

Protecting national collective agreements in UK construction

A REPORT BY AMICUS, GMB AND TGWU

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National Engineering Construction Committee

October 2005

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Preface

A paper by the NECC on the Posting of Workers Directive 96/71/EC and the need to enhance employment protection for domestic and non-UK workers in the UK construction industry, as agreed in the Warwick accord between the Labour Party and the unions.

The NECC unions being Amicus, GMB and TGWU congratulate and welcome the return of the Labour Government to a historic third term. We look forward to working with the Government on delivering the commitments developed at Warwick University on 25th July 2004, by the Labour Party's National Policy Forum. Further we welcome the speech made by the Chancellor of the Exchequer Gordon Brown MP at the 2005 TUC conference where he said *"I am here today to tell you that Tony Blair and the government will, as a priority, put in place this year and next the legislation honouring in full the Warwick agreement"*.

Of particular significance to the NECC in these assurances was the inclusion of the following commitment:

- *'Assurance that Posting of Workers Directive will not lead to under-cutting'*

The intention of this paper is to outline how this commitment can be met, consequently ensuring that the UK construction industry is protected from unregulated wage competition and also creating a level playing field with Europe. This approach will protect the terms and conditions of domestic workers, and guarantee a platform of fairness for non-UK workers in an environment free from exploitation. This paper follows on from the endeavours of engineering construction members of the three unions who lobbied Westminster in December 2003, and further lobbied throughout 2004 and 2005 up until the General Election.

Aim of the Posting of Workers Directive 96/71/EC

The Posting of Workers Directive (The Posted Workers Directive) 96/71/EC ("the Directive") reproduced in Appendix 2 of this document was adopted by the European Parliament and Council of the European Union on 16th December 1996, and came into effect on 24th September 1999. It is binding on the United Kingdom of Great Britain and Northern Ireland.

The aim of the Directive is to protect the rights of workers sent abroad to work in another European Union country. In regard to the construction industry, it aims to further protect posted workers from exploitation. Conversely, in particular regard to the construction, contracting and building sectors, it protects domestic construction workers and contractors in the host country from unregulated wage competition or social dumping. The Directive addressed the need to create a basic framework of equal treatment for workers within the territory where (building and construction) work is undertaken.

The mobility of people in the European construction Industry

The European Union's single market, and its ongoing process of economic integration and cross border transnational trade has seen a rise in the number of workers sent to temporarily work in another Member State.

As the European Union continues to develop we anticipate that the scale of these movements in cross border trade will continue to grow. Such temporary arrangements are common in the construction, contracting and building sectors and their related activities.

Nearly 10 million people were employed in the EU construction industry in 2000, representing around 11% of employment in Europe (Lienhardt, 2004). EU Enlargement expanded the European Economic Area to 450m people (Langford and Agapiou, 2004), and the impact on the construction industries people figures will have been great. In the UK the industry employs 1.4 million people and represents at least 10 per cent of GDP (DTI), it further supports hundreds of thousands of jobs throughout the UK, and is of strategic importance to the UK economy.

Debates are taking place within the new accession countries, including Hungary, to develop legislation to enforce industry wide collective agreements within their construction industries (Toth and Neumann, 2005). They recognise the need for increased social protection in the construction sector, in line with the majority of the 'old' EU member states.

The development of the Posting of Workers Directive 96/71/EC

The development and subsequent adoption of the Directive came about due to the increasing transnationalization of labour within the EU. The social partners developed the Directive over a twenty period, culminating in its adoption in 1996. Of particular significance in the progress of the Directive was the experience of the German construction industry.

According to the German construction and building union IG Bau, during the 1990's, at the height of the German crisis in social dumping, 400,000 domestic construction workers were unemployed, whilst 400,000 foreign workers were actively employed in the construction sector across the country (IG Bau). Notably, at the time the UK construction industry was in recession, and an estimated 60,000 of these foreign workers were from the United Kingdom and Eire (Thompsons, 1997).

In a 2003 report on the German experience to the ILO in Geneva, Thomas Faist, from the University of Bremen, said that in the early to mid 1990's "*...firms mainly from Portugal began to take advantage of the freedom of services provision of the internal market. These companies outpaced those from CEE (Central & Eastern European) countries – among other reasons because they could offer labour at an even cheaper price than the CEE companies who had to pay prevailing German wage rates (excluding social wages). The EU companies could pay the wages in the country of origin. It took some time until the EU attempted to regulate this situation in 1996 by means of a Directive stipulating that workers from EU countries should basically be employed according to the conditions prevalent in the country where the project is fulfilled, i.e. "equal pay for equal work at the same place". In regard to the era prior to the Directive, he went onto say "By the mid-1990s employers began to exit the regional construction employers associations. This constituted a threat to this sector-specific collective bargaining structure in the Federal Republic of Germany."* (Faist, 2003).

To further complicate matters, the scenario exists that a worker can be posted to a Member State from a third Member State via a contractor or intermediary seeking to capitalise on the lowest set of terms and conditions.

In such circumstances unscrupulous employers could undercut established terms and conditions by applying the poorest set of conditions rather than the higher conditions prevailing in the host country.

These situations described above, where long established employment practices and collective agreements come under threat from unregulated wage competition are now developing within the UK. For a detailed overview of recent abuses in the UK, please refer to our previous NECC documents:

- NECC statement of case '*Social-dumping: a crisis in the UK Engineering Construction industry*' February 2004 (Second Edition).
- NECC '*Posted Workers Directive bulletin*'. November 2004

Both are available to download at www.amicustheunion.org once there, click on sectors, then construction and contracting, then campaigns.

Interpreting the Directive in its true spirit

In our ongoing campaign to seek legislation to end social dumping and the exploitation of posted workers, the NECC have consistently referred to the need for the Directive to be enacted into UK law "in its true spirit". What we mean by this is that the Directive was written with specific provisions for the construction industry, something that UK law has so far failed to either address or recognise. There has been no legislative transposition of the Directive by the Government, only the citing and clarification of existing minimum standards in order to (in the Government's opinion) comply.

Our aim would see the national construction collective agreements in the UK being fully recognised as the prevailing standards, laid down in legislation. A list of UK construction industry collective agreements is detailed in appendix 1.

Analysing the experiences of Member States and respective case law can sum the impetus behind the Directive. The question arose as to what terms and conditions applied to posted workers:

those of the home country (the country of origin)?

or

those of the host country (the country of posting)?

The Rome Convention of 19th June 1980 says that, whichever law applies, the workers should have equal protection of the laws of the host country. The European Court of Justice (ECJ) reinforced this protection via the decision in *Rush Portuguesa* (1990) ECR I-1417. The ECJ held that "*Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory.*"

This situation enables Member States to compel companies posting workers in another Member State to respect national / local legislation and collective

agreements. Such arrangements exist for collective agreements in construction throughout the 'old' European economies.

This ECJ decision was tested in the courts via a case between a local German employment office (Arbeitsamt) and Portugaia Construction, a Portuguese construction company.

On 24th January 2002, the ECJ issued a judgment, which largely upholds the German Law on the Posting of Employees (Arbeitnehmer-Entsendegesetz). Based on this law, provisions of certain collective agreements in the building industry can also be applied to foreign workers and their employers (Behrens, 2002). This grants prevailing wages and working conditions to foreign workers while working on German construction sites (NECC, February 2004).

Martin Behrens, of the Institute for Economic and Social Research wrote in regard to this 2002 ECJ ruling on the German construction industry "... *The Portugaia case shows again that there are two different types of logic applying to 'fair competition' within the EU which need to be balanced against each other. Indeed, it makes a difference whether lower-paid workers physically move to other Member States or whether workers simply help to produce cheaper goods and services which are then exported. By having enacted the posted workers Directive, a majority within the EU Council of Ministers seems to have acknowledged this distinction and decided to protect national regimes of labour law from the most destructive powers of unregulated wage competition, but also to protect migrant workers by providing them with access to national guaranteed minimum standards. As the recent ruling in the Portugaia case and similar cases have shown, this dual understanding of fair competition is still not universally accepted. There is, however, a case for maintaining minimum labour standards in construction. Threatened by the poor quality of the work of some 'fly-by-night' contractors the US Congress decided to introduce prevailing wage legislation as early as 1931. Large parts of this **Davis-Bacon Act** are still in force today. Why should Europeans be satisfied with less?*" (Martin Behrens, Institute for Economic and Social Research, WSI)

The NECC agree with this sentiment, and ask why should UK workers and those coming to work here settle for less?

The Posting of Workers Directive goes further than the ECJ judgement on the Rome Convention by enshrining requirements in European Community law. A 'hard core' of clearly defined protective rules are required by recital (13) of the Directive. These are defined in Article 3(1) of the Directive, which says:

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or*
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:*
 - (a) maximum work periods and minimum rest periods;*
 - (b) minimum paid annual holidays;*
 - (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
 - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*
 - (e) health, safety and hygiene at work;*

- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

Provisions for Article 3 within UK law include:

Article	'hard core' measures	UK measures to comply
3(1)(a)	Maximum work periods and minimum rest periods	Regs. 4-6, 10-12 Working Time Regulations 1998
3(1)(b)	Minimum paid annual holidays	Regs. 13-16 Working Time Regulations 1998
3(1)(c)	Minimum paid annual holidays	National Minimum Wage Act 1998 and regulations
3(1)(d)	The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings	Employment Agencies Act 1973 and regulations, Employment Agencies and Employment Businesses Regulations
3(1)(e)	Health, safety and hygiene at work	Health and Safety at Work Act 1973 and regulations
3(1)(f)	Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people	Various Health and Safety, Social Security, Maternity and employment of children legislation.
3(1)(g)	Equality of treatment between men and women and other provisions on non-discrimination	Equal pay, Sex, Race, Sexual orientation, Disability Discrimination legislation.

For the scope of which workers are covered, Article 1(2) says that merchant navy seafarers are specifically excluded from the Directive.

Article 2(2) states "*the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted*".

The EFBWW (European Federation of Building & Woodworkers) have identified problems across the EU where, although the provisions above, and special consideration of construction activities are laid down in national law, the reality is that a lack of monitoring by the authorities means that in many instances exploitation and non-adherence to national law continues. A cohesive strategy by all social partners including trade unions, the DTI, HSE and employers needs to be developed to monitor and ensure the fair employment of workers. Joint investigations of abuses and monitoring are key to the overall success of any social legislation.

In regard to Article 3(1)(b) above, according to Thompsons Solicitors "*The Member States in the Council Minutes asserted that this covered "national social fund benefits, governed by collective agreements or legal provisions, provided that they do not come within the sphere of social security". This may have been provoked by a decision of the ECJ, Case 272/94: Climatec, 28 March 1996, which ruled that the EC Treaty allowed an undertaking to avoid paying employer's contributions to some benefit schemes in the host country where the undertaking was already liable for comparable contributions in its home country. The Court misunderstood contributions towards an employer's loyalty bonus scheme and a scheme covering bad-weather payments - both parts of pay packages - and classified them as comparable social*

security benefits. The Member States were anxious that paid holiday schemes be properly classified and remain mandatory entitlements for posted workers.”
(Thompson Solicitors, 1997)

The national collective agreements in the UK construction industry incorporate Holiday pay and combined benefits credit schemes as described above. These enable contractors to efficiently put money aside for holiday pay, and provide workers with a range of benefits, which throughout the industry encapsulate everything from death and accident benefits to occupational healthcare. This further gives weight to the arguments that such arrangements must be protected from the ravages of unregulated wage competition and social dumping.

In relation to the above minimum ‘*hard core*’ of standards however, in the first paragraph of Article 3, the Directive states:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

The Annex described in the second indent relates to the construction, contracting and building sectors, and is reproduced here for ease of reference:

ANNEX

The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

- 1. excavation*
- 2. earthmoving*
- 3. actual building work*
- 4. assembly and dismantling of prefabricated elements*
- 5. fitting out or installation*
- 6. alterations*
- 7. renovation*
- 8. repairs*
- 9. dismantling*
- 10. demolition*
- 11. maintenance*
- 12. upkeep, painting and cleaning work*
- 13. improvements.*

The development of this Annex was due to the outcome of the ECJ Rush Portuguesa case, which generated extensive debate and political struggles amongst member states regarding the application of collective agreements across all sectors. This debate led to a compromise being reached within the Posting of Workers Directive, being:

- Collective agreements will only be mandatory for activities listed in the Annex (construction, contracting and other building related activities) (Article 3(1));
- But Member States at their discretion can choose to apply collective agreements to other activities (Article 3(10)).

We believe that construction industry collective agreements are laid down in the Directive as being mandatory in relation to the Annex. Article 3(1) defines these as collective agreements “*which have been declared universally applicable*”,

which means they (Article 3(8)): *"must be observed by all undertakings in the geographical area and in the profession or industry concerned"*.

Many member states across the European Union extend their construction collective agreements so that they are also binding on parties not signatory to them. This ensures that sectoral and / or regional collectively agreed standards are not undermined, and that a level playing field is maintained as far as is reasonably practicable. Previously in the United Kingdom, Schedule 11 to the Employment Protection Act 1975 and the Fair Wages Resolution 1946 guaranteed similar requirements for terms and conditions in the UK, until the legislation was repealed by the then Conservative Government, a move that in our opinion should never have taken place.

The 1946 Fair Wages Resolution came into existence at a time when there was mass social and economic upheaval across Europe following the Second World War. Thankfully we now live in an age where throughout the European Union the nations of Europe are at peace with one another. However, this European integration brings with it the need for safeguards for workers in what is a time of further social and economic change.

In the UK we rely upon the development of social legislation to address issues such as those outlined within this document.

At present, in the UK collective agreements are deemed to be 'voluntary' and not 'legally binding'. The argument put forward by the DTI and Labour Government prior to the Warwick accord was that this resulted in the UK construction industry collective agreements not falling under the scope of the Posting of Workers Directive. But the NECC explains that in some industries, and particularly the construction, building and contracting sectors 'Industry wide collective agreements' set the actual or minimum prevailing rates and conditions, not the lesser national legislation on minimum employment conditions. The NECC have consistently sought to protect these nationally agreed benchmarks, and our stance has always been and remains the eradication of exploitation and an end to non-adherence to the national collective agreements.

With the lack of mandatory construction industry collective agreements in the UK, the question is what can be done? The answer lies within Article 3(8) of the Directive, which foresaw this scenario. Article 3(8) outlines two options, and states:

"In the absence of a system for declaring collective agreements or arbitration awards to be of universal application... Member States may, if they so decide, base themselves on:

- *collective agreements...which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or*
- *collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory"*.

The NECC interprets that "in the absence of a system of declaring collective agreements... to be of universal application", Member States (the United Kingdom) may choose either or both of these two options, however the obligation is to choose at least one.

The NECC argue therefore that the Posting of Workers Directive 96/71/EC requires the application across the total construction process, as defined in the Annex, of mandatory collective agreements. **Basically, in the current environment, the United Kingdom has simply to decide which collective agreements to apply.**

Moving forward with the Warwick commitment

The NECC are conscious that the UK Government may be apprehensive of implementing what we have called for. Although implementation is within the scope of the Directive, the fear may be that such a move could fall foul under Article 49 of the EC Treaty (the freedom to provide services); therefore we bring attention to the following examples of ECJ cases including the Portugaia case:

- *Arblade* [1999] ECR I-8453
- *Mazzoleni* [2001] ECR I-2189
- *Finalarte* [2001] ECR I -7831
- *Portugaia Construcoes* [2002] ECR I-787
- *Commission v Italy* [2002] ECR I-1425

The reasoning of the ECJ in these cases shows that if measures are taken which implement rules on collective agreements, which reasonably pursue the aim of the social protection of workers, these rules have been permitted to stand by the ECJ.

The question raised by some is why construction? The answer is that the industry by its very nature is disparate, itinerant and notorious for resorting to operating within a 'grey zone' (Cremers and Donders et al, 2004).

The built environment and essential infrastructure are critical to the advancement of any economy and society; to take the industry for granted is not an option. Construction is characterised by a transient workforce, this rapid mobility and significant movement of labour across boundaries and borders is unique to construction compared to other more static industries. Project deadlines and fast track schedules can lead to chaotic organisation. This, coupled with the use of multiple contractors and sub-contractors creates an environment where even the client and main contractor of a project network lose sight of the situation. Circumvention of the law, bogus self-employment, tax avoidance, exploitation of people, disregard of health and safety leading to tragic consequences, and poor or non-existent welfare facilities are all synonymous with the unregulated side of the industry. Specific laws already exist in the UK solely dealing with construction, treating it entirely differently to other sectors of the economy due to its inherent problems. These problems are the very reason the Directive came into being, recognising the fact that national collective agreements bring frameworks of best standards and best practice within the industry for bona fide companies and workers. The agreements offer continuity of employment reward, benefits, health and safety, competency and standardised skills recognition, apprenticeship frameworks and increased security for all.

In comparison static workplaces by their very nature enable workers to organise and bargain over a period of time, whereas within construction, due to tight timescales and job insecurity this can be difficult, and at times impossible. Without these agreements construction is otherwise open to abuse from the more unscrupulous elements that seek to exploit the weaknesses of the industry, gaining an unfair advantage over decent employers.

We look forward to working in full cooperation with the Labour Government, DTI and industry stakeholders so that the Warwick commitment on the Posting of Workers Directive is successfully delivered. This will ensure that the people working in the UK construction process, whether domestic workers or from elsewhere, are afforded the fairness and enhanced employment protection they deserve. Together we can end unregulated wage competition and exploitation. Furthermore, **the full extension of the agreements will bring dividends in developing skills, enhancing productivity, welfare provision and advancing health and safety on UK sites.**

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Appendix 1

Agreements in construction, contracting and building

Prevailing wages and the National Collective Agreements in the UK construction, contracting and building sectors.

Industry-wide Collective agreements set the prevailing pay and conditions in the UK construction industry, not lesser national minimum employment rights and guidelines. Adherence to the agreements gives workers on Construction projects guaranteed terms and conditions within the prevailing national agreements. Some industries in the construction sector set the actual rates of pay, which the most representative bodies between employers and labour within the specific industry follow, these include:

Engineering Construction

- NAECI (National Agreement for the Engineering Construction Industry).
- TICI (TICA) (National Agreement for the Thermal Insulation Contracting Industry).
- OCA Partnership Agreement - Offshore Contractors Association

Mechanical & Electrical Contracting

- JIB (Joint Industry Board for the Electrical Contracting Industry).
- SJIB (Scottish Joint Industry Board for the Electrical Contracting Industry).
- HVAC (Heating, Ventilating, Air Conditioning, Piping and Domestic Engineering Industry National Agreement) JIC.
- JIB (PMES) (Joint Industry Board for Plumbing Mechanical Engineering Services).
- SNIJIB (Scottish Joint Industry Board for the Plumbing Industry).
- MPA (Major Projects Agreement).
- Lift and Escalator Industry Working Rule Agreement (company level terms and conditions).
- Environmental Engineering Industry NJC (EEI) (Staff agreement in M&E engineering and contracting, this agreement sets minimum salaries and terms and conditions).

In other parts of the Building and Construction Industry, the agreements set minimum rates, terms and conditions, which the most representative bodies between employers and labour within the specific industry follow. These can be enhanced through local and company level negotiation. However, terms and wage rates should not fall below these minimums. The agreements include:

Building & Civil Engineering

- CIJC – Construction Industry Joint Council Working Rule Agreement
- BATJIC – Building & Allied Trades Joint Industrial Council
- Building & Civil Eng (NI)
- Scottish Painting Council agreement
- Demolition contracting
- Felt Roofing Contracting NJC
- Flat Glass NJC
- Mastic Asphalt NJC
- Refractory Users Federation
- Steeplejacks & Lightning Conductor Engineers
- NJC for the Monumental Masonry Industry
- Highway construction, repair and maintenance

Other agreements

1.

Within Local Authorities, both in-house and respective building departments that have been out sourced, workers who engage in and carry out construction and building related activities are covered by the following collective agreements:

JNC Local Authority Craft & Associated Employees Agreements

- Local Authorities (Building) Scotland
- Local Authorities (Craft) England & Wales
- Local Authorities (Electricians) Scotland
- Local Authorities (Craft) Scotland

2.

In regard to the former Power Cabling & Jointing NJC, company specific agreements now cover this part of the construction process. These are specific to power cable jointers not working in-scope to the JIB Cabling and Jointing agreement appendix, and include:

- Pirelli cables construction agreement
- Balfour Beatty power networks agreement

3.

The REC's (Regional Electricity Company) agreements cover workers who fell under the scope of the Electricity supply industry agreement prior to privatisation, within these agreements are workers who undertake construction related work.

4.

The total construction process involves a multitude of specialist work on UK Infrastructure. For example the UK rail industry, and for instance Network Rail are signatory to collective agreements covering construction related disciplines.

Note

Detailed consideration should be given when compiling a list of collective agreements to ensure it is comprehensive and that the total construction process is covered.

The Posting of Workers Directive

(The Posted Workers Directive)

96/71/EC

31996L0071

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
Official Journal L 018 , 21/01/1997 P. 0001 - 0006

DIRECTIVE 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 1996 concerning the posting of workers in the framework of the provision of services
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2) and 66 thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the Economic and Social Committee (2),
Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),
(1) Whereas, pursuant to Article 3 (c) of the Treaty, the abolition, as between Member States, of obstacles to the free movement of persons and services constitutes one of the objectives of the Community;
(2) Whereas, for the provision of services, any restrictions based on nationality or residence requirements are prohibited under the Treaty with effect from the end of the transitional period;
(3) Whereas the completion of the internal market offers a dynamic environment for the transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily to perform work in the territory of a Member State other than the State in which they are habitually employed;
(4) Whereas the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract;
(5) Whereas any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;
(6) Whereas the transnationalization of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; whereas it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;
(7) Whereas the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (4), signed by 12 Member States, entered into force on 1 April 1991 in the majority of Member States;
(8) Whereas Article 3 of that Convention provides, as a general rule, for the free choice of law made by the parties; whereas, in the absence of choice, the contract is to be governed, according to Article 6 (2), by the law of the country, in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country;
(9) Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice;
(10) Whereas Article 7 of the said Convention lays down, subject to certain conditions, that effect may be given, concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular the law of the Member State within whose territory the worker is temporarily posted;
(11) Whereas, according to the principle of precedence of Community law laid down in its Article 20, the said Convention does not affect the application of provisions which, in relation to a particular matter, lay down choice-of-law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts;
(12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means;
(13) Whereas the laws of the Member States must be coordinated 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; whereas such coordination can be achieved only by means of Community law;
(14) Whereas a 'hard core' of clearly defined protective rules should be observed by the provider of the services notwithstanding the duration of the worker's posting;
(15) Whereas it should be laid down that, in certain clearly defined cases of assembly and/or installation of goods, the provisions on minimum rates of pay and minimum paid annual holidays do not apply;
(16) Whereas there should also be some flexibility in application of the provisions concerning minimum rates of pay and the minimum length of paid annual holidays; whereas, when the length of the posting is not more than one month, Member States may, under certain conditions, derogate from the provisions concerning minimum rates of pay or provide for the possibility of derogation by means of collective agreements; whereas, where the amount of work to

be done is not significant, Member States may derogate from the provisions concerning minimum rates of pay and the minimum length of paid annual holidays;

(17) Whereas the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

(18) Whereas the principle that undertakings established outside the Community must not receive more favourable treatment than undertakings established in the territory of a Member State should be upheld;

(19) Whereas, without prejudice to other provisions of Community law, this Directive does not entail the obligation to give legal recognition to the existence of temporary employment undertakings, nor does it prejudice the application by Member States of their laws concerning the hiring-out of workers and temporary employment undertakings to undertakings not established in their territory but operating therein in the framework of the provision of services;

(20) Whereas this Directive does not affect either the agreements concluded by the Community with third countries or the laws of Member States concerning the access to their territory of third-country providers of services; whereas this Directive is also without prejudice to national laws relating to the entry, residence and access to employment of third-country workers;

(21) Whereas Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (5) lays down the provisions applicable with regard to social security benefits and contributions;

(22) Whereas this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions;

(23) Whereas competent bodies in different Member States must cooperate with each other in the application of this Directive; whereas Member States must provide for appropriate remedies in the event of failure to comply with this Directive;

(24) Whereas it is necessary to guarantee proper application of this Directive and to that end to make provision for close collaboration between the Commission and the Member States;

(25) Whereas five years after adoption of this Directive at the latest the Commission must review the detailed rules for implementing this Directive with a view to proposing, where appropriate, the necessary amendments,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.
2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.
3. 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; or
 - (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
 - (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.
4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

Article 2

Definition

1. For the purposes of this Directive, '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.
2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.

Article 3

Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:
 - by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
 - (a) maximum work periods and minimum rest periods;
 - (b) minimum paid annual holidays;
 - (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
 - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
 - (e) health, safety and hygiene at work;
 - (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

- (g) equality of treatment between men and women and other provisions on non-discrimination.
For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.
2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days.
This provision shall not apply to activities in the field of building work listed in the Annex.
3. Member States may, after consulting employers and labour, in accordance with the traditions and practices of each Member State, decide not to apply the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) when the length of the posting does not exceed one month.
4. Member States may, in accordance with national laws and/or practices, provide that exemptions may be made from the first subparagraph of paragraph 1 (c) in the cases referred to in Article 1 (3) (a) and (b) and from a decision by a Member State within the meaning of paragraph 3 of this Article, by means of collective agreements within the meaning of paragraph 8 of this Article, concerning one or more sectors of activity, where the length of the posting does not exceed one month.
5. Member States may provide for exemptions to be granted from the first subparagraph of paragraph 1 (b) and (c) in the cases referred to in Article 1 (3) (a) and (b) on the grounds that the amount of work to be done is not significant. Member States availing themselves of the option referred to in the first subparagraph shall lay down the criteria which the work to be performed must meet in order to be considered as 'non-significant'.
6. The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.
For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker.
7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.
Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.
8. 'Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.
In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:
- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
 - collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,
- provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.
Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:
- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
 - are required to fulfil such obligations with the same effects.
9. Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1 (3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out.
10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:
- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,
 - terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

Article 4

Cooperation on information

1. For the purposes of implementing this Directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.
2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3 (10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.
4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.

Article 5

Measures

Member States shall take appropriate measures in the event of failure to comply with this Directive. They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.

Article 6

Jurisdiction

In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.

Article 7

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 16 December 1999 at the latest. They shall forthwith inform the Commission thereof. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 8

Commission review

By 16 December 2001 at the latest, the Commission shall review the operation of this Directive with a view to proposing the necessary amendments to the Council where appropriate.

Article 9

This Directive is addressed to the Member States.

Done at Brussels, 16 December 1996.

For the European Parliament

The President

K. HÄNSCH

For the Council

The President

I. YATES

(1) OJ No C 225, 30. 8. 1991, p. 6 and

OJ No C 187, 9. 7. 1993, p. 5.

(2) OJ No C 49, 24. 2. 1992, p. 41.

(3) Opinion of the European Parliament of 10 February 1993 (OJ No C 72, 15. 3. 1993, p. 78), Council common position of 3 June 1996 (OJ No C 220, 29. 7. 1996, p. 1) and Decision of the European Parliament of 18 September 1996 (not yet published in the Official Journal). Council Decision of 24 September 1996.

(4) OJ No L 266, 9. 10. 1980, p. 1.

(5) OJ No L 149, 5. 7. 1971, p. 2; Special Edition 1971 (II), p. 416. Regulation as last amended by Regulation (EC) No 3096/95 (OJ No L 335, 30. 12. 1995, p. 10).

ANNEX

The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work:

1. excavation
2. earthmoving
3. actual building work
4. assembly and dismantling of prefabricated elements
5. fitting out or installation
6. alterations
7. renovation
8. repairs
9. dismantling
10. demolition
11. maintenance
12. upkeep, painting and cleaning work
13. improvements.

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