EUROPEAN
COMMISSION

Brussels, 21.3.2014
COM(2014) 176 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on the application of Directive 2008/104/EC on temporary agency work

{SWD(2014) 108 final}

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on the application of Directive 2008/104/EC on temporary agency work

1. INTRODUCTION

1.1. The Directive

Directive 2008/104/EC[1] on temporary agency work (hereafter 'the Directive') was adopted by the European Parliament and the Council under Article 137(2) of the EC Treaty (now Article 153(2) TFEU).

Its purpose 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, 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 job creation and to the development of flexible forms of working.

In particular, the Directive:

- establishes the principle of equal treatment in user undertakings, while allowing for certain limited derogations under strict conditions;
- provides for a review by the Member States, during the transposition period, of restrictions and prohibitions on the use of agency work;
- improves agency workers' access to permanent employment, to collective facilities in user undertakings and to training;
- includes provisions on the representation of agency workers.

The services provided by temporary-work agencies are excluded from the scope of Directive 2006/123/EC[2] on services in the internal market. This Directive states in its Article 2(2)(e) that it shall not apply to the services of temporary-work agencies.

1.2. Legal basis and object of the report

This report reviews Member States' implementation of the Directive as required in Article 12, which provides that:

'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 aim of this report is twofold. First, it provides an overview of how Member States have implemented the Directive and highlights key problems. However, it cannot provide an

[1] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9.

[2] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

exhaustive account of all national implementation measures.[3] Second, it examines whether experience gained in applying the Directive, two years after the end of its transposition period, may justify any amendments to the text currently in force.

The report was drawn up on the basis of the Commission's examination of Member States' provisions implementing the Directive. It is also based on replies the Commission received to two questionnaires, one on options chosen to implement the Directive into national law, the other on the review of the Directive and cost issues.

Both were submitted to the Member States. The second was also addressed to the social partners at European level. The governmental expert group on the transposition of the Directive, in whose work the European social partners have been involved, also contributed to this report. The report also draws on information available to the Commission from other sources, such as independent expert reports from the European Labour Law Network.

Part 5 of the report is based to a large extent on Member States' reports on the results of the review of restrictions and prohibitions on the use of temporary agency work and on complementary information provided by a number of countries at the Commission's request. Other available sources, notably complaints submitted to the Commission and information originating from the European social partners, were also used.

2. TRANSPOSITION PROCESS

Under Article 11(1) of the Directive, Member States were under a duty to transpose the Directive into national law by 5 December 2011, either by adopting and publishing the laws, regulations and administrative provisions necessary to comply with it, or by ensuring that the social partners introduced the necessary provisions by way of an agreement.

All Member States have transposed the Directive. In a number of cases, transposition occurred late and only after the Commission had launched infringement proceedings. In early 2012, the Commission sent letters of formal notice for non-communication of transposition measures to 15 Member States. Later that year, reasoned opinions were sent to three Member States. In the Member State that was the last to transpose the Directive, the implementing legislation entered into force on 1 July 2013.

Transposition was carried out in a variety of different ways. This is linked to the fact that before the Directive became applicable, temporary agency work was regulated by law in some Member States, mainly through collective agreements in others, or by a combination of both. Some Member States did not have a legal framework applicable to temporary agency work, so they specifically regulated this form of work for the first time while transposing the Directive.. Some Member States amended one piece of legislation, while others modified several legal texts.

Three Member States (*France*, *Luxembourg* and *Poland*) considered that their national provisions already complied with the Directive and did not require any amendment on its entry into force.

[3] Nothing in this report should be understood as prejudging a position which the Commission may take in the future in any legal proceedings.

3. SCOPE AND DEFINITIONS (ARTICLES 1 AND 3)

3.1. Application of the Directive to user undertakings not engaged in economic activities (Article 1(2))

Article 1(2) states that the 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.

Temporary-work agencies normally fulfil the condition of being engaged in economic activities. However, some activities of user undertakings, for instance, those carried out by parts of the public sector, cannot be regarded as economic.[4] Member States are entitled to exclude user undertakings that are not engaged in economic activities from the scope of the Directive. Nevertheless, 19 Member States apply the Directive to user undertakings not engaged in economic activities. *Bulgaria, Cyprus, Denmark, Ireland, Luxembourg, Malta, the Netherlands, Romania* and the *United Kingdom* have chosen to exclude such undertakings from the scope of their implementing provisions.

At this stage, the implementation of this provision does not appear to pose any particular problem.

3.2. Derogation for specific public or publicly supported vocational training, integration or retraining programmes (Article 1(3))

Article 1(3) enables Member States, after consulting the social partners, to exclude from the scope of their transposition measures the employment relationships concluded under a specific public or publicly-supported vocational training, integration or retraining programme.

A large majority of Member States do not exclude any of the above-mentioned employment relationships from their national implementing provisions.

Austria, Cyprus, Denmark, Hungary, Ireland, Malta and *Sweden* do apply this exclusion. In *Cyprus* and *Ireland*, the aim is to facilitate the integration or re-integration of certain categories of people who may encounter difficulties in entering or re-entering the labour market. *Sweden* excludes workers benefiting from special employment support or in sheltered employment, but only as regards the principle of equal treatment. Provisions regarding, for instance, access to amenities and collective facilities and information about vacant posts in user undertakings remain applicable to this group of employees.

The Commission has not been made aware of any specific difficulty in implementing this derogation or of any issue of compliance of national implementing measures with the Directive.

[4] In accordance with the Treaty rules on the internal market, all services provided for remuneration must be classified as economic activities. According to Court of Justice case law, the service does not necessarily have to be paid for by those for whom it is performed, but there must be a consideration for the service in question. Activities which are not performed in return for a consideration, e.g. by the State or on its behalf in the framework of its missions in the social field (for instance, courses taught under the national education system or in an establishment of higher education which is financed essentially out of public funds) do not constitute economic activities (see Commission Staff Working Document 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest' (SEC(2010) 1545 final of 7.12.2010), notably points 6.1 to 6.3).

3.3. Definitions (Articles 3(1)(a) to (e))

Articles 3(1)(a) to (e) provide definitions of a number of the main notions used in the Directive: 'worker', 'temporary-work agency', 'temporary agency worker', 'user undertaking' and 'assignment'.

Several Member States (*Cyprus*, *Greece*, *Hungary*, *Ireland*, *Italy*, *Lithuania*, *Malta*, *Portugal*, *Sweden* and *United Kingdom*) have provided definitions of at least some of these notions in their transposing legislation, by using wording that in most cases is very similar to that used in the Directive. This usefully clarifies the scope of the national implementing measures. Other Member States have not adopted such definitions.

In *Latvia*, the transposing legislation expressly states that the temporary-work agency shall be regarded as the employer of the temporary agency worker. This provides a useful clarification in compliance with the definitions in Article 3(1), according to which a temporary agency worker has 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.

4. PRINCIPLE OF EQUAL TREATMENT

4.1. Equal treatment as regards basic working and employment conditions (Articles 3(1)(f), 3(2), first subparagraph, and 5(1))

Article 5(1) lays down the principle of equal treatment in the user undertakings. According to this principle, from the first day of their assignment, agency workers have to have the basic working and employment conditions that would apply if they were recruited directly by the user firm to occupy the same job. These conditions cover pay, as well as the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays. They must be applied to agency workers to the extent that they constitute binding general provisions in force in the user undertaking. The conditions must also comply with rules in force in the user undertaking on protection of pregnant women and nursing mothers, protection of children and young people, as well as equal treatment for men and women and any anti-discrimination measures[5].

Certain derogations from the principle of equal treatment may be applied. However, the Directive defines strict conditions for these, as explained below.

A number of Member States already applied the principle of equal treatment before the Directive entered into force. Currently, all Member States recognise this principle. However, 12 Member States allow derogations from the principle under certain conditions. Moreover, most Member States have opted for a wording that differs to a variable extent from the terms used in the Directive, in particular as regards the transposition of Article 5(1), first subparagraph, which defines the principle of equal treatment, and of Article 3(1)(f), which determines the scope of the notion of 'basic working and employment conditions'.

[5] Compliance with Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, 28.11.1992, p. 1), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16) has not been monitored in this report.

For example, in *Estonia*, the implementation of the principle of equal treatment is based on the notion of 'comparable employee' in the user undertaking. If there is no comparable employee, the comparison should be made by reference to the applicable collective agreement. If there is no collective agreement, an employee engaged in the same work or similar work in the same region is deemed to be a comparable employee. It appears that in *Poland* and the *United Kingdom*, conditions to be applied to agency workers are also determined by comparison with comparable employees in the user undertaking.

The Commission will monitor whether in practice such reference to a comparable employee ensures the correct application of the principle of equal treatment or whether it may lead to discriminatory practices against temporary agency workers. If necessary, it will adopt appropriate measures to ensure full compliance with the Directive.

The Commission will also make sure that the notion of 'basic working and employment conditions' is correctly implemented in all Member States. This notion covers pay as well as the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays. This is a compulsory list from which no derogation is possible.

4.2. Possible derogations

4.2.1. Derogation provided for in Article 5(2)

In accordance with Article 5(2), Member States may, after consulting the social partners, provide for an exemption from equal pay if temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. A majority of Member States do not apply this derogation.

However, *Hungary*, *Ireland*, *Malta*, *Sweden* and the *United Kingdom* provide for the possibility to derogate from equal pay during assignments for agency workers with an open-ended contract of employment who are paid even between assignments, i.e. during periods in which they are out of work.

In *Hungary*, according to the Labour Code, agency workers who meet these conditions are entitled to equal treatment as regards the payment of wages and other benefits as of the 184th day of work at a user undertaking.

In *Ireland*, the Protection of Employees (Temporary Agency Work) Act of 2012 states that temporary agency workers with a permanent contract of employment are not entitled to equal pay for the duration of their assignments, provided that in the period between assignments they are paid at least half the pay to which they were entitled in respect of their most recent assignment, and not less than the national minimum wage. Before an agency worker enters into a contract of employment, the temporary-work agency must notify him/her in writing that he/she will not be entitled to equal pay.

Similar provisions apply in the *United Kingdom*, where the Agency Workers Regulations 2010 provide for an exemption from equal treatment provisions on pay and holiday pay with respect to agency workers who meet the conditions of Article 5(2). In the time between assignments, agency workers are entitled to a minimum of 50% of the basic pay paid to them during the last 12 weeks of the previous assignment and, in any event, to the national minimum wage. The contract of employment must include a statement that the agency worker will not be entitled to equal pay.

In *Malta*, the Temporary Agency Workers Regulations 2010 state that the provision introducing equal pay shall not apply to a temporary agency worker who has an indefinite contract of employment and is paid between assignments.

Pursuant to the legislation transposing the Directive in *Sweden*, as regards pay, the equal treatment requirement does not apply to workers who are permanently employed with a temporary-work agency and are paid between assignments.

Thus, the five Member States referred to above do derogate from the principle of equal pay during periods in which the agency workers are assigned to user undertakings. Without prejudice to the applicable minimum wages, none of them has adopted rules limiting the extent of the derogation during assignments, for instance, by setting a specific minimum level of pay. As regards periods between assignments, *Hungary*, *Malta* and *Sweden* have not set minimum levels of pay to be respected. However, in *Malta*, agency workers are entitled to the same level of pay during and between assignments.

As a derogation from the principle of equal treatment, Article 5(2) is to be interpreted restrictively. It does not concern temporary agency workers on fixed-term contracts, and can only be applied to those working under a permanent contract of employment.

In the light of the national implementation of Article 5(2), this derogation raises several questions of interpretation, notably as to whether the pay level of agency workers during and between their assignments may legally be as low as the applicable minimum wage, if any, while minimum wages are not subject to any lower limit. The measures intended to prevent misuse of the derogation need to be considered as well.

These questions should be examined in-depth at future meetings of the Expert Group on the transposition of the Directive. In any case, the Commission will adopt appropriate measures to ensure that all Member States fully comply with the Directive.

4.2.2. Derogation provided for in Article 5(3)

Under Article 5(3), Member States may, after consulting the social partners, enable them to conclude or uphold collective agreements on the working and employment conditions of temporary agency workers derogating from the principle of equal treatment, providing the overall protection of agency workers is respected. Article 5(3) should be read in the light of Article 2(2) of Directive 91/383/EEC[6] on the safety and health at work of workers with a fixed-term or a temporary employment relationship. According to this provision, different treatment of a worker who has a temporary employment relationship with a temporary employment business is not justified with respect to working conditions regarding the protection of safety and health at work.

A majority of Member States have chosen not to apply the derogation of Article 5(3). Nevertheless, this provision provides for a degree of flexibility and takes into account the fact that in certain Member States, temporary-agency work has traditionally been regulated mainly by collective agreements. Ten Member States (*Austria, Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, Italy, the Netherlands* and *Sweden*) have adopted provisions allowing collective labour agreements deviating from equal treatment of agency workers. *Austria, Ireland* and *Sweden* refer to the need for these collective agreements to be appropriately balanced to ensure that they do not prejudice the overall protection of temporary agency workers.

[6] 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, OJ L 206, 29.7.1991, p. 19.

At present, the Commission has not been made aware of any particular problem in the implementation of this provision. It will monitor compliance with the 'overall protection of temporary agency workers' in all cases, especially if national implementing provisions do not refer to this notion.

4.2.3. Derogation provided for in Article 5(4)

According to Article 5(4), Member States in which there is no system for declaring collective agreements universally applicable or no system for extending their provisions to all similar undertakings in a certain sector or geographical area may, on the basis of an agreement concluded by the national social partners, derogate from equal treatment as regards the basic working and employment conditions of temporary agency workers, provided that they enjoy an adequate level of protection. This may include a qualifying period for equal treatment.

Only the *United Kingdom* and *Malta* have resorted to Article 5(4). In the *United Kingdom*, agency workers are entitled to full equal treatment at the user undertaking once they have completed a 12-week qualifying period in the same job with the same hirer. In *Malta*, the principle of equal treatment, insofar as it relates to pay, does not apply for the first four weeks of an assignment if that assignment lasts 14 weeks or more.

Member States applying Article 5(4) must specify whether occupational social security schemes, including pension, sick pay or financial participation schemes, are included in the basic working and employment conditions. The *United Kingdom* and *Malta* actually exclude these schemes from the basic working and employment conditions to which agency workers are entitled.

Moreover, Article 5(5) requires Member States to take appropriate measures to prevent misuse in the application of Article 5 and, in particular, successive assignments designed to circumvent the provisions of the Directive. The risk of circumvention of the principles of equal treatment and equal pay is particularly high if the principles are not applied from the first day of the agency workers' assignments, but only after a qualifying period.

The *United Kingdom* has adopted detailed measures to avoid misuse of its legislation, *inter alia* by stating that in case of a break of not more than six weeks in an assignment, the qualifying 'clock' is not reset to zero. In *Malta*, if a temporary agency worker who was not granted equal pay during the first four weeks of his/her assignment is subsequently replaced, the agency worker assigned as a replacement will benefit from equal treatment regarding pay from the first day of the assignment.

5. REVIEW OF RESTRICTIONS AND PROHIBITIONS ON THE USE OF TEMPORARY AGENCY WORK (ARTICLE 4)

5.1. Object of Article 4

Article 4 states that 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;

- the need to ensure that the labour market functions properly;

- the need to ensure that abuses are prevented.

Member States were under an obligation, after consulting the social partners, to review these prohibitions and restrictions to verify whether they were justified on grounds of general interest and to inform the Commission of the results of this review by the end of the transposition period (5 December 2011). Prohibitions and restrictions laid down by collective agreements could be reviewed by the social partners who had negotiated the agreement.

As regards the scope of the review, as indicated in the 2011 Report of the Commission services on the work of the Expert Group on transposition of the Directive on temporary agency work, it should cover any measures, for instance, measures laid down by legislation, regulations or administrative provisions, applied in Member States and which aim to, or have the effect of, imposing limitations on temporary agency work.

Besides, Article 4(4) makes it clear that the provisions of Article 4 are without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies. Consequently, the requirements falling under one of these categories, which relate to market access and the exercise of activities of temporary-work agencies, remain outside the scope of the obligation to review restrictions and prohibitions.

Thus, Article 4 reduces the scope of justifications to which Member States may resort to restrict the use of temporary agency work. Article 4(1) is binding on all Member States. It is up to each Member State to decide in its national context on the method that should be used to implement this provision. There is no time limit for the implementation of Article 4(1). Article 4 obliges Member States to undertake a review of prohibitions and restrictions on the use of temporary agency work, to inform the Commission of the results of the review, and to provide justifications for prohibitions and restrictions on grounds of general interest.

5.2. Results of the review by the Member States

All Member States have informed the Commission of their position with respect to the review of restrictions and prohibitions on the use of temporary agency work.

Twenty-four Member States have reported on the results of the review they carried out. Four Member States (*Ireland, Luxembourg, Malta* and the *United Kingdom*) stated that no restrictions or prohibitions were in place. Consequently, no review has been carried out in these Member States.

In the cases of *Ireland*, *Malta* and the *United Kingdom*, the Commission's examination did not identify any specific restriction or prohibition that would make it necessary for these Member States to carry out a proper review of the provisions concerned. As for *Luxembourg*, the Commission did identify restrictions in the applicable national legislation, for instance, as regards the duration of assignments or the existence of a list of permissible reasons for using temporary agency work. Therefore, prohibitions and restrictions in place in *Luxembourg* should be reviewed after consultation of the social partners, in accordance with Article 4(2) of the Directive.

The reports on the results of the review of restrictions and prohibitions provided by the 24 Member States were very diverse in terms of format and length. In most cases, they were complemented by specific, more accurate information provided at the request of the Commission.

This diversity is partly attributable to the variety of situations encountered in Member States. Although temporary agency work only accounts for a small proportion of employed workers

overall, it is much more widespread in some countries than in others. In some Member States, a national legal framework for temporary agency work was adopted in the 1960s (*Netherlands*) or 1970s (*France, Germany, United Kingdom*). In a number of others, it has been regulated much more recently, in some cases only in the context of the transposition of the Directive. Moreover, although the numbers of agency workers are relatively modest, the importance of this flexible form of working in the functioning of national labour markets cannot be denied. All Member States have made specific choices in terms of employment policy, for instance, by favouring labour market flexibility to variable degrees. Such choices have an influence on the role and place of temporary agency work in their respective labour markets.

Five Member States (*Denmark, Estonia, Latvia, Lithuania* and *Slovakia*) stated in their report on the results of the review that they do not apply any prohibitions or restrictions on the use of agency work.

Moreover, various Member States also informed the Commission about national provisions falling under Article 4(4) of the Directive and relating e.g. to registration and financial guarantees of temporary-work agencies. There is no review obligation with respect to these provisions.

5.2.1. Justification of the prohibitions and restrictions on grounds of general interest

Prohibitions and restrictions applied by Member States on the use of temporary agency work can be justified only on grounds of general interest, as indicated under point 5.1. By referring to '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', Article 4(1) of the Directive provides an indicative, non-exhaustive list of grounds that may justify prohibitions and restrictions.

Member States were under a duty to inform the Commission of the justification for the prohibitions and restrictions they apply by the end of the transposition period. They listed a number of prohibitions and restrictions and, in the vast majority of cases, cited one or several of the grounds of general interest enumerated in Article 4(1) as justification. If they considered that the same justification could apply to several restrictive measures, they provided a common justification for different prohibitions or restrictions.

On the whole and with few exceptions, Member States provided only very general justifications for restrictive provisions in force, even when the Commission asked for complementary information on the reasons why national authorities considered that prohibitions and restrictions that remain applicable were justified on grounds of general interest.

Member States referred in particular to the justifications listed in Article 4(1) of the Directive:

- A number of Member States (notably *Belgium, Bulgaria, Croatia, Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Slovenia*) referred to 'the protection of temporary agency workers' to explain and provide a justification for certain prohibitions or restrictions in place.

  For instance, this is one of the justifications that has been used with respect to restrictions applicable in the construction industry in *Germany*. *Poland* said the limitation of the period during which an agency worker may work in a single user

undertaking is related to the temporary nature of the tasks that temporary agency workers may perform and contributes to protecting them.

- The 'requirements of health and safety at work' were cited by a number of Member States (notably *Belgium, Bulgaria, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal, Slovenia* and *Spain*) to justify either restrictions to, or an outright ban on the use of agency workers to carry out tasks involving special risks to the health and safety of workers. Certain Member States have resorted to this justification in combination with other justifications listed in Article 4(1), in particular the protection of temporary agency workers (*Croatia, Portugal, Slovenia*).

  In *Slovenia*, where a branch collective agreement could prohibit the use of temporary agency workers, the possibility of providing for such a ban has been restricted to cases in which the purpose of the prohibition is to guarantee greater protection for workers or the health and safety of workers.

  Article 4(1) should be read in the light of Article 5(1) of Directive 91/383/EEC on the safety and health at work of workers with a fixed-term or a temporary employment relationship. According to this, Member States have the option of prohibiting agency workers 'from being used for certain work (…) which would be particularly dangerous to their safety or health, and in particular for certain work which requires special medical surveillance (…)'. In the absence of any definition in EU law of the notion of work that is particularly dangerous to the safety or health of workers, Member States are competent to identify the activities concerned, under the control of the Court of Justice.

- Various Member States (notably *Belgium, Bulgaria, the Czech Republic, France, Italy, Poland, Portugal, Romania* and *Sweden*) referred to 'the need to ensure that the labour market functions properly' to justify restrictive measures, such as a limitative list of reasons for using agency workers (*France, Italy, Poland*), limitations on the number or proportion of agency workers who may be used in a user undertaking (*Belgium, Italy*), or the obligation for the employer to negotiate with a workers' organisation before using agency workers (*Sweden*).

- Several Member States (*Belgium, Bulgaria, Czech Republic, Germany, Greece, Italy, Poland, Sweden*) justified certain prohibitions or restrictions on the use of agency work by 'the need to ensure that abuses are prevented'. This justification has been resorted to with respect to measures as diverse as restrictions on the nature of the tasks that may be assigned to agency workers (*Italy, Poland*), the possibility for national collective agreements to set quantitative limits on the use of fixed-term contracts for agency work (*Italy*), or the need, in certain cases for the user undertaking to obtain the consent of its union delegation before using agency workers (*Belgium*).

  The 'need to ensure that abuses are prevented' has sometimes been cited in combination with other justifications drawn from Article 4(1) of the Directive, in particular the need to ensure that the labour market functions properly (*Italy, Poland, Sweden*).

The following justifications have also been used by certain Member States in relation to prohibitions and restrictions in force:

- Among Member States which apply a prohibition on use of temporary agency workers to replace workers exercising their right to strike (*Austria, Belgium, Bulgaria, Croatia, France, Greece, Hungary, Italy, Poland, Slovenia, Spain*), four (*Belgium, Greece, Hungary* and *Italy*) have explicitly referred to the protection of the right to strike.

Several Member States cited recital 20 of the Directive, according to which the provisions 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.

- Several Member States (*Belgium, France, Greece, Poland*) explained various restrictive measures by the need to protect permanent employment and to avoid a situation in which permanent positions might be filled by workers employed on a temporary basis. In particular, they have used this justification to limit the duration of assignments and to explain the existence of a list of permissible reasons for using temporary agency work, such as, for instance, the replacement of an absent worker, a temporary increase in the volume of work, or the performance of exceptional or seasonal tasks.
- *Austria* referred to the protection of human life and health to justify the application of quotas limiting the proportion of temporary agency workers who may be used in a user undertaking for certain professions in the health sector to 10 % or 15 %.

In the context of their review of restrictions and prohibitions to the use of temporary agency work, Member States could have considered removing certain prohibitions and restrictions that were originally justified by a wish to protect agency workers. For example, *Romania*, where a limitative list of reasons for using temporary agency work was in force, now makes it possible to resort to this form of work 'for the execution of specific temporary tasks'. In *Sweden*, the prohibition to assign a temporary agency worker to his/her former employer in the first six months after the termination of the contract of employment was lifted with effect from 1 January 2013. In *Belgium*, the recourse to temporary agency workers is now allowed under certain conditions for integration purposes, i.e. with a view to the possible direct recruitment of the worker by the user undertaking.

Although a few restrictions and prohibitions on the use of temporary agency work have been removed, the review has not so far led to major changes in the extent of the restrictive measures applied by the Member States. Nevertheless, in a number of Member States, the prohibitions and restrictions and their justification continue to be discussed, including with the social partners, with a view to possible complementary adjustments. Consequently, the review of restrictions and prohibitions is still work in progress in several Member States (e.g. Belgium, Greece and the Netherlands).

Nevertheless, by stating that prohibitions or restrictions are justified only on grounds of general interest, Article 4(1) authorises Member States to continue to apply a number of prohibitions or restrictions that are based on such grounds. In the Commission's view, to the extent that these restrictive measures are the result of policy options based on legitimate grounds and are proportionate to their aim, they would appear to be justified on grounds of general interest, without prejudice to a more in-depth examination of those prohibitions and restrictions on a case-by-case basis.

The protection of temporary agency workers, the requirements of health and safety at work, the need to ensure that the labour market functions properly and that abuses are prevented may justify certain prohibitions or restrictions on the use of temporary agency work. Other grounds of general interest may also justify restrictive measures insofar as they are legitimate and proportionate to their objective. Provided that they comply with the Directive on temporary agency work and other applicable EU legislation and principles, such as the freedom to provide services, the freedom of establishment and the legislation on non-discrimination, Member States can regulate different types of employment, including

temporary agency work, and ensure the smooth functioning of the labour market according to their own policy choices.

Prohibitions or restrictions amounting to discrimination against temporary agency workers cannot be considered as justified on grounds of general interest. For example, a prohibition on employing disabled persons as agency workers could not be justified, neither by the need to ensure that the labour market functions properly, nor by the protection of those persons or the requirements of health and safety at work.

5.2.2. Consultation of the social partners

As stated under point 5.1., Member States were under a duty to consult the social partners before reviewing prohibitions and restrictions. Furthermore, where prohibitions and restrictions are laid down by collective agreements, social partners who had negotiated the agreement could carry out the review.

The Member States which reviewed the prohibitions and restrictions in place involved the social partners in various ways, reflecting the diversity of labour markets and industrial relations across the EU.

They can be grouped into three main categories:

- Member States where the social partners were consulted in the framework of the review of prohibitions and restrictions (*Belgium, Croatia, France, Germany, Greece, Hungary, Italy, Poland* and *Portugal*); some have, to a variable extent, provided the Commission with the views of the social partners (*Belgium, Greece, Poland* and *Portugal*);
- Member States where the review was mostly carried out by the social partners themselves, given that most prohibitions and restrictions are laid down by collective agreements (*Denmark, Finland, Netherlands* and *Sweden*); *Finland* and *Sweden* have informed the Commission of the views of the social partners;
- Member States where the social partners were consulted in the context of the adoption of the national transposition measures (*Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Romania, Slovenia* and *Spain*).

Generally, the way in which the social partners were involved in the review seems to reflect the variations in their place and role across the EU. Where the Commission was informed of the positions of the social partners, it is clear that more weight could have been given to those positions. Nevertheless, it seems that, with the exception of *Luxembourg*, consultation of the social partners took place in compliance with Article 4(2).

6. ACCESS TO EMPLOYMENT, COLLECTIVE FACILITIES AND VOCATIONAL TRAINING — REPRESENTATION OF AGENCY WORKERS — INFORMATION OF WORKERS' REPRESENTATIVES (ARTICLES 6, 7 AND 8)

6.1. Access to employment, collective facilities and vocational training (Article 6)

Article 6 improves the access of temporary agency workers to permanent employment, collective facilities and vocational training. It notably provides for the information of agency workers on vacant posts in the user undertaking (Article 6(1)). It also ensures agency workers

are entitled to equal access to the amenities and collective facilities in the user undertaking, in particular canteens, child-care facilities and transport services, unless a difference in treatment is justified by objective reasons (Article 6(4)). It asks Member States or the social partners to improve agency workers' access to training in temporary-work agencies and in user undertakings (Article 6(5)).

Article 6(1) has been transposed almost literally by a number of Member States. It does not appear to pose any particular problem at the present stage.

As regards Article 6(4), 14 countries (*Austria, Belgium, Cyprus, Denmark, Finland, Germany, Greece, Ireland, Latvia, Lithuania, Malta, Netherlands, Sweden* and the *United Kingdom*), i.e. half the Member States, said that they make use of the possibility to derogate from equal access to amenities and collective facilities in the user undertaking if the difference in treatment is justified by objective reasons. In most cases, the wording used in national measures is almost identical to the text of the Directive. The Commission underlines that differences in treatment whereby agency workers enjoy less favourable conditions than workers employed by the user undertaking should remain exceptional. The possibility opened up in a number of Member States does not necessarily mean that it is applied in practice.

Article 6(5) encourages the social partners to play an important role in improving access to training and child-care facilities for agency workers in agencies, and to training organised for workers of user undertakings. The implementation of this provision does not seem to be problematic. Agency workers in *Malta* benefit from equal access to vocational training with workers of the user undertaking unless a difference in treatment is justified by objective reasons.

6.2. Representation of agency workers (Article 7)

Article 7 provides that for the purpose of calculating the threshold above which bodies representing workers are to be formed, temporary agency workers must be taken into account, either in the temporary-work agency, or in the user undertaking, or in both.

In most Member States, temporary agency workers are counted in the temporary-work agency employing them (*Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Italy, Lithuania, Malta, Poland, Slovenia, Spain, Sweden* and *United Kingdom*) or in both the agency and the user undertaking to which they are assigned (*Austria, Cyprus, France, Germany, Greece, Luxembourg, Netherlands, Portugal* and *Slovakia*). In only three Member States (*Belgium, Latvia* and *Romania*), they are taken into account only in the user undertaking.

Certain Member States have introduced specific conditions under which agency workers are taken into account. For instance, *Bulgaria* takes into consideration the average number of agency workers who have been employed by the temporary-work agency during the previous 12 months. In *Belgium*, the calculation is based on the average number of agency workers who have been placed at the user undertaking during the previous quarter. However, agency workers who are actually replacing members of the permanent staff at the user undertaking are not taken into account.

The Commission is not aware of any particular difficulty in relation to the transposition of Article 7.

6.3. Information of workers' representatives (Article 8)

Under Article 8, 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.

Some Member States impose detailed obligations on user undertakings. For example, in *Greece*, the user undertaking is required to provide information on the number of agency workers, but also on its plans to use agency workers and the prospects of recruiting them directly. In *France* and *Luxembourg*, staff representatives can have access to the contracts concluded between the user undertaking and the temporary-work agency for the assignment of workers.

At this stage, the Commission is not aware of any particular problem in the implementation of this provision.

7. PENALTIES (ARTICLE 10)

A first examination of the transposing legislation adopted by the Member States shows that information provided about penalties mainly relates to national provisions other than those adopted to transpose the Directive (e.g., management of an agency without due authorisation, failure to notify public authorities about employment contracts signed by the agency …). This issue needs to be examined in more depth in the coming months, notably to check whether penalties are used within the scope of the Directive. Since only very few Member States have provided tables of concordance, it has not yet been possible to compile a comprehensive overview of the situation at national level.

8. REGULATORY COSTS

In an on-line public consultation carried out by the Commission in October-December 2012, the Directive was earmarked by the small and medium-sized enterprises (SMEs) and SME organisations that replied to the consultation as one of the most burdensome pieces of EU legislation.[7] The results were published in a Staff Working Document[8] of 7 March 2013 accompanying the Communication on Smart Regulation.

The Commission Communication of 18 June 2013[9] on the follow-up to the 'Top Ten' consultation of SMEs on EU Regulation showed these claims were mostly related to existing obstacles to the operation of temporary-work agencies and the obligation to register every time an agency wants to operate in a different Member State. The Communication indicated that this report would take SME concerns and regulatory burden aspects into account.

In that context, the Commission sent a questionnaire to Member States and social partners at European level to seek their views on the issue of costs incurred in relation to the Directive.

[7] Out of a total of 995 respondents, among which 768 were SMEs based in the EU or organisations representing SMEs' interests in the EU, 59 have identified Directive 2008/104/EC as one of the most burdensome pieces of EU legislation.

[8] Staff Working Document 'Monitoring and Consultation on Smart Regulation for SMEs' (SWD(2013) 60 final) accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Smart regulation — responding to the needs of small and medium-sized enterprises' (COM(2013) 122 final).

[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Commission follow-up to the 'Top Ten' Consultation of SMEs on EU Regulation', COM(2013) 446 final of 18 June 2013.

The Commission asked first *whether the Directive places a significant administrative burden on the national public authorities and whether those costs have been assessed in the Member States*.

Among the twenty-seven Member States that responded, all but two said the Directive itself did not create a significant administrative burden for the national authorities, or that they had not specifically assessed it. *Belgium* referred to significant administrative costs to carry out the review of restrictions and prohibitions. The *United Kingdom* published an impact assessment prior to the implementation of the Directive, according to which the total costs to public sector hirers in terms of increased wages would be between GBP 157 million and GBP 259 million per year, but no update is available. No Member State has assessed the administrative burden created by the Directive.

The Commission also asked *whether the substantive provisions of the Directive entail significant costs or obstacles for temporary-work agencies or user undertakings, and whether those costs have been assessed*.

A few Member States found that the Directive did entail minor costs for temporary-work agencies (*Austria, Germany*) and/or user undertakings (*Finland, Germany, Poland*), whereas the *United Kingdom* cited increased wage costs for agencies, as well as costs for agencies and user undertakings due to information obligations. Other Member States did not refer to any significant costs or obstacles for agencies or users. No Member State has any up-to-date information on the level of costs incurred.

Cyprus stated that no temporary-work agencies were as yet operating on its territory.

As for the European social partners, BusinessEurope referred to substantial compliance costs for temporary-work agencies in some Member States and to considerable social costs resulting from poor implementation or non-implementation of Article 4. Eurociett mentioned increased costs for agencies in countries such as the *United Kingdom* and *Ireland* and stressed that it accepted and supported this increase since it supported the adoption of the Directive. It also referred to costs linked to the insufficient transposition of certain provisions of the Directive, while for CEEP[10], the Directive had significantly increased costs for employers, in particular where equal treatment had not been in place before the transposition of the Directive. However, none of these employers' organisations provided a quantification of the costs they mentioned. UEAPME[11] was not aware of any particularly costly rules for user undertakings.

ETUC[12] said that Article 12 of the Directive, which is the legal basis for this report, did not envisage a cost assessment and that there was no study showing an increase in costs for agencies due to the transposition of the Directive. In the view of UNI-Europa, costs do not put any obstacles in the way of temporary-work agencies or user undertakings.

On the question of *whether there is any information available on the costs borne by SMEs and/or micro-enterprises*, no Member State has any such information. *Germany* said that the Directive did entail costs for both temporary-work agencies and user undertakings. In the view of *Austria* and *Belgium*, the Directive cannot be considered as particularly burdensome for SMEs.

The European social partners did not provide any information on this issue. ETUC considered it inappropriate to use the results of the 'Top Ten' consultation as a basis for future work.

[10] European Centre of Employers and Enterprises providing Public services.
[11] European Association of Craft, Small and Medium-sized Enterprises.
[12] European Trade Union Confederation.

Besides, several Member States, when consulted, mentioned that any overall assessment of costs resulting from the Directive should also take into account the benefits it has brought.

9. RELATIONSHIP BETWEEN THE DIRECTIVE ON TEMPORARY AGENCY WORK AND OTHER EU LEGISLATION

Article 3(2), second subparagraph, states that Member States shall not exclude workers or employment relationships from the scope of the Directive solely because they relate to part-time workers, fixed-term contract workers or persons with an employment relationship with a temporary-work agency. This provision makes clear that agency workers working on a part-time basis or under a fixed-term contract cannot be excluded from the scope of Directive 2008/104/EC on the grounds of their being 'atypical' workers.

The Court of Justice has confirmed that Directive 1999/70/EC on fixed-term work does not apply to the fixed-term employment relationship between an agency worker and a temporary-work agency.[13] Consequently, even if agency workers are employed under a fixed-term contract of employment, their three-way employment relationship is not governed by the Directive on fixed-term work, which only applies to direct employment relationships between an employer and a worker.

As regards the relationship between Directive 2008/104/EC on temporary agency work and Directive 96/71/EC[14] on the posting of workers, recital 22 of Directive 2008/104/EC states that it should be implemented in compliance with the provisions of the Treaty on the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC. The Directive on temporary agency work in principle covers national situations, whereas the Directive on the posting of workers is specifically aimed at cross-border situations. The Directive on temporary agency work fully applies to mobile workers who work in a Member State other than their own as if they were national workers, while the Directive on posting only applies to posted workers, i.e. workers who, for a limited period, carry out their work in the territory of a Member State other than the State in which they normally work.

Pursuant to its Article 1(3)(c), the Directive on the posting of workers notably applies to a temporary employment undertaking or placement agency which hires out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

In accordance with Article 3(1) of the same Directive, with respect to posted workers, certain terms and conditions of employment, which include 'the minimum rates of pay, including overtime rates' and 'the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings', have to be respected to the extent that they are set by law or universally applicable collective agreements. As stated in recital 22 of Directive 2008/104/EC referred to above, the above-mentioned provisions of the Directive on the posting of workers take precedence over the provisions of the Directive on temporary agency work. However, Member States may provide that temporary agency workers posted to their territory should be granted equal treatment as regards the terms and conditions applicable to temporary workers in the Member State where the work is carried out, in conformity with Article 3(9) of the Directive on the posting of workers.

[13] ECJ 11 April 2013, Case C-290/12 Oreste Della Rocca v Poste Italiane SpA..

[14] 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, OJ L 18, 21.1.1997, p. 1.

10. POSSIBLE AMENDMENTS

The questionnaire referred to under point 8 also raised the issue *whether on the basis of the experience gained since the Directive became fully applicable in December 2011, it had achieved its social policy goals as set out in Article 2.*

In accordance with Article 12, this report should consider any amendment to the Directive that would appear to be appropriate. The Commission also raised this point in the questionnaire by asking *whether any provision of the Directive needs clarification and, if yes, which provisions and what are the problems encountered.*

On the *first question*, most Member States considered that the Directive had indeed achieved its social policy goals or that it represented an important step in the development of a social Europe. A few of them pointed to practical difficulties encountered for reasons unrelated to the Directive (*Slovakia, Slovenia*), but no Member State replied that the Directive had failed to achieve its goals. *Bulgaria* found it difficult to answer the question because temporary-work agencies have only been in operation there for a short period, while the *United Kingdom* did not have any data enabling it to answer the question. *Cyprus* could not reply either, in the absence of any temporary-work agencies in the country.

For BusinessEurope and Eurociett, however, the objectives of the Directive have not been fully achieved. They replied that a substantial number of unjustified restrictions to temporary agency work remained in place in some Member States, or had even been introduced recently. Examples included sectoral bans, unreasonable limits on the maximum length of assignments, too limited reasons for use and quotas on the maximum number of agency workers. They said such restrictions should be lifted. For their part, UEAPME and, to a certain extent, CEEP were of the view that the Directive had fulfilled its social policy objectives.

ETUC stressed that the deadline for the transposition of the Directive was relatively recent and that many Member States had carried out the transposition belatedly. For those reasons, it was too early for a decent evaluation of the situation at national level. UNI-Europa was of the view that in most Member States, the objectives set out in Article 2 of the Directive had already largely been achieved by national legislation before the Directive entered into force.

On the *second question*, the vast majority of Member States found that at this stage, there was no need for clarification or review of any of the Directive's provisions. For *Bulgaria* and *Poland*, it was premature to raise such issues. Together with *Cyprus*, *Bulgaria* pointed to a lack of practical experience of temporary-agency work. *Portugal* stressed the importance of guaranteeing that the Directive was correctly transposed in all Member States.

Finland said Article 4 of the Directive was unclear, in particular regarding whether it obliges Member States to adopt national legislation in line with Article 4(1) citing the reasons that can justify prohibitions and restrictions on the use of agency work.

In the view of BusinessEurope, the Directive needed not revision, but proper implementation of its Article 4 in Member States where unjustified barriers to the use of agency work remain in place. BusinessEurope called on the Commission to adopt an interpretative communication on Article 4 and to encourage the lifting of unjustified restrictions in country-specific recommendations, if necessary, through infringement proceedings. Eurociett did not consider it necessary to revise the Directive either. However, it added that if substantial progress in the implementation of Article 4 were not possible, it might consider calling for a conditional, limited revision of this article. UEAPME did not see any need for a review of the Directive at this stage, while CEEP referred to a need to clarify certain national implementing measures rather than the Directive itself.

ETUC said that given the delayed transposition in a number of Member States, it was too early to decide whether the Directive needed to be reviewed. However, it finds the derogations to the principle of equal treatment very problematic, especially Article 5(2) as applied in some Member States.

UNI-Europa is of the opinion that the Directive should be revised. It considers that the derogations provided for in Articles 5(3) and 5(4) need to be removed, since they directly contravene the principle of equal treatment. Besides, in the absence of any limitation on successive assignments in the Directive, the notion of 'misuse' in the application of Article 5 should be clarified.

11. CONCLUSIONS

The Directive aims to reach a fair balance between, on the one hand, improving the protection of temporary agency workers, in particular by establishing the principle of equal treatment, and, on the other hand, supporting the positive role that agency work can play by providing sufficient flexibility in the labour market.

The Commission acknowledges the significant work that has been carried out on transposition of the Directive, in particular in Member States where there was either no legislation specifically regulating temporary agency work, or where the principle of equal treatment was recognised in national law for the first time.

The above analysis shows that, in general, the provisions of the Directive seem to have been correctly implemented and applied. However, the analysis has also shown that the twofold goal of the Directive has not yet been fully fulfilled. On one hand, the extent of the use of certain derogations to the principle of equal treatment may, in specific cases, have led to a situation where the application of the Directive has no real effects upon the improvement of the protection of temporary agency workers. On the other hand, the review of restrictions and prohibitions on the use of temporary agency work has served, in the majority of cases, to legitimate the status quo, instead of giving an impetus to the rethinking of the role of agency work in modern, flexible labour markets.

The Commission will continue to closely monitor the application of the Directive, taking into account further developments in the fields of labour law and temporary agency work, to ensure that its goals are adequately achieved and that its provisions are completely and correctly transposed in all Member States. In this context, the Commission will work in close contact with the Member States and the social partners within the working group that will follow the application of the Directive, as well as in other fora.

In addition, the Commission intends to tackle any problems in the implementation of the Directive with the appropriate means, including infringement proceedings where necessary. Complaints lodged with the Commission against Member States, petitions and preliminary questions to the Court of Justice may also constitute an important source of information as to national measures or practices that would be incompatible with the Directive.

Against the background of the European Semester, if the Commission identifies specific regulatory burden aspects as obstacles to growth and competitiveness in its assessment of national obstacles to the activity of temporary-work agencies, it will consider including recommendations to the Member States concerned in the country-specific measures.

As regards possible amendments to the Directive, more time is needed to accumulate experience in its application and to determine whether it has fully reached its objectives. Its transposition period expired in December 2011 and some of the Directive's national

implementing provisions were adopted only in spring 2013. There is as yet no case law of the Court of Justice on its application.

In that context and in the light of the Commission's own assessment of the application of the Directive, taking into account views expressed by Member States and European social partners during the consultation process for this report, the Commission takes the view that no amendments are necessary at this stage.

Accompanying Commission Staff Working Document:

- overview on options chosen by Member States for the implementation of the Directive into national law
- overview of the reports of the Member States on the results of the review of restrictions and prohibitions on the use of temporary agency work