

II

(Preparatory Acts)

COMMISSION

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

(2002/C 203 E/01)

(Text with EEA relevance)

COM(2002) 149 final — 2002/0072(COD)

(Submitted by the Commission on 21 March 2002)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

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

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

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

Whereas:

(1) This instrument respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union; in particular, it is designed to ensure full compliance with Article 31 of that Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

(2) Moreover, point 7 of the Community Charter of the Fundamental Social Rights of Workers provides, *inter alia*, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly by forms of work other than permanent contracts such as fixed-term contract work, part-time work, temporary work and seasonal work.

(3) The conclusions of the European Council in Lisbon of 23 and 24 March 2000 set the European Union a new strategic target, namely to 'become the most competitive and most dynamic knowledge-based economy in the world, capable of sustained economic growth with more and better jobs and greater social cohesion'.

(4) In accordance with the European Social Agenda, which, on the basis of the communication from the Commission, was adopted by the European Council in Nice of 7, 8 and 9 December 2000, with the conclusions of the European Council in Stockholm of 23 and 24 March 2000 and with the Council Decision of 19 January 2001 on the 2001 employment guidelines, a satisfactory and flexible work organisation system has to be put in place, with new flexible contracts offering workers a fair degree of job security and enhanced occupational status, which, at the same time, is compatible with the workers' aspirations and undertakings' needs.

(5) The Commission consulted the social partners on the course of action that could be adopted at Community level with regard to flexibility of working hours and job security of workers on 27 September 1995.

(6) After that consultation, the Commission decided that Community action was desirable and consulted the social partners once again with regard to the content of the planned proposal on 9 April 1996.

(7) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories had indicated their intention to consider the need for a similar agreement on temporary work.

(8) The general cross-sector organisations, i.e. the UNICE, CEEP and ETUC, informed the Commission in their joint letter of their desire to implement the procedure provided for by Article 138(4) of the EC Treaty; in a joint letter they asked the Commission for an extension of the deadline by three months; the Commission granted this request by extending the negotiation deadline until 15 March 2001.

(9) On 21 May 2001, the social partners acknowledged that their negotiations on temporary work had not produced any agreement.

(10) There are considerable differences in the legal situation of temporary workers within the Union.

- (11) Temporary work should meet undertakings' needs for flexibility and employees' needs to reconcile their working and private lives and contribute to job-creation and participation and integration in the labour market.
- (12) The aim of this directive is to establish a protective framework for temporary workers which also provides temporary agencies operating in the European Community with a consistent and flexible framework which is conducive to their activities, without imposing any administrative, financial or legal constraints which would impede the creation and development of small and medium-sized undertakings.
- (13) This Directive shall be implemented in compliance with the Treaty, specifically with regard to freedom to provide services and freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 ⁽¹⁾ concerning the posting of workers in the framework of the provision of services.
- (14) Directive 91/383/EEC of 25 June 1991 ⁽²⁾ supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship establishes the safety and health provisions applicable to temporary workers.
- (15) With respect to basic working and employment conditions, temporary workers should not be treated any less favourably than a 'comparable worker', i.e. a worker in the user undertaking in an identical or similar job, taking into account seniority, qualifications and skills.
- (16) However, differences in treatment are acceptable if they are objectively and reasonably justified by a legitimate aim under national law.
- (17) In the case of workers who have a permanent contract with their temporary agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.
- (18) In view of the need to maintain a certain degree of flexibility in the working relationship, provision should be made for the Member States to be able to delegate to the social partners the task of defining basic working and employment conditions tailored to the specific characteristics of certain types of employment or certain branches of economic activity.
- (19) There should be some flexibility in the application of the principle of non-discrimination in cases of missions effected to accomplish a job which, due to its nature or duration, lasts less than six weeks.
- (20) An improvement in the minimum protection for temporary workers occasioned by this Directive will enable any restrictions or prohibitions which may have been imposed on temporary work to be reviewed and, if necessary, lifted if they are no longer justified on grounds of the general interest regarding, in particular the protection of workers.
- (21) There must be an effective means of safeguarding temporary workers' rights.
- (22) In compliance with the principle of subsidiarity and the principle of proportionality under Article 5 of the Treaty, the aims of the action envisaged above cannot be achieved satisfactorily by the Member States, since the goal is to establish a harmonised Community-level framework of protection for temporary workers; owing to the scale and the impact of the action planned, these objectives can best be met at Community level by introducing minimum requirements applicable throughout the European Community; this directive confines itself to what is required for achieving these objectives,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

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

Article 2

Aim

The purpose of this Directive is:

1. to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers;

⁽¹⁾ OJ L 18, 21.1.1997, p. 1.

⁽²⁾ OJ L 206, 29.7.1991, p. 19.

2. to establish a suitable framework for the use of temporary work to contribute to the smooth functioning of the labour and employment market.

Article 3

Definition

1. For the purposes of this directive:
- (a) 'worker' means any person who, in the Member State concerned, is protected as a worker under national employment law;
- (b) 'comparable worker' means a worker in the user undertaking occupying an identical or similar post to that occupied by the worker posted by the temporary agency, account being taken of seniority, qualifications and skills;
- (c) 'posting' means the period during which the temporary worker is placed at the user undertaking;
- (d) 'basic working and employment conditions': working and employment conditions relating to:
- (i) the duration of working time, rest periods, night work, paid holidays and public holidays;
- (ii) pay;
- (iii) work done by pregnant women and nursing mothers, children and young people;
- (iv) action taken to combat discrimination on the grounds of sex, race or ethnic origin, religion or beliefs, disabilities, age or sexual orientation.

2. This directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship. However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because they concern:

- (a) part-time workers within the meaning of Council Directive 97/81/EC of 15 December 1997;
- (b) fixed-term contract workers within the meaning of Council Directive 99/70/EC of 28 June 1999;

- (c) persons on a posting at a user undertaking.

Article 4

Review of restriction or prohibitions

1. Member States, after consulting the social partners in accordance with legislation, collective agreements and national practices, shall review periodically any restrictions or prohibitions on temporary work for certain groups of workers or sectors of economic activity in order to verify whether the specific conditions underlying them still obtain. If they do not, the Member States should discontinue them.
2. The Member States shall notify the Commission of the result of said review. If the restrictions or prohibitions are maintained, the Member States shall inform the Commission why they consider that they are necessary and justified.

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

CHAPTER II

EMPLOYMENT AND WORKING CONDITIONS

Article 5

The principle of non-discrimination

1. Temporary workers during their posting, shall receive at least as favourable treatment, in terms of basic working and employment conditions, including seniority in the job, as a comparable worker in the user enterprise, unless the difference in treatment is justified by objective reasons. Where appropriate, the *pro rata temporis* principle applies.
2. Member States may provide that an exemption be made to the principle established in paragraph 1 when temporary workers who have a permanent contract of employment with a temporary agency continue to be paid in the time between postings.
3. Member States may give the social partners at the appropriate level the option of concluding collective agreements which derogate from the principle established in paragraph 1 as long as an adequate level of protection is provided for temporary workers.

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

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

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

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

Article 6

Access to permanent quality employment

1. Temporary workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.

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

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

4. Temporary workers shall be given access to the social services of the user undertaking unless there are objective reasons against this.

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

— improve temporary workers' access to training in the temporary agencies, even in the periods between their

postings, in order to enhance their career development and employability;

— improve temporary workers' access to training for user undertakings' workers.

Article 7

Representation of temporary workers

Temporary workers shall count for the purposes of calculating the threshold above which bodies representing workers provided for under national and Community legislation should be formed at the temporary agency.

Member States may provide that, under conditions that they define, these workers count for the purposes of calculating the threshold above which bodies representing workers provided for by national and Community legislation should be formed in the user undertaking.

Article 8

Information of workers' representatives

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

CHAPTER III

FINAL PROVISIONS

Article 9

Minimum requirements

1. This directive does not prejudice the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.

2. The implementation of this Directive shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive. This shall be without prejudice to the rights of Member States and/or management and labour to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are adhered to.

*Article 10***Penalties**

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

*Article 11***Implementation**

1. The Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this directive by [two years after adoption] at the latest, or shall ensure that the social partners introduce the necessary provisions by way of an agreement, whereby the Member States must make all the necessary arrangements to enable them to guarantee at any time that the objectives of this directive are being attained. They shall forthwith inform the Commission thereof.

2. When Member States adopt these provisions, they shall contain a reference to this directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

*Article 12***Review by the Commission**

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

*Article 13***Entry into force**

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

Article 14

This directive is addressed to the Member States.
