



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.01.1999
COM(1999) 3 final

99/0012 (COD)
99/0013 (CNS)

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the posting of workers who are third-country nationals for the provision of
cross-border services

Proposal for a
COUNCIL DIRECTIVE

extending the freedom to provide cross-border services to third-country nationals
established within the Community

(presented by the Commission)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 26.02.1999
COM(1999) 3 final/2
99/0012 (COD)
99/0013 (CNS)

CORRIGENDUM : pages 27 En. et 29 Dk.

Article premier.

Concerne uniquement En. et Dk.

corrected page 27 inserted.

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EXPLANATORY MEMORANDUM

TABLE OF CONTENTS

INTRODUCTION

ANALYSIS OF THE CURRENT SITUATION

- A. Context**
- B. The legal framework under the EC Treaty and the EEA Agreement**
- C. Regulations in the Member States**

NEED FOR COMMUNITY MEASURES

- A. Secondment of workers who are third-country nationals**
- B. Extension of the freedom to provide services to self-employed third-country nationals**

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE POSTING OF WORKERS WHO ARE THIRD-COUNTRY NATIONALS FOR THE PROVISION OF CROSS-BORDER SERVICES

- A. Legal basis**
- B. Objective and scope**
- C. Specific provisions**

PROPOSAL FOR A COUNCIL DIRECTIVE EXTENDING THE FREEDOM TO PROVIDE CROSS-BORDER SERVICES TO THIRD-COUNTRY NATIONALS ESTABLISHED WITHIN THE COMMUNITY

- A. Legal basis**
- B. Objective and scope**
- C. Specific provisions**

SUBSIDIARITY

Annex : STATISTICAL DATA

INTRODUCTION

1. These two proposals for Directives concern the free movement of services within the internal market. They are aimed at introducing the "EC service provision card", an instrument designed to cover the situation in which nationals of a non-member country who are legally resident and allowed to take up employment or be self-employed in one Member State have to move for the purposes of providing services in another Member State, since such provision of services is hampered by problems in obtaining visas, residence permits and work permits.
2. **The first proposal for a Directive is aimed at businesses in the Community.** The objective of this proposal is to ensure that a service provider can second his staff "at any time", by sending a simple prior declaration to authorities of the Member State in which the service is to be provided. To ensure that such posting does not result in unrestricted movements of third-country workers, the declaration system incorporates guarantees by the country in which the service provider s establishes. To this end, a document must be issued by the Member State in which the service provider is established: "the EC service provision card". This document, which must be uniform in all the Member States, has only a limited duration of validity and is not automatically renewable.
3. **The second proposal for a Directive is aimed at extending the freedom to provide services to third-country nationals established as self-employed persons** within the Community. The objective of this proposal is to ensure that third-country nationals legally established as self-employed within the Community can provide services in a second Member State without having to be established there. A Community initiative - provided for explicitly in Article 59(2) of the EC Treaty for more than 40 years - is all the more necessary since the Community is at the same time taking steps as regards the posting of workers. The Directive again provides for the issuing of an "EC service provision card".

ANALYSIS OF THE CURRENT SITUATION

A. Context

1. The provision of services through the movement of an entrepreneur and/or his staff to a country other than the one in which the entrepreneur is established is a common feature of the internal market. The posting is for a specific purpose (the provision of services), which means that the presence in a Member State can *a priori* be for only a limited period of time (until the service has been provided). In this particular instance, we are dealing with the movement of third-country nationals for the purpose of providing services within the Community.

2. This measure concerns the situation described above and does not therefore cover:
 - (a) businesses established outside the Community and their seconded staff;
 - (b) unemployed persons with the right of residence in a Member State;
 - (c) the members of families of third-country nationals posted to another Member State for the purpose of providing services.

3. This measure is, on the other hand, aimed at businesses established in the Community and workers from third countries legally resident and with the right to engage in an activity, as employed or self-employed persons, in a Member State for the purpose of providing cross-border services. Statistics in this respect are presented in the Annex to the Explanatory Memorandum. Two cases must be distinguished:
 - (a) the movement of staff including third-country nationals - also referred to as "posting of workers";
 - (b) the provision of services in another Member State by a self-employed person who is a third-country national established in a Member State and, if necessary, his personal movement for that purpose.

4. The situation at which this initiative is aimed is not subject to any Community coordination. However, an initiative aimed at the conditions governing visas and residence and work permits will complete the co-ordination of the socio-economic factors indissolubly linked to a secondment for the purpose of providing services. This coordination is being established (or proposed by the Commission):
 - (a) **In terms of employment and working conditions:** In this field, the Community already has an instrument for co-ordination aimed at ensuring that workers on secondment have working and employment conditions corresponding to a minimum level of statutory protection - regardless of the law applicable to their employment contract. Directive 96/71/EC¹ requires any firm providing cross-border services on the territory of another Member State and posting workers for that purpose to comply with a "hard core" of essential minimum rules - particularly those covering the minimum wage - in force in the Member State in which the services are provided.

¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1); see also the proposal for a Council Directive on manning conditions for regular passenger and ferry services operating between Member States (OJ C 213, 9.7.1997, p. 17).

The Directive does not concern national legislation on the conditions governing the entry, residence and employment of workers who are third-country nationals². Nevertheless, it should be pointed out that Article 1(3) describes different forms of posting, of which the following are of particular interest in this context:

- (i) posting under a contract concluded between the business providing the service and the party for whom the services are intended;
- (ii) posting to an establishment or to a business owned by the same group.

(b) **In terms of social security:** The Community instrument for coordination is Regulation (EEC) No 1408/71, and in particular Article 143. A worker posted to another Member State "to perform work there" for the business to which he is "normally attached" continues to be subject to the social security of the country in which his employer is established during his posting for a period not exceeding twelve months. The same applies to self-employed persons. The Commission has recently proposed that Regulation (EEC) No 1408/71 be extended in its entirety to nationals of third countries⁴, hence including the rules applying to postings of employed and self-employed persons. Currently, the social security conditions are governed by a complex system of bilateral agreements.

5. Secondment at **international level** is already a phenomenon unrelated to the conditions governing access to employment. That is why the Council Resolution of 20 June 1994⁵, which states that "admission for temporary employment may therefore be considered only in terms of what is purely exceptional" does not apply to this particular case. The distinction between secondment and access to employment can be clearly seen, for example, in the commitments entered into by the Community and its Member States as regards the movement of the staff of businesses under the General Agreement on Trade in Services (GATS)^{6 7}.
6. The provision of services by self-employed persons is similarly recognised at international level. This also comes under the field of application of the General Agreement on Trade in Services (GATS). The liberalisation of services does not therefore include only services provided by legal persons but also natural persons.

² See recital No 20 of the Directive.

³ Regulation (EEC) No 1408/71 on the application of social security schemes to employed or self-employed persons and their families moving within the Community (consolidated version OJ L 28, 30.1.1997).

⁴ Proposal for a Council Regulation (EC) amending Regulation (EEC) No 1408/71 as regards its extension to nationals of third countries (OJ C 6, 10.1.1998, p. 15).

⁵ See the Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment (OJ C 274, 19.9.1996, p. 3).

⁶ See the Third Protocol attached to the General Agreement on Trade in Services (OJ L 167, 6.7.1996, p. 43).

⁷ It is understood that amendments to Community law by virtue of this initiative do not automatically entail amendments to the commitments taken by the Community and its Member States under GATS.

7. To the extent that international agreements do not apply, the Community has taken a uniform position as regards the conditions of creation of an establishment: a self-employed person from a third country who wishes to become established may not be admitted to a Member State "when he is of no economic benefit to that State or any of its regions"⁸. Provided a Member State confirms the benefit of the self-employed third-country national to its economy and provided that the latter has built up an effective and ongoing relationship with its economy, it is difficult to declare that this does not also represent a benefit for the internal market⁹.
8. Moreover, and with regard to third-country nationals legally and permanently resident in the Member States, the Union must take steps to establish a common position laying down the extent to which such third-country nationals and the citizens of the Union should be treated equally¹⁰. An initiative aiming to extend the freedom to provide services to self-employed third-country nationals - already envisaged in 1957 by the Treaty of Rome - contributes to this effort to define a common position, as do other Commission proposals¹¹. In any event, this initiative does not affect the competence of the Member States to determine which third-country nationals are admitted in order to establish themselves and exercise an independent economic activity on a permanent basis.

B. The legal framework under the EC Treaty and the EEA Agreement

1. If a **service provider posts a third-country worker** to another Member State, the visa and residence and work permit conditions directly affect the provider's capacity to act. In the absence of coordination at Community level, the conditions under which services are provided can be established only on the basis of an interpretation of Article 59 of the EC Treaty.
2. The conditions governing the provision of services do not therefore come under immigration policy¹². Nor can the scope of the freedom to provide services be determined by the Schengen *acquis*, which does not affect the exercise of an economic activity (and movement for this purpose) in a Member State other than the one in which a third-country national is legally resident.
3. Article 59 of the EC Treaty means that a Member State cannot make the provision of services on its territory conditional upon observance of all the conditions required for establishment,

⁸ See also the Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons (OJ C 274, 19.9.1996, p. 7)" - in particular paragraph 5.

⁹ It is understood that amendments to Community law by virtue of this initiative do not automatically entail amendments to the commitments taken by the Community and its Member States under GATS.

¹⁰ See the Communication from the Commission "Towards an Area of Freedom, Security and Justice" of 14 July 1998, COM(1998) 459 final, p. 6.

¹¹ See also the proposal to extend to third-country nationals Regulation (EEC) No 1408/71 on the coordination of the social security systems (quoted above), and the proposal regarding the legal status of third-country nationals who are long-term residents in the Member States, in the framework of the proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States (OJ C 337, 7.11.1997, p. 9).

¹² The Council explicitly confirmed this in its Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals (OJ C 304, 14.10.1996, p. 1, point I. "Scope").

since the freedom to provide services would otherwise be deprived of all practical effectiveness¹³. In general terms, this principle applies to any authorisation which makes the provision of services conditional upon the issuing of an administrative authorisation, unless it is justified by the reasons set out in Article 56 of the EC Treaty, to which Article 66 refers, (public order, public security or public health) or imperative reasons relating to the public interest and is not disproportionate to the objective pursued¹⁴. A Member State cannot therefore assess the posting as a function of the conditions applying to employment with an employer established in that Member State and, hence, cannot insist on a work permit granting access to employment. The same applies to the conditions of entry (visa) and residence for the persons concerned, since these are indispensable for the freedom to provide services. This freedom specifies an outcome: the measures taken at national and Community level to achieve it, including those relating to diplomas and professional qualifications, must promote the achievement of that freedom and not make it conditional upon other factors¹⁵.

4. The conditions governing posting remain governed by the freedom to provide services, even if the worker concerned does not enjoy freedom of movement under Article 48 of the EC Treaty. This concerns the posting of:

- (a) third-country nationals by Community service providers, and

- (b) nationals of Member States who, for a transitional period, do not enjoy the right to the free movement of workers under Article 48 of the Treaty¹⁶, but whose employers enjoy the freedom to provide services.

These principles were enshrined in the Court's judgments¹⁷ of 1994 (case (a) and 1990 (case (b) as regards the requirement for a work permit. The conditions governing visas and residence permits were, in 1995, the subject of (inconclusive) discussions amongst the Member States on the conclusions to be drawn from this jurisprudence¹⁸ on the granting of visas and residence permits.

5. As things stand, the Community *acquis* does not allow the **provision of services by a self-employed third-country national** established within the Community, nor hence his movement to another Member State for that purpose. The EC Treaty accords this freedom only subject to a Council Decision extending such freedom to self-employed persons.

¹³ "Säger/Dennemeyer" judgment (C-76/90, 25.7.1991, Reports 1991, I-4221).

¹⁴ "Säger/Dennemeyer" (see above), "Vander Elst" judgment (C-43/93, 9.8.1994, Reports 1994, I-3803).

¹⁵ "Vlassopoulou" judgment (C-340/89, 7.5.1991, Reports 1991 I-2357).

¹⁶ See also Article 55 to 59 and 215 to 219 of the documents concerning the accession of the Kingdom of Spain and the Portuguese Republic (OJ L 302, 15.11.1985, pp. 23 *et seq.*).

¹⁷ "Rush Portuguesa" (C-113/89, 27.3.1990, Reports 1990 I-1417) and "Vander Elst" (see above) judgments.

¹⁸ Document of the Council of the European Union of 11 October 1995, 7710/1/95 Rev 1, Restricted.

6. As regards the European Economic Area, Article 36 of the EEA Agreement lays down that the freedom to provide services applies only to nationals of the Member States and the EFTA countries established in a Member State of the EC or in an EFTA country. Only the first Directive thus comes under a field covered by the EEA Agreement.

C. Regulations in the Member States

1. As regards the **secondment of workers who are third-country nationals**, the Member States distinguish between two cases:

(a) As regards **secondment for the purpose of performing a contract with a customer:**

- (i) Three Member States (EL, I, LUX) have not followed up the court's jurisprudence (in particular the "Vander Elst" case). A fourth Member State (S) has opted for a reaction limited to secondments of less than three months, but now envisages abolishing this limit.
- (ii) Three Member States no longer consider secondment as a request for access to employment with an employer established in those countries, but either formally maintain the requirement for a work permit (DK and NL) or else replace it with another specific instrument intended for secondment (AUT). The permits must always be obtained from the authorities in the region in which the service is provided.
- (iii) Eight Member States (B, D, E, F, FIN, IRL, P, and UK) have abolished the work permit and the need to obtain authorisation from the authorities in the region in which the service is provided. Their consular authorities in the country in which the service provider is established issue - in conjunction with the granting of a visa or a residence permit - a supplementary authorisation which lays down the conditions of the secondment. Two Member States (D et UK) require it in all instances, while six Member States (B, ES, F, FIN, IRL and P) require it only under the rules for issuing a visa: the person concerned may be exempted by virtue of his nationality or under an international convention¹⁹.

- (b) **The secondment of a worker who is a third-country national to an establishment or business belonging to the same group, but established in different Member States:** Many Member States either do not require a work permit or issue it automatically without stipulating that the job with the service provider concerned can only be taken by workers from the Community. This applies, in particular, to staff contributing an added value to the national economy. Such schemes are often limited to managerial staff (e.g. B, F, FIN, and S), or, more generally, to staff bringing in investments (e.g. UK and D).

¹⁹ See Article 21 of the Convention applying the Schengen Agreement as regards foreign nationals holding a residence permit issued by one of the contracting parties.

(c) On the other hand, certain Member States require the worker to have been with the same service provider for at least one year before any secondment. This one-year rule is applied strictly in DK, F and NL, and more loosely in A (the other option is an open-ended employment contract), B (the person does not need to have been employed by the same service provider for a year), and UK (not always a year), and not at all in FIN, E, P and S (envisaged option). It is astonishing that, in the countries which apply the one-year rule, this requirement relates only to secondment for the purpose of performing a contract with a customer, whereas:

- (i) this restriction is not imposed in the case of secondment to a business belonging to the same group;
- (ii) a business established outside the Community is either on an equal footing²⁰, (e.g. in L, subject to a collective authorisation for the staff seconded and employed for the last six months) or does not even have to meet this requirement (e.g. D as regards its subcontracting agreements with the CEECs and Turkey).

2. **Self-employed persons** who intend to exercise an activity only temporarily in a Member State other than the one in which they are established are treated by Member States as persons wishing to become established. Such persons are always subject to authorisation for access to an independent activity, such as the identity card for a foreign businessman (e.g. in F), the licence (e.g. in B) or the work permit (e.g. in Denmark). This access is granted only after examination of the market needs in that Member State.

NEED FOR COMMUNITY MEASURES

A. Secondment of workers who are third-country nationals

The need for business

1. The conditions imposed on secondments in terms of visas, residence and access to employment directly affect the capacity to act of businesses providing services. Despite the clear precedents in the case law, the national administrations are continuing to focus on third-country nationals as the only persons covered by the national instruments (visas, residence permits and work permits), without taking account of the direct rights of the service provider. This situation has led the Commission to initiate infringement proceedings against several Member States.
2. The capacity to act is affected, in particular, by the preventive checks which some authorities insist on making. These checks are occasioned specifically by a fear of abuse, despite the fact that it has not been possible to quantify the actual abuse, and discriminate against foreign service providers, since:

²⁰ See also the commitments entered into by the Member States in the Third Protocol attached to the General Agreement on Trade in Services, quoted above.

- (a) the length of the procedures, including the need to obtain a specific authorisation from the authorities in the country in which the service is provided, involves such difficulties that the service providers are frequently obliged to withdraw from providing the service or to put up with damaging delays in accomplishing it;
 - (b) the preventive checks are a duplication of effort, since they are directed at details of the business's activities and of the employment relationship with the seconded worker, although checks have already been made by the authorities in the country of establishment. Moreover, they are on top of *a posteriori* checks carried out by the authorities in the place where the service is provided.
3. The stipulation that the worker must have been employed by the same service provider for at least one year is highly controversial²¹. It is often justified by referring to the "Vander Elst" judgment, which speaks about persons "habitually employed"²². However, it is enough to make sure that a worker is complying with the bulk of his professional obligations in the country in which the service provider is established²³ for secondments to be admitted "at any time". The one-year rule does not take into account the actual duration of a secondment: it is hard to see why a period of several months during which the worker has met his obligations in the country of establishment of his employer cannot suffice for a secondment to another Member State for one or two months.
 4. Secondment within a group of businesses established within the internal market is considered by the Member States to be a phenomenon covered not by the internal market, but only by international commitments. The result is that opportunities for secondment suffer from major national disparities, particularly as regards the period for which a secondment is allowed (often only three months) and the reasons for admitting a secondment, which are listed limitatively, but differently, in each Member State.

The need for national administrations

5. There is no denying the difficulty of accepting a secondment according to the principles of the "country of origin" - despite their being inherent to the internal market - unless there are guarantees from that country of origin and explicit cooperation between the national administrations. Currently, the national authorities of the Member State in which the service is provided:
 - (a) are reduced to checking the lawfulness of a situation in which the elements depend on the Member State in which the service provider is established at the time of the entry and residence of the third-country national on their territory;

²¹ This criterion also emerges from the Member States' discussions in 1995 (cf. above).

²² "Vander Elst" judgment (C-43/93, 9.8.1994, Reports 1994 I-3803), whereas the "Rush Portuguesa" judgment (C-113/89, 27.3.1990, Reports 1990 I-1417) does not contain this reference.

²³ See the "Rutten" (C-383/95, 9.1.1997, Reports 1997 I-57) and "Mulockx" (C-125/92, 13.7.1993, Reports 1993 I-4075) judgments.

- (b) have no guarantees from the Member State in which the service provider is established that the third-country national will return there and be readily admitted after the service has been provided. The authorities of the country in which the service is provided must rely on the assumption that the third-country national will be "prepared" to return there.
6. In particular, the national authorities have no documents covering the specific situation of a secondment for the purpose of providing services. Nor are there any models at EU level: neither the uniform format for residence permits²⁴ nor the uniform format for visas²⁵ contain data relating to secondment, particularly on the service provider.

The need for the proper functioning of the internal market

7. One of the features of the internal market is the free movement of services under which a service provider may second a third-country national. The citizens of the Union enjoy the right to decide to work, to become established and to be seconded anywhere, at any time and in any Member State. The third-country nationals concerned are not in a comparable position. Rather than taking the *acquis* applicable to the citizens of the Union²⁶ as a starting point, it is preferable to clarify the temporary presence of third-country nationals seconded for the purpose of providing services. Not only do the national instruments (residence and work permits) differ enormously from one Member State to another but, above all, they do not cater for the specific situation of secondments, whence the need for a specific instrument - the "EC service provision card".
8. This being the case, a visa requirement is no longer justifiable if the "EC service provision card" certifies the lawfulness of the situation in the Member State in which the service provider is established, since certification of this kind provides an explicit guarantee that from the outset excludes cases of illegal and clandestine immigration and would confirm the obligation of the Member State issuing the EC service provision card not to refuse readmission of the posted third-country national under any circumstances. Furthermore, the obligation to declare an intended posting in advance enables the Member State in which the service is to be provided to examine questions of public order, public security and public health in specific cases. The coordination provided for under Directive 64/221/EEC²⁷ should be borne in mind in this respect. At present, this coordination applies only to posted staff who are nationals of Member States and not to the rest of the staff - third-country nationals, the lawfulness of whose situation is already certified by the "EC service provision card".

²⁴ Joint Action of 16 December 1996 adopted by the Council concerning a uniform format for residence permits (OJ L 7, 10.1.1997, p. 1).

²⁵ Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, 14.7.1995, p. 1).

²⁶ i.e. Directive 68/360/EEC of 15 October 1968 (OJ L 257, 19.10.1968, p. 13) on the admission and residence of seconded workers, Regulation (EEC) No 1612/68 of 15 October 1968 (OJ L 257, 19.10.1968, p. 2), forbidding the work permit, and Directive 73/148/EEC of 21 May 1973 (OJ L 172, 28.6.1973, p. 49) on the admission and residence of the service providers themselves.

²⁷ 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 (OJ 56, 4.4.1964, p. 850/64).

9. Inasmuch as the Community *acquis* on the external borders of the internal market does not solve the differences between the Member States as regards their policies on visas, the possible legal obstacles for service provision can be overcome by a Community act based on Articles 57(2) and 66 of the Treaty. Such a Community act exclusively covers what is strictly necessary for a service provision within the internal market, although it concerns third-country nationals as members of staff seconded by a service provider and it does not pursue a harmonisation of Member States' visa policies. Therefore, Article 57(2) (in conjunction with Article 66) represents the appropriate legal basis.
10. The provision of services is hampered not only by conditions governing visas and residence and work permits, but also by requirements as to professional qualifications designed to protect the customer. When the seconded worker (and not the service provider himself) has to meet a professional qualification requirement, the recognition of diplomas, certificates and other evidence of formal qualifications acquired within the Community must also be covered, since another feature of the internal market is the free movement of services provided by "qualified" staff.

B. Extension of the freedom to provide services to self-employed third-country nationals

The need for business

1. Businesses frequently call in service providers as subcontractors. These subcontractors are frequently natural persons - self-employed workers - and in some cases self-employed third-country nationals established in the Community. Extension would therefore be of benefit to Community businesses.
2. The EC Treaty places the emphasis on an economy developed by an economic operator whose activities have an effective and ongoing relationship with the internal market²⁸, irrespective of his nationality. Anyone established outside the Community cannot benefit from the internal market, even if he is a national of a Member State. If the Member States accept that admitting self-employed workers from a third country can be of benefit to their national economy, the same is all the more true for self-employed third-country nationals who are already legally established in a Member State and have an effective and ongoing relationship with the economy of that Member State.

The need for the proper functioning of the internal market

3. For more than 40 years now, the EC Treaty has provided for the possibility of extending the freedom to provide services to self-employed third-country nationals, but the Community has never used this possibility. Nowadays, such an extension will be of benefit not only for the economy of each Member State, but for the whole of the internal market. In view of the first proposal for a Directive concerning the conditions for posting workers who are third-country nationals, the proper functioning of the internal market means that one must avoid a situation in which a self-employed person cannot travel to provide services, while a worker can be seconded.

²⁸ See the general programme of the Member States of 18 December 1961 for the abolition of restrictions on the freedom to provide services (OJ 32, 15.1.1962, p. 32/62).

4. The fact that a person has chosen self-employed status in the economy of a Member State does not affect the labour market in another Member State, nor does it justify inequality of treatment between self-employed and employed persons. Without prejudice to the social protection to which a Member State wishes to submit certain self-employed persons, the status of a self-employed person should not create barriers to the provision of services²⁹.
5. Nor can it be justified that a third-country national has to set up a company in a Member State in order to benefit from the freedom to provide services, whereas businessmen who are natural persons and who do not enjoy limited responsibility, although they have a comparable turnover, are denied the right.
6. The Community has a well-developed *acquis* as regards the implementation of the freedom to provide services in the light of the case law of the Court of Justice³⁰, and in particular the principle of equality of treatment inherent in that freedom, which differs from that in Articles 48 and 52. The Member States have put in place specific arrangements for service provisions which would apply, if necessary, to the self-employed persons referred to in the second paragraph of Article 59. The Member States' experience relates to an *acquis* which already includes, in line with Articles 66 and 58 of the EC Treaty, companies set up by third-country nationals³¹.
7. As regards the implementation of this freedom, it must be remembered that any fundamental freedom in the internal market specifies an outcome, and that the measures taken to achieve it, thus including those relating to travel (visa and residence) and to diplomas, certificates and other evidence of formal qualifications acquired within the Community must promote these freedoms and not make them conditional³².

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE POSTING OF WORKERS WHO ARE THIRD-COUNTRY NATIONALS FOR THE PROVISION OF CROSS-BORDER SERVICES

A. Legal basis

The proposal is based on Article 57(2) of the EC Treaty, to which Article 66 explicitly refers for the provision of services (**co-decision procedure**). It aims to co-ordinate the national regulations by means of a document, the "EC service provision card", to be issued by the Member State in which the service provider is established and recognised by the Member States in which services are provided. There are numerous precedents for this form of coordination, such as the regulations on social security³³ or the "European passport" for non-bank investment companies³⁴.

²⁹ See, for instance, the "Syndesmos/Ergasias" judgment (C-398/95, 5.6.1997, Reports 1997 I-3091).

³⁰ See also the interpretative communication from the Commission on the free cross-border movement of services (OJ C 334, 9.12.1993, p. 3).

³¹ General programme of the Council for the abolition of restrictions on the freedom to provide services of 18 December 1961 (OJ 32, 15.1.1962, p. 32/62).

³² "Vlassopoulou" judgment (C-340/89, 7.5.1991, Reports 1991 I-2357).

³³ See Article 2(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 28, 30.1.1997, p. 102).

B. Objective and scope

1. The proposal is aimed at ensuring that a service provider can second his staff "at any time" through a simple advance declaration to be sent to the authorities of the Member State in which the service will be provided. However, care must be taken to ensure that the secondment remains associated with the provision of services. To this end, the Member States must contribute to the smooth functioning of the internal market.
2. The Member State in which the service provider is established must contribute to the smooth functioning of the market in such a way that the lawful status of the entrepreneur as such, and of his worker who is a third-country national, is confirmed to all the other Member States where services may be provided. To this end, a document - the "EC service provision card" - must be issued by that Member State. It is issued to the service provider and allows him to second the worker concerned to any other Member State where a service might be provided under certain conditions and for a limited period of validity. A scheme involving a simple declaration prior to providing the services, made in the country in which the services are provided, is thus sufficient - all the more so as it is accompanied by the "EC service provision card". In particular, this instrument makes it possible to take account, by reason of its limited period of validity, of the fact that the EC Treaty does not grant workers from third countries either the right of free movement within the Community or freedom of access to employment in a Member State.
3. It is for the Member State in which the service is provided to check, during the provision of one or more services, whether the third-country worker is "still" in the situation of being seconded for the purpose of providing one or more services. This thus allows *a posteriori* checks, in particular on the temporary nature of a service, in terms of its continuity, frequency and duration³⁵.
4. The present proposal thus avoids submitting the service provider, as was previously the case, to the need to make administrative approaches in each country in which a service is to be provided. It is sufficient to ask for the "EC service provision card", a document which ensures that he can second the person "at any time" as part of his ordinary activities, although only if the period of validity of the document is respected. On the other hand, the present proposal does not amount to a total abolition of checks, since *a posteriori* checks are still possible. The "EC service provision card" is useful to this end, in that it makes it easier to make on-the-spot checks.

³⁴ See Articles 3 and 14 of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27).

³⁵ "Gebhard" judgment of 30 November 1995 (C-55/94, Reports 1995 I p. 4165).

5. On the one hand, this scheme is open to all forms of provision of services, but it still provides for one major exception in relation to labour market policy in the Member States: the Directive excludes temporary employment agencies. The very purpose of a temporary employment agency providing workers to a user business is to admit workers to employment in that business in such a way that the latter does not recruit staff of its own. Attention must be drawn to the case law of the Court which, exceptionally, considered that a system of prior authorisation was justified in the case of this particular activity "in order to be able to refuse licences where there is reason to fear that such activities may harm good relations on the labour market ..."³⁶.

C. Specific provisions

1. **Article 1** describes the scope of the Directive.
2. **Article 2** refers to the obligations of the Member State in which the service provider is established and in which his member of staff is resident. This Member State issues the "EC service provision card".

Article 2(1) lays down that the authorities of that Member State must establish that the service provider maintains or wishes to maintain commercial relations either with customers established in other Member States or with a view to secondment within a group of undertakings established in various Member States. The scheme is thus, in principle, open to any economic activity of a business in which secondments may arise. Reference to Article 1(3) lit. a) and b) Directive 96/71/EC relating to businesses in the internal market and workers (Community nationals and, of importance in this instance, third-country nationals) obliges however the Member States to verify that the service provider is not a business of temporary work in the meaning of Article 1(3) lit. c).

The authorities of that Member State must also establish the lawful presence of the worker resident there; this condition is also part of the coordination laid down in the bilateral agreements between the Member States on social security and double taxation as regards persons resident in the Member States.

The "EC service provision card" may be issued only if the worker to be posted is covered in the event of sickness or industrial accident.

The objective of **Article 2(2)** is, in particular, the following: the "EC service provision card" is intended to ensure the free movement of services, while avoiding this leading to the unrestricted movement of workers. This dual objective is assured, in particular, through the period of validity of the card during which the worker can be posted. The period can be six or twelve months depending on the application by the service provider concerned and on the duration of the regular and actual work done by the worker on the territory of the Member State.

³⁶ "Webb" judgment of 17 December 1981 (279/80, Reports 1981, p. 3305).

As far as **Article 2(3)** is concerned, when the "EC service provision card" is no longer valid, the service provider can apply for its renewal only if the conditions for its issue and for the requested period of validity are still met. In other words, the service provider cannot apply for it for a worker who has mainly carried out tasks in other countries during a secondment. On the other hand, the mere fact that an "EC service provision card" has expired, without the worker having been seconded, does not in itself prevent the issue of a second "EC service provision card".

Article 2(4) ensures that the "EC service provision card" is issued to the service provider at his request; it can cover only one specific worker and not several. In order to ensure a uniform and secure model for this document, the Commission considers it essential to adopt an implementing Regulation, in accordance with the committee procedure (3b - "contrefilet" procedure) established by Regulation (EC) No 1683/95 laying down a **uniform format for visas**.

Article 2(5) ensures also that the Member State issuing the "EC service provision card" remains primarily responsible for the presence of the seconded worker on the territory of the Community:

(a) A secondment does not allow the Member State to refuse renewal of a residence or work permit, but must be regarded as equivalent to an authorised stay and to work carried out in that Member State.

(b) That Member State must readmit the person to its territory under all circumstances, in particular when the provision of services or the employment contract with the service provider has terminated, the "EC service provision card" has expired, the posted worker's residence permit has expired, or the Member State in which the services are provided wishes the person to leave its territory for reasons of public order.

3. **Article 3** refers to the obligations incumbent on any other Member State where a service is provided. That Member State is obliged to recognise the "EC service provision card" and, hence, the entry, residence and secondment of the persons concerned on its territory for the sole purpose of providing a service. This recognition naturally covers the entire stay needed during and at the time of the secondment to a Member State³⁷.

Article 3(2) ensures a reduction in the many and varied authorisation procedures needed before each secondment (visa, residence permit, work permit).

Article 3(3) ensures, at the same time, that the Member State has all the means of checking that the secondment of the person concerned does not lead to an ongoing situation on its territory. For that reason, this provision does not include provisions relating to the free movement of persons, but only provisions relating specifically to the free movement of services. This is a provision "*sui generis*" which lays down:

³⁷ Working hours, rest periods, week-ends.

- (a) the obligation of the service provider to declare the intended presence of the worker concerned and the circumstances of his presence prior to his entry, thus allowing the authorities of that Member State to carry out *a posteriori* checks on the spot;
- (b) the issue of a resident document establishing (and not authorising) the presence for the purpose of providing a service where such provision of services exceeds six months. This document may be required "at any time", but at the earliest after the entry of the person concerned.

When the Member State establishes the presence for the purpose of providing services on a temporary residence permit, its authorities may check whether the presence is for the provision of services within the meaning of Article 59 of the EC Treaty, and in particular whether the activities of the business by which the person is seconded are "still" temporary in nature. This is always a question of the individual case, on the basis of the criteria of the continuity, frequency and duration of the services provided³⁸. The wording of Article 3(3) allows this assessment of the individual case by the Member State concerned on the basis of the jurisprudence of the Court of Justice:

- The criterion of continuity must be appraised in terms of the provision of services in question. In fact, an assessment on the basis of the duration of the secondment (stay) of the worker would be pointless if workers were continually seconded to replace other workers seconded previously. The **six-month** limit is required, above all, for tax reasons in the light of the agreements on double taxation (183-day rule)³⁹.
- The criterion of frequency must be appraised in terms of the **twelve-month reference period** laid down for tax purposes, as well as in other fields⁴⁰. Article 3(3) makes it possible to treat as a single provision of services the totality of several provisions of services of short duration but whose total duration is more than six months.
- The criterion of the duration of the provision of services is taken into account if it **exceeds the duration of the validity of the "EC service provision card"**. The six-month period for the obligation to obtain a temporary residence document is therefore required because of a possible six-month period of validity of the "EC service provision card". When the provision of services in question exceeds twelve months - the maximum period for secondment under this Directive, the Member State in which the service is being provided may, if it wishes, decide on conditions of secondment according to its own requirements, in accordance with Article 59 of the Treaty.

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

³⁸ "Gebhard" judgment of 30 November 1995 (C - 55/94, Reports 1995 I p. 4165).

³⁹ See Article 15(2) of the OECD's model agreement on double taxation.

⁴⁰ See Article 15(2) of the OECD's model agreement on double taxation, see also the commitments entered into by the Community and the Member States as regards the movement of persons under the GATS (see above).

recognised in a Member State). Within these limits, the present Directive is aimed at achieving equality of treatment with the citizens of the Union, in particular as regards Directives 89/48/EEC⁴¹ and 92/51/EEC⁴², and, in future, the mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalisation and transitional measures⁴³. 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.

4. **Article 4** ensures that the present Directive laying down a framework for the proper functioning of the internal market cannot, on the one hand, be bypassed by arrangements made by one Member State with a third country and, on the other, does not prejudice national measures taken because of a threat to public order, public security or public health.
5. **Articles 5 and 6** lay down, in particular, the arrangements for cooperation between the authorities of the Member States, as well as the obligations as regards penalties deriving, in general terms, from Article 5 of the EC Treaty.

PROPOSAL FOR A COUNCIL DIRECTIVE EXTENDING THE FREEDOM TO PROVIDE CROSS-BORDER SERVICES TO THIRD-COUNTRY NATIONALS ESTABLISHED WITHIN THE COMMUNITY

A. Legal basis

The legal basis is set out explicitly in Article 59(2) of the Treaty (**consultation procedure**).

B. Objective and scope

1. Apart from the conditions for the movement of self-employed workers, the second proposal has a dimension of its own: it grants specific rights to nationals of a third country established within the Community.
2. It is essential to lay down the conditions under which a self-employed worker must be considered to be "established" within the meaning of Article 59(2) of the Treaty, in particular by ensuring that the centre of activity of the persons concerned is not located outside the Community.
3. Moreover, reference is made to the observations on the first proposal for a Directive, in particular as regards professional qualifications.

C. Specific provisions

⁴¹ Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ L 19, 24.1.1989).

⁴² Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ L 209, 24.7.1992).

⁴³ See Council Common Position (EC) No 42/98 of 29 June 1998 (OJ C 262, 19.8.1998, p. 12) following the proposal from the Commission (OJ C 115, 19.4.1996, p. 16 and OJ C 264, 30.8.1997, p. 5).

1. **Article 1** describes the scope, covering entrepreneurs who are natural persons as self-employed workers. The extension does not concern the transport sector covered by the common transport policy introduced by Articles 75 *et seq.* of the EC Treaty. This provision excludes services in the field of transport covered by Articles 61(1) and 74 *et seq.* of the EC Treaty⁴⁴. The exclusion of the transport sector does not alter the practical effectiveness of the present Directive in any way, because there are practically no cross-border providers of services that are natural persons in this sector.

Article 1(3) sets out the personal field of application of the Directive, i.e. which self-employed workers are considered to be established within the Community:

- (a) The condition of an effective and ongoing relationship with the economy of a Member State reiterates the principles established for companies of nationals of a third country in accordance with the General Programme of the Council of 18 December 1961⁴⁵: the freedom to provide services applies if the activity of such a company involves an "effective and ongoing relationship with the economy of a Member State, whereby this relationship must not depend on the nationality of the partners, the members of the management or supervisory bodies or the persons holding the share capital" (see Title 1). This case must be distinguished from the national rules governing the first admission of a self-employed person, for example on the basis of an agreement governing the rules for the admission of third-country nationals to the Member States⁴⁶. The 12-month rule defines the condition of an "ongoing relationship".
 - (b) The condition of residence ensures that the self-employed person is legally present within the Community and is in a situation in which the coordination established between the Member States by virtue of the bilateral agreements on social security and double taxation applies.
 - (c) The exclusion of the activities of workers avoids overlaps with the activities of self-employed persons. This principle is also to be found in the Europe agreements with a view to association with the CEECs in the framework of the right of establishment of self-employed persons⁴⁷.
2. **Articles 2 to 10** take over the solutions proposed for the posting of workers, with certain differences because of the fact that this proposal for a Directive grants specific rights to third-country nationals. The extension of the freedom to provide services is based on a benefit for the internal market. In particular, if a self-employed worker has proved that he has fulfilled the conditions of Article 1(3), it is arbitrary to limit the validity of the "EC service provision card" to a period of less than 12 months.

SUBSIDIARITY

⁴⁴ See in particular the judgment in *Parliament v Council* (13/83, 22.5.1985, Reports 1985, p. 1513).

⁴⁵ General Programme of the Council of 18 December 1961 for the abolition of restrictions on freedom to provide services (OJ 32, 15.1.1962, p. 32/62).

⁴⁶ See the proposal from the Commission for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States (OJ C 337, 7.11.1997, p. 9).

⁴⁷ For instance, Article 44(4)(a)(i) of the Agreement with Poland (OJ L 348, 31.12.1993, p. 11).

1. What are the objectives of the two proposed actions with respect to the obligations of the Community?

These proposals for Directives are in line with the spirit of subsidiarity in that they provide for measures which are limited strictly to cross-border services. The "EC service provision card" establishes a Community framework for the full achievement of the freedom to provide services by involving third-country nationals lawfully established within the Community. This Community framework sets out the scope of this freedom for any provision of services requiring a secondment or move lasting not more than 12 months.

2. Is the action envisaged a matter of exclusive Community competence or one shared with Member States?

The actions envisaged are a matter of exclusive Community competence. While Article 59(2) of the EC Treaty refers to such a competence for self-employed persons, the same exclusive competence applies by virtue of Articles 57 and 66 of the EC Treaty for the secondment of workers.

The actions envisaged are limited to setting out the conditions governing the freedom to provide services. They do not impinge upon the Member States' competence for determining which nationals of third countries are admitted for an activity as an employed or self-employed person, under what conditions the admission must be extended, or what professional activity is regulated or not in a Member State.

3. Are the means of Community intervention proportionate to the objectives to be achieved?

The introduction of the "EC service provision card" is aimed only at the checks prior to the provision of cross-border services, and not at the *a posteriori* checks carried out in a Member State in which the services are provided.

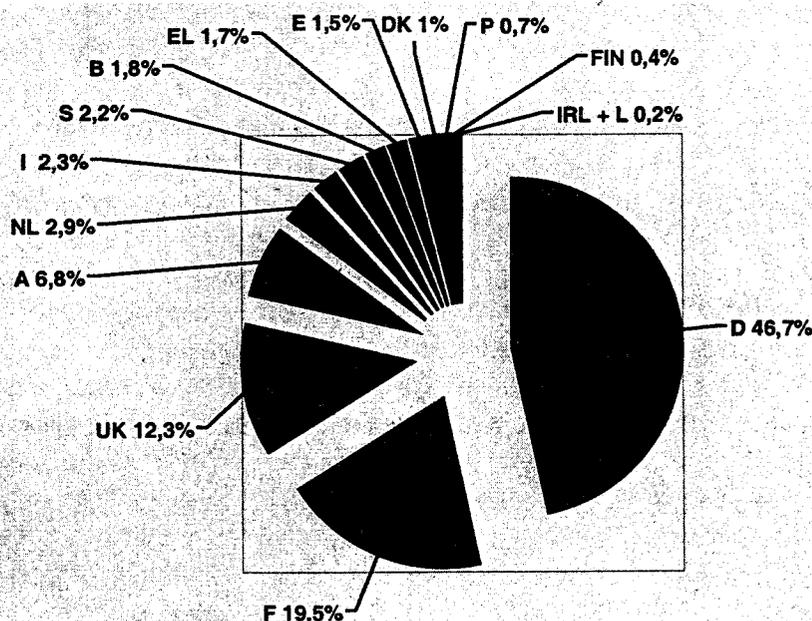
Because of the lack of a national document covering the various aspects of secondment which could serve as an adequate basis for recognition of the situation in the country of establishment, the introduction of the "EC service provision card" is unavoidable, both to facilitate the provision of cross-border services and to clarify the situation of third-country nationals posted/moving within the European Union. This document, which could be on the lines of existing models (for visas and residence permits) respects the principle of proportionality.

The Community intervention is also limited to postings lasting a maximum of 12 months and leaves it to the Member States to determine, in accordance with Article 59 of the EC Treaty, the conditions governing postings for a longer period.

By extending the freedom to provide services to self-employed nationals of third countries, the second proposal for a Directive also covers third-country nationals who do not move to the Member State in which the services are provided. It is for that Member State to apply the same national regulations it already applies to Community companies and citizens who currently enjoy the freedom to provide services. For instance, the second proposal for a Directive leaves it for the Member States concerned to apply their own regulations in order to be able to establish whether a third-country national is temporarily exercising an activity as a self-employed person in a Member State other than the one in which he has his principal establishment. Moreover, this proposal is limited to the professional qualifications acquired and recognised within the Community, and not those acquired in a third country.

Annex: STATISTICAL DATA

- Two factors give an idea of the scale of the phenomenon:
 - the number of workers from a third country legally resident within the Community;
 - the volume of cross-border services in the sectors most concerned.
- In 1997, there were 4 982 million employed and self-employed persons from third countries (3.0% of the total labour force)⁴⁸, broken down as follows:



- Trade in cross-border services involving the posting of employed/self-employed persons within the internal market takes place between businesses established in different Member States. One business - the service provider - provides services to another - the customer. The commercial relationship may involve independent businesses subcontracting services to others⁴⁹, or groups within which businesses act as providers and customers respectively.
- Postings of employed/self-employed persons directly or indirectly affect all the services sectors. The credit of commercial transactions' accounts on cross-border trade in services within the internal market⁵⁰ amounted to ECU 176 746 million in 1995, i.e. 11.2% of the value for trade in goods and services between the 15 Member States

⁴⁸ Eurostat, Labour Force Survey, Results 1997.

⁴⁹ Surveys carried out in 1995 show that between 60% and 90% of the businesses questioned engage in subcontracting, see the report "Working Time and Contract Flexibility in the European Union" (Brewster, C. Mayne *et al.*) published in 1997 by the Commission (DG V), p. 187.

⁵⁰ Eurostat, International trade in services, EU 1985-1995, Declarant EU 15, Partner EU 15, the value of services exported and recorded in the balance of payments.

(ECU 1 572 554 million) or 77.6% for cross-border services (ECU 227 756 million). The sectors most involved are as follows:

- (a) The specific commitments by the Member States as regards the movement of persons under the General Agreement on Trade in Services (GATS)⁵¹ list a large number of them⁵². Any sector concerned in that context is all the more affected by movements within the internal market. Examples are architects and consultants, the building industry/public works, research and development, advertising including market studies, trade fairs, legal, tax, management and accounting consultancy services, computer services and services in the fields of culture, sport, teaching and translation.
 - (b) Other sectors within the internal market are also affected, such as tourism (travel agencies, guides), cleaning services and private security. Then there are the services involved in the processing of goods at the place of export, the classic example being the assembly/installation of a good. Agriculture and forestry are also concerned, e.g. businesses carrying out harvesting/felling for farmers and foresters.
 - (c) Trade in services within a group of businesses amounted to 1% of the credit of commercial transactions' accounts on goods and services (or 6.25% for cross-border services). This sector itself is more important than any other mentioned above under (a) and (b).
5. The social security bodies recorded 539 169 postings of workers who are Community nationals for periods of less than a year in 1994⁵³. However, the records relate to postings from only nine Member States (DK, EL, F, IRL, L, NL, P, S, UK), so that the number is undoubtedly higher in reality and also higher than the number of movements of self-employed persons⁵⁴.
6. It is difficult, therefore, to establish accurate quantitative indicators for postings of third-country nationals for the purpose of providing services. The Member States do not have representative data on postings of third-country nationals: either they do not distinguish between a posting and a work permit for access to the labour market, or they do not distinguish between postings between Member States and between a Member State and a third country, or the statistics relate to postings authorised on the basis of simple administrative practices which themselves do not take account of postings between businesses belonging to the same group⁵⁵.

⁵¹ OJ L 336, 23.12.1994, p. 190.

⁵² See the Third Protocol attached to the General Agreement on Trade in Services (OJ L 167, 6.7.1996, p. 43).

⁵³ BMT, Utrecht, "Temporary employment across borders, posting in accordance with regulation 1408/71 in practice", P. Donders in Second European Conference on Social Security in Europe, Crete, October 1995.

⁵⁴ There are 19.9 million entrepreneurs and self-employed persons (nationals of Member States and third countries) in the EU, as against 102.5 million employed persons (Eurostat, 1998 □ 5 (Labour force 1997)).

⁵⁵ In reply to a request for information from the Commission in 1997, for example, Germany communicated 243 postings of third-country nationals in 18 months between 1996 and 1997, but the conditions of their posting are governed by unknown instructions and do not include postings within a group of undertakings.

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the posting of workers who are third-country nationals for the provision of
cross-border services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission⁵⁶,

Having regard to the opinion of the Economic and Social Committee⁵⁷,

Acting in accordance with the procedure laid down in Article 189b of the Treaty⁵⁸,

- (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;
- (2) Whereas the free movement of services includes the right for service providers to post their staff even if the persons in question are not citizens of the Union but third-country nationals legally present in the Community; whereas the staff also includes the managers of companies;
- (3) Whereas the freedom to provide services neither creates direct rights for the workers concerned nor affects rights already recognised at Community or national level or under international agreements, including those guaranteed by the Convention for the Protection of Human Rights, particularly as regards family life;
- (4) Whereas service providers who need to post a worker who is a third-country national encounter such difficulties that they are often obliged to withdraw from providing the service or put up with damaging delays; whereas the preventive checks carried out by the Member States in which the services are provided before any workers are posted duplicate both the checks they make after the event and those made in the country of establishment;

⁵⁶ O J C

⁵⁷ O J C

⁵⁸ O J C

- (5) Whereas the authorities of a Member State in which services are provided have no guarantee of the lawfulness, in the Member State in which the provider is established, of the situation of the service provider and worker to be posted; whereas, furthermore, the Member States have no guarantee that the workers posted will return to the Member State in which they chiefly work when the services have been completed;
- (6) Whereas a document known as an "EC service provision card", to be issued by the Member State in which the service provider is established, should be the instrument that facilitates postings so that a provider can react with a view to current or potential postings in connection with normal activities even if his staff includes one or more third-country nationals; whereas it should be for the service provider to decide whether to apply for the EC service provision card; whereas this Directive, similarly, does not affect the undertakings of the Community and its Member States, given in the context of the General Agreement on Trade in Services (GATS)⁵⁹; 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 data⁶⁰;
- (7) Whereas the Member State issuing the EC service provision card should take account of public policy aimed at combating clandestine immigration by certifying the lawfulness of the situation in the Member State in which the service provider employs the third-country national; whereas the document should ensure that the main activity of the posted worker takes place in the Member State in which the service provider is established; whereas the document should be safeguarded against falsification; whereas it is therefore no longer necessary to require an entry visa;
- (8) Whereas the EC service provision card issued by a Member State should thus provide the guarantee necessary to ensure that all other Member States in which services are to be provided will allow persons to enter and reside in the country in order to provide one or more services, namely during and at the time of the provision of services; whereas this guarantee should include the obligation not to consider the posting as an interruption of the period of residence and of the permitted paid activity, and in particular not, under any circumstances, to refuse readmission of the person posted; whereas, consequently, the Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry, residence and access to a temporary paid activity; whereas this Directive does not affect the binding rules on conditions of work and employment prevailing in the Member State in which a service is provided, those rules having been laid down by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services⁶¹;

⁵⁹ OJ L 336, 23.12.1994, p. 190.

⁶⁰ OJ L 281, 23.11.1995, p. 31.

⁶¹ OJ L 18, 21.1.1997, p. 1.

- (9) Whereas each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the posted worker into the territory, his intended presence and the service or services for which he is to be posted; whereas a compulsory prior declaration should enable the Member State in question to take measure in specific cases on grounds of public order, public security or public health, within the limits set by this Directive; whereas each Member State in which a service is provided should also be able to make it obligatory to obtain, after entry, a temporary residence permit if the time required for the service or services for which the posted worker will reside exceeds six months out of a period of twelve months;
- (10) Whereas each Member State should thus be able to check, particularly if a temporary residence permit is issued, that the residence of the worker posted is for the purpose of providing a service or services in the Member State; whereas the freedom to provide services should always be of a temporary nature which must be determined on the basis of the continuity, frequency, and duration of the service; whereas the validity of the temporary residence permit should be capable of limitation to the period of validity of the EC service provision card on the grounds that the Member State intends to issue, in conformity with the freedom to provide services, a residence permit in accordance with its own national provisions for postings exceeding six or twelve months;
- (11) Whereas for this Directive to be effective, there must be equality of treatment between third-country nationals and citizens of the Union posted as workers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community; whereas, under this Directive, this equality of treatment should be invoked only by service providers who employ third-country nationals; whereas this equality of treatment should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State;
- (12) Whereas Member States should not be able to confer more favourable treatment on service providers established outside the Community than on those established within the Community; whereas the Member States may derogate from this Directive on grounds of public order, public security or public health; whereas the limits of such derogation must be determined with respect to service providers as employers and the workers who are third-country nationals on the basis of the coordination provided for in Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health⁶², as last amended by Directive 75/35/EEC⁶³ as in order to establish a uniform framework for the service provider regardless of the nationality of his staff;

⁶² OJ 56, 4.4.1964, p. 850/64.

⁶³ OJ L 14, 20.1.1975, p. 14.

- (13) Whereas it is vital for the implementation of this Directive to ensure close cooperation between the competent authorities of the Member States; whereas it would be useful for the competent authorities of the Member States to adopt a uniform format for the EC service provision card; whereas the Commission should be empowered to lay down this format and other procedures in connection with the EC service provision card, acting in accordance with the procedure set out in Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas⁶⁴;
- (14) Whereas, this Directive does not affect the competence of the Member States to decide which third-country nationals are to be admitted for the purpose of a paid activity, the conditions on which such admission should be extended or which professional activities are regulated on national territory, and which are not;
- (15) Whereas, in accordance with the principle of proportionality as set out in the third paragraph of Article 3b 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 covers only the checks that precede the provision of cross-border services, but not the checks made afterwards in the Member State in which the service is provided; whereas it is limited to postings for periods of not more than twelve months and to the recognition of diplomas, certificates and other qualifications acquired within the Community;
- (16) Whereas for the purpose of implementing this Directive, Member States should lay down an appropriate system of sanctions;
- (17) Whereas, not later than four years after the date of transposal of this Directive, the Commission must examine its application with a view to proposing any necessary amendments,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

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

⁶⁴ OJ L 164, 14.7.1995, p. 1.

Article 2

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

The EC service provision card shall be issued if it is established that:

- (a) the worker resides in that Member State, in accordance with its legislation;
 - (b) he is affiliated to the social security scheme in the Member State responsible for the risk of sickness or industrial accident, or else is insured against the risk of sickness or industrial accident during his posting to one or more other Member States.
2. The EC service provision card shall be valid for the period during which the worker is in lawful actual employment, which may not exceed
 - (a) twelve months in the case of lawful actual employment for more than twelve months before the card is issued, or
 - (b) six months in the case of lawful actual employment for more than six months before the card is issued.

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

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

3. The EC service provision card shall be renewable only if the conditions as to its issue set out in paragraphs 1 and 2 are fulfilled once more.
4. The EC service provision card shall be a separate document belonging to the service provider, which he puts at the disposal of the posted employed worker described therein.

It shall contain the following data:

- (a) details of the service provider and the posted worker;
- (b) the period of validity;

- (c) the issuing authority and issuing Member State.

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

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

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

Article 3

1. Any Member State in which services are provided shall permit the entry and residence of a worker who is a third-country national to its territory for the purpose of one or more provisions of services, if such person is in possession of the EC service provision card, and of an identity card or passport valid for the period during which the services are to be provided.
2. No Member State in which a service is provided may require from the posted worker or the service provider in his capacity as employer
 - (a) an entry or exit visa;
 - (b) a residence permit other than that specified in paragraph 3; or
 - (c) a work permit or permit for access to a job; or
 - (d) impose any obligation equivalent to those in points (a), (b) and (c).
3. Any Member State in which a service is provided may require the service provider to declare, before the worker enters the territory, the intended presence of the posted worker, the period of presence provided for and the service provision or provisions for which he is to be posted. If the total period required for the service provision or provisions in question exceeds six months out of a period of twelve months, the Member State shall issue, after entry of the posted worker, a temporary residence permit showing that residence is authorised.
4. In order to facilitate the provision of services, any Member State in which a service is carried out shall ensure equality of treatment between third-country nationals and citizens of the Union posted as workers for the purpose of provision of services as regards the recognition of diplomas, certificates and other qualifications acquired within the Community with a view to performing the activity concerned, and issued by a competent authority of a Member State. The Member State shall ensure that legal remedy under

national law is available to the service provider in his capacity as employer in connection with decisions that fail to observe this equality of treatment.

Article 4

1. Member States shall not give more favourable treatment to service providers established outside the Community than to those established within the Community.
2. Member States may not derogate from this Directive except on grounds of public order, public security or public health, in which case Directive 64/221/EEC shall apply *mutatis mutandis*.

Article 5

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

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

Article 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

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

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

Article 9

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

Article 10

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

FINANCIAL STATEMENT

1. TITLE OF THE ACTION

Proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services

2. BUDGET LINE CONCERNED

3. LEGAL BASIS

Articles 57(2) and 66 of the EC Treaty

4. DESCRIPTION OF THE ACTION

4.1 General objective of the action

The proposal for a Directive concerns the introduction of a "EC service provision card" - a document to be issued by the Member State in which a service provider is established and from which he intends to post workers who are nationals of a third country to provide services. Any other Member State in which this service is provided must recognise this document and cease to apply its own requirements regarding visas, residence and access to employment to the worker and service provider concerned.

4.2 Period covered by the action and renewal procedures

The Committee provided for in Article 6 of Regulation (EC) No 1683/95, as referred to in Article 2(4) of the proposal, could begin its work as soon as the proposal is adopted (possible as from 2000). The aim is to facilitate the implementation of the Directive, and in particular administrative cooperation, by adopting a standard format for the "EC service provision card". As soon as the proposal is adopted (possibly in 2001), the Committee will have to operate only to the extent required by changes to this format.

5. CLASSIFICATION OF EXPENDITURE

None

6. TYPE OF EXPENDITURE

None

7. FINANCIAL IMPLICATIONS FOR PART B

None

8. ANTI-FRAUD PROVISIONS

None

9. COST-BENEFIT ANALYSIS

9.1 Specific quantifiable objectives, target population

The aim of the proposal is to ensure that service providers - businesses established within the internal market - can post workers who are nationals of a third country "at any time" by sending a simple prior declaration to authorities of the Member State in which the service is to be provided. To ensure that such posting does not result in unrestricted movements of third-country workers, the declaration system incorporates guarantees by the country in which the service provider is established. To this end, a document must be issued by the Member State in which the service provider is established: "the EC service provision card".

In 1997, 4.98 million employed and self-employed third-country nationals were legally present within the Community (3 % of the total work force). Of these, approximately one in six was self-employed.

9.2 Justification of the action

The initiative concerns the operation of the internal market and hence comes under the exclusive competence of the Community (free movement of services in the internal market). The proposal does not aim at harmonising the rules on admission to a job with an employer in a Member State, nor at extending the Community rules on the recognition of professional qualifications to workers who are third-country nationals.

The "EC service provision card" will ensure that the service provider may post the person in question at any time, which will also lead to a substantial reduction in the many and varied authorisation procedures needed before each posting (visa, residence, work permit) to the Member State in which services are to be provided. Close administrative cooperation will therefore become a necessity for the implementation of this Directive. The adoption of a standard format for an "EC service provision card" is essential.

9.3. Monitoring and evaluation of the action

Article 7 of the proposal for a directive stipulates that, not later than four years after the date of transposal, the Commission shall report to the European Parliament and the Council on its application in the Member States, particularly as regards national arrangements concerning the recognition of professional qualifications acquired within the Community by workers who are third-country nationals.

10. ADMINISTRATIVE EXPENDITURE (PART A OF SECTION III OF THE GENERAL BUDGET)

The effective mobilisation of the necessary administrative resources will result from the annual Commission decision on the allocation of resources to DG XV, particularly on the basis of the additional staff and amounts approved by the budget authority.

10.1 Effect on the number of jobs

Types of job		Staff to be assigned to managing the action		Of which		Period
		Permanent jobs	Temporary jobs	By using existing resources of the DG department concerned	By using additional resources	
Officials or temporary agents	A	0.5		0.5		The years 2000 and 2003
	B	-		-		
	C	0.5		0.5		
Other resources						
Total		1.0		1.0		

10.2 Total financial implications of human resources

Types of job		Staff to be assigned to managing the action		Annual cost
		Permanent jobs Annual amount	Temporary jobs	
Officials or temporary agents	A	EUR 54 000		
	B			
	C	EUR 54 000		
Other resources				
Total		EUR 108 000		

10.3 Increase in other operating expenditure resulting from the action
(EUR '000)

Budget line (No and title)	Amounts					Calculation module
	2000	2001	2002	2003	2004	
A – 7031 Obligatory Committee	19.5	-	-	-	-	2 meetings of 15 experts representing the Member States: EUR 2 x 9 750 = EUR 19 500
A – 7050 Studies and consultations	-	-	-	30	-	Studies for the preparation of the report on the application of the Directive
Total	19.5	-	-	30	-	

Expenditure will be covered by using existing resources of the concerned DG.

Proposal for a
COUNCIL DIRECTIVE

**extending the freedom to provide cross-border services to third-country nationals
established within the Community**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission⁶⁵,

Having regard to the opinion of the European Parliament⁶⁶,

Having regard to the opinion of the Economic and Social Committee⁶⁷,

- (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;
- (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;
- (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 through European Parliament and Council Directive .../.../EC⁶⁸ when the Community clarifies 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

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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;
- (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)⁶⁹; 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 data⁷⁰;
- (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 admit 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,

⁶⁹ OJ L 336, 23.12.1994, p. 191.

⁷⁰ OJ L 281, 23.11.1995, p. 31.

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;

- (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 measure in specific cases on grounds of public order, public security or public health, within the limits set by this Directive; whereas each Member State in which a service is provided should also be able to make it obligatory to obtain, after entry, a temporary residence permit if the time required for the 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 health⁷¹, as last amended by Directive 75/35/EEC⁷²;
- (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 visas⁷³;

⁷¹ OJ 56, 4.4.1964, p. 850/64.

⁷² OJ L 14, 20.1.1975, p. 14.

⁷³ OJ L 164, 14.7.1995, p. 1.

- (14) Whereas, this Directive does not affect the competence of the Member States to decide which third-country nationals are to be admitted for the 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 transposal of this Directive, the Commission must examine its application with a view to proposing any necessary amendments,

HAS ADOPTED THIS DIRECTIVE:

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;

(b) has his residence, in accordance with the legislation of that State;

(c) is not also an employee.

Article 2

1. When a provider of services proposes, in the ordinary course of his business, to move to, and to reside in, one or more 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 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.

2. The EC service provision card shall be valid for 12 months. It 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.

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.
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 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.

Done at Brussels,

*For the Council
The President*

FINANCIAL STATEMENT

1. TITLE OF THE ACTION

Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community

2. BUDGET LINE CONCERNED

3. LEGAL BASIS

Article 59(2) of the EC Treaty

4. DESCRIPTION OF THE ACTION

4.1 General objective

The proposal for a Directive extends the freedom to provide cross-border services to third-country nationals legally established within the Community as self-employed persons. In future, therefore, not only the third-country nationals connected to a company set up in accordance with Articles 58 and 66 of the EC Treaty will enjoy this freedom but also those operating as natural persons.

As regards the conditions governing the movement of the persons concerned, the proposal for a Directive provides for the introduction of a "EC service provision card" on more or less the same terms as for the posting of workers. Moreover, the proposal for a directive aims to facilitate the exercise of this freedom to provide services by the persons as regards the recognition of professional qualifications acquired within the Community. However, this recognition does not mean that the Community rules applicable to the citizens of the Union will be automatically extended to third-country nationals.

4.2 Period covered by the action and renewal procedure

The Committee provided for in Article 6 of Regulation (EC) No 1683/95, as referred to in Article 2(3) of the proposal, could begin its work as soon as the proposal is adopted (possible as from 2000). The aim is to facilitate the implementation of the directive, and in particular administrative cooperation, by adopting a standard format for the "EC service provision card". As soon as the proposal is adopted (possibly in 2001), the Committee will have to operate only to the extent required by changes to this format.

5. CLASSIFICATION OF EXPENDITURE

None

6. TYPE OF EXPENDITURE

6.1 Type of expenditure

None

7. FINANCIAL IMPLICATIONS FOR PART B

None

8. ANTI-FRAUD PROVISIONS

None

9. COST-BENEFIT ANALYSIS

9.1 Specific quantifiable objectives, target population

The aim of the proposal is to ensure that the third-country nationals legally established in the Community can provide services, on a temporary basis, without having to establish themselves in another Member State, regardless of their economic status in the Member State in which they are established (connected to a company or independent entrepreneur).

In 1997, 4.98 million employed and self-employed third-country nationals were legally present within the Community (3% of the total work force). Of these, approximately one in five was self-employed.

9.2 Justification of the action

The initiative concerns the operation of the internal market and hence comes under the exclusive competence of the Community; thus, the principle of subsidiarity does not apply to this specific situation. The proposal does not aim at harmonising the rules on admission of self-employed persons to a Member State, nor at automatically extending the Community rules on the recognition of professional qualifications.

In view of the first proposal for a directive, it is not justifiable that a worker may be posted to provide services while a self-employed person may not provide a service on his own account and responsibility without first setting up a company in a Member State.

The "EC service provision card" will ensure that self-employed persons may move at any time as soon as the document has been issued. Close cooperation between the authorities of the Member States will therefore be vital for the implementation of this directive. The adoption of a uniform format for a "EC service provision card" is therefore essential. The Commission may not adopt this format before consulting the Member States via the Committee established under Regulation (EC) No 1683/95.

9.3. Monitoring and evaluation of the action

Article 7 of the proposal for a Directive stipulates that, not later than four years after the date of transposal of the directive, the Commission shall report to the European Parliament and the Council on its application in the Member States, particularly as regards national arrangement concerning the recognition of professional qualifications acquired within the Community by third-country nationals.

10. ADMINISTRATIVE EXPENSES (PART A OF SECTION III OF THE GENERAL BUDGET)

The effective mobilisation of the necessary administrative resources will result from the annual Commission decision on the allocation of resources to DG XV, particularly on the basis of the additional staff and amounts approved by the budget authority.

10.1 Effect on the number of jobs

Types of job		Staff to be assigned to managing the action		of which		Period
		Permanent jobs	Temporary jobs	By using existing resources of the DG department concerned	By using additional resources	
Officials or temporary agents	A	0.5		0.5		The years 2000 and 2003
	B	-		-		
	C	0.5		0.5		
Other resources						
Total		1.0		1.0		

10.2 Total financial implications of human resources

Types of job		Staff to be assigned to managing the action		Annual cost
		Permanent jobs annual amount	Temporary jobs	
Officials or temporary agents	A	EUR 54 000		
	B			
	C	EUR 54 000		
Other resources				
Total		EUR 108 000		

10.3 Increase in other operating expenditure resulting from the action

(EUR '000)

Budget line (No and title)	Amounts					Calculation module
	2000	2001	2002	2003	2004	
A - 7031 Obligatory Committee	19.5	-	-	-	-	2 meetings of 15 experts representing the Member States: EUR 2 x 9 750 = EUR 19 500
A - 7050 Studies and consultations	-	-	-	30	-	Studies for the preparation of the report on the application of the Directive
Total	19.5	-	-	30	-	

Expenditure will be covered by using existing resources of the concerned DG.

IMPACT EVALUATION

IMPACT OF THE PROPOSALS ON BUSINESS AND PARTICULARLY SMEs

Titles: Proposal for a Directive on the posting of workers who are third-country nationals for the provision of cross-border services

Proposal for a Directive extending the freedom to provide cross-border services to third-country nationals established within the Community

In view of the principle of subsidiarity, why is Community legislation necessary in this field and what are the main objectives?

The first proposal concerns Community businesses that provide cross-border services through posted staff, which include third-country nationals who are legally present and admitted to paid employment within the Community. By definition, this proposal goes beyond the territorial competences of the Member States. It concerns the issuing of a document by the Member State in which the service provider is established and the third-country national resides establishing the lawfulness of the situation in that Member State. The temporary presence of third-country nationals on the territory of another Member State will be permitted on presentation of the document and on the basis of a declaration of presence.

While the second proposal has similar aims as regards the temporary presence of self-employed persons for the purpose of providing services, it mainly concerns extending the freedom to provide services to nationals of a third country.

The impact on business

Who will be affected by the proposals?

With the exception of transport, all service sectors will be affected, particularly commercial and computer services, architecture/engineering, the construction industry, advertising, services in connection with culture and sport, etc., and also metallurgy and agriculture.

What measures will businesses need to take to comply with the proposals?

The proposals reduce the steps to be taken to simply declaring the intended presence of a third-country national and the reason for his presence before his movement. Given that third-country nationals are concerned, it is inevitable that businesses will have to take steps to obtain authorisation from the authorities in the country in which they are established. This authorisation will certify the lawfulness of the situation of the service provider and will be valid in all the other Member States for the purpose of providing services, thus obviating the need for the same steps to be taken in each of the Member States in which services are to be provided.

As regards the extension of the freedom to provide services to third-country nationals, these will in future basically be on an equal footing with national service providers in the Community

as regards the requirements in the Member States already applicable to service providers in the internal market.

What are the likely economic effects of the proposals?

Employment: The movement of third-country nationals for the provision of services will not affect the rules of the labour market. The workers concerned will not be looking for jobs in the Member State in which they provide the service, but will return to the Member State in which they are legally present when the service is completed.

Investment and the creation of new businesses: The provision of services is a right which does not cover the creation of new businesses in other Member States, but is favourable to investments in the internal market. As regards conditions of work and employment, these directives do not add anything not already contained in Directive 96/71/EC.

Competitiveness: The mobility of the regular staff employed by a business is of increasing importance since businesses need to adapt to rising market demands as regards the quality and speed of services. Moreover, these proposals aim to reduce the disparities between national rights by covering both employed and self-employed persons.

Do the proposals contain measures to take account of the specific situation of small and medium-sized businesses (reduced or different requirements)?

The various steps service providers have to take before they can post their staff are a greater burden on SMEs than other businesses. In the vast majority of cases, the second directive in practice covers natural persons, who tend to represent small businesses.

Consultation

The high-level group on the free movement of persons (the "Veil" group) recommended in its report of 18 March 1997 that the Commission "take Community action" on the first Directive.

In June 1997, the Member States were consulted on this recommendation and its possible scope. 13 Member States replied.

In July 1997, the competent Commission departments consulted 22 organisations, of which 11 replied, i.e. CEC (professional and managerial staff), CES, EUROCADRES, EURO-IFET, EFBWW, FIEC, GEOPA-COPA, HOTRECA, UNICE, ORGALIME-WEM, UEPAME/EUROPMI.

In most cases reactions were favourable. Certain unions preferred to wait for a Commission proposal. One organisation (FIEC) was against a proposal, while stressing that the existing national provisions should be simplified. A large majority was opposed to the idea of extending a Community action to temporary employment agencies.

In view of the support for action on the posting of workers, the Commission thinks it is essential also to include an action which has been explicitly provided for in the EC Treaty since 1957: the

extension of the freedom to provide services to third-country nationals established within the Community.

ISSN 0254-1475

COM(99) 3 final

DOCUMENTS

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04 06 11 10

Catalogue number : CB-CO-99-042-EN-C

Office for Official Publications of the European Communities

L-2985 Luxembourg