



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.11.2002
COM(2002) 701 final

2002/0072 (COD)

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on working conditions for temporary workers

(presented by the Commission in accordance
with Article 250(2) of the EC Treaty)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

On 20 March 2002, the Commission adopted a proposal for a directive of the European Parliament and the Council on working conditions for temporary workers¹. This proposal was forwarded to the European Parliament and the Council on 21 March 2002.

On 19 September 2002, the Economic and Social Committee gave its opinion on the Commission's proposal².

The European Parliament gave its opinion at the first reading on 21 November 2002³.

2. AMENDMENTS

A – The European Parliament's amendments accepted by the Commission

The amended proposal contains two types of amendments; first, to reword the articles or add new provisions in the interests of clarification or precision and, second, to amend the substance and scope of the text by including or deleting important provisions.

The Commission is prepared to accept, in part or in full, all the amendments set out below, which, it thinks, improve the proposal and maintain its aims and political viability:

- amendment No 1 (changing the title of the directive): see title of the proposal;
- amendment No 4 (rewording recital 4): see recital No 4;
- amendment No 6 (specifying the links between this proposal and Directive 1999/70 of 28 June 1999 on fixed-term work): see recital No 7;
- amendment No 15 (announcing proposed amendments to Article 5.1): see recital No 15;
- amendment No 20 (announcing proposed amendments to Article 4): see recital No 19;
- amendment No 22 (reinforcing the principle of subsidiarity): see recital No 22;
- amendment No 23 (rewording the scope to illustrate more clearly the triangular nature of temporary work): see Article 1.1;
- amendment No 26 (reinforcing Article 2): see Article 2;
- amendment No 27 (adding the definition of a temporary worker): see Article 3(1)(b);
- amendment No 28 (deleting the definition of a comparable worker): deletion of this definition in Article 3;
- amendment No 29 (redefining a posting): see Article 3(1)(c);

¹ COM(2002)149 in OJ C... of..., p.

² OJ C of, p. .

³ OJ C of, p. .

- amendment No 30 (adding the definition of a temporary agency): see Article 3(1)(d);
- amendment No 31 (adding the definition of a user undertaking): see Article 3(1)(e);
- amendment No 32 (redefining working and employment conditions): see Article 3,(1)(f) and Article 5(1) second indent;
- amendment No 85 (specifying that it is up to the Member States to define pay): see Article 3(2);
- amendment No 33 (specifying workers who cannot be excluded from the scope of the Directive): see Article 3(2);
- amendment No 34 (extending the obligation on the Member States to review restrictions or prohibitions pertaining only to certain categories of workers or certain branches to all restrictions or prohibitions; extending the scope of justifications for prohibitions/restrictions): see Article 4(1) and (2);
- amendment No 35 (specifying that the provisions in force concerning registration and monitoring of temporary workers are not prohibitions or restrictions within the meaning of the foregoing amendment): see Article 4(3);
- amendment No 36 (adding a provision stipulating that temporary workers may not replace striking workers in the user undertaking): see recital No 21;
- amendment No 87 (acceptance of the part rewording the principle of non-discrimination): see Article 5(1) first indent;
- amendment No 86 (restricting the exemption to remuneration and requiring consultation of the social partners): see Article 5(2);
- amendment No 92 (acceptance of the part on prior consultation of the social partners and enabling them to uphold existing collective agreements): see Article 5(3);
- amendment No 71 (acceptance only of the part restricting exemptions to pay): see Article 5(4);
- amendment No 43 (deleting Article 5(5)): see deleted Article 5(5), previous version;
- amendment No 44 (specifying that implementation of Article 5 through an agreement between the social partners should be in line with national practice): see Article 5(5);
- amendment No 46 (specifying how information on vacancies may be made public): see Article 6(1);
- amendment No 47 (on clauses prohibiting the conclusion of contracts of employment): see Article 6(2);
- amendment No 48 (specifying the scope of the prohibition on fees): see Article 6(3);
- amendment No 49 (specifying social services): see Article 6(4);
- amendment No 51 (an addition to take account of the fact that workers' representation may be determined by collective agreements): see Article 7;

- amendment No 52 (introducing a choice of the action open to workers — direct action or action through representatives — if the Directive is not complied with): see Article 10.

B – The European Parliament’s amendments rejected by the Commission

By contrast, the Commission cannot accept at this stage the other amendments proposed by the Parliament. Some of them do not constitute an improvement to the Directive or are not acceptable from a strictly legal point of view. Others might, in the Commission’s view, disrupt the balance of the initial text.

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on ~~working conditions for~~ temporary work

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and, in particular, Article 137(2) thereof,

Having regard to the proposal from the Commission⁴,

Having regard to the opinion of the Economic and Social Committee⁵,

Having regard to the opinion of the Committee of the Regions⁶,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁷,

Whereas:

- (1) This instrument respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union; in particular, it is designed to ensure full compliance with Article 31 of that Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity and to restriction of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.
- (2) Moreover, point 7 of the Community Charter of the Fundamental Social Rights of Workers provides, *inter alia*, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly by forms of work other than permanent contracts such as fixed-term contract work, part-time work, temporary work and seasonal work.
- (3) The conclusions of the European Council in Lisbon of 23 and 24 March 2000 set the European Union a new strategic target, namely to “become the most competitive and most dynamic knowledge-based economy in the world, capable of sustained economic growth with more and better jobs and greater social cohesion”.
- (4) In accordance with the European Social Agenda, which, on the basis of the communication from the Commission, was adopted by the European Council in Nice

⁴ OJ C of, p. .

⁵ OJ C of, p. .

⁶ OJ C of, p. .

⁷ OJ C of, p. .

of 7, 8 and 9 December 2000, with the conclusions of the European Council in Stockholm of 23 and 24 March 2000 and with the Council Decision of 19 January 2001 on the 2001 employment guidelines, a satisfactory and flexible work organisation system has to be put in place, ~~with new flexible contracts~~ **including new statutory flexibility arrangements**, offering workers a fair degree of job security and enhanced occupational status, ~~and which~~, at the same time, ~~is compatible with~~ **reconciling** workers' aspirations and undertakings' needs.

- (5) The Commission consulted the social partners on the course of action that could be adopted at Community level with regard to flexibility of working hours and job security of workers on 27 September 1995.
- (6) After that consultation, the Commission considered that Community action was desirable and consulted the social partners once again with regard to the content of the planned proposal on 9 April 1996.
- (7) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories had indicated their intention to consider the need for a similar agreement on temporary work **and not to include temporary workers in the Directive on fixed-term work**.
- (8) The general cross-sector organisations, i.e. the UNICE, CEEP and ETUC, informed the Commission in their joint letter of their desire to implement the procedure provided for by Article 138(4) of the EC Treaty; in a joint letter they asked the Commission for an extension of the deadline by three months; the Commission granted this request by extending the negotiation deadline until 15 March 2001.
- (9) On 21 May 2001, the social partners acknowledged that their negotiations on temporary work had not produced any agreement.
- (10) There are considerable differences in the legal situation of temporary workers within the Union.
- (11) Temporary work should meet undertakings' needs for flexibility and employees' need to reconcile their working and private lives and contribute to job creation and to participation and integration in the labour market.
- (12) The aim of this Directive is to establish a protective framework for temporary workers which also provides temporary agencies operating in the European Community with a consistent and flexible framework which is conducive to their activities, without imposing any administrative, financial or legal constraints which would impede the creation and development of small and medium-sized undertakings.
- (13) This Directive shall be implemented in compliance with the Treaty, specifically with regard to freedom to provide services and freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and the Council of 16 December 1996⁸ concerning the posting of workers in the framework of the provision of services.

⁸ OJ L 18 of 21.1.1997, p. 1.

- (14) Directive 91/383/EEC of 25 June 1991⁹ supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship establishes the safety and health provisions applicable to temporary workers.
- (15) ~~With respect to~~ **The** basic working and employment conditions; **applicable to temporary workers should be at least those which would apply to such workers if they were recruited by not be treated any less favourably than a “comparable worker”, i.e. a worker in the user undertaking to occupy the same job in an identical or similar job, taking into account seniority, qualifications and skills.**
- ~~(16) However, differences in treatment are acceptable if they are objectively and reasonably justified by a legitimate aim.~~
- (16) In the case of workers who have a permanent contract with their temporary agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.
- (17) In view of the need to maintain a certain degree of flexibility in the working relationship, provision should be made for the Member States to be able to delegate to the social partners the task of defining basic working and employment conditions tailored to the specific characteristics of certain types of employment or certain branches of economic activity.
- (18) There should be some flexibility in the application of the principle of non-discrimination in cases of assignments effected to accomplish a job which, due to its nature or duration, lasts less than six weeks.
- (19) An improvement in the minimum protection for temporary workers occasioned by this Directive will enable any restrictions or prohibitions which may have been imposed on temporary work to be reviewed and, if necessary, lifted if they are no longer justified. **They may be justified only on grounds of the general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and abuses are prevented.**
- (20) **The provisions of this Directive on restrictions or prohibitions on temporary work are without prejudice to national legislation or practices prohibiting striking workers being replaced by temporary workers.**
- (21) There must be an effective means of safeguarding temporary workers' rights.
- (22) In compliance with the principle of subsidiarity and the principle of proportionality under Article 5 of the Treaty, the aims of the action envisaged above cannot be achieved satisfactorily by the Member States, since the goal is to establish a harmonised Community-level framework of protection for temporary workers; owing to the scale and the impact of the action planned, these objectives can best be met at Community level by introducing minimum requirements applicable throughout the European Community **in order to provide the Member States with a common framework to facilitate the integration of European labour markets and cross-**

⁹ OJ L 206 of 29.7.1991, p. 19.

border mobility of workers, especially in border regions; this Directive confines itself to what is required for achieving these objectives,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Directive applies to **workers with a** ~~the~~ contract of employment or employment relationship **with** ~~between a temporary agency, which is the employer, and the worker, who is~~ **are** posted to a user undertakings to work **temporarily** under ~~its~~ **their** supervision.
2. This Directive applies to public and private undertakings engaged in economic activities whether or not they are operating for gain, **and which are temporary agencies or user undertakings**.
3. Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.

Article 2

Aim

The purpose of this Directive is:

1. **to ensure the protection of temporary workers and** to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers **and recognising temporary agencies as employers**;
2. to establish a suitable framework for the use of temporary work to contribute to **creating jobs and** the smooth functioning of the labour market.

Article 3

Definition

1. For the purposes of this Directive:
 - a) “worker” means any person who, in the Member State concerned, is protected as a worker under national employment law;

b) temporary worker: a person with a contract of employment or an employment relationship with a temporary agency with a view to being posted to a user undertaking to work temporarily under its supervision;

~~b) “comparable worker” means a worker in the user undertaking occupying an identical or similar post to that occupied by the worker posted by the temporary agency, account being taken of seniority, qualifications and skills.~~

c) “posting” means the period during which the temporary worker is placed at the user undertaking **to work temporarily under its supervision;**

d) “temporary agency” means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary workers in order to post them to user undertakings to work there temporarily under their supervision;

e) “user undertaking” means any natural or legal person for whom and under the supervision of whom a temporary worker works temporarily;

df) “basic working and employment conditions”: working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other general provisions relating to:

i) the duration of working time, **overtime, work breaks,** rest periods, night work, paid holidays and public holidays;

ii) pay.

~~iii) work done by pregnant women and nursing mothers, children and young people;~~

~~iv) action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation.~~

2. This Directive shall be without prejudice to national law as regards the definition of **pay,** contract of employment or employment relationship **or worker.**

However, Member States shall not exclude from the scope of this Directive **workers,** contracts of employment or employment relationships solely because **they relate to** ~~they concern:~~

~~a) part-time workers, within the meaning of Council Directive 97/81/EC of 15 December 1997;~~

~~b) fixed-term contract workers or within the meaning of Council Directive 99/70/EC of 28 June 1999;~~

e) persons **with a contract of employment or employment relationship with a temporary agency,** ~~on a posting at a user undertaking.~~

Article 4

Review of restrictions or prohibitions

~~1. Member States, after consulting the social partners in accordance with legislation, collective agreements and national practices, shall review periodically any restrictions or prohibitions on temporary work for certain groups of workers or sectors of economic activity in order to verify whether the specific conditions underlying them still obtain. If they do not, the Member States should discontinue them.~~

1. Prohibitions or restrictions on the use of temporary work are justified only on grounds of general interest relating in particular to the protection of temporary workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented.

2. The Member States, after consulting the social partners in accordance with national legislation, collective agreements and practices, shall review any restrictions or prohibitions mentioned above in order to verify whether they are justified on the grounds given in paragraph 1. If not, the Member States shall discontinue them. The Member States shall inform the Commission of the results of that review.

3. Paragraphs 1 and 2 are without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary agencies.

~~2. The Member States shall notify the Commission of the result of said review. If the restrictions or prohibitions are maintained, the Member States shall inform the Commission why they consider that they are necessary and justified.~~

~~The restrictions or prohibitions which could be maintained shall be justified on grounds of the general interest regarding, in particular, the protection of workers.~~

CHAPTER II

EMPLOYMENT AND WORKING CONDITIONS

Article 5

The principle of non-discrimination

~~1. Temporary workers during their posting, shall receive at least as favourable treatment, in terms of basic working and employment conditions, including seniority in the job, as a comparable worker in the user enterprise, unless the difference in treatment is justified by objective reasons.~~

~~Where appropriate, the pro rata temporis principle applies.~~

The basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would

apply if they had been recruited directly by that enterprise to occupy the same job.

When applying the above paragraph, the rules in force in the user undertaking on:

i) protection of pregnant women and nursing mothers and protection of children and young people and

ii) equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation

must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 when temporary workers who have a permanent contract of employment with a temporary agency continue to be paid in the time between postings.

3. Member States may, after consulting ~~give~~ the social partners at the appropriate level, give them the option of upholding or concluding collective agreements which derogate from the principle established in paragraph 1 as long as an adequate level of protection is provided for temporary workers.

4. Without prejudice to the provisions of paragraphs 2 and 3 above, Member States may, with regard to pay, provide that paragraph 1 shall not apply where a temporary worker works on an assignment or series of assignments with the same user enterprise in a post which, due to its duration or nature, can be accomplished in a period not exceeding six weeks.

Member States shall take appropriate measures with a view to preventing misuse in the application of this paragraph.

~~5. When this directive calls for a comparison to be made with a comparable worker in the user undertaking but no such worker exists, reference shall be made to the collective agreement applicable in the user undertaking; if no such collective agreement exists, the comparison will be made by reference to the collective agreement applicable to the temporary work agency; if no collective agreement is applicable, the basic working and employment conditions of temporary workers will be determined by national legislation and practices.~~

~~6~~5. The implementing procedures for this Article shall be defined by the Member States after consultation of the social partners. The Member States may also entrust the social partners at the appropriate level with the task of defining these procedures for this chapter by means of a negotiated agreement, in accordance with national practices.

Article 6

Access to permanent quality employment

1. Temporary workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. **Such information may be provided by a general announcement in a suitable place in the undertaking for which and under whose supervision temporary workers are engaged.**

2. Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary worker after his posting are null and void or may be declared null and void.

This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for posting, recruitment and training of temporary workers.

3. Temporary agencies shall not charge workers any fees, **especially** in exchange for arranging for them to be recruited by a user undertaking, **or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out a posting in that undertaking.**

4. Temporary workers shall be given access to the **amenities or collective services** ~~social services~~ of the user undertaking **especially canteen, child care and transport services under the same conditions as workers employed directly by the undertaking,** unless there are objective reasons against this.

5. Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices in order to:

- improve temporary workers' access to training in the temporary agencies, even in the periods between their postings, in order to enhance their career development and employability;
- improve temporary workers' access to training for user undertakings' workers.

Article 7

Representation of temporary workers

Temporary workers shall count, **under conditions established by the Member States,** for the purposes of calculating the threshold above which bodies representing workers provided for under ~~national and Community~~ **and national law and collective agreements** ~~legislation~~ are to be formed at the temporary agency.

Member States may provide that, under conditions that they define, these workers count for the purposes of calculating the threshold above which bodies representing workers provided for by ~~national and Community~~ **and national law and collective agreements** ~~legislation~~ are to be formed in the user undertaking, **in the same way as**

if they were workers employed directly for the same period of time by the user undertaking.

Article 8

Information of workers' representatives

Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific, the user undertaking must provide suitable information on the use of temporary workers when providing information on the employment situation in that undertaking to bodies representing the workers set up in accordance with national and Community legislation.

CHAPTER III

FINAL PROVISIONS

Article 9

Minimum requirements

1. This Directive does not prejudice the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.
2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This shall be without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are adhered to.

Article 10

Penalties

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions enacted under this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by the date given in Article 11 at the latest and any subsequent amendment within good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.

Article 11

Implementation

1. The Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by [two years after adoption] at the latest, or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this Directive are being attained. They shall forthwith inform the Commission thereof.
2. When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 12

Review by the Commission

(Five years after adoption of this Directive) at the latest, the Commission shall, in consultation with the Member States and social partners at Community level, review application thereof with a view to proposing, where appropriate, the necessary amendments to the Parliament and the Council.

Article 13

Entry into force

This Directive shall enter into force on the twentieth day after its publication in the *Official Journal of the European Communities*.

Article 14

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President