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COMMISSION OF THE EUROPEAN COMMUNITIES

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2002/0072 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

**Common Position of the Council on the adoption of a European Parliament and Council
Directive on temporary agency work**

Political agreement on a common position (QMV)

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1. BACKGROUND

Date of transmission of the proposal ¹ to the EP and the Council (document COM(2002)149 final – 2002/0072 COD):	21 March 2002
Date of the opinion of the European Economic and Social Committee ² :	19 September 2002
Date of the opinion of the European Parliament, first reading ³ .:	21 November 2002
Date of transmission of the amended proposal ⁴ :	28 November 2002.
Date of adoption of the common position ⁵ :	15 September 2008

2. OBJECTIVE OF THE COMMISSION PROPOSAL

The proposal for a Directive on temporary agency work aims to ensure that the principle of equal treatment is applied to temporary agency workers and also to recognise temporary work agencies as employers. It complements the law of Member States, pursuant to Article 137 of the Treaty, by laying down a common and flexible Community framework covering temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

¹ OJ C 203E, 27.8.2002, p.1-5. Title as in original.

² OJ C 61, 14.3.2003, p. 124 .

³ OJ C 25 E,29.1.2004, p.368

⁴ BULLETIN/2002/11/ 1.3.20

⁵ OJ ...xxx

3. COMMENTS ON THE COMMON POSITION

3.1. Brief general observations on the Common Position

Whilst the Common Position does not reflect all of the amendments proposed by Parliament and incorporated into the Commission's amended proposal, the majority of Parliament's amendments have nonetheless been adopted either in whole, in part or in spirit. Moreover, the outcome of the political agreement on the Common Position indicates that progress has been made on several issues such as; the direct application of the principle of equal treatment for agency workers from the first day of an assignment without any exception for short-term assignments (so-called "grace period"), the clarification of definitions, and either consultation with, or involvement of, the social partners as a condition applying to the various derogations that permit some deviation from the equal treatment principle.

3.2. European Parliament's amendments, taken into account fully, partly or in spirit in the Council's common position and the Commission's amended proposal.

Numbering of Recitals and Articles refer to the Council's common position:

3.2.1. *Title : amendment No 1 (changing the title of the Directive⁶)*

3.2.2. *The Recitals*

Recital 5: amendment No 6 (specifying the links between this proposal and Directive 1999/70 of 28 June 1999 on fixed-term work – former Recital 7).

Recital 9: amendment No 4 (rewording and updating of former Recital 4).

Recital 14: amendment No 15 (announcing the content of Article 5(1)– former Recital 15).

Recital 20: amendment No 36 (adding a provision stipulating that temporary agency workers may not replace striking workers in the user undertaking).

3.2.3. *The Articles*

Article 1

Article 1(1): amendment No 23 (rewording the scope to illustrate more clearly the triangular nature of temporary agency work).

Article 1(2): accepting an element of amendment No 24 (confirming that both user undertakings and temporary work agencies are covered by the Directive)

Article 2

Article 2: amendment No 26 (reinforcing the balanced aims of the Directive).

Article 3

Article 3: amendment No 28 (deleting the definition of a comparable worker from the definitions in Article 3);

Article 3(1)(b): amendment No 30 (adding the definition of a temporary agency);

Article 3(1)(d): amendment No 31 (adding the definition of a user undertaking);

⁶ See 1 above. The original title was proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers.

Article 3(2): amendment No 85 (stipulating that it is up to the Member States to define pay) and amendment No 33 (specifying workers who cannot be excluded from the scope of the Directive).

Article 4

Article 4(1): amendment No 34 (extending the obligation on the Member States to review restrictions or prohibitions pertaining only to certain categories of workers or certain branches to include all restrictions or prohibitions; extending the scope of justifications for prohibitions/restrictions);

Article 4(4): amendment No 35 (specifying that national requirements concerning the registration and monitoring of temporary work agencies are not prohibitions or restrictions within the meaning of Article 4(1)).

Article 5

Article 5(1) first indent: amendment No 87 (acceptance of the part rewording the principle of non-discrimination);

Article 5(2): amendment No 86 (restricting the exemption to remuneration and requiring consultation of the social partners);

Article 5(3): amendment No 92 (acceptance of the part on prior consultation of the social partners and enabling them to uphold existing collective agreements).

Article 6

Article 6(1): amendment No 46 (specifying how information on vacancies may be made public);

Article 6(2): amendment No 47 (on the arrangements whereby temporary work agencies may be recompensed for services rendered to user enterprises);

Article 6(3): amendment No 48 (specifying the scope of the prohibition on charging fees to workers);

Article 6(4): amendment No 49 (specifying the scope of the amenities and collective facilities in the user enterprise to which temporary agency workers should be afforded access).

Article 7

Article 7(1) and 7(2): amendment No 51 (taking account of the fact that workers' representation may be determined by collective agreements).

3.3. Amendments which have been accepted by the Commission, but not adopted in the Common Position

Amendment No 22: a common framework is justified as a means of facilitating European labour market integration and cross-border mobility (formerly part of Recital 22).

Amendment No 44: specifying that implementation of Article 5 through an agreement between the social partners should be in line with national practice (formerly Article 5(5)).

Amendment No 71: restricting exemption to pay in the case of short-term contracts (formerly Article 5(4)).

Amendment No 52 (leaving the choice to workers as to whether to pursue direct action or action through their representatives where the provisions of the Directive are not being complied with - Article 10(2)).

3.4. Amendments which have not been accepted by the Commission, and have not been adopted in the Common Position

The Common Position does not include amendments 3, 5, 7, 8, 9, 13, 16, 25, 39, 45, 54, 84, 94 which the Commission had declined to accept on the grounds that they did not constitute an improvement to the Directive. Nor does the Common Position include amendments 10, 11, 12 (first part), 21, 53, 88, 91, 93, 95, which the Commission considered to be unacceptable either from a strictly legal point of view or because they detracted from the overall balance of the Directive.

3.5. Amendments introduced by the Council during its debates

Recitals 8 and 9: these reformulated Recitals replace former Recitals 3 and 4 that had referred, respectively to developments in the context of the launch of the Lisbon Strategy in 2000 and of the Commission's Communication on the Social Agenda of 2000 and to related European Council conclusions with more up-to-date citations taking account of developments in 2005 and 2007.

Recital 10: is expanded in the light of the European Parliament debate about differences in the status and working conditions of temporary agency workers across the European Union.

Recital 11: a limited re-wording for purposes of consistency.

Recitals 12, 16 and 17: reinforce the character of the protective framework being provided for temporary agency workers, while respecting the diversity of labour market and industrial relations systems that had been highlighted in the European Parliament debate (and reflected at least in part in the content of Amendments 18, 53, 54 and 71) by announcing the scope for derogations under Articles 5(3) and 5(4) respectively by collective agreement or - in specific circumstances - by agreement between the national social partners.

Recital 15: an addition to this Recital takes into account the European Parliament debate⁷ (reflected in Amendment 12) on the need to recognise contracts of an indefinite duration as a kind of benchmark in the labour market.

Recital 18: aligns the text of this Recital, which had reflected the European Parliament's amendment No 20 concerning the grounds on which restrictions or prohibitions might be justified, with the Council's proposed re-wording of Article 4.

Recital 19: follows the thrust of Recital 14 in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Recital 21: replaces former Recital 21, reinforcing the safeguards for temporary agency workers' rights, and announces the new provision on penalties inserted at Article 10(1).

⁷ see also para 9 of the EP Resolution of 17 July 2007 on modernising labour law to meet the challenges of the 21st century.

Article 2: emphasises the balanced aims of the Directive in a re-worded single paragraph, reflecting the main content of the European Parliament's Amendment 26, as well as the thrust of Amendment 54.

Article 3(1)(c) and Article 3(1)(e): redefine the terms temporary agency worker and assignment, aligning the definitions in the amended proposal with the specific wording of amendments No 27 and No 29.

Article 3(1)(f) and Article 5(1): follow the approach of the Commission's amended proposal and amendment No 32 (redefining basic working and employment conditions) qualifying the reference to "general provisions" at Article 3(1)(f) as those in force in the user undertaking and introducing wording consistent with the revised definitions.

Article 4(2): follows the amended proposal and amendment No 34 except insofar as it no longer refers to Member States being subject to an obligation to discontinue any restrictions or prohibitions that can no longer be justified, since the Council did not consider it necessary to repeat the effect of the prohibition at Article 4(1) or appropriate to stipulate the final outcome of the review exercise.

Article 4(3): follows amendment No 34 (enabling the social partners to undertake a review of restrictions or prohibitions laid down in collective agreements).

Article 5(4): follows amendments No 19 and No 42 (deletion of the exemption for contracts of a duration not exceeding six weeks – as the principle of equal treatment for agency workers is to take effect from the first day of an assignment without any general qualifying period applicable to short-term contracts.)

Articles 5(3) and 5(4): reflect the spirit of amendments No 44 and No 71 (acceptance in principle that differing national practices in the Member States can be accommodated through affording scope for agreement between the social partners in line with national practice).

Article 5(5): taking account of elements of amendments No 40, No 71 and No 86 (acceptance of elements relating to the prevention of misuse with regard, in particular, to successive assignments).

Articles 6(3) and 6 (4): follow the amended proposal and amendments No 48 and No 49 with some re-wording for precision and consistency with other amendments.

Article 7: provides that Member States availing themselves of the option at Article 7(2) regarding the basis for calculating the threshold for establishing bodies representing workers in the user undertaking are not obliged to implement the provisions of Article 7(1) regarding the basis for establishing such bodies within a temporary agency.

Article 8: includes a specific reference to 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.

Article 10: includes a new paragraph 1 concerning measures that the Member States should take to ensure that temporary work agencies and user undertakings discharge the obligations deriving from the Directive.

Article 11: the Council considers that Member States would need three years to implement the Directive, whereas EP amendment No 53 and the Commission's amended proposal had set a two-year implementation period.

4. CONCLUSION

In general it should be stressed that the Common Position considerably enhances the text of the initial proposal and responds to the European Parliament's desire to ensure that the principle of equal treatment, as regards basic working and employment conditions, between temporary agency workers and the workers directly recruited by user companies should have effect as of day one of their assignments. Prohibitions or restrictions on the use of temporary agency work can only be maintained after the implementation of the Directive if they are justified on grounds of general interest. At that stage, any continuing prohibitions or restrictions must be subject of review and made the subject to a report to the Commission. In the interests of subsidiarity, differing national practices as regards labour market conditions and industrial relations practice among the Member States can be accommodated through affording scope for derogation from the principle of equal treatment by collective agreement or - under specific conditions - by agreement between the national social partners.