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COMMISSION STAFF WORKING DOCUMENT

Commission's services report

**on the implementation of Directive 96/71/EC concerning
the posting of workers in the framework of the provision of services**

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¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

1. INTRODUCTION

On 25 July 2003, the Commission adopted Communication COM (2003)458 on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereafter the Directive) in the Member States².

The aim of this Communication was to review the rules for the application of the Directive pursuant to its Article 8. It outlined the work concerning its transposition and practical application in the Member States and defined the Commission's position as to whether the "posting" Directive needed to be revised.

The Communication concluded that the difficulties encountered in the implementation of the Directive tended to be more of a practical nature than a legal nature and that amendments to the Directive were not justified. However, as far as the practical application is concerned the communication identified a certain number of problems, which, if not handled properly and timely could prevent the Directive from reaching its objectives. Such problems were *inter alia* the failure to monitor compliance, the difficulty in comparing the requirements of the host country and the working conditions in the country where the worker habitually carries out his/her work, and the difficulties faced by workers and service-providers in gaining access to the relevant provisions referred to in the Directive. In order to resolve these practical problems, the Commission proposed that a group of government experts meet at least twice a year to examine these issues in greater detail and put forward appropriate solutions.

The European Parliament examined Communication COM (2003)458 on 4 and 26 November 2003 (Employment and Social Affairs Committee) and 14 January 2004 (plenary session). On 15 January 2004, it adopted Resolution P5_TA (2004)0030³, evaluating the content of the Communication.

In this resolution, Parliament considers that the Directive continues to be necessary in order to provide greater legal certainty for posted workers and the companies involved, and identifies a number of issues of particular importance which, in its view, need to be looked at more closely.

These questions include: the effect of the optional exemptions provided for in the Directive in order to prevent unfair competition; the concept of "relevant workers"; the (ultimate) liability for the obligations of subcontractors towards their workers; mutual recognition and enforcement of financial penalties; the clarity of some terms and definitions used in the Directive (such as the "minimum rates of pay, including overtime rates", "minimum paid annual holidays" and the "hiring-out of workers"); the implementation of the Directive by means of collective agreements; the impact of enlargement on the application of the Directive; transparency and accessibility of the material terms and conditions of employment; and administrative cooperation.

² http://europa.eu.int/comm/employment_social/labour_law/docs/com2003_458_en.pdf.

³ http://www.europarl.eu.int/omk/sipade3?SAME_LEVEL=1&LEVEL=3&NAV=X&DETAIL=&PUBREF=-//EP//TEXT+TA+P5-TA-2004-0030+0+DOC+XML+V0//EN

On 31 March 2004, the Economic and Social Committee adopted an opinion on Communication COM(2003) 458, which essentially followed the same lines as the European Parliament resolution.

Following on from the Communication of 25 July 2003, as well as the European Parliament's resolution of 15 January 2004 and the Economic and Social Committee opinion of 31 March 2004, the Commission undertook a number of actions with the aim of improving information about the application of the Directive and tackling the practical obstacles preventing it from reaching its intended effects.

In order to obtain more information about the situation on the ground, the Commission approached the social partners within the Liaison Forum⁴ and addressed a specific questionnaire to them on the legislative framework governing the posting of workers and its enforcement in practice. In the context of this consultation, it received contributions from the European Trade Union Confederation (ETUC), the European Transport Workers Federation and the European Federation of Building and Woodworkers.

The Commission co-financed a research project run by the European Federation of Building and Woodworkers and the European Construction Industry Federation concerning the practical implementation of the Directive in the construction sector. It also made a financial contribution to a conference on the posting of workers, organised by the social partners in this sector, which was held in The Hague on 15 and 16 October 2004.

The Member States have been asked to reply to a detailed questionnaire on the application of the Directive and to present their observations. In this connection, their attention has been drawn to the importance of involving social partners at national level throughout the follow-up to COM(2003) 458.

In order to evaluate the situation in the ten new Member States which joined the European Union on 1 May 2004, the Commission has commissioned a series of studies by independent experts which will look at the implementation of all directives relating to labour law. In this connection, there will be a detailed examination of the implementation of the Directive in Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia⁵. These studies are expected to be finalized in the first half of 2007.

At the practical level, the Commission has set up a website⁶ in three languages on the European Union portal dealing specifically with the posting of workers. Apart from providing important information on this subject, the site contains links to national websites, which offer information on the situation within the Member State concerned. The site is updated and should gradually improve as the amount of available information increases and the quality of national websites improves. New initiatives following on from discussions within the group of national experts on the implementation of the Directive should also be presented on the website. At the instigation of the Commission, the group of national experts on the

⁴ The liaison forum brings together the sectoral and interprofessional social partners at Community level.

⁵ This examination will be carried out in the context of a wider study on the implementation of EU labour law. The results of this examination are expected for mid 2007.

⁶ http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm

implementation of the Directive has the status of a group of experts set up pursuant to Article 2(3) of Decision 2002/260/EC⁷. It has met five times since Communication COM(2003) 458 was adopted, and has dealt with the following items:

- general discussion of the Commission's Communication COM(2003) 458 and the European Parliament's Resolution P5_TA(2004)0030;
- integration of the new Member States into arrangements for cooperation on information;
- enforcement of financial penalties in connection with the draft framework decision on the application of the mutual recognition principle to financial penalties;
- labour inspection systems and monitoring in order to avoid and penalise non-compliance with national provisions transposing the Directive;
- access to information: improved transparency;
- Commission website on the posting of workers, and improvement of national websites;
- Commission proposal for a Directive on services in the internal market⁸;
- report from the European Federation of Building and Woodworkers and the European Construction Industry Federation on the practical implementation of the Directive;
- multilingual cooperation form;
- compilation of "country factsheets" on terms and conditions of employment applicable under the legislation transposing the Directive;
- improved cooperation on information, and the framing of "cooperation standards".

The group of experts is looking at a number of specific proposals, which will be described below⁹.

2. AIM OF THIS REPORT

This report is intended to respond to the European Parliament's and the Economic and Social Committee's call for more information on the practical implementation of the Directive in the Member States. It does so by:

- identifying and examining certain problems of interpretation and implementation of the Directive which have emerged and/or have been reported by the social partners, the Member States and their experts, the European Parliament and the Economic and Social Committee;
- taking stock of the work and deliberations undertaken, particularly within the group of national experts, to make terms and conditions of employment more transparent and

⁷ 2002/260/EC: Commission Decision of 27 March 2002 concerning the creation of a Group of Directors-General for Industrial Relations, OJ L 91 6.4.2002, p. 30; the Group of Directors-General for Industrial Relations took a decision to this effect at its meeting on 7 November 2003.

⁸ Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2, from 13.1.2004.

⁹ See especially section 5.1. and 5.2.

strengthen cooperation on information in order to ensure a credible and effective response by the national authorities in the event of non-compliance with the Directive.

The information and analysis contained in this report partly underpins the guidance provided to Member States outlining the relevant ECJ jurisprudence and best practices already identified in the process of cooperation on information, which is the subject of a separate communication to the Council and the European Parliament. However, the report does not express an opinion on whether the national measures and transposition measures already referred to are compatible with the Directive and the Treaty establishing the European Community. It does not prejudge the stance which the Commission may take in connection with any infringement procedures.

A draft of this report was submitted to and discussed with national experts. Social partners have been consulted on an earlier draft of this report. Their contributions are reflected in this report.

3. GENERAL INFORMATION REGARDING IMPLEMENTATION

3.1. Number of posted workers

Given the large variety in the duration and nature of the provision of services¹⁰ – and thus also the posting of workers in the context of the provision of services – it is very difficult to estimate the total number of posted workers within the European Union.

Most Member States are unable to provide figures or reliable estimates. In the Member States where data have been collected, the figures are often based solely on a statistical analysis of mandatory posting declarations, and a degree of caution is thus advisable when assessing the significance of this information¹¹.

According to the information received, the number of posted workers within Member States' territories is as follows:

Member State	Year	Sector	Number	Duration of posting	Source
Germany	2003	Construction	105 854, mainly from a non-Member State	In most cases less than 6 months, and a large proportion of these less than 3 months.	ULAK ¹²

¹⁰ See judgment of the Court of Justice of 11 December 2003 in Case C-215/01 *Schnitzer*, [2003] ECR I-13859, paragraph 30.

¹¹ This point is also emphasised by the Member States providing such information.

¹² The German Construction Industry Holiday and Wage Compensation Fund.

Spain	2003	All	257		Declaration
France	2001	Services (21%), agriculture (25%), building and public works (26%), industry (28%)	Approx. 12 000	3½ months on average	Declaration
Greece		Hotel Industry Construction	112 619 1		Declaration
Lithuania	01/1995- 06/2004	All	Approx. 150		Social security
Luxembourg	10/2003- 08/2004	Construction (70%), industry (10%), finance (10%)	4 625	146.2 days on average	Declaration
Slovenia	05/2004- 07/2004	All	489		Declaration

The following data were provided by the European Industrial Relations Observatory, which compiled figures on the posting of workers as part of an update, carried out in 2003¹³, of a 1999 study on the implementation of the Directive¹⁴:

Member State	Year	Sector	Number
Austria	2002	All	3 550
Germany	2002	Construction	22 151 from Member States; 93 258 from non-member countries
Belgium	04/2002- 06/2002	All	More than 1 914 ¹⁵
France	2001	All	8 554 registered; DILT ¹⁶ estimate: 18 000–30 000

¹³ <http://www.eiro.eurofound.eu.int/thematicfeature2.html>

¹⁴ <http://www.eiro.eurofound.eu.int/1999/09/study/index.html>

¹⁵ Belgian legislation gives an employer based in another Member State the possibility of issuing a posting declaration, which exempts him for a period of six months from the obligation to draw up a whole range of social security documentation provided for under Belgian law. The figure of 1 914 comprises only those workers whose employers have made a declaration.

¹⁶ Interministerial Delegation for Curbing Illegal Employment (*Délégation interministérielle à la lutte contre le travail illégal*).

3.2. Cases before the national courts

Similar problems emerge when attempting to estimate the number of legal disputes in national courts that are related to the Directive.

Member States' legal statistics do not generally make a distinction between labour disputes which involve an employer based within their territory and those which do not. Furthermore, disputes connected with the Directive may be referred to a very wide range of courts, such as criminal or civil courts, and especially industrial relations tribunals.

Most Member States are therefore unable to provide reliable data on this point. Luxembourg has indicated that there are currently no actions before the national courts which have been lodged on the basis of Luxembourg's legislation transposing the Directive¹⁷.

3.3. Enlargement

As a consequence of the enlargement of the European Union in 2004 the undertakings established in the ten new Member States now fully benefit from the freedom to provide services with some exceptions in Germany and Austria as set out below. At the same time, these countries introduced measures for the protection of workers relating to their conditions of employment, including the guarantees provided under the Directive.

In contrast with the free movement of workers, the transitional measures on the posting of workers provided for in the Accession Treaty¹⁸ are concerned solely with postings to Germany and Austria by firms based in the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia and, on a reciprocal basis, postings from Germany and Austria to these Central and Eastern European countries¹⁹.

In order to address serious disturbances or the threat thereof in specific sensitive services sectors and as long as they apply national measures to the free movement of workers from the Member States mentioned above, the transitional measures allow Germany and Austria, after notifying the Commission, to derogate from the first paragraph of Article 49 of the EC Treaty establishing the European Community with a view to limiting, in the context of the provision of services by companies based in these countries, the temporary movement of workers whose

¹⁷ Act of 20 December 2002 transposing Directive 96/71/EC.

¹⁸ Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, JO L 236, 23.9.2003.

¹⁹ See Annexes V, VI, VIII, IX, X, XII, XIII and XIV in conjunction with Article 24 of the Act of Accession.

right to take up work in Germany and Austria is subject to national measures. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia may take equivalent measures in relation to Germany and Austria.

Both Austria and Germany have made use of the above mentioned possibility. In Austria this limitation applies in 8 sectors, namely agricultural service activities, cutting, shaping and finishing of stone, manufacture of metal structures and parts of structures, construction, including related trades, security activities, industrial cleaning, home nursing and social work activities without accommodation. In Germany this applies to three sectors, namely construction and related branches, interior decorating and industrial cleaning (buildings, furnishings and vehicles). Only Hungary, Slovenia and Poland apply the principle of reciprocity²⁰.

For the other Member States which are not covered by these transitional measures, the freedom to provide services as interpreted by the Court of Justice²¹ fully applies. Given the different transitional arrangements, the scenarios involving the free movement of workers must be clearly differentiated from those falling within the scope of Articles 49 ff. of the Treaty. See also sections 4.2.1. and 4.4. below.

In what concerns the situation in the new Member States created by the implementation of Directive 96/71/EC, it should first of all be made clear that the Act of Accession did not grant derogations from the obligations laid down in Directive 96/71/EC. As from 1 May 2004, the Directive is applicable in all Member States, both old and new. It goes without saying that it also applies to the provision of services by a new Member State to an old one, and between new Member States.

All the new Member States have officially communicated texts transposing the Directive. This report has, where possible, drawn on what information is available concerning the situation in these countries.

As stated above, the Commission has commissioned a series of studies in order to examine more closely the situation in the new Member States which will examine the implementation of all directives in the field of labour law, including Directive 96/71/EC.

²⁰ Information available on Eures, Site: 'Where can I go for work? Information on the transitional rules governing the free movement of workers from, to and between the new member states.

²¹ See inter alia ECJ judgments in *Rush Portuguesa* (Judgment of the Court of Justice of 27 March 1990 in Case-C113/89 *Rush Portuguesa* [1990] ECR I-1417) and *Vander Elst* (Judgment of the Court of Justice of 9 August 1994 in Case C-43/93 *Vander Elst* [1994] ECR I-3803).

4. LEGAL ISSUES

4.1. Context, aims, key content and added value of the Directive

The general context, key content and added value of the Directive are set out in Communication COM(2003) 458, and a brief description can be found on the Commission's website²². They will therefore not be dealt with in this report.

However, given the importance of the Directive's aims for the purpose of interpreting it, these should be considered in more detail and clarified in relation to previous rulings of the Court of Justice of the European Communities.

Directive 96/71/EC was adopted with a view to facilitate the provision of cross-border services and, for that purpose, to coordinate the legislation of the Member States concerning terms and conditions of employment "in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided"²³. This coordination, which should be based on "fair competition and measures guaranteeing respect for the rights of workers", is necessary in order to promote the transnational provision of services in the internal market²⁴.

The Court of Justice in its recent judgment in *Wolff & Müller*²⁵ confirmed that "inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided that the conditions mentioned in paragraph 34 hereof are met. Moreover, as the Austrian Government has rightly pointed out in its observations, there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71/EC demonstrates that those two objectives can be pursued concomitantly".

As regards the question of how the Directive ties in with earlier rulings of the Court of Justice on the issues covered by the Directive, these rulings are still relevant in that Directive 96/71/EC is based on provisions conferring the freedom to provide services, and these provisions should be interpreted in the light of Articles 49 and 50 of the Treaty²⁶.

²² http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm

²³ Recital No 13 of the Directive.

²⁴ Recital No 5 of the Directive.

²⁵ Judgment of the Court of Justice of 12 October 2004 in Case C-60/03 *Wolff & Müller*, [2004] ECR I-9553, paragraph 41 ff.

²⁶ See judgment of the Court of Justice of 22 January 2002 in Case C-390/99 *Canal Satélite Digital* [1999] ECR I-607, paragraph 27 ff.

4.2. Scope of the Directive

The Directive applies to companies established in a Member State which post workers to the territory of another Member State in the context of the cross-border provision of services, as provided for in Article 1(3).

4.2.1. Existence of an employment relationship and measures to combat abuse of rights

All the posting scenarios set out in Article 1(3) are based on the assumption that an employment relationship between the company which posts/makes available the worker and the worker himself exists at the time of the posting, and that this employment relationship is maintained throughout the duration of the posting.

The European social partners in the construction sector²⁷ consider that this condition should be set out explicitly in the national legislation transposing the Directive. Similarly, they advocate the introduction of measures at national level in order to stop employment legislation in the host country from being abused by "letter-box" companies which do not engage in any genuine and meaningful business activities in the country where they have their registered office.

The Court of Justice has ruled, in connection with Regulation 1408/71²⁸, that in order to establish the existence of a direct link between a worker and the company posting him, it is necessary to deduce from all the circumstances of the worker's employment that he is under the authority of that undertaking²⁹. The existence of a relationship of subordination between a worker and the posting company, as well as the question of who pays the salary and is empowered to dismiss the worker for any misconduct by him in the performance of his work with the hiring undertaking, are to be included among the relevant criteria in this connection³⁰.

The Court of Justice has consistently ruled, with respect to the limits on fundamental freedoms under the Treaty, that Member States may take measures designed to prevent service providers from improperly or fraudulently taking advantage of the freedom to provide services, in particular with a view to circumvent employment legislation in the host Member State^{31,32}. However, when Member States take such measures, they have to respect the limits imposed by Community law, and in particular they have to ensure that such measures do not

²⁷ The European Federation of Building and Woodworkers and the European Construction Industry Federation.

²⁸ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 5.7.1971, p. 2. Regulation (EEC) No 1408/71 will be replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004) as from the date of entry into force of the latter.

²⁹ See judgment of the Court of Justice of 10 February 2000 in Case C- 202/97 *FTS* [2000] ECR I-883, paragraph 24.

³⁰ See judgment of the Court of Justice of 17 December 1970 in Case 35/70 *Manpower* [1970] ECR 1251, paragraph 18.

³¹ See judgment of the Court of Justice of 27 March 1990 in Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 17.

³² See also section 4.4.below.

render illusory the freedom to provide services. The measures that Member States may take to that effect have to be taken on a case by case basis, taking into account abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely. It follows from the case law of the Court that a generalised and automatic presumption of fraudulent behaviour by someone making use of the freedom to provide services constitutes a disproportionate obstacle to this freedom³³.

4.2.2. Merchant navy undertakings and international transport

Directive 96/71/EC does not apply to merchant navy undertakings as regards seagoing personnel³⁴.

This exclusion is considered justified by the vast majority of Member States³⁵, given the specific nature of the itinerant work done by this group of workers and the practical difficulties associated with monitoring them. The legislation in the Netherlands and the Czech Republic transposing the Directive does not make explicit provision for derogations with regard to the merchant navy.

International rail, road or air transport is not excluded as such from the scope of the Directive.

However, in a statement included in the minutes of a Council meeting³⁶, the Council and the Commission pointed out that Article 1(3)(a) of the Directive³⁷ presupposes

- the transnational provision of services by an undertaking on its own account and under its direction, under a contract concluded between the undertaking providing the services and the party for whom the services are intended and
- posting as a part of such provision of services.

Accordingly, where the aforementioned conditions are not met, workers who are normally employed in the territory of two or more Member States and who form part of the mobile staff of an undertaking engaged in operating professionally on its own account international passenger or goods transport services by rail, road, air or water do not fall within the scope of Article 1(3)(a).

³³ See, e.g., judgment of 13 March 2003, Case C-9/02, *De Lasteyrie du Saillant*; see also judgment of 15 September 2005, case C-464/02, *Commission v. Denmark*, paragraph 81.

³⁴ The exclusion of these undertakings from the scope of the Directive does not exempt them from the rules of private international law (Rome Convention).

³⁵ In their contribution, the European Federation of Transport Workers has expressed a position contrary to this exclusion.

³⁶ Council document No 10048/96 SOC 264 CODEC 550, statement No 3.

³⁷ Article 1(3)(a) of the Directive reads as follows:

"This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting..."

This situation is justified by the fact that it would be difficult to manage the practical consequences of applying different national laws to the existing relationship between the international transport undertaking (operating on its own account or on behalf for hire or reward) and its mobile staff, depending on the country to which the passengers/goods were being transported.

On the other hand, “cabotage transport operations”, in which the various parts of the journey take place within the borders of the same Member State, fall within the scope of Article 1(3)(a) of the Directive³⁸.

4.2.3. Undertakings in non-Community countries

Directive 96/71/EC stipulates in its Article 1(4) that undertakings established outside the Community may not receive more favourable treatment than undertakings established in the territory of a Member State, which means, in practice, that the provisions of the Directive apply to these undertakings.

4.3. The definition of a worker

Several social partners, in their contributions, regret the fact that the Directive is not based on a Community definition of the term “worker”³⁹ and have expressed their concerns about the status of self-employed workers with regard to the Directive. They feel that the considerable differences between the Member States when it comes to distinguishing between employees and self-employed workers often lead to situations in which workers who are regarded as self-employed in their country of origin, but not in the host Member State, are deprived of the protection guaranteed under the Directive. They argue that foreign undertakings posting workers of this kind thus find themselves competing on an unfair basis with undertakings established in the territory of the host country which make use of paid employees.

According to the definition used in the Directive, the designation of a worker in accordance with the law of the Member State in which he or she normally works does not affect his/her coverage by the protective rules in force in the host Member State. This may, however, lead to creating obstacles to the cross-border provision of services by the self-employed⁴⁰.

The legal situation of self-employed workers⁴¹ is attracting increasing attention from legislators at both Community and national levels.

³⁸ See, for example, the definition of “cabotage transport operations” set out in Article 1 of Regulation (EC) No 12/98 of 11 December 1997 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State, OJ L 4 of 8.1.1998, p. 10 and Regulation 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State, OJ L 279 of 12.11.1993, p. 1.

³⁹ In accordance with Article 2(2) of Directive 96/71/EC, “the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.”

⁴⁰ See, in this context, the pending case C-255/04, *Commission v. France*.

⁴¹ Particularly those workers who are self-employed only in legal terms but are economically dependent (parasubordination).

The Commission has included in its work programme for 2006 a Green Paper aimed at launching a public debate on how to cope with the challenge of adapting labour law to the evolving demands for greater flexibility in the labour market, while ensuring a more balanced and transparent access to social rights across all segments of the labour force.

This seems clearly to be a more appropriate context than Directive 96/71/EC to address the self-employed status and the issues it raises for the application of labour law.

In practice, the definition of a worker is in some Member States established on a case-by-case basis, depending on the legal instrument in question (this is the case in Denmark, the Netherlands, Ireland, Sweden and the UK). Many new Member States have consolidated their labour legislation (labour code) which include a definition applying to the entire field of labour law (Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic). Where there is a legal definition of worker it often appeals to the concept of subordination and sets out a number of criteria allowing national courts to rule in specific cases (e.g. that the work in question has been carried out under the supervision and authority of someone else and in exchange for remuneration). Case law has a key role to play in establishing a distinction between employment (including cases of “bogus self-employment”) and self-employment and in some Member states it has established the grounds on which current definitions are based (Germany, France, Hungary and Sweden).

4.4. The temporary nature of the posting

Under Article 2 of Directive 96/71/EC, the term “posted worker” means 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.

In order to establish whether all the terms and conditions of employment in force in the host country apply or only those referred to in Directive 96/71/EC, it is important to know whether a professional activity is exercised on a temporary or on a stable and continuous basis⁴².

Depending on the circumstances, this may be difficult to establish in view of the fact that the term “posting” covers very different situations and the Directive does not stipulate a specific length of time beyond which an activity may no longer be considered as being carried out for a limited period.

This situation has attracted some criticism and it has been argued that a specific time-frame could have been laid down as in the case of Regulation (EEC) No 1408/71⁴³.

However, this criticism does not take account of the fact that the posting of workers within the meaning of Directive 96/71/EC is a way of exercising the freedom to provide services, as set out in Articles 49 and 50 of the Treaty.

⁴² Including those referred to in Article 3(10), first indent, of the Directive.

⁴³ It should be reminded that Directive 96/71/EC does not apply to social security. This matter is regulated by Regulation (EEC) No. 1408/71.

In fact, if the definition of a posted worker set out in the Directive were to diverge from the general definition of the provision of services set out in the Treaty, this would not only make the legal situation more complicated, but would be likely to reduce the level of protection provided to those working on a temporary basis in another Member State.

In accordance with the case law of the Court of Justice, “services” within the meaning of the Treaty “*may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building*”⁴⁴.

The Court also ruled that “*no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty*”⁴⁵ and that the temporary nature of the activity of the service provider must be determined in light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity⁴⁶.

The same principles must therefore be observed when determining the temporary nature of an activity within the meaning of Directive 96/71/EC⁴⁷.

4.5. Maximum work periods and minimum rest periods: periods of inactivity caused by inclement weather

As regards maximum work periods and minimum rest periods, the Council and the Commission stated⁴⁸, at the time of the adoption of the Directive, that, in keeping with the provisions of the Directive concerning the organisation of working time⁴⁹, the term “rest period” refers to any period which is not working time. In accordance with national provisions, it therefore also covers periods of inactivity caused by inclement weather.

4.6. Systems of paid leave funds

Systems of paid leave funds are used in some Member States especially for the building industry. They involve the aggregation of workers' leave entitlements acquired with different employers in the course of a year. Employers must pay into the leave funds contributions calculated on the basis of the relevant national provisions. The interpretation of Article 3(1)(b), read in conjunction with (c), has raised problems regarding such systems and, in

⁴⁴ Judgment of the Court of Justice of 11 December 2003 in case C-215/01 *Schnitzer*, [2003] ECR I-14847, paragraph 30.

⁴⁵ Aforementioned judgment, paragraph 31.

⁴⁶ forementioned judgment, paragraph 28.

⁴⁷ Notwithstanding the case law of the Court regarding Articles 49 ff. of the EC Treaty, Hungary and Greece has opted to establish maximum posting periods.

⁴⁸ Council document No 10048/96 SOC 264 CODEC 550, statement No 6.

⁴⁹ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, OJ L 307 of 13.12.1993, p. 18. This Directive was consolidated by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299 of 18.11.2003, p. 9.

particular, how they tie in with the legislation of Member States that do not have this type of system.

This problem has already been examined in Communication COM(2003) 458⁵⁰.

When the Directive was adopted, the Council and the Commission stated that points (b) and (c) covered contributions to national social fund benefit schemes governed by collective agreements or legal provisions, and benefits covered by these schemes, provided that they did not come within the sphere of social security⁵¹.

In accordance with the case law derived from the *Finalarte* cases⁵², the Court concluded that Articles 49 and 50 EC do not preclude a Member State from imposing national rules guaranteeing entitlement to paid leave for posted workers, on a business established in another Member State which provides services in the first Member State by posting workers for that purpose, on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued⁵³.

In *Finalarte*, the Court left it to the national court to consider whether the potential benefits of a paid leave funds scheme confer real additional protection on posted workers.

4.7. Minimum wage rates

Most of the Member States make provision for statutory minimum wages in their legislation (France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, United Kingdom, Slovakia, Slovenia, Czech Republic). Minimum wage rates are also set in collective agreements which are universally applicable on a sectoral or national basis (Germany, Belgium, Spain, Finland, France, Luxembourg, Malta, and Portugal). In eight Member States (Germany, Austria, Cyprus, Denmark, Estonia, Finland, Italy, Sweden), there is no inter-sectoral national minimum wage and collective agreements are the principal means by which wage rates are regulated.

In accordance with the final part of Article 3(1) of Directive 96/71/EC, it is for the host Member States to define the concept of a minimum wage.

This definition may vary from one Member State to another: e.g. minimum wage rates relating to a particular period of time — monthly or hourly — or to productivity, a single, agreement-based rate for all employees in a given industry or different minimum wage rates applicable to occupational skills and jobs as laid down in collective agreements.

⁵⁰ See section 4.2.1. of this Communication.

⁵¹ Council document No 10048/96 SOC 264 CODEC 550, statement No 7.

⁵² Judgment of 25 October 2001 *Finalarte and others* [1999] ECR I-7877.

⁵³ Aforementioned judgment, paragraph 51.

Member States may also determine the various allowances and bonuses which are included in the minimum wage applicable within limits such as those set out in the Court's jurisprudence.

With regard to the comparison of the wage received and the minimum wage, Article 3(7) of the Directive stipulates that allowances specific to the posting which are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging, may not be considered to be part of the minimum wage.

In this regard, the Council and the Commission stated that, for the purposes of this comparison, account should be taken, where remuneration is not determined by the hour, of the relationship between the remuneration and the number of hours to be worked and of any other relevant factors⁵⁴.

In other respects, it is the full remuneration which the worker receives in his Member State of origin which must be used in the comparison with minimum wage rates in the host Member State.

Another method, which involves comparing the individual elements of the minimum wage in the host State with the corresponding elements of the wage paid in another Member State and which therefore imposes the wage structure applicable in the host State on undertakings from the other Member States, has been the subject of infringement proceedings before the Court of Justice⁵⁵. The Court has considered that allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, and which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71/EC, be treated as being elements of that kind.

As the Directive is not concerned with social security or taxation, the comparison should be made on the basis of gross pay⁵⁶, not net take-home pay.

4.8. Temporary work

The Directive obliges the Member States to ensure that the conditions governing the hiring-out of workers which are in force in their territory are applied to temporary employment undertakings established in other Member States (Article 3(1)(d)). Pursuant to Article 3(9) of the Directive, Member States may introduce provisions to ensure that posted temporary workers benefit from the conditions which apply to temporary workers in the Member State where the work is carried out, including, where appropriate, the principle of non-discrimination. Where such provisions do not exist, differences in the employment conditions of posted temporary workers *vis à vis* locally recruited temporary workers can therefore arise.

In 2002 the Commission presented a proposal of a Directive on working conditions for temporary workers⁵⁷ with the aim of improving protection for these workers by introducing

⁵⁴ Council Document No 10048/96 SOC 264 CODEC 550, statement No 9.

⁵⁵ Judgment of the Court of Justice of 14 April 2005 in Case C-341/02 *Commission v Germany*, [2005] ECR I-2733.

⁵⁶ See previous footnote, paragraph 29 states: "It is the gross amounts of wages that must be taken into account".

the principle of non-discrimination. While these two legal instruments aim at different objectives (on the one hand, the coordination of rules in transnational cases and, on the other, the alignment of substantive provisions — irrespective of whether or not cross-border activities take place) they are complementary to the extent that the application of the principle of non-discrimination would allow in principle for an improvement of the protection of posted temporary workers.

However, the proposed Directive on working conditions for temporary workers would not in any way alter the scope of the Directive⁵⁷.

In their report on the practical implementation of the Directive in the construction sector, the European Federation of Building and Woodworkers and the European Construction Industry Federation outline the problems which might arise with regard to determining which collective agreement is relevant in cases in which the activity in question may fall either within the scope of a collective agreement in the construction sector or within the scope of temporary work.

However, each collective agreement itself determines its scope and there is no reason why, in principle, several collective agreements should not apply to a given situation. It is for the Member States, and, in particular, the social partners in the Member States, to ensure that the conditions for applying collective agreements are clear and understandable and that the agreements themselves are not inconsistent with each other.

4.9. Collective agreements

Collective bargaining plays, in many Member States, a fundamental role in establishing terms and conditions of employment. In practice, the role of collective agreements seems most important with regard to minimum wage rates, paid leave and working time, but the other matters referred to in Article 3 of the Directive can also be the subject of provisions in collective agreements, as is frequently the case. Generally speaking, the hierarchy of standards established in the country implies that collective agreements add to the protection provided by legislative or regulatory provisions.

4.9.1. The sectors concerned

Contrary to the argument which is often put forward, Directive 96/71/EC does not authorise the application of collective agreements to undertakings established in another Member State only with regard to activities in the construction sector but may also cover, by virtue of Article 3(10), second indent, all the other sectors.

The construction sector differs from the other sectors to the extent that the application of the terms and conditions of employment laid down in collective agreements within the meaning

⁵⁷ See the amended proposal for a directive of the European Parliament and the Council on working conditions for temporary workers, COM(2002) 701.

⁵⁸ See recital 13 of the amended proposal for a directive.

of Article 3(8) of Directive 96/71/EC is compulsory for the construction sector, whereas it is up to the Member States to take this decision with respect to the other sectors.

In practice, the vast majority of those Member States where collective agreements are made universally applicable require that, in the sector(s) covered by the relevant collective agreement, undertakings established in another Member State comply with those terms and conditions of employment as listed in Art. 3(1) of the Directive which are laid down in the collective agreements.

Germany and Hungary are exceptions in this regard. They have put in place limitations in this area.

4.9.2. Universal application of collective agreements

Directive 96/71/EC stipulates that, if the terms and conditions of employment as listed in its Article 3(1) set out in collective agreements in the host country are to apply to undertakings established in another Member State, then these collective agreements must be universally applicable.

This requirement has sometimes been criticised for creating uncertainty as to the rules applying in Member States which do not have a system in which collective agreements are declared universally applicable, which is the case, for example, in Sweden, Denmark, Malta and the United Kingdom. It should be pointed out that, in the absence of a system for declaring collective agreements universally applicable, Article 3(8), second indent, of the Directive stipulates that the Member States may make, by an act of the public authorities, service providers from other countries subject to collective agreements which are *de facto* universally applicable⁵⁹, either because they are generally applicable in the sector and region concerned or because they have been concluded by the most representative social partners at national level.

However, in reality most Member States that could avail themselves of this possibility did not declare it explicitly when transposing the Directive into national law. The application of Article 3(8), second indent, and its relation to the other provisions of Directive 96/71/EC, in particular article 3(1) c), and to primary legislation, notably article 49 EC Treaty, are subject of preliminary questions that the Swedish Labour Court has referred to the European Court of Justice in the so-called Vaxholm-case⁶⁰.

It is clearly stated in Article 3(8) that the application of collective agreements should ensure the equality of treatment between undertakings established in the host country and in another Member State on those matters. This and other cases illustrate how legal certainty for the undertakings established in other Member States can be impaired by the implementation of the Directive on this point being left to a system which cannot be predicted in advance since it is the result of negotiations between the social partners.

⁵⁹ See section 4.1.2.1. of Communication COM(2003) 458.

⁶⁰ C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Svenska Byggnadsarbetareförbundets avd. 1, Byggettan Svenska Elektrikerförbundet*.

On the other hand, it is necessary to bear in mind the implications of recital 22 of Directive 96/71/EC which states that this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.

4.10. Optional exemptions

Numerous concerns have been expressed about the optional exemptions provided for in Article 3(3), (4) and (5) of the Directive, granting to Member States the possibility not to guarantee minimum rates of pay in the cases where the length of posting does not exceed one month, or not to guarantee minimum rates of pay and minimum paid annual holidays when the amount of work is not significant. However, it should be recognised that these exemptions are not of great practical importance, as most Member States did not make use of them.

The Member States which availed themselves of the possibility afforded by Article 3(3), (4) and (5) are the following:

Spain applies an exemption from Article 3(1)(b) and (c) with respect to journeys of less than eight days, apart from postings in the context of temporary work. Malta applies the exemption authorised in Article 3(3) of the Directive. Slovenia has established a system of reciprocity, with the agreement of the social partners. The Labour Code of the Czech Republic makes provision for exemptions from Article 3(1)(c) if the period of posting does not exceed one month within a 12-month reference period and from Article 3(1)(b) and (c) if the work concerned does not last for longer than 22 days within a 12-month reference period.

It should be underlined that, where these exemptions also relate to the provisions concerning the minimum duration of paid annual leave, they go beyond what is provided for in Article 3(3) to (5).

In general terms, considering the limited nature of the exemptions, it is difficult to see that their application will pose any specific problems when seeking to prevent unfair competition.

5. INFORMATION, ADMINISTRATIVE COOPERATION AND ENFORCEMENT

5.1. Information on the terms and conditions of employment in the host country

For the Directive to be applied properly, there must be access to information on the terms and conditions of employment that apply pursuant to it. The terms under which such access must be granted are defined in Article 4 dealing with cooperation on information.

The evidence collected on the application of this Article from social partners, national authorities, undertakings and other stakeholders points to serious deficiencies as to the way access to information is provided across Member States.

In its Communication COM(2003) 458 the Commission recognised that the obstacles encountered in seeking information are such as to limit the effectiveness of the Directive. It

proposed that a group of experts nominated by the national authorities started to examine ways of facilitating access to information on the provisions applicable to posted workers in the host Member states by a variety of means.

Therefore, the Commission services have supported the work of the group of national experts in the context of the practical application of the Directive. They emphasised the importance of setting up appropriate information structures, and they reorganised and published lists of the liaison offices and monitoring authorities in the Member States⁶¹.

At the end of January 2004 the Commission services launched a website on the portal www.europa.int⁶², devoted exclusively to the posting of workers within the framework of the provision of services. This site, which is supposed to be a "living" site, contains links to the Member States' own sites on the posting of workers or, in the absence of such sites, on their national labour legislation⁶³. The national experts have expressed satisfaction with this new site and have undertaken to develop their own respective sites and keep them up-to-date. Since then, the number of national sites has grown, and an increasing amount of information on these sites is accessible in languages other than the national one(s).

Several Member States have developed and published leaflets or brochures, sometimes addressed and tailored to specific Member States (France, for example, has done this). They are translated into the main languages spoken in the country of origin. However, again in this case, this is far from constituting a generalised practice.

Apart from the information available from the liaison offices, the Member States have mentioned the following sources of information:

Germany	Website: www.zoll.de – News – <i>Finanzkontrolle Schwarzarbeit</i> (Department for the Financial Control of Undeclared Employment)– <i>Arbeitnehmer-Entsendegesetz</i> (Posting of Workers Act), www.sokabau.de ; notice on the Posting of Workers Act; leaflets on the German holiday and wage equalisation fund, in various languages
Austria	Website: www.bmwa.gv.at – Topics - Labour Law and worker protection – Labour Law – Posting of workers
Belgium	Website: www.meta.fgov.be –keywords – posting; leaflets on certain laws applicable
Czech Republic	Website: www.mpsv.cz
Denmark	Website: www.posting.dk
Spain	Website: www.mtas.es (Guía Laboral of the Ministry of Labour),

⁶¹ http://www.europa.eu.int/comm/employment_social/labour_law/docs/liaisonoffices_fr.pdf

⁶² http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_fr.htm

⁶³ http://www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_fr.htm#7

	www.Boe.es (Boletín Oficial del Estado)
Estonia	Website: www.ti.ee (Labour Inspectorate), www.legaltexts.ee (legislation), www.sm.ee (Ministry of Social Affairs), www.ametlikudteadaanded.ee (Collective agreements, in Estonian)
Finland	Website: www.finlex.fi/normit/index (general collective agreements); brochures on labour legislation, including on the site www.mol.fi ; the Finnish trade union organisation SAK has opened an information point in Tallin on working in Finland, www.suomi.fi (employment and entrepreneurship)
France	National telephone hotline (0 825 347 347); Reply within five days to questions put via the Employment Ministry's portal (www.travail.gouv.fr); general information leaflet; brochures for each of the EU Member States, and as a priority for the new Member States
Hungary	Website: www.afsz.hu
Ireland	Website: www.entemp.ie , www.justice.ie , www.labourcourt.ie (collective agreements)
Italy	Website: www.welfare.gov.it/eures/default
Latvia	Websites: www.vdi.lv , www.nva.lv
Lithuania	Websites: www.vdi.lt , www.lrs.lt (legislation)
Luxembourg	Website: www.itm.public.lu –Labour Law
Malta	Website: www.education.gov.mt
Netherlands	Websites: www.szw.nl , www.cao.swz.nl (legislation); telephone information service (+31 (0) 800-9051); e-mail (info@szw.nl)
Poland	Website: www.pip.gov.pl/start/menu-obco.htm ; information brochures
Portugal	Website: www.igt.gov.pt
United Kingdom	Websites: www.dti.gov.uk/er/individual.htm www.dti.gov.uk/er/directive.htm , www.dti.gov.uk www.homeoffice.gov.uk
Slovakia	Website: www.safework.gov.sk
Slovenia	Website: www.gov.si/mddsz

Sweden	Websites: www.av.se/english/about_us/posting_of_workers.shtm www.riksdagen.se (legislation)
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On a proposal from the Commission services, the group of national experts has agreed on the creation of “country factsheets” containing basic information on the terms and conditions of employment to be observed in each Member State.

These factsheets are drawn up under the responsibility of the Member States concerned and will be published on the Commission’s internet site. They will contain a concise description of the main rules to be observed in each Member State, thus making these rules easily accessible to workers and service providers.

Drafts of these factsheets are at present being elaborated on by the Commission's services in collaboration with the Member States with the aim of publishing them in 2006.

The social partners in the construction sector at European level, the European Federation of Building and Woodworkers and the European Construction Industry Federation, run at present a project that will set up a database on the implementation of the provisions of the Directive. This project is financed by the European Commission. This database should gather together the national legal and conventional provisions that apply to the construction sector and that have to be respected during the posting of workers.

While social partners play an important role in providing information on the terms and conditions of employment in their respective Member States, the prime responsibility for this obligation still lies with the national liaison offices, and they should not be tempted into systematically referring requests for information to the social partners.

Despite the efforts that have been carried out with the aim of improving access to information on the terms and conditions of employment applicable pursuant to the Directive, the Commission services are aware that the situation is still unsatisfactory in many regards and that stepped up efforts are needed from national authorities if the objectives of the Directive are to be reached.

5.2. Administrative cooperation: monitoring authorities and liaison offices

5.2.1. Control measures

Host Member States have resorted to several measures in order to control the respect for the employment conditions established in Article 3 of the Directive. However, in carrying out such measures, Member States are obliged to respect Article 49 EC Treaty and therefore abstain from creating or introducing unjustified or disproportionate obstacles to the free provision of services in the Internal Market. The control measures that have been the subject of specific case law are the following:

- the requirement to have a representative in the territory of the host Member State;

- the requirement to lodge an advance declaration with the authorities of the host member State;
- the requirement to obtain a prior authorization or a prior registration;
- the requirement to hold and keep social documents in the territory of the host member State and/or under the conditions applicable in its territory.

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, the Commission presented a modified proposal where Articles 24 and 25 setting out specific provisions on posting of workers are deleted. Therefore, the Commission undertook to clarify the obligations of Member States in the field of posting of workers, by providing them guidance in order to ensure that they act in line with the Community *acquis* as interpreted by the European Court of Justice in its jurisprudence on Article 49 EC Treaty. A separate communication deals in detail with the four types of control measures mentioned above, and for this reason the matter will not be examined further in this report.

5.2.2. Administrative cooperation

Administrative cooperation between national authorities regarding the provision of information also needs improvement.

The Directive imposes clear obligations as regards cooperation between national administrations, especially in the context of transnational activities suspected of being illegal.

While several Member States are making considerable efforts to achieve this objective, others still need to step up their efforts in order to respect not only the letter of Article 4 of the Directive, but also its spirit.

The report of the European Federation of Building and Woodworkers and the European Construction Industry Federation is very critical on the subject of administrative cooperation, claiming that staff numbers are often inadequate, that very few requests for information are made, and that the liaison offices and monitoring authorities often fail to provide answers at all, or else provide only vague answers.

The Commission services reacted to this situation by asking the Member States to make sure the bodies designated as liaison offices and/or monitoring authorities are fully aware of their role as "relays" within the framework of European cooperation. They expressed the opinion that designating a specific person or operational service as contact point appears to be more useful than designating a large anonymous structure.

In addition, the discussions of the expert group have revealed that language problems lie behind many of the difficulties encountered in connection with administrative cooperation. This is one of the reasons why the group has decided to create a standard form for facilitating exchanges of information. This has been finalised by the expert group in 2005.

Another Commission initiative concerns the drafting of "cooperation standards" containing certain key principles of good cooperation and serving as a tool for structuring and implementing administrative cooperation. A code of conduct on cooperation standards has been agreed upon by the expert group. This code of conduct will now have to be incorporated into the functioning of the national authorities when handling requests for information from foreign authorities. The experience of working with this code of conduct on cooperation standards will be evaluated within the group of experts and by the Commission. With the aim of allowing the monitoring authorities to know more about the inspection systems applied in other Member States, the Commission services organised an exchange of information within the group of national experts concerning the organisation and functioning of the different labour inspection systems⁶⁴.

This exchange of information revealed that concepts, competences and methods used by labour inspectorates vary significantly from one country to another. A number of aspects were highlighted. Information on these aspects was also provided in the answers to the questionnaire:

Member State	General system/ limited system	Level (national/regional/local)	Triggers for inspection activities	Ways of improving observed shortcomings, sanctions
France	General system, also covering social plans, collective rights, company registration, illegal work, bogus self-employment, bogus trainees, etc.	Interministerial organisation; responsibility part-shared with other bodies		Temporary closure of work site; observations, warnings, court action
Spain	General system, also covering social security, the underground economy, bogus self-employment, industrial relations, etc.	Decentralised: 17 regions, but central coordinating authority	Annual plan of objectives (after consultation with the relevant bodies); determines inspection figures and criteria; complaints	Temporary closure of work site; application, administrative sanctions, court action

⁶⁴

A questionnaire was prepared on this subject and sent to the Member States. The information collected was communicated to the group of experts and was discussed further. The group decided to disseminate the information by publishing it on the Commission's internet site.

United Kingdom	Limited system: health and safety, minimum wage	Organisation shared between the Health & Safety Executive and local authorities, depending on the risk		Minimum wage: administrative sanction; Health and safety: administrative sanction, prison, professional disqualification
Denmark	Limited system: working environment; no ex-ante controls on working conditions			
Germany	Combined system: health and safety; undeclared employment, transnational postings	Health and safety: regional level; undeclared employment and postings: Department for the Financial Control of Undeclared Employment (17 bases for intervention)	Declaration: previous irregularities (in 15% of cases); complaints and denunciations, priority sectors identified every 6 to 8 weeks	
Luxembourg	General system: health and safety and labour law	National level		Temporary closure of work site (following structural reforms); advance warnings, penal sanctions (including for the client); more than 200 procedures for stopping work
Belgium	Specialised system: social legislation, health and safety and social security	Services at federal and regional level Decentralised system Interdisciplinary cells	complaints or control on own initiative	Administrative sanctions, criminal proceedings
Sweden	Limited system: working environment; no ex-ante controls on working conditions	Decentralised: 10 districts, but central coordinating authority	Planning based on statistics, risks, areas, accidents and plan for activity, regulated by internal routings	Work Environment Authority (injunction, prohibitions, fines), Ombudsman (discrimination), supervisions by social partners of collective

			Complaints	agreements, judicial proceedings for breach of law
Finland	General system: health and safety and labour law	8 regions; inspection unit for foreign workers		Administrative and penal sanctions
Malta			In particular, complaints	
Poland	General system	Chief Labour Inspectorate and authorities in 16 regions	Routine inspections, complaints	Administrative and penal sanctions
Czech Republic	General system: Labour Code	77 regional offices; health and safety: special authority	Ex officio, complaints	Administrative sanctions
Hungary	General system	19 regional offices	Ex officio	
Lithuania			Complaints, random inspections, certain types of companies	
Austria	Limited system: health and safety, working time	Central Inspectorate and 19 regional inspectorates	Ex officio, complaints	Administrative sanctions, court action
Cyprus	Health and safety	4 regional offices		
Greece	General system: labour law	National level	Mostly inspections following a planning, complaints	
Ireland	Labour conditions, except health and safety (Health and Safety Authority)	National level	Mostly complaints, also routine inspections	Administrative sanctions
Latvia	General system: labour law, labour protection	7 regional inspections and 19 regional offices	Inspections and organisation of campaigns	Administrative sanctions
Slovakia	General system	General Labour Inspectorate, 8 regional inspections		Administrative sanctions

Slovenia	Health and safety	3 inspectorates and 14 regional units	Ex officio	Administrative sanctions, court action
Portugal	General system	National level, 32 regional services	Plan of activities, annual report and organization of campaigns, routine inspections and previous contact with social partners	Administrative sanctions, temporary suspension, court action and accessory sanctions
Netherlands	Mixed system: health and safety, illegal employment and to limited extent labour law	National level		

While some Member States have several thousand labour inspectors working in the frame of an integrated system (Germany, for example: in 2003 the German authorities performed 37 000 controls, resulting in the imposition of 21 000 fines under the German Posting of Workers Act), this type of control is much less developed in other Member States (UK, Denmark, Sweden, for instance).

Despite this diversity, it appears necessary and useful to strengthen the cooperation between the labour inspectorates on matters covered by the posted workers directive. As a first step the group of experts decided to involve more closely the Labour Inspectorates and other monitoring bodies in the working of the group, and as of 2006 there will be at least once per year a meeting where monitoring issues of a more practical nature will be discussed.

The evidence gathered in this report shows that there is considerable scope for improving access to information and administrative cooperation, among others by identifying and disseminating best practices. While it is up to the Member States to create the necessary conditions for administrative cooperation to function effectively, the Commission has a duty to ensure that Member States respect their obligations in accordance with Article 4 of the Directive. In a separate communication, the Commission sets out the directions that Member States should follow in order to achieve the results required by the Directive in a more effective manner.

5.3. Measures in the event of non-compliance with the Directive, and transnational enforcement of fines

Directive 96/71/EC does not provide itself for the means in the event of non-compliance with the law, but leaves it to the Member States to make the choice as to the instruments to put in place to this end. It springs, however, from the general principles of community law that these

instruments have to be of such a nature as to guarantee to the persons concerned the effective protection of their rights. This implies in particular the putting into place of appropriate judicial recourse, as well as the penalties that need to be of an effective, proportionate and dissuasive character and the basic conditions and the procedures of these penalties have to be similar as regards nature and importance to the ones applicable to the violations of national law.

In addition to the judicial proceedings provided for in Directive 96/71/EC for the purpose of enforcing obligations, all Member States have a system of penal or administrative sanctions for failure to comply with the Directive. The nature and content of these sanctions depend, in principle, on the type and gravity of the offence.

Given the transnational nature of the activities covered by the Directive, the mutual recognition and enforcement of fines (in particular) in the country of establishment of the company posting the workers is crucial.

In the absence of a common mutual recognition and enforcement instrument⁶⁵, this point has caused major practical problems. However, as already emphasised in Communication COM(2003) 458, with the adoption and transposition of the Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties⁶⁶ the situation should improve.

Following a detailed presentation by the Commission services, the group of national experts welcomed this Framework Decision and examined how it might be applied in the context of Directive 96/71/EC. The group felt that the Decision would prove a valuable tool in ensuring compliance with the terms and conditions of employment referred to in the Directive, and a means of remedying existing problems.

On a proposal from the Commission services, the group examined the question of the principle of double incrimination contained in Article 5(3) of the draft Framework Decision, whereby the executing State may make the recognition and execution of a decision subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing State.

The group felt that this possibility of refusing to enforce a fine was irrelevant in the context of Directive 96/71/EC, insofar as Article 5(1), final indent, read in combination with Article 7(2)(b), lists "offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty" among those offences for which there is no provision for refusal of enforcement in the absence of double incrimination.

⁶⁵ At present these questions are mainly governed by international Conventions, none of which has been ratified by all the Member States. They include the Convention of 11 June 1990 on the transfer of proceedings in criminal matters, the Convention between the EC Member States of 1991 on the enforcement of foreign criminal sentences, the European Convention (Council of Europe) of 1970 on the International Validity of Criminal Judgments and the European Convention (Council of Europe) of 1972 on the transfer of proceedings in criminal matters.
Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16 of 22.3.2005.

Moreover, all Member States have within their legislation sanctions for failure to comply with the terms and conditions of employment laid down in Directive 96/71/EC (in this context, see Article 5 of the Directive).

5.4. Joint and several liability

The European Parliament⁶⁷ and several social partners endorse the principle of general or principal contractors having joint and several liability for subcontractors' obligations towards their workers, taking the view that this reinforces the liability of contractors to monitor compliance with the employment legislation by their commercial partners.

Certain advantages for posted workers have been credited to a regime of joint and several liability offers. In particular, it:

- offers the posted worker an additional channel of redress, particularly useful in cases where his employer "disappears" or becomes insolvent;
- creates a strong incentive for companies which subcontract construction work to another company to make sure that the situation of posted workers is "in order";
- dissuades companies from subcontracting work to companies when they have serious doubts about the willingness and/or capacity of those companies to comply with the rules laid down in the legislation transposing the Directive.

However, it may also lead to a general reluctance to sub-contract foreign companies, which raises questions as regards the dissuasive effect in practice of such legislation on the freedom to provide services.

Germany, Spain, Italy, Austria, the Netherlands and Portugal all apply systems of joint and several liability, which however differ among themselves. In some cases (Germany, Spain, Italy and the Netherlands) they allow workers to claim directly and immediately against the general contractor; in others (Austria), the general contractor cannot be held liable until redress has first been sought against the actual employer. Spain and Portugal have specific rules regarding joint and several liability in respect of temporary work.

French legislation imposes an obligation of vigilance upon the principal contractor, requiring him to carry out several formalities with regard to his chosen subcontractor in order to verify that the latter runs his business in conformity with labour law. However, failure to comply with this obligation of vigilance does not at the moment incur any financial penalty.

The Court of Justice recently delivered a judgment on the German rules regarding the general contractor's joint and several liability in respect of payment of the minimum wage by his subcontractors.

⁶⁷ Points 6 and 9 of Resolution P5_TA(2004)0030 of 15.1.2004.

In its Judgment of 12 October 2004 in the case *Wolff & Müller*⁶⁸, the Court found that, pursuant to Directive 96/71/EC, Member States are obliged to ensure that undertakings guarantee to workers posted in their territory the payment of minimum rates of pay; if Member States have a wide margin of appreciation in determining the form and detailed rules governing the adequate procedures for doing this, they should, in applying this margin of appreciation, observe the fundamental freedoms established by the Treaty.

The Court did not make clear whether the German rules restricted the freedom to provide services and instructed the referring court (the German *Bundesarbeitsgericht*) to determine whether the measure would lead to additional expenses and/or burdens.

The Court then pointed out that the protection of workers was one of the overriding reasons relating to the public interest capable of justifying restrictions on the freedom to provide services, and that the procedural arrangements ensuring observance of a right constituting an overriding reason relating to the public interest should likewise be regarded as being such as to ensure that protection.

After having noted that the German guarantee added to the first debtor of the minimum rate of pay a second debtor, and that this was such as to ensure the protection of posted workers, as well as to ensure the overriding requirement to prevent unfair competition, the Court concluded that the freedom to provide services does not preclude joint and several liability to protect minimum remuneration, even if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective. The Court left it to the referring court to carry out the assessment of whether this measure is proportionate.

The *Wolff & Müller* judgment shows that a system of joint and several liability, while not being required by the Directive, may nevertheless constitute "*an appropriate measure in the event of failure to comply with [...] Directive [96/71/EC]*." It encourages compliance with the Directive and may, in this sense, count among the instruments destined to ensure effective and widespread implementation of the Directive provided it is proportionate to the objective pursued.

The Commission services had the opportunity to inquire Member States about the advisability of introducing a European framework governing joint and several liability. Opinions diverge among Member States as to the proportionality of such a measure as well as on the issues of subsidiarity and coherence of civil law. Social partners have expressed on this point divergent views, with some employers' representatives stating that joint and several liability was a strange notion for many national legal systems and that EU rules on this matter would not be in line with subsidiarity and proportionality. On the other hand, trade unions would welcome a Community initiative designed to expand the use of joint and several liability in order to minimize the possibilities to circumvent legal or collectively agreed labour standards.

⁶⁸ Judgment of the Court of Justice of 12 October 2004 in Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.