COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
C(2009)

Reassessing the regulatory social framework for more and better seafaring jobs in the EU:

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Second consultation of the European social partners on the revision of exclusions concerning seafaring workers contained in Directives 2008/94/EC\(^1\), 94/45/EC\(^2\), 2002/14/EC\(^3\), 98/59/EC\(^4\), 2001/23/EC\(^5\) and/or 96/71/EC\(^6\)

INTRODUCTION

The importance of a stable, simple and more consolidated regulatory framework for a competitive maritime economy and the need to develop an integrated approach were underlined in the Green Paper *Towards a future maritime policy for the Union*, which raised the issue of the exclusion of maritime sectors from parts of the European labour and social legislation and called for its reassessment in close cooperation with the social partners.

In its Resolution of 11 July 2007\(^7\), the European Parliament requested 'that all workers have access to the same level of protection and that certain groups are not excluded by default from the broadest level of protection, such as is currently often the case for seafarers, workers on vessels and offshore workers'. In its opinion on the Green Paper\(^8\), the European Economic and Social Committee noted 'the exclusion of fishermen and seafarers from European social legislation on a number of issues (e.g. the Directives on collective redundancies, on transfer of undertakings, on information/consultation and for posting of workers in the framework of the provision of services)', and went on to state that 'irrespective of the reasons behind these exclusions, it is important to put an end to that discrimination where appropriate.' It therefore invited the Commission 'to reassess these exclusions in close cooperation with the social partners'.

On 10 October 2007 the Commission adopted a Communication entitled 'Reassessing the regulatory social framework for more and better seafaring jobs in the EU\(^9\)', which launched the first phase in the consultation of the social partners at Community level provided for in Article 13\(^{(2)}\) of the Treaty. The social partners were requested to give the Commission their views concerning the possible repeal of certain provisions excluding seafaring professions from the scope of EU labour legislation ('exclusions'). In particular, the social partners were asked to say whether they considered that the inclusion of seafaring workers within the general scope of application of the relevant Directives should be envisaged or whether it was more appropriate to adopt specific legislation. They were also asked to say whether, in the case of exclusions that they considered justified owing to the particularities of the sector or for

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\(^{2}\) OJ L 254, 30.9.1994, p. 64.

\(^{3}\) OJ L 80, 23.3.2002, p. 29.


\(^{5}\) OJ L 82, 22.3.2001, p. 16.


\(^{7}\) 2007/2023(INI).


\(^{9}\) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Reassessing the regulatory social framework for more and better seafaring jobs in the EU (first phase consultation of the social partners at Community level provided for in Article 13\(^{(2)}\) of the Treaty)* (COM(2007) 591 final).
other reasons, an equivalent level of protection for seafaring professions was actually guaranteed by other means.

I. OVERVIEW OF RESULTS OF THE FIRST STAGE IN THE CONSULTATION PROCESS

The Commission received replies from the European Community Shipowners' Associations (ECSA), the European Transport Workers' Federation (ETF) and a joint response from ETF and EUROPECHE (within the Sectoral Social Dialogue Committee Sea Fisheries (hereinafter 'SSDC Sea Fisheries')).

The first consultation showed that the social partners in the maritime transport sector had differing views on the need to do away with the existing exclusions. While the employees (ETF) were in favour of doing away with all exclusions, the employers (ECSA) considered that the reasons for introducing them, which were linked to the specificities of the maritime transport sector, remained valid, and that the exclusions should therefore be maintained.

For their part, the SSDC Sea Fisheries were in favour of doing away with some of the existing exclusions (in particular, those set out in Directives 2002/74/EC (Insolvency), 98/59/EC (Collective redundancies) and 2001/23/EC (Transfer of undertakings)). They also stressed the need to guarantee equivalent provisions for the entire sector regarding information and consultation rights (Directive 2002/14/EC on information and consultation) and encouraged the Commission to 'put all the Member States on an equal footing' in this respect.

Of the options offered, the social partners considered only the alternative between eliminating and maintaining the exclusions concerned. Eliminating the relevant exclusions was construed as extending the scope of application of the relevant Directive to categories currently excluded. The SSDC Sea Fisheries underlined the need for a systematic examination of European social regulations from the viewpoint of the particular circumstances of fishing activity and called for specific provisions or adaptations, where necessary. However, sector-specific legislation has not been proposed in respect of any of the exclusions.

The social partners consulted agreed that the particular legal conditions applying in the Member States needed to be examined to ensure that the seagoing professions enjoyed adequate protection, particularly in the case of conditional exclusions, and the Member States needed to adopt more specific regulations or alternative guarantees granting the same degree of protection. The ECSA insisted in particular on the need to step up enforcement of those rules, while the ETF found them insufficient and proposed that they be repealed. The SSDC Sea Fisheries pointed out that the use of conditional exclusions should not result in forgoing the specific regulations or alternative guarantees.

The ECSA and ETF have very different views regarding the feasibility of exercising information and consultation rights on board. The ETF stressed the importance of information and consultation rights in a highly internationalised environment and found the provisions contained in the Directives sufficiently flexible. They emphasised how much easier it was to exercise such rights thanks to new technologies and new communication systems. The ECSA argued that economic and logistical difficulties made it unfeasible to 'bring together' crews working at a great distance from ports and from each other. Similar arguments were put forward regarding provisions on information and consultation rights in the different directives.

The ECSA mentioned an additional difficulty involving the use of short-term contracts and frequent transfers of vessel ownership with regard to the applicability of Directives 94/45/EC (European Works Councils) and 2002/14/EC (Information and consultation of employees) to the maritime sector.
Both the ETF and the SSDC Sea Fisheries were in favour of repealing the exclusions set out in Directives 98/59/EC (Collective redundancies) and 2001/23/EC (Transfer of undertakings). The ECSA, however, felt that this could have a disruptive effect on the buying and selling of ships, which normally took place at short notice. In the ECSA's view, notification requirements and certain types of contracts, such as bareboat chartering, made it very difficult to apply these Directives. In the case of Directive 2001/23/EC, the fact that a buyer or bareboat charterer of a ship cannot apply his own collective bargaining agreements to seafarers employed by his company was also mentioned as a problem. The ECSA also mentioned the often complex manning arrangements existing in the sector.

With regard to Directive 2002/74/EC (Insolvency), both ETF and SSDC Sea Fisheries argued in favour of repealing the existing exclusion, while the ECSA proposed that it be maintained but asked the Commission to check whether other types of protection afforded by the Member States had proved to be equivalent.

The ETF pointed out that international private law was not sufficient for dealing with situations involving the posting of workers in the maritime area. In their view, the specific features of mobile maritime work and the difficulties associated with monitoring it were not a sufficient reason to continue excluding seafarers from the scope of Directive 96/71/EC (concerning the posting of workers). The ETF called for a review of the scope of the Directive and asked the Commission to explore ways of making its provisions applicable to the maritime sector or at least to intra-EU maritime activities, such as ferries.

II. OBJECTIVES

The Commission's aim in reviewing the exclusion of seafarers from the scope of Community labour legislation is to improve and expand the rights of workers in the seafaring professions in the EU in order to bring them up to the standard enjoyed by workers on shore. Combating low-quality jobs and inadequate protection in maritime activities is important if European seafarers are to be attracted to the sector, and may therefore contribute to remedying the decline in their numbers. A thorough assessment of the economic impact of changes to the regulatory framework is necessary in order to avoid causing irreparable damage to the international competitiveness and sustainability of the EU maritime sectors. This is crucial to the creation of more and better jobs in these sectors.

III. PLANNED CHANGES TO COMMUNITY LEGISLATION

The principles of equality and proportionality must be borne in mind when reviewing the exclusions provided for in Directives 2008/94/EC, 94/45/EC, 2002/14/EC, 98/59/EC, 2001/23/EC and 96/71/EC. As defined by the European Court of Justice, the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified, while the principle of proportionality requires that the measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question.

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10 A type of demise charter in which the lessee (charterer) leases a vessel without a master and crew and appoints his own personnel for those positions for the duration of the lease (charter).
The consequences of this approach are twofold: on the one hand, the exclusions should only be maintained as long as the underlying objective reasons justifying them remain; on the other hand, any additional burdens imposed on undertakings once the exclusions are repealed should be limited to what is strictly necessary to ensure the effective exercise of employees’ rights.

The following options could be envisaged for the exclusions in each directive concerned:

(a) Maintaining the existing exclusion without any further legislative action;

(b) Maintaining the existing exclusion as well as providing for a guarantee that the same degree of protection would be provided by means of national legal provisions\(^\text{14}\);

(c) Maintaining the existing exclusion as well as laying down specific provisions for the protection of seafarers’ rights into the existing directives or into sector-specific directives\(^\text{15}\);

(d) Repealing the exclusion and extending the general scope of application of the directive concerned to the categories previously covered by the exclusion.


Article 1(5) of Directive 94/45/EC states that 'Member States may provide that this Directive shall not apply to merchant navy crews'. This option of not applying the Directive, which only six Member States\(^\text{16}\) have made use of to date, has been justified on the grounds of difficulties in communication created by physical distance between crews and/or between crews and management.

However, this argument has become less and less convincing as increasingly technological progress has made long-distance information provision and communication more efficient and affordable. It looks even less convincing in the case of ferry crews, who frequently travel shorter distances and are based in specific ports, which allows them to enjoy shore leave more regularly than seafarers on ocean voyages. Furthermore, there is often a physical distance between workers and also between workers and management in other sectors (such as road transport) who are covered by the Directive.

It has also been argued that short-term employment contracts and the fact that vessels are often sold at short notice in the course of maritime activity could make it particularly difficult to apply the Directive to the maritime sector. However, this does not appear to be a sector-specific problem: there are other sectors, such as construction or agriculture, where short-term contracts are common and to which the Directive applies. The frequent use of short-term contracts therefore does not *per se* justify different treatment.

Furthermore, the introduction of procedures allowing transnational information and consultation rights to be exercised effectively is particularly justified in the case of the highly internationalised workforce that is typical of the maritime sectors.

Options (b) (ensuring that national provisions guarantee an equivalent degree of protection) and (c) (laying down specific provisions) do not seem justified, given the very significant

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\(^{14}\) This was the solution adopted for Directives 2008/94/EC and 2002/14/EC.

\(^{15}\) Both options have been used in the legislation on working time. Seafarers are excluded from the scope of Directive 2003/88/EC, but Directive 1999/63/EC gives binding effect to an agreement between the social partners laying down specific rules for them. Directive 2003/88/EC lays down specific provisions concerning workers on board seagoing fishing vessels.

\(^{16}\) CY, EE, EL, HU, IT and LV.
freedom granted to companies and workers to negotiate the terms under which European Works Councils should function. It therefore appears justified to propose the deletion of Article 1(5) of Directive 94/45/EC. Provision should also be made for a specific criterion for determining the number of employees where some or all work on board, and for their attachment to a particular Member State.

2. **Directive 2002/14/EC (Information and consultation)**

In accordance with Article 3(3) of Directive 2002/14/EC, the Member States may derogate from the Directive 'through particular provisions applicable to the crews of vessels plying the high seas'. That derogation applies to all vessels sailing the high seas, and therefore covers both merchant navy crews and fishermen (in contrast to the exclusion contained in Council Directive 94/45/EC, which refers to merchant navy crews only, regardless of where the ship is operating). Use of the derogation by the Member States should not prejudice the information and consultation rights of seagoing workers, as 'particular provisions' should be laid down.

The majority of the Member States have not made use of the derogation under Article 3(3); of the eight Member States that have, only three laid down 'particular provisions' applying to crews falling within the scope of the derogation.¹⁷

The reasons originally invoked to justify the derogation were similar to those for Directive 94/45/EC. The conclusion arrived at in respect of Directive 94/45/EC was that those reasons do not seem by themselves to constitute valid grounds for excluding merchant navy crews. The social partners confirmed that the same reasoning is applicable to fishermen employed in high-sea fisheries. A proposal to do away with this exclusion and repeal Article 3(3) of Directive 2002/14/EC may therefore be justified.

However, allowing the flexible solution found for the establishment of information and consultation structures at national level to continue is worth considering. The Commission intends to investigate in detail the way in which the Member States have applied the derogation provided for in Article 3(3) as part of its monitoring of the application of Directive 2002/14/EC. It will consider the results of that investigation in connection with the impact assessment required for any future legislative initiative in this area.


Article 1(2) of Council Directive 2008/94/EC allows the Member States to exclude claims by certain categories of employees from its scope in so far as other forms of guarantee exist which provide an equivalent degree of protection for employees in the event of the insolvency of their employers.

This provision is not restricted to the maritime professions, though it could potentially be used to exclude seagoing workers from the general scope of the Directive. It therefore cannot be considered as excluding seagoing workers *stricto sensu*. Its reassessment consequently falls outside the remit of this consultation, which is restricted by definition to the maritime sector. Furthermore, a category can only be excluded where 'other forms of guarantee' exist which provide an equivalent degree of protection for employees in the case of insolvency. This statement is much more specific and precise than the wording used in Directive 2002/14/EC, where 'particular provisions' are mentioned (see point 2).

In addition to the possibility of exclusion provided for in Article 1(2), Article 1(3)(b) of Directive 2008/94/EC allows the Member States that excluded share-fishermen from the

¹⁷ DE, DK and UK.
scope of their national legislation when the Directive entered into force to maintain such exclusions.\footnote{18}

No alternative protection is required in the case of this second exclusion concerning share-fishermen, and this could lead to a lower degree of protection of the rights of these workers in the event of insolvency of their employers. It should be stressed that, if this exclusion were to be repealed, the general provision of Article 1(2) could still be applied to share-fishermen, subject to an additional obligation to provide 'other forms of guarantee'. Share-fishermen would thus be entitled to protection equivalent to that enjoyed by other seagoing workers and all other workers falling within the scope of the Directive.

As a consequence, a proposal to repeal Article 1(3)(b) of Directive 2008/94/EC may be justified.


Article 1(2)(c) of Directive 98/59/EC states that the latter does not apply to the crews of seagoing vessels. However, eight Member States have decided to make applicable to the crews of seagoing vessels their national legislation implementing the Directive.

The obligation to inform and consult employees and the notification requirement do not in themselves prevent the employer from carrying out collective redundancies, while they do grant the employee a minimum degree of protection, especially when the vessel operates far from the port of origin.

However, it has been argued that the requirement to notify the public authorities and to comply with the 30-day period before planned collective redundancies can take effect is incompatible with the flexibility needed for implementing urgent decisions in the sector. That argument can be invoked only partly as a reason for exclusion, since the Directive gives the Member States the power to reduce the period following notification as provided for in Article 4.

The temporary nature of some seafarers' employment does not appear to be incompatible with the Directive, because Article 1(2)(a) excludes from its scope 'collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts'.

Lastly, the Directive does not prevent the Member States from introducing national collective redundancies provisions which are more favourable to workers and which may be more suited to certain features of their shipping sectors. Such provisions may include promoting or permitting the application of collective agreements more favourable to workers (see Article 5).

Directive 98/59/EC thus already offers some flexibility, which could be used in cases of transfers and acquisitions of ships at short notice. It therefore seems justified to propose doing away with that exclusion and deleting Article 1(2)(c). Additionally, if the flexibility granted under the Directive is considered insufficient or lacking in detail, one option may be to lay down specific provisions applicable in such situations.

\footnote{18}{The concept is not defined in the Directive. It refers to fishermen remunerated by a share of the profits or gross earnings of the vessel.}
\footnote{19}{Share fishermen are excluded from the scope of implementing legislation in EL, IT, HU, MT, SK and UK.}

Article 1(3) of Directive 2001/23/EC stipulates that the latter does not apply to seagoing vessels.

The provisions of the Directive on the safeguarding of employees' rights do not appear to be incompatible with the special nature of contracts of employment or employment relationships on seagoing vessels.

The Directive safeguards employees' rights during and after transfers. It has been argued that flexibility in the application of collective agreements in the flag State could pose certain problems after the transfer of the ship. However, it should be borne in mind that the Directive does not prevent the transferee from negotiating a new collective agreement, if the parties should deem it necessary. Furthermore, Article 3(3) offers the possibility of further flexibility in so far as it states that 'Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.'

Lastly, the same reasoning as for Directives 2002/14/EC and 98/59/EC should apply regarding information and consultation rights so as to ensure consistency in the approach.

Article 1(2) of the Directive states that it 'shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.' That provision does not cover the case of seagoing vessels, which may be transferred while they are outside the territorial scope of application of the Treaty. A specific criterion of attachment should therefore be laid down.

In view of the foregoing, a proposal to delete Article 1(3) and amend Article 1(2) of Directive 2001/23/EC to take account of the mobile nature of seagoing vessels could be justified.

6. **Directive 96/71/EC (Posting of workers)**

In accordance with Article 1(2) of Directive 96/71/EC, the latter does not apply to merchant navy undertakings as regards seagoing personnel.

This exclusion is limited to merchant navy undertakings and is further restricted to their seagoing personnel. Therefore, pursuant to Article 1(2), no other category of undertaking posting seagoing personnel, such as temporary work agencies, is excluded; and the Directive applies to the personnel of merchant navy undertakings other than seagoing personnel.

The exclusion may be justified by the difficulty linked to the use of the concept of "territory" of a member State in Article 1(1) of the Directive, and the different ways in which member States tend to consider ships flying their own flags in relation to that concept. However, consideration should be given to the need to afford necessary protection to seagoing personnel that are posted in the framework of a transnational provision of services. In this connection, one should take into account the possibility to extend the scope of application of the Directive in Article 1 (1) to ships flying the flag of a member State in addition to the concept of territory, without prejudice of the current interpretation of the latter in the different member States. Furthermore, such extension would require introducing a few amendments in other provisions of the Directive, in particular in Articles 1, 2 and 3, in order to reflect the specific nature of work on board a merchant ship.

### III. QUESTIONS TO THE SOCIAL PARTNERS

The Commission recognises the differences in opinion among the social partners as to how best to protect the rights of seagoing workers while safeguarding the competitiveness of the EU maritime sectors. It considers, however, that the social partners are in the best position to evaluate the impact of changes to the legal framework contemplated and to identify solutions
or options that are consistent with the specific needs of the undertakings and employees they represent.

The Commission therefore requests the social partners:

- to send it an opinion or, where appropriate, a recommendation concerning the objectives and substance of the proposals envisaged, in accordance with Article 138(3) of the EC Treaty.

- where appropriate, to inform it whether they wish to initiate the negotiation procedure on the basis of the proposals contained in this document, in accordance with Article 138(4) and Article 139 of the EC Treaty.

The Commission would appreciate it if the social partners’ opinions and/or recommendations contained an assessment of the impact of the measures advocated above and of any other solution which may be put forward.