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STATEMENT OF THE COUNCIL'S REASONS

Subject : Common Position adopted by the Council on 15 September 2008 with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 20 March 2002, the Commission adopted in the context of the Lisbon strategy a proposal for a Directive concerning "working conditions for temporary workers" to better reconcile flexibility in labour markets and job security, and create more and better jobs.

Acting in accordance with Article 251 of the Treaty, the European Parliament delivered its opinion on first reading on 21 November 2002.

The Economic and Social Committee gave its opinion on the Commission's proposal on 19 September 2002.

The Committee of the Regions stated in a letter dated 23 May 2002 that it would not be submitting an opinion on the proposal for a Directive.

On 28 November 2002, the Commission adopted an amended proposal, taking into account the opinion of the European Parliament.

The Council reached political agreement on a Common Position by qualified majority during its session of 9 and 10 June 2008, in parallel with a political agreement, also by qualified majority, on the Working Time Directive.

In accordance with Article 251(2) of the EC Treaty, the Council formally adopted its Common Position by qualified majority on 15 September 2008.

II. OBJECTIVE

The objective of the draft 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 is applied to temporary agency workers and by recognising temporary work agencies as employers. The draft Directive also aims at establishing 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.

III. ANALYSIS OF THE COMMON POSITION

1. GENERAL OBSERVATIONS

According to Article 137(1) of the Treaty "*the Community shall support and complement the activities of the Member States in*" a number of fields, including "*working conditions*".

Article 137(2) of the Treaty states that the Council "*may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States*".

The Council's Common Position is in accordance with the objectives of Article 137(2) of the Treaty in the area covered, since it is designed to ensure the protection of temporary agency workers and to improve the quality of temporary agency work. In addition, the Common Position also takes into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing to the creation of jobs and to the development of flexible forms of working.

The Common Position respects the objectives put forward by the Commission and supported by Parliament, in particular that the principle of equal treatment from day one should be the general rule. In general, it includes a majority of the amendments resulting from Parliament's first reading of the Commission's proposal.

2. STRUCTURE AND KEY ELEMENTS

2.1 **General structure and the title of the Directive**

The general structure of the Common Position is in line with the general structure of the Commission's amended proposal. Concerning the title of the Directive, the Council has followed the Commission's amended proposal and opted for a more general title: the Directive on temporary agency work. It is to be noted that, in a number of instances, the Council's Common Position clarifies the key terms and expressions, in particular by using consistently the English terms "temporary agency worker" and "temporary work agency".

2.2 **Main differences from the Commission's amended proposal**

In Article 4 on the review of restrictions and prohibitions on the use of temporary agency work, while essentially following the spirit of the Parliament's Amendment 34, the Council added a new paragraph 3 concerning the review of agreements negotiated by the social partners. The Council considered that, in order to respect their autonomy, the social partners should themselves review whether the restrictions and prohibitions negotiated by them were justifiable on the grounds set out in the first paragraph of Article 4. The Council did not consider it necessary to retain an explicit reference to the discontinuation of unjustified restrictions and prohibitions.

While generally following the Commission's amended proposal, the Council modified Article 5(3) and substantially reformulated Article 5(4) and (5). The Council also considered that the principle of equal treatment from day one should be the general rule. Any treatment of temporary agency workers differing from that principle should be agreed by the social partners, either through collective bargaining or through social partner agreements concluded at national level. In the light of the modifications made to Article 5(3) to (5), a specific exemption for short-term contracts (six weeks or shorter), as envisaged in the Commission's amended proposal, was therefore no longer considered necessary or appropriate.

In Article 5(3) and (4), as in a number of other instances, the Common Position reflects those of the Parliament's amendments which stress the importance of the role of social partners in negotiating arrangements on working and employment conditions. In Article 5(5), the Common Position echoes the Parliament's concerns in relation to the prevention of misuse.

In Article 10, the Council's Common Position includes a new paragraph 1 concerning measures the Member States are expected to take in order to ensure compliance with the Directive by temporary work agencies and user undertakings.

The Council considered that the Member States would need three years to implement the Directive, while the Commission had proposed a two-year implementation period (Article 11).

In addition, a number of recitals have been updated and modified, in order both to explain the modifications introduced by the Council to the Commission's amended proposal and to describe developments since the amended proposal was published in 2002. For example, references to the relaunch of the Lisbon Strategy, in 2005, and to the agreed common principles of flexicurity, endorsed by the European Council in December 2007, were included in recitals 8 and 9.

3. THE EUROPEAN PARLIAMENT'S AMENDMENTS IN FIRST READING

3.1 European Parliament amendments adopted by the Council

Altogether 26 amendments (numbers 1, 15, 19, 20, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 40, 42, 43, 46, 47, 48, 49, 51, 85 and 86) are taken up in their entirety, if not word-for-word then at least in spirit, in the Common Position.

Specifically, the Council accepted Amendment 1 to the title, three amendments to the recitals (Amendments 15, 19 and 20) as well as a number of amendments to the following articles: Article 1 on the scope (Amendment 23), Article 2 on the aim of the Directive (26), Article 3 on definitions (27-33 and 85), Article 4 on the review of restrictions and prohibitions (34-36), Article 5 on the principle of equal treatment (40, 42, 43 and 86), Article 6 on access to employment, collective facilities and vocational training (46-49), and Article 7 on the representation of temporary agency workers (51).

It is to be noted that some amendments have been included in another part of the text of the Common Position than originally suggested by the Parliament. For example, a part of Amendment 32 is reflected in Article 5(1) and not in Article 3(1)(d). Another example is Amendment 36 that, rather than in Article 4, is reflected in a more general form in recital 20.

3.2. European Parliament amendments adopted partially by the Council

Amendment 4 on "*new forms of regulated flexibility*" is reflected in spirit in the text of recital 9; however, the Council considered it appropriate to update the text of the recital and to refer to the common principles of flexicurity agreed in 2007, rather than use the formulation suggested by the Parliament in its first reading opinion.

Amendment 6 is accepted in spirit, as recital 5 specifies the links between this Directive and Directive 1999/70/EC of 28 June 1999 on fixed-term work. Concerning this amendment, the Common Position follows the amended proposal of the Commission.

The thrust of Amendment 12, on employment contracts of an indefinite duration being the general form of employment relationship, is included in recital 15.

The underlying objectives of Amendment 18, on allowing the social partners to negotiate and define the basic working and employment conditions of temporary agency workers when these differ from the principle of equal treatment, are included in the Common Position (see recitals 16 and 17 and Article 5(3) and (4)).

Amendment 24 is accepted partly as it is useful to clarify, in line with the amended proposal, that both user undertakings and temporary work agencies are covered by the Directive. However, it would not be appropriate to allow Member States to exclude certain undertakings from the principle of equal treatment (the last part of the amendment).

Amendment 54 (on job creation, on making temporary agency work more attractive and on recognising different national circumstances) is accepted in spirit in Article 2 (the aim of the Directive), which now includes the wording "*while taking into account the need for establishing 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*". The need for taking into account different national circumstances is explicitly referred to in recitals 12, 16, 17 and 19.

Amendment 87 is partly taken up in Article 5(1); while the first part of the amendment (on the principle of equal treatment) was included in the Commission's amended proposal and is taken over by the Council in its Common Position, the second part had become redundant as the concept of "comparable worker" had been removed from the text (cf. Amendment 28 accepted by the Commission and the Council).

In line with the Commission's amended proposal, Amendment 92 is partly accepted in Article 5(3). It was, however, considered appropriate to state specifically that the social partner agreements should respect "*the overall protection of temporary agency workers*" when establishing arrangements concerning working and employment conditions differing from the principle of equal treatment.

3.3 European Parliament's amendments not adopted by the Council

The Council did not consider it advisable to include amendments 3, 5, 7, 8, 9, 10, 11, 12 (first part), 13, 16, 21, 22, 25, 44, 45, 52, 53, 71, 84, 88, 91, 93, 94 and 95 in its Common Position, for the following reasons:

(i) Recitals

There was no specific need for the text to explain in the recitals certain historical developments concerning temporary agency work or the draft Directive; therefore the Council followed the Commission's amended proposal in rejecting Amendments 3, 5, 7 and 11 as well as the first part of Amendment 12.

In line with the Commission's amended proposal, Amendments 8, 9, 10, 13 and 84 were not adopted by the Council. The amendments contained specific examples of how temporary agency work could either help or harm temporary agency workers themselves (women, workers with interrupted work histories, etc.) or user undertakings (especially small and medium-sized undertakings), or affect systems or traditions of industrial relations.

Amendments 16 and 94 had become redundant as the Commission's amended proposal no longer contained the former recital 16 on when differences in treatment would be considered acceptable.

The reasons explained in connection with Article 7 (see point (v) below) apply also to the rejection of Amendment 21 on information, consultation and participation of employees.

Amendment 22 concerning cross-border labour mobility (accepted by the Commission), which could be considered as an example, is not included in the Common Position as the text is not limited in any specific way to cross-border mobility.

The Council reworded recital 12 making it substantially shorter. Some aspects of Amendment 93 (e.g. the call for clarity concerning the rights of temporary agency workers and concerning the status of temporary work agencies as employers) have, however, been included in the redrafted text of the recital.

While recital 15 on temporary agency workers with a permanent contract with their agency has been strengthened by the Council by adding a sentence on employment contracts of an indefinite duration being the general form of employment relationship, the Common Position does not include the more detailed wording of Amendment 88 on what such permanent contracts should offer to a temporary agency worker.

(ii) Article 1 - Scope

Following the Commission's amended proposal, the Council did not accept Amendment 25 which would have extended the possibility of not applying the Directive to employment contracts or relationships concluded under specific training programmes without any public support.

(iii) Article 4 - Review of restrictions and prohibitions

In its Amendment 91, the Parliament called for a comprehensive review of national legislations concerning temporary agency workers. The Council, like the Commission in its amended proposal, considered that this would be outside the scope of the Directive.

(iv) Article 5 - The principle of equal treatment

Following the amended proposal, Amendment 39 (on non-discrimination) was considered redundant in view of the incorporation in the text of Article 5(1) of relevant elements of Amendment 32.

While Amendment 44 has become redundant, as Article 5(5) of the amended proposal was not included in the Common Position, it should be noted that the spirit of the amendment was followed in the general thrust of the text calling for the respect of different national practices.

Amendment 45 on safety and health at work and on safety training was considered superfluous as the relevant Community legislation on safety and health at work, and especially Directive 91/383/EEC 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, would in any event have to be applied. Therefore, the Council followed the Commission's amended proposal in rejecting this amendment.

(v) Article 7 - Representation of temporary agency workers

Amendment 95, with its accompanying Amendment 21 to recital 21, was not adopted as it went beyond the scope of the article on the representation of temporary agency workers.

In this context it should be noted that Article 8 of the Common Position includes a reference to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

(vi) Article 10 - Penalties

The Council considers that the wording "*workers and/or their representatives*" in Article 10(2) correctly takes into account the variety of different situations in the labour markets of the Member States. The Common Position therefore maintains that expression, rejecting Amendment 52.

(vii) Article 11 - Implementation

The text of Article 11 on implementation was considered sufficiently clear without the suggested amendment 53 reading "*where applicable in accordance with their national legislation and practices*".

Amendment 71 (on a five-year period for not applying the Directive in certain situations) has become redundant as the Common Position in its Article 5 now makes the principle of equal treatment a general rule from day one and does not include the possibility of excluding assignments with a duration shorter than six weeks from the application of that principle. However, it should be noted that the essence of the last part of the amendment, dealing with the prevention of misuse, has been included in Article 5(5) of the Common Position.

4. CONCLUSION

The Council considers that, as a whole, the Common Position is in line with the fundamental objectives of the Commission's amended proposal. The Council also considers that it has taken account of the principal objectives pursued by the European Parliament in its amendments to the Commission's original proposal.
