



COMMISSION OF THE EUROPEAN COMMUNITIES

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Amended 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**

Amended 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 pursuant to Article 250 (2)
of the EC-Treaty)

EXPLANATORY MEMORANDUM

1. BACKGROUND

On 27 January 1999, the Commission adopted two proposals for Directives¹, viz.

- the 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 (hereinafter referred to as the first proposal)²,
- the proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community (hereinafter referred to as the second proposal)³.

The proposals were sent to Parliament and the Council on 12 February 1999. On 26 May 1999, the Economic and Social Committee delivered an opinion on these proposals⁴. Parliament was consulted on the first proposal under the codecision procedure. The Council consulted Parliament on the second proposal on 25 January 2000.

Parliament entrusted the examination of the two proposals to its Committee on Legal Affairs and the Internal Market (responsible for the report), to its Committee on Employment and Social Affairs, to its Committee on Citizens' Freedoms and Rights, and to its Committee on Budgets (the three of which were consulted for an opinion). After examining the opinions of the other three committees (adopted on 23 November 1999, 29 November 1999 and 31 March 1999 respectively), the Committee on Legal Affairs and the Internal Market approved its own report⁵ on 11 January 2000. Meeting in plenary session on 3 February 2000, Parliament adopted its opinion approving the Commission's proposals subject to the amendments made and called upon the Commission to amend its proposals in consequence, in accordance with Article 250(2) of the EC Treaty.

2. THE AMENDED PROPOSAL

The European Parliament supports the main thrust of the Commission's proposals, including the need to introduce an "EC service provision card". The support extends to the legal basis cited by the Commission, since the proposals belong in the area of the free movement of services.

The amendments proposed by Parliament are partly technical and partly aimed at supplementing the system for issuing the "EC service provision card". The Commission has accepted half the amendments, some of them subject to a revamp and changes to the wording, while retaining the spirit desired by Parliament and the necessary consistency in the amendments between the two proposals.

¹ COM (1999) 3 final of 27.1.1999.

² OJ C 67 of 10.3.1999, page 12.

³ OJ C 67 of 10.3.1999, page 17.

⁴ OJ C 209 of 22.7.1999, page 5.

⁵ Reports of the EP of 2 February 2000 (A5-0007/2000 and A5-0012/2000).

3. THE FIRST PROPOSAL

3.1. The amendments accepted by the Commission in whole or in part

3.1.1. The recitals

The sixth recital has been amended to incorporate Amendment 2, which reinforces the point that all the elements of the proposal belong in the area of the free movement of services. For reasons of wording, the original sixth recital has been split into two recitals (6 and 6a). The amendments to the other recitals correspond to the amendments to the articles relating to them (see below).

3.1.2. The body of the text

Article 2(1)

The new version takes account of Amendments 7, 9 and 10. Parliament is calling for there to be no reference to Directive 96/71/EC for the definition of "posting the worker". In addition it introduces increased flexibility for the service provision card system: the service provider may apply for a card valid not simply for the whole of the Community, but also for one or more Member States.

Article 2(1)(a)

First of all, the circumstances in which a service provider may post a worker are set out explicitly; when issuing the card, the Member State in which the service provider concerned is established thus checks that it is not a temporary employment agency which is only making the worker available to a user undertaking. Amendments 7 and 8 are thus incorporated in such a way that the Member State in which the service provider is established ensures that the card scheme is properly applied and that recognition of the card by the other Member States remains subject to clear rules.

In addition, the Commission has taken over elements of Amendment 10, such as:

- the condition of "normal residence", in the sense of regular residence of 12 months or more, and excluding nationals of third countries whose residence is only tolerated, not authorised;
- changes to the wording relating to cover against the risk of sickness and occupational accidents.

Article 2(2) and (3)

These provisions take account of Amendment 11, which suggests establishing a closer link between the duration of the lawful employment before the issue of the card and the period of validity of the card.

In addition, the definition of "lawful employment" has been clarified. However, the Commission cannot accept a minimum of three months of lawful employment before the card can be issued (Amendment 11). That period could make it possible to recruit third-country nationals in their country of origin and to post them almost immediately to other Member States. The proposal for a period of six months is therefore retained.

Article 2(3)(a)

As a result of Amendment 10, there is a need to clarify the consequences in cases where the conditions for issuing the card are suddenly no longer met, e.g. termination of the employment contract between the service provider and the posted worker. Amendment 10 is therefore incorporated.

Article 2(4)

As a result of Amendment 10, the Commission agrees to set out the obligations of the service provider once the validity of the card expires. In this respect, a solution is suggested for all cases, including the normal expiry of the period of validity of the card.

Article 2(5) (and the eighth recital)

The amendments incorporate the first part of Amendment 15 on the relationship between the Member State issuing the card, the service provider and the posted worker when an employment contract is terminated. The second part of Amendment 15 concerns the relationship between the individuals concerned and the Member State in which a service is being provided; it is therefore incorporated into Article 3(3) of the amended proposal (*see below*).

Article 3(1)

The addition incorporates the entire Amendment 16. However, it is considered necessary to replace the requirement of a simple copy of a declaration by the service provider transmitted to the authorities of the host Member State with the condition of proper confirmation.

Article 3(3) (and the ninth recital)

The specific addition of the obligations of the service provider vis-à-vis the host Member State when the employment contract is terminated has been deleted (cf. above, Article 2(5)).

Article 5a (and recital 13a)

In Amendment 14, Parliament calls for the setting-up of a new advisory committee to assist the Commission in adopting the implementing Regulation and in taking account of Parliament's new rights subsequent to the adoption of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

The first point has not been accepted. The proposal provided for the adoption of one single implementing measure. The creation of a new committee appears disproportionate.

However, the new Article 5a ensures that Parliament's new rights under the co-decision procedure subsequent to the new Decision 1999/468/EC, and in particular Article 8 thereof, are respected.

3.2. The amendments rejected by the Commission

3.2.1. The title of the card

Under Amendment 1, the title should be "EU service provision card". However, since it is a document based on Community law which has binding effects for individuals and authorities and in the Member States, the EC Treaty does not allow this.

3.2.2. The recitals

Amendment 4 seeks to delete the justification for a temporary residence permit for a host Member State in recital 10, although the relevant provision is not deleted. Also, Amendment 6 concerning recital 15 calls for a clarification, which is of little use, of the checks made "afterwards" in the host Member State. This is not acceptable.

3.2.3. The body of the text

Article 2(1), second subparagraph

Some parts of Amendment 10 have been accepted by the Commission (cf. above). However, this amendment also sets out the following conditions for the issue of the card:

- normal residence of the worker to be posted in the Member State in which the service provider is established for a duration of at least three months longer than the validity of the card;
- an automatic check by the Member State in which the service provider is established for any problems of public order, public security or public health, as set out in Directive 64/221/EEC, in the other Member States concerned;
- and, at the same time, a right of objection by the other Member States against any condition for issuing the card (including those set out above). Since this right is unlimited in time, it could be exercised before and after the issuing of the card.

The Commission proposes, on the other hand:

- a lawful status of the third-country national in the Member State in which the service provider is established whose duration need not exceed the period of validity of the card;
- that the Member State in which the service provider is established and the worker to be posted is resident provide proof of the lawful nature of the worker's situation on its territory; this check would be carried out subject to even more detailed conditions in this amended proposal;
- the Member State in which a service is provided recognises the card but may require the service provider to inform its authorities, before a posting, of the details of the service provision and the person to be posted; the purpose of this is to allow that Member State to make a general check on the movement of persons on its territory, whatever the situation regarding the Community's internal borders

and, if necessary, to derogate from the Directive for reasons of public order, public security or public health, as set out in Directive 64/221/EEC.

These aspects of Amendment 10 are rejected not because of the substance but because of the instruments proposed. Although the Commission agrees with giving the Member States a role, particularly in view of their public-order considerations, Parliament's suggestions are not practical for the authorities responsible and the individuals concerned.

Parliament's agreement on the applicability of Directive 64/221/EEC demonstrates that there is no difference of opinion with the Commission as to the substance. Moreover, the above-mentioned additional period of three months would mean that the third-country national had a *de facto* period of three months to return to the Member State in which the service provider is established, whereas he should return there immediately after finishing providing a service in another Member State. In particular, his return is ensured by the rule on readmission set out in Article 2(5) of the proposal.

Article 2(4), first subparagraph

Amendment 13 must be rejected as regards the item to be added concerning the nature of the activity. It is not clear from either the text of the amendment or the justification provided by Parliament whether this applies to the activity of the service provider or that of the posted worker.

Article 3(3) (and recital 9)

Amendments 3 and 17 aim to limit the scope a host Member State has to require the service provider to notify the posting of an employee who is a third-country national before his entry where the worker is not in possession of a valid card.

These amendments are unacceptable because they would mean that posting became easier without the card and the host Member State was deprived of any check on the lawfulness of the situation in the Member State in which the service provider is established. Moreover, the objective of the draft Directive is to establish coordination between Member States under the service provision card scheme, and not to deal with other situations where a service provider does not wish to make use of the card scheme.

Article 4

In a new Article 4(2a), it is suggested that Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services should be fully applicable. As the Commission already confirmed in its initial proposal, this Directive already applies to third-country nationals posted for the provision of services. Amendment 18 is therefore unnecessary.

Article 5(1) to (3)

Amendment 19 calls for cooperation measures amongst the Member States based essentially on the approach that there is no need to identify the responsible authorities in the Member State in which a service may be provided, since the latter is also responsible for applying this Directive. This follows the line already proposed

in Amendments 10 and 17 (cf. above). Amendment 19 is therefore not acceptable for the same reasons as set out above. The role of these authorities is fundamental for the proper application of the Directive.

4. THE SECOND PROPOSAL

4.1. The amendments accepted by the Commission in whole or in part

4.1.1. Article 1(3)(a), Article 2(2) and Recital 5a

Parliament wished to exclude the so-called "fake self-employed", i.e. self-employed persons who, according to a specific tradition or specific legislation in many Member States, are only formally self-employed but should in fact be considered as employees working in a relationship of dependence on, and subordination to, an undertaking in view of the circumstances in which they exercise their activities.

The Commission accepts the need for clarification in order to prevent the risk of possible abuses concerning the "true beneficiaries" of this Directive. However, it is not in favour of the solution set out in Amendments 9 and 15. These would have left the Member States in which a service was provided with a right of objection; this right would allow them to derogate from the Directive "in individual cases if the activity of the service provider deviates significantly from the conditions for working as a self-employed person laid down under national law".

The solution suggested by Parliament lacks clarity and legal certainty, both for the beneficiaries of this Directive, who would not know the real value of the card once issued, and for the authorities in the Member States who had to recognise the card. It is preferable to fine-tune the definition of service provider set out in Article 1. This takes into account the fact that practically all the Member States assume that an employee has a relationship with only one undertaking – a relationship in which the degree of dependence and subordination determine whether the activity is that of an employed or self-employed person. However, where a self-employed person has relationships with more than one undertaking in the course of time, any doubts as to his status as a self-employed person can no longer be justified.

The Commission therefore proposes that maintaining a principal establishment requires contractual relations with at least two recipients of services within the previous 12 months (see Article 1(3)(a)), and that a third-country national cannot obtain a service provision card in the absence of continuous activities in the Member State in which he has his principal establishment(see Article 2(2)). The new recital 5 explains the underlying reasons.

4.1.2. Points identical to the first Directive

The amendments to the following Articles have been incorporated for same reasons as for the first Directive:

- Article 1(3)(b) concerning residence (Amendment 7);
- Article 2(1), second subparagraph, 2(1a), 2(2a) and 2(2c) (Amendment 9 in part);

- Article 2(3), first subparagraph (Amendment 9 in part and Amendment 10), including the nature of the service provider's activities, added as an item which must feature on the service provision card;
- Article 3(1), opting for a solution consistent with the first Directive (Amendment 12);
- Article 5a as regards Parliament's right to information (Amendment 11 in part).

4.2. The amendments rejected by the Commission

4.2.1. Amendments acceptable for the first Directive but not for the second Directive

Parliament suggested identical amendments for the first and second Directives, although there are no reasons justifying incorporation into the second one:

Recital 7 (Amendment 2): elimination of legal uncertainties was also cited as the objective of the second Directive, although this measure, instead of relating to the existing situation, is aimed at creating new rights for a certain category of third-country nationals.

Article 5a(2):

Amendments 4 and 11 lay down a procedure for adopting the implementing measure which would be identical to that for the first Directive. However, since the adoption of the second Directive is the sole responsibility of the Council, an implementing measure is not likely to jeopardise the co-decision procedure set out in Article 251 of the Treaty. Parliament's rights relating to co-decision are thus not affected, since Article 8 of Decision 1999/468/EC does not apply.

4.2.2. Rejection of amendments for the same reasons as cited for the first Directive

As the Commission has been unable to accept some amendments already tabled for the first Directive, it is again not in a position to accept almost identical amendments to the second Directive. Reference is therefore made to the reasons outlined in the case of the first Directive. More specifically, this concerns the title of the card (Amendment 1), Article 2(1), second subparagraph (the unacceptable part of Amendment 9), Article 3(3) and Recital 10 (Amendments 3 and 14), and Article 5 (Amendment 16).

4.2.3. Rejection of other amendments

Amendments 5, 6 and 7 call for mere changes to the wording of Article 1. Since the gist of the initial proposal in this respect is clear, the Commission can see no reason to amend its proposal.

Amended 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles ~~57~~ **47** (2), et ~~66~~ **55** thereof,

Having regard to the proposal from the Commission⁶,

Having regard to the opinion of the Economic and Social Committee⁷,

Acting in accordance with the procedure laid down in Article ~~189b~~ **251** of the Treaty,

Whereas:

- (1) ~~Whereas~~, Pursuant to point (c) of Article 3(**1**) of the Treaty, the abolition, between Member States, of obstacles to the free movement of services constitutes one of the objectives of the Community.
- (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.
- (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. Furthermore, the

⁶ OJ C 67 of 10.3.1999, page 12.

⁷ OJ C 209 of 22.7.1999, page 5.

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;~~ **must aim to eliminate the legal uncertainty associated with postings and thus facilitate the free movement of services. The service provider must be entitled to ask for a service provision card in his Member State of establishment with a view to providing one or more services in other Member States. The card must be valid, depending on the application, in one or more or all of the other Member States.**
- (6a)** ~~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)⁸. ~~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 data⁹.
- (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, **for instance when the employment contract with the service provider is terminated.** ~~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 services¹⁰.

⁸ OJ L 336 of 23.12.1994, page 190.

⁹ OJ L 281, 23.11.1995, page 31.

¹⁰ OJ L 18, 21.1.1997, page 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. **The same applies when the employment relationship is suddenly terminated and the posted worker's stay on the territory of that Member State is thus no longer required for the provision of a service.** ~~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 health¹¹, as last amended by Directive 75/35/EEC¹² in order to establish a uniform framework for the service provider regardless of the nationality of his staff.
- (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

¹¹ OJ 56 of 4.4.1964, page 850.

¹² OJ L 14 of 20.1.1975, page 14.

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 visas¹³.

(13a) Since the measures needed to implement this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁴, these measures should be adopted according to the regulatory procedure set out in Article 5 of that Decision.

- (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~~ **5**, 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 transposition 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.

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, **for the provision of one or more services to be carried out in one or more or all of the other** Member States ~~on account of one of the situations set out in points (a) and (b) of Directive 96/71/EC~~, the Member State in which the service-provider is established shall be

¹³ OJ L 164 of 14.7.1995 page 1.

¹⁴ OJ L 184 of 17.7.1999, page 23.

obliged to issue to him, at his request, a document to be known as an "EC service provision card".

1a. A posted worker is one whom the service provider intends to post, for his account and under his direction, either under one or more contracts with one or more parties for whom the services are intended, operating in another Member State, or to an establishment or to an undertaking owned by the same group but established in another Member State. The card may be issued only if the service provider in question provides evidence

a) that he is not a temporary employment undertaking hiring out the worker to another user undertaking;

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

c) 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. that the worker is insured against the risk of sickness and industrial accident at the time of his posting to the other Member State(s) concerned by the social security institution of the Member State in which the service provider is established, or by a private insurance scheme.

2. The EC service provision card shall be valid for the period during which the worker is in lawful actual employment~~which may not exceed~~. **The period of validity may not exceed the period of lawful employment preceding the issue of the card, and may under no circumstances exceed 12 months. The period of preceding lawful employment may not be less than six months.**

~~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 card, which permits access to a job either with the applicant service provider or with another employer established in the Member State in question.~~ **a paid activity which may be carried out by virtue of a provision of Community law or of legislative, regulatory or administrative provisions of the Member State in which the service provider is established, by a worker who legally resides in that Member State, excepting persons possessing documents which only confirm that their presence in that Member State is only accepted pending their expulsion.**

~~"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, **1a** and 2 are fulfilled once more.

3a. The EC service provision card shall lose its validity if one of the conditions set out in paragraphs 1, 1a and 2 is no longer met because of events occurring after the issue of the card.

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. **If the card is no longer valid, the Member State in which the service provider is established shall require him to return the card immediately to its responsible authorities. The card** 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;
- d) the Member State(s) for which the card is valid.**

4a. 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~~ **Article 5a(2).**

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, **including the termination of the employment relationship between the service provider and the worker in question.**

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, an identity card or passport valid for the period during which the services are to be provided, **and a statement from the service provider entrusting him with the provision of a service, showing the probable duration of the stay.**

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; **that Member State may also require the service provider to notify immediately the termination of the employment contract.**

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 5a

- 1. The Commission shall be assisted by the committee set up by Article 6 of Regulation (EC) No 1683/95.**
- 2. If reference is made to this paragraph, the procedure set out in Article 5 of Decision 1999/468/EC shall apply, while respecting the provisions of Article 7(3) and Article 8 of that Decision.**
- 3. The period provided for in Article 5(6) of Decision 1999/468/EC is fixed at three months.**

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

Amended 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~~49 thereof,

Having regard to the proposal from the Commission¹⁵,

Having regard to the opinion of the European Parliament¹⁶,

Having regard to the opinion of the Economic and Social Committee¹⁷,

Whereas:

- (1) ~~Whereas~~Pursuant to point (c) of Article 3(1) of the Treaty, the abolition, between Member States, of obstacles to the free movement of services constitutes one of the objectives of the Community. ~~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~~ 48 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.

¹⁵ OJ C 67 of 10.3.1999, page 17.

¹⁶ Opinion given on 3.2.2000 (not yet published in the Official Journal).

¹⁷ OJ C 209 of 22.7.1999, page 5.

- (4) ~~Whereas~~It is appropriate, therefore, to introduce such an extension at a time when, through European Parliament and Council Directive .../.../EC¹⁸, the Community is clarifying the conditions for posting workers who are nationals of a third country for the provision of services. ~~whereas~~ In view of Article 64 ~~51~~⁵¹(1) of the Treaty, the scope *ratione personae* of this Directive cannot be extended to service providers operating in the transport sector except by a specific act adopted under the Treaty provisions governing the common transport policy.
- (5) ~~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.
- (5a) A self-employed worker who is a third-country national may benefit from the freedom to provide services only if he maintains his principal establishment in a Member State and if his residence is authorised for at least twelve months. If there are doubts as to the self-employed status of a third-country national, it is essential for a person covered by this Directive to be properly identified.**
- (6) ~~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)¹⁹. ~~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 data²⁰.
- (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.

¹⁸ OJ L ...

¹⁹ OJ L 336 of 23.12.1994, page 190.

²⁰ OJ L 281, 23.11.1995, page 31.

- (9) ~~Whereas~~The EC service provision card issued by the Member State in which the self-employed person is established should thus afford the necessary guarantee that any other Member State in which services are provided will permit the entry and residence of that person for the purpose of one or more services, namely residence during and at the time of the provision of the service. ~~whereas~~ This guarantee should include the obligation not to consider the movement as an interruption of the period of residence and of the initially permitted self-employed activity, and in particular not, under any circumstances, to refuse readmission of the person concerned. ~~whereas~~ The Member State in which the service is provided should therefore no longer be able to impose its own requirements as regards entry and residence and access to a self-employed activity.
- (10) ~~Whereas~~Each Member State in which a service is provided should be able to make it obligatory to declare, before the entry of the provider concerned into the territory, his intended presence and the service or services for which he is moving. ~~whereas~~ An obligation to make a prior declaration should enable the Member State in question to take measures in specific cases on grounds of public order, public security or public health, within the limits set by this Directive. ~~whereas~~ Each Member State in which a service is provided should also be able to make it obligatory to obtain, after entry, a temporary residence permit if the time required for the services for which the self-employed person is moving exceeds six months out of a period of twelve months. ~~whereas~~ The period of validity of a residence permit should be limited to the period of validity of the EC service provision card on the grounds that the Member State intends to issue a residence permit in accordance with its own rules in the case of residence for a period of more than twelve months.
- (11) ~~Whereas~~For this extension to be effective there must be equality of treatment between third-country nationals and citizens of the Union in their capacity as service providers as regards the recognition of diplomas, certificates and other qualifications acquired within the Community. ~~whereas~~ This equality of treatment should be restricted to the provision of services. ~~whereas~~ It should not cover diplomas, certificates and other qualifications acquired in a third country and only recognised in a Member State.
- (12) ~~Whereas~~The Member States should not be able to confer more favourable treatment on self-employed persons established outside the Community than on those established within the Community. ~~whereas~~The Member States should be able to derogate from this Directive on grounds of public order, public security or public health. ~~whereas~~ The limits of such derogation should be determined with respect to the third-country national service providers concerned on the basis of the coordination provided for in Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health²¹, as last amended by Directive 75/35/EEC²²;
- (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

²¹ OJ 56 of 4.4.1964, page 850.

²² OJ L 14 of 20.1.1975, page 14.

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 visas²³.

(13a) Since the measures needed to implement this Directive are measures of general scope within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission²⁴, these measures should be adopted according to the regulatory procedure set out in Article 5 of that Decision.

- (14) ~~Whereas~~ This Directive does not affect the competence of the Member State to decide which third-country nationals are to be admitted for the purposes of a self-employed activity, the conditions on which such admission should be extended or which professional activities are regulated on national territory, and which are not;
- (15) ~~Whereas~~In accordance with the principle of proportionality as set out in the third paragraph of Article~~3b~~ **5** of the EC Treaty, this Directive does not go beyond what is necessary for achieving the objective of the free movement of services. ~~whereas~~ It allows Member States to make their checks to determine whether a third-country national is providing cross-border services on a temporary basis or is pursuing a permanent activity on the territory of a Member State other than the one in which he has his main establishment. ~~whereas~~ It is limited to movements for periods of not more than twelve months for the purpose of providing services in another Member State, and to the recognition of diplomas, certificates and other qualifications acquired within the Community.
- (16) ~~Whereas~~For the purpose of implementing this Directive, Member States should lay down an appropriate system of sanctions.
- (17) ~~Whereas~~Not later than four years after the date of transposition of this Directive, the Commission must examine its application with a view to proposing any necessary amendments,

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,

²³ OJ L 164 of 14.7.1995, page 1.

²⁴ OJ L 184 of 17.7.1999, page 23.

- 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.~~

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

- b) **resides, in accordance with the legislation of that State, for a period of 12 months or more, excepting persons possessing documents which confirm that their presence is only accepted pending expulsion.**
- c) is not also an employee.

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 or all of the** other Member States, in his capacity as such, the Member State in which he is established shall be obliged to issue to him, at his request, a document to be known as an "EC service provision card".

1a. ~~For the purposes of the first paragraph, confirmation shall be given~~**The card may be issued only if the service provider in question provides evidence**

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

b) 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 that he is insured against the risk of sickness and industrial accident at the time of his posting to the other Member State(s) concerned by the social security institution of the Member State in which the service provider is established, or by a private insurance scheme.

2. The EC service provision card shall be valid for the **period during which the service provider continues to have a residence in the Member State in which he is established, excepting persons possessing documents which confirm that their presence is only accepted pending expulsion.**

2a. ~~The EC service provision card~~ **It shall be renewable only if the conditions as to its issue set out in paragraphs 1, 1a and 2 are fulfilled once more.**

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

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

- a) details of the service provider, **including the nature of his activities in the Member State in which he is established;**
- b) the period of validity;
- c) the issuing authority and issuing Member State;
- d) the Member State(s) for which the card is valid.**

The precise details, a specimen of the document to be issued, and the technical specifications designed to prevent falsification shall be laid down ~~in an implementing regulation~~ in accordance with the procedure laid down in ~~Article 6 of Regulation (EC) No 1683/95~~ **Article 5a(2).**

- 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,~~ **and a statement from the service recipient confirming the provision of a particular service, showing the probable duration of the stay.**
- 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 5a

1. The Commission shall be assisted by the committee set up by Article 6 of Regulation (EC) No 1683/95.
2. If reference is made to this paragraph, the procedure set out in Article 5 of Decision 1999/468/EC shall apply, while respecting the provisions of Article 7(3) of that Decision.
3. The period provided for in Article 5(6) of Decision 1999/468/EC is fixed at three months.

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