UNICE
THE VOICE OF BUSINESS IN EUROPE

S/permanent/01/post 2002/pp directive agency work 2002 27/06/2002

PROPOSAL FOR A DIRECTIVE ON WORKING CONDITIONS FOR TEMPORARY WORKERS (COM (2002) 149 FINAL)

UNICE POSITION PAPER

Executive summary

Temporary agency work corresponds to both companies and workers needs for flexibility and is a useful tool to foster integration of new entrants on the labour market.

UNICE does not object, in principle, to a directive on temporary agency work. However, it believes that the content of the Commission proposal could lead to legal uncertainty, unnecessary bureaucracy, and hamper job creation. It could therefore compromise the Lisbon objective of reaching an average employment rate of 70% in the European Union by 2010.

So far, EU legislation on non-discrimination has been based on the comparability of workers within the same company. Temporary agency work has the unique feature of implying a triangular relationship involving a temporary worker, an agency (who is the employer), and a user company. Non-discrimination can therefore be established, in comparison either with a worker of the user company, or with a temporary worker employed by the same agency. Member States and national social partners have applied both solutions. There is no justification for giving preference, at EU level, to the comparison with the user company.

The best compromise solution would be to avoid indicating any preferences in the European text, leaving the legislator or social partners in the Member States free to choose between two options (i.e. a comparable worker of the user company, or a comparable temporary worker of the same agency). Should the reference to the user company be chosen, the two exceptions foreseen must be maintained and extended.

UNICE insists that any EU text should be a broad framework compatible with the great variety of choices in Member States, fully reflect the fact that the agency is the employer and encourage the removal of obstacles to the development of temporary agency work. It makes concrete drafting proposals to bring the text closer to these objectives.

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I. Introduction

UNICE has noted the Commission proposal for a Directive on working conditions for temporary agency workers.

This proposal follows on from a consultation of the social partners on flexibility in working time and security for workers in accordance with article 137 of the Treaty. In response to this consultation, the European social partners concluded two agreements (one on part-time work and one on fixed-term work contracts). Unfortunately, the third negotiation on temporary agency work did not succeed. The Commission therefore decided to propose a Directive, complementing previous texts on part-time work and fixed-term work contracts.

UNICE does not object, in principle, to a directive on temporary agency work. However, it believes that the content of the Commission proposal is a bad compromise, which could lead to legal uncertainty, unnecessary bureaucracy, and hamper job creation.

So far, EU legislation on non-discrimination has been based on the comparability of workers within the same company. Temporary agency work has the unique feature of implying a triangular relationship involving a temporary worker, an agency (who is the employer of that worker), and a user company (where that worker is sent on assignment). Non-discrimination can therefore be established, in comparison either with a worker of the user company, or with a temporary worker employed by the same agency.

In this context, UNICE insists that article 137 (6) of the Treaty, which explicitly excludes pay from EU competences, must be reflected in the directive. Imposing the comparison with a worker of the user company for pay, is tantamount to fixing the pay levels in the agency, who is the employer. In UNICE's view, this would grossly disregard Treaty limits on EU competences. It would also constitute an unacceptable interference from the EU level in the autonomy of collective bargaining between the social partners of the sector concerned in Member States.

The Commission proposal claims that there is a need to extend at Community level non-discrimination between temporary agency workers and comparable workers of the user company. Moreover, the Commission shifts the employer's responsibility from the agency on the user company, regardless of the fact that it is the agency, who is the employer, and not the user company (see notably provisions on social services and on training).

Such a conception seems more geared towards protecting the rights of those who already have a job rather than towards facilitating the integration of new entrants on the labour market. It could even undermine the ability to achieve the Lisbon objective of increasing the average employment rates of the EU to 70% by 2010.

II. General comments

On the explanatory memorandum and impact assessment

UNICE believes that the Commission proposal rests on a misinterpretation of the situation of temporary agency work in Member States.

The explanatory memorandum and impact assessment section contain several inaccuracies.

For example, in the Netherlands, temporary agency workers are, in practice, not recruited on the basis of a fixed-term contract but on the basis of a very flexible and special employment contract, which can be terminated by the user company and renewed by the agency at any moment during a period of 26 weeks. This period of 26 weeks is extended by collective agreement to 52 weeks. Moreover, even though Dutch law foresees that pay for temporary agency workers should be set by comparison with a worker in the user company, in reality, the salaries of Dutch temporary agency workers are determined in the collective agreement concluded by the agencies.

Similarly, it is inaccurate to state that "access to social services of the undertaking is very often provided for by legislation". This is not required by legislation in most Member States.

More generally, the three categories of countries presented on page 4 of the explanatory memorandum are very unclear and misleading. They disregard the great differences that exist both between the countries grouped together in the same category and within each country (between sectors or activities, depending of the specific employment conditions concerned, etc.). Indeed, it is sometimes difficult to understand the rationale which drove the Commission to include some countries in one category rather than another, especially when it comes to categories 2 and 3.

On the incorporation of expectations of social partners

It is also misleading to state that the text prepared by the Commission merely incorporates "points agreed upon during the negotiations and formulates provisions to overcome the remaining sticking points". Even though some points of agreement emerged during the negotiations, the remaining sticking points concerned crucial issues. UNICE does not consider that the solution proposed by the Commission as a good compromise. On the issue of the comparable worker in particular, there is a much simpler way to produce a balanced text (see below).

Moreover, contrary to what is stated in the explanatory memorandum, the proposed solution does not "meet the expectations of the social partners in the temporary agency sector". Indeed, in a joint declaration published by Euro-CIETT and Uni-Europa in 2001, the sectoral social partners explicitly emphasised that the employer of temporary workers was the

agency. They did not recommend that the worker of the user company should be instituted as the first point of reference to protect workers against discrimination.

On the principle of non-discrimination and the comparable worker

UNICE does not question the principle of protecting temporary agency workers against discrimination. However, in a triangular relationship where the temporary worker is employed by an agency (who is the employer) but sent on assignment to a user company, two options are available to achieve this goal. The comparison can

- either be made between the temporary agency worker and a worker of the user company, or
- between temporary workers employed by the same agency and sent on assignment to different user companies to do a similar job.

Member States and national social partners have applied both solutions. In some Member Sates, they exist in parallel depending on the sector of activity concerned, or on the specific employment condition they are applied to. The choice of the solution that will make it possible to provide a stable framework for the development of temporary agency work will depend on the national context. There is no justification for giving preference, at EU level, to the comparison with the user company.

Firstly, keeping the comparison within the agency is logical since it is the agency who is the employer and not the user company. It should be noted that, so far, EU anti-discrimination legislation only implied comparisons between employees working for the same employer.

Secondly, the comparison with a worker in the user company generates a lot of administrative work since the terms and conditions of employment vary from one assignment to the next.

European employers insist that the best compromise solution would be to avoid indicating any preferences in the European text, leaving the legislator or social partners in the Member States free to choose between two options (i.e. a comparable worker of the user company, or a comparable temporary worker of the same agency). Should the reference to the user company be chosen, the two exceptions foreseen in articles 5 (2) and 5 (3) must be maintained and extended to fixed-term contracts that pay for idle-time between two postings. Moreover, the possibility not to apply the principle of non-discrimination to temporary workers with an assignment of less than 6 weeks should be extended to 18 months.

Imposing the comparison with a worker of the user company for pay, amounts to fixing the pay levels in the agency, who is the employer. The EU has and should not have competence to determine salaries for any sector of activity. Wage setting is a core competence of the social partners. Any interference of the EU in this area would seriously undermine national social dialogue. Temporary agencies and their employees must be allowed to determine their employment conditions in accordance with national negotiating practices like in any other sector of activity.

UNICE therefore urges the Council and the European Parliament to put the two existing options on the same level and calls on them to consider the amendments set out in section III below (modifications underlined in the text).

III. Specific proposals for amendments

A. Article 1: scope

1.This directive applies to the contract 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 Sates may, after consulting the social partners, provide that this directive does not apply to employment contracts or relationships concluded under a specific {delete "public or publicly supported"} training, integration or vocational retraining programme.

Justification: In some Member States purely private programmes of integration for vulnerable groups exist. The directive should not apply to training employment contracts concluded in the context of such programmes. The reason for excluding training employment contracts stemming from such programmes is not related to the public origin of the funds supporting them. Failing that, purely private initiatives of this kind will disappear.

B. Article 2: aim

UNICE suggests amendment of the aim of the directive as follows:

The purpose of this Directive is

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

b. to establish a framework for temporary agency work which contributes to smooth functioning of labour markets and fosters employment creation.

Justification: the aim of fostering employment creation should appear clearly as an objective of the proposal, alongside improvement of the quality of temporary agency work.

C. Article 3: definition

UNICE suggests the following amendments:

For the purpose 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,

- *either 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, or*
- *a worker employed in order to be posted by the same temporary agency, account being taken of seniority, qualifications and skills.*

Justification: both solutions are legitimate and should be placed on an equal footing in the EU text.

c. *"posting" means the period during which the temporary worker is placed at the user undertaking,*

d. *"basic working and employment conditions":* delete.

Justification: a European definition of employment conditions (basic or not) is neither desirable nor necessary. Moreover, the items listed as "basic working or employment conditions" went well beyond what is considered basic in most Member States. Finally, the explicit reference to pay is in contradiction with article 137 (6) of the Treaty, which specifies that pay matters (with the exception of equal pay between women and men, which is not at stake here) is excluded from EU competences. It is sometimes argued that guaranteeing non-discrimination with regard to pay cannot be regarded as imposing specific pay levels through EU legislation. However, the combined effect of an explicit reference to pay and of instituting the worker of the user company as the first reference would result in imposing the pay level of the user company to the agency (who is the employer). This would be contrary to the Treaty.

e. *This directive shall be without prejudice to national law as regards the definition of contracts of employment or employment relationship.* The rest of the paragraph should be deleted.

Justification: the additional explanations confuse matters rather than clarifying them. They do not seem necessary as exclusions from the scope are only possible within the limits set out in article 1. Moreover, the reference to the directive on fixed-term work does not make sense since temporary agency work is explicitly excluded from the scope of the agreement on which it is based.

D. Article 4: review of restrictions or prohibitions

This article should be amended as follows:

1. Member States, after consulting the social partners in accordance with legislation, collective agreements and national practices, shall periodically, and at least every five years, review any restrictions or prohibitions on temporary work {delete" 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 results of the 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 safety.

Justification: restrictions and prohibitions should be as limited as possible. Allowing them on the grounds of "general interest" is too wide.

E. Article 5: the principle of non-discrimination

Article 5 should be replaced by the following text:

1. *During their posting, temporary agency workers shall not be treated in a less favourable manner than a comparable worker in respect of employment conditions,, unless different treatment is justified on objective grounds, account being taken of seniority, qualifications and skills.*

2. *Where appropriate, the principle pro rata temporis shall apply.*

3. *With regard to health and safety protection measures taken in accordance with Directive 91/383, the comparable worker shall be an employee doing the same or a similar job in the user enterprise.*

4. *With regard to other employment conditions, Member States, after consultation with the social partners, and/or social partners shall be free to define the comparable worker, choosing between the two possibilities set out in article 3.b.*

5. *The arrangements for application of this principle shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law, national law, collective agreements or practices.*

Justification: the text proposed by the Commission was unclear and could lead to considerable legal uncertainty. A simple, clear and balanced solution should be preferred to a complicated set-up of exceptions. Should the reference to the user company be chosen, the two exceptions foreseen in paragraphs 2 and 3 must be maintained and extended to fixed-term contracts that pay for idle-time between two postings. Moreover, the possibility not to apply the principle of non-discrimination to temporary workers with an assignment of less than 6 weeks should be extended to 18 months.

G. Article 6: access to permanent quality employment

Article 6 should be replaced by the following text:

1. *During their posting, temporary agency workers shall have access to the same information about vacancies which become available in this undertaking or establishment as employees of this undertaking or establishment.*

2. *Temporary employment businesses shall not*

   a. *charge any fees to workers in exchange for assignments in a user enterprise or establishment ,*
   b. *introduce clauses in employment contracts which forbid temporary agency workers from entering into a direct employment contractor relationship with the user company after his/her posting .*

Justification: references to training and social services should be deleted since these are of the responsibility of the employer (i.e. the agency). The text proposed by the Commission would not only be comparing the temporary worker with workers in the user company but also fundamentally shift the employer's responsibilities on the user company.

H. Article 7: representation of temporary workers

Article 7 should be replaced by the following text:

Temporary agency workers shall be taken into consideration, to the extent and in the conditions foreseen by national arrangements in this field, in calculating the threshold above which workers' representative bodies provided for in national and European legislation may be constituted.

Justification: The Commission initial draft seemed to suggest that agency workers should be taken into account on a per capita basis. This will not always be the case. It is therefore necessary to add a reference to national calculation rules for the thresholds. There is no need to make a specific reference to the possibility to foresee representation in the user company since the EU text only sets out minimum prescriptions. Should the Commission's text which explicitly referred to workers representative bodies in the user company be maintained, it would be essential to specify that double counting of workers should be avoided.

I. Article 8: information of workers 'representatives

Article 8 should be replaced by the following text:

The user undertaking shall include appropriate information about temporary work in the undertaking when providing information on the employment situation in the undertaking to bodies representing workers in accordance with national and Community legislation.

Justification: There is no need to make a specific reference to the possibility to foresee more stringent or more specific provisions since the EU text only sets out minimum prescriptions. The Commission's text could give the impression that new information and consultation requirements are introduced over and above the already far-reaching existing national and EU rules. A more neutral reference to national and Community legislation would be sufficient.

J. Articles 9 to 13: final provisions

UNICE accepts the present wording and does not seek amendments.

IV. Conclusion

To sum up, UNICE is not opposed, in principle, to a directive on temporary agency work. However, it insists that any EU text should:

- take full account of the fact that temporary agency work corresponds to both companies and workers needs for flexibility and is a useful tool to foster integration of new entrants on the labour market;
- be a broad framework compatible with the great variety of choices in Member States;
- fully reflect the fact that the agency is the employer even though work is actually performed at a user enterprise;
- encourage the removal of obstacles to the development of temporary agency work.

With regard to the non-discrimination principle, UNICE urges the Council and the European Parliament to leave the legislator or the social partners free to decide whether comparison should be with a worker of the user company or with a worker of the agency, by putting the two existing options on the same level.