

Briefing Paper #21

Precarious Labour

Legal and Policy Frameworks at EU Level



solidar

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Photo from Soweto

Photo of Social worker with lady

About the project

“Decent Work for All: A Key for Effective Industrial Relations” is a one-year project which aims to produce recommendations on how to improve working conditions around Europe in sectors with higher incidences of precarious working conditions (ie construction, health and long-term care) and more vulnerable groups (ie youth, undocumented migrants) through coordinated efforts by governments, employers and trade unions in the framework of social dialogue. It also looks into the role of social partners in fighting precarious labour and promoting decent work and quality jobs.

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SOLIDAR is a European network of 52 NGOs working to advance social justice in Europe and worldwide.

SOLIDAR lobbies the EU and international institutions in three primary areas: social affairs, international cooperation and education.

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INTRODUCTION

Since the beginning of 2010, SOLIDAR has been carrying out the “Decent Work for All – A Key to Effective Industrial Relations” project which looks at the efforts that governments, employers and trade unions can do to safeguard or extend decent work around Europe in the frame of social dialogue. The project looked in particular at sectors with higher incidences of precarious labour (e.g. construction, health and long-term care) and more vulnerable groups (e.g. young people, undocumented migrants).

In this briefing, we wanted to provide an overview of the relevant EU-level legal and policy framework for selected forms of precarious labour covered under the project to provide information on key features of European legislation on forms of atypical work that present new challenges and risks to decent working conditions, in the context of intensified European economic integration.

Three groups of workers are focused on. The first two categories, temporary agency work and posted work, have gained in quantitative importance during the last decade across Europe. Data for temporary agency workers is available (annex 1 and 2) allowing us to track the phenomenon whereas data on the number of workers posted to or from a particular country is almost impossible to find in any Member State. The third category covered here, migrant workers, is a rather heterogeneous one. The briefing will therefore focus on the cross-border dimension, that is to say on those with a recent labour migration experience (i.e. not second or third generation migrants), on those from outside the EU and on other issues identified as challenges in the case studies prepared by project partners.

Other training and communication tools from the project include case studies carried out by project partners, summary briefings, training manual, photo exhibition and a recommendations booklet. They can all be found on www.solidar.org

1. POSTED WORKERS – POSTING OF WORKERS DIRECTIVE

The issue of posted work and how to best regulate this type of work at both European and national level has become a topical, but also fairly controversial issue during the last years. Four rulings of the European Court of Justice (ECJ) in 2008 on the Posted of Workers Directive gave rise to many debates on how best to react to problems and shortcomings pointed out in the jurisprudence of the ECJ. This section summarises key steps towards the relevant EU legal framework and identifies issues discussed upon by social partners and other key stakeholders.

The notion of *posting of workers* was initially applied in the field of the coordination of social security in Europe. From the creation of the European Economic Community it was formulated that EU citizens have the right of free movement, including the right to work in another Member State. The so-called coordination rules, first formulated in 1957, adapted in 1971 (Regulation 1408/71) and again modified in 2009, are based on the principle that one jurisdiction applies at any one time in cases of employment outside a worker's country of origin: persons moving within the EU are subject to the social security provisions of only one Member State. The rules aim to guarantee equal treatment and non-discrimination by the application of the *lex loci laboris* or host country principle. This means that, as a general rule, the legislation of the Member State in which the person pursues his or her activity as an employed or self-employed person is to apply. In the coordination framework as formulated, derogations from the general rules are made possible in specific situations that justify other criteria of applicability. Posting is one of the exceptions formulated in the applicable legislation (Regulation 883/2004, art. 12)¹.

Rush Portuguesa: the seminal case

In the late eighties, after the enlargement of the then European Economic Community to

¹ J. Cremers, forthcoming article to be published in the European Industrial Relations Journal.

Spain and Portugal in 1986, the European Court of Justice, in the *Rush Portuguesa* (C-113/89) case², had to ascertain whether a Member State could impose upon a provider of services from Portugal conditions relating to the recruitment of workers in situ or the obtaining of work permits for the Portuguese workforce. Back then, a transitional phase for the free movement of workers from Portugal and Spain was still under way whereas the provision of services had been immediately implemented. Given the principle of free provision of services and that free movement of workers applies only to workers who become part of the host country's labour market, thus not to posted workers as they are part of a provision of services, the European Court of Justice (ECJ), in 1990, ruled that a Member State cannot prohibit a company established in another Member State from moving freely on its territory with all its staff. However, the ECJ also declared that: *Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means*" (paragraph 18, C-113/89)

This statement gave the green light to Member States to impose national labour regulations to foreign providers raising concern regarding the balancing of free internal market and social protection amongst the European Commission and the Council which decided to cooperate in what eventually became the Directive 96/71, notably the Posting of Workers Directive.

² The lawsuit was due to limitations imposed by the French immigration service to a Portuguese construction company which had offered its services in France bringing in its cheap Portuguese labour force as part of the services provisions.

The Posting of Workers Directive and its interpretation

This directive applies to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to another Member State but also, as stated in art.1, par.4 of Directive 96/71, undertakings established in a non-member State must not be given more favourable treatment than those established in a Member State. This second provision, as highlighted in the case study elaborated by our Romanian project partner ADO SAH ROM, is not implemented in Romania whereas there is evidence that workers posted from third countries find themselves in a non regulated situation. In other Member States, such as Spain, Portugal and the Netherlands, national law extends the scope to workers from third countries who are entitled to at least the same protection and their employers are obliged to comply with the same conditions as employers from within the EU.

The Posting of Workers Directive defined what a posted worker is and a common set of terms and conditions of employment. According to the directive concerning the posting of workers in the framework of the provision of services, a posted worker is “*a person who, for a limited period of time, carries out his or her work in the territory of a EU Member State other than the State in which he or she normally works*” (art. 2). According to art. 3, host countries must ensure that transnational services providers guarantee posted workers the terms and conditions of employment covering a hard core of labour matters: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality treatment between men and women and other provisions on non-discrimination.

The posting of workers is a delicate issue, even more in the last decade since business

practices increasingly make recourse to it in addition to outsourcing and subcontracting, taking advantage of differences in labour cost amongst European countries. Further, 2004 and 2007 European Union enlargements paved the way towards more systematic posting of workers. These challenges made the ECJ interpretation of the directive paramount in order to find the right balance between the freedom of providing services and the protection of workers.

The case-law developed by the ECJ turns around the interpretation of the art.49³ of the Treaty Establishing the European Community (TEC) which prohibits any restriction on freedom to provide services within the Community. The approach taken by the ECJ in several cases (Sager/Dennemeyer 1991, Wolff and Müller 2004, Laval, Viking, Rüffert, Luxembourg, all in 2008) switched radically from what had been stated in the *Rush Portuguesa* case. Indeed, in many ECJ rulings, the application of host country labour standards is seen as a restriction on free provision of services, principle which, according to the Court, should not be impeded or rendered less advantageous by the host Member State’s domestic legislation through additional administrative and economic burdens. A restriction to the free provision of services can be accepted by the Court if it is not discriminatory, if it meets overriding requirements relating to public interest and provided that that interest is not safeguarded by the rules to which the supplier of services is subject in the Member State in which he is established. Further, the ECJ established that the protection of the posted workers, if they are already enjoying a similar protection in the country of origin, cannot be invoked as

³ “..., restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community”

overriding requirement relating to public interest as well as the protection of domestic business or the reduction of unemployment. In the Wolff and Müller case, the ECJ also downsized the objective of preventing unfair competition through cheaper labour standards as an overriding requirement although the preamble 5 of the Posting of Workers Directive states that *“the transnational provision of services requires a climate of fair competition”* (being a preamble, of course, it is not compulsory).

Reactions to the ECJ rulings

At least three rationales for the Posting of Workers Directive are plausible: protecting posted workers, protecting host state workers, promoting cross-border services.

The Ruffert case, in which the ECJ examined the interrelationship between the fundamental economic freedoms and the social protection of workers, including the application of collective agreements to workers on a given territory where those services are being performed, clearly shows that the last rationale was chosen.

This interpretation raised severe criticism not only by trade unions across Europe. If, on the one hand, the European Trade Union Confederation (ETUC) considered the ECJ's interpretation as narrow, clearly inviting to social dumping and threatening workers' rights as well as working conditions, on the other hand, also the European Centre of Employers and Enterprises Providing Public Services (CEEP) feared that the freedom to provide services would become a problem for public authorities and enterprises as contracting bodies and as social partners.

Business Europe highlighted that the “ECJ rightly concluded that the problems that have occurred are respectively due to national transposition being silent on some provisions of the PWD (Laval), incompatible national legislation (Ruffert) or an overly wide interpretation of the PWD and unclear and unjustified control measures (Luxembourg)⁴.”

Business Europe therefore stresses that there is no need for a revision of the Posting of Workers Directive.

Luxembourg law requires companies which post workers to its territory to comply with certain standards. In the Luxembourg case of 18 June 2008 the ECJ says that any exception to the fundamental principle of freedom to provide services, such as in the Posting of Workers Directive, must be interpreted strictly. It ruled that a Member State may impose upon foreign service providers terms and conditions of employment other than those contained in the PWD, but only if they constitute crucial public policy provisions. It stated that Luxembourg had wrongly described provisions as falling under national public policy and failed to establish that a serious threat to a fundamental interest of society was at stake. Again this ruling raised concern and debates on how to best balance the exercise of fundamental freedoms of internal market with the safeguarding of individual and collective labour rights.

Furthermore, in a resolution of 2007, the European Parliament (EP) highlighted that the protection of posted workers and the preservation of working conditions should be regarded as an overriding reason of general interest and that the full implementation of the directive should be a measure against social dumping. The EP also called on the Commission to fully take into account the variety of labour market models existing in the European Union.

On 22 September 2008 the European Parliament's Employment and Social Affairs Committee issued the own-initiative report “Challenges to collective agreements in the EU” (2008/2085(INI)) that concluded that the 2008 ECJ rulings displays an imbalance between fundamental freedoms of the internal market on the one hand and fundamental rights (as enshrined in individual and collective labour law) of workers on the other. It therefore called for highlighting both the economic and social dimension of the principle

Directive after ECJ rulings”,
http://www.nho.no/getfile.php/filer%20og%20vedlegg/2008-10-07_PP_on_ECJ-Posting_-_Final.pdf

⁴ Business Europe Position Paper 8 October 2008 “No need for revision of Posting of Workers

of non discrimination and equal treatment and for a re-establishment of a real balance between fundamental rights recognised in the European Charter of Fundamental Rights and by Member States and fundamental freedoms of the internal market. The report also concluded that there is a need for a review of the PWD in light of the ECJ rulings, in order to (a) guarantee equal pay for equal work and allow all collective agreements to be taken into account when protecting workers' interests but also to (b) put stronger emphasis on the issue of social criteria in public procurement.

Future development of posted workers issue and our recommendations

In January 2010, László Andor, Commissioner-Designate of Employment, Social Affairs and Social Inclusion, during his appointment hearing at the European Parliament, announced to envisage a revision of the Posting of Workers Directive. The issue is also mentioned in the Commission' Communication on the Europe 2020 Strategy (COM(2010) 2020) under the Flagship Initiative "An Agenda for new skills and jobs", with the Commission announcing that it will work "to adapt the legislative framework, in line with 'smart' regulation principles, to evolving work patterns" (p. 17).

The Commission Working Programme for 2010 announces a legislative proposal on the implementation of the Posted Workers' Directive. "The initiative will aim to improve the implementation of the Posting of Workers Directive. The proposal will clarify the legal obligations for national authorities, businesses and workers on the Directive's implementation and ensure the same rules are universally applicable. Any new legal instrument would improve the provision of information for firms and workers. It would improve cooperation between national authorities, ensure effective enforcement through sanctions and remedial action, and prevent abuse"⁵.

The European Parliament is currently drafting a report on atypical contracts, secured professional paths, flexicurity and new forms of social dialogue (2009/2220(INI)), with the draft report of 26 February 2010 not mentioning the category of posted workers.

⁵ COM(2010) 135 final, 31.03.2010, p. 13, http://ec.europa.eu/atwork/programmes/docs/cwp2010_annex_en.pdf

2. AGENCY WORKERS – DIRECTIVE ON TEMPORARY AGENCY WORK

In the last 20 years, labour markets have become more complex reflecting an economy mainly based on services and the need for a customised production. Also, high levels of unemployment, skill shortages, changing expectations of workers towards their professional career and a more heterogeneous labour force have led decision makers in pursuing policy reforms. Temporary agency work also is at the heart of the flexicurity debate⁶.

A recent Eurofound study⁷ highlights that almost all EU member states have been active in seeking ways to reconcile employment protection with employment flexibility through temporary agency work, whether by law, collective bargaining or some combination of both. It is a regulated form of atypical work based with a mix of legislation, collective labour agreements and instruments of self-regulation at national level. Comparing the 27 Member States wide variations exist in what is regulated (e.g. reasons for using temporary agency work, prohibited sectors, maximum length of assignment) and how this regulation is developed and implemented, most notably the role played by social dialogue. The Eurofound report shows that temporary agency work is currently used in EU Member States, representing 3.8 million people, generating over €100 billion in revenue and predominantly consisting of young people under 30 years of age. It concludes that “in the context of the current economic crisis, policy-makers need to ensure that the regulatory framework in place across the EU upholds both workers rights and the growth of the

sector, so that business and employees can take full advantage of the job creation”.

Regulating the work of private employment agencies

Amongst the labour market policy reforms undertaken in the last 15 years, the progressive recognition of private agencies providing employment services is one of the more important. In 1994, the International Labour Organisation (ILO) itself, after that through the 1949 Convention 96 called for private employment services to be abolished, acknowledged the positive contribution of agency work to the effective functioning of labour markets. Three years later, through the Convention 181, the ILO legitimised private employment services as well as temporary work agencies, nonetheless calling for clear regulations of these.

Once recognised the legitimacy of the temporary work agencies, the challenge became how to find the right balance between protecting workers' rights and promoting flexibility. In particular, what had to be ensured were the fair treatment of temporary agency workers and that employment and working conditions of regular jobs were not to be weakened. Since 2001, in the major European countries, temporary work agencies have doubled their share of permanent placements and increasingly act as a recruitment channel.

In order to protect temporary agency workers from abuse, in many countries, the agency work services have been regulated. There are countries in Europe, such as Italy, Germany and Spain, who require a license for private employment agencies and other who do not. The United Kingdom, for instance, through the *Deregulation and Contracting Out Act*, adopted in 1994, abolished licences. Following the *Morecambe Bay cockling disaster*, when at least 21 cockle pickers, all irregular migrants working for a temporary employment agency, were drowned by the incoming tide, the United Kingdom required agencies in the agricultural,

⁶ For further reading please cf. e.g. SOLIDAR report on flexicurity and labour market inclusion services (2009)
<http://cms.horus.be/files/99931/MediaArchive/FIC-SOLIDAR-Seminar-Flexicurity-Report.pdf>

⁷ James Arrowsmith (2009): Temporary agency work and collective bargaining in the EU. Dublin: Eurofound, cf.
<http://www.eurofound.europa.eu/eiro/studies/tn0807019s/tn0807019s.htm>

shellfish and food packing sectors to be licensed⁸.

Indeed, according to the European Trade Union Confederation, “*compared to all other forms of employment, temporary agency work has the worst record for working conditions, judged on a number of indicators, including repetitive labour, and the supply of information to employees about workplace risks*”. The ILO convention 181 on private employment agencies provides an important legal framework in this regard. Lately, in December 2008, after 10 years of discussion around common minimum standards to be applied⁹, the EU adopted a Directive on temporary agency work (2008/104/EC), to be transposed into national legislation until end December 2011.

The ILO convention 181 on private employment agencies

The ILO convention 181 has been ratified by 23 countries around the world, 12 of which are European Member States (Belgium, Bulgaria, Czech Republic, Finland, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia and Spain). Through this Convention the ILO seeks to assist its member states to establish policies, legislation and implementing mechanisms for the registration and licensing of private employment agencies. According to the Convention, *Members shall take the necessary measures to ensure adequate protection for the workers employed by private employment agencies (...) in relation to: freedom of association; collective bargaining; minimum wages; working time and other working conditions; statutory social security benefits; access to training; occupational safety and health; compensation in case of occupational accidents or diseases; compensation in case of insolvency and protection of workers claims; maternity*

⁸ In January 2010, the UK Government passed *The Agency Worker Regulations 2010*, implementing the EU directive on temporary agency work, which guarantees, at least, equal pay and working time rights when compared what a direct worker would be paid.

⁹ Although it was proposed in 2002, the British government blocked its adoption until 2008.

protection and benefits, and parental protection and benefits (Art. 11). The Convention also aims at avoiding discrimination in the access to labour market through private employment agencies (Art. 5), at eliminating charges on workers who recur to the services provided by agencies (Art. 7) and at providing adequate protection, preventing from abuses, migrant workers recruited or placed in the member’s territory by private employment agencies (Art. 8).

The EU Directive on temporary agency work (2008/104/EC)

Member States have to transpose into national law the temporary agency work directive by 5 December 2011 and the Commission shall review the application of the directive by the end of 2013, so it is early to have an assessment of the provisions adopted. However, according to article 2, the 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 to workers under this category and by recognising temporary work agencies as employers with a view to contributing to the creation of jobs and to the development of flexible forms of working. A definition is provided according to which *temporary agency worker means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction* (Art. 3.1, c).

The main elements of the agreement are that:

- Existing restrictions on temporary agency work should be assessed and reviewed periodically to ensure that they are proportionate, non-discriminatory and objective (Art. 4);
- The basic working conditions of temporary agency workers (such as working hours, overtime, rest time, paid leave and non-discriminatory policies) shall be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job – principle of equal treatment (Art. 5);

- There is no discrimination in the access to employment, collective facilities and vocational training (Art. 6).

The Temporary Agency Work directive does grant national social partners the flexibility to set specific aspects related to temporary employment, such as equal pay and a negotiated time frame of the temporary period. It insofar opens the door for collective

agreements to address governance of agency work, as well as for national legislation to enact laws and work regulations.

The ETUC welcomed the end of a long political deadlock, and gave special praise to the strong language on equality as the principle of equal treatment will not only apply to national situations but also to cross-border agency work which according to ETUC is an important feature in view of increased intra-EU mobility of workers and services.

3. MIGRANT WORKERS - THIRD COUNTRY NATIONALS

The migration of workers from developing countries to the industrialised countries has been on the rise for the last few decades. In the first quarter 2006, according to the European Foundation for the Improvement of Living and Working Conditions (Eurofound), in the European Union around 8 million non-EU citizens were among the economically active population, which means 3.5 % of the total labour force¹⁰. Especially countries like Austria (7%), Germany (6%) and Spain (10%) benefit from the contribution of migrant workers from third countries¹¹.

Migrant workers are more exposed to atypical employment contracts. According to the Organisation for Economic Co-Operation and Development (OECD)¹², in all countries for which data are available, except for Ireland, the risk of being in a temporary job is higher for migrants than for natives. This happens in particular because of the limited duration of work permits, the high incidence of seasonal work among migrant workers (for instance in sectors as agriculture) and the role played by temporary work agencies as recruiters of migrant workers.

Due to the lack of appropriate regulation, migrant workers, in particular those with recent working experience, generally face inadequate working conditions and have fewer possibilities to complaint against employers. As also highlighted in two case-studies produced by our Italian DWIR project partners, migrant

workers face challenges related to working conditions like differences in wages, little likelihood to benefit from training and to advance in their career, exposure to risk in work environment and weak representation in the trade unions. The disadvantaged working conditions of migrant workers seem especially to be linked to their difficulties in obtaining a work-permit and in acquiring the citizenship of host countries, to the recognition of education acquired in their country of origin and to indirect discrimination due to the application of apparently objective criteria that tend to reflect qualifications of the host country's population.

The multiannual programmes on justice and home affairs

EU migration policies are relatively recent if we take as a starting point the conclusions of the Tampere European Council in 1999. Back then, the first 5 years programme on freedom security and justice was agreed, followed by the Hague Programme in 2004 and the recent Stockholm Programme which is going to cover the period that goes from 2009 to 2014. In the Tampere Programme, some important political messages were addressed, in particular concerning fair treatment of third country nationals and management of migration flows. Indeed, the European Council called for measures enhancing non-discrimination in economic, social and cultural life, acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals and proposed EU legal provisions granting a set of uniform rights which are as near as possible to those enjoyed by EU citizens in matter of residence, education and employment.

Following these political commitments, the European Commission put forward in July 2001 a proposal for a Directive on the conditions of admission and stay of third country workers¹³ but, due to Member States'

¹⁰ Eurofound, "Employment and working conditions of migrant workers", 2007

¹¹ These estimates do not take into account the contribution of migrants in undeclared work, particularly in the areas of agriculture, construction, catering, tourism, household services and cleaning. For instance, in Lombardy (Italian northern region with the highest concentration of migrants) within the economically active migrant population, 14.4% work in undeclared employment. It also must be said that most of the undeclared work is executed by regular workers and self-employed (see J. Cremers and J. Janssen "Undeclared labour: don't blame the migrants" in *Transfer*, winter 2008, volume 14, no. 4).

¹² OECD 2006 report

¹³ COM/2001/0386

diverging views on this issue, the negotiations did not lead to the adoption of legislation.

Indeed, as even more stressed 5 years later through the Hague Programme, it seems that migrant workers were considered by Member States as an economic added-value rather than a category of workers whose rights had to be guaranteed. In the 2004 Presidency Conclusions, European Commission was called to present a policy plan on legal migration in order to “respond promptly to fluctuating demands for migrant labour in the labour market”, legal migration was deemed as important in “enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy” and no reference was made on migrant workers, apart from a faint call for the creation of equal opportunities and for fair treatment of legally resident third country nationals.

The Policy Plan on Legal Migration therefore adopted by the EC on December 2005 proposed four sectoral directives respectively on highly skilled workers, on seasonal workers, on paid trainees and on posted workers in multinational companies. So far, of these measures proposed, only the “Blue Card” directive on the conditions of entry and residence of third country nationals for the purpose of highly qualified employment has been adopted by the Council (end of 2008).

In 2007, the EC also presented a Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State¹⁴. This directive would introduce a single application procedure for non-EU nationals who apply to be admitted to the territory of a member state in order to work there so as to simplify admission procedures and facilitate checks on the status of third country nationals. Further, it would grant the right to equal treatment of migrant workers with the nationals of the member state as regards working conditions, freedom of association and to join

a workers’ or employers’ organisation, education and vocational training, recognition of diplomas and other professional qualification, social security, access to services. Nevertheless, member states may limit rights to equal treatment related to study grants and loans or other allowances concerning secondary and higher education, access to social security, access to services and in particular to housing.

Furthermore, there are also several exceptions in the scope of the directive. Indeed, amongst other exceptions, the directive does not apply to posted workers, to self-employed, to refugees and to seasonal workers (this category should however regulated by an ad-hoc directive).

All these exceptions, in the rights conferred and in the scope, clearly weaken the objectives of the directive.

In the recent Stockholm Programme, not much more space has been given to legal migration that is predominantly seen as a tool to increase competitiveness and economic vitality of EU Member States. In its conclusions, issued in December 2009, the European Council calls for “a concerted policy in keeping with national labour-market requirements” through the full implementation of the Policy Plan on Legal Migration, availability of comparable data on migration and improvement of skills recognition and of labour market needs analysis. Only a short paragraph of the multi-annual programmes is dedicated to proactive policies for migrants and their rights, timidly calling for “a more vigorous integration policy that should aim at granting to migrants rights and obligations comparable to those of EU citizens”¹⁵

¹⁴ COM/2007/638

¹⁵ *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, p. 64

The Employer sanctions directive¹⁶

The employer sanctions' directive was adopted in May 2009 and Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by July 2011.

The purpose of the directive is to establish common minimum standards that prohibit the hiring of third country nationals irregularly staying and provide for sanctions against employers. The aim is to counter one of the "pull factors" for irregular migration, notably the possibility of finding a job without having a work permit. The directive covers all irregular third-country nationals without distinction between irregular migrants, overstayers and rejected asylum seekers.

Employers will be required before hiring a non-EU citizen to check if migrants selected have a residence permit and then to inform the competent authorities (art.4.1). The sanctions that may be charged to negligent employers are financial, proportionate to the number of irregular residents employed (art.5), and the directive also provides a mechanism for payment of arrears, of all unpaid wages, and an amount equal to any social security contributions and any tax that the employer should have paid (art.6.1).

Considering that the employment relationship is often based on services provided by intermediaries, the directive also applies to (only) direct subcontractors (art.8.1). In the case in which a subcontractor employs irregular third country nationals companies are not reliable if they prove they were not aware of the infraction committed (art.8.2). The criminal charge is laid in certain circumstances (art.9.1): if the infraction is continued or repeated in a persistent manner; if a significant number of irregular non-EU citizens are employed simultaneously or are victims of trafficking in human beings; if irregulars are victim of working conditions particularly

¹⁶ Directive 2009/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

exploitative; if there is use of a minor. In the last two circumstances the member state concerned may issue, on a case by case, residence permits (art.13.4).

When the directive was adopted, SOLIDAR alongside ENAR, PICUM and the European Women's Lobby¹⁷ pointed out that the directive does not target the reasons that underlie the vulnerability of migrants. Indeed, the choice of the legal basis (art. 63, par. 3b) suggests the missing link to labour migration although the relationship between the provisions adopted and employment policies is evident. As stated by the European Trade Union Confederation¹⁸, the European Union has granted priority to a migration policy of repression rather than developing clear measures against exploitation of labour. Further, as highlighted in the directive impact assessment, one possible side effect could be the deterioration of irregular migrants' conditions who might be stuck even more in the underground economy and suffer greater control of their activities and movements from employers not complying with the provisions.

A reference to the decent work agenda

Still, there is no legal framework regulating all migrant workers in the EU but a reference to decent work was made in the briefing on the outcome of the second Euro-African Ministerial Conference on Migration and Development, held in Paris the 25th November of 2008. The three-year cooperation programme agreed not only focused on fighting against irregular migration but also on organising legal migration. Facilitating the emergence of legal migration opportunities and strengthening institutional cooperation and information on legal migration were put amongst the main objectives. Also, in order to strengthen the synergies between migration and

¹⁷ ENAR, PICUM, EWL, SOLIDAR, "Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation?"

<http://cms.horus.be/files/99935/MediaArchive/pdf/ENAR%20PICUM%20ENAR%20Solidar%20Common%20Position%2015%204%202008%20FINAL.pdf>

¹⁸ ETUC "Sanctions against employers of irregular migrants: ETUC deplores a toothless and counterproductive instrument"

<http://www.etuc.org/a/5801>

development, the cooperation programme put forward the need to “ensure the promotion of decent work in countries of destination (...) by respecting rights of migrant workers, non-discrimination and their integration in the workplaces, including through social dialogue”¹⁹.

The EU acquis on legal migration

If we look at what has been achieved until now in terms of EU acquis on legal migration, it seems that member states are more willing to have EU legal provisions only for the most socially and politically acceptable types of migrants, such as high-earning professionals and migrants admitted on short-term contracts. As a matter of fact, the EU has so far adopted the following legal measures: a directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service²⁰; a directive on a specific procedure for admitting third-country nationals for the purpose of scientific research²¹; a directive on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment²².

The adoption of this last directive, the so-called Blue Card proposal, generated a lively debate, in particular as regards to the definition of ‘highly-skilled worker’ and to the already existing national schemes aimed at attracting qualified foreign labour. Among the necessary criteria to be admitted, the requirement of having a salary 1.5 times the average wage does not seem to be appropriate in order to assess applicant’s values and to define a highly skilled worker. Highly qualified specialists may also find the conditions offered too restrictive: the two year initial validity of the Blue Card is for instance perceived as too low, insufficient for successful integration and might even put off

valuable senior candidates in search of mid to long-term opportunities.

Possible next steps could be, according to the policy plan on legal migration mentioned before, the adoption of specific measures concerning seasonal workers, paid trainees and posted workers in multinational companies.

The adoption of the Lisbon Treaty

In the area of freedom, security and justice, the adoption of the Lisbon Treaty ratifies the full jurisdiction of the European Court of Justice, the passage to co-decision for all elements (except for administrative cooperation) and the introduction of policy objectives. According to art 67, par 2, in which policy objectives are listed, the Union “shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals”. Here two questions may be posed: what does solidarity imply and what is the notion of fair common policy. These points should have been better explained.

Art. 79, inspired by the Tampere conclusions, deals with immigration. The first paragraph sets the policy objective, notably to ensure, at all stages, the efficient management of migration flows, fair treatment of regular third-country nationals and the prevention of irregular immigration and trafficking in human beings. The second paragraph lists the measures in which the ordinary legislative procedure, i.e. co-decision, applies: conditions of entry and residence, standards for long-term visas and residence permits (including family reunification), the definition of the rights of regular third-country nationals, unauthorised residence and the fight against trafficking. However, as stated in the fourth and fifth paragraph, MS are still competent as regard to integration and labour migration.

¹⁹ Council of the European Union, *Comprehensive approach to migration – briefing on the outcome of the second Euro-African Ministerial Conference on Migration and Development*, Paris, 25 November 2008

²⁰ Directive 2004/114/EC of 13 December 2004

²¹ Directive 2005/71/EC of 12 October 2005

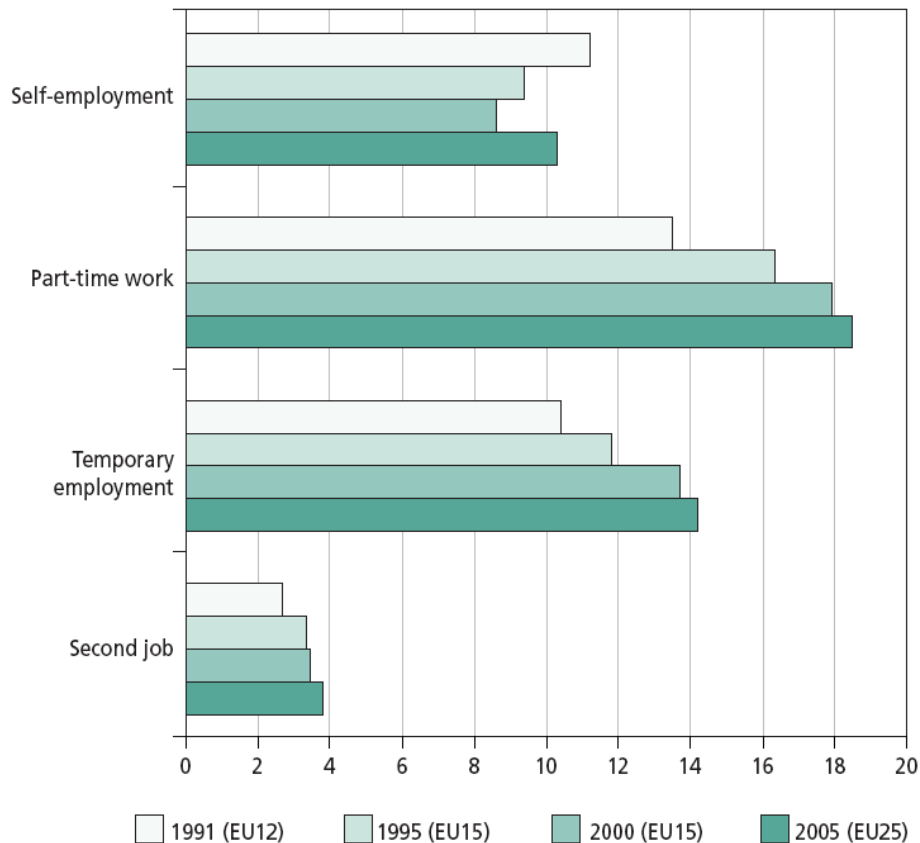
²² Directive 2009/50/EC of 25 May 2009

ANNEXES

1. Extent and growth of temporary agency workers (1990-2003)

	Main trends in numbers of temporary agency workers	Composition of sample	Source
Denmark	Rapid and constant increase in the period from 1993-2001. 1993: 1,538; 2001: 30,565	Number of people working for temporary work agencies	General economic statistics on trade and industry, Statistics Denmark
Finland	Growth from 1996-2002. 1996: 6,307; 1999: 13,270; 2002: 16,633	Number of people working in labour recruitment and provision of personnel	Employment statistics, Statistics Finland
France	Doubling from 1995-1999. Decrease from 2001 to 2002. 1995: 292,000; 1999: 604,000; 2001: 602,500; 2002: 570,000	Number of contracts equivalent to full time jobs	DARES, use of UNEDIC files based on monthly reports from temporary work agencies
Germany	Constant increase until 2002, when a slight decrease is observed. 1990: 123,378; 1995: 176,185; 2001: 357,264; 2002: 336,295	Number of employees working for temporary work agencies	Employment statistics, German Federal Employment Agency
Netherlands	Increase from 1992-1997 and then stabilising from 1997-1999. Downward trend from 2000. 1992: 1.9%; 1997: 3.8%; 1998: 3.8%; 1999: 3.7%; 2002: 2.8%	Share of total employment (%)	Dutch Central Bureau of Statistics
Spain	Fivefold increase from 1995-1999. Downward trend since 2001. 1995: 378,739; 2000: 2,005,132; 2001: 1,901,352; 2002: 1,949,453	Number of "Put at disposal contracts" signed between temporary work agencies and user firms	Spanish Ministry of Labour and Social Affairs
Sweden	Rapid growth from 1994-1999. Slight decrease from 2000-2003. 1994: 5,000; 1999: 24,000; 2000: 42,300; 2002: 36,900; 2003: 28,700	Number of people working as temporary agency workers	Swedish TAW sector's own calculations

2. Non-Standard employment in the European Union, 1991 – 2005 (%)



Source: Labour Force Survey.

Note: 'Temporary employment' refers to workers on fixed-term contracts and those on temporary agency contracts.

3. Health indicators among temporary agency workers and permanent employees, 2000* (%)

Health indicators	Temporary agency workers		Permanent employees	
	Full-time	Part-time	Full-time	Part-time
Job dissatisfaction	22.4	25.4	14.1	12.1
Health-related absenteeism	16.3	8.0	15.4	13.1
Stress	17.3	16.2	30.2	26.3
Fatigue	21.6	14.1	20.6	17.8
Backache	28.6	21.8	31.6	29.2
Muscular pains	29.7	23.9	31.1	28.0

*The number of temporary agency workers participating in the European working conditions survey 2000 is 327 (185 full-timers and 142 part-timers), which equals 1.7% of the survey population. The number of employees in permanent employment is 14,028 (10,356 full-timers and 3,672 part-timers), equalling 72.3% of the total survey population.

Source: European Foundation for the improvement of Living and Working Conditions, 2007

4. Employees who received training in the last 12 months by type of contract, 2000

Type of contract	%
Temporary agency contract	23
Fixed-term contract	31
Indefinite contract	35
Apprenticeship	40
All employees	34

Source: Paoli, P. and Merllié, D., Third European survey on working conditions, 2001, p. 19.