

**COMMON POSITION (EC) No 24/2008****adopted by the Council on 15 September 2008****with a view to the adoption of Directive 2008/.../EC of the European Parliament and of the Council of ... on temporary agency work**

(2008/C 254 E/04)

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 European Economic and Social Committee <sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(2)</sup>,

Whereas:

- (1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union <sup>(3)</sup>. In particular, it is designed to ensure full compliance with Article 31 of the 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) The Community Charter of the Fundamental Social Rights of Workers provides in point 7 thereof, *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 in respect of forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.
- (3) On 27 September 1995 the Commission consulted management and labour at Community level in accordance with Article 138(2) of the Treaty on the course of action to be adopted at Community level with regard to flexibility of working hours and job security of workers.
- (4) After that consultation, the Commission considered that Community action was advisable and on 9 April 1996 further consulted management and labour in accordance with Article 138(3) of the Treaty on the content of the envisaged proposal.
- (5) In the introduction to the framework agreement on fixed-term work concluded on 18 March 1999, the signatories indicated their intention to consider the need for a similar agreement on temporary agency work and decided not to include temporary agency workers in the Directive on fixed-term work.
- (6) The general cross-sector organisations, namely the Union of Industrial and Employers' Confederations of Europe (UNICE) <sup>(4)</sup>, the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) and the European Trade Union Confederation (ETUC), informed the Commission in a joint letter of 29 May 2000 of their wish to initiate the process provided for in Article 139 of the Treaty. By a further joint letter of 28 February 2001 they asked the Commission to extend the deadline referred to in Article 138(4) by one month. The Commission granted this request and extended the negotiation deadline until 15 March 2001.
- (7) On 21 May 2001, the social partners acknowledged that their negotiations on temporary agency work had not produced any agreement.
- (8) In March 2005, the European Council considered it vital to relaunch the Lisbon Strategy and to refocus its priorities on growth and employment. The Council approved the Integrated Guidelines for Growth and Jobs 2005-2008, which seek, *inter alia*, to promote flexibility combined with employment security and to reduce labour market segmentation, having due regard to the role of the social partners.
- (9) In accordance with the Communication from the Commission on the Social Agenda covering the period up to 2010, which was welcomed by the March 2005 European Council as a contribution towards achieving the Lisbon Strategy objectives by reinforcing the European social model, the European Council considered that new forms of work organisation and a greater diversity of contractual arrangements for workers and businesses, better combining flexibility with security, would contribute to adaptability. Furthermore, the December 2007 European Council endorsed the agreed common principles of flexicurity which strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalisation.

<sup>(1)</sup> OJ C 61, 14.3.2003, p. 124.

<sup>(2)</sup> Opinion of the European Parliament of 21 November 2002 (OJ C 25 E, 29.1.2004, p. 368), Council Common Position of 15 September 2008 and Council Decision of ... (not yet published in the Official Journal).

<sup>(3)</sup> OJ C 303, 14.12.2007, p. 1.

<sup>(4)</sup> UNICE changed its name to BUSINESSEUROPE in January 2007.

- (10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.
- (11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.
- (12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.
- (13) Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship <sup>(1)</sup> establishes the safety and health provisions applicable to temporary agency workers.
- (14) The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.
- (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.
- (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.
- (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.
- (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.
- (19) This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law.
- (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.
- (21) Member States should provide for administrative or judicial procedures to safeguard temporary agency workers' rights and should provide for effective, dissuasive and proportionate penalties for breaches of the obligations laid down in this Directive.
- (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 the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services <sup>(2)</sup>.
- (23) Since the objective of this Directive, namely to establish a harmonised Community-level framework for protection for temporary agency workers, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level by introducing minimum requirements applicable throughout the Community, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

#### CHAPTER I

#### **General provisions**

##### *Article 1*

#### **Scope**

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.
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.

<sup>(1)</sup> OJ L 206, 29.7.1991, p. 19.

<sup>(2)</sup> OJ L 18, 21.1.1997, p. 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.

#### Article 2

##### Aim

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.

#### Article 3

##### Definitions

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;
  - (f) '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.

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

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.

#### Article 4

##### Review of restrictions or prohibitions

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.
2. By ... (\*), 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.
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.
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.
5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by ... (\*).

#### CHAPTER II

##### Employment and working conditions

#### Article 5

##### The principle of equal treatment

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.

(\*). Three years after the entry into force of this Directive.

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.

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.

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.

4. 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.

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.

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.

#### Article 6

### Access to employment, collective facilities and vocational training

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.

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

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

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.

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.

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.

#### Article 7

### Representation of temporary agency workers

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.

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.

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.

#### Article 8

### Information of workers' representatives

Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific 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>(1)</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 the workers set up in accordance with national and Community legislation.

#### CHAPTER III

### Final provisions

#### Article 9

### Minimum requirements

1. This 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.

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 is 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 respected.

#### Article 10

### Penalties

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the temporary-work agency or the user undertaking. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

2. Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing 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 ... (\*). Member States shall notify to the Commission any subsequent amendments to those provisions in 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. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by ... (\*), 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 measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

#### Article 12

### Review by the Commission

By ... (\*\*), the Commission shall, in consultation with the Member States and social partners at Community level, review the application of this Directive with a view to proposing, where appropriate, the necessary amendments.

#### Article 13

### Entry into force

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

#### Article 14

### Addressees

This Directive is addressed to the Member States.

Done at ...

For the European Parliament  
The President

For the Council  
The President

...

...

(1) OJ L 80, 23.3.2002, p. 29.

(\*) Three years after the entry into force of this Directive.

(\*\*) Five years after the adoption of this Directive.

## STATEMENT OF THE COUNCIL'S REASONS

### I. INTRODUCTION

On 20 March 2002, the Commission adopted in the context of the Lisbon strategy a proposal for a Directive concerning 'working conditions for temporary workers' to better reconcile flexibility in labour markets and job security, and create more and better jobs.

Acting in accordance with Article 251 of the Treaty, the European Parliament delivered its opinion on first reading on 21 November 2002.

The Economic and Social Committee gave its opinion on the Commission's proposal on 19 September 2002.

The Committee of the Regions stated in a letter dated 23 May 2002 that it would not be submitting an opinion on the proposal for a Directive.

On 28 November 2002, the Commission adopted an amended proposal, taking into account the opinion of the European Parliament.

The Council reached political agreement on a Common Position by qualified majority during its session of 9 and 10 June 2008, in parallel with a political agreement, also by qualified majority, on the Working Time Directive.

In accordance with Article 251(2) of the EC Treaty, the Council formally adopted its Common Position by qualified majority on 15 September 2008.

### II. OBJECTIVE

The objective of the draft 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 is applied to temporary agency workers and by recognising temporary work agencies as employers. The draft Directive also aims at establishing 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.

### III. ANALYSIS OF THE COMMON POSITION

#### 1. GENERAL OBSERVATIONS

According to Article 137(1) of the Treaty '*the Community shall support and complement the activities of the Member States in*' a number of fields, including '*working conditions*'.

Article 137(2) of the Treaty states that the Council '*may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States*'.

The Council's Common Position is in accordance with the objectives of Article 137(2) of the Treaty in the area covered, since it is designed to ensure the protection of temporary agency workers and to improve the quality of temporary agency work. In addition, the Common Position also takes into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing to the creation of jobs and to the development of flexible forms of working.

The Common Position respects the objectives put forward by the Commission and supported by Parliament, in particular that the principle of equal treatment from day one should be the general rule. In general, it includes a majority of the amendments resulting from Parliament's first reading of the Commission's proposal.

#### 2. STRUCTURE AND KEY ELEMENTS

##### 2.1. General structure and the title of the Directive

The general structure of the Common Position is in line with the general structure of the Commission's amended proposal. Concerning the title of the Directive, the Council has followed the Commission's amended proposal and opted for a more general title: the Directive on temporary agency work. It is to be noted that, in a number of instances, the Council's Common Position clarifies the key terms and expressions, in particular by using consistently the English terms 'temporary agency worker' and 'temporary work agency'.

## 2.2. Main differences from the Commission's amended proposal

In Article 4 on the review of restrictions and prohibitions on the use of temporary agency work, while essentially following the spirit of the Parliament's Amendment 34, the Council added a new paragraph 3 concerning the review of agreements negotiated by the social partners. The Council considered that, in order to respect their autonomy, the social partners should themselves review whether the restrictions and prohibitions negotiated by them were justifiable on the grounds set out in the first paragraph of Article 4. The Council did not consider it necessary to retain an explicit reference to the discontinuation of unjustified restrictions and prohibitions.

While generally following the Commission's amended proposal, the Council modified Article 5(3) and substantially reformulated Article 5(4) and (5). The Council also considered that the principle of equal treatment from day one should be the general rule. Any treatment of temporary agency workers differing from that principle should be agreed by the social partners, either through collective bargaining or through social partner agreements concluded at national level. In the light of the modifications made to Article 5(3) to (5), a specific exemption for short-term contracts (six weeks or shorter), as envisaged in the Commission's amended proposal, was therefore no longer considered necessary or appropriate.

In Article 5(3) and (4), as in a number of other instances, the Common Position reflects those of the Parliament's amendments which stress the importance of the role of social partners in negotiating arrangements on working and employment conditions. In Article 5(5), the Common Position echoes the Parliament's concerns in relation to the prevention of misuse.

In Article 10, the Council's Common Position includes a new paragraph 1 concerning measures the Member States are expected to take in order to ensure compliance with the Directive by temporary work agencies and user undertakings.

The Council considered that the Member States would need three years to implement the Directive, while the Commission had proposed a two-year implementation period (Article 11).

In addition, a number of recitals have been updated and modified, in order both to explain the modifications introduced by the Council to the Commission's amended proposal and to describe developments since the amended proposal was published in 2002. For example, references to the relaunch of the Lisbon Strategy, in 2005, and to the agreed common principles of flexicurity, endorsed by the European Council in December 2007, were included in recitals 8 and 9.

## 3. THE EUROPEAN PARLIAMENT'S AMENDMENTS IN FIRST READING

### 3.1. European Parliament amendments adopted by the Council

Altogether 26 amendments (numbers 1, 15, 19, 20, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 40, 42, 43, 46, 47, 48, 49, 51, 85 and 86) are taken up in their entirety, if not word-for-word then at least in spirit, in the Common Position.

Specifically, the Council accepted Amendment 1 to the title, three amendments to the recitals (Amendments 15, 19 and 20) as well as a number of amendments to the following Articles: Article 1 on the scope (Amendment 23), Article 2 on the aim of the Directive (26), Article 3 on definitions (27-33 and 85), Article 4 on the review of restrictions and prohibitions (34-36), Article 5 on the principle of equal treatment (40, 42, 43 and 86), Article 6 on access to employment, collective facilities and vocational training (46-49), and Article 7 on the representation of temporary agency workers (51).

It is to be noted that some amendments have been included in another part of the text of the Common Position than originally suggested by the Parliament. For example, a part of Amendment 32 is reflected in Article 5(1) and not in Article 3(1)(d). Another example is Amendment 36 that, rather than in Article 4, is reflected in a more general form in recital 20.

### 3.2. European Parliament amendments adopted partially by the Council

Amendment 4 on '*new forms of regulated flexibility*' is reflected in spirit in the text of recital 9; however, the Council considered it appropriate to update the text of the recital and to refer to the common principles of flexicurity agreed in 2007, rather than use the formulation suggested by the Parliament in its first reading opinion.

Amendment 6 is accepted in spirit, as recital 5 specifies the links between this Directive and Directive 1999/70/EC of 28 June 1999 on fixed-term work. Concerning this amendment, the Common Position follows the amended proposal of the Commission.

The thrust of Amendment 12, on employment contracts of an indefinite duration being the general form of employment relationship, is included in recital 15.

The underlying objectives of Amendment 18, on allowing the social partners to negotiate and define the basic working and employment conditions of temporary agency workers when these differ from the principle of equal treatment, are included in the Common Position (see recitals 16 and 17 and Article 5(3) and (4)).

Amendment 24 is accepted partly as it is useful to clarify, in line with the amended proposal, that both user undertakings and temporary work agencies are covered by the Directive. However, it would not be appropriate to allow Member States to exclude certain undertakings from the principle of equal treatment (the last part of the amendment).

Amendment 54 (on job creation, on making temporary agency work more attractive and on recognising different national circumstances) is accepted in spirit in Article 2 (the aim of the Directive), which now includes the wording '*while taking into account the need for establishing 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*'. The need for taking into account different national circumstances is explicitly referred to in recitals 12, 16, 17 and 19.

Amendment 87 is partly taken up in Article 5(1); while the first part of the amendment (on the principle of equal treatment) was included in the Commission's amended proposal and is taken over by the Council in its Common Position, the second part had become redundant as the concept of 'comparable worker' had been removed from the text (cf. Amendment 28 accepted by the Commission and the Council).

In line with the Commission's amended proposal, Amendment 92 is partly accepted in Article 5(3). It was, however, considered appropriate to state specifically that the social partner agreements should respect '*the overall protection of temporary agency workers*' when establishing arrangements concerning working and employment conditions differing from the principle of equal treatment.

### 3.3. European Parliament's amendments not adopted by the Council

The Council did not consider it advisable to include amendments 3, 5, 7, 8, 9, 10, 11, 12 (first part), 13, 16, 21, 22, 25, 44, 45, 52, 53, 71, 84, 88, 91, 93, 94 and 95 in its Common Position, for the following reasons:

#### (i) Recitals

There was no specific need for the text to explain in the recitals certain historical developments concerning temporary agency work or the draft Directive; therefore the Council followed the Commission's amended proposal in rejecting Amendments 3, 5, 7 and 11 as well as the first part of Amendment 12.

In line with the Commission's amended proposal, Amendments 8, 9, 10, 13 and 84 were not adopted by the Council. The amendments contained specific examples of how temporary agency work could either help or harm temporary agency workers themselves (women, workers with interrupted work histories, etc.) or user undertakings (especially small and medium-sized undertakings), or affect systems or traditions of industrial relations.

Amendments 16 and 94 had become redundant as the Commission's amended proposal no longer contained the former recital 16 on when differences in treatment would be considered acceptable.

The reasons explained in connection with Article 7 (see point (v) below) apply also to the rejection of Amendment 21 on information, consultation and participation of employees.

Amendment 22 concerning cross-border labour mobility (accepted by the Commission), which could be considered as an example, is not included in the Common Position as the text is not limited in any specific way to cross-border mobility.

The Council reworded recital 12 making it substantially shorter. Some aspects of Amendment 93 (e.g. the call for clarity concerning the rights of temporary agency workers and concerning the status of temporary work agencies as employers) have, however, been included in the redrafted text of the recital.

While recital 15 on temporary agency workers with a permanent contract with their agency has been strengthened by the Council by adding a sentence on employment contracts of an indefinite duration being the general form of employment relationship, the Common Position does not include the more detailed wording of Amendment 88 on what such permanent contracts should offer to a temporary agency worker.

(ii) *Article 1 — Scope*

Following the Commission's amended proposal, the Council did not accept Amendment 25 which would have extended the possibility of not applying the Directive to employment contracts or relationships concluded under specific training programmes without any public support.

(iii) *Article 4 — Review of restrictions and prohibitions*

In its Amendment 91, the Parliament called for a comprehensive review of national legislations concerning temporary agency workers. The Council, like the Commission in its amended proposal, considered that this would be outside the scope of the Directive.

(iv) *Article 5 — The principle of equal treatment*

Following the amended proposal, Amendment 39 (on non-discrimination) was considered redundant in view of the incorporation in the text of Article 5(1) of relevant elements of Amendment 32.

While Amendment 44 has become redundant, as Article 5(5) of the amended proposal was not included in the Common Position, it should be noted that the spirit of the amendment was followed in the general thrust of the text calling for the respect of different national practices.

Amendment 45 on safety and health at work and on safety training was considered superfluous as the relevant Community legislation on safety and health at work, and especially 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, would in any event have to be applied. Therefore, the Council followed the Commission's amended proposal in rejecting this amendment.

(v) *Article 7 — Representation of temporary agency workers*

Amendment 95, with its accompanying Amendment 21 to recital 21, was not adopted as it went beyond the scope of the article on the representation of temporary agency workers.

In this context it should be noted that Article 8 of the Common Position includes a reference to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

(vi) *Article 10 — Penalties*

The Council considers that the wording '*workers and/or their representatives*' in Article 10(2) correctly takes into account the variety of different situations in the labour markets of the Member States. The Common Position therefore maintains that expression, rejecting Amendment 52.

(vii) *Article 11 — Implementation*

The text of Article 11 on implementation was considered sufficiently clear without the suggested amendment 53 reading '*where applicable in accordance with their national legislation and practices*'.

Amendment 71 (on a five-year period for not applying the Directive in certain situations) has become redundant as the Common Position in its Article 5 now makes the principle of equal treatment a general rule from day one and does not include the possibility of excluding assignments with a duration shorter than six weeks from the application of that principle. However, it should be noted that the essence of the last part of the amendment, dealing with the prevention of misuse, has been included in Article 5(5) of the Common Position.

**IV. CONCLUSION**

The Council considers that, as a whole, the Common Position is in line with the fundamental objectives of the Commission's amended proposal. The Council also considers that it has taken account of the principal objectives pursued by the European Parliament in its amendments to the Commission's original proposal.

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