
Temporary agency work – guide for transposition at national level

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Introduction

The idea of European standards for temporary agency work was first considered in 1982. Thirteen years later, in 1995, the Commission launched a process of European social partner consultation on part-time, fixed-term and temporary agency work. While on the first two of these three topics the social partners were able to conclude agreements that led, in 1997 and 1999, to European Directives, the negotiations on temporary agency work, initiated in May 2000, broke down during the following year due to the failure to achieve compromise between the two sides on the principle of equal treatment of temporary agency workers and on the point at which such a principle should become applicable.

In the absence of a deal between the two sides of industry, the European Commission, in 2002, put forward its own proposal for a Temporary Agency Work Directive. This draft passed the first reading in the European Parliament but, due to the opposition of a minority of Member State governments, became stuck in the Council. In 2007 efforts were renewed, but the plans to introduce equal treatment for temporary agency workers from day one once again prevented progress in the Council. It was not until 2008 that, as a result of two developments, the situation regained fluidity. A joint declaration on temporary agency work by the UK social partners and the UK government prompted the main opponent to alter its stance on the European level also. Furthermore, the European partners for the temporary agency work sector signed a joint declaration calling for a regulatory framework on temporary agency employment and including the principle of equal treatment as from day one. From this point on, progress was swift and rapid: the employment ministers reached agreement on the draft text in June 2008; the European Parliament voted it later in the same year; on 5 December 2008 Directive 2008/104/EC was published.

The Member States thus had three years – until 5 December 2011 – within which to implement the Directive by means of legislation or collective agreement. This interpretation guide is intended to provide help in this implementation process at the national level. It is a tool designed to assist an understanding of the context of certain articles and which seeks to raise awareness of key points for consideration in transposing the Directive. Further, it sets out to highlight likely problems and pitfalls, focusing on a number of relevant national examples. The overall aim is to further the efforts to achieve the best possible transposition from a trade union point of view.

Text of the Directive and points to take into consideration in the process of transposition at the national level

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 [1],

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union [3]. 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) [4], 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.

(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.

This Directive is a social policy Directive, as its legal base is constituted by the social chapter which was, at the time, Article 137 (2).

Accordingly, this Directive regulates only the labour law aspect of temporary agency work, meaning the relationship of the agency worker with the temporary work agency and the user undertaking. There is no European-level regu-

lation of the business aspect of temporary agency work, i.e. of the relationship between the temporary agency and the user undertaking or the public aspect of temporary agencies, including matters such as licensing, monitoring, etc. It should be remembered that the Directive on services in the internal market excludes services provided by temporary agencies.

The regulation provided by the Directive on temporary agency work relates primarily to the assignment at the user undertaking rather than to the contract of employment with the agency.

The preamble refers to Art. 31 of the Charter of Fundamental Rights of the European Union and to the Community Charter of Fundamental Social Rights of Workers.

No reference is made, however, to ILO Convention No. 181 or to Recommendation No. 188 on private employment agencies.

(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 [5] establishes the safety and health provisions applicable to temporary agency workers.

Because the question of health and safety is covered by a more specific piece of European legislation, health and safety aspects are not dealt with in the core of this Directive.

(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.

The principle of equal treatment is laid down in the Directive. With regard to “basic working and employment conditions”, the approach is different from that adopted in previous Directives (part-time work and fixed-term work), see below.

(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.

This recital makes it very clear that the employment contract of indefinite duration is the rule and that it constitutes the benchmark on the labour market.

(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.

Derogations to principles laid down in this Directive will be possible only subject to social partner initiative; some derogations will result from consultation; others will require the existence of a collective agreement.

(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.

The derogation from the principle of equal treatment is possible only with social partner agreement; even in this case, an adequate level of protection must be guaranteed.

(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.

This provision contains a clear statement of the close link between a review of existing restrictions and the improvement of the minimum protection for temporary agency workers.

(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.

This provision guarantees respect of the autonomy of the social partners.

(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.

This provision is extremely important, as it stipulates the need for observance of national rules prohibiting the replacement of strikers 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 of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [6].

While the connection with the posting Directive is mentioned only here in this recital, this connection is, of course, a crucial one in practice. If temporary agency work is taking place across borders (i.e. the temporary agency is established in one country, the user-undertaking in another and the agency is sending its workers across borders), this constitutes one of the three forms of posting mentioned in the posting of workers Directive. What provisions are applicable in such cases?

a) First of all, the agency worker who moves to another country for agency work may or may not be regarded as a migrant worker in the sense of Article 45 TFEU (39 EC). There is a persistent ambiguity here, because the ECJ has, in its case law (including in *Rush Portuguesa*), taken up a position on agency workers that is quite at odds with its position on subcontracted posted workers in terms of their access to the labour market of the host country. To take a concrete example: a worker is working in country A for a temporary agency and is posted by this agency to work in country B for an undertaking there. Indeed, as it is the explicit aim of the agency (in country A) to provide workers to the user company in the host country (country B), it is clear that the agency workers (of country A) hereby gain access to the labour market of the host country (country B). (Some MSs thus insist, in such cases, on the application of their migration rules, a matter concerning which several court cases are currently pending).

However, the worker, who is recruited on the labour market of the home country (country A), remains the worker of the foreign agency (in country A) and is regarded as not having transferred his habitual place of work and residence to the host country (country B). One might thus say that the agency worker in question is simultaneously active on both the home country's and the host country's labour market (countries A and B). This means that the agency worker must, at least, (also) be understood as a migrant worker in the sense of Article 45 TFEU (39 EC). At the same time, his employer, the cross-border agency, is clearly a service provider in the sense of Article 56 TFEU (49 EC).

b) To prevent agency workers from 'falling between wharf and ship', the Posting Directive has included cross-border hiring out of workers (temporary agency work) in the definition of 'posting'. In combination with the definition of a posted worker ('a worker who for a limited period carries out his work in

the territory of a MS other than the State in which he normally works'), this leads to the application of the Posting Directive to most situations of agency work.

c) However, the Posting Directive also refers, among the 'core provisions' of Article 3.1., to the 'conditions of hiring out of workers'. There is some ambiguity as to the meaning of this provision, in relation to Article 3.9 of the Directive which states that MSs may provide that the posting undertaking must guarantee to its agency workers the terms and conditions (other than the core conditions?) which apply to temporary workers in the MS where the work is carried out. In any case, as from the point of transposition of the TAW Directive, the equal pay provisions applicable to national agency workers must probably be considered to belong to the 'core provisions' of Article 3.1. and therefore must be applied to cross-border agency workers also.

For more information, see: UNI europa http://www.uniglobalunion.org/Apps/iportal.nsf/pages/taw_social_crossEn

(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.

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.
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.

This Article states the scope of this Directive. It applies to the triangular relationship that is inherent in temporary agency work, namely the relationship between the temporary-work agency, the temporary agency worker and the user undertaking.

It is made clear already in paragraph 1 that the temporary-work agency is the employer (here we have the employment contract or the employment relationship) and that the user undertaking has obligations of supervision and direction in respect of the agency worker.

It is immaterial whether or not the employment contract is a valid one, as the “employment relationship” is covered.

Furthermore, we find that the assignment of the agency worker is a temporary one, which excludes, from the outset, unlimited assignments. This temporary nature is the key condition for distinguishing a temporary agency work relationship from a placement service. Nevertheless, the Directive gives no indication as to the nature of the limits that would allow a period to be referred to as “temporary”.

Paragraph 2 makes it clear that the Directive applies to all kinds of agencies and users, whether in the private or the public sector. All organisations operating as temporary work agencies and all users of temporary agency workers are to be covered by the Directive. It is sufficient that the undertaking be engaged in an economic activity. Non-economic activities would be those exercised by the State itself or by authorities functioning within the limits of their public authority, e.g. army or police. Attention should be paid from an ETUC point of view to activities of a social nature, which are not to be excluded from the scope of the Directive on the sole grounds that they are non-economic.

As it is stated that the agencies covered do not necessarily need to operate for gain, this means that nearly all undertakings are covered, including temporary-work agencies which send agency workers at cost price. This might entail changes for the German legislation, insofar as the Directive provisions deviate from those of the “*Arbeitnehmerüberlassungsgesetz*”, insofar as non-commercial temporary agency work will no longer be possible.

The Directive contains no reference to its territorial scope. The ETUC considers that agencies established in the EU which assign to user undertakings outside the EU, as well as agencies established in a third country assigning workers to user undertakings inside the EU, should be covered.

The derogation in paragraph 3 for workers employed under public training / programmes represents an exception to the general rule. Member States need to clearly state in the transposing act their intention to make use of this derogation. Furthermore, they need to consult the social partners beforehand if they do wish to do so.

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.

This article explains the threefold aim of the directive. It is designed, firstly, to protect the temporary agency workers and, secondly, to improve the quality of temporary agency work by ensuring equal treatment and by recognising temporary agency work agencies as employers. Thirdly, the Directive is intended to foster job creation and flexible forms of work thanks to the provision of a suitable legal framework.

It is important to ensure that the activities carried out by the temporary agencies do not compromise existing standards applicable to the normal workforce in user companies and sectors.

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 em-

ployment 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, 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.

Paragraph 1:

The definitions here again emphasize the three-way relationship of temporary agency work. It is principally the relationship between the worker and the temporary-work agency that is regulated by this Directive, while the relationship between the agency and the user undertaking is governed by commercial law. It should not be forgotten, however, that it is the user undertaking that is responsible for the safety, hygiene and health at work of the temporary agency worker (91/383/EEC).

a) The question of who is a *worker* is to be defined under national law, as is usual for Directives in the labour law field. Attention needs to be paid to the distinction still existing in some countries between employees and workers.

b) The *temporary-work agency* is the employer in this triangular relationship, as it is the party which concludes the contract. In most EU member states that have legislation on this subject, the temporary-work agency is considered to be the employer, but this is not the case in *Bulgaria* or *Ireland*, nor in certain cases in the *UK*, the consequence being that the Directive does not apply in these cases. Attention therefore needs to be paid in the transposition process to considering what is required in the national context to ensure that temporary agency workers will be covered by the equal treatment principles.

The definition covers public as well as private temporary-work agencies, including those not operating for gain. The legal size and form of an agency is immaterial. The reference to an employment relationship (as is usual in labour law Directives) refers to cases in which, even though no formal contract of employment has been signed, the distinctive features of an employment relationship are nonetheless present.

The agency then assigns the temporary agency worker for a certain period to a user undertaking. Agencies which “introduce” job-seekers to employers who then hire them directly therefore do not fall under the definition of the Directive. The same applies to head-hunters or recruitment agencies.

Attention needs to be paid to the practice of having an “in-house” temporary-work agency which assigns workers only to the undertaking for which it was set up and not to any other user undertaking. Insofar as this failure to operate on the wider labour market is deliberately intended as a means of avoiding equal treatment by circumventing the equal treatment regulations it should be considered to constitute an abusive practice at national level. Such “in-house” practices have been reported in Portugal, Germany and the Netherlands.. It is a problem that cannot arise in Belgium insofar as one licensing condition is that a single undertaking cannot provide more than 30 % of the turnover of the temporary-work agency.

In the national transposition attention should be paid to ensuring that the definition also covers the situation of subcontracting chains.

c) The *temporary agency worker* is the worker employed by the temporary-work agency with a view to being assigned to a user undertaking on a temporary basis. The worker may have a fixed-term or permanent employment relationship with the agency; this depends on the very different national legal settings (see annex).

Self-employed workers are not covered by the Directive, as they are generally working under commercial contracts. It is of the utmost importance that the national legislation should ensure that employers cannot use bogus self-employment as a means of avoiding application of this Directive so as to circumvent the equal treatment principle. However, the Directive itself supplies an answer to this dilemma, insofar as it refers not just to a contract of employment but also to an employment relationship.

d) The *user undertaking* is the one actually providing the workplace and the work to the agency worker. It has the obligation of supervision and direction towards the agency worker. The user undertaking may be a natural or a legal person; no minimum size is specified; nor is any specific legal form required. As such, an agency worker may be assigned to work for a self-employed person, for example a doctor.

e) *Assignment* is the period of time during which the agency worker is working temporarily at the user undertaking. The Directive therefore excludes open-ended assignments. A date for the start of the work at the user undertaking is needed, as well as a date or an event that determines the end of the assignment. However, the Directive sets no limit on the duration of the assignment. It would be most useful to set an upper limit with regard to the workplace, and not with regard to the temporary agency worker, so as to avoid a situation where one temporary agency worker can be replaced by another. In *Romania* there exists a regulation according to which a succession of contracts with a user undertaking is possible for a period of 18 months.

Attention needs to be paid in the transposition process so as to be clear about the difference between the temporary agency worker’s assignment to the user-undertaking and his/her employment contract with the agency.

The assignment must be temporary but the contract between the agency worker and the agency may be of any kind.

In practice, the problem arises in some Member States of (successive) one-day contracts. Yet since the European Directive on fixed-term work excludes temporary agency work from its scope, the European level does not offer a solution to this problem.

In Portugal an overarching approach has been adopted, according to which all forms of precarious work have been lumped together so that the employer is free to use any kind of “atypical” contract for a maximum of 3 years.

In the *German* context assignments do not necessarily need to be temporary; this should be judged unlawful under the Directive. The same applies to Finland where open-ended assignments are legal for the time being.

f) *Basic working and employment conditions* are the following: the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, as well as pay. The rules applicable are those in force in the user undertaking. This notion of basic working and employment conditions determines the scope of the principle of equal treatment through the reference made in Art. 5 (1). It is therefore essential that this notion should be correctly understood and transposed.

This definition of basic working and employment conditions is not the same as that found in the posting of workers directive. For example, health and safety are not mentioned, as it is considered (indent 13 in the preamble) that Directive 91/383/EEC is applicable.

The phrase “and/ or other *binding* general provisions” suggests that “legislations, regulations, administrative provisions, collective agreements” are examples and do not constitute an exhaustive list of legal instruments.

These terms might turn out to be very important in practice. What happens if the pay level is determined in the user undertaking by a handbook? Or if pay scales set only the minimum and maximum levels of pay determined by the experience of the staff? “Basic working and employment conditions” will need to be applied to temporary agency workers whenever they have a binding and general character and are “in force” in the user undertaking, i.e. expected to be applied in practice to all workers. It should be argued that this binding character is applicable also if a standard employment contract is used for all workers in the user undertaking (so as to include pay rates agreed upon in a contract of employment).

Attention must therefore be paid to ensuring that the words “basic working and employment conditions” are broadly defined in the transposition, such that the points mentioned cannot fall outside the scope of national regulation.

Employers will try to support a restrictive interpretation of the Directive, but such restrictive interpretation would not be in conformity with the aim (to ensure protection and improve quality by ensuring the principle of equal treatment) and the context of the Directive. Indent 2 of the preamble refers to the Charter of fundamental social rights, saying 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 will be achieved by harmonising progress on these conditions, mainly in respect of forms of work such as (...) temporary agency work (...)”

The equal treatment principle as laid down in Article 5 (1) is unrestricted. As such it is necessary to interpret Article 3 (1) f non-restrictively and in a manner which makes the principle of equal treatment effective (*effet utile*).

i) Concerning holidays: this looks as if it could be quite complex in practice.

In accordance with Directive 91/533/EEC (Art.2 (2 f)) regarding the obligation of the employer to inform employees of the conditions applicable to the contract or employment relationship, the temporary agency has to provide the agency worker with the following information on holidays:

“the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;”.

The temporary agency is the employer; therefore the rights to annual leave are determined by this employment contract and by any collective agreements existing in this agency. But the annual leave is to be found under “basic working and employment conditions” and is thus subject to the equal treatment principle. Therefore the comparator is the user undertaking where specific rules (e.g. collective agreement) on holidays might well exist also. It follows from this that an agency worker may be granted different leave entitlements in respect of the duration of assignments carried out in different user undertakings. These various entitlements will need to be calculated on a pro-rata basis for each assignment and added up to produce a total number of days of holiday. Such calculation is necessary only in relation to entitlements that exceed the minimum holiday entitlement laid down by legislation.

ii) concerning pay:

It will be crucial in the transposition process to pay attention to the question of what, for an agency worker, is to be included under the term “pay”. Will it include performance pay, maternity pay, and redundancy payments, paid time off for trade union duties, occupational pension schemes and other benefits? What about bonuses or performance pay awarded in an annual assessment when the assignment period is shorter?

Art. 157 TFUE paragraph 2, which establishes the principle of equal pay for male and female workers, can help as an indicator. It states: “*For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary*

and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.”

According to the ECJ’s interpretation of this provision, pay includes not only basic pay, but also, for example, overtime supplements, special bonuses paid by the employer, travel facilities, compensation for attending training courses and training facilities, termination payments in case of dismissal and occupational pensions.

A further point is that Governments need to stick to the existing definition of pay and cannot demonstrate their creativity in relation to temporary agency workers as a separate category.

Paragraph 2:

The Directive shall have no influence on the definition of pay, contract of employment, employment relationship or worker contained in the national law.

It is quite possible to argue that paid maternity leave is included, seeing that this right applies to all pregnant workers.

The Directive cannot exclude from its scope part-time or fixed-term workers on the sole grounds of their status. The reference to temporary agency workers here appears illogical. The wording was probably taken over from other Directives.

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 5 December 2011, 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 5 December 2011.

This article deals with restrictions and prohibitions which are possible only on grounds of general interest.

Article 4 does not state that restrictions or prohibitions with regard to temporary agency work are impossible; their existence is accepted. What Article 4 does stipulate is that any such restrictions or prohibitions can be justified only insofar as they are grounded in the “general interest”. This article requires no more than a review of any restrictions or prohibitions currently in force. It does not stipulate that they must be lifted but only that the Commission must be informed of their existence.

It is a very ambiguous article. What is to be understood as “general interest”? On what definition should the transposing law be based?

Paragraph one enumerates what could be understood as general interest: 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 that abuses are prevented. This list of what the general interest could comprise is not exhaustive; the justification could be based on other grounds. The phrase “the need to ensure that the labour market functions properly and abuses are prevented” expresses a highly important consideration in the context of the need to help fight current problems and abuses.

Can Article 4 be read as a “deregulatory” provision? It seems highly likely that, as a result of discussion on the national level, pressure will be accumulating for the exclusion of certain sectors. Indeed, national restrictions and/or prohibitions in some cases limit temporary agency work to certain sectors or occupations or certain cases, such as temporarily absent employees, exceptional increase of activity, etc. The latter applies in Belgium where the Ministry of Labour considers that this is perfectly in line with the scope of the Directive.

Close attention should accordingly be paid during transposition in order not to undermine any more protective regulations that may be in force on the national level. ILO Convention No. 181 (signed by Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal and Spain) permits, in its Art. 2 (4 a), states to prohibit private employment agencies from operating in respect of certain categories of workers or branches of economic activity. This is, of course, in order to protect workers, e.g. in dangerous occupations.

It is provided that the Member States, after consultation with the social partners, will review any restrictions or prohibitions in place by December 2011. This means a review to be conducted simultaneously with the transposition of the Directive, and “review” should be read to mean re-examination or discussion. This opportunity should be used by the trade unions to ensure the main aim of better protection of agency workers.

Paragraph 3 stipulates that the review of collective agreements may be carried out by the social partners themselves. This provision is intended to respect the

social partners' autonomy. But in practice employers might claim that those need to be withdrawn from the collective agreements on the basis of the Directive.

A process whereby restrictions and prohibitions are listed and examined will thus be required to take place at the national level. This examination should take place at the level at which the agreement was signed. The most important step is to explain the reasons which justify the restrictions and prohibitions.

It is crucial to note that the article does *not* state that, should the review show incompatibility between the national rules and the European legislation, the unjustified restrictions and prohibitions need be lifted.

Paragraph 4 makes it clear that the Directive does not interfere with national regulations concerning the business side of temporary agency work, such as the licensing, registration and monitoring of temporary work agencies. Such regulations are not to be understood as constituting prohibitions or restrictions within the meaning of Article 4(1), which means that they remain possible under the Directive.

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.

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.

The Directive sets equal treatment from day one as the general rule, and this is surely very positive. Any treatment differing from that day-one principle is to be agreed by the social partners, either through collective bargaining or through social partner agreements.

In practice, in order to avoid equal treatment, employers resort to the use of bogus self-employed workers.

However, equal treatment does not apply in general but only to the basic working and employment conditions as defined in Art. 3 (1 (f)), i.e. duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay.

This leaves outside the scope of the Directive other forms of leave, e.g. parental leave, with regard to which the revised framework agreement between the European social partners states in Art.1 (3) that persons with a contract of employment or employment relationship with a temporary agency cannot be excluded from the scope of this agreement solely due to their status. Therefore temporary agency workers are indeed entitled, vis-à-vis their employer the temporary agency, to take parental leave.

The basic working and employment conditions are to be at least equivalent to those that would be enjoyed by workers directly employed by the user un-

dertaking. Here the wording changed in the course of the legislation process. The Directive no longer speaks of a comparable worker but of the working conditions that would apply had the worker been recruited directly by that undertaking, regardless of the type of contract.

But how will the comparison operate in practice? The conditional “would” suggests that the comparison should be with a “hypothetical” comparator and that the existence of an actual worker doing broadly similar work in the user undertaking should be treated as useful evidence rather than determinative of the issue. In other words, it does not actually matter whether or not such a comparable worker actually exists in the particular user undertaking.

Paragraph 2 allows an exemption from the principle of equal treatment after consultation of the social partners – but with regard only to pay – when temporary agency workers have a permanent contract and are paid between assignments. This might be justified if additional protection exists for the worker. But attention should be paid in the transposition process to ensuring that this is possible only if the contract really is a fully fledged employment contract with all the normal labour law and social security rights attached to it. In the different national contexts it must be asked whether the trade unions wish to allow provision for such exemption.

But what does “continue to be paid” mean? No link is made to the level of pay. In *Lithuania* this is the minimum wage only. Attention needs to be paid in this respect in the transposition process to ensuring the best protection for the workers.

In *Germany* an exception exists with regard to equal pay from day one and this is that an employer can pay a reduced wage during the first six weeks of the relationship for an agency worker who was unemployed before entering the relationship with the agency. This would appear not to be in line with the Directive, since it is not one of the exemptions stipulated in Art. 1, 3. As such, this exception would be possible only if it were laid down in a collective agreement.

Attention needs to be paid to a possible form of abusive practice. We refer to the case where a temporary agency knows that it wishes to employ a worker only for a certain limited period of time but nonetheless issues a permanent contract in order to avoid equal treatment provisions concerning pay and then dismisses the worker on the date in question.

Paragraph 3 opens up the possibility to member states to foresee derogation by collective agreements from the equal treatment principle regarding working conditions and pay. A general opening of the possibility to derogate by collective agreement without further details/conditions cannot be regarded as sufficient in the light of the Directive.

The question in the transposition process will thus be whether this paragraph should be taken over by your national legislator. A major issue here is

forms of remuneration other than wages, examples of which include bonuses and welfare benefits.

Paragraph 4 was included in the text of the Directive in the interests of the UK, in order to allow deviation from the day-one principle and inclusion of a qualifying period (12 weeks), on the basis of a national agreement being a “collective agreement”. No other countries appear to be in a position to make use of this paragraph.

Paragraph 4 says that this derogation “may include a qualifying period for equal treatment”, which would mean that the derogation can relate equally well to something other than a qualifying period, subject to the legislator’s powers of invention.

Paragraphs 3 + 4 provide for a safeguard, when derogating from the principle of equal treatment, the condition being: “while respecting the overall protection of temporary agency workers” and “provided that an adequate level of protection is provided”. Assessing the precise meaning of these phrases and whether they mean the same thing would seem to be somewhat problematic. Taking the *British* example with a qualifying period of 12 weeks, 55% of the agency workers will not enjoy equal treatment. A debate is required to establish what alternative protection these agency workers actually do enjoy.

Furthermore, the risk is that, in order to estimate the “overall protection”, a package approach may be adopted, meaning that one benefit having being cut, another must be raised. How is an agency worker going to be able to judge whether or not his/her protection is “overall” the same as that of other workers?

Paragraph 4 is problematic insofar as it states that social security is not necessarily covered by equal treatment, that this is a choice left to the national level. Therefore, when transposing this Directive into national law, very close attention needs to be paid to ensure that this matter is adequately dealt with at national level, so as to ensure the continuity of rights of the agency workers between different contracts.

One solution might be to set up occupational pension schemes at the level of the temporary-work agency or at sectoral level, as is done in some collective agreements, in order to ensure continuity for the workers in their payments for their supplementary pensions. Another possibility (this is actually the case in Belgium) is that the workers should receive a gross premium comparable to supplementary pension rights.

Paragraph 5 deals with the prevention of abuse, especially in the form of successive assignments. Here again, it is crucial that the transposition should be carefully worded so as to rule out all possibility of abuse in this respect since several successive assignments do indeed exclude temporary agency workers from equal treatment, other than the basic working conditions and pay, as mentioned in the Directive. In *Germany* several employment contracts for

temporary agency workers could, formerly, follow on from one another over a period of two years (§ 14 II TzBfG); this would seem now to be impossible under Article 5 Paragraph 5.

In relation to the *UK's* wish for a qualifying period, it should be ensured that short breaks during assignments do not re-launch such qualifying periods. How long must such breaks be?

CHAPTER II EMPLOYMENT AND WORKING CONDITIONS

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.

The information obligations of the user undertaking are stipulated in paragraph 1. The wording is drawn from the fixed-term work Directive.

Paragraph 2 ensures the possibility for temporary agency workers to be taken over by the user undertaking after the assignment. This in order to enable temporary agency workers access to permanent employment. While the worker cannot be required to pay fees in such instances, the user undertaking might be required to do so.

Paragraph 3 specifies that workers shall not be charged any fees. What does the term “fee” embrace? What about housing, travel, etc. In *France* there exists a practice known as “*portage salarial*” e.g. for translators; this would now appear to be considered unlawful. Problems could also arise in the Netherlands, where fees are payable in some cases.

Paragraph 4 specifies what is understood by amenities or collective facilities under the equal treatment principle.

Paragraph 5 deals with training for temporary agency workers. It can indeed be shown that in practice this group of workers receives fewer training opportunities. The directive on health and safety at work for temporary agency workers does not properly specify the respective responsibilities of the agency and user company as regards training.

In relation to paragraph 5, it might be useful to refer to the framework agreement on inclusive labour markets concluded among the European social partners, as this agreement contains provision for the introduction of individual competence development plans (in line with the framework of actions for the lifelong development of competences and qualifications) drawn up jointly by the employer and the worker, taking into account the specific situation of each employer, particularly SMEs, and worker. These plans identify both the competences required of the worker in a given work situation as well as – on the basis of shared responsibilities according to individual situation – actions to develop the worker’s competences.

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.

This Article regulates the representation in the temporary-work agency and/or the user undertaking of the temporary agency workers. They may be represented in the

- a) temporary agency only
- b) temporary agency and user undertaking at the same time or
- c) user undertaking only.

When represented in the temporary agency, attention needs to be paid to those countries where the temporary agencies are relatively small and the thresholds for worker representation relatively high, in order to avoid a situation where a high percentage of agency workers will not be represented.

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 [7], 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 workers set up in accordance with national and Community legislation.

This article regulating the information of workers' representatives refers to Directive 2002/14/EC. Is it therefore to be assumed that 2002/14 can only broaden the scope but not reduce it?

The user undertaking must provide worker representatives with "suitable information" on the use of temporary agency workers when providing information on the employment situation. What does "suitable information" imply? The number of agency workers in the enterprise, the positions they occupy, etc. – what are their basic working and employment conditions? And in which situations? Are these to be specifically enumerated or is there to be an obligation to supply information in general?

In *Germany* an explicit reference exists with regard to workplace safety procedures.

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 9 lays down the more favourable treatment principle, as well as the principle that no reduction with regard to already existing standards is possible during transposition of the Directive into national legislation.

Article 10

Penalties

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings. 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 5 December 2011. 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.

Since the regulations concerning penalties are in the hands of the national legislator, attention must be paid during transposition to ensuring that the penalties are really effective, proportionate and dissuasive. Who is made

liable in the national law: the temporary-work agency as employer, the user undertaking, or both in joint liability?

In *Germany* violation of the equal treatment principle is not sanctioned in any way; the legislator will now have to change this.

The means of enforcing the obligations resulting from the terms of this Directive are foreseen for the workers and/or their representatives; in other words, they can sue individually or collectively.

Article 11

Implementation

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 5 December 2011, 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.

The implementation deadline for the national transposition of this Directive is 5 December 2011.

Article 12

Review by the Commission

By 5 December 2013, 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.

The Commission is scheduled to review this Directive in 2013.

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.

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