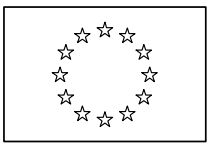

COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

Guidance on the posting of workers in the framework of the provision of services

{SEC(2006) 439}

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Guidance on the posting of workers in the framework of the provision of services

1. PURPOSE OF THIS COMMUNICATION

Article 49 of the EC Treaty (hereinafter known as 'EC') establishes the principle that Member States should ensure the freedom to provide services within the Community. This fundamental freedom includes the right of a service provider established in a Member State to temporarily post workers to another Member State in order to provide a service. Under the case law, the free provision of services, a fundamental principle of the Treaty, may only be restricted by rules justified on one of the grounds listed in Article 46 EC and by overriding reasons based on the general interest, in accordance with the principles of non-discrimination and proportionality.

Directive 96/71/EC (hereinafter known as 'the Directive') identifies the mandatory rules in force in the host country that are to be applied to posted workers by establishing a hard core of terms and conditions of work and employment and making them binding on undertakings posting workers to a Member State other than the State in whose territory these workers habitually work. The Directive has a clear social objective: that posted workers are guaranteed during the period of posting the respect by their employer of certain protective rules of the Member State to which they are posted. These rules include in particular:

- 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,
- 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.

Member States have a legal obligation to adopt the rules necessary to comply with the Directive, to take the appropriate measures in the event of failure to comply with those rules and to ensure that workers and/or their representatives have appropriate measures available to enforce the obligations defined in the Directive, as well as to make provision for cooperation between the public authorities.

The aim of the Directive is to reconcile companies' rights to provide transnational services under Article 49 EC, on the one hand, and the rights of workers temporarily posted abroad to provide them, on the other.

Following the adoption by the European Parliament on 16 February 2006 of a legislative resolution on the proposal for a directive on services in the internal market, the Commission presented an amended proposal, in which Articles 24 and 25 of the initial proposal setting out specific provisions on the posting of workers are deleted. In these Articles, the Commission proposed the scrapping of certain administrative obligations concerning the posting of workers, accompanied by measures to reinforce administrative cooperation between Member States.

The Commission undertook to draw up guidelines to clarify the prevailing Community law on the administrative procedures dealt with in Articles 24 and 25. This Communication tells the Member States how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC and how to achieve the results required by the Directive in a more effective manner. The evidence gathered in the Commission's report SEC(2006) 439[1], which is annexed to the present Communication, shows that there is considerable scope for improving access to information, administrative cooperation and monitoring of compliance, *inter alia* by identifying and disseminating best practices.

This Communication does not affect the Commission's prerogative provided for under the Treaty to ensure Member States' compliance with Community law, nor does it affect general rules on visa requirements.

2. GUIDANCE: CONTROL MEASURES

In its case law[2], the Court accepted that Member States could verify that no abuses of the freedom to provide services had taken place, for example the use of workers from third countries on the labour market of the host Member State. It also accepted the justification for the inspection measures necessary to monitor the observance of obligations justified under the general interest. However, the Commission would like to point out that, when performing inspections as part of the implementation of the Directive, Member States must abide by Article 49 EC and refrain from creating or upholding unjustified and disproportionate restrictions to the free provision of services within the Community. The Court has underlined several times that these inspections must be suitable for achieving the objectives pursued without restricting this freedom any more than necessary[3], in accordance with the principle of proportionality.

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1 This report is a follow-up to the European Parliament's request to the Commission in its resolution of 15 January 2004, P5_TA(2004)0030.

2 Case C-113/89 (Rush Portuguesa Ldª v Office national d'immigration), judgment of 27 March 1990, paragraph 17, and joint cases C-369/96 and 376/96 (public prosecutor v Jean-Claude Arblade et al), judgment of 23 November 1999, paragraph 62.

3 See, in this context, the judgments Commission v Luxembourg, case C-445/03, judgment of 21 October 2004, paragraph 40 and Commission v Germany, C-224/04, judgment of 19 January 2006, paragraph 36.

2.1. General application measures

Of the measures implemented by certain Member States, the following urgently require clarification on the basis of the case law of the Court of Justice based on Article 49 EC[4]:

– the requirement to have a representative on the territory of the host Member State;

– the requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation;

– the requirement to make a declaration;

– the requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory.

a) The requirement to have a representative established on the territory of the host Member State

The Court[5] described the requirement to have a subsidiary on the national territory as constituting *"the very negation of the free provision of services"*. An obligation on the service provider to appoint a representative domiciled in a particular Member State in order to offer services there would appear to be incompatible with Article 49 EC, being similar to the requirement to elect domicile with an approved agent, which has already been declared unlawful by the Court[6].

In the judgment *Arblade et al.*[7], the Court ruled that the obligation to have available and keep certain documents at the domicile of a natural person resident in the host Member State, who would hold them as the employer's appointed agent or proxy, even after the employer has stopped employing workers in that State, could only be admissible if the national authorities were not able to effectively perform their control duties effectively in the absence of such an obligation. This case law must be interpreted on a case-by-case basis, but it can be considered that, to fulfil this role, the appointment of a person from among the posted workers, for example a foreman, to act as the link between the foreign company and the labour inspectorate, should be sufficient.

Conclusion: Pursuant to current case law, it must be concluded that the requirement made by a Member State that companies posting workers on its territory must have a representative domiciled in that host Member State is disproportionate for monitoring the working conditions of these workers. The appointment of a person from among the posted workers, for example a foreman, to act as the link between the foreign company the labour inspectorate, should suffice.

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4 These measures are identified in the Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services – COM(2002) 441 of 30 July 2002.

5 Case C-279/00 (Commission v Republic of Italy), judgment of 7 February 2002, paragraph 18.

6 See, in this context, for example, the Court's judgment of 6 March 2003 in case C-478/01, paragraph 19.

7 See footnote 2, paragraph 76.

b) The requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation

According to the established case law of the Court of Justice, national rules which stipulate that the provision of services on national territory by a company established in another Member State is subject, as a general rule and for all activities, to obtaining an administrative authorisation, constitute a restriction of the free provision of services within the meaning of Article 49 EC (see, in particular, the Vander Elst judgment[8]).

There are certain activities whose exercise is regulated in the Member States by legal or regulatory provisions including a specific authorisation system for each activity. For example, many Member States insist that temporary employment agents must be properly authorised, so as to ensure that they have sufficient guarantees to perform this work.

The host Member State is entitled to require prior authorisation only for the performance of certain activities, whatever the posting situation, on condition that this can be justified by overriding reasons based on the general interest, is proportionate and is compatible with the relevant provisions of the Treaty concerning the free provision of services. This requirement must take into account the controls and monitoring already carried out in the Member State of origin.

Conclusion: Pursuant to current case law, it must be concluded that any rules which make the posting of workers subject to systematic prior control, including by way of compulsory and systematic prior authorisation or registration, would be disproportionate.

c) Requirement to make a declaration

Almost half the Member States require service providers which post workers to their territory to submit a prior declaration to their authorities[9]. The purpose of such declarations would appear to be, on the one hand, to enable the national authorities to verify the information on the posting of workers obtained during *in situ* checks and, on the other, to help the labour inspectorates to conduct risk assessments in order to target their checks at situations or companies which are at high risk.

At this stage, the Court has not delivered any judgments relating specifically to the admissibility of an obligation to make a declaration concerning the posting of workers. In the case *Commission v Luxembourg*[10], in which a posted worker who was a national of a third country was required to have a work permit in order to provide services, the Court declared that *"a measure which would be just as effective whilst being less restrictive than the measures at issue here would be an obligation imposed on a service-providing undertaking to report beforehand to the local authorities on the presence of one or more deployed workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment. It would enable those authorities to monitor compliance with Luxembourg social welfare legislation during the deployment while at the same time taking*

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8 Case C-43/93 (Raymond Vander Elst v Office des migrations internationals), judgment of 9 August 1994.

9 The Member States in question are: Austria, Belgium, Germany, Spain, France, Greece, Luxembourg, Hungary, Latvia, Malta, Netherlands and Portugal. Slovenia and the Czech Republic impose a similar obligation on the recipients of the services.

10 See footnote 3, paragraph 31.

account of the obligations by which the undertaking is already bound under the social welfare legislation applicable in the Member State of origin".

As regards the posting of workers who are nationals of a third country by a Community service provider, the Court concluded in its judgment in the case *Commission v Federal Republic of Germany*[11], that *"as the Advocate General observed in point 27 of his Opinion, a requirement that the service provider furnishes a simple prior declaration certifying that the situation of the workers concerned is lawful (...) in the Member State where that provider employs them, would give the national authorities, in a less restrictive but as effective a manner as checks in advance of posting, a guarantee that those workers' situation is lawful and that they are carrying on their main activity in the Member State where the service provider is established. Such a requirement would enable the national authorities to check that information subsequently and to take the necessary measures if those workers' situation was not regular".*

Under this case law of the Court, a declaration is deemed to be a measure which is just as effective as and less restrictive than a prior authorisation when it comes to ensuring that Member States are informed at all times about the presence of posted workers from third countries on their territory.

The Member States must refrain from using declarations for purposes other than for providing information, such as for checking or registering companies which provide services, which would amount to a system of authorisation.

Conclusion: On the basis of existing case law, the Commission considers that the host Member State, in order to be able to monitor compliance with the conditions of employment laid down in the Directive, should be able to demand, in accordance with the principle of proportionality, that the service provider submit a declaration, by the time the work starts, at the latest, which contains information on the workers who have been posted, the type of service they will provide, where, and how long the work will take. The declaration could mention that posted workers from third countries are in a lawful situation in the country in which the service provider is established, including with regard to the visa requirements, and legally employed in that country.

d) The requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory

The Court of Justice has expressed its opinion on the obligation to keep and store social security documents on posted workers in the host Member State.

In its judgment in the case concerning *Arblade et al.*[12], the Court pointed out that the effective protection of workers, particularly as regards health and safety matters and working hours, could require that certain documents be kept in an accessible and clearly identified place in the territory of the host Member State, so that they were 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/EC"*.

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[11] See footnote 3, paragraph 41.

[12] See footnote 2, paragraph 61.

However, in the same judgment, the Court explained that, before imposing an obligation of this kind on a service provider, the competent authorities in the host country would have to verify that the social protection of the workers concerned was not sufficiently safeguarded by the production, within a reasonable time, of the documents kept in the Member State of establishment[13]. In the *Finalarte* cases[14], the Court accepted that businesses established outside the host Member State could be required to provide more information than businesses established in that State, to the extent that this difference in treatment could be attributed to objective differences between those businesses and businesses established in the host Member State.

However, the Court also said that it was necessary to check whether the information provided in the documents required under the legislation of the Member State of establishment were sufficient as a whole to enable the checks needed in the host Member State to be carried out[15].

Since the period for transposing the Directive came to an end in 1999, and since a system of cooperation on information pursuant to Article 4 has been gradually put in place, the Member States have had less scope to demand that certain social documents be kept in the State to which workers have been posted. However, the Commission takes the view that the host Member State could still demand that certain documents which have to be generated and held *in situ* are kept in the workplace, such as records on actual hours worked or documents on conditions of health and safety in the workplace. In order that the authorities in the host Member State can monitor conditions of employment in accordance with the Directive, they are allowed to require the service provider to produce documents which are considered necessary for carrying out these checks within a reasonable period of time.

However, it is not acceptable for the host Member State to demand that a second set of documents which comply with its own legislation be provided simply because the documents which comply with the legislation of the Member State of establishment exhibit certain differences in terms of form and content. Nor is it acceptable for the host Member State to require that social security documents be provided as they are the subject of a specific procedure in the country of origin, pursuant to Regulation (EEC) No 1408/71. However, the Court of Justice recognised in the cases concerning *Arblade et al.*[16] that *"the items of information respectively required by the rules of the Member State of establishment and by those of the host Member State (...) may differ to such an extent that the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment".*

Conclusion: On the basis of the aforementioned case law, it must be concluded that, in order to be able to monitor compliance with the conditions of employment laid down in the Directive, the host Member State must be able to demand, in accordance with the principle of proportionality, that documents be kept in the workplace which are, by their nature, created there, such as time sheets or documents on conditions of health and safety in the workplace. The host Member State cannot demand a second set of documents if the documents required under the legislation of the Member State of establishment, taken as a whole, already provide

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13 See footnote 2, paragraph 65.

14 Joined Cases C-49/98, 50/98, 52/98, 54/98, 68/98 and 71/98 (Finalarte Sociedade de Construção Civil L[da] v Urlaubs- und Lohnausgleichskasse der Bauwirtschaft and Others), judgment of 25 October 2001, paragraphs 69-74.

15 See footnote 2, paragraphs 64-65.

16 See footnote 2, paragraph 63.

sufficient information, to allow the host Member State to carry out the checks required.

2.2. Measures which apply to posted workers who are nationals of third countries

In the existing case law on the freedom to provide services in accordance with Article 49 EC (see, for example, the judgments in the *Vander Elst*[17] and *Commission v Luxembourg* cases[18]), the Court took the view that workers who were regularly and habitually employed by a service provider established in a Member State (country of origin) could be posted to another Member State (host country) without being subject in the latter State to administrative formalities, such as the obligation to obtain a work permit.

The Court also held that a number of additional conditions which certain Member States imposed with regard to the posting of workers from third countries were excessive. In the case *Commission v Germany*[19], the Court held that German legislation ran counter to Article 49 EC by requiring nationals of third countries posted to Germany by a company established in another Member State to have been employed by that company for at least a year in order to be eligible for a residence visa. In this case, the Court confirmed its judgment in the case *Commission v Luxembourg*[20], in which it concluded that legislation requiring posted workers to have been employed for at least six months before being posted went beyond what was required for the objective of the social welfare protection of workers who were nationals of a third country and therefore was not justified. In the latter judgment, the Court also censured the requirement concerning contracts of employment of indefinite duration.

Conclusion: On the basis of existing case law, it must be concluded that the host Member State may not impose administrative formalities or additional conditions on posted workers from third countries when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host Member State to check that these conditions are complied with in the Member State where the service provider is established.

3. COOPERATION ON INFORMATION

a) Access to information

Article 4(3) of the Directive sets out a clear obligation for Member States to take the appropriate measures to make the information on the terms and conditions of employment generally available to foreign service providers and to workers.

There is major scope for improvement as regards the use of tools to provide information on the terms and conditions of employment during posting, and on the obligations to fulfil. Supplementary efforts are needed in order to bring about visible improvements on the following aspects:

- while the number of national internet sites dedicated specifically to posting has grown substantially, there is still a need for Member States to make better use of internet

17 See footnote 8.
18 See footnote 3.
19 See footnote 3.
20 See footnote 3.

possibilities and to improve the accessibility and clarity of the information provided on the national websites[21];

- Member States need to make it clear which part of their national legislation has to be applied by foreign service providers, and avoid having only information on labour law in general, without specifying which terms and conditions have to be applied to posted workers;

- information should be made available in other languages than the national language(s) of the host country;

- liaison offices need to be equipped with appropriate staff and other resources to fulfil their information duties;

- Member States should indicate a contact person in charge of dealing with requests for information, as this works better than a large, anonymous structure;

- liaison offices also need to have at their disposal an efficiently organised structure. They need to be able to function as an intermediary between the person requesting information and other competent national bodies.

In order to fulfil their obligations, Member States are asked to redouble their efforts to enhance, and improve access to, the information on the terms and conditions of employment that must be applied by service providers, and to ensure that their liaison offices are in a position to carry out their tasks effectively. The Commission will continue to support the Member States in this area, especially through the expert group, and will monitor their efforts in order to make sure that they contribute to progress towards best practices.

b) Cooperation between Member States

Article 4(1) and (2) of the Directive imposes clear obligations as regards cooperation between national administrations, and makes it the responsibility of Member States to create the necessary conditions for such cooperation. This obligation includes the creation of a monitoring authority that can reply to a reasoned request on, for instance, whether the company providing transnational services is truly established in the Member State of origin or to a request for documentary evidence to establish whether the worker is considered a worker according to the legislation of the host Member State.

The information request can also be needed in the reverse direction. For instance, when the posting is over and the posted worker wants to know whether he received what he was entitled to over the period of posting.

In order to comply with Article 4 of the Directive, Member States have to ensure that liaison offices and monitoring authorities are organised and equipped in such a way as to function effectively and to be able to reply promptly to requests. This may require liaison offices and/or monitoring authorities to undertake investigations or to obtain information from other sources or bodies (such as social security institutions), and they will have to do so in the same way as in domestic cases and in accordance with national legislation.

[21] The national websites have links in the Commission website on posting of workers: http://europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm

Transnational cooperation can be improved by building on the initiatives taken by the Commission through the expert group, in particular the drafting of a code of conduct on good cooperation and the adoption of a multilingual form for the exchange of information between authorities. In order to facilitate the exchange of information, use can be made in due time of the electronic system which will be set up by the Commission in support of the Services Directive.

In order to fulfil their obligations, Member States are asked to take the necessary measures to ensure that their liaison offices and/or monitoring authorities have the necessary equipment and resources to respond effectively to requests for information and cross-border cooperation from the competent authorities of the other Member States. The Commission will continue to support the Member States in this area, especially by making more appropriate electronic systems available, and will monitor their progress closely.

4. MONITORING OF COMPLIANCE WITH THE DIRECTIVE AND MEASURES IN THE EVENT OF FAILURE TO COMPLY

Member States have an obligation to guarantee certain terms and conditions to workers posted to their territory under Article 3 of the Directive, and to take measures to prevent and combat any unlawful behaviour by service providers, such as refusing to offer such terms and conditions. This is a fundamental condition for establishing fair competition, which improves public perception of the posting of workers in the context of the cross-border movement of services. Member States must, accordingly, ensure that mechanisms are in place to guarantee compliance with the implementing legislation on the posting of workers.

Posted workers and/or organisations representing them should have the possibility to complain directly to the relevant authority of the host Member State, and enforcement should be able to be prompted by complaints by workers or competing undertakings. While this can contribute to better monitoring and enforcement, it also means that the monitoring authority must have the necessary resources and powers to follow up on such complaints.

Member States need to evaluate constantly the effectiveness of labour inspectorates and other monitoring systems and examine ways to improve them, in keeping with their obligations under the Directive. These efforts may be supported by strengthening the cooperation between the national authorities responsible for monitoring (including labour inspectorates) on matters covered by the Directive. At least once a year representatives of the labour inspectorates or other bodies responsible for the monitoring the application of the Directive should meet in the expert group on posting of workers.

In case of failure to comply with the obligations under the Directive, the Member States are obliged under Article 5 of the Directive to take appropriate measures. While it is left to the Member States to choose the appropriate instruments to introduce, these have to be capable of guaranteeing due protection of rights for the persons concerned and be similar to those applicable in case of violations of national law in purely domestic situations.

Where irregularities are detected, Member States must provide for measures, including sanctions and penalties, which are genuine, proportionate and dissuasive in nature. They may also introduce appropriate procedures for workers and/or their representatives to enforce their rights. Easy access to courts and tribunals for posted workers, including arbitration or

mediation procedures, on the same footing as national workers, is a precondition in this context.

In a preliminary ruling[22], the European Court of Justice expressed an opinion on a system of joint and several liability for general or principal contractors. The Court held that Article 5 of the Directive, interpreted in the light of Article 49 EC, did not preclude the use of such a system as an appropriate measure in the event of failure to comply with the Directive. The Court also laid down that such a measure must not go beyond what is necessary to attain the objective pursued, and referred to the national court for application of this judgment in the case in question.

Member States are invited to assess the impact of introducing a proportionate and non-discriminatory measure of this kind in national legislation. The Member States that already have such a system in place are invited to assess its effectiveness as a proportionate and non-discriminatory measure, in the event of failure to comply with the Directive.

In order to fulfil their obligations, Member States are asked to re-examine their systems for monitoring and implementing the Directive. They are asked, in particular, to ensure that there is a mechanism in place to remedy any deficiencies; that appropriate and proportionate monitoring measures are in place; and that service providers who do not comply can be effectively sanctioned. The Commission undertakes to work with the Member States in order to improve transnational cooperation of labour inspectorates in the subject areas covered by the Directive on the posting of workers.

5. CONCLUSIONS

There is an urgent need to clarify the control measures which Member States can use, in the light of Article 49 EC as interpreted by the Court's judgments, and to improve access to information and administrative cooperation. Member States should act to ensure that the guidance provided in this Communication gives rise to concrete results as soon as possible. In order to assess progress, the Commission will adopt within 12 months a report which will examine the situation in all Member States with regard to all aspects covered by this Communication. In order to monitor developments in the Member States and to be able to undertake an objective assessment, on the basis of the guidance set out above, the Commission will:

- address a detailed questionnaire, as soon as possible, to national authorities and social partners, inviting them to comment not only on their own measures but also on how they perceive and assess measures or actions undertaken by other authorities or social partners;

- make a form available through the Commission's website, allowing users to set out their positive or negative experience with obtaining information, with international cooperation and with monitoring and enforcement;

- closely monitor and assess, on an ongoing basis, efforts made by the Member States to facilitate access to information and implement the code of conduct and the standard form for exchange of information.

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[22] Case C-60/03 (Wolff & Müller GmbH & Co. KG v. José Felipe Pereira Félix), judgment of 12 October 2004, paragraph 37.

If, as a result of this monitoring exercise, the Commission comes to the conclusion that compliance with the relevant provisions of Community law and/or co-operation between Member States under Articles 4 and 5 of the Directive have not substantially improved, it will take the necessary steps to rectify this situation.