



**Report**  
Expert Group  
**Transposition of Directive 2008/104/EC on  
Temporary agency work**

August 2011





Introduction .....	3
I. Scope of the Directive .....	5
1. Territorial scope – application to seafarers .....	5
2. Notion of 'economic activities' (Article 1(2)) .....	6
3. Possible derogation for specific public or publicly supported vocational training, integration or retraining programmes (Article 1(3)) .....	9
II. Definitions .....	11
4. Main notions used in the Directive - Article 3(1)(a) to (e) and Article 3(2), second subparagraph .....	11
III. Principle of equal treatment .....	16
5. Principle of equal treatment – basic working and employment conditions (Articles 3(1)(f), 3(2), first subparagraph and 5(1)) .....	16
6. Principle of equal treatment – possible derogations (Articles 5(2) to 5(5)) .....	22
IV. Review of restrictions or prohibitions on the use of temporary agency work (Article 4) .	26
7. Review of restrictions or prohibitions imposed on the use of temporary agency work (Article 4(1) to 4(3)) .....	26
8. National requirements on registration, licensing, certification, financial guarantees or monitoring of agencies (Article 4(4)) .....	32
9. Obligation to inform the Commission of the results of the review (Article 4(5)) .....	33
V. Access to employment, collective facilities and vocational training – representation of agency workers – information of workers' representatives (Articles 6, 7 and 8) .....	36
10. Access to employment, collective facilities and vocational training (Article 6) .....	36
11. Representation of temporary agency workers (Article 7) .....	40
12. Information of workers' representatives (Article 8) .....	42
Annex.....	43



## Introduction

As for other Directives in the field of labour law, the Commission set up an Expert Group composed of national experts representing the Governments of the twenty-seven Member States, the three EEE-EFTA<sup>1</sup> States and the EFTA Surveillance Authority in order to provide technical assistance and a forum for discussing the facilitate the transposition process of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work<sup>2</sup>.

Directive 2008/104/EC complements Directive 97/81/EC on part-time work<sup>3</sup> and Directive 1999/70/EC on fixed-term work<sup>4</sup> by setting common rules at EU level for temporary agency work. The Directive aims at protecting temporary agency workers and improving the quality of temporary agency work by ensuring that the workers concerned benefit from the principle of equal treatment. At the same time, one of the purposes of the Directive is to recognize temporary-work agencies as employers with a view to contributing to the creation of jobs and to the development of flexible forms of working.

The Expert Group exchanged views on the points of the Directive whose implementation into national law raises questions of interpretation and is likely to present particular difficulties. It focused its work on Articles 1 (Scope), 3 (Definitions), 4 (Review of restrictions or prohibitions), 5 (The principle of equal treatment), 6 (Access to employment, collective facilities and vocational training), 7 (Representation of temporary agency workers) and 8 (Information of workers' representatives) of the Directive.

The Expert Group had an informal status, and the role of the Commission has been limited to providing it with logistical support and helping to develop its ideas. While aiming at improving the implementation of the Directive through a preventive exchange of views and favouring a better common understanding of the process by providing the Member States with technical assistance in the implementation process of the Directive, the Commission has not sought to interfere with the transposition process at national level in any way, nor to intervene in the right of interpretation of the Court of Justice, or other courts concerned. The same applies to the experts in the Expert Group who, in their countries, are responsible, as the case may be, for producing draft legislation or monitoring discussions between the social partners as part of agreement-based transposition.

The Commission is very pleased with the work and achievements of the Expert Group, which has had a fruitful exchange of views in a remarkable spirit of co-operation on the basis of the working documents presented by the Commission. This positive judgment is shared by the members of the Expert Group. A total of 6 meetings were held between September 2009 and March 2011, during which the main issues arising from the implementation of the Directive were extensively discussed. The consensual approach with the objective of simplifying what, in any event, is a complex corpus of legal provisions allowed the Expert Group to agree with the report deriving from the minutes and working documents.

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<sup>1</sup> European Economic Area – European Free Trade Association.

<sup>2</sup> OJ L 327 of 5.12.2008 p. 9.

<sup>3</sup> Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14 of 20.1.1998 p. 9.

<sup>4</sup> Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175 of 10.7.1999 p. 43.



The report is, in fact, a simple reminder to all which are or will be involved in the legislative work leading to the transposition of the Directive in all countries concerned by it. It is by no means binding and is not to be considered as representing the official position of Governments participating in the Expert Group. Nevertheless, the report does not in any way exonerate Member States from the responsibility of ensuring the correct transposition and application of the Directive, as it does not exempt the Commission from its obligation to monitor that work.



## I. Scope of the Directive

### 1. Territorial scope – application to seafarers

#### 1.1. Provisions of the Directive

**Article 1(1):** *"This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction."*

#### 1.2. Issues

Since the main concepts used in Article 1(1) are defined and developed in Article 3(1) of the Directive, they will be examined together with the latter article. Nevertheless, Article 1(1) raises questions about the **territorial scope** of the Directive as well as its **application to seafarers**.

#### What is the territorial scope of the Directive?

The Directive does not contain any provision defining its territorial scope of application. Consequently, it has to be determined in the light of the provisions of the Treaty on its territorial scope.

On that basis, in principle the Directive would not be applicable to temporary agency workers employed by agencies established in the European Union and assigned to user undertakings outside the EU. However, according to consistent case law of the Court of Justice, the mere fact that the activities are carried out outside the territory of the EU in itself is not sufficient to exclude the application of EU rules, provided that the employment relationship retains a sufficiently close link with EU law (see for instance judgment of 30 April 1996 in the case C-214/94, Boukhalfa, as well as previous cases Walrave-Koch, 36/74, Prodest, 237/83, Lopes da Veiga, 9/88, and Aldewereld, C-60/93). The Court of Justice held that this principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other.

As to the opposite case where an agency established in a third country assigns a worker to a user undertaking within the EU, there does not seem to be any provision of the Directive excluding such agency workers from its scope. Consequently, it was agreed that in principle the Directive is to be applied in those situations.

#### Does the Directive apply to seafarers?

The Agreement concluded by the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, annexed to Directive 2009/13/EC<sup>5</sup>, defines the term "seafarer" as meaning any person who is employed or engaged or works in any capacity on board a ship other than

<sup>5</sup> Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the ECSA and the ETF on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, OJ L 124 of 20.5.2009 p. 30.



one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply.<sup>6</sup>

Directive 2008/104/EC does not exclude seafarers from its scope. However, seafarers carry out their duties under very specific working conditions, partly in international waters and in a sector characterized by the provision of manpower through "manning agencies". Therefore, the situation of seafarers raises legal questions about the concrete effects of the agency work Directive on this particular profession.

Furthermore, the case of seafarers raises the issue of the determination of the law applicable to their employment contracts. This question is not regulated by Directive 2008/104/EC but Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations<sup>7</sup> ("Rome I") establishes criteria to be applied in that respect.

Therefore the complex issue of the applicability of the Directive to seafarers needs to be assessed on a case-by-case basis by taking into account a number of relevant criteria.

## 2. Notion of 'economic activities' (Article 1(2))

### 2.1. Provisions of the Directive

**Article 1(2):** *"This Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain."*

### 2.2. Issues

If it is clear that in principle no economic activity is excluded from the scope of the Directive, this wording nevertheless raises the issue of the scope of the notion of "economic activities" and, notably, the question whether the Directive applies to user undertakings which may not be considered as carrying out an economic activity. Both issues will be further discussed below, having recalled the relevant parts of the 'travaux préparatoires'.

#### How did the legislator come to the final wording of Article 1(2)?

The initial proposal for a Directive, presented by the Commission on 20 March 2002<sup>8</sup>, stated in Article 1(2) that

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

The European Parliament, in its legislative resolution on the Commission proposal adopted on 21 November 2002<sup>9</sup>, altered the wording of this provision by adding the words in italic:

"This directive applies to public and private undertakings *that are engaged in economic activities and that are operating as temporary work agencies*, whether or not they are operating for gain."

<sup>6</sup> According to this definition, temporary agency workers on board ferries operating inside EU territory would in principle not be considered as seafarers and they would be covered by Directive 2008/104/EC.

<sup>7</sup> OJ L 177 of 4.7.2008 p. 6.

<sup>8</sup> COM(2002) 149 final of 20.3.2002.

<sup>9</sup> European Parliament legislative resolution on the proposal for a European Parliament and Council directive on working conditions for temporary workers (COM(2002) 149 – C5-0140/2002 – 2002/0072(COD)) (P5\_TA(2002)0562).



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

The relevant provision of the amended proposal adopted by the Commission on 28 November 2002<sup>10</sup> differs from the initial proposal in the fact that the words in italic have been added:

"This directive applies to public and private undertakings engaged in economic activities whether or not they are operating for gain, *and which are temporary agencies or user undertakings.*"

In parallel, the Social Questions Working Party started examining the Commission proposal article by article in its meeting held on 25 June 2002<sup>11</sup>. On the issue of Article 1(2), the meeting minutes indicate that:

"BE, FI, UK asked for clarification about the scope of application of the Directive as it was not clear exactly which companies would be covered and which would be excluded. Scrutiny reservation by UK. FI did not want public sector enterprises to be excluded. The Commission stated that, as indicated in recent case law, an undertaking was an enterprise which carried out economic activities. Therefore, trade unions, charitable organisations and public administrations would be excluded, but public companies controlled by the state, such as the Spanish postal service "Correos" would be included. The Commission also confirmed that the Directive covered both temporary agencies and the user undertaking and indicated its willingness to clarify this in the text. (...)."

Article 1(2) was discussed again by the Social Questions Working Party in its meeting of 16 September 2002<sup>12</sup> and the Commission made the following point:

"In response to UK about exemption of charities, the armed forces, trade unions and government departments, the Commission confirmed that if they were not engaged in economic activities, even as a secondary activity, they would be excluded".

The final wording of Article 1(2) is substantially identical to the amended proposal of 28 November 2002.

### **Application of the Directive to user undertakings not engaged in economic activities?**

According to the text finally upheld, in order to be applicable, both the temporary-work agency and the user undertaking should be engaged in economic activities<sup>13</sup>. Whereas all temporary-work agencies fulfil this condition, the situation is more complex as regards user undertakings since certain activities cannot be regarded as economic.

<sup>10</sup> COM (2002) 701 final, 28.11.2002

<sup>11</sup> 10425/02 of 11.7.2002.

<sup>12</sup> 12222/02 of 25.9.2002.

<sup>13</sup> In accordance with the Treaty rules on the internal market, all services provided for remuneration must be classified as economic activities. According to Court of Justice case law, the service does not necessarily have to be paid for by those for whom it is performed, but there must be a consideration for the service in question (see Commission Staff Working Document "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" (SEC(2010)1545 final of 7.12.2010), notably points 6.1 to 6.3).



The final wording of Article 1(2) seem to imply that the Directive does not impose on the Member States to apply its rules to user undertakings which are not engaged in economic activities<sup>14</sup>, in contrast with the wording proposed by the Parliament in 2002. In this case Member States would be entitled for instance to exclude from the scope of the Directive the parts of their public sector which are not engaged in economic activities.

However, the discussions in the Expert Group have indicated that many Member States were willing and intended (if necessary) to implement the Directive in such a way that user undertakings would be covered by the national transposition measures regardless of their being or not being engaged in economic activities. In such case, for instance, all temporary agency workers assigned to the Ministry of Defence in a Member State would be covered, irrespective of their tasks or activities performed (e.g. cleaning or catering services).

In line with the general principle that Directives based on Article 153 TFEU (ex 137) set minimum standards and that Member States may, if they so wish, implement provisions that are more protective for workers, a transposition of the Directive or parts thereof in a way to cover undertakings that do not perform economic activities can be accepted. Moreover, the Commission observed that it may be very difficult to draw a clear dividing line between bodies having or not having economic activities.

Four experts of the Member States considered that the fact that user undertakings not engaged in economic activities are not covered by the Directive meant that Member States wishing to apply the Directive in such cases would do it on a voluntary basis; user undertakings which do not perform any economic activity are outside the scope of Article 4. One of those experts underlined that with respect to the user undertakings falling outside the scope of the Directive, it is left to the discretion of Member States to determine to what extent they may be covered by national transposition measures. Another expert considered that the notion of economic activity should be interpreted in a broad sense in order to guarantee that the objectives pursued by the Directive are being attained.

The European social partners expressed a favourable view as regards a wider application of the Directive. The UEAPME and Eurociett representatives considered that the notion of economic activity should receive a broad definition in order to avoid unfair competition, so that user undertakings such as public administrations, trade unions and charitable organisations could be covered. The representatives of ETUC and UNI-Europa also supported a broad scope of the Directive, indicating that any undertaking or organisation in its role as user undertaking, including e.g. public administrations and trade unions, should be covered.

It was acknowledged though by the large majority that the above conclusions are without prejudice to the provisions of Article 4 of the Directive. For instance, Article 1(2) does not have any bearing on a national legislation prohibiting the provision of temporary agency workers to the public sector; such a prohibition on the use of temporary agency work falls under Article 4 and is to be reviewed in compliance with the provisions of this article.

**The applicability of the Directive to companies which are not temporary-work agencies but occasionally second staff by placing it under the supervision and direction of another undertaking**

Article 1(2) states that the Directive applies to undertakings "which are temporary-work agencies (...)" and Article 3(1)(b) contains an autonomous definition of the notion of

<sup>14</sup> This observation is borne out by a comparison between the English, French, German, Italian and Spanish versions of the Directive.





"temporary-work agency". Consequently, the Directive may in certain situations be applicable to employers in spite of their not being qualified as temporary-work agencies under national law. However, this may only be the case when the entity under consideration fulfils the conditions laid down in Articles 1 and 3 and, thus, must be considered as a temporary-work agency in the meaning of the Directive.

For instance:

- A worker employed by a company which is not a temporary-work agency may at a certain point be put at the disposal of another company belonging to the same group of undertakings, in particular to adapt to changing economic circumstances. This is a situation where the Directive would not be applicable.
- An accountant working for a company specialized in accounting may be seconded to another company for a limited period in order to work under the daily supervision and direction of the latter firm. This is a situation where the worker is incidentally put at the disposal of another undertaking: the accountant's employer has not recruited him *in order to* assign him to another company to work there temporarily under its supervision and direction. The Directive would not apply in this case.
- An accountant may be recruited by a temporary-work agency focusing on that type of activity and put at the disposal of a company for a limited period of time. In that case the Directive would be applicable.
- Public employment services may, in certain Member States, employ workers and assign them to user undertakings to work temporarily under their supervision and direction, an activity which is typical of temporary-work agencies. Public employment services are to be considered as temporary-work agencies when having this kind of activity. This is, however, without prejudice to the possibility of derogation provided for in Article 1(3) for the cases where the employment relationship is concluded under a specific public or publicly supported vocational training, integration or retraining programme.

### **3. Possible derogation for specific public or publicly supported vocational training, integration or retraining programmes (Article 1(3))**

#### **3.1. Provisions of the Directive**

**Article 1(3):** "*Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.*"

#### **3.2. Issues**

##### **What type of measures can be covered by Article 1(3)?**

This provision is very similar to clause 2(2)(b) of the ETUC-UNICE-CEEP framework agreement annexed to Council Directive 1999/70/EC of 28 June 1999 on fixed-term work.



By providing for such a possibility of derogation, Article 1(3) is intended to promote measures aimed at improving the employability of certain categories of people who face difficulties in entering or re-entering the labour market. The Directive enables Member States to encourage temporary-work agencies to participate in public or publicly supported actions designed to facilitate the employment and professional integration of categories of workers such as young people, older people or the unemployed.

Moreover, Article 1(3) also covers the situation of charities which operate as temporary-work agencies by putting vulnerable people such as handicapped persons or former detainees at the disposal of user undertakings in order, whenever possible, to allow them to progressively readapt themselves to normal working conditions. Such charities are obviously not operating for gain and are often financed by religious communities, trade unions, employers' organisations and humanitarian NGOs.

Nevertheless, the possibility of derogation laid down in Article 1(3) remains an exception to the general rule and Member States should clearly state in transposition legislation their intention to use it. Besides, they cannot resort to this derogation without prior consultation of the social partners, as the text indicates clearly.

The BusinessEurope, UEAPME and Eurociett representatives agreed with the Commission's analysis on the interpretation of Article 1(3). The ETUC and UNI-Europa representatives considered that the possibilities for exemptions under Article 1(3) should be interpreted very restrictively.

### **Can the exemption provided for in Article 1(3) be applied to doctors in training in hospitals? To disabled persons employed by undertakings receiving State support?**

On a question raised by one expert, the Commission indicated that whenever doctors in training in hospitals would be employed as temporary agency workers under a vocational training programme which is state-supported, their employment relationships can be exempted from the Directive. The question whether such working relationships fall under Article 1(2) is a distinct one and depends on the question whether in the country concerned there is a market for health services and public hospitals are active players on that market, in which case these activities would be deemed to be economic. However, the case of doctors is very specific, the spirit of Article 1(3) being to increase the recruitment possibilities for certain categories of jobseekers, particularly disadvantaged ones. It was recalled that a Member State intending to make use of this possibility for derogation must consult the social partners and explicitly refer to the derogation in the transposition act.

Another expert enquired about the possibility for a Member State to exempt from the Directive disabled persons who work for undertakings operating for gain when in exchange those undertakings receive financial support from public sources. In its reply, the Commission indicated that the derogation of Article 1(3) could only be applied if this scheme can be considered as a "vocational training, integration or retraining programme", which is unlikely if the disabled persons work under the same conditions as other workers.



## II. Definitions

### 4. Main notions used in the Directive - Article 3(1)(a) to (e) and Article 3(2), second subparagraph

#### 4.1. Provisions of the Directive

**Article 3(1):** "For the purposes of this Directive:

**(a)** 'worker' means any person who, in the Member State concerned, is protected as a worker under national employment law;

**(b)** 'temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

**(c)** 'temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

**(d)** 'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;

**(e)** 'assignment' means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction."

**Article 3(2), second subparagraph:** "Member States shall not exclude from the scope of this Directive workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary-work agency."

#### 4.2. Issues

##### The notion of 'worker'

The Directive refers to the notion of worker as it is defined in national employment law. This provision should be read in conjunction with Article 3(2), first subparagraph according to which the Directive shall be without prejudice to national law as regards, notably, the definition of worker.

##### Definition of "temporary-work agency" – Article 3(1)(b)

This notion is defined by the Directive as meaning "any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".

This definition is broad enough to cover public as well as private temporary-work agencies, including those agencies which are not operating for gain.

It should also be stressed that the notion of temporary-work agency encompasses not only legal persons, but natural persons as well. Even though temporary-work agencies not having legal personality are a rare occurrence, a business may be considered as an agency regardless of its legal form and size.



## **Definition of "temporary agency worker" – Article 3(1)(c)**

The Directive defines these terms as *"a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction"*.

This definition covers a great variety of situations in Member States. In particular, agency workers may have a fixed-term employment relationship with the agency but may also have a permanent contract of employment; besides, in some Member States no specific legislation governing temporary agency work has yet been adopted. The Commission indicated that the Directive applies irrespective of differences in national legislation.

Reference should also be made to Article 3(2), first subparagraph, according to which the Directive shall be without prejudice to national law as regards, notably, the definition of contract of employment, employment relationship or worker.

## **What is to be understood under 'contracts of employment or employment relationships'?**

As regards the relationship between the worker concerned and the temporary-work agency, the reference to "contracts of employment or employment relationships" is a standard wording which has already been used in other Directives, notably Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC and Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. The mention of an "employment relationship" is meant to encompass the situations where the distinctive features of an employment relationship are present but no formal contract of employment has been concluded.

## **Does the Directive apply to businesses who act as intermediaries on the labour market?**

One of the main characteristics of temporary agency work is the fact that, contrary to a standard employment relationship, not two, but three parties are involved. The agency worker is employed and paid by a temporary-work agency<sup>15</sup> but does not actually work under the daily supervision of the agency. He/she is put at the disposal of another entity, the user undertaking, where he/she normally works together with other workers who are directly employed by the user undertaking and is placed under the supervision and direction of that undertaking. As to the relationship between the agency and the user, it is governed by commercial law.

It is clear from the wording of the Directive that businesses whose function is to introduce workers to companies willing to recruit permanent staff are not covered by it. Indeed, in such a situation, the business concerned only acts as an intermediary: the worker becomes the employee of the hirer and subsequently has no contractual relationship with the intermediary.

Thus, the Directive only covers situations where the very purpose of employing workers is to assign them to a user undertaking in order to work there temporarily.

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<sup>15</sup> The notion of temporary-work agency encompasses not only legal persons, but natural persons as well. Even though temporary-work agencies not having legal personality are a rare occurrence, a business may be considered as an agency regardless of its legal form and size.



Several issues require specific attention:

**- *The temporary agency worker is employed by the temporary-work agency***

In some Member States, especially those with a common law legal system, temporary-agency workers, even though being paid by the agency, may in certain cases not be considered to be employed by it under national law. It may even be the case that the user undertaking is not recognised as their employer either, especially for long-term agency workers.

Nevertheless, if the conditions laid down in Article 1(1) of the Directive are fulfilled, the worker is to be considered as employed by the agency for the purposes of the Directive, regardless of the legal qualification given to this relationship in national law.

In that context, it should be recalled that according to Article 8 of Directive 91/383/EEC 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<sup>16</sup>, the user undertaking and/or establishment is/are responsible, for the duration of the assignment, for the conditions governing performance of the work in the field of safety, hygiene and health at work.

**- *The worker is employed in order to be assigned to user undertakings***

It is clear from the wording of the Directive that businesses whose function is to introduce workers to companies willing to recruit permanent staff are not covered by it. Indeed, in such a situation, the business concerned only acts as an intermediary: the worker becomes the employee of the hirer and subsequently has no contractual relationship with the intermediary.

Thus, the Directive only covers situations where the very purpose of employing workers is to assign them to a user undertaking in order to work there temporarily.

**- *Temporary agency work must be clearly distinguished from subcontracting***

If, for instance, a company such as a law firm subcontracts the practical organisation of a conference, this means that this task will be outsourced to another company which will use its own staff and offices to organise the conference. Obviously, depending on the tasks involved, subcontracted activities may also be carried out on the premises of the client; this is notably the case for cleaning activities, where the staff of the subcontracted company will be performing its work in the offices of the client. In the case of subcontracting, the Directive does not apply.

On the contrary, the Directive does apply in situations where a company asks a temporary-work agency to provide it with personnel to exercise an activity within its own premises and under its supervision and direction. In this situation the staff involved is employed by the temporary-work agency and temporarily put at the disposal of the user undertaking.

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<sup>16</sup> OJ L 206 of 29.7.1991 p. 19.



### **What is to be understood under 'user undertaking'?**

As in the case of temporary-work agencies, user undertakings can be natural or legal persons. Thus, the notion of user undertaking does not imply any minimum size or any specific legal form. There is no obstacle to an agency worker being assigned to work for a self-employed person, e.g. a doctor or a craftsman, who did not set up a registered company.

For the purposes of the Directive, the notion of "user undertaking" is given a broad definition. Consequently, regardless of the common meaning of the word "undertaking" and without prejudice to Article 1(3), the Directive applies to any user undertakings, including public bodies, which are engaged in economic activities whether or not they are operating for gain.

Some experts considered that the Directive applies to "user undertakings" in the public sector insofar as they are an "undertaking" and are engaged in economic activities.

### **Does the Directive apply regardless of the duration of assignments?**

Although definitions in Article (3) use the word "temporarily", there is no limitation to the duration of assignments. Practice differs in different Member States and economic sectors as to the length of assignments, which may be for instance a matter of days in certain situations, while in other cases they may last a number of months. In all these situations the assignment remains of a temporary character.

### **Does the Directive apply to employers which are not temporary-work agencies but occasionally second staff by placing it under the supervision and direction of another undertaking?**

Article 1(2) states that the Directive applies to undertakings "which are temporary-work agencies (...)" and Article 3(1)(b) contains an autonomous definition of the notion of "temporary-work agency". Consequently, the Directive may in certain situations be applicable to employers in spite of their not being qualified as temporary-work agencies under national law. However, this may only be the case when the entity under consideration fulfils the conditions laid down in Articles 1 and 3 and, thus, must be considered as a temporary-work agency in the meaning of the Directive.

For instance:

- A worker employed by a company which is not a temporary-work agency may at a certain point be put at the disposal of another company belonging to the same group of undertakings, in particular to adapt to changing economic circumstances. This is a situation where the Directive would not be applicable.
- An accountant working for a company specialized in accounting may be seconded to another company for a limited period in order to work under the daily supervision and direction of the latter firm. This is a situation where the worker is incidentally put at the disposal of another undertaking: the accountant's employer has not recruited him *in order to* assign him to another company to work there temporarily under its supervision and direction. The Directive would not apply in this case.



- An accountant may be recruited by a temporary-work agency focusing on that type of activity and put at the disposal of a company for a limited period of time. In that case the Directive would be applicable.
- Public employment services may, in certain Member States, employ workers and assign them to user undertakings to work temporarily under their supervision and direction, an activity which is typical of temporary-work agencies. Public employment services are to be considered as temporary-work agencies when having this kind of activity. This is, however, without prejudice to the possibility of derogation provided for in Article 1(3) for the cases where the employment relationship is concluded under a specific public or publicly supported vocational training, integration or retraining programme.

### **Are the definitions given in Article 3 specific to Directive 2008/104/EC?**

Directive 2008/104/EC deals specifically with temporary agency work and Article 3(1) expressly states that the definitions it contains are given "for the purposes of this Directive". Consequently, the notion of "temporary employment undertaking or placement agency" used in Article 1(3)(c) of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services<sup>17</sup> cannot be considered as having exactly the same meaning and scope as the notion of "temporary-work agency" in Directive 2008/104/EC, all the more since the two Directives use two different wordings.

### **What is to be understood under Article 3(2), second subparagraph?**

Being of a general nature, this provision can be considered as complementing the recitals of the Directive. It is intended to make clear that temporary agency workers working on a part-time basis or under a fixed-term contract in compliance with Directive 97/81/EC on part-time work, Directive 1999/70/EC on fixed-term work or Directive 91/383/EEC of 25 June 1991 on the safety and health at work of workers with a fixed-duration or temporary employment relationship cannot be excluded from the scope of Directive 2008/104/EC on the grounds of their being "atypical" workers.

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<sup>17</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 of 21.1.1997 p. 1.



### III. Principle of equal treatment

#### 5. Principle of equal treatment – basic working and employment conditions (Articles 3(1)(f), 3(2), first subparagraph and 5(1))

##### 5.1. Provisions of the Directive

**Article 3(1)(f):** "For the purposes of this Directive, 'basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

- (i) *the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;*
- (ii) *pay."*

**Article 3(2), first subparagraph:** "*This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.*"

**Article 5(1):** "*The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.*

*For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:*

- (a) *protection of pregnant women and nursing mothers and protection of children and young people; and*
- (b) *equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;*

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

##### 5.2. Issues

#### Basic working and employment conditions - The relationship between Article 3(1)(f) and Article 5(1), first subparagraph

The notion of "basic working and employment conditions", which is defined in Article 3(1)(f) of the Directive, determines the scope of the principle of equal treatment to be applied to temporary agency workers by virtue of the reference made to it in Article 5(1).





Therefore, in order to implement the Directive correctly it is essential that this notion be correctly understood and transposed/implemented.

Two main questions in this context need to be dealt with specifically:

- a) *What is the legal nature of the provisions which have to be considered as "basic working and employment conditions"?*
- b) *What is covered by the notion of "basic working and employment conditions"?*

### **What is the legal nature of the provisions which have to be considered as "basic working and employment conditions"?**

The use of the words "and/or other binding general provisions" in Article 3(1)(f) seems to suggest that "legislation, regulations, administrative provisions, collective agreements" are to be considered as examples and do not constitute an exhaustive list of legal instruments by which basic working and employment conditions may be laid down. "Basic working and employment conditions" would have to be applied to temporary agency workers whenever they have a binding and general character and are in force in the user undertaking. One should bear in mind that the guiding principle for the implementation of Article 3(1)(f) is that the temporary agency worker must receive at least the same entitlements as if he had been recruited directly by the user undertaking to occupy the same job (except if the derogations foreseen in Article 5, paragraphs 3 and 4, apply).

For instance, taking the example of pay entitlements, the following questions arise: if the level of pay is determined in the user undertaking by a company handbook, how is this to be considered? If the rules in force in the user undertaking provide for pay scales by only setting a minimum and maximum level of pay for staff with a certain level of experience, what will the consequences be for agency workers assigned to that undertaking? If there is no formalised pay structure in the company, but only a "going rate", what will be the entitlements of agency workers? It may also be the case that certain entitlements, although not formally written down in the contracts of employment of staff, are granted by the user undertaking as a mere practice which the company may have been following consistently over a certain period.

On the basis of Article 5(1), read in conjunction with Article 3(1)(f), the basic working and employment conditions should, as regards pay, be determined as indicated in the following examples:

1. A collective labour agreement is applicable to the user undertaking. In accordance with this collective agreement, the user determines the pay level of its staff by taking into account its qualifications, professional experience as well as seniority in the company.

A temporary agency worker assigned to the user undertaking will be entitled to the same pay as a worker who would have been recruited by that undertaking to occupy the same job. He will benefit from the binding general provisions in force in the user undertaking. Consequently, his qualifications and professional experience will have to be taken into account according to the criteria set by the applicable



collective agreement. His seniority is also to be considered but, obviously, he will have none at the time he starts his assignment.

2. No collective agreement applies to the user undertaking. The user applies standardised pay scales to its permanent workforce and these pay scales take into account the relevant professional experience of workers.

A temporary agency worker will be entitled to the pay level provided for in the user's pay scales and his relevant experience acquired prior to the start of his assignment will have to be taken into account.

3. No collective agreement applies to the user undertaking. However, the user applies to its workers a "going rate" which is in use across the professional field concerned.

A temporary agency worker will be entitled to the "going rate" in use, in the same conditions as if he had been recruited directly by the user to occupy the same job.

4. A small company where no collective agreement, "going rate" or any other binding general provision applies resorts to a temporary agency worker as a receptionist for the first time.

In the absence of any binding general provisions in force in the user undertaking in relation to pay, the user undertaking is not bound by any specific wage level.

This conclusion obviously does not affect other basic working and employment conditions, in respect of which any binding general provisions will also have to be taken into consideration. For instance, if the user gives all its permanent employees one week of annual leave on top of the annual leave entitlements determined, for instance, by national legislation, an agency worker will also be entitled to this additional week.

5. A company which is not bound by any binding general provision on pay employs highly-skilled personnel whose pay level is entirely determined by individual negotiation.

In the absence of any established practice as regards pay, a temporary agency worker will not be entitled to any specific, predetermined pay level, given the fact that if he had been recruited directly by the user undertaking, it would not have been possible either to determine his pay level on the basis of any binding general provisions in force.

The above developments illustrate the notion of "legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking" by quoting examples relating mainly to pay, which is among the "basic working and employment conditions" listed in Article 3(1)(f). However, the same reasoning applies to a certain extent when determining the entitlements of temporary agency workers in the other fields mentioned in Article 3(1)(f) (the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays).



On the issue of the legal nature of the provisions to be considered as 'basic working and employment conditions', the ETUC representative supported a very broad interpretation; she considered that this notion should include all provisions applying according to national law and practice, including company handbooks and non-formalised pay structures when they are known and applied across the board. The BusinessEurope representative considered that binding provisions should be taken into account, but not voluntary or incidental ones.

#### **What is covered by the notion "basic working and employment conditions"?**

As regards *the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays*, the Directive provides for the implementation of the principle of equal treatment without any restrictions. However, this is without prejudice to the derogations which may be applied under the conditions laid down in Articles 5(2) to 5(4).

Issues related to the duration of working time, overtime, breaks, rest periods and night work should be dealt with while being aware that the agency worker must receive at least the same entitlements as if he had been recruited directly by the user undertaking to occupy the same job. The comparison should be based on the provisions in force in the user undertaking and, thus, the rights to which agency workers are entitled in practice may go beyond the minimal provisions laid down in the EU Directives relating to working time.

As regards *holidays and public holidays*, full equality of treatment must be applied as well, in compliance with Article 5(1) of the Directive without prejudice to the derogations which may be applied under the conditions laid down in Articles 5(2) to 5(4).

An expert enquired about the entitlements to annual leave of agency workers who are successively assigned to several user undertakings for short durations and may be granted leave entitlements calculated on a different basis in different companies; for instance, a user undertaking may provide for 24 days of annual leave while another would calculate leave entitlements on the basis of 30 days per year. The Commission indicated that Member States could clarify this issue in their national legislation; alternatively, the issue of leave could be covered by a collective agreement concluded under Article 5(3).

#### **What is to be understood under the reference to "pay" (Article 3(1)(f) under (ii))?**

On a question from an expert on the concept of pay, the Commission recalled that the notion of pay is not defined in Directive 2008/104/EC. Article 3(2), first subparagraph, by stating that the Directive is without prejudice to national law as regards, notably, the definition of pay, leaves it to the Member States to determine the content of this notion for the purposes of the Directive. Nevertheless, should the European Court of Justice have to interpret the concept of pay, it cannot be excluded that it would use Article 157 of the Treaty on the Functioning of the European Union, which defines equal pay for male and female workers, as a source of inspiration.

The definition of pay given by Article 157(2) TFEU, formerly Article 141 TEC, and the case law developed by the Court of Justice may indeed be relevant for the implementation of Article 3(1)(f) under (ii).



Article 157 TFEU, which establishes the principle of equal pay for male and female workers for equal work or work of equal value, states in its second paragraph that:

*"For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."*

According to the case law of the Court of Justice on this provision, pay includes not only basic pay, but also, for example, overtime supplements<sup>18</sup>, special bonuses paid by the employer<sup>19</sup>, travel facilities<sup>20</sup>, compensation for attending training courses and training facilities<sup>21</sup>, termination payments in case of dismissal<sup>22</sup> and occupational pensions<sup>23</sup>.

In the light of the above-mentioned case law, the Commission pointed out that if a Member State decided to exclude, for instance, occupational pension schemes from the notion of pay when transposing the Directive, it may not be followed by the Court of Justice. The Commission further underlined that the provision contained in Article 5(4), second subparagraph according to which "Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions" was only applicable to those Member States making use of Article 5(4). Nevertheless, it is clear that certain elements, for instance statutory social security schemes, are not considered by the existing case law to be part of pay and, as a consequence, Member States remain free to exclude them from the scope of pay even if they do not make use of Article 5(4).

On a question with respect to bonuses, the Commission indicated that they will be part of the basic working and employment conditions in the case of a guaranteed right to obtain the bonus; however, in practice, bonuses are often based on company performance and it is rather unlikely that their amount be determined in the employment contract and that they have the character of binding provisions for the companies. Nevertheless, bonuses, even performance-related ones, which would have been paid to a worker recruited directly for the same duration should in principle be taken into account when applying equal treatment, without prejudice to possible derogations.

### **Is the European legislator entitled to establish the principle of equal pay?**

As explicitly stated in Article 153(5) TFEU, formerly Article 137(5) TEC, the provisions of this article shall not apply to pay. However, this provision of the Treaty does not prevent the European legislator from establishing the principle of equal treatment with respect to pay in favour of temporary agency workers, which, as a consequence, directly determines their pay level by reference to the pay that they would have been entitled to if they had been recruited by the user undertaking to occupy the same job.

This has been explicitly confirmed in the Alonso judgment of the European Court of Justice (ECJ 13 September 2007, Case C-307/05, Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud), in particular in points 40 and 41:

<sup>18</sup> See for example ECJ 6 December 2007, Case 300/06 Ursula Voß v Land Berlin.

<sup>19</sup> See for example ECJ 21 October 1999, Case C-333/97 Susanne Lewen v Lothar Denda.

<sup>20</sup> See for example ECJ 9 February 1982, Case 12/81 Eileen Garland v British Rail Engineering Limited.

<sup>21</sup> See for example ECJ 4 June 1992, Case C-360/90 Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötzel.

<sup>22</sup> See for example ECJ 27 June 1990, Case C-33/89 Maria Kowalska v Freie und Hansestadt Hamburg.

<sup>23</sup> See for example ECJ 13 May 1986, Case 170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz and ECJ 17 May 1990, Case C-262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group.



- 40 *More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq.*
- 41 *The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance.*

#### **Are Member States entitled to grant agency workers a level of protection higher than is required by Articles 3(1)(f) and 5(1), first subparagraph?**

On a question by an expert, the Commission indicated that the basic working and employment conditions listed in Article 3(1)(f) (i) and (ii) do not constitute an exhaustive list since Member States may apply equal treatment to other employment conditions as well. In any case, other conditions stated in Article 5(1) must be guaranteed by the user undertaking.

More generally, all Directives based on Article 153 TFEU lay down minimal requirements for the protection of workers. According to its Article 9(1), the Directive is without prejudice to 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. Consequently, Member States are entitled to make the level of protection of temporary agency workers more stringent than is required by the provisions of the Directive on the principle of equal treatment, as long as it is not prejudicial to other provisions of the Treaty, particularly on competition and the internal market.

#### **How does Directive 2008/104/EC interact with Directive 96/71/EC concerning the posting of workers?**

The Commission explained that Directive 2008/104/EC in principle covers national situations, whereas Directive 96/71/EC provides a mechanism for cross-border situations. The Directive on temporary agency work fully applies to migrant workers, who work in a Member State other than their own as if they were national workers, while the Directive on the posting of workers only applies to posted workers, which means workers who are temporarily sent to another Member State to perform work in the context of the provision of services.

As regards posted workers, the host country cannot impose the respect of all national labour law provisions, but only of the 'hard core' provisions laid down in Article 3(1) of the Directive on posting, covering a number of important working conditions which roughly speaking contain the same elements as included in the notion of 'basic working and employment conditions' used in the Directive on agency work. Furthermore, explicitly mentioned as being part of the nucleus of rules to be respected are 'the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings'.<sup>24</sup>

Besides, it is clear from Article 1(3)(c) of the Posting Directive that this Directive applies to temporary assignments by temporary-work agencies in cross-border situations, and the 'conditions of hiring-out of workers' are among the 'hard core' provisions defined by this

<sup>24</sup> Article 3.1 under (d) of Directive 96/71/EC.



piece of legislation. However, at present it appears to be more common for agency workers to be recruited in practice by temporary-work agencies in the country where they perform their work than to be posted to other Member States.

On the issue of the compatibility between the Directive on posting and the Directive on temporary agency work, the Commission pointed out that Article 3(9) of the Posting Directive allows Member States to apply the entirety of their national terms and conditions to temporary agency workers posted to their territory, which would make the Directives perfectly compatible with one another. In that case the posted workers concerned would benefit from full equal treatment as regards the working and employment conditions, including wage rates based on company handbooks if the latter are binding. However, in practice, few Member States currently apply this provision.

Moreover, the Posting Directive specifies the instruments by which the 'hard core' provisions may be set. Contrary to Article 5(3) of Directive 2008/104/EC, the use of Article 5(4) may in theory lead to different levels of protection according to the Posting and the Agency Work Directives, given the fact that where there are no universally applicable collective agreements, the Posting Directive only provides for the level of protection set by statutory law. However, in practice, the Member States concerned apply all their national legislation to posted workers.

## 6. Principle of equal treatment – possible derogations (Articles 5(2) to 5(5))

### 6.1. Provisions of the Directive

**Article 5(2):** *"As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments."*

**Recital (15):** Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work 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.

**Article 5(3):** *"Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1."*

**Recital (16):** In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

**Article 5(4), first subparagraph:** *"Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic*



*working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment."*

**Article 5(4), second subparagraph:** *"The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph 1. Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers."*

**Recital (17):** Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.

**Article 5(5):** *"Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures."*

## 6.2. Issues

### What is the scope of the derogation of Article 5(2)?

The derogation defined in Article 5(2) has a limited scope as it "only" relates to pay and may be applied only to agency workers who have a permanent contract of employment and continue to be paid between assignments. In the light of recital 15, according to which employment contracts of an indefinite duration are the general form of employment relationship, it is clear that this derogation does not apply to agency workers having a fixed-term contract. The Commission supported this position during the whole negotiation process in the Council; otherwise, there would be a serious risk of circumvention of the Directive.

The Commission recalled that the derogation in Article 5(2) must be laid down in legislation, after consultation of the social partners, and indicated that it is to be interpreted very restrictively, which does not exclude that other derogations may apply. This provision raises several questions of interpretation, notably as to the level of pay to be granted between assignments and the existence of measures aimed at preventing misuse in its application.

An expert explained that in her Member State agencies must offer open-ended contracts to agency workers and pay them between assignments in accordance with their collective agreement. An expert informed that in the national legislation of her Member State, the pay level between assignments must be above the national minimum wage and at least 50% of assignment pay.



## **What issues can or must be covered by collective agreements concluded under Article 5(3)?**

According to Article 5(3), Member States may leave it to the social partners to transpose the Directive by collective agreement<sup>25</sup>. This provision has a broad scope and allows the social partners not only to deviate from the 'basic working and employment conditions', but to establish arrangements concerning the 'working and employment conditions' of agency workers, potentially covering the whole content of the Directive; however, counterbalancing elements of protection have to be present in the collective agreements concluded under Article 5(3) so as to ensure 'the overall protection of temporary agency workers'. For instance, the social partners may agree on a lower level of pay in exchange of better training opportunities in the time between assignments. However, such collective agreements cannot limit themselves to setting levels of pay lower than those that equal treatment would require: they must be balanced by other provisions favourable to temporary agency workers.

On a question by an expert, the Commission noted that the Directive refers to a qualitative level of protection of agency workers in order to respect the autonomy of the social partners, who are encouraged to use the mechanisms provided by the Directive and show creativity by adopting collective agreements suited to the respective national traditions and situations.

An expert observed that issues covered by collective agreements can vary considerably in practice. The Commission indicated that some of the constituent elements of pay, such as the indexation of the cost of living, are normally regulated by law; collective agreements may have a very limited scope and, for instance, limit themselves to pay and working time, but they may also cover a wide range of issues, notably education and training including for family members, reconciliation of work and family life or even bonuses for high quality work.

## **Under which conditions can a Member State resort to Article 5(4)?**

This provision has a more restricted scope than Article 5(3). Article 5(4) allows social partners to deviate only from 'basic working and employment conditions' and only applies to Member States in which there is no system in law for declaring collective agreements universally applicable. If, in a Member State, collective agreements covering certain sectors do qualify as universally applicable collective agreements, they would fall under Article 5(3) and, as a consequence, recourse to Article 5(4) would only be possible outside the scope of such collective agreements.

The Commission underlined that a qualifying period for equal treatment can be agreed upon only in Member States making use of Article 5(4).

Besides, Member States applying Article 5(4) should specify the scope of the basic working and employment conditions in accordance with the second sentence of the second subparagraph, by determining explicitly whether 'occupational social security schemes, including pension, sick pay or financial participation schemes' are included in the basic working and employment conditions.

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<sup>25</sup> Article 5(3) should be read in conjunction with Article 11(1) according to which the social partners may, by way of an agreement, introduce the necessary provisions to implement the Directive. Thus, Article 5(3) enables the social partners to transpose the Directive by themselves. Such a possibility has been explicitly recognised by the European Court of Justice (see for example ECJ 18 December 2008, Case C-306/07, *Ruben Andersen v Kommunernes Landsforening*).





### **Does the obligation to adopt "anti-avoidance" measures in compliance with Article 5(5) apply to all Member States?**

Article 5(5) applies to the whole article, including all derogations mentioned in Article 5(2) to 5(4); its exact implications depend on the situation in each Member State and the derogations that will be applied. It requires Member States at least to inform the Commission about national measures aimed at preventing misuse in the application of Article 5 and, in particular, preventing successive assignments designed to circumvent the provisions of the Directive. The risk of circumvention of the principle of equal treatment and equal pay indeed calls for specific measures. In particular, a Member State resorting to Article 5(4) and providing e.g. for a 12-week qualifying period for equal treatment needs to adopt provisions preventing successive 11-week assignments, as this would circumvent the principle of equal treatment. If the Directive is entirely transposed by collective agreement, it may be difficult for a Member State to adopt anti-avoidance measures, but on the other hand, if certain workers are not covered by collective agreements, legislative measures may have to be taken with respect to them.

On a question by an expert, the Commission indicated that Member States applying equal treatment from day one may not have to adopt specific measures to avoid the circumvention of the Directive, but would have to inform the Commission of this situation in any case. On the contrary, in Member States resorting to Article 5(4) and in particular where a qualifying period is applied, the risk of circumvention must be fought by appropriate measures.

An expert explained that the national legislation of her Member State provides for a minimum award of two weeks' pay for equal treatment claims on pay between assignments. Besides, where an agency worker has been assigned three or more times to the same hirer for less than the 12-week qualifying period, tribunals can impose a fine.



## IV. Review of restrictions or prohibitions on the use of temporary agency work (Article 4)

### 7. Review of restrictions or prohibitions imposed on the use of temporary agency work (Article 4(1) to 4(3))

#### 7.1. Provisions of the Directive

**Article 4(1):** "Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented."

**Article 4(2):** "By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1."

**Article 4(3):** "If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement."

**Article 4(4):** "Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies."

**Article 4(5):** "The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."

#### To be read in connection with:

**Recital (18):** The improvement in the minimum protection for temporary agency workers should be accompanied by a review of any restrictions or prohibitions which may have been imposed on temporary agency work. These may be justified only on grounds of the general interest regarding, in particular, the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented.

**Recital (20):** The provisions of this Directive on restrictions or prohibitions on temporary agency work are without prejudice to national legislation or practices that prohibit workers on strike being replaced by temporary agency workers.

**Recital (22):** This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>26</sup>.

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<sup>26</sup> OJ L 18, 21.1.1997, p. 1.



## 7.2. Origin and objectives of the provisions

### **Explanatory memorandum of proposal COM(2002) 149 final, page 11 and 13:**

"(...) 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".<sup>27</sup>

"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."

"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."

### **Impact assessment form attached to proposal COM(2002) 149 final, page 26 and 34:**

"(...) The directive also provides for a regular<sup>28</sup> 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."

"(...) 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."

### **Minutes of the Social Questions Working Party, 25 June 2002<sup>29</sup>:**

"(...) The Commission stressed that these provisions [Article 4] were based on the agreement between the social partners, ILO Convention 181, and case law from the European Court of Justice. The Commission also pointed out that whilst it did not consider some restrictions, such as that in the construction sector in Germany, to be wrong, it felt that they should nevertheless be reviewed."

<sup>27</sup> The initial proposal for a Directive referred to "grounds of general interest regarding, in particular, the protection of workers", whereas the final version also mentions other examples of grounds of general interest.

<sup>28</sup> Contrary to the initial proposal, the final version of the Directive provides for a single review to be carried out during the transposition period.

<sup>29</sup> 10425/02 of 11.7.2002.



### **Minutes of the Social Questions Working Party, 23 October 2007<sup>30</sup>:**

"The Commission considered that Article 4 was a fundamental part of the political balance of the draft Directive and that the Directive should support the positive role of temporary agencies."

### **Eurociett/UNI-Europa Joint Declaration on the Directive on working conditions for temporary agency workers, 28 May 2008:**

"7. UNI-Europa and Eurociett stress on the one hand the necessity to identify and review obstacles of a legal or administrative nature, which may limit the opportunities for temporary agency work to operate, and, where appropriate, eliminate them. On the other hand, they recognise the necessity of certain restrictions to prevent potential abuses, such as potential undermining of employment conditions of workers. (...) 14. UNI-Europa and Eurociett agree that restrictions and prohibitions on the use of temporary agency work should be proportionate, non-discriminatory and objective. They should be assessed and reviewed periodically by Member States – or by relevant social partners if such restrictions and prohibitions are laid down by collective labour agreements – to ensure that this remains the case. Unjustified restrictions to the supply of temporary agency workers should be removed."

## **7.3. Issues**

### **How is Article 4 to be understood in the general context of the Directive?**

Directive 2008/104/EC aims to reach a fair balance between protecting temporary agency workers and supporting the positive role played by temporary agency work by providing sufficient flexibility in the labour market. It was clear from the beginning of the negotiation process in the Council that this article, along with the provisions of the Directive on equal treatment, must be regarded as forming part of a political compromise between Member States insisting on the necessity to remove any obstacles to temporary agency work and those putting the emphasis on the recognition of the principle of equal treatment from the first day of the assignments of agency workers.

This double objective of improved protection and increased flexibility is also reflected in Article 2, which recalls the aim of the Directive:

*"The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working."*

As early as 2002, when the Commission submitted its initial proposal for a Directive on working conditions for temporary workers, the explanatory memorandum and the impact assessment form attached to the proposal explained in substance that the establishment of minimum standards for temporary agency workers would remove the basis for many

<sup>30</sup> 14256/07 of 30 October 2007.



concerns associated with agency work and, thus, should make it possible to lift a number of restrictions which are no longer justified by the desire to protect this category of workers. The improvements in working conditions of agency workers, in particular through the recognition of the principle of equal treatment, would make many restrictions obsolete.

At present, it is clear that on the whole, temporary agency work has been on the increase across the EU, in spite of considerable differences from one Member State to another and the effects of the economic crisis. Already in 2006, the Commission pointed out in its Green Paper 'Modernising labour law to meet the challenges of the 21<sup>st</sup> century'<sup>31</sup> that temporary agency work had become an established feature of European labour markets.

### **What are the obligations of Member States under Article 4(1) to 4(3)?**

Member States have a duty to *carry out a review* of any restrictions or prohibitions on the use of temporary agency work. The Member States being under an obligation to inform the Commission of the results of the review by 5 December 2011, the review must be carried out during the transposition period, which expires on that date.

The review should cover any measures, for instance measures laid down by legislation, regulations or administrative provisions, which are applied in Member States at any level (national, regional or local) and which aim at, or have the effect of, imposing limitations on temporary agency work. The following are examples of restrictions or prohibitions which might apply to temporary agency work<sup>32</sup>:

- prohibition to use temporary agency work in sectors of activity which are considered as dangerous;
- prohibition to offer contracts of indefinite duration to temporary agency workers;
- existence of a limitative list of permissible reasons for using temporary agency work (e.g. to cover temporary and exceptional peaks of work, to replace an absent employee...);
- limitation of the duration of assignments;
- limitation of the number of possible renewals of temporary agency workers' contracts of employment;
- limitation of the numbers or proportion of agency workers that may work in user companies;

Furthermore, these imply equally matters such as

- obligations to carry out exclusively the activity of temporary-work provider; or
- obligations to have a specific legal form.

The *review exercise* is to be carried out by the competent authorities in each Member State. In compliance with Article 4(2), it must be *preceded by a consultation of the social partners*; the Directive expressly states that this consultation shall take place in accordance with national legislation, collective agreements and practices.

<sup>31</sup> COM(2006) 708 final of 22.11.2006.

<sup>32</sup> This list is provided for illustrative purposes only and does not have a binding nature. Other types of restrictions can be included, if they conform with the definition given above.



Besides, Article 4(3) provides for the possibility for the social partners who have negotiated a collective agreement laying down restrictions or prohibitions to review themselves these restrictions or prohibitions. For instance, where national legislation does not limit the duration of temporary work assignments but leaves it open to the social partners to do so and a collective agreement effectively sets a maximum duration of assignments, the review of this restriction may be carried out by the social partners concerned. Thus, Article 4(3) also clarifies that collective agreements, should they establish any restrictions or prohibitions on the use of temporary agency work, must be submitted to the review.

As regards the objectives pursued by the review exercise, according to Article 4(2), it must be carried out in order to verify whether restrictions or prohibitions applicable to temporary agency work are justified on the grounds mentioned in paragraph 1. The paragraph referred to states that such prohibitions or restrictions "shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented".

Consequently, every single restrictive measure or prohibition must be examined and submitted to the usual test carried out by the European Court of Justice in order to verify whether or not it can be considered as justified on grounds of general interest. As specified in Recital (22) of the Directive, "this Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services". This means that the restrictions or prohibitions to be reviewed must be not only justified but also and "in any event necessary and in proportion to the aim" to be pursued by such a measure, as explained in the Explanatory memorandum of proposal COM(2002) 149 final (see above).

Thus, this examination will lead to one of the following conclusions:

- *The restriction or prohibition under consideration is not justified.*

One of the major objectives of Directive 2008/104/EC is to improve the working conditions of agency workers and to ensure a minimum level of protection<sup>33</sup>, but also to establish a suitable framework for the use of temporary agency work<sup>34</sup>. Many of the restrictions and prohibitions in force have been introduced a number of years ago, at a time when agency work was often associated with certain concerns, notably about the protection of workers; the overall context has equally evolved.

- *The restriction or prohibition is justified on grounds of general interest.*

Pursuant to Article 4(1) of the Directive, the review may lead to the conclusion that the measure under consideration is justified on grounds of general interest relating to either:

- the protection of temporary agency workers;
- the requirements of health and safety at work;
- the need to ensure that the labour market functions properly;

<sup>33</sup> In particular by establishing the principle of equal treatment in respect of the basic working and employment conditions.

<sup>34</sup> With a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.



- the need to ensure that abuses are prevented.

A comparison of several linguistic versions of the Directive<sup>35</sup> makes it clear that although the justification for certain restrictions or prohibitions is most likely to be found in the specific grounds referred to in Article 4(1), it cannot be excluded that other grounds of general interest might be invoked under certain conditions.

Two experts considered that the scope of the review should be narrower than the one envisaged in the Commission's view. One of those experts pointed out that when the Directive was being negotiated, the objective was to review specific restrictions to temporary agency work such as sectoral restrictions to agency work, e.g. in the construction sector, but not other aspects relating to the general legal framework like general labour law of temporary agency work, some of which could fall under Article 5(5) concerning the prevention of misuse which entails an obligation to inform the Commission. Some experts considered that the Directive applies to user undertakings in the public sector insofar as they are an undertaking and are engaged in economic activities and that the scope of the review under Article 4 should be limited to the scope of the Directive itself.

The Commission indicated that in its view the review exercise should apply to all restrictions and prohibitions, without any distinction between major and minor ones, with the only exception of requirements mentioned in Article 4(4). Consequently, the review should not be limited to sectoral restrictions and include for instance provisions prohibiting the recourse to agency work unless it is to replace women on maternity leave. The Commission also explained that a national provision according to which the right of workers to benefit from an open-ended contract after a certain period applies to temporary agency workers only after 26 weeks constitutes a restriction which should be submitted to the review process, regardless of it being justified or not; however, an expert objected to the Commission's position in this respect.

The UEAPME representative supported a restrictive interpretation of the notion of grounds of general interest justifying restrictions, in line with the case law of the Court of Justice. The Eurociett representative stressed that all restrictions and prohibitions should be reviewed and mentioned two restrictions in place in some Member States: the obligation to consult trade unions before an agency worker is assigned to a user undertaking as well as the existence of higher mandatory social contributions on training in the agency work sector. The representative of ETUC and UNI-Europa underlined that Member States where no legislation regulating agency work was in place before the adoption of the Directive were free to apply restrictions to this sector during or after the transposition period, if appropriate and justified.

### **Do restrictions and prohibitions which are not justified on grounds of general interest have to be lifted?**

Contrary to what had been originally envisaged, the final version of the Directive does no longer explicitly oblige Member States to lift unjustified restrictions and prohibitions. Nevertheless, EU law prevails over national law and Member States must comply with the principles and obligations deriving from the Treaty.

The BusinessEurope representative considered that the Directive is part of the EU policy of balancing flexibility and security for workers and that Article 4 constitutes a fundamental

<sup>35</sup> The English version uses the words 'in particular' in Article 4(1) of the Directive while the French, German and Spanish versions respectively use the terms 'notamment', 'vor allem' and 'sobre todo'.



part of this political balance; the grounds of general interest providing a justification for restrictions or prohibitions should be strictly interpreted and if such measures turn out not to be necessary, proportionate to their aim or legitimate, they should be lifted. The representative of ETUC and UNI-Europa considered that abolishing restrictions and prohibitions was clearly not the purpose of Directive 2008/104/EC, which aims at protecting workers' rights.

### **What is the role of the social partners in the review of restrictions and prohibitions?**

According to Article 4, Member States must review restrictions, notably statutory ones, whereas restrictions laid down in collective agreements "may" be reviewed by the social partners. Nevertheless, the responsibility to inform the Commission of the results of the review as well as the responsibility for the restrictions themselves lies with the Member States, even as regards restrictions laid down in collective agreements.

Three experts underlined that it was essential to respect social partners' agreements and the Commission indicated that it was not its intention to intervene in determining which restriction(s) were or were not justified.

The BusinessEurope, UEAPME and Eurociett representatives expressed their support for the prior consultation of the social partners and the review of restrictions and prohibitions established by collective agreements, stressing that in certain Member States, numerous collective agreements do apply to temporary agency workers, notably at sectoral and company level. The Eurociett and UEAPME representatives considered that the review process should involve not only the social partners at cross-sectoral level, but also employers' and employees' federations representing the agency work sector, who have extensive expertise in this field.

## **8. National requirements on registration, licensing, certification, financial guarantees or monitoring of agencies (Article 4(4))**

### **8.1. Provisions of the Directive**

**Article 4(4):** "Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies."

### **8.2. Origin and objectives of the provisions**

**Position of the European Parliament adopted at first reading on 21 November 2002 with a view to the adoption of the Directive (P5\_TC1-COD(2002)0072):**

Article 4(4): "The provisions set out in paragraphs 1 and 3 are without prejudice to reasonable arrangements for the registration, licensing, certification, guaranteeing or monitoring of temporary agency work, as long as they do not place disproportionate administrative burdens on the undertakings and persons involved."

**Eurociett/UNI-Europa Joint Declaration on the Directive on working conditions for temporary agency workers, 28 May 2008:**

"8. UNI-Europa and Eurociett agree that systems of licensing (which can include financial guarantees), certification, inspection or registration may contribute to the sound





development of the sector, provided that such systems are proportional, non-discriminatory and objective and do not aim at hampering the development of temporary agency work."

### 8.3. Issues

#### Does Article 4(4) limit the scope of the review to be carried out?

Article 4(4) provides that the first three paragraphs of Article 4 shall be "without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies". Consequently, requirements falling under one of these categories are not included in the obligation to review under the Directive; those restrictions, which relate to market access and the exercise of activities of temporary-work agencies, are the only ones which do not need to be reviewed. As an example, the following measures appear to fulfil the conditions set out in Article 4(4):

- necessity for temporary-work agencies to obtain a licence or authorisation to operate;
- necessity for agencies to provide a financial guarantee.

However, it should be recalled in this context that, irrespective of Article 4(4) of the Directive, and as recalled by Recital (22) of the Directive, Articles 49 and 56 TFEU, as interpreted by the ECJ, impose on Member States to respect the freedom of establishment and the freedom to provide services respectively. This implies that in order to be compatible with prevailing Union law, the national rules concerned (imposed at any level) that make the access or the exercise of temporary agency work subject to an authorisation regime (such as an obligation on the provider to register, to have a licence or be certified before it can exercise its activities) or an obligation to make a deposit or to have a financial guarantee, or any other type of restrictions or prohibitions (e.g., an obligation on the provider to take a specific legal form, requirements that relate to the shareholding, prohibition on the provider to carry out other activities, restrictions or prohibitions on the use of temporary agency work) must be justified and proportionate to the aim to be achieved, in the light of the ECJ case law on the freedom of establishment or freedom to provide services. In this context, it can be referred for example to the judgments by the ECJ in cases C-279/80 *Webb* and C-279/00 *Commission v. Italy*.

Moreover, the Commission recalled that regardless of the provisions of Article 4(4) of the Directive, a Member State which makes the activity of temporary-work agencies within its territory conditional upon those agencies being established in the country is in breach of the provisions of the Treaty on the freedom to provide services<sup>36</sup>.

## 9. Obligation to inform the Commission of the results of the review (Article 4(5))

### 9.1. Provisions of the Directive

**Article 4(5):** "The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."

<sup>36</sup> Order of the ECJ, 16 June 2010, Case C-298/09 *RANI Slovakia s.r.o. v Hankook Tire Magyarország Kft.*



## 9.2 Issues

### Scope and content of the obligation to inform the Commission of the results of the review

Pursuant to Article 4(5), the Member States are under an obligation to inform the Commission of the results of the review of restrictions and prohibitions by 5 December 2011. The elements provided by Member States in compliance with this provision will constitute a major source of information on the concrete situation of temporary agency work and the national legal framework applicable in each Member State. After the transposition deadline, the Commission will use the information provided, which it intends to make public, and will draw the appropriate conclusions. Consequently, the Commission stressed that Member States should provide it with substantial, comprehensive and up-to-date information when complying with their obligations under Article 4(5) of the Directive.

Although the legal obligation to review restrictions and prohibitions per se does not extend to restrictive measures pertaining to Article 4(4) of the Directive, the Commission favours that for the sake of clarity and completeness of the data, such measures should also be communicated before the end of the transposition period. Indeed, differences of interpretation may arise between Member States as to the exact scope of Article 4(4), notably the delimitation between Article 4(4) and Article 4(1), and the restrictive character of any given measure. Therefore, any restrictions and prohibitions on the use of temporary agency work, notably including measures relating to the access of agencies to the market in a Member State, should be communicated to the Commission.

The review exercise as well as future use, examination and further analysis of its results could be facilitated if the Member States follow a unified structure when informing the Commission of the results of the review.

Therefore, the Commission proposed to proceed as follows:

- By 5 December 2011, each Member State sends detailed information to the Commission on the results of the review of prohibitions and restrictions on the use of temporary agency work. The letter should notably give relevant information on the consultation of the social partners, notably indicating which ones have been consulted and setting out the results of this consultation.
- Member States enclose a report providing detailed information on every prohibition or restrictive measure which has been identified. A template of the report is to be found in *annex*; its structure should be the following:
  1. Member States should indicate the nature of every single measure identified as a restriction or prohibition on the use of temporary agency work. It may be for instance of a legislative nature or may consist in a regulation or collective agreement etc.
  2. Member States should give a precise description of the measure, in particular by explaining its object and scope.
  3. Point 3 comprises two bullet points, enabling Member States to indicate whether the measure has been reviewed by their own authorities or by the social partners. It should be recalled that when it comes to the implementation of a Directive, the interlocutors of the Commission in the Member States are always the national authorities; consequently, the Commission expects to receive the results of the review from the national authorities, regardless of the fact that the review may have been at least partly carried out by the social partners.



4. Point 4 is to be filled in where the review has led to the conclusion that the measure is not justified.
5. Point 5, divided into five bullet points, should be filled in only where the review has shown that the restriction/prohibition is justified on grounds of general interest. Member States should either choose between one of the possible justifications mentioned in the Directive (protection of temporary agency workers, requirements of health and safety at work, need to ensure that the labour market functions properly, prevention of abuses), by explaining why they consider that the chosen justification is relevant, or fill in the last bullet point if they are of the opinion that other grounds of general interest do justify the restrictive measure. In the latter case, Member States must specify on what grounds they deem the measure justified.
6. The last point is designed for comments on the specific measures. In particular, it enables Member States to provide information on modifications brought to restrictions or prohibitions and on the lifting of any of these measures. If a Member State considers taking any new steps with regard to such measures, this could also be mentioned. If a Government is of the opinion that a given measure falls under Article 4(4) and therefore does not need to be reviewed, it should indicate it as well under point 6.

*The Commission indicated that the use of the proposed template, which is aimed at facilitating the procedure to be followed by Member States when complying with their obligation under Article 4(5) of the Directive, is by no means mandatory and, of course, cannot be imposed on the social partners.*

An expert enquired about the extent of the Member States' obligation to inform the Commission with regard to licensing arrangements requiring a double authorisation in the country of origin and in the country where agency work is carried out. The Commission recalled that national requirements falling under Article 4(4) are exempt from the review obligation under the Directive; the information Member States would provide with regard to Article 4(4) will be used by the Commission to carry out an overall assessment, but the Commission does not intend to launch infringement procedures on that basis after 5 December 2011. Nevertheless, independently of the provisions of Article 4(4), Articles 49 (freedom of establishment) and 56 (freedom to provide services) of the Treaty fully apply and may prohibit certain restrictive national measures.

#### **Does the review of restrictions and prohibitions form part of the transposition process?**

The transposition of the Directive and the review process are two separate exercises. Provisions on transposition are to be found in Article 11<sup>37</sup>, whereas Article 4 specifically requires Member States, and possibly social partners, to review prohibitions and restrictions on the use of agency work and inform the Commission of the results of the review.

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<sup>37</sup> In particular, Article 11(1) provides that "Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2011, 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."



## V. Access to employment, collective facilities and vocational training – representation of agency workers – information of workers' representatives (Articles 6, 7 and 8)

### 10. Access to employment, collective facilities and vocational training (Article 6)

#### 10.1. Provisions of the Directive

**Article 6(1):** "Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged."

**Article 6(2), first subparagraph:** "Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void."

**Article 6(2), second subparagraph:** "This paragraph is without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers."

**Article 6(3):** "Temporary-work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking."

**Article 6(4):** "Without prejudice to Article 5(1), temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons."

**Article 6(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:

(a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability;

(b) improve temporary agency workers' access to training for user undertakings' workers."

#### 10.2. Origin and objectives of the provisions

Remark: The explanatory memorandum and the impact assessment attached to the initial proposal for a Directive tend to refer to the provisions of Article 6 together with those of



Article 7 and/or Article 8. Therefore, comments relating to Articles 6, 7 and 8 have been grouped hereunder under the heading of Article 6.

**Explanatory memorandum of proposal COM (2002) 149 final, pages 5, 7 and 13:**

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

"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 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 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."

**Impact assessment form attached to proposal COM (2002) 149 final, pages 32 and 34:**

"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."

"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."

"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. (...)

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."

**Minutes of the Social Questions Working Party, 16 July 2002, footnote 13<sup>38</sup>:**

*On Article 6(5) stating that "Member States shall take suitable measures or shall promote dialogue between the social partners, in accordance with their national traditions and practices"<sup>39</sup>: "(...) The Commission explained that these requirements were alternatives and stressed that promotion of social dialogue was a responsibility under the Treaty, although there was no obligation as to the result of such negotiation."*

### 10.3. Issues

#### **The scope of the obligation to inform agency workers of vacant posts in the user undertaking**

Article 6(1) should be given the broadest possible interpretation; information about vacant posts, which is usually communicated to the whole staff of a company, should in the same

<sup>38</sup> 10586/02 of 24.7.2002.

<sup>39</sup> This wording, used in the original proposal, remains unchanged in the final text of the Directive.



way be distributed to all agency workers, irrespective of whether they are eligible for the specific functions concerned and regardless of their having a fixed-term or open-ended contract. This would in practice create a minimal administrative burden, given the fact that most companies advertise vacant posts either by a general announcement on their Intranet site or in paper version distributed to all staff.

The BusinessEurope representative considered that temporary agency workers should be informed of vacancies without distinction as to the level of the functions being proposed and irrespective of their having fixed-term or open-ended contracts; she favoured a practical approach and indicated that vacancies are usually posted in the hall of the company or, in a growing number of cases, on the Intranet site of the company. The representative of ETUC and UNI-Europa stressed that agency workers, including those with an open-ended contract, should receive this information even if it concerns positions at a higher level than their own.

### **Are there any exceptions to the principle of equal access to the collective facilities in the user undertaking?**

An expert enquired about the meaning of the notion of "objective reasons" which may justify derogation from the principle of equal access of temporary agency workers to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities and transport services.

The Commission explained that it seems very difficult to find situations where a difference in treatment between agency workers and staff directly employed by the user undertaking could be justified. For instance, no objective reason could justify not granting agency workers access to company canteens, regardless of the duration of the assignment, provided that they are accessible to all categories of directly employed workers. As regards transport services, a difference in treatment may be justifiable only where only a certain category of workers does benefit from these services. In the case of child-care facilities, where there is only a limited number of places available and it is insufficient to meet the needs of the own staff of the undertaking, this could possibly justify restrictions on the access of agency workers to this service.

However, equal access to collective facilities of the user undertaking should be the rule while differences in treatment should remain exceptional. The Commission pointed out that under EU law, economic reasons, i.e. the cost of collective facilities, could never be considered as objective reasons justifying a difference in treatment. Only practice will help to determine on a case-by-case basis what special circumstances could provide such a justification.

The representative of ETUC and UNI-Europa expressed the view that all collective facilities should be accessible to agency workers and that objective reasons not to grant them equal access to those facilities, if any are to be found, should be negotiated by the social partners at the relevant level. The BusinessEurope representative indicated that the possible existence of objective reasons not to grant agency workers equal access to collective facilities, or the conditions for access to those facilities, should be considered by the parties concerned at national, sectoral or company level; if, for instance, child-care facilities do exist in the user company, the scarcity of available places could constitute such an objective reason.



## How detailed do the provisions transposing Article 6(4) need to be?

An expert enquired whether Member States must transpose Article 6(4) explicitly or can content themselves with overall regulation in this field. The Commission pointed out that it seems difficult to draw up detailed transposition measures for this provision, observing that the list of collective facilities it contains is not an exhaustive one; overall regulation would enable to avoid potential difficulties.

The BusinessEurope representative considered that a general transposition would be the best solution for implementing Article 6(4). The representative of ETUC and UNI-Europa indicated that the recognition of the principle of equal treatment should be made absolutely clear when transposing this provision into national law.

## What type of obligations does Article 6(5) impose on Member States?

Article 6(5) requires Member States to "take suitable measures" or to "promote dialogue between the social partners" in order to improve agency workers' access to training both in the temporary-work agencies and in the user undertakings, but does not impose that a given result be reached. Nevertheless, agency workers should in principle not be denied access to training in the user undertakings. On a question by an expert, the Commission indicated that the national or sectoral social partners would be best placed to improve access of agency workers to training by negotiating collective agreements in accordance with their national traditions and practices.

An expert enquired whether Article 6(4), read in conjunction with the provision of Article 6(5) on the improvement of agency workers' access to child-care facilities in the agencies, would allow a Member State to oblige agencies to provide such facilities for the whole period of employment of the parent as agency worker, in the interests of the child. The Commission replied positively; such choices are to be made at national level, depending on the situation in each Member State. For instance, in Member States where child-care is part of family benefits provided under the social security scheme, access to child-care facilities may be granted regardless of the employment status of parents.

The representative of ETUC and UNI-Europa underlined the importance of training for agency workers and considered that improvements as to their access to training both in agencies and user undertakings need to respect national practices. However, should no progress be made in this field, Member States would be responsible for improving the situation. The BusinessEurope representative considered that it would be preferable to leave it to the social partners to discuss and agree on access to training for agency workers, thus respecting the different systems of labour relations in the Member States.

## 11. Representation of temporary agency workers (Article 7)

### 11.1. Provisions of the Directive

**Article 7(1):** "Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency."

**Article 7(2):** "Member States may provide that, under conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and





*collective agreements are to be formed in the user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking."*

**Article 7(3):** *"Those Member States which avail themselves of the option provided for in paragraph 2 shall not be obliged to implement the provisions of paragraph 1."*

## 11.2. Origin and objectives of the provisions

See remark under 10.2 above.

### Minutes of the Social Questions Working Party, 16 July 2002, footnote 14<sup>40</sup>:

"(...) The Commission observed that paragraph 1 reflected the current situation in national legislation and paragraph 2, which was not mandatory<sup>41</sup>, was intended to take into account the situation in some Member States. (...)"

## 11.3. Issues

### What obligations does Article 7 impose on Member States?

The logic of Article 7 is twofold. First, it obliges Member States to provide for the counting of agency workers for the purposes of calculating the threshold above which bodies representing workers are to be formed. Second, it allows for the counting of those workers either in the temporary-work agency, in compliance with Article 7(1), or in the user undertaking, according to Article 7(2), or in both of them.

Members were invited to indicate whether their Member State resorts to Article 7(2) and it turned out that a majority of countries currently only apply Article 7(1). An expert indicated that his Member State has been applying Article 7(2) for a long time under certain conditions, notably, only one person is counted when an agency worker replaces another worker. An expert pointed out that in her country temporary agency workers are taken into account in the user undertaking after 6 months of presence, whereas two experts remarked that their Member State applies both Articles 7(1) and, after a certain duration, 7(2). Experts from Member States where agency workers are counted in the user undertaking in compliance with Article 7(2) did not refer to any practical problems in this respect.

The BusinessEurope representative explained that the criteria for counting agency workers with a view to the setting-up of bodies representing workers usually consist in the duration of assignments in the user undertaking and the seniority in the agency; they should be determined at Member State level. Besides, priority should be given to the representation of agency workers in the agency, which is their employer, rather than in the user company. The Eurociett representative indicated that a recent study on the representation of agency workers had shown that in spite of the diversity of the systems of representation (in the agency, in the user company or dual representation), agency workers were taken into account by each one of them; this variety of mechanisms should be accepted as long as they work properly and comply with the Directive. The representative of ETUC and UNI-Europa insisted on the right of agency workers to representation on equal terms with other workers and on the fact that national rules on

<sup>40</sup> 10586/02 of 24.7.2002.

<sup>41</sup> The final wording of Article 7 differs from the original proposal which was then under discussion. Notably, contrary to the initial proposal, paragraph 1 is not mandatory for Member States who choose to apply paragraph 2.



workers' representation should in no way be undermined; these rules should be such as to open the way to workers' representation of temporary workers both in the temporary agency and in the user company.

## 12. Information of workers' representatives (Article 8)

### 12.1. Provisions of the Directive

**Article 8:** *"Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>42</sup>, the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation."*

### 12.2. Origin and objectives of the provisions

See remark under 10.2 above.

### 12.3. Issues

#### **What type of information is to be provided under Article 8 by the user undertaking?**

According to Article 8 of the Directive, the user undertaking, when providing information on the employment situation in that undertaking to bodies representing workers, is under an obligation to provide "suitable information on the use of temporary agency workers". This provision is to be read in conjunction with Article 4(2) (b) of Directive 2002/14/EC, which states that "Information and consultation shall cover: (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment". The information to be provided to bodies representing workers must be substantial and ensure the effectiveness of Article 8.

The representative of ETUC and UNI-Europa considered that "suitable information" on the use of temporary agency workers should be detailed; in the Member States where the recourse to agency workers must be justified by objective reasons, those reasons should be accessible to workers' representatives upon request. Moreover, the requirements of Article 8 of the Directive should be considered as a minimum and should not in any way limit the quantity and quality of information to be provided to workers' representatives. The BusinessEurope representative expressed the view that "suitable information" should be factual and informative, covering issues such as the number of agency workers, their functions and the duration of assignments, but considered that no justification was to be given for the recourse to agency workers by a user undertaking.

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<sup>42</sup> OJ L 80 of 23.3.2002 p. 29.



## Annex

### Template of the report on the results of the review of restrictions or prohibitions – Article 4(5)

#### *Measure N° 1*

1. Nature of the measure (legislative, regulatory, administrative, set by way of collective agreement, etc.)
2. Description of the measure
3. Reviewed by:
  - Member State authorities (at national, regional or local level)
  - Social partners
4. Not justified (please specify whether the measure has been lifted, modified or what future steps are envisaged)
5. Justified on grounds of general interest (please specify why you consider a given measure is justified and necessary to pursue the public policy objectives indicated below):
  - Protection of temporary agency workers
  - Requirements of health and safety at work
  - Ensure that labour market functions properly
  - Prevention of abuses
  - Other (please specify)
6. Comments (please specify whether the measure has been maintained, modified or lifted, what future or further steps are envisaged, whether you consider that it falls under Article 4(4), etc.)

#### *Measure N° 2*

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