

**January 2003**

**Report from the Commission services on the implementation  
of 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**

The Directive concerning the posting of workers (the PWD)<sup>1</sup> was adopted in 1996. The Member States had to implement it by 16 December 1999. The Directive, in essence, defines the set of terms and conditions of employment of the host state that must be guaranteed to workers posted in its territory, irrespective of the law that governs the contract of employment of the posted worker.

Under Article 8 of the Directive, the Commission shall review the operation of the Directive with a view to proposing the necessary amendments to the Council. This report looks into the national measures transposing the PWD with a view to facilitating the assessment of the operation of the Directive.

The objective of the present report is not to pronounce on the compatibility of the national transposing measures referred to in this report with the Directive and the Treaty. Some of the measures mentioned in the report may already have been condemned by the European Court of Justice or may be subjected to infringement proceedings. This report is without prejudice to the positions which the Commission shall take in particular in the context of possible infringement proceedings.

Even before the adoption of the Directive, several Member States - **Germany**<sup>2</sup>, **Austria**,<sup>3</sup> and **France**<sup>4</sup> - had already introduced their own national legislation on the posting of workers in order to address distortions to competition and the adverse effects on the protection of workers resulting from the transnational provision of services. These countries may be said to have anticipated the adoption of a Community text. Once the Directive was finally adopted the laws of these countries were amended with a view to meet the requirements of Directive<sup>5</sup>.

**Spain**<sup>6</sup>, **Denmark**<sup>7</sup>, **Finland**<sup>8</sup>, **Greece**<sup>9</sup>, **Italy**<sup>10</sup>, **the Netherlands**<sup>11</sup>, **Portugal**<sup>12</sup> and **Sweden**<sup>13</sup> transposed the Directive via instruments which took effect following the adoption of the Community text.

At the time of preparing the report, only draft instruments existed in **Belgium** and **Luxembourg**.<sup>14</sup> In the meantime the Belgian law has been adopted.<sup>15</sup>

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<sup>1</sup> 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, 21.1.97, pp. 1-5.

<sup>2</sup> *Arbeitnehmer-Entsendegesetz (AentG)* Act on the posting of workers of 26 February 1996.

<sup>3</sup> Bundesgesetzblatt I 1995/895.

<sup>4</sup> Act of 20 December 1993 and Implementing Decree of 11 July 1994.

<sup>5</sup> Cf. in Germany, the Act of 19 December 1998 amending the Act of 26 February 1996 on the posting of workers; in Austria, the amendment of the AVRAG which took effect on 1 October 1999; in France, the Decrees of 4 September and 29 May 2000 amending the rules of the French Labour Code governing the posting of workers in the framework of the international provision of services.

<sup>6</sup> Act 45/1999 of 29 November 1999.

<sup>7</sup> Act 933 of 15 December 1999, took effect on 17 December 1999.

<sup>8</sup> Act 1146/1999, took effect on 16 December 1999, amended by Act 74/2001 of 26 January 2001 to take into account the adoption of a new law on labour agreements.

<sup>9</sup> Presidential Decree 219 of 28 August 2000, took effect on 31 August 2000.

<sup>10</sup> Legislative Decree No°72 of 25 February 2000.

<sup>11</sup> Act of 2 December 1999, took effect on 23 December 1999.

<sup>12</sup> Act 9/2000 of 15 June 2000.

<sup>13</sup> Act 1999:678, took effect on 16 December 1999.

<sup>14</sup> On 20 December 2002 the Luxembourg law transposing the Directive was adopted (*Detechement de travailleurs et contrôle de l'application du droit de travail, Loi du 20 décembre 2002, Recueil de législations A-*

In **Ireland**, all employment legislation covered by the Directive applies to posted workers.<sup>16</sup>

**In the United Kingdom**, the authorities have not deemed it necessary to adopt any specific instrument to transpose the Directive, since domestic law applies to all workers regardless of their situation. All that has been done is to amend certain more restrictive texts in order to extend their scope to posted workers.

In order to examine the state of transposition of the different aspects of the directive, this report follows the logic and sequence of the directive itself. Hence it addresses in succession:

- the directive's scope (I),
- the terms and conditions of employment designed to benefit workers (II),
- the respect as regards exceptions and reliance on the derogations provided for in the text (III),
- administrative cooperation (IV),
- measures to ensure compliance (V),
- jurisdiction (VI).

## ***I- Scope***

The scope of the directive is defined in five respects: the undertakings covered are those established in a Member State (1); merchant navy undertakings are excluded as regards seagoing personnel (2); the transnational measures coming within the scope of the directive are precisely enumerated (3); the treatment of third country undertakings is elaborated upon (4); and a definition of the notion of "posted worker" is outlined<sup>17</sup> (5).

### **1) Undertakings established in a Member State (Article 1(1))**

**All Member States** have imposed compliance with the rules protecting posted workers on all undertakings established abroad who post workers to their territory.

### **2) The exclusion of merchant navy undertakings as regards seagoing personnel (Article 1(2))**

Most of the national transposition instruments include an explicit exemption concerning merchant navy undertakings. This goes for the **Belgian, Danish, Spanish, Finnish,**

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No 154, 31 décembre 2002.) At the time of finalising this report it had not yet been communicated to the Commission.

<sup>15</sup> Loi 5 mars (Moniteur belge 13 March 2002) and Arrêté royal 29 March 2002 (Moniteur belge 17 April 2002)

<sup>16</sup> Section 20, Protection of Employees (Part-Time Work) Act 2001, Part 3

<sup>17</sup> It must be pointed out that the definition of the concept 'worker' is determined by the law of the host Member State.

**Portuguese and Swedish acts, the Greek Presidential Decree, and the Italian Decree. The draft Luxembourg instrument** also exempt merchant navy undertakings.

### **3) The transnational measures covered (Article 1(3))**

This concerns three situations:

- the posting of workers under a contract concluded between the undertaking making the posting and the party for whom the services are intended, on the undertaking's account, to a Member State,
- the posting of workers to an establishment or to an undertaking owned by a group,
- the hiring out of a worker by a temporary employment undertaking or placement agency to a user undertaking established or operating in a Member State.

In all these cases, the Directive specifies that there must be “an employment relationship between the undertaking making the posting and the worker during the period of posting”.

**The Danish, Finnish and Swedish acts and the Greek decree** have literally transposed Article 1(3) defining the different posting situations that fall within the scope of the Directive.

**In Spain**, the act applies “to undertakings established in a Member State of the European Union or a country which is signatory to the Agreement on the European Economic Area which temporarily posts workers to Spain in the framework of providing transnational services.”. The situations concerned include 1) the posting of a worker on the account of, and under the direction of, his undertaking under a contract concluded between the undertaking and the party for whom the services are intended who is operating or exercising an activity in Spain, 2) posting to an establishment of the undertaking or to an undertaking owned by the group and 3) posting made by temporary employment undertakings.

**In Portugal**, the act concerns postings “with a view to providing services on Portuguese territory, performed by an undertaking established in another Member State...”.

**The French Labour Code** covers workers posted to French territory to provide services there on a temporary basis by an undertaking not established in France. Services include industrial, commercial, crafts and professional activities performed under a works contract, a contract for the hiring out a worker for temporary employment or any other hiring out of workers. On the other hand, French law on the posting of workers applies only provided that the undertaking is not established in France.<sup>18</sup>

**Section 1(1) of the Italian decree** is worded in terms which are very similar to the Directive. However, postings made by temporary employment undertakings are treated in a separate section (section 4) which makes reference to the law concerning temporary work.<sup>19</sup>

The **German act, with reference to collectively agreed terms and conditions of employment**, covers all situations in which a worker is employed by a foreign employer in

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<sup>18</sup> The Directive makes no such restriction. French authorities are considering amending Article L 314-5 of the Labour Code to cover the specific situation of workers posted to an establishment or an undertaking belonging to the same group.

<sup>19</sup> Law of 24 June 1997, No. 196.

the framework of the territorial application of a national collective agreement. Statutory terms and conditions of employment within the meaning of Article 3 of the Directive apply to all workers working within German territory.

The **Luxembourg draft law** concerns all workers exercising an activity on Luxembourg territory.

**The Netherlands act** applies to all workers who exercise an activity in the Netherlands on a temporary basis and whose employment contract is not governed by Netherlands law.

**Austrian** legislation concerns cross-border postings carried out by foreign employers (established in a country other than Austria).

**The Belgian act** covers persons who, under the terms of a contract, provide services against remuneration and under the authority of another person.

#### **4) The treatment of third country undertakings (Article 1(4))**

The Directive prohibits the more favourable treatment of undertakings established in a non-Member State.

**Greek law** replicates the principle set out in the Directive by prohibiting more favourable treatment of undertakings established in a non-Member State.

Similarly, the transposition laws **of all the other Member States except Austria** apply to all undertakings established abroad or to all workers exercising an activity on national territory. The **Austrian** law differentiates between employers established in a country belonging to the European Economic Area (EEA) and employers established in third countries; but third country undertakings are not given more favourable treatment than undertakings established in the EEA.

#### **5) Definitions**

- The Directive defines a “posted worker”, as a worker who, for a limited period, carries out his work in the territory of a Member State other than the state in which he normally works (Article 2(1)).

**In Sweden**, a posted worker means a worker “who customarily carries out his work in another state but who, for a limited period is posted to Sweden”. This replicates the text of the Directive. The text of the **Danish, Finnish and Greek** instruments also transpose the Directive more or less verbatim.

**In Austria**, posting is defined as posting to Austria with a view to providing a continuous service. The interpretation of the legal rules governing posting, reinforced by Austrian private international law, suggests that posting corresponds to temporary transfer of the workplace, which is normally located in the worker’s country of origin.

**French legislation** does not define what is meant by a posting. But it is generally recognised in French law that posting basically implies the maintenance of a contractual relationship with

the employer and the temporary nature of the activity in France (based on the assumption that the worker will return to his own State afterwards).

**The Netherlands Act** does not include a definition of the concept 'posted worker', but it follows from Article 1 of the Act that it applies to "workers who temporarily carry out work in the Netherlands and whose employment contract is governed by legislation other than Netherlands legislation."

The concept of posting is not elaborated upon in **Germany, Ireland, the UK, Italy or Portugal**.

## ***II- Terms and conditions of employment for posted workers***

According to Article 3(1) of the Directive, Member States shall ensure that undertakings, coming within the scope of the Directive, guarantee workers, posted to their territory, the terms and conditions of employment which are laid down by law, regulation or administrative provision and/or collective agreements or arbitration awards which have been declared universally applicable – insofar as they concern the activities referred to in the Annex of the Directive - concerning: working time, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, conditions of hiring out of workers, protective measures for pregnant women, young people and children and equality of treatment between men and women.

Hence the Directive determines **the nature of the standards** which the Member States must apply as well as **the substance** of these standards.

### **1) The nature of the applicable standards**

#### **- Applicability of collective agreements in the Member States**

The question of the application of collective agreements is important in several Member States, inasmuch as pay is mainly determined via such agreements.

**The French legislation** transposing the Directive provides for the application of extended collective agreements. Posted workers in France benefit from "extended collective agreements and conventions, applicable to workers employed by undertakings established in France exercising a principal activity identical to the services being provided by the posted workers".

**Spanish law** concerns collective agreements and arbitration awards at the place and in the sector or branch of activity in question.

Likewise, **Greek law** requires application of the national general collective labour agreement, on which the law confers universal applicability, as well as collective agreements or arbitration awards declared to be of universal applicability under the law on free collective bargaining.

The **Portuguese transposition act** refers to "the terms and conditions of employment provided for by law and in the rules governing collective bargaining in force on the national territory". It specifies that, in the second case, it is mandatory to apply "the collective

agreements and arbitration awards which are the subject of an extension and which are applicable to all undertakings belonging to the sector of activity in the geographical area and in respect of the occupation to which the posting relates”.

**The Finnish act** provides that the provisions of universally applicable collective agreements are applicable to posted workers in respect of leave, working time, and safety at work, as well as minimum pay rates.

**The Belgian act** provides for the application of collective labour agreements which have been declared as *ordre public* by an act of the public authority (Royal Degree).

The same applies to the **draft Luxembourg act**, which expressly refers to collective agreements declared to be of universal applicability and comparable instruments.

**In Germany**, the required universal applicability of collective agreements is brought about either by the extension procedure under general legislation on collective agreements or by an accelerated procedure applicable only in the context of the Act on the posting of workers (*AentG*). In the latter case, the extension is effected by means of a ministerial decree (*Rechtsverordnung*). This accelerated procedure applies only to the building sector<sup>20</sup> and then only to the provisions of collective agreements on minimum pay, including overtime pay, duration of leave, holiday pay and additional holiday pay. The internationally binding effect of all these provisions on employers established abroad is legally imposed by the *AentG* itself.

**In Austria**, the law on the posting of workers was designed as a procedure for extending certain collective labour agreement rules to posted workers. The law provides that these workers shall be entitled to at least the same pay as the pay enshrined in labour agreements for comparable workers granted by comparable employers. The collective labour agreements also apply to posted workers as regards working time.

**In Netherlands**, provisions of collective agreements declared universally binding and related to the terms and conditions of employment listed in the Directive also apply to workers temporarily carrying out work in the Netherlands on the basis of an employment contract governed by foreign legislation. The application of the provisions of collective agreements is however, limited to the activities in the building sector.

**Italian law** requires the application of “collective agreements concluded by the organisations of employers and workers which are the most representative at national level, applicable to workers who provide similar professional services at the place at which the posted workers exercise their activity”.

In certain countries, such as **Denmark, the United Kingdom and Sweden**, there is no procedure for declaring the universal applicability of collective agreements or any system of universally applicable arbitration awards and it has not been considered necessary to devise a specific procedure for applying collective agreements to posted workers. Hence the only rules which these countries apply to posted workers are those enshrined in the law or in other regulatory or administrative instruments.

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<sup>20</sup> This sector corresponds to the activities referred to in the annex to the directive.

**In Ireland**, there is a procedure by which collective agreements may become universally applicable. Collective agreements can be approved by the Labour Court and as a result must be observed by all undertakings in the geographical area and in the profession or industry concerned. Therefore, it was not considered necessary to devise a specific mechanism for applying a agreement to posted workers.

#### **- Determining the branch agreement<sup>21</sup> applicable to posted workers**

**In Germany**, the applicability of extended collective agreements depends on the objective of the organisational unit concerned. One of the decisive criteria is the number of hours the workers devote to building work: if more than half the hours consist of building work, the agreement must normally be enforced. In this case all workers employed by the undertaking benefit from it, regardless of their activity. In the case of posting by a foreign undertaking, a specific solution has been adopted: workers who exercise an activity in Germany, but who are linked to an undertaking established abroad, are deemed to be a business for the purposes of applying the collective agreements and the agreement is applicable if this business basically carries out construction work.

**The French rules** provide that the applicable sectoral agreement shall depend on the main activity of the group of workers which provides the services in France. In accordance with the explanatory circular accompanying the transposition decree, in the case of undertakings exercising several activities the essential criterion for determining the chief activity is the activity of the personnel employed. This procedure for determining the applicable sectoral agreement is different from that used to determine the agreements applicable to undertakings established in France. For these undertakings, the applicable agreement depends on the activity of the **undertaking** and not that of the **workers**.

**Italian law makes reference to** agreements “applicable to workers who provide similar professional services on a subordinate basis at the place where the posted workers exercise their activity”. The **Spanish legislation** covers collective agreements and arbitration awards applicable at the place and in the sector or branch of activity in question.

Research carried out in preparation of this report indicates that the transposition instruments in the other Member States do not contain any details on this question as to the branch agreement applicable.

#### **- Determination of the agreement applicable at territorial level<sup>22</sup>**

With a view to determining the territorially applicable agreement, **German law** provides that posted workers shall come within the remit of the agreement applicable at the place of work. To ensure equal treatment with national employers, as a precondition for an internationally binding effect, German legislation on posted workers also requires domestic employers to grant their employees at least the contractual terms of employment applicable at the place of work.

In accordance with the explanatory circular accompanying the **French** decree, when the scope of the collective agreement is geographically limited (agreement with infra-national territorial

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<sup>21</sup> Agreement applicable as a function of the sector of activity to which the undertaking belongs.

<sup>22</sup> Agreement whose scope is infra-national and hence whose applicability is geographically limited.



scope), the undertakings which are not established in France must, whenever the place where the service is provided is changed, alter the rules to be applied to the workers so as to apply the relevant territorial agreement.

Research carried out in preparation of this report indicates that the transposition instruments in the other Member States do not contain any details on this question as to the territorially applicable agreement.

## **2) The substance of the applicable standards**

Three groups can be distinguished as regards the substance of the standards governing posted workers:

- certain countries have basically reproduced the Directive verbatim and do not specify precisely which provisions of domestic law correspond to the subject matter of the Directive;
- other countries have tried to identify the applicable national rules corresponding to the subject matter covered by the Directive and provide many references to these national rules;
- one Member State, namely the United Kingdom, has not introduced any specific rule concerning the provisions of domestic law applicable to posted workers but has simply expanded, where necessary, the scope of its domestic law.

### **a) Verbatim reproduction of the text of the Directive**

**In Germany**, the transposition instrument virtually reproduces the text of the Directive as regards the key terms and conditions of employment covered by the Directive. The German Act on the posting of workers does not elaborate upon the implications of this general text in the different areas of domestic law concerned.

**In Greece**, the decree transposing the Directive reproduces the wording of the Directive laying down the scope of the imperative rules protecting the rights of posted workers. The only difference concerns the conditions governing the hiring out of workers, notably by temporary employment undertakings. Introduced into Greek law after transposition of the Directive, the provisions governing temporary work do not come within the remit of the law.

**The Italian decree** merely mentions “the working conditions laid down by law and regulatory or administrative provisions, as well as by collective agreements...”.

**In Portugal**, the list of the subjects covered is very similar to that of the Directive.

### **b) Identification of the national rules corresponding to the subject matter covered by the Directive**

**In Austria**, the law requires that employers who post workers pay at least the minimum statutory or regulatory wages earned by workers employed by undertakings established in Austria. Pay levels basically depend on the collective agreements. The transposition act also provides that posted workers shall benefit from the statutory provisions governing working time, temporary agency employment and paid leave. However, the system of paid leave funds for construction workers is not applicable to workers posted from abroad. As part of an

amendment to the Act on Equal Treatment (*Gleichbehandlungsgesetz*), which lays down provisions on the equal treatment of women and men in the workplace, the scope of application of the Act is to be extended in such a way that it makes express reference to posted workers. As for the other areas covered by the Directive, if it has not been explicitly specified which rules of domestic law apply to posted workers in Austria, their application is presumed since they are mandatory rules within the meaning of the Rome Convention.

**The Belgian act** provides for application of conditions governing work, pay and employment in cases in which non-compliance is penally sanctioned.

**In Denmark**, the transposition instrument refers first to the application of the Working Environment Act. This act contains rules governing maximum work periods and minimal rest periods, rules governing safety, health and hygiene at work, rules protecting pregnant women and women who have recently given birth, children and young people. The act also refers to the act on holidays and the acts on equal treatment, equal pay and prohibition on discrimination in the labour market. The provisions granting paid leave to pregnant women and women who have recently given birth are also applicable. No reference is made to minimum rates of pay because there is no minimum wage in Denmark. For the same reason Danish law does not refer to rules governing conditions pertaining to the hiring out of workers, notably by temporary employment undertakings.

**Spanish legislation** requires undertakings, falling within the scope of the law, to guarantee to workers, whom they post to Spain in the framework of providing transnational services, all the working conditions enshrined in Spanish employment law: working time, provisions pertaining to pay, temporary employment, employment of young people, prevention of occupational hazards, non-discrimination. The transposition act identifies the specific provisions of national employment law which are applicable.

**In Finland** the Posting of Workers Act enumerates the legal rules applicable to posted workers. It refers to the Annual Holidays Act, certain provisions of the Employment Contracts Act, certain provisions of the Working Time Act (overtime pay, payment of salaries, extra pay for Sunday work, night work in bakeries). The provisions of the Protection at Work Act, which are designed to ensure safety at work and a safe working environment, are applicable. The same goes for the Act concerning health services in undertakings. Finally, Finnish law refers to the rules governing the protection of pregnant women and women who have recently given birth, children and young people, rules on parental leave and rules concerning equal treatment of men and women and prohibiting discrimination.

**In France**, the transposition instrument covers most of the provisions of social legislation, including social security, pay, working time and working conditions. The specific provisions of French employment law which apply to posted workers have been elaborated upon in the implementing decree: rules concerning “working time, Sunday work, night work, paid leave, leave for family reasons, public holidays, pay including bonuses and extra pay, safety, health and hygiene at work, measures governing the terms and conditions of employment of pregnant women and women who have recently given birth, children and young people, equal treatment between men and women and all rules governing non-discrimination, classification, reimbursement of expenses of all kinds and compensation for absence in the event of sickness and accidents”. The implementing decree specifies the individual rules of French law which apply to the areas concerned. In particular, it stipulates that undertakings which provide

services and which are established in another Member State must comply with the rules governing temporary work.

As regards contributions to paid leave funds, undertakings established in a Member State are exonerated from the obligation to become affiliated and to contribute to one of the French paid leave funds when the undertaking can show that the workers it posts to France benefit, during their period of posting, from the right to paid leave under conditions equivalent to those contained in the French Labour Code or when the country in which the undertaking is established has institutions equivalent to the French paid leave funds.

**The draft Luxembourg instrument** is based on the principle of the territorial applicability of employment law. This concerns not only all the provisions of Luxembourg employment law in the areas covered by the Directive but also informing the worker concerning the contract, rules governing fixed-term contracts and part-time work, protection against lay-offs due to bad weather, technical lay-offs, rules to combat clandestine and/or illegal employment.

**In the Netherlands**, the provisions rendered applicable by the transposition instrument concern holidays and leave, working time, equal treatment of men and women, safety at work, and the employer's liability in the event of accidents. Other specific rules are not mentioned in the transposition instrument because they were deemed applicable even before the adoption of the Directive. This applies to the ban on discrimination, minimum pay, regulation of work periods and rest periods, the ban on child employment, rules governing the employment of young people and pregnant women or women who have recently given birth, and safety at work.

**The Swedish transposition act**, similar to the Directive as regards the subject matter covered, spells out the national employment law rules applicable. There are no provisions relating to minimum pay because, as in Denmark, there is no statutory minimum wage in Sweden.

### **c) The case of the United Kingdom and Ireland**

**The United Kingdom** has not adopted any specific transposition rules. Provisions in domestic law corresponding to the subject matter of the Directive were already considered to be applicable to posted workers. This is the case with the Working Time Act, which concerns notably maximum working hours, rest periods and paid leave. There are no specific provisions relating to the protection of temporary workers. The Health and Safety at Work Act applies to all persons employed in the United Kingdom. The protection of pregnant women and women who have recently given birth is enshrined in employment law and in the law prohibiting sexual discrimination. Protection of children and young people is provided for in the Act on children and young persons and the Health and safety of young workers Act. In the United Kingdom application of the rules governing equal treatment of men and women and prohibiting discrimination has been extended to the workers covered by the Directive via an instrument which entered into force on the day of expiry of the deadline for transposition of the Directive.

In the United Kingdom section 1(2) of the National Minimum Wage Act 1998 states that "a person qualifies for the national minimum wage if he is an individual who... is working, or ordinarily works, in the United Kingdom under his contract." This means that the protection

applies beyond those who 'usually' work in the United Kingdom and that therefore posted workers are covered.

**In Ireland**, all Irish employment rights legislation within the meaning of the Directive applies to posted workers as it applies to other employees generally. To this extent, the position of Ireland is therefore comparable to that of the UK.

### ***III- Exception and options provided for in the Directive***

There are restrictions on the applicability of the rules protecting posted workers in respect of the subject matter covered by the Directive: on the one hand, the Directive imposes an exemption on Member States for certain services (1) and on the other hand, the Directive gives them the freedom to make derogations (2) or other options (3).

#### **1) The exemption imposed on the Member States**

Article 3(2), **apart from the construction activities listed in the Annex**, excludes the application of the provisions on minimum rates of pay and the duration of paid annual leave for initial assembly and/or first installation of goods, provided the period of posting does not exceed 8 days. The Directive specifies that the operation must be an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking.

**The Belgian, Finnish, French, Greek, Italian, Portuguese and Swedish acts, and the draft Luxembourg act** reproduce this exception virtually verbatim.

**Spanish and Danish law**<sup>23</sup> adopt an original solution in that they do not restrict the non-applicability of the rules of domestic social law to initial assembly and the first installation of goods: the minimum duration of leave and the minimum rates of pay are never applicable to workers posted to these countries, when the duration of the posting does not exceed 8 days.

Neither **Ireland** or **the United Kingdom** have transposed the exemption required by Article 3(2) of the Directive.

The exception for assembly work does not apply to construction work. In cases where Member States determine minimum salaries and paid leave through collective agreements (of general application) only in the construction sector, there is no need to make an explicit provision concerning the non-application of these conditions.

#### **2) Optional derogations**

- Article 3(3) authorises Member States not to impose compliance with the rules of domestic law governing minimum rates of pay when the length of the posting does not exceed one month.

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<sup>23</sup> This exception does not concern paid leave, since there is no minimum wage in Denmark.

**In Belgium, Germany, France, Finland, Greece, Ireland, Italy, the Netherlands, the United Kingdom and Sweden** there is no derogation for short periods of work. Neither has the **draft Luxembourg instrument** incorporated this derogation.

**In Denmark** the exception is not applicable since there is no statutory minimum wage and no minimum rate of pay on the basis of extended collective agreements.

- Article 3(5) entitles Member States to allow exemptions to be made in respect of minimum paid annual holidays and minimum rates of pay when the **amount of work** to be done is **not significant**.

This potential exemption has not been incorporated in the **Austrian transposition act, in the Finnish, and French instruments, in the Greek Presidential Decree, the Irish act, the Italian Decree, the Netherlands act, in the United Kingdom, in the Swedish act, in the Belgian act or in the draft Luxembourg instrument**. However, in the Netherlands the parties to collective agreements may, if they wish so, decide on excluding from the scope of the extended collective agreements workers posted to the Netherlands in the context of a non-significant posting.

**In Denmark** the exceptions of paragraphs 2 and 5 of the Directive are combined. All types of work (including building work) which last less than 8 days lie outside the remit of the legislation governing paid leave. Like Denmark, **Spain** has restricted extension of its domestic legislation to postings lasting more than 8 days.

### **3) Other Options**

- **Article 3(7) provides that the Directive shall not prevent application of terms and conditions of employment which are more favourable to workers.**

The purpose of this rule is to enable workers to benefit from terms and conditions of employment which are more favourable than those in force in the country in which the temporary work is performed. Certain Member States have reproduced Article 3(7) verbatim.

- **Article 3(10), first indent, authorises the application of public policy provisions under domestic law.**

**Spanish law** adds to the subject matter covered by the Directive: respect for privacy and consideration of the dignity of workers, trade union liberties, the right of assembly and the right to strike.

**In France**, provisions which must be complied with, although they do not come within the remit of the Directive, include: payment of wages on a monthly basis, the procedure governing the payment of wages and remittance of the pay slip, declaration of hours of work, declaration of collective accommodation, declaration of accidents at work, lay-offs due to bad weather, declaration prior to the inspection of work, display of documents at building sites to the effect that a building permit has been obtained.

**Finnish law** includes freedom of association and the right of workers to assemble at the workplace, night work and shift work, Sunday work, and the remuneration of workers who have been prevented from working on grounds linked to the employer.

**In Greece** the transposition decree provides for the application of national rules governing the protection of persons in respect of their personal data.

**In the draft Luxembourg law** the provisions which go beyond the subject matter of the Directive concern: the employer's obligation to inform the worker about the contract, the rules governing fixed-term contracts and part-time working contracts, lay-offs due to bad weather and technical lay-offs, the prevention of clandestine and/or illegal work.

Besides the subject matter covered by the Directive, **Swedish law** provides for the application of the rules governing the right of association and bargaining and the peace obligation (in the case of a collective agreement concluded with a Swedish trade union).

Belgium, Germany, Denmark, Ireland, Italy, the Netherlands, Portugal and the United Kingdom have not availed of Article 3(10).

- Article 3(10), second indent authorises the application of **collective agreements to sectors other than the construction sector**.

**In Austria, Belgium, Spain, Finland, France, Greece, Italy and Portugal**, the applicable agreements are not confined to the activities listed in the Annex. All sectors are covered. The same applies to the **draft Luxembourg instrument**.

**In Germany**, extension of terms and conditions of employment laid down in collective agreements to activities other than building work is provided for only in respect of services to assist maritime navigation, as regards minimum pay, the duration of paid leave, holiday pay and the additional holiday bonus.

**In the Netherlands**, application of collective agreements is confined to the building sector.

**In Denmark, the United Kingdom and Sweden**, where collective agreements are not universally applicable, this option does not apply.

**In Ireland**, collective agreements generally are not legally enforceable. However, where they exist in sectors of the economy other than construction they should apply to posted workers as well as to Irish workers.

#### ***IV- Administrative cooperation***

**All Member States** have put in place bodies designed to ensure the cooperation required by the Directive.

**In Germany**, the competent monitoring bodies are the Bundesanstalt für Arbeit and the main customs offices. The tasks of the liaison office as referred to in Article 4(1) are performed by the Bundesanstalt für Arbeit. In addition, different regional employment offices provide the administrative assistance referred to in Article 4(2), in their capacity as liaison offices. They cooperate with foreign authorities who perform the tasks referred to in German law on posted workers and who are responsible for combating illegal employment or who can provide information concerning the employer's compliance with the working conditions referred to in

the Directive. This co-operation should allow communication of data relating to infringement of the laws governing illegal employment, the hiring out of workers, taxes, social security and the law on foreign workers.

**In Austria**, the law on posted workers provides for the cooperation of the public administrations with those of other Member States. These institutions must transmit the particulars required in the event of reasoned requests from public administrations of other Member States with a view to monitoring the working conditions of workers posted to another Member State.

The Department for the regulation of labour relationships of the Federal Ministry of Labour is the **Belgian** liaison office. Its role is, on one hand, to reply to the information requests coming from employers who post workers to Belgium and from their workers concerning issues that fall within its competence, and, on the other, to transmit to the competent Belgian authorities other requests of information or the co-operation requests which emanate from administrative authorities abroad (here the Ministry is the contact point).

**In Denmark**, the labour market directorate acts as liaison office. It is responsible for cooperation with a view to addressing problems which may arise in the context of international postings. This liaison office must also provide information to foreign workers and employers concerning Danish legislation. This information may take various forms: references to the competent authorities or trade union organisations, various mediators, the supply of legislative texts, etc.

**In Spain**, responsibility for liaising with the public administrations of other Member States has been vested in two separate bodies; the territorially competent labour authorities, which are responsible for informing the parties involved in the posting of the working conditions to be guaranteed and the Inspectorate of Labour and Social Security which is in charge of monitoring compliance with working conditions. The law provides for the supply of information using all means of communication, including electronic and telematic means. The Spanish labour authorities must also alert the competent bodies of the public administrations in other Member States to infringements in Spain by undertakings established in these States.

**In Finland**, the liaison office is the department responsible for labour protection at the Ministry of Social Affairs and Health. It is responsible for preparing and making available information on the terms and conditions of employment applicable to posted workers. This agency is also obliged to provide information on collective agreements.

**In France**, two bodies share responsibility for international cooperation: the Directorate of Labour Relations at the Ministry for Employment and Solidarity (DRT, office DS4, responsible for new forms of employment) and the Interministerial Delegation to combat Illegal Employment (DILTI). These two bodies are responsible for disseminating the necessary information on the obligations on undertakings that provide services in France. Their task is to reply to requests for information from foreign undertakings or administrations. They are also required to forward requests for information from the monitoring services of other Member States.

**In Greece**, liaison is the task of the Directorate-General of Employment and the Directorate-General of Working Conditions and Hygiene at Work at the Ministry of Employment and Social Security. The labour inspectorate is also involved in international

cooperation. These services must provide information on the working conditions to be respected by undertakings supplying posted workers as well as other useful particulars concerning surveillance and monitoring of the implementation of the rules governing posting. In addition, the competent Greek bodies must inform the administrations of the other Member States in the event of infringements in Greece by undertakings coming within the scope of the Directive.

**In Ireland**, the Department of Enterprise, Trade and Employment is responsible for applying the Directive. It is proposed to disseminate information via the Department's website containing a brief description of the measures taken in Ireland to implement the Directive.

**In Italy**, the competent body is the Directorate-General for Employment at the Ministry of Labour and Social Security. Reasoned requests for information presented by the competent authorities of other Member States are handled by the provincial directorates of employment.

**In Luxembourg**, the body responsible for international cooperation was appointed even before completion of the draft instrument transposing the Directive.

**In the Netherlands** the Labour Inspectorate can give information relating to the Directive.

**In Portugal**, the Labour Inspectorate is responsible for cooperation in the field of information. In the Autonomous Regions of the Azores and Madeira, it is the working conditions inspectorate which is responsible for cooperation.

**In the United Kingdom** the Department of Trade and Industry acts as liaison office. It disseminates information via a website containing a brief description of the measures taken in the United Kingdom to implement the Directive, together with references to the different services responsible for various aspects of the legislation, links to these services, and relevant publications.

**In Sweden**, the authority responsible for the working environment acts as liaison office. It is responsible for providing information on the terms and conditions of employment applicable in Sweden. It must also provide information on the Swedish system of collective agreements and on the collective agreements applicable, referring back to the social partners. This authority is also responsible for co-operation with corresponding liaison offices in other countries.

## ***V- Measures designed to ensure compliance with the Directive***

Two types of measures are used by the Member States to ensure compliance with the Directive: measures to monitor the legality of postings (1) and measures to penalise possible irregularities (2).

### **1) Monitoring**

Besides the usual inspections of undertakings or workplaces, certain States have relied on two types of methods to facilitate compliance with the transposition rules: the keeping of records required for monitoring purposes at the place where the services are provided, and the declaration of the provision of services to the national authorities.



## **- Keeping of records at the workplace**

**In Germany**, employers must record the beginning, end and duration of daily work, when an universally applicable agreement or a minimum pay decree is applicable in the building sector. In addition, all records necessary for monitoring compliance with an agreement of universal applicability or a minimum pay and leave decree in the building sector must be drafted in German and, kept in the country, or at the request of the authority, at the work site, during the period of posting. This obligation is imposed only on undertakings established abroad.<sup>24</sup> Domestic undertakings are obliged to keep records on the basis of provisions of tax, social insurance, health and safety and commercial law.

**In Austria**, a report containing personal data and information on the employment of posted workers in Austria (in particular the identity of the workers and the dates of the beginning and end of work) and the social security documents on the registration of the employee with the social security authorities must be kept available for consultation by the inspection services at the workplace. Fines are imposed on foreign undertakings who fail to comply with this obligation.

In order to monitor working conditions, **Finland** requires that employers of posted workers comply with obligations pertaining to the management of working time, the keeping of leave records and personal records for drivers of motor vehicles. Employers must also present, at the request of the labour protection authorities, information on the basic working conditions which apply to the employment contracts of posted workers.

**The draft Luxembourg law** requires the employer to entrust the documents needed for monitoring purposes to a representative resident in Luxembourg, in the absence of a permanent establishment.

**The Belgian instrument** provides for a relaxation of the administrative obligations incumbent on employers who post workers to Belgium. However, this exemption is subject to a declaration pertaining to the posting and the keeping of copies of equivalent documents provided for in the legislation in the state of where the employer undertaking is established for consultation by the monitoring services.

## **- The declaration to the national authorities concerning the provision of services**

**In Germany**, a declaration must be made to the competent regional employment office prior to the performance of building work by employers established abroad. As for the posting declaration in **Belgium**, see above.

**In Austria**, a prior declaration (the report pursuant to § 7 AVRAG) must be submitted to the Federal Ministry of Finance's Central Coordination Office for Monitoring Illegal Employment (pursuant to the Act on the Employment of Foreigners and the Adjustment Law relating to the Act on Employment Contracts) which forwards a copy of the declaration to the Labour Inspectorate. A copy is sent also to the sickness insurance institutions, to the paid leave fund of the building sector and, if necessary, to the labour inspectorate responsible for transport. This declaration must include numerous particulars on the conditions governing the activity in

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<sup>24</sup> This matter is currently the subject of infringement proceedings.

Austria and, notably, data identifying the representative empowered to issue instructions to the posted workers and the national principal, as well as personal data relating to the workers.

**Spanish law** stipulates that undertakings that posted workers to Spain must first declare the posting to the Spanish authorities, who forward the declaration to the labour inspectorate and the social security authorities. This obligation concerns only postings lasting more than eight days, except in the case of postings of temporary workers. In addition, Spanish law imposes a specific obligation to co-operate with the labour inspectorate on posting undertakings. In addition there is a specific penalty for obstructing inspection activities designed to monitor compliance with the Transposition Act.

**In France**, undertakings which provide services and which are established in another Member State must first declare the posting to the labour inspectorate of the place where the services are to be provided. Only temporary employment undertakings, which are subject to specific declaration requirements, are exempt from this obligation. This obligation is a substitute for other declarations required in the case of undertakings established in France and is designed to ensure compliance with the terms and conditions of employment of posted workers by the monitoring services in France.

**Greek law** requires employers to submit a written declaration before the beginning of the posting, regardless of its duration, to the labour inspectorate at the place where the service is provided. The particulars to be furnished must contain information relating to the identity of the undertaking, the place and date of the activities, and the list of posted workers. This list must be stamped and displayed at the workplace together with various details concerning seniority, working time, pay, etc.

**The draft Luxembourg instrument** requires that employers who post workers must provide various particulars to the labour inspectorate on request, before the posting takes place. These particulars are basically designed to make it possible to monitor the legality of the posting.

## 2) Penalties

- Some Member States have not introduced any new penalties to ensure compliance with the Directive. The mechanisms in question are those provided for in the domestic law governing posting.

This is the case **in Finland, France, Italy, Portugal, the United Kingdom and Sweden**, where failure to comply with the protective rules pertaining to posted workers is not subject to specific sanctions but, rather, to the customary penalties for infringement of domestic law.

- Certain states have introduced specific penalties.

Besides applying the usual penalties, **Denmark** has introduced a special penalty as regards leave in the case of posted workers. The rules have been adapted to accommodate posted workers and the penalties which normally apply under the law on leave are not applicable.

**In Spain**, acts of omission or commission that fall foul of the transposition law constitute administrative infringements, as does failure to comply with the working conditions provided for in the law. These penalties, imposed by the administrative authorities, mainly consist of fines. They may also take the form of withdrawal of approval to perform certain activities or

a ban on participation in public tenders. The customary penalties for failure to comply with the rules of domestic employment law are also imposed.

**The Greek Presidential Decree** imposes both penal sanctions, which include fines and imprisonment, and administrative sanctions. These specific penalties do not rule out the imposition of penalties enshrined in texts whose application is extended to undertakings established in another Member State.

**The draft Luxembourg instrument** also provides for specific penalties: termination of work and withdrawal of the firm's licence in the case of severe infringements, specific fines and penal sanctions in the event of non-compliance with the transposition rules. As in the case of Spain and Greece, the sanctions applicable in the event of infringements of the provisions of domestic law may also be imposed.

- Certain Member States have introduced mechanisms designed to facilitate sanctions in the event of infringements of the transposition rules.

**The German act** provides that employers established abroad must appoint representatives to whom notifications are served in Germany in the event of an administrative procedure.

**In Austria**, any infringements ascertained may be notified to a representative of the employer (or posted worker in isolation), if it proves impossible to contact the employer directly himself. Austria does not provide for any administrative or penal sanctions in the event of infringement of workers' rights. Only violation of the obligations to declare posted workers or to provide information is considered to be an administrative offence and is penalised in the form of fines.

In addition, **German law** stipulates that fines may be imposed on principals who rely on the services of an undertaking which does not itself respect the law, under certain conditions. These principals may also be excluded from public tenders if they have been fined under the previous provision. Likewise, principal undertakings (main contractor) are considered as liable for the obligations of their subcontractors (minimum wages for the building sector, holiday pay fund contributions).

As in the case of **German law**, Austrian law widens the liability of the principal undertaking. Any undertaking whose subcontractors fall foul of the law governing public tenders or public contracts is deemed liable for the pay of the workers employed by the subcontractor. In addition, in the event of legal subcontracting in the building sector, the principal undertaking must furnish a performance guarantee as regards the pay claims of the workers against the subcontractor.

A similar provision exists in **Italian law**. Employers who subcontract services to undertakings "organised and managed as transnational undertakings" are jointly and severally responsible for paying a mandatory minimum wage to the workers and must guarantee that they will be treated at least on the same footing as their own workers.

**In Ireland**, there are no specific rules prescribing compliance with the Directive as such. However, the substantive rights conferred on posted workers by the Directive are implemented under the specific legislative provisions conferring such rights on employees generally. These include investigations by the Labour Inspectorate, redress procedures

involving quasi-judicial institutions, creation of offences and imposition of penalties for contravention of legislation and record-keeping.

## ***VI- Jurisdiction***

- As required by Article 6 of the Directive, most of the Member States have made it possible to institute judicial proceedings in their territory when a worker is or was posted there, in order to enforce the right to the terms and conditions of employment guaranteed by the Directive.

The competence of the **Austrian, German, Danish, Spanish, Finnish, French, Greek, Netherlands and Swedish courts** has been recognised by the transposition instruments. This competence is also enshrined in **Portugal** via the provisions of the Labour Code and in **Belgium** via the provision of article 653,3 of the "Code judiciaire". The **draft Luxembourg instrument** also recognises the competence of the national courts.

The **Italian Decree**, sets down the competence of the Italian courts to resolve disputes arising from its application: proceedings must be brought before the Italian courts during the performance of the contract or within one year of its expiry.

**Spanish law** entitles representatives of workers posted to Spain to bring administrative and judicial proceedings under the same conditions as the representatives of workers usually employed in Spain. In addition, the representatives of Spanish workers in undertakings established in Spain that employ posted workers may exercise, on behalf of posted workers, powers which are legitimately recognised in respect of other workers.

- **Neither Ireland nor the United Kingdom** have introduced specific provisions allowing posted workers to bring an action before the national courts.

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