Application of Directive 96/71/EC on the posting of workers

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PURPOSE : to lay down guidelines on the posting of workers in the framework of the provision of services.

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

and proportionality.

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

Following the adoption by the European Parliament on 16 February 2006 of a legislative resolution on the proposal for a directive on services in the internal market (so-called Bolkestein Directive **COD/2004/0001**), the Commission presented an amended proposal, in which Articles 24 and 25 of the initial proposal setting out specific provisions on the posting of workers are deleted. In these Articles, the Commission proposed the scrapping of certain administrative obligations concerning the posting of workers, accompanied by measures to reinforce administrative cooperation between Member States.

The Commission undertook to draw up **guidelines** to clarify the prevailing Community law on the administrative procedures dealt with in Articles 24 and 25. This Communication tells the Member States how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC and how to achieve the results required by the Directive in a more effective manner. The evidence gathered in the Commission's report SEC(2006)0439, which is annexed to the present Communication, shows that there is considerable scope for improving access to information, administrative cooperation and monitoring of compliance, *inter alia* by identifying and disseminating best practices.

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

Questions relating to control measures: in its case law, the Court accepted that Member States could verify that no abuses of the freedom to provide services had taken place, for example the use of workers from third countries on the labour market of the host Member State. It also accepted the justification for

the inspection measures necessary to monitor the observance of obligations justified under the general interest. However, the Commission would like to point out that, when performing inspections as part of

the implementation of the Directive, Member States must abide by Article 49 EC and refrain from creating or upholding unjustified and disproportionate restrictions to the free provision of services within the Community. The Court has underlined several times that these inspections must be suitable for achieving the objectives pursued without restricting this freedom any more than necessary.

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

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

The requirement to obtain authorisation from the competent authorities of the host Member State or to be registered with them, or any other equivalent obligation: the Commission concludes that that any rules which make the posting of workers subject to systematic prior control, including by way of compulsory and systematic prior authorisation or registration, would be disproportionate.

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

The requirement to keep and maintain social documents on the territory of the host country and/or under the conditions which apply in its territory: according to the Commission, the host Member State must be able to demand, in accordance with the principle of proportionality, that documents be kept in the workplace which are, by their nature, created there, such as time sheets or documents on conditions of health and safety in the workplace. The host Member State cannot demand a second set of documents if the documents required under the legislation of the Member State of establishment, taken as a whole, already provide sufficient information, to allow the host Member State to carry out the checks required.

Measures which apply to posted workers who are nationals of third countries: the Commission states that the host Member State may not impose administrative formalities or additional conditions on posted workers from third countries when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host Member State to check that these conditions are complied with in the Member State where the service provider is established.

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

Cooperation between Member States: Member States are asked to take the necessary measures to ensure that their liaison offices and/or monitoring authorities have the necessary equipment and resources to respond effectively to requests for information and cross-border cooperation from the competent authorities of the other Member States. The Commission will continue to support the Member States in

this area, especially by making more appropriate electronic systems available, and will monitor their progress closely.

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