continuous link as a self-employed person with the economy of that Member State;

An actual and continuous link shall be deemed to be maintained if services have been provided for at least twelve months, against remuneration from at least two service recipients operating in that Member State;

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

(c) is not also an employee.

Unchanged

Article 2

1. When a provider of services proposes, in the ordinary course of his business, to move to, and to reside in, other Member States, in his capacity as such, the Member State in which he is established shall be obliged to issue to him, at his request, a document to be known as an 'EC service provision card'.

1. When a provider of services proposes, in the ordinary course of his business, to move to, and to reside in, one or more or all of the other Member States, in his capacity as such, the Member State in which he is established shall be obliged to issue to him, at his request, a document to be known as an 'EC service provision card'.

For the purposes of the first paragraph, confirmation shall be given

1a. The card may be issued only if the service provider in question provides evidence

that the service provider is affiliated to the social security scheme of the competent Member State against the risk of sickness and industrial accident, or, failing such affiliation, is covered by insurance against sickness and industrial accident during his movements through one or more other Member States

(a) that he meets the conditions set out in Article 1(3);

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2. The EC service provision card shall be valid for the.

Elle shall be renewable only if the conditions as to its issue are fulfilled once more.

3. The EC service provision card shall be a separate document belonging to the service provider and shall contain the following data:

(a) details of the service provider;

(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 laid down in Article 6 of Regulation (EC) No 1683/95.

(b) that he 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 service provider continues to have a residence in the Member State in which he is established, excepting persons possessing documents which confirm that their presence is only accepted pending expulsion.

2a. 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.

2b. The EC service provision card shall lose its validity if one of the conditions set out in paragraphs 1, 1a and 2 are no longer fulfilled because of events occurring after the card was issued.

3. The EC service provision card shall be a separate document belonging to the service provider. If the card is no longer valid, the Member State in which the service provider is established shall require him to return it immediately to the competent authorities. The card shall contain the following data:

(a) details of the service provider, including the nature of his activities in the Member State in which he is established;

Unchanged

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

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

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4. The Member State issuing the EC service provision card may not regard the movement for the provision of services as being an interruption of the service provider's period of residence or self-employed activity on its territory.

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

Article 3

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

2. No Member State in which a service is provided may require from the service provider

(a) an entry or exit visa;

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

(c) an authorisation to provide services, such as a work permit, a foreign businessman's identity card or a business card; or

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

3. Any Member State in which a service is provided may require the service provider to declare, before he enters the territory, his intended presence, the period of presence provided for and the service provision or provisions for which he is moving. 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, a temporary residence permit showing that residence is authorised.

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1. Any Member State in which services are provided shall permit the entry into and residence on its territory of a self-employed person who is a third-country national for the purposes 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 in which the services are to be provided, and a statement from the service recipient confirming the provision of a particular service, showing the probable duration of the stay.

Unchanged

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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 in their capacity as service providers 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.

Article 4

1. Member States shall not give more favourable treatment to self-employed persons 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. It 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.

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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.

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

Member States shall adopt and publish not 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 shall 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.

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) of that Decision.

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

Unchanged