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**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 November 1999

**Interinstitutional Files:
99/0012 (COD)
99/0013 (CNS)**

12863/99

LIMITE

**MI 114
SOC 400
ASIM 45
CODEC 678**

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OUTCOME OF PROCEEDINGS

from : Working Party on Economic Questions – Establishment and Services (Posting of third-country nationals)

on : 6 October 1999

No. prev. doc.: 10718/99 MI 84 SOC 295 ASIM 35 CODEC 473

No. Cion prop.: 6079/99 MI 16 SOC 54 ASIM 7 CODEC 82

Subject : - Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services¹
- Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community

I. INTRODUCTION

1. The Working Party on Economic Questions met on 6 October and focused its debates on the legal basis of the first proposal, in particular on the basis of a presentation² by the representative of the Commission Legal Service, on the one hand, and the Opinion of the Council Legal Service (doc.10364/99), on the other hand.

The Working Party also examined Articles 2(1), 2(2) and 3(4) of the proposal.

¹ Hereinafter the "first proposal" or "the proposal".

² On 12 November 1999, the Commission circulated a Working Document developing the ideas it had expressed orally at this meeting (doc 13106/99).

II. LEGAL BASIS

2. The representative of the Commission Legal Service, who could not share the opinion of the Council Legal Service set out in doc. 10364/99, stressed that:

- a) The European Court of Justice had made it clear that the conditions governing the posting of the workers affect the service provider's ability to provide the service. The conditions for entry, residence and return to the employer's country of establishment are therefore essential elements for the posting of workers and thus for the activity as a cross-border service provider.
- b) The proposal is fundamentally a "functional" type of measure, i.e. a measure which is based on the freedom to provide services and which seeks to achieve the complete liberalisation of services, even if the service is provided by Community nationals with the help of third-country nationals. The proposal is not a general measure which would extend beyond Title III ECT and enter the field of application of Title IV, at least not to a predominant extent.
- c) The only legal basis appropriate for all the provisions of the proposal are those which relate to the free provision of services, namely Article 47(2) and Article 55 ECT; the provisions in Title IV ECT do not constitute appropriate legal bases for any provision of the proposal, because the predominant aspect of the proposal clearly lies in Title III ECT, given that the measures to facilitate the movement and residence of nationals of third countries remain intimately linked to the provision of services by a Community national.

The provisions whose legal basis is called into question in the Council Legal Service opinion are needed to ensure that the proposed Directive operates correctly and has practical effect. In particular:

- Article 2(5) (Readmission to the Member State of establishment of the employer) does not deal with the right of residence in a Member State other than that where the third-country national originally resided and the conditions under which such residence is legal. This right arises from the service provider's right to provide services in another Member State. Thus Article 63(4) of the EC Treaty is not the correct legal basis for Article 2(5) of the proposal. Articles 62(3) and 63(3) are not the correct legal basis either.
- Article 62(1) ECT is not a suitable legal basis for Article 3 of the proposal. Article 62(1) ECT is geared to the abolition of all controls on persons in general when they cross internal frontiers. The predominant aspect of the proposal lies in the functional area of the provision of services: control is confined to a determined category of third country nationals working within the framework of services provided by a Community national or a Community undertaking and for the duration thereof.
- Articles 63(3) and 63(4) ECT are not appropriate legal basis for Article 3 of the proposal either, as the duration and objective of the limitation of the Member States' powers over visas and residence are clearly linked to the provision of a service and its duration.
- Directive 64/221/EEC is incorporated in Article 4(2) of the proposal by a reference, a usual technique. It should also be noted that Directive 64/221/EEC already applies to certain third-country nationals, i.e. non-EU spouses and members of the family of the person concerned by the provisions of that Directive.³

³ The UK delegation pointed out that Directive 64/221/EEC referred only to serious criminal offences. Accordingly, the derogation possibility provided for in Article 4(2) of the proposal does not apply to persons having committed minor offences. This delegation felt that this would mean that a Member State would occasionally be obliged to issue a EC-service provision card to certain offenders who would subsequently move into other Member States.

3. All delegations expressed their wish to receive the opinion of the Commission Legal Service in writing, and have therefore at this stage a scrutiny reservation on this opinion. The S,GR and NL delegations had a positive first reaction on the Commission's opinion.
4. The representative of the Commission Legal Service confirmed that, in the framework of the proposal, the United Kingdom and Ireland would be able to exercise border controls on persons seeking to enter their territories, as provided for in the Protocol to the Treaty of Amsterdam on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland.
5. In response to a question by the P delegation, the representative of the Commission Legal Service explained that Article 62(1) ECT need not to be invoked in the framework of the proposal.
6. The ES delegation felt that certain provisions in Title IV of the Treaty, including Article 137(3), 4th tiret, were needed as legal basis for the proposal.
7. A majority of delegations felt that the proposal should be applicable to all 15 Member States.

III. ANALYSIS OF ARTICLES 2(1) and (2) and 3(4)

A. Article 2(1) and (2)

9. The UK delegation proposed a new drafting for Article 2 (1)⁴. According to the UK delegation, this new drafting uses "Vander Elst" language to define the third country national, removing the words in the second paragraph of Article 2(1) which provide for a less specific definition. It would also clarify the question of nationality, to avoid confusion where a third country national may hold dual nationality including that of an EU Member State. It would also seek to clarify that the service provider must be established in a Member State.
10. The I,L,F,D,A,P,B and ES delegations could support the idea, put forward by the UK delegation, that the worker should be habitually and legally employed.

⁴ Text proposed by the UK delegation (changes marked by underlining):

"Article 2

1. When a provider of services legally established in a Member State proposes, in the ordinary course of his business, to post [...] a worker who is not a national of a Member State [...] to one or more other Member States on account of any of the situations set out in points (a) and (b) of article 1(3) of Directive 96/71/EC, the Member State in which the provider of services is established shall [...] issue to the worker, at request of the provider of services, a document to be known as an "EC service provision card" if the provider of services demonstrates to the issuing Member State that the worker:
 - (a) is habitually and legally employed by the provider of services in the Member State where the provider of services is established;
 - (b) is legally entitled to reside in that Member State for the proposed period of validity of the card; and
 - (c) continues to be affiliated to a social security scheme in the issuing Member State or is otherwise insured against sickness and industrial accident throughout the period of validity of the card.

(delete rest of paragraph)".

11. A majority of delegations and the Commission representatives supported the idea of establishing a clear relation between the period of validity of the card and the period of validity of the residence permit in the dispatching country.
12. In response to the suggestion, made by several delegations, that the posted worker should have worked for at least 12 months with the service provider in the dispatching country, the Commission representatives pointed out that this could hinder the application of the proposal in some sectors, like the building or the Information Technology sectors, where permanent employment contracts are not very common.
13. The I,F,L,P and NL delegations stressed that it should be made clear that posted workers must be fully covered by a social security scheme in the dispatching country. The Commission representatives undertook to work on a text that would reflect this idea.
14. The F delegation pointed out that the service provision card should be refused if it is established that the service provider has been convicted of illegal employment of third country nationals. The Commission representatives supported this suggestion.
15. The ES delegation felt that the card should be issued to the worker, rather than to the service provider. This delegation also stressed that the contents of the card, to be issued by the national central authorities, should be the same in all Member States.
16. The FIN delegation suggested that workers who are applicants for asylum should be excluded from posting.

17. The UK delegation proposed a new text for Articles 2(2) and (3)⁵ with the intention of simplifying the linkage of the card to a specific contract, removing potential problems of mismatch between contracts and the period of validity of the card.

The Commission representatives considered that the proposal from the UK delegation would create burdensome and costly bureaucracy for undertakings who would, in any case, be required to stop any posting before the card is granted and would lead to higher costs for producing the card. The Commission representatives felt that, if the linkage to a specific contract should be reinforced, it could be done under the declaration scheme provided for in Article 3(3).

B. Article 3(4)

18. The Commission representatives explained that Article 3(4) ensures that the requirements relating to professional qualifications do not affect the freedom to provide services and the activities of the service provider who employs the seconded worker. If a Member State requires that the latter, and not the service provider, meet the conditions for a regulated profession, it must take into account the qualifications acquired within the Community (not including those acquired in a third country but only recognised in a Member State). Within these limits, the proposal is aimed at achieving equality of treatment with the citizens of the Union, in particular as regards Directives 89/48/EEC, 92/51/EEC and 99/42/EC. It is for the Member State in which the services are provided to ensure that the employer whose rights as a service provider are affected has the opportunity to appeal under national law.

⁵ Text proposed by the UK delegation:

"2. The EC service provision card shall be valid for the period [...] for which the provider of services is contracted to provide the service in question in the other Member state. This period shall normally not exceed 24 months.

(delete rest of paragraph 2)

3. The EC service provision card shall relate only to employment for the purposes of a specific contract entered into by the provider of services at whose request it is issued. If the contract is extended, the same Member State may issue a new card valid for the period of the extension, but not exceeding a further 12 months, provided the requirements in paragraph 1 are still met."

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The Commission representatives emphasised that Article 3(4), together with Recital 11, clarifies that the equality of treatment does not apply to posted workers having acquired qualifications in a third country; in the absence of such clarification, it would remain unclear whether the current case-law on Community nationals and third country qualifications is also applicable in the context of posting of third country staff or not.

19. The UK, D, A and L delegations pointed out that, if the aim of Article 3(4) was to amend the scope of the Directives on recognition of diplomas, some redrafting would then be needed in order to specify the actual provisions of those Directives which are going to be modified.
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