

Transposition of EU Directive 104/2008/EC on temporary agency work

Unbalanced implementation hampers the industry's contributing to job creation, participation and integration in the labour market

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1. Overall Eurociett Assessment

- 1.1. The Directive 2008/104/EC defines clear objectives in Article 2, namely to ensure the protection of agency workers and 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. This approach was welcomed by the EU Sectoral Social Partners in their joint declaration on the Directive, signed in 2008. With this paper, *Eurociett aims to contribute to the questionnaire sent to EU Social Partners in June 2013.*
- 1.2. **Eurociett is strongly concerned that many Member States have not sufficiently implemented Article 4 of the Directive and do not comply with the obligation to remove unjustified restrictions.** Article 4 obliges Member States to review and lift unjustified restrictions on the use of temporary agency work. The Eurociett legal assessment is that Article 4 clearly states that restrictions on temporary agency work must be justified and those unjustified must be removed.
- 1.3. **Eurociett advocates that the Commission and the Member States should take all the necessary actions to ensure a full transposition of the Directive, focusing on Article 4.** Especially three actions should be taken: The continued dialogue in the EU Expert Group on the review and lifting of unjustified restrictions, the use of the Europe 2020 country-specific recommendations to call on Member States to lift unjustified restrictions and the launch of infringement procedures to reach a full and better implementation of Article 4. Eurociett believes that these are the most promising approaches and tools to ensure a full transposition of the Directive. A revision of the Directive is not necessary to realise the balanced approach as set out in recital 18 and Article 2 of the Directive. However, if real and substantial progress is not possible via these channels, Eurociett might consider calling for a conditional, limited revision of Article 4 of the Directive.
- 1.4. **The provisions on equal treatment & equal pay (Article 5) have proven to be an overall balanced approach,** recognising the need for derogations and the role of social partners and collective labour agreements in this area. However, more countries should make use of the derogations for open-ended contracts (Article 5, paragraph 2).
- 1.5. **With regard to costs related to the Directive, Eurociett is predominately concerned about the economic and social costs of the non-transposition of certain articles of the Directive.** In fact, the lack of progress in lifting unjustified restrictions implies less economic growth, lower competitiveness for companies, higher unemployment levels as well as fewer and less secure transitions in the labour market.

2. General Assessment – Too limited progress towards the Directive’s objectives

- 2.1. The Directive on temporary agency work defines in its Article 2 very clear and balanced objectives, namely to ensure the protection of temporary agency workers and to improve the quality of temporary agency work, 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. The Article 2 should furthermore be read and understood in conjunction with Recital 11 of the Directive, which highlights the contribution of temporary agency work to job creation, participation and integration in the labour market.
- 2.2. When Directive 2008/104/EC on temporary agency work was adopted in 2008, the agency work penetration rate in Europe stood at 1.7% (with large differences between the European countries ranging from 0.1% in the case of Greece to 4.1% for the UK).¹ In 2011, thus the year of the Directive’s transposition deadline, the average penetration rate stood at 1.6% (with national penetration rates ranging from 0.1% to 3.6%). The total number of agency workers in Europe amounted to 4 million in 2011 (in full-time equivalent), corresponding to 10 million yearly. Despite the influence of the general economic development and economic crisis on the evolution of the agency work industry, the figures clearly illustrate that the Directive has not yet had a significant impact on driving job creation and enhancing participation and integration in the labour market.
- 2.3. Eurociett is strongly concerned that many Member States have not sufficiently implemented Article 4 of the Directive and do not comply with the obligation to remove unjustified restrictions. Article 4 obliges Member States to review and lift unjustified restrictions on the use of temporary agency work. The Eurociett legal assessment is that Article 4 clearly states that restrictions on temporary agency work must be justified and those unjustified must be removed.
- 2.4. Since the deadline for transposing the Directive (2011), a substantial number of unjustified restrictions on the use of temporary agency work remain in place in some EU Member States, including sectoral bans, too short maximum length of assignments, too limited reasons for use and quotas on the maximum number of agency workers. These unjustified restrictions continue to be applied based on national law and/or – in some countries – collective labour agreements. Eurociett has been highlighting the insufficient progress on the review and lifting of unjustified restrictions in numerous statements,² position papers³ and letters to national and EU

¹ All figures based on: Ciett (2013): The agency work industry around the world. Economic Report. Available on the Eurociett website: www.eurociett.eu

² Eurociett Press Release on the assessment of the transposition of the EU Directive on temporary agency work (05-12-2011), Eurociett Press Release on the need for regulation that creates jobs and protects workers (05-12-2012) and Eurociett Press Release on the European Semester process 2013 “Europe 2020 country specific recommendations must go further in calling for labour market reforms (20-06-2013)”.

policy makers.⁴ External, legal advice on the Directive, commissioned by Eurociett in 2008, clearly stated that restrictions related to sectoral bans,⁵ maximum length of assignments,⁶ quotas on the maximum number of agency workers⁷ and reasons for use⁸ may be classified as unjustified and need to be very carefully reviewed. The legal advice also clarified that unjustified restrictions must be lifted. Only a limited number of countries have taken some important steps in this respect.⁹

The lack of progress on the lifting of unjustified restriction on temporary agency work is in fact not only an element of concern for the European agency work industry, but for the European business community at large. On the occasion of the discussion of the Europe 2020 country-specific recommendations, *BUSINESSEUROPE*, the main, European cross-industry employers' organisation, underlined in June 2013 that "flexible forms of employment should be valued as an important vector of employment growth and a stepping stone for the young. *We (BusinessEurope)* regret that many Member States did not correctly implement the Temporary Agency Work Directive by refraining from reviewing and lifting unjustified restrictions on its use."

Furthermore, in several EU Member States (including particularly Sweden, the Netherlands, Norway, Germany and France) there has been a tendency in recent years of introducing or re-establishing unjustified restrictions by collective labour agreements of client/user-companies. While the agency work industry is not a negotiating partner of these collective labour agreements, these severely hamper and limited the job creation potential and business services of temporary work agencies in a disproportionate and discriminatory way.

- 2.5. This general assessment can be further illustrated by remaining unjustified restrictions related to labour contracts that can be offered by temporary work agencies. Eurociett advocates that all forms of labour contracts that are established under national law should be available to temporary agency workers in order to meet the diversity of their economic and social needs and to reduce labour market

³ The deficits in the transposition of the Directive have been particularly highlighted in the Eurociett Position Paper on the EU Employment Package "Towards a job-rich recovery" and the Position on the Commission Communication "Moving youth into employment".

⁴ Eurociett letters on an unbalanced transposition of the Directive have been sent to the national governments of the Austria, Bulgaria, the Czech Republic, Greece, Italy, Spain, Sweden and Portugal

⁵ Such as the sectoral bans applied in Belgium (public sector), Spain (public sector and construction in practice), and Greece (public sector).

⁶ As applied in Belgium, the Czech Republic, Finland, France, Greece, Italy, Luxembourg, Poland, Portugal, Slovenia, Spain and Sweden.

⁷ Provided for in Austria, Belgium, Bulgaria, the Czech Republic, Finland, Germany, Italy, Netherlands and Sweden.

⁸ Restrictive reasons for use systems are applied in 10 EU countries in 2013.

⁹ Since 2009 the following unjustified restrictions have been lifted in Europe: France: public sector (2009) + apprenticeship contracts (2011), Belgium: 4th reason of use (2011), Spain: Permanent recruitment + cooperation with PES + Public and construction sector (but still closed due to CLA and lack of implementation decree), Germany: haulage sector, Italy: apprenticeship contracts (2011) + use of TAW eased for vulnerable workers, Romania: sectoral bans lifted + extension maximum length assignment.

segmentation. Particularly prohibitions to offer open-ended contracts to agency workers should be removed,¹⁰ as the EU Directive on temporary agency work explicitly recognises the opportunity to employ agency workers on open-ended contracts. Recently, several governments have recognised that a well-regulated agency work sector can provide for better work security and improved transitions compared to (*direct*) fixed-term contracts.¹¹ It is against this background that Eurociett calls for progress towards the lifting of remaining, unjustified restrictions on temporary agency work labour contracts.

- 2.6. In order to avoid the maintaining or re-establishing of unjustified restrictions on temporary agency work, Article 4, paragraph 1 should be directly transposed and integrated in national law, thus establishing a clear barrier to unjustified restrictions at national level.
- 2.7. The principles of equal treatment & equal pay have been established in all EU Member States in accordance with the Directive. Some Member States have used the possibility provided in the Directive to allow for a derogation from equal treatment / equal pay by collective labour agreements (including Netherlands, Sweden, Denmark, Finland, Austria and Germany) or agreements of social partners (United Kingdom). Furthermore, the UK and Ireland have introduced in their national legislation the opportunity to derogate from equal pay for open-ended contracts providing pay between assignments. Eurociett does not see any need for amending the Article 5 on equal treatment and equal pay. At the same time, many countries that are offering open-ended contracts to agency workers do not benefit from the derogation provided for in Article 5, paragraph 2. Eurociett advocates that national regulation should offer more often the opportunity to use this derogation.
- 2.8. The implementation of Article 10 of the Directive requires a careful review. Eurociett calls for a transposition of Article 10 into national law in all EU Member States, particularly those in which social partners have a prominent role in defining regulation on temporary agency work. The transposition of Article 10 should allow for sufficient legal remedies at national law to challenge remaining, unjustified restrictions imposed on temporary agency work.

¹⁰ These restrictions related to employing temporary agency workers on an open-ended contract are currently still applied in Belgium, France, Greece, Luxembourg and Poland.

¹¹ As reflected in recent labour market reforms for example in France.

3. Need for clarification or review of certain provisions of the Directive

3.1. Eurociett advocates that the European Commission and the Member States should take all the necessary actions to ensure a full transposition of the Directive, focusing on Article 4. Especially three actions should be taken:

- The **continued dialogue in the EU Expert Group on the Directive on temporary agency work** on the review and lifting of unjustified restrictions, as well as bilateral, country-by-countries assessments and discussions on unjustified restrictions, which remain in place. A Communication from DG Employment should clarify the need to lift unjustified restrictions on the use of temporary agency work.
- The **use of the Europe 2020 country-specific recommendations** to call on Member States to lift unjustified restrictions on temporary agency work. The review and lifting of unjustified restrictions should thus be done on a regular basis. Given the fact national regulation on temporary agency work is evolving and that new restrictions on the use of temporary agency work are frequently included in collective labour agreements of client companies, there is also a need for a more regular review and assessment of restrictions. Verifying the appropriateness of national regulation should be understood as an integral element of the Europe 2020 Strategy for smart, sustainable and inclusive growth. Eurociett advocates that Member States should be encouraged to review regulation and restrictions on temporary agency work at least every three years to verify, whether national regulation is in line with the objectives of the Directive. At the same time, such a more regular review of the appropriateness and efficiency of regulation on temporary agency work does not require a formal revision of the Directive, but could be associated with the Europe 2020 European Semester and particularly the implementation of the Employment Guideline No. 7.¹²
- The **launch of infringement procedures to ensure a full and better implementation of Article 4**. Infringement procedures should ensure that the Article 4, paragraph 1 is transposed directly into national law and that unjustified restrictions on temporary agency work are removed.

3.2. Eurociett believes that these are the most promising approaches and tools to ensure a full transposition of the Directive. A revision of the Directive is not necessary to realise the balanced approach as set out in recital 18 and Article 2 of the Directive. However, if real and substantial progress is not possible via these channels, Eurociett might consider calling for a conditional, limited revision of Article 4.

3.3. Finally, there is a need to clarify the interrelation between the Directive on temporary agency work and the Posting of Workers Directive. While the Directive on the Posting of Workers which was adopted in 1996, includes paragraphs on

¹² Which is focusing on Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality

temporary agency work and covers only the specific situation of posted workers, the Directive on temporary agency work was adopted and implemented at later stage and establishes general employment and working conditions for temporary agency workers in the European Union. Against this background, Eurociett calls for an in-depth legal analysis and review of the interrelation of both Directives to gain legal certainty and to avoid any misconceptions linked to posting of temporary agency workers.

4. Costs linked to the Directive's transposition or to certain provisions

4.1. The issue of costs related to the implementation of the Directive and specifically the costs for small and medium-sized companies has been to a much lesser extent an issue of concern or discussion for the agency work industry. Especially for the countries which already applied the principles of equal treatment and equal pay prior to the transposition of the Directive, there have been limited costs linked to the transposition of the Directive and no specific impact for small and medium-sized companies.

4.2. In some countries (especially the UK, Ireland), new regulation on equal pay has led to an increase in costs for temporary agency work. In addition to the further costs linked to the change in regulation, especially in the UK & Ireland there have been significant costs for the agency work industry in terms of training and support of member companies to ensure compliance with the new regulation. A similar assessment can be provided for Norway, where the introduction of equal pay as led on average to 5% higher prices for agency work services.

However, this increase in costs of temporary agency work services is accepted and supported by Eurociett members, given the fact that Eurociett supported the adoption and implementation of the Directive on temporary agency work. First experience from Eurociett member federations illustrate that the main reasons for referring to agency work services is much more related to the benefits of flexibility and adaptability in HR management and thus shows that potential costs related to the transposition of the Directive did not have significant or negative impact on the evolution of the agency work industry.

4.3. As EU Sectoral Social Partner for temporary agency work, Eurociett is less concerned about the costs of the Directive's transposition, but much more alarmed about the costs of a not-appropriate or non-transposition of certain aspects of the Directive. Eurociett is convinced that the lack of progress on lifting existing, unjustified restrictions as illustrated in section 2 of this paper bears significant costs in terms of high unemployment levels in Europe, lower growth rates in Europe, more limited labour market opportunities for young people as well as fewer and less secured transitions in the labour market. Furthermore, the high number of unjustified restrictions applied in the different EU Member States and the diversity in scope and

focus of these restrictions imply significant costs for companies to comply with heterogeneous regulation.

It is in this context that Eurociett would like to highlight the findings of the Eurociett/Uni-Europa project on “Temporary agency work and transitions in the labour market”,¹³ which proved the transition function of temporary agency work. In this context, Eurociett and Uni-Europa agreed on joint recommendations, including the call for a better transposition of the Directive on temporary agency work.

About Eurociett

As the European confederation of private employment agencies, Eurociett is the authoritative voice representing the common interests of the agency work industry in Europe. Eurociett gathers 30 national federations from European countries, and 7 of the largest international staffing companies as corporate members. Its main objective is to seek greater recognition for the positive role private employment agencies play in the labour market.

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¹³ The results of the Eurociett/Uni-Europa project on “Temporary agency work and transitions in the labour market”, as well as the joint recommendations signed by the sectoral social partners are available on the Eurociett website. <http://www.eurociett.eu>

Annex: Examples of restrictions imposed on temporary agency work, which might be unjustified should be carefully and periodically assessed

Category of restriction	Country, where this restriction is applied¹⁴
Maximum length of assignments	Belgium, Czech Republic, Finland, France, Greece, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovenia, Spain, Sweden
Sectoral bans	Belgium, Germany, Greece, Poland, Spain
Reasons for use	Belgium, Bulgaria, Czech Republic, Finland, France, Italy, Netherlands, Poland, Portugal, Romania
Quotas on the maximum number of temporary agency workers	Austria, Belgium, Bulgaria, Czech Republic, Finland, Germany, Italy, Netherlands, Sweden

¹⁴ Either in law or based on collective labour agreements.