

## EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY LEGISLATION

Submitted by the Department of Trade and Industry on 29 April 2002.

A Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers

### SUBJECT MATTER

1. The stated aims of the proposal are to improve the quality of temporary agency work by applying an equal treatment principle to temporary agency workers and to establish a suitable framework for the use of temporary agency work. It applies to workers employed by temporary work agencies and posted to client companies to work under the supervision of those client companies. The directive would mean that an agency worker assigned to work under the control of a client company should not be given less favourable basic employment conditions than a similar permanent worker in that client company, unless this is objectively justified. The proposal contains three limited derogations from this principle. It also requires that member states periodically review restrictions on the use of temporary agency workers and take measures to make it easier for them to find permanent jobs. There is no scrutiny history.

### MINISTERIAL RESPONSIBILITY

2. The Secretary of State for Trade and Industry has primary responsibility. The Minister for Employment and Learning has responsibility for implementation in Northern Ireland.

### LEGAL AND PROCEDURAL ISSUES

#### Legal basis

3. The legal basis proposed by the Commission is Article 137(2) of the Treaty. See comment under "Policy Implications" below at paragraph 14.

#### Legislative procedure

4. The Co-decision procedure of the European Parliament will apply, pursuant to Article 251 of the Treaty.

#### Voting procedure

5. The Council would adopt a common position by a qualified majority procedure.

#### Impact on UK law

6. There is no general obligation in UK law to provide for equal treatment between agency workers and permanent workers as required by the proposal. Implementing legislation would be required, which could be achieved by separate regulations for

Great Britain and Northern Ireland. These would need to ensure equal treatment as between agency workers and workers in client companies. They would need to cover statutory minimum and contractual rights related to working time, pay (although see paragraph 15), certain maternity rights and the prevention of discrimination. This could require some amendments to maternity provisions in the Employment Rights Act 1996, as well as specific equal treatment legislation related to contractual terms. Legislation on European Works Councils would need to be amended, so that all agency workers counted towards thresholds when calculating whether agencies needed to establish European Works Councils. Corresponding amendments would be needed to legislation in Northern Ireland.

7. The Government is currently updating the Conduct of Employment Agencies and Employment Businesses Regulations and the new regulations could require further amendments in the light of this proposal. Legislation implementing the new Equal Treatment Directive would need to apply to temporary agency workers in order to comply with the current proposal. Amendments would be required to legislation in Great Britain and Northern Ireland.

### **Gibraltar**

8. The proposal applies to Gibraltar.

### **EUROPEAN ECONOMIC AREA**

9. The measure is potentially applicable to the EEA.

### **SUBSIDIARITY**

10. It is stated that the directive provides a stable framework for the further development of agency work in the EU and responds to the objectives of improving working conditions and promoting employment and social dialogue set out in Article 136. It builds on negotiations on agency work between the European Social partners, which broke down in May 2001 and responds to the joint declaration of the European social Partners in the temporary agency sector. The Commission takes the view that extending the equal treatment principle to agency workers at EU level and creating a common framework for their use will promote agency work in the EU. Its proposal would harmonise the position for agency workers posted at a national level as well as those posted transnationally. The proposal also follows directives on part-time and fixed term work, agreed in 1997 and 1999 respectively and supplements both this and directive 91/383/EC on the health and safety of temporary workers, in developing a framework of protection for those in 'non-standard' employment relationships.
11. The Government intends to examine this case further and seek certain clarifications from the Commission. In particular, it is not clear that the objectives in question cannot be sufficiently achieved by member states' action. Directive 96/71 concerning the posting of workers covers transnational posting of temporary agency workers. Temporary work agencies that wish to post their workers to client companies established in other member states must give them the minimum statutory employment rights in force in the host country.

## POLICY IMPLICATIONS

12. The Government believes that temporary agency workers deserve adequate protections, which is why the national minimum wage and working time legislation make specific provisions to cover them. Agency work can provide a useful way in to the labour market, particularly permanent jobs, for workers. It can increase labour market flexibility in ways which benefit both business and workers. It can also offer workers who want to control or vary their patterns of work greater choice than permanent work. The Commission claims that the proposal would make temporary agency work more attractive to those looking for work and increase its status. However, there is a risk that the proposal could decrease the attractiveness of agency workers to user companies, which might reduce the number of jobs available. The Commission assessment does not adequately address whether introducing a complex equal treatment requirement could discourage employers from making use of temporary agency workers and what the impact of this may be on employment levels.
13. Nine member states already apply an equal treatment requirement as between agency workers and similar workers in the client company. In these member states, wage levels and other employment conditions covering entire sectors are often fixed by collective agreements. It is therefore easy for an agency to be aware of the employment terms its clients' workers have and apply them to their own workers. In the UK, collective bargaining is more likely to take place at workplace level and is not universal. It would therefore be difficult for agencies to find out what terms their clients gave workers and therefore to comply with the regulations – this could impose significant administrative burdens. Agency workers could also find their employment terms and conditions changed significantly between assignments. The derogations from this equal treatment principle – for agency workers on assignments that can be accomplished in six weeks or less, agency workers employed on permanent contracts or where a collective agreement allows – would not always be applicable in the UK context. In particular, the derogation for collective agreements could only be used if more agency workers wished to join trades unions. Additional flexibility in the directive would be necessary to make it more compatible with the situation in the UK.
14. As regards the legal basis, there is an issue as to whether the directive can cover pay. The proposal applies an equal treatment principle to certain 'basic working conditions' listed at article 3(1)(d), including 'pay'. However, Article 137(6) provides that, 'the provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. In the light of this, the Government took the view when agreeing to directives 97/81/EC and 99/70/EC on part-time work and fixed term work respectively, that these directives, which also have article 137 as a legal base, could not cover pay<sup>1</sup>. This view was recorded in the council minutes when both directives were agreed. Unlike the proposal on agency workers, the fixed term and part time directives do not specifically state which employment conditions they apply to and do not mention pay. On the face of it, it seems difficult to reconcile the specific inclusion of pay in the directive with the provision in Article 137(6).

## CONSULTATION

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<sup>1</sup> When implementing the directives on part-time and fixed term work, the Government decided to make regulations covering pay for domestic policy reasons, by taking powers in section 19 of the Employment Relations Act 1999 and clauses 45 and 46 of the Employment Bill 2001.

15. No formal consultation has been held. Officials have held initial discussions with groups representing agencies, users of agency workers and workers, in particular the Trades Union Congress, Confederation of British Industry, Local Government Employers' Organisation, British Chamber of Commerce and Engineering Employers' Federation.

#### **REGULATORY IMPACT ASSESSMENT**

16. This is attached.

#### **FINANCIAL IMPLICATIONS**

17. None.

#### **TIMETABLE**

18. The Presidency has not yet scheduled any discussions in the Council Working Group.

**Alan Johnson**

**MINISTER OF STATE FOR EMPLOYMENT RELATIONS AND THE REGIONS  
DEPARTMENT OF TRADE AND INDUSTRY**