SOC/110
Working conditions for
temporary workers

Brussels, 19 September 2002

OPINION
of the Economic and Social Committee
on the
Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers
(COM(2002) 149 final – 2002/0072 (COD)

_____

On 22 April 2002, the Council decided to consult the Economic and Social Committee, under Article 137 of the Treaty establishing the European Community, on the

Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers.
(COM(2002) 149 final - 2002/0072 (COD)).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 4 September 2002. The rapporteur was **Mrs Le Nouail-Marlière.**

At its 393rd plenary session (meeting of 19 September 2002) the Economic and Social Committee adopted the following opinion by with 83 votes in favour, 75 against and 12 abstentions.

1. Introduction

1.1 Since the beginning of the 80s, temporary work has become an increasingly prominent feature of the European labour market. The Council and the Parliament responded to this trend by adopting resolutions[1] in which they emphasised the need for Community action to provide a framework for temporary work and to ensure that the workers in question were protected. In 1982, the Commission submitted a proposal for a directive to them to meet this need, which was amended in 1984 but never adopted.

1.2 In 1990, the Commission put forward a set of basic rules to ensure that there was a minimum degree of consistency between the various types of contracts for atypical employment: part-time work, fixed-term contracts and temporary work.[2]

1.3 This was part of the action programme associated with the Community Charter of the Fundamental Social Rights of Workers, which stated that these new living and working conditions should be "harmonised from above".

1.4 The only proposal adopted, taking the form of Council Directive 91/383/EC of 25 June 1991, concerned temporary workers and was designed to guarantee the same conditions of health and safety as for workers in the user undertaking.

1.5 Since no progress was made in the Council on the initiatives described above, the Commission decided to implement the procedure under Article 3 of the Agreement on Social Policy annexed to the Protocol (No. 14) on Social Policy annexed to the Treaty establishing the European Community (new Treaty Articles 137 and 138 on social dialogue). Agreements on part-time work and fixed-term contracts reached by three representative organisations, UNICE, CEEP and ETUC[3], were

1 OJ C 2 of 4.1.1980, p. 1 and OJ C 260 of 12.10.1981, p. 54

2 Three proposals for Council Directives on atypical work, COM(1990) 228 final of 29.6.1990, OJ C 224 of 8.9.1990, p. 8

3 Union of Industrial and Employers' Confederations in Europe (UNICE)

implemented by Council Directives 97/81/EC of 15 December 1997 and 1999/70/EC of 28 June 1999 respectively. The latter emphasised the principle of non-discrimination of workers on the basis of their work contract.

1.6 In May 2000, the social partners decided to start negotiations on the third section of the Commission's initiative on atypical employment, flexible working time and worker safety, concerning temporary work. However, on 21 May 2001 they had to acknowledge that they were not able to reach an agreement.

1.7 The stalemate came when attempting to lay down the terms of comparison for the possibility of equal treatment between a temporary worker and a permanent employee of the user undertaking in question, including working conditions and pay, or of equal treatment between salaried temporary workers even within a temporary agency.

1.8 After ten months, the Commission has taken up its right of initiative once again by submitting the present draft directive[4]. The Committee would point out that two reports may be consulted to ascertain the specific aspects of working and employment conditions and health and safety at work[5] as regards temporary workers.

1.9 In addition to the differing legal situations in the Member States, which the social partners and the Commission are aware of, temporary work also differs widely in structural and social terms. In countries whose national economies are predominantly service-based, temporary workers are primarily employed in the service sector, at managerial level and below, in some cases accounting for the majority of temporary staff. In other countries, however, where industrial or agricultural development is still mainly dependent on sectors using "casual" labour, the use of temporary work and the conditions under which it is resorted to are structured differently. Of course, in all cases, temporary labour is used to replace absent workers (sickness, maternity, leave), but that is no longer the most common instance in which it is used. Since the late 1980s, the reasons for employing temporary workers have ranged from dealing with seasonality in some farming, agrifood or large-scale distribution sectors to making working conditions more flexible in various industries and the widespread introduction of "just in time production". The Committee's recommendations quite specifically take account of these varying conditions, without losing sight of the objectives of "full employment" set by the Lisbon Council.

European Centre for Public Enterprises (CEEP)

European Trade Union Confederation (ETUC)

4 Explanatory Memorandum, section 3.1.B

5 *Temporary agency work in the European Union*, **Donald Storrie**, the European Foundation for the Improvement of Living and Working Conditions (2002) and

New forms of contractual relationships and the implications for occupational safety and health, European Agency for Safety and Health at Work

1.10 The Committee would add that the biggest temporary agencies in the European marketplace are Swiss or American holding companies, followed by Dutch, British, Belgian or French groups[6].

1.11 Depending on the country and the source, temporary work accounts for between 2 and 10% of the wage-earning population and between 30 and 50% of labour market entrants (under 25s).

2. Content of the draft directive

Preamble and Chapters on general provisions, employment and working conditions and final provisions

2.1 The scope of the draft directive covers "a contract of employment or employment relationship between a temporary agency", deemed the employer, and "a worker posted to a user undertaking to work under its supervision"; it applies to "public and private undertakings engaged in economic activities". "Employment contracts concluded under a specific public or publicly supported training, integration or vocational retraining programme" may be exempted.

2.2 Chapter I Article 2 sets out the aim of the directive: to improve the quality of temporary work by ensuring that the principle of non-discrimination is applied to temporary workers, and to establish a framework for the use of temporary work to contribute to the smooth functioning of the labour market. Article 3 defines the terms used, while Article 4 introduces provisions on the review of restrictions or prohibitions in operation in the Member States.

2.3 In Chapter II, Article 5 sets out a principle of non-discrimination and equal treatment, four derogations and implementing procedures.

2.4 Article 6 contains provisions on access for temporary workers to vacancies for permanent posts in the user undertaking and prohibits temporary agencies from charging workers any fees. It also states that temporary workers shall also be given access to the social services of the user undertaking and that temporary workers' access to training should be clearly defined by the Member States or the social partners.

2.5 Article 7 provides for the representation of temporary workers at the temporary agency and for temporary workers to be taken into account for the purposes of calculating thresholds at the user undertaking. Article 8 provides for the information of workers' representatives on the bodies representing workers in the user undertaking regarding the use of temporary workers within their company.

2.6 Chapter III contains the final provisions, including the minimum requirements (Article 9), which deal with the non-reversal of more favourable provisions in the Member States,

---

6 *Travail temporaire, diagnostic et prévisions 2002*, Institut Xerfi (France)

improvements and amendments permitted through collective agreements and respecting the general level of protection of workers in the fields covered by the draft.

2.7 Lastly, Articles 10, 11, 12 and 13 are standard provisions.

3. General comments

3.1 At the international level, ILO Convention C 181 1997 concerning private employment agencies was adopted on 19 June 1997 and ratified by Spain, Finland, Italy, the Netherlands and, since 23 March 2002, Portugal. Of the candidate countries, the Czech Republic has also ratified this Convention. While lifting the ban on private employment agencies, the Convention aims to protect workers using the services of private employment agencies and specifies the type of measures which States must take in order to guarantee adequate protection of temporary workers. The Committee encourages Member States who have not yet done so to ratify this Convention.

3.2 At the European level, it is worth bearing in mind the principle of equal treatment among workers, specifically the various directives and decisions on non-discrimination on the grounds of gender, nationality, ethnic origin, group affiliation, political or religious convictions, disability, age or sexual orientation[7], which testify to the high degree of harmonisation achieved by the EU in this field.

3.3 It is also worth pointing out that the (revised) Council of Europe Social Charter, the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights, as well as the fundamental ILO Conventions ratified by all Member States[8] guarantee trade-union freedom and equality in work and employment for all workers.

4. General provisions

4.1 Title of the directive

In the interests of consistency throughout the text, the Committee suggests that the title should read " … on working *and employment* conditions for temporary workers".

4.2 Scope

4.2.1 (Article 1.1)

---

7 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, pp. 16-22

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, pp. 22-26

Council Decision establishing a Community action programme to combat discrimination (2001 to 2006), OJ L 303 of 2.12.2000, pp. 23-28

8 Especially Conventions C 87, C 98, C 111 and C 135

The Committee points out that only the contract of employment falls within the scope of the draft, and not the commercial contract between temporary agencies and user undertakings. Nevertheless, the Committee feels that the provisions of these contracts on the terms of posting temporary workers must not conflict with the provisions of the present directive. This must be explicitly stated, either as an exemption to the scope or in the final provisions so that there are no juridical inconsistencies in the internal law of the Member States when this legislation is transposed.

4.2.2 **(Article 1.2)**

The Committee would point out that, under national law, some public administrations are not allowed to recruit staff on temporary contracts. It therefore proposes that there should be a distinction between public "enterprises" and public "administrations", depending on the situation in each country.

4.2.3 **(Article 1.3)**

The Committee proposes amending the wording of this point, replacing "after consulting the social partners" with "when there are agreements with the social partners".

4.3 **Aim (Article 2)**

Given that Article 2(a) entails human consequences while 2(b) deals with the economic aspect of the labour market, the Committee endorses the principles of equal treatment, i.e. non-discrimination with respect to other workers, as mentioned in the preamble and set out in Article 5 of the draft directive. But it would add as a further objective the raising of social standards and protections to reinforce social and economic cohesion.

4.4 **Definitions (Article 3)**

4.4.1 **"comparable worker"**

The seniority referred to here is taken to mean seniority within the user undertaking. In order not to be discriminatory, account should also be taken of the seniority of the temporary worker in his occupation, in addition to his qualifications and skills, because when taking people on as temporary workers, the agency also makes its recruitment choice based on the work certificates submitted. The national legislation or conventions of certain Member States contain provisions referring to "an equivalent level of qualification, after a trial period, to a full-time employee in the same post". However, these provisions do not take account of the seniority of temporary workers in their occupation or area of activity. This constitutes a basic inequality of treatment deriving from the status of temporary workers which could be rectified by the social partners and at Member State level if the draft directive were to prompt them to do so.

4.4.2 **"basic working and employment conditions"**

The Committee notes that basic working and employment conditions include pay (cf. Article 3(d)(ii)). Although Article 137 of the EC Treaty allows the Member States to retain the prerogative on basic social protection and pension rights, the Committee would point out that, for temporary workers, these rights prove to be basic working and employment conditions, both in terms of qualifying for these rights and the length of time that has to be worked to qualify for them and in terms of piecing together job histories to gain access to these rights[9]. As was the case with the directive on fixed term contracts, the Member States should be urged to take supplementary measures to adapt their social security systems to this form of working so as to ensure equal treatment, since the discrimination which exists hinges largely on these factors (thresholds and conditions for entitlement to unemployment benefit, payment of social security contributions).

4.5 **Review of restrictions or prohibitions (Article 4)**

4.5.1 The provisions of the EC Treaty (Article 137.6) do not allow the directive to place a formal ban on using temporary workers to replace workers involved in a collective dispute (strikes in particular). However, the Committee would point out that there is a voluntary commitment on the part of agencies not to post temporary workers to replace workers involved in collective action[10] and that some Member States have introduced such a ban in their national legislation. A commitment of this kind should become the norm both for temporary agencies and for user undertakings.

The directive should at least contain a provision ensuring that the national right to strike is not undermined. One proposal would be to provide for Member States themselves and/or the social partners to introduce regulations ruling out the use of temporary workers in undertakings where workers are on strike.

4.5.2 The Committee notes that the draft directive is rather vague about the existing restrictions which Article 4 proposes to review. It should be possible not only to lift such restrictions, but also to impose new ones if the particular conditions require it in certain areas of economic activity. The evolution of new technologies, health and public safety[11], and the current degree of knowledge in the field of biotechnologies make it impossible to rule out the possibility of having to introduce new ones where they have become essential between reviews. The Committee is thinking, for example, of the treatment of hospital waste and the threats of bacteriological pollution. The Committee would point out that provisions which either impose or lift restrictions must also comply with Council Directive 91/383[12], especially as regards radiation.

5. **Working and employment conditions**

---

9 CES 686/2002 of 29 May 2002 on *Options for the reform of pension schemes*, rapporteur: **Mrs Cassina**, co-rapporteur: **Mr Byrne**

10 CIETT, International Confederation of Temporary Work Businesses

11 CES 843/2002 of 17 July 2002, on *the control of high activity sealed radioactive sources*, rapporteur: **Mr Wolf**

CES 1495/2001 of 29 November 2001, on *market access to port services*, rapporteur: **Mr Retureau** (OJ C 48 of 21.02.2002)

12 Council Directive 91/383/EEC, OJ L 206 E of 29.7.1991, pp. 19-21

5.1 **The principle of non-discrimination (Article 5)**

5.1.1 The Committee endorses the principle of non-discrimination which conforms to the norms of fundamental human rights.

The Committee recognizes that, in order to achieve the objective of improving the protection of temporary workers, it is important to lay down a general principle. However, the Committee regrets that the derogations provided for in Article 5 itself effectively cancel out this principle of non-discrimination.

5.1.2 As regards the problem of cross-border workers posted by temporary agencies in a Member State other than that whose law governs the contract, the law on working and employment conditions to be applied should be that of the Member State where the posting is located, unless that is less favourable that the contract law of the country of origin.

5.1.3 As regards permanent employees originating from a third state seconded to provide cross-border services and sent to work at a location in a Member State by an undertaking with its head office in another Member State, the directive on the posting of workers is the one to be applied[13].

5.1.4 The Committee regrets that the impact study appended to the draft directive does not make a detailed study of the effects of cross-border temporary work on national employment markets (locations in St-Nazaire in France, Berlin in Germany and Trieste in Italy, for example) or regional ones (border regions).

5.1.5 It is important to stress that the wide distribution of temporary workers must not lead to a situation where their representation within the social dialogue is seen as completely separate from that of other workers.

5.1.5.1 The Committee suggests that it should be specified that the derogation (Article 5(2)) regarding temporary workers who have a permanent contract of employment with a temporary agency applies only to pay and on condition that the workers concerned receive a level of payment between postings in line with that laid down by collective agreement and/or legislation.

5.1.5.2 The Committee would like to see the most favourable national practices which are enshrined in legislation or collective agreements continuing to be applied in a more clearly defined way than that suggested by Article 5(3). "An adequate level of protection" is not sufficiently well defined, and the Committee would suggest that it could only be defined in the final analysis by the Court of Justice or the European Court of Human Rights, which would involve temporary workers and employers in the vagaries of procedures which could take many years. The Committee calls on the Commission to specify how this paragraph is to be interpreted in the light of Article 9 of this draft. For example, if "an adequate level of protection" is accepted as such by minority unions, would this

13 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, pp. 1-6

be considered "sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by this Directive"?

5.1.5.3 The Committee is not in favour of the derogation defined in Article 5(4) of the draft directive, which in fact excludes the majority of temporary workers from the purview of the principle of non-discrimination and introduces a criterion of duration which is in itself discriminatory and in contradiction with the principle of non-discrimination.

5.1.6 The derogation defined in Article 5(2): "temporary workers who have a permanent contract of employment with a temporary agency [and] continue to be paid in the time between postings" and that defined in Article 5(4): "assignments … not exceeding six weeks", once part of Community law, might be introduced in the Member States through a review of the legislation or collective agreements negotiated by the social partners, if these less favourable Community provisions were considered to constitute an "adequate level of protection" (Article 5 (3)).

5.1.7 The existence of a specific statute or agreement concerning temporary employees who have a permanent contract of employment with a temporary agency must not prevent such workers from benefiting from more favourable provisions which may be in force within user undertakings.

5.1.8 The freedom to choose the means of achieving the objectives of the directive means that it is left entirely up to the Member States to decide how exactly to implement the principle of non-discrimination, as provided for in Article 5(6). The Committee endorses these provisions.

5.2 **Access to permanent quality employment (Article 6)**

5.2.1 The Committee emphasises the importance which must be given to incorporating temporary workers in associative groupings within the enterprise and endorses Article 6(1) as a means of promoting equal opportunities and equal treatment among workers.

5.2.2 The Committee also approves the provisions of Article 6(2) which serve to render null and void any obstacles preventing temporary workers being taken on by the user undertaking at the end of their posting, thereby ensuring that workers are not forced to remain in insecure employment[14].

5.2.3 The Committee recognises that the continuing training of temporary workers should be a responsibility shared between the user undertaking and the temporary agency, in line with national practice, and that such practices may be improved by the Member States (public responsibility) and by the social partners (shared responsibility)[15].

---

14 *Commission Communication on combating exclusion and poverty*, (COM(2000) 368 final – 2000/0157 COD)

15 EESC Opinion on the *Memorandum on Lifelong Learning*, rapporteur: **Mr Koryfidis**, OJ C 311 of 7.11.2001

5.3 **Representation of temporary workers (Article 7)**

The Committee would stress that the representation of temporary workers must be guaranteed and reinforced in compliance with the universal principle of respecting trade-union freedom. It therefore approves Article 7.

6. **Final provisions**

6.1 **Minimum requirements (Article 9)**

6.1.1 It is important not to undermine provisions protecting temporary workers in countries where they are protected in a way suited to the social norms prevailing in the Member States, and where collectively agreed and balanced arrangements are already in place at the time of transposition.

6.2 **Implementation (Article 11)**

The Committee proposes a new paragraph 2 in Article 11, to read as follows: "The Member States shall consult the social partners prior to any legislative, regulatory or administrative initiative taken by a Member State to comply with the present Directive."

7. **Concluding comments**

7.1 On the one hand, the Committee feels that the principle of non-discrimination in relation to a comparable worker in the user undertaking, which is fundamental, is in danger of being eroded by the derogations the draft allows, specifically in Article 5(4), concerning temporary workers who complete assignments with a user undertaking over a period not exceeding six weeks. The Committee fears that, in some countries, this derogation will have the effect of depriving temporary workers of the protection afforded by the principle of non-discrimination in relation to comparable workers in the user undertaking. It considers this protection essential to ensure the legal safety of the temporary worker and so as not to undermine the conventional arrangements for setting working conditions and pay within the user undertaking.

7.2 On the other hand, the Committee realises that the principle of non-discrimination, a fundamental principle of the European treaties, must not be put at risk. This is to be guaranteed using the point of reference chosen in the directive, i.e. in terms of basic working and employment conditions, a comparable worker in the user undertaking. But it would suggest that, to ensure that this principle is implemented effectively by the Member States, bearing in mind the differing legal and social circumstances which apply and the triangular nature of temporary work, which is one of its specific features, the Member States should be allowed the option of how to achieve it while avoiding a reference system involving restrictive interpretations or derogations and complying with national legislation, conventions and practices.

7.3 These two recommendations take into account the aim of simplifying Community legislation which the European institutions have expressed[16], and which the Committee has already addressed in three opinions[17].

Brussels, 19 September 2002

The President of the Economic and Social Committee	The Secretary-General of the Economic and Social Committee
Göke Frerichs	**Patrick Venturini**

*

* *

N.B. Appendix overleaf.

16 Communication from the Commission on the Action plan "Simplifying and improving the regulatory environment", COM(2002) 278 final

17 EESC Opinion on *Simplifying rules in the single market (SMO)*, rapporteur: **Mr Vever**, OJ C 14 of 16.1.2001

EESC Opinion on *Simplification*, rapporteur: **Mr Walker**, OJ C 48 of 21.2.2002

EESC Opinion on the *Communication from the Commission "Simplifying and improving the regulatory environment"*, rapporteur: **Mr Walker**, OJ C 125 of 27.5.2002

A P P E N D I X I
to the Opinion of the Economic and Social Committee

The following amendment, which obtained at least one quarter of the votes cast, was rejected during the discussion:

(COUNTER-OPINION)

Replace the whole of the section opinion with the following:

"The Committee endorses the principle of a directive on temporary working with the twofold objective of ensuring the legal safety of temporary workers and boosting the employment potential of this sector. However, it feels that the Commission proposal constitutes a poor compromise.

The Committee wishes to point out that the key principle of non-discrimination towards temporary workers is not in question. However, it feels that this principle can only be effectively applied by placing responsibility with the Member States, allowing them the option to implement it either in relation to a comparable worker in the user undertaking, or in relation to a comparable worker in the temporary agency. The arrangement advocated in the Commission proposal amounts to regarding comparison with a comparable worker in the user undertaking as the only form of reference, any other constituting a derogation and therefore subject to restrictive interpretation.

The solution advocated by the Committee is dictated by the diversity of legal situations in the Member States. The specific nature of temporary working stems from the triangular relationship it involves. In contrast to the fixed-term contracts cited as a reference, which are two-way relationships, temporary working involves three partners: the temporary worker, the temporary agency and the user undertaking. The Member States have addressed this specific aspect using a variety of legal options. In the Committee's view, it follows that the Member States should be allowed a degree of autonomy in implementing the principle of non-discrimination, which is in no way contested.

The Committee fears that solutions imposed from above may prove counterproductive as regards promoting employment, which the Commission presents as an argument in favour of its proposal. It also points out that the over-exacting nature of the proposal will give rise to new administrative burdens affecting SMEs first and foremost."

Votes

For:	82
Against:	90
Abstentions:	6.