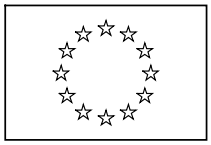

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 20.3.2002
COM(2002) 149 final

2002/0072(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on working conditions for temporary workers

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

The knowledge-based economy is founded on innovation and human capital and requires undertakings and workers to be able to adapt to change more readily. In order to make a success of the transition towards this economy, the cooperation of the social partners must be enlisted in a bid to promote more flexible forms of work organisation and reform the regulatory, contractual and legal environment so as to better reconcile flexibility and job security and create more and better jobs. It is with this in mind that the 2001 employment guidelines[1] and the broad economic policy guidelines for 2001[2] recommend developing various flexible forms of employment and employment contracts.

These measures will help to implement the strategy adopted by the European Council in Lisbon in March 2000, which is intended to make the Union the most competitive and dynamic knowledge-based economic in the world capable of sustained economic growth with more and better jobs and greater social cohesion. The Union will thus put itself in a position to achieve full employment, i.e. a rate of employment of 70% overall, at least 60% for women and 50% for older workers, by 2010.

As the Social Agenda proposed by the Commission and the guidelines adopted by the European Council in Nice recommend, the Union must make use of all the available instruments to stimulate the creation of quality jobs, diversify forms of employment and reconcile flexibility and security.

One of the courses of action to achieve this priority aim was to build on the negotiations between the social partners on temporary work, and, after the break down of negotiations, to define a framework comparable to that which already applies to fixed-term and part-time work.

2. THE COMMUNITY DIMENSION OF TEMPORARY WORK

1. Overall view of the temporary sector in the European Union

According to a recent study[3] carried out by the European Foundation for the Improvement of Living and Working Conditions and based on a study[4] by the International Confederation of Temporary Work Companies (CIETT), the share of temporary work in Europe has been increasing steadily for ten years, with an annual rate of growth estimated at 10% between 1991 and 1998, even though its share of overall employment still remains small (averaging 2.1 million people (expressed in full-time jobs), or 1.4% of total employment in Europe in 1998).

---

1 Council Decision of 19 January 2001, OJ of 24 January 2001.

2 Council Recommendation of 15 June 2001 on the broad guidelines of the economic policies of the Member States and the Community, OJ L 179 of 2.7.2001, p. 1 to 45.

3 *Temporary agency work in the European Union*, Dublin, 2002 (not yet published);

4 *Orchestrating the evolution of Private Employment Agencies towards a stronger society*, Brussels, 2000. At present there are no harmonised European data on temporary work: the ECHP survey provides figures on fixed-term contracts or short-term contracts (question PE024), which include more than just temporary work.

There are four main reasons for this rapid growth which make temporary work a key element in boosting the capacity of the labour market, undertakings and workers to adapt:

- Generally speaking, undertakings have seen an increased need for flexibility in managing their labour force, particularly because of the more rapid and greater fluctuations in their order books. Temporary work can thus help to cope with a shortage of permanent staff or a temporary increase in workload, which is particularly important for SMEs, as they are more sensitive than other undertakings to the costs of recruiting and laying off permanent staff. But the benefits accruing from temporary work may be curtailed if the sector suffers from poor social standing and job quality. Undertakings, especially SMEs, have an increasing need for qualified workers with a wide range of skills and need them on a temporary basis too. Quality temporary work can thus provide a more effective response to today's economy's need for flexibility.

- From the point of view of the temporary workers themselves, this form of employment is often a means of gaining access or returning to the labour market, especially for young people. Depending on the Member States, between 24 and 52% of people who became temporary workers for the first time were not in gainful employment beforehand, because they were either unemployed or still undergoing basic training.

- More recently, undertakings have been using temporary work because they are short of staff with certain qualifications, especially in occupations related to information technologies. This phenomenon is symptomatic of a widespread European shortage of these qualifications which the action plan on skills and mobility, to be presented to the European Council in Barcelona by the Commission, is intended to remedy.

- Finally, the legislative framework has become far more flexible: today, the majority of the Member States have put this form of employment on their statute books and many have made their regulations more flexible, whereas just a few years ago it was prohibited in some Member States.

Despite its overall growth, temporary work has spread very unevenly in the Union. According to the above-mentioned study, around 80% of temporary workers in 1999 were employed in four Member States: the Netherlands, France, Germany and the United Kingdom. And its share in total employment differs too: in the Netherlands, temporary workers account for 4.0% of the working population, followed by Luxembourg (3.5%), France (2.7%), , the United Kingdom (2.1%), Belgium (1.6%), Portugal (1%), Spain and Sweden (0.8%), Austria, Germany and Denmark (0.7%), Ireland and Finland (0.60%), and Italy (0.2%).

These differences are mirrored by differences in the structure of the jobs in question, even though all sectors of activity use temporary work. In the United Kingdom, for example, 80% of the activities of temporary agencies are in the services sector and the public sector, whilst in France 75% are in manufacturing industry and in construction and public works.

2. National legislation

The basic common feature of all temporary work is a "three-way relationship" between a user undertaking, an employee and an agency. Although this applies everywhere, the legal situation varies considerably from one Member State to another. In many Member States, the conditions governing the employment of temporary workers and the activities of temporary agencies are strictly regulated. In others, such as the United Kingdom and Ireland, the legislative and regulatory framework is very flexible.

The type of provisions which apply also differ from one Member State to another. In some cases, such as in Germany, the sector is regulated almost exclusively by legislation. Very frequently there is a combination of legislative and agreement-based provisions but there are also situations in which it is codes of conduct that govern such activity.

- Broadly speaking, the Member States can be classified in three categories:

1. Those in which there are no definitions of temporary agency work or which have a very limited specific regulation: Denmark, Finland, Ireland and the United Kingdom.

2. Those which have specific definitions of and regulations for temporary work, mainly covering the *relationship* between the temporary agency, the user undertaking and the worker: Germany, Austria, Spain, Luxembourg, the Netherlands and Sweden.

3. Those which have drafted specific definitions of and regulations for temporary work covering not only the *relationship* between the temporary agency, the undertaking and the worker but also the *status* of the temporary worker: Belgium, France, Italy, Portugal and Greece.

- Although there are many differences in the way working conditions are regulated, some common features can be identified:

- ***The temporary agency is generally regarded as the employer of the temporary worker***, who is therefore an employee. The United Kingdom and Ireland are the exceptions here: in some cases, the temporary agencies explicitly guarantee the persons they recruit the status of employees, in others temporary workers are regarded as being self-employed. Finally, some decisions made by the courts suggest that temporary workers are bound by a special contract because they are not employees of the temporary agency or the user undertaking.

- ***In its capacity as the employer, the temporary agency is bound to meet all the obligations this entails***. However, the three-way relationship peculiar to temporary work frequently involves a sharing of responsibilities with the user undertaking, which sometimes has to guarantee payment of salaries and social contributions and has to apply health and safety rules. However, it is generally at the temporary agency that temporary workers can enforce their collective rights, although in some Member States (Austria, France and the Netherlands) they can enforce their rights in both under certain conditions.

- ***Temporary workers are recruited on the basis of a fixed-term contract***. In Germany and Sweden, by contrast, permanent contracts are the norm. In some States, particularly Italy and the Netherlands, fixed-term contracts are converted to permanent contracts under certain conditions. In the Netherlands, for example, as soon as a temporary worker has been employed for over 18 months by the same user undertaking or more than 36 months by the same temporary agency, the contract between the agency and the worker is regarded as permanent.

- Temporary workers receive pay at least equal to that which a permanent worker in the undertaking carrying out identical or similar tasks would receive. A similar principle can also be identified in the provisions of legislation, agreements or codes of conduct governing the sector in Austria, the Netherlands, Belgium, France, Italy, Portugal, Spain, Luxembourg and Greece.

- An employee who is on strike may not be replaced by a temporary worker. This principle is very often enshrined in the legislation, collective agreements or codes of conduct.

- ***Access to the social services of the undertaking*** is very often provided for by the relevant legislation.

3. Temporary work and job quality

The "Lisbon strategy" calls upon Europe to create more and better jobs. Temporary work is a key factor to meeting both these requirements:

– it enables the overall number of jobs to be increased, since it is particularly suited to the increased demands for flexibility in today's economy;

– however, it will not be able to provide a permanent source of jobs unless it is sufficiently attractive for workers and jobseekers, i.e. if it does not offer quality jobs despite its temporary nature (which does not prejudice the employment relationship between the agency and the workers). Demand for quality will steadily become more pressing in the coming years, especially as there will be a decline in the working population (9 million persons fewer in the Union between 2000 and 2025).

To determine job quality, the working conditions for a temporary worker and for a worker in the user undertaking carrying out similar tasks, who is, for example, helped or replaced by the temporary worker during his posting, need to be compared. The conclusions of the European Council in Stockholm[5], which were fleshed out and clarified by the Communication from the Commission on *"Social and employment policies: a framework for investing in quality*"[6], identified various aspects of the concept of quality enabling this comparison to be made.

The first thing we should realise is that many of the aspects which determine the intrinsic quality of a job under a temporary contract are linked not with the employment relationship but with the sector of activity or the type of work carried

---

5 §26: "equal opportunities for the disabled, gender equality, good and flexible work organisation permitting better reconciliation of working and personal life, lifelong learning, health and safety at work, employee involvement and diversity in working life."

6 COM (2001) 313 final

out. According to a study by the European Foundation for the Improvement of Living and Working Conditions[7], whilst the proportion of temporary workers in 1996 who thought that there were health and safety problems at work was 70%, the figure for workers with fixed-term contracts was the same and only slightly different for workers with permanent contracts (73%). The gap is greater with regard to the work content, which 76% of workers with permanent contracts say is interesting compared with 70% of temporary workers, but here the differences between the two categories (particularly seniority in the labour market) need to be taken into account too.

The main difference in terms of intrinsic quality seems to be related to pay. No data on the ratio between the pay of temporary workers and comparable workers in user undertakings exist. However, a number of figures which are available do indicate that at least on average agency workers tend to receive lower wages. In the national study for the European Foundation on Austria estimates are mentioned that in some cases the difference between the salary defined by the collective agreement in the user enterprise and the actual salary of agency workers may amount to as much as 30%. In contrast, another study quoted, which compares an agency worker's average gross income per month with the average income in the same line of work estimates that the wage gap may be only around 5%.

Figures contained in an official parliamentary report on the situation of temporary agency work in Germany indicate that agency workers might earn between 22% and 40% less than the average wage received by 'other workers'. However, in Germany agency workers tend to have open-ended contracts and are also paid between two missions, which does not allow a direct comparison between their income and that of other workers.

Sector estimates for Spain (European Industrial relations Observatory, 28/7/99) suggested that before a new law came into force in 1999, which stipulates that wages of agency workers should be equal to the ones laid down in the collective agreement applicable to the user firm, wages paid by agencies may have been between 10% and 15% lower than in user enterprises.

For the UK, figures quoted in the national report for the study of the Dublin Foundation show that the average weekly income of full-time agency workers is 68% of the average weekly income for all employees, whereas the relevant figure for full-time people on fixed-term contracts is 89%.

Finally, willingness to do temporary work varies considerably. Almost a third of temporary workers say that they generally prefer this type of employment because of the flexibility it offers, the freedom to choose an employer and the opportunity to acquire a variety of occupational experience and hence to enhance one's employability.

Temporary workers take part in far less continuing vocational training (approximately 20%) than workers with permanent contracts (36%) or even fixed-term contracts (27%). User undertakings and the temporary agencies themselves have little incentive to give temporary workers vocational training because their posting at the undertaking is, by definition, temporary. However, there are some

---

7 *Working conditions in the European Union,* Luxembourg, 1996.

arrangements for improving access to training for temporary workers which are voluntary (as in the United Kingdom) or obligatory under collective agreements or under the law (such as in France, Belgium, Spain and Italy).

The situation with regard to equality for men and women varies greatly depending on the Member State. In some countries, mainly those where temporary work is most common in industry, construction and public works, such as Austria (87%), Germany (80%), France (74%), Luxembourg (77%), Spain (62%) and Belgium (60%), the sector is dominated by men. In other countries, such as the Netherlands, Portugal and the United Kingdom, there is a fair balance between the sexes. In Finland and in Sweden, however, women are very much in the majority, accounting for some 80% of all temporary workers.

As regards flexibility and job security, temporary work obviously offers undertakings and employees flexibility in managing employment. This is highlighted by the duration of postings, the vast majority of which do not exceed six months. In France and Spain, moreover, 80% of contracts last one month at most. Austria and the Netherlands are the exceptions here, since postings for longer than six months account for 30% and 17% of the total respectively.

The basic question is whether temporary workers can enter more stable and longer employment relationships, which means that a certain amount of job security is being fostered, or whether they remain in an employment relationship which is, by its very nature, insecure and is liable to be so permanently. The figures[8] give some grounds for optimism: depending on the country, between 29 and 53% of temporary workers find a permanent contract in the year following their recruitment by the temporary agency.

As regards health and safety, the third European survey on working conditions (2000) conducted by the European Foundation for the Improvement of Living and Working Conditions shows that working conditions are worse for temporary workers than for workers on other types of employment contracts. Temporary workers are exposed more to physical hazards (awkward posture, vibration and noise) and have to cope with higher work loads or work rates than workers on fixed-term or permanent contracts.

3. JUSTIFICATION FOR THE INITIATIVE

1. Previous initiatives

This Directive is a continuation of a number of proposals for legislation and recent negotiations between the social partners (June 2000 to May 2001) which did not produce an agreement. The Commission saw that these negotiations had enabled a fair amount of common ground to be identified, which suggested that the parties had in fact been very close to a consensus. This is why it wished to propose a directive immediately, incorporating the points agreed upon during the negotiations and formulating provisions to overcome the remaining sticking points.

---

8 CIETT, 2000, op.cit.

A. First moves by the Commission

Since the beginning of the 80s, temporary work has become an important cog in the machinery of the European labour market as undertakings have been seeking greater flexibility in job management.

More than twenty years ago now, the Council and the Parliament responded by adopting resolutions[9] in which they emphasised the need for Community action to provide a framework for temporary work and to ensure that the workers in question were protected. In 1982, the Commission submitted a proposal for a directive to them to meet this need. The proposal was amended in 1984 but was never adopted.

Subsequently, in 1990, the Commission put forward a set of basic rules to ensure that there was a minimum degree of consistency between the various types of contracts. It proposed three Council directives on atypical employment[10] covering part-time work, fixed-term contracts and temporary work. This was part of the action programme associated with the Community Charter of the Fundamental Social Rights of Workers, which stated that these new living and working conditions (i.e. work on fixed-term contract, part-time work, temporary work and seasonal work) should be "harmonised from above".

Two of the drafts presented by the Commission were intended to provide the employees concerned with a whole series of rights putting them on an equal footing with permanent full-time workers. The third was for temporary workers and was designed to guarantee the same conditions of health and safety as for workers in the user undertaking. Only the last proposal was adopted, taking the form of Council Directive 91/383/EC of 25 June 1991 supplementing measures to encourage improvements in the safety and health of workers at work with a fixed-term or temporary employment relationship.

B. Consultation of the social partners

Since no progress was made in the Council on the initiatives described above, the Commission decided to implement the procedure under Article 3 of the Agreement on Social Policy annexed to the Protocol (No 14) on Social Policy annexed to the Treaty establishing the European Community. On 27 September 1995, it therefore approved consultation of the social partners in accordance with Article 3 (2) of the said Agreement on flexibility of working hours and safety of workers.

The social partners' response revealed that there was widespread support for the basic guiding principle of non-discrimination of workers involved in these new forms of flexible work and for treatment comparable with full-time workers and workers on permanent contracts. Although opinions differed considerably as to the nature of and the appropriate level at which action was to be taken in this area, the majority of the social partners said they were prepared to play an active part in establishing the principles and in implementing them, mainly by a collective agreement at the appropriate level.

---

9 OJ No C 2 of 4.01.1980, p. 1 and OJ No C 260 of 12.10.1981, p. 54.

10 COM (90) 228 final of 29.06.1990, OJ C 224 of 8.9.1990, p. 8.

After examining their reactions, the Commission decided that Community action would be advisable and on 9 April 1996 decided to initiate a second round of consultation of the social partners under Article 3 (3) of the Agreement on Social Policy.

On 19 June 1996, three organisations, the UNICE (Union of Industrial and Employers' Confederations in Europe), the CEEP (European Centre for Public Enterprises) and the ETUC (European Trade Union Confederation) announced their intention to initiate negotiations in this area, dealing with the individual subjects one after another. They started by looking at part-time work and came to an agreement on 6 June 1997, which was implemented by Council Directive 97/81/EC of 15 December 1997.

They then negotiated on fixed-term contracts and reached an agreement on 18 March 1999, which was implemented by Council Directive 1999/70/EC of 28 June 1999.

Finally, in May 2000, the social partners decided to start negotiations on temporary work. However, on 21 May 2001 they had to acknowledge that they were not able to reach an agreement.

Apparently, the real bone of contention is the concept of the "comparable worker". The workers' representatives want the point of reference to be a worker in the user undertaking carrying out the same or similar work. The employers disagree, saying that such a comparison would be unjustified in countries where temporary workers have a permanent contract with the agency and are paid even when they are not on a posting. As far as the trade unions are concerned, the point of reference for the essential conditions of employment such as pay, working hours, safety and health, etc. has to be the comparable worker in the user undertaking, as is already the case in the majority of the countries in the Union. However, despite this basic disagreement, which persisted even though both sides were undoubtedly willing to concede some ground, the social partners did come to hold converging views on many other points. For this reason this proposal for a directive is largely based on the points where the negotiators were able to reach a consensus.

Finally, it should be noted that this proposal does meet the expectations of the social partners in the temporary agency sector — namely Euro-Ciett, the organisation of employers, and Uni-Europa, the workers' organisation — as expressed in their joint declaration of 8 October 2001 in which the two organisations set out their views on this subject and on the content of a future directive.

C. Transnational situations

On 16 December 1996, the European Parliament and the Council adopted Directive 96/71 concerning the posting of workers in the framework of the provision of services, the prime aim of which was to promote cross-border services. The legislature was fully aware of the fact that this would require fair competition and measures guaranteeing that workers' rights were upheld.

The principle on which the directive is based is that the basic working and employment conditions in force in the host country have to be applied to both national and posted workers if the latter are employees of a undertaking established in another country. Transnational posting of temporary workers therefore comes

within the scope of the directive. In practice, this means that temporary work agencies that wish to post their workers to user undertakings established in another Member State are obliged to apply to them the minimum statutory rights in force in the host country. These minimum rights include the conditions for posting of temporary workers.

This proposal for a directive is intended to clarify and harmonise the conditions for posting workers at national level. At the same time, it can be seen as an extension of arrangements already in force for transnational posting of temporary workers. In a proper internal market, it is only logical for the rules for posting temporary workers to be aligned with each other, irrespective of whether a posting is national or transnational.

Finally, it should be made clear that this proposal for a directive does not in any way alter the scope of, or the possibilities for exemptions from, the directive on the posting of workers.

2. ILO Convention C 181 1997 concerning private employment agencies

The General Conference of the International Labour Organisation adopted the Convention on private employment agencies on 19 June 1997, one of the aims of which is to protect temporary workers. The Convention specifies the type of measures which States must take in order to guarantee adequate protection of temporary workers. Spain, Finland, Italy and the Netherlands have ratified this Convention.

3. Subsidiarity

The proposal for a Directive on working conditions for temporary workers responds to the objectives laid down by Article 136 of the Treaty establishing the European Community, in particular to the improvement of working conditions and the promotion of employment and the social dialogue.

With that in mind, the proposal complements the law of Member States, pursuant to article 137 of the Treaty by laying down a common and flexible Community framework aiming at improving the quality of work of temporary workers and the promotion of the temporary work sector.

The need to undertake Community action in this field is justified on several grounds.

Firstly, there is a need to extend at Community level the principle of non-discrimination between temporary agency workers and comparable workers of user undertakings, already in force in nine Member States. In so doing, the proposal for a directive will provide a stable framework for the development of temporary work. By guaranteeing minimum rights for temporary workers the proposal will make the sector more attractive and enhance its reputation. The greater attractiveness of agency work will give more choice to user firms and allow them to better meet their needs for flexibility, since they will have access to a larger pool of applicants. It will therefore lay the foundations for further expansion of the sector, contribute to fully realising its employment potential and improve the functioning of the labour market.

Secondly, with a view to promoting temporary work, it is necessary to pave the way to eliminate at Community level the existing restrictions and limitations to the use of

temporary work which are no longer justifiable on grounds of the general interest and the protection of workers.

Thirdly it is urgent to supplement the exisiting Community law – Council Directives 91/383/EEC, 97/81/EC and 1999/70/EC – which already lay down the principle of non-discrimination as regards non-standard employment relationships, including in the field of health and safety the principle of non-discrimination between agency workers and workers of user undertaking.

Fourthly, a Community legal framework on temporary workers will echo the wishes of the intersectoral social partners at Community level who, launched in May 2000 negotiations in this field with a view to laying such a framework. It will also respond to the expectations of the social partners in the temporary agency sector who, in their joint declaration of 8 October 2001, acknowledged the need for a Community Directive in this field.

To this respect is worth noting that in its contribution to the Barcelona European Council, the International Confederation of Temporary Work Businesses - Euro-Ciett - welcomes a Community Directive on Agency work aiming at striking the right balance between workers protection and employment creation.

4. The principle of proportionality

The action proposed also complies with the principle of proportionality, since it sets out a minimum level of protection in the Community, leaving it up to the Member States and also the social partners to make any adjustments which may be necessary to take account of national peculiarities.

Within this context, the framework established by the proposal for a directive is flexible. First and foremost, it is eminently suitable for consolidating or reinforcing good practices in the various Member States. It gives the Member States the option of waiving the principle of non-discrimination very extensively whenever temporary workers have a permanent contract. Member States may also delegate to the social partners the task of waiving this principle irrespective of the type of employment contract. Moreover, the proposal requires the Member States to conduct a periodic review of the restrictions which might have been imposed on temporary work. As the basic level of protection of temporary workers improves in the future, it ought to be possible to lift the restrictions hitherto justified by the desire to protect these workers.

4. LEGAL BASIS

Article 137 (1) of the EC Treaty provides that "with a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields: (…) – working conditions (…)".

Paragraph 2 of the same article provides that to that end "the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in

a way which would hold back the creation and development of small and medium-sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions".

Article 137 (2) constitutes the legal basis for this proposal.

The action which is proposed complies with these provisions. The proposal for a directive establishes a common set of minimum rules in order to encourage the spread of temporary work and enhance its quality.

For small and medium-sized undertakings (SMEs), temporary work obviously represents an ideal means of adjusting their labour force to market conditions. They make use of it to cope with temporary increases in activity and seasonal fluctuations or to replace absent workers and seek quality workers with good qualifications and motivation. In as far as the directive improves the image of temporary work by enhancing working conditions for temporary workers, it is likely that more people will be attracted to this type of employment. Temporary agencies will thus be able to offer a wider range of qualifications and provide a highly selective response to user undertakings' needs. Moreover, the proposal for a directive will, by establishing a stable, clear and legible framework, eliminate any blatant discrepancies between the national situations and make it easier for SMEs operating in the internal market.

5. THE MAIN ELEMENTS OF THE PROPOSAL

1. Overall description of the directive

This proposal for a directive establishes the general principle of non-discrimination of temporary workers, according to which a temporary worker may not be treated worse, in terms of basic working conditions, than a comparable worker who is defined as a worker in the user undertaking in an identical or similar job.

The proposal for a directive provides for one restriction of and two possible exemptions to the principle.

A restriction can be made if there is objective justification for a difference in treatment. This is the case when circumstances dictate that a temporary worker is in a different situation from a normally comparable worker and cannot therefore be treated in the same way.

Exemptions from the principle may also be made, first of all in the wider sense, when temporary workers have a permanent contract with the agency. In this case, and assuming that the temporary workers are still paid when they are between postings, the Member States may permit an exemption from the principle of non-discrimination to be made, given the additional protection enjoyed by the temporary workers.

The Member States may also authorise the social partners, by means of collective agreements, to establish working conditions which deviate from this principle as long as an adequate level of protection is ensured. This is intended to highlight the role of

the social partners so that they can tailor the rules as closely as possible to the interests and needs of the parties concerned.

These two exemptions represent a proposal for a flexible response to the point on which negotiations foundered. They are a compromise between the need to create a level playing ground in terms of conditions of work for temporary workers and to make allowances for national legislation and practices.

At the same time, the proposal requests the Member States to review periodically existing restrictions or prohibitions on temporary work. Guaranteeing minimum rights for temporary workers should enable restrictions to be lifted in future that were originally justified by a desire to protect the workers in question, it being understood that any restriction on the freedom to provide services must in any event be necessary and in proportion to the aim of such a measure.

The proposal for a directive provides for an additional set of rules to improve the situation of temporary workers, mainly with a view to enabling them to gain access to permanent employment. To this end, the directive stipulates that temporary workers in a user undertaking must be informed about vacant posts and that any clauses prohibiting or having the effect of preventing the user undertaking from recruiting a temporary worker are null and void.

Temporary workers' material working conditions are also to be improved by enabling them to gain access to the social services of the user undertaking and to increase their employability by providing access to training organised in the temporary agency and in the user undertaking.

Finally, the directive stipulates that temporary workers are counted for the purposes of calculating the threshold above which workers' representative bodies provided for by national and Community legislation may be formed in a temporary agency. It is left up to the Member States whether this is to be extended to the user undertaking itself when the threshold is being calculated there. In any event, the user undertaking must inform its workers' representatives if temporary workers are to be employed.

2. Description article by article

Chapter I: General provisions

1. Articles 1 to 3: Scope and definitions

Article 1 defines the scope of the proposal for a directive. The Article includes the concept of "temporary working relationships" as defined in the Directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-term or temporary employment relationship[11]. The second paragraph stipulates that the directive is applicable to private and public undertakings.

Paragraph 3 enables the Member States to exclude from the scope of the directive persons who are undergoing a specific public programme for training, integration or vocational retraining or one supported by the public authorities.

[11] Directive 91/383/EEC. OJ L No 206/19, 29.7.91.

Article 2 specifies the directive's aim.

Paragraph 1 of **Article 3** defines the concepts of worker, comparable worker, posting and basic working and employment conditions. In **paragraph 2** of **Article 3,** the reader is referred to national law for a definition of the employment contract or relationship; it is specified that a State may not exclude a worker from the scope of the directive on the grounds that he has a fixed-term contract, is working part-time or is on temporary work. The latter clause is intended to end the legal uncertainty which may surround temporary work in some Member States where the very varied interpretation of temporary workers' contracts may deprive them of the protection of labour legislation.

Article 4 stipulates that the Member States must review periodically restrictions or prohibitions on temporary work relating to specific groups of workers or sectors of activity.

Chapter II: Employment and working conditions

Paragraph 1 of Article 5 establishes the principle of non-discrimination and defines the conditions in which it is to be applied. One limitation and two exemptions may be made in respect of this principle, first of all if there are objective reasons which prevent its being applied. **Paragraph 2** also authorises the Member States to make an exemption from this principle in the specific case of temporary workers who have a permanent contract which ensures that they are still paid even when they are not on a posting. **Paragraph 3** stipulates that the Member States may entrust the social partners with the task of concluding collective agreements which are exempt from this principle. **Paragraph 4** provides that, for jobs of less than six weeks duration, Member States may not apply the principle of non-discrimination provided for in paragraph 1. Paragraph 5 sets out what is to be done in the event of a comparable worker not existing. **Paragraph 6** specifies the practical arrangements for applying this Article.

Article 6 lays down for a series of provisions to improve the quality of temporary work. In order to give temporary workers the possibility of gaining access to permanent employment, they must be informed about vacant posts and must not face any obstacles if they are given an opportunity to conclude a permanent contract with the user undertaking once their posting has ended **(paragraphs 1 and 2)**. Temporary workers may not be charged any fees **(paragraph 3)**. They must have access to the social services of the user undertaking **(paragraph 4)**. Finally, every effort must be made to improve temporary workers' training both in the temporary agency and in the user undertaking **(paragraph 5)**.

Article 7 stipulates that temporary workers are counted at the temporary agency for the purposes of calculating the threshold above which workers' representations provided for by national and Community legislation may be formed. The Member States are free to extend this for the purposes of calculating the thresholds at the user undertaking.

Article 8 provides that the employees of the user undertaking must be informed of the fact that temporary workers are being employed in their undertaking.

Chapter III Final provisions

Article 9: Minimum requirements (standard clause)

Article 10: Penalties (standard clause)

Article11: Implementation (standard clause)

Article12: Review by the Commission. This is proposed five years after adoption with a view to presenting any amendments.

2002/0072(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

on working conditions for temporary workers

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 Commission[1],

Having regard to the opinion of the Economic and Social Committee[2],

Having regard to the opinion of the Committee of the Regions[3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[4],

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 limitation 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

---

1 OJ C of , p. .
2 OJ C of , p. .
3 OJ C of , p. .
4 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 offering workers a fair degree of job security and enhanced occupational status, which, at the same time, is compatible with the 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 decided 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.

(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 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 1996[5] concerning the posting of workers in the framework of the provision of services.

(14) Directive 91/383/EEC of 25 June 1991[6] supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration

---

[5] OJ L 18 of 21.1.97, p1.

[6] OJ L 206 of 29.7.1991, p. 19.

employment relationship or a temporary employment relationship establishes the safety and health provisions applicable to temporary workers.

(15) With respect to basic working and employment conditions, temporary workers should not be treated any less favourably than a "comparable worker", i.e. a worker in the user undertaking 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 under national law.

(17) 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.

(18) 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.

(19) There should be some flexibility in the application of the principle of non-discrimination in cases of missions effected to accomplish a job which, due to its nature or duration, lasts less than six weeks.

(20) 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 on grounds of the general interest regarding, in particular the protection of 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; 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 the contract of employment or employment relationship between a temporary agency, which is the employer, and the worker, who is posted to a user undertaking to work under its supervision.

2. This directive applies to public and private undertakings engaged in economic activities whether or not they are operating for gain.

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 training, integration or vocational retraining programme.

Article 2

Aim

The purpose of this Directive is:

a) to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers*;*

b) to establish a suitable framework for the use of temporary work to contribute to the smooth functioning of the labour and employment 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) “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;

d) “basic working and employment conditions”: working and employment conditions relating to:

i) the duration of working time, 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 contract of employment or employment relationship. However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because they concern:

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

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

c) persons on a posting at a user undertaking.

Article 4

Review of restriction 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.

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.

2. Member States may 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 give the social partners at the appropriate level the option of 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 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. 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.

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.

2. Member States shall take any action required to ensure that any clauses banning 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.

3. Temporary agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking.

4. Temporary workers shall be given access to the social services of the user 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 for the purposes of calculating the threshold above which bodies representing workers provided for under national and Community legislation should 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 legislation should be formed in the user undertaking.

Article 8

Information of workers' representatives

Without prejudice to national and Community provisions which are more stringent and/or more specific on information and consultation, 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 sanctions 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 disuasive 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	*For the Council*
The President	*The President*

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

TITLE OF PROPOSAL

Directive of the European Parliament and the Council on working conditions of temporary workers

DOCUMENT REFERENCE NUMBER

COM(2002) 149 final

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

   As outlined in the explanatory memorandum, the proposed Directive builds upon a number of previous initiatives at European level and in particular upon negotiations between the social partners. These negotiations were the social partners' response to a consultation launched by the Commission in 1995 calling for a European legislative initiative concerning the working conditions of part-time, fixed-term and temporary agency workers. The objective of this consultation was to develop ways and means of improving flexibility in working time while enhancing security for employees.

   The social partners have already concluded framework agreements on part-time and fixed-term work, which have both been implemented through Council Directives. Similar negotiations on temporary agency work failed in May 2001, even though the actual positions of the social partners were very close, including a basic agreement on the principle of non-discrimination regarding agency workers with temporary contracts.

   In its reaction to the failure of the negotiations, CIETT, the sector's international confederation, stated that it "considered these negotiations crucial, as it felt that the agency work industry and as such the EU labour market as a whole would benefit from a European legal framework negotiated by the social partners".

   The current proposal is largely based on the consensus that was reached by the social partners during the negotiations, offering a compromise on the issues that could not be resolved during the negotiations, which accommodates the different positions of the social partners. It thus also meets the expectations of the social partners in the temporary agency sector, namely Euro-Ciett and Uni-Europa, as expressed in their joint declaration of 13 July 2001, in which they "welcome the European Commission's announcement that it will propose legislation on Agency Work".

It is also worth mentioning that the principle of non-discrimination between temporary workers and comparable workers in user undertakings is already enshrined in Community law in the field of health and safety at work through Council Directive 91/383/EEC of 25 June 1991 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.

The proposed directive formulates a general framework for the working conditions of temporary agency workers in Europe. By establishing a general principle of non-discrimination, it will lead to greater transparency and increase confidence in the sector. It will thus improve the security of workers while at the same time giving greater flexibility to enterprises.

The proposed directive provides a stable framework for the further development of temporary work. By guaranteeing minimum rights for temporary workers and laying down core standards, it is expected that this will make the sector more attractive and enhance its reputation. It will improve the security of temporary workers and make sure that they do not face any disadvantages. The greater attractiveness of agency work will give more choice to user firms and allow them to better meet their needs for flexibility, since they will have access to a larger pool of applicants. In addition, the directive also provides for a regular review of existing restrictions and prohibitions on temporary work. It will thus contribute to the lifting of such restrictions, given that improvements in working conditions will render them more and more obsolete. On the whole, this proposal will therefore lay the foundations for the further expansion of the sector, contribute to fully realising its employment potential, and improve the functioning of the labour market. Doing so, the proposal aims to reach a fair balance between the protection of agency workers and enhancing the positive role that agency work can play in the European labour market.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

The proposal will affect the temporary agency sector in the EU, including agencies and user enterprises. As outlined in the explanatory memorandum, temporary agency work is common in all Member States. In 1999, around 2.1 million persons (expressed in full time jobs) worked through agencies on an average daily basis, representing 1.5% of all employees in Europe. The approximate turnover of the agency sector in Europe in 1999 amounted to €59 billion.

Agency work is most widespread in the UK, the Netherlands, France, Germany, Spain and Belgium. Around 80% of all agency workers were employed in the UK, France, the Netherlands and Germany. In terms of shares in employment, the sector is most developed in the Netherlands, Luxembourg, France and the UK.

The sectoral structure differs significantly between countries. In France the share of agency workers is highest in construction and industry with 6.7% and 5.8%. In the UK, the share is similar for industry, construction and services with around 2% to 2.5%, but substantially higher in the public sector with 5.3%. In contrast, in the Netherlands the penetration rate is highest in industry and services (6.6% and 4.4%).

The main motives for employing temporary agency workers are to deal with variations in demand – either seasonal fluctuations or unexpected peaks – or with the absence of permanent staff. In contrast, cost advantages seem to play an almost negligible role. Only in 1% of all cases did enterprises hire temporary agency workers because they were cheaper.

The market for agency work is relatively concentrated in most countries. In a number of countries, the five largest agencies have a market share of close to or even more than 80%.

Characteristics of agency workers differ widely. Almost three-quarter of all agency workers are younger than 35, a majority (60%) has completed secondary education, and around two thirds perform manual work . However, in principle agency work is found across all age groups, it is equally prevalent among workers with primary and tertiary education, and a substantial share of agency workers is employed to perform office work.

Reasons for seeking employment through agency work also differ substantially, with around one third of all agency workers expressing a genuine preference for this kind of work.

There is also no uniform pattern with regard to gender. In some cases more than three-quarter of agency workers are men. In some other countries, however, there is either a more or less equal distribution or a majority of women. These differences largely reflect differences in the sectoral structure. Where agency work is concentrated in the manufacturing or construction sector, more men than women are likely to work through agencies. Where it is more prevalent in the service sector or for white-collar jobs, women tend to be represented more.

Assignments of agency workers to user enterprises are usually very short. In the vast majority of cases assignments last for less than six months. In most countries this is the case for more than 90% of assignments. In France and Spain very short assignments of less than a month are the norm. In contrast, in Sweden or Germany assignments are usually longer than one month, but hardly exceed six months. According to figures provided by the CBI, in the UK the majority of assignments lasts for less than 3 months.

3. What will business have to do to comply with the proposal?

The proposed directive establishes a general principle of non-discrimination between temporary workers and comparable workers in the user enterprise, taking into account seniority, qualifications and skills, in terms of basic working conditions. Exemptions from this principle are possible for temporary workers with permanent as well as fixed-term contracts.

Specific rules concern the information of temporary workers about vacancies in the user enterprise, the prohibition of practices impeding temporary workers from taking up permanent employment, and the access of temporary workers to social facilities and to training. Temporary workers are to be taken into account in calculating the thresholds concerning collective representation in agencies, and user firms must inform existing bodies for employee representation on the use of agency work.

For the most part, these provisions codify common practices and rules which are already enshrined in national legislation, collective agreements or codes of conduct. In addition, the directive allows for a significant degree of flexibility in the case of temporary workers with permanent as well as fixed-term contracts.

On the whole the proposed regulations should therefore bring only very limited immediate changes for businesses. It will, however, lay the foundation for improving the quality of work in the sector and enhancing its future development.

4. What economic effects is the proposal likely to have?

For most of the measures proposed in the directive it is not possible to quantify costs and benefits. The statistical information that would be necessary in this respect is not available. Information on the economic situation of the sector is relatively limited as such, and comparable data in particular hardly exist at all.

On the basis of the limited information that is available, a qualitative analysis of the possible impact of the directive has been carried out. This analysis relied mainly on information provided by the sector itself, a study carried out by Ciett, the industry's association, and a recent study by the European Foundation for the Improvement of Living and Working Conditions (not yet published), which also includes national reports on all Member States.

In assessing the impact of the proposal it is necessary to take into account the substantial degree of flexibility that it offers. Exemptions from the principle of non-discrimination are, for instance, possible

– for objective reasons,

– on the basis of collective agreements,

– in the case of agency workers with open-ended contracts,

– where there exists no comparable worker nor any collective agreement applicable to the user undertaking.

These exemptions and derogations are particularly important given the actual heterogeneity of the sector outlined above. However, both this flexibility and diversity make it impossible to come up with any simplistic conclusions as regards possible costs and benefits of the Directive.

- **General remarks**

Before analysing the implications of the proposed directive on employment, investment, and the competitive position of business in more detail, it is perhaps worth pointing out the general approach taken in this impact assessment as well as some of its general conclusions.

The impact assessment included a comprehensive review of the existing regulatory framework for temporary agency work in the Member States as well as an evaluation of the scale and scope of changes required by the proposed Directive.

The second pillar of the impact assessment consisted in identifying the main factors, which determine the development of the temporary agency sector, including the main challenges regarding its future growth. This part was largely based on the analysis carried out by the industry's association, Ciett, and in some parts also on the report by the European Foundation for the Improvement of Living and Working Conditions.

This provided the basis for a qualitative analysis of the effects of the required changes in regulation on the factors identified above, namely wage costs, non-wage costs, the general image and social acceptance of the sector, the ability of the sector to meet the needs of user enterprises in terms of flexibility, the ability of the sector to provide differentiated, tailor-made services to user undertakings, and existing restrictions for agency work.

It is particularly important to underline that on the whole the actual changes required by the Directive will be very limited, because for the most part it codifies rules which are already common practice and are enshrined in national legislation, collective agreements or codes of conduct. Moreover, even in cases where some changes may be required, the actual effects will be mitigated by the substantial flexibility offered by the Directive.

Given that the proposed Directive will therefore entail only very limited changes of the regulatory framework, it is obvious that any costs, which might be induced by the Directive, should on all accounts remain very limited.

A second preliminary conclusion is equally important. As emphasised in the study by Ciett, the user enterprises' predominant reason for using agency work is their need for flexibility. In the vast majority of cases, agency work is used to cope with the absence of permanent staff or a temporary increase in workload. In contrast, cost advantages play an almost negligible role. In their contribution to the Barcelona summit, Euro-Ciett has reiterated this point, emphasising that "[t]he comlpanies' decision to recruit agency workers is hardly ever based on cost: only 1% of workers was recruited because the cost of doing so was lower than that of hiring an permanent worker".

Accordingly, in analysing the economic implications of this proposal in a consistent way, the emphasis should be on how it is going to affect the opportunities of user undertakings to use agency work for managing contingencies. Factors such as the availability of staff matching the needs of user firms will be far more important in this respect than any cost advantages.

- **On employment**

A number of different factors have to be taken into consideration in order to assess the impact of the proposal on employment in a comprehensive and systematic way. The implications of the Directive in terms of wage costs are only one element in this respect. At the very least, any assessment will also have to take into account possible effects on the productivity of agency workers.

Moreover, a number of elements of the proposed Directive will have an impact on the demand for agency workers that goes well beyond and is completely independent of the very narrow focus on wages. More notably this concerns issues such as the

image and social acceptance of agency work, the attractiveness of the sector for potential employees, and the prospective lifting of current restrictions. In fact, given the overriding concern of user firms with flexibility, these latter aspects are bound to be far more important than any wage effects.

Non-wage aspects

The study by Ciett estimates that, with the right legal framework in place, 6.5 million people could be employed in the agency sector on an average day by 2010. This would mean a net increase of more than 4 million people.

According to Ciett, two elements are particularly important with respect to this legal framework. One concerns the lifting of existing restrictions and prohibitions. The other refers to the further development of labour regulation.

As already mentioned, the Directive provides for a regular review of existing restrictions and prohibitions of agency work. And by improving the regulation of working conditions in the sector it will remove an important obstacle for the further deregulation of the sector. It will thus make an important contribution to putting in place a favourable legal framework for the further development of the agency sector.

Obviously, this is not confined to the lifting of existing restrictions. The importance of measures to improve the social acceptance of agency work – including through the regulation of working conditions – for the growth of the sector is emphasised in the Ciett study as follows:

"[I]t is important that any new terms and conditions governing agency work – particularly in the areas of wages and security of employment – are ensured through appropriate labour regulation. All these measures will improve the image of the sector and increase the social acceptance of agency work. This is vital if the [Private Employment Agency (PrEA)] industry is to develop further. The Netherlands provides an example of how a progressive change in the social acceptability of agency work has enabled the development of the Dutch PrEA industry and has created a platform for future growth."

Also in relation to legislative initiatives in some countries aimed at ensuring non-discrimination between agency and non-agency workers in terms of wages, the Ciett study concludes that this "may be necessary to increase the social acceptability of agency work" at least in cases where agencies and agency workers or their representatives are not able to "tackle the wage issue by themselves". This is exactly the approach taken in the proposed Directive, by giving clear priority to collective agreements and imposing the principle of non-discrimination with respect to wages only if no solution can be found at this level.

The proposed Directive will thus be an important element in creating an appropriate legal framework for the continued expansion of the agency sector. Establishing a general principle of non-discrimination will help to improve the social acceptance of temporary agency work, will make it more attractive and will facilitate the lifting of barriers for its further development. The availability especially of workers with higher qualifications and more diversified skills will encourage more user enterprises to employ temporary workers. This will allow agencies to recruit their workers from a larger pool of candidates and to expand into new areas. The provisions can

therefore help to realise the full employment potential of the sector. On the basis of this analysis it can therefore be expected that this proposal will contribute to the creation of extra employment in Europe, to improving the functioning of labour markets and thus to achieving the objectives set out at the Lisbon summit.

Wage costs

The implications of the Directive in terms of wage costs are more difficult to assess. Figures on the actual wage gap between agency workers and comparable workers in user undertakings do not exist. In fact, hardly any data on the wage levels or the wage structure for agency workers exist at all.

The few figures that are actually available in this respect only refer to aggregate data and compare the average wages of agency workers with the average income of 'other' workers, either in the sector or even in the whole economy. They will therefore exaggerate by far the wage gap between agency workers and *comparable* workers in user enterprises and cannot be taken as an indication for any wage increase that may result from the current Directive. For the sake of completeness these figures are reported here. It should, however, also be noted that in most cases they are pure estimates that are not based on any explicit methodology and are not based on any systematic collection of data.

In the national study for the European Foundation on Austria estimates are mentioned that in some cases the difference between the salary defined by the collective agreement in the user enterprise and the actual salary of agency workers may amount to as much as 30%. In contrast, another study quoted, which compares an agency worker's average gross income per month with the average income in the same line of work estimates that the wage gap may be only around 5%.

Figures contained in an official parliamentary report on the situation of temporary agency work in Germany indicate that agency workers might earn between 22% and 40% less than the average wage received by 'other workers'. However, in Germany agency workers tend to have open-ended contracts and are also paid between two missions, which does not allow a direct comparison between their income and that of other workers.

Sector estimates for Spain (European Industrial relations Observatory, 28/7/99) suggested that before a new law came into force in 1999, which stipulates that wages of agency workers should be equal to the ones laid down in the collective agreement applicable to the user firm, wages paid by agencies may have been between 10% and 15% lower than in user enterprises.

For the UK, figures quoted in the national report for the study of the Dublin Foundation show that the average weekly income of full-time agency workers was 68% of the average weekly income for all employees, whereas the relevant figure for full-time people on fixed-term contracts was 89%.

Again, it should be underlined that these figures are mentioned here for illustrative purposes and for the sake of completeness only. All these data are only estimates and refer only to aggregate data. Accordingly, they give no indication of any possible wage increases induced by the proposed Directive.

Having said that, it is of course possible that at least in some cases the principle of non-discrimination between agency workers and comparable workers will lead to an increase in wage costs for agencies and/or user enterprises.

However, any such increase will be limited by a number of factors. First of all, it has to be emphasised again that in a majority of Member States the principle of non-discrimination with respect to pay is already effectively applied, which means that in these cases the Directive will not imply any wage increases at all. Secondly, even where this is not the case, the Directive will allow for a number of important derogations with respect to agency workers with both fixed-term and open-ended contracts. In particular, the principle of non-discrimination with regard to pay will only apply if no collective agreements covering this matter exist. This as well will limit the impact of the Directive with regard to wage increases. Thirdly, there exists some anecdotal evidence of examples where agency workers may actually earn more than comparable workers, for example because they have much-sought-after skills, also implying that no wage increases will result in these cases.

Taking into account these considerations, it is therefore difficult to imagine the proposed Directive leading to any broad-scale increase in labour costs. Any such increase should on all accounts be confined to some specific cases.

Even in cases where the Directive will indeed imply some increases in wage costs, these will also be mitigated by potential increases in productivity. A number of provisions contained in the Directive are likely to have a positive impact on temporary workers' productivity. For example, agency work will become more attractive for better-qualified workers, and it will become possible to match temporary workers' profiles more closely to the specific needs of user firms. The Directive also promotes an improved access of agency workers to training measures. Non-discrimination and other measures aimed at improving the integration of temporary workers in the user firms, such as the information of workers' representatives on the use of agency work or the access to social facilities, will have a positive impact on their motivation and help to avoid possible conflicts with permanent staff. All these measures will have a positive impact on productivity and thus mitigate the effects of any wage increase.

Finally, the actual impact of any wage increase on employment levels will also depend on the wage sensitivity of the demand for agency workers. While again no concrete data are available in this respect, it is important to note that according to the study by Ciett the predominant motivation for user enterprises to employ agency workers concerns the replacement of absent staff and temporary increases in workload, whereas cost advantages are relevant only in 1% of all cases. Accordingly, even if the Directive should lead to wage increases in certain cases, it would appear rather unlikely that this should cause a major decline in business for temporary agencies and thus have major negative effects on employment.

To sum up this discussion, the Directive has a number of implications – both in terms of wages and non-wage-factors – which will influence the potential for job creation in the agency sector. There are a number of reasons why any effect on wage costs will be rather limited in scale and scope and be mitigated in its effects by a number of factors. At the same time, through establishing an appropriate legal framework for the further development of the temporary agency sector, the Directive will contribute to fully realising its employment potential. In this context it is also worth noting that

similar or identical rules to the ones proposed by the Directive – including especially the principle of non-discrimination of agency workers with respect to basic working conditions – already exist in a number of countries, and that these countries are among those, where the temporary agency sector is most thriving.

- **On investment and the creation of new businesses**

The proposed directive does not have any direct impact on investment and the creation of new businesses. As argued in the previous section, it does lay the foundations, though, for a further expansion of the agency sector across Europe, and may in this way induce investments.

Temporary agency work is important for start-up firms, in which there is considerable demand for well-qualified personnel, but which may not always be able to employ staff on a permanent basis. To the extent that the proposed provisions make agency work more attractive, it should become easier for start-up firms to find workers suited to their particular needs.

- **On the competitive position of businesses**

With regard to assessing the implications of the proposed Directive on the competitive position of businesses, it is possible to refer to a large extent back to many arguments made already in relation to its employment effects. The following analysis will discuss the main implications separately for temporary work agencies and user enterprises.

Temporary work agencies

From the point of view of temporary work agencies, the main potential costs involved in the proposed Directive concern possible wage increases resulting from the principle of non-discrimination between agency workers and comparable workers in user enterprises. However, the degree to which this will actually be the case is limited by a number of factors. Firstly, and most importantly, the principle of non-discrimination with regard to pay will only apply if no collective agreements exist. Secondly, only some agencies in some countries will be affected, because either the principle of non-discrimination may already be applied or because agency workers may de facto already earn similar or even higher wages. Thirdly, important exceptions will remain possible in cases of agency workers with both open-ended and fixed-term contracts. Fourthly, some wage disparities may continue to persist because they may be due to differences for instance in terms of qualification, experience or professional background. Finally, in a number of cases agencies will be able to pass on wage increase to user enterprises, given their predominant concern with flexibility. On the whole, the extra burden imposed by the Directive on temporary agencies throughout Europe should therefore on all accounts remain relatively limited.

The need to determine the relevant wage levels for comparable workers in user enterprises can impose a certain administrative burden on agencies. In many cases, however, this information will be readily available, either through relevant collective agreements which could serve as a reference point, or through information from the user enterprise itself, which may have to be gathered anyway in the process of arranging particular assignments.

The prohibition of practices which prevent temporary workers from taking up permanent employment may occasion costs for agencies in terms of lost revenue or higher staff turnover. These practices are not very common, though, in Europe, and any costs involved should be fairly low. The UK Government has, for example, drafted a regulation which will prohibit 'temp-to-perm' fees, and a study by the Department of Trade and Industry puts the resulting cost for agencies at just 0.04% to 0.08% of the total industry turnover.

At the same time the Directive offers a number of advantages to temporary agencies, which are likely to address directly or at least indirectly many of the challenges currently faced by the sector. As argued above and in the Ciett study, at least in some countries the further expansion of agency work is hampered by the negative image that it very often still has. In others the main challenge for the sector is to expand into new areas and to offer their clients more diversified and specialised, tailor-made services. This in turn will require the availability of highly qualified, motivated and flexible workers with diversified skills.

In both respects, the proposed Directive can create some major benefits for the agency sector. Establishing a general principle of non-discrimination between agency workers and other workers in user enterprises will go a long way towards improving the social acceptance of agency work. At the same time it will make agency work more attractive for more groups of workers and allow agencies to recruit their personnel from a larger pool of candidates.

In addition, and perhaps most importantly, by laying down certain minimum standards for the working conditions of agency workers, the basis for many concerns currently associated with agency work is actually removed. This will mean that in many cases it will become much easier to remove restrictions, which are still very often impeding the activities of temporary work agencies. The regular review of existing limitations for agency work as it is provided for by the Directive will further contribute to this lifting of existing limitations.

User enterprises

For user enterprises the overriding motive to employ temporary agency workers is their need for greater flexibility in dealing with fluctuations in demand or the absence of regular staff. They should therefore have a major interest in being able to recruit well-qualified, motivated and adaptable workers through agencies, who can be rapidly and easily integrated into the enterprise.

The proposed Directive therefore entails a number of benefits for user enterprises. To the extent that it increases the attractiveness of agency work, it will become much easier for user enterprises to recruit workers that match their particular needs. In addition, many of the provisions contained in the proposal have the potential to improve the productivity of agency workers and to ease their integration into the user enterprise. This concerns in particular the principle of non-discrimination, the information of workers' representatives on the use of agency work, or the access to social facilities. These aspects will also entail a reduction of potential conflicts and frictions with permanent staff and help to avoid any possible costs associated with this. In particular the fact that agency workers will not be treated less favourably than permanent staff with whom they work together on a daily basis, will remove an important source of possible tensions and conflicts.

The abolition of practices which impede agency workers from taking up permanent employment will further benefit user firms by saving them fees and enabling them to recruit temporary workers more easily.

User enterprises may face certain costs, especially to the extent that agencies may pass wage increases on to them through higher fees. However, the costs of agency workers make up only a small part of the total wage costs for most user enterprises. Such cost increases are therefore not likely to affect user enterprises on any major scale. In addition, in all the cases mentioned above where no wage increases will be required by the Directive, this will also imply no changes for user undertakings. Again, this concerns in particular the case where collective agreements exist.

Providing access to the social facilities of the user enterprise is an important factor in fully integrating temporary staff in the enterprise. In most cases this is going to cause little or no extra costs. Most social facilities (such as canteens, childcare facilities, transportation etc.) are likely to involve a certain amount of fixed set-up costs. But the marginal costs involved in making these facilities available to more workers will tend to be minor or close to zero. On the other hand, it will almost certainly improve the motivation of workers. It will strengthen their sense of being part of the enterprise, affect their interaction with other workers and improve their overall productivity.

Informing agency workers about vacancies in the enterprises is not very likely to create any costs for enterprises but should offer them a number of advantages. At most, this may involve some administrative costs in setting up and maintaining a mechanism that ensures that agency workers are systematically and regularly informed about vacancies. This will, however, not only improve the integration, motivation and productivity of agency workers. It will also imply that enterprises will be able to use agency work more systematically as a device for recruiting permanent staff, which can help to save costs normally spent on finding, screening and recruiting candidates.

The provision to inform workers' representatives on the use of agency work by the user enterprise will involve little to no extra costs. It will, however, contribute to address and possibly reduce any reservations or objections the enterprise’s staff might have and help to avoid any possible conflicts or frictions.

With regard to training the Directive promotes enhanced social dialogue in order to improve the access of agency workers to training measures. The Directive therefore has no direct cost implications in this respect.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc.)?

The proposed directive applies equally to all enterprises. With regard to agencies it has to be noted that in most countries the sector is actually heavily concentrated and the largest five agencies have a market share of more than 80%. With regard to user enterprises no figures concerning their size structure are available.

With regard to small and medium sized agencies, the lifting of existing limitations on activities of agencies will allow them to better compete with larger agencies through improved opportunities of specialising in certain niche markets. The flexibility

provided for in the directive with respect to temporary workers with permanent and fixed-term contracts will allow highly flexible arrangements at both sectoral and undertaking level, and should help to avoid administrative or financial burdens for small and medium sized agencies. The provision that the principle of non-discrimination will not be applied to missions lasting for less than one month – at least for a limited period of time and in those countries where the principle of non-discrimination is not yet fully established – is particularly aimed at giving small and medium sized agencies more time to adapt themselves to these changes.

As concerns small and medium sized user enterprises, a number of benefits mentioned above, such as the availability of well-qualified workers with a wide range of experience, which may be particularly relevant for them; enabling them even better in the future to meet their needs for flexibility through employing agency workers.

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views.

The proposed directive builds upon negotiations between the social partners at European level. In 1995 the Commission launched a consultation of the social partners on 'Flexibility in working time and security for employees', which covered part-time, fixed-term and temporary work. The social partners have already concluded framework agreements on part-time and fixed-term work, which have been implemented through Council Directives. Similar negotiations on temporary agency work failed in May 2001.

Despite this failure, the actual positions of the social partners were very close. There was, for example, a basic agreement on the principle of non-discrimination between temporary workers and comparable workers in user enterprises for workers with temporary contracts. No agreement could be reached, though, with respect to temporary workers with permanent contracts.

The current proposal is largely based on the consensus that was reached by the social partners during the negotiations. It proposes a flexible formula which would allow to derogate from the principle of non-discrimination for temporary workers provided that they continue to be paid between assignments. The proposed directive thus provides a European legal framework that builds upon the social partners' negotiations and offers a compromise on the issue of temporary workers with permanent contracts that accommodates the different positions of the social partners.