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Equal Treatment for Transnational Temporary Agency Workers?

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I. Temporary Agency Work

Temporary Agency Work (= TAW) is a form of employment involving the supply of workers by intermediaries (temporary work agency) for assignment in other undertakings (user undertaking) where they work temporarily under the user undertaking's direction and supervision. Once such work is performed cross-border, it represents transnational TAW. The most common form of transnational TAW is represented by agencies sending workers they employed at their place of establishment abroad for working at a user undertaking in a foreign country.

The notion of "temporary agency worker" according to Article 3 §1(c) Agency Work Directive includes workers whose contractual duties are not restricted to exclusively being assigned to a user undertaking but also allow for working at the agency in-between assignments. Generally, a TAW contract as such can be fixed term or of indefinite duration. The permissible duration of the worker's assignment to the user undertaking, however, remains an open question: For all contractual relationships coming under the scope of the Directive it is decisive, though, that the assignment as such has to be temporarily in nature for compliance with Article 1 §1 Agency Directive. The notion of agency work being "temporarily in nature" has been interpreted by some¹ as limiting the Directive's material scope of application. If the TAW – Directive were to deal only with assignments of a temporary nature all agency workers assigned on indefinite or consecutive contracts would be left unprotected by EU law. Such consequence is not in keeping with the spirit of Art. 5 § 5 of the Directive, obliging Member States to "prevent successive assignments designed to circumvent the provisions of the Directive". This obligation clearly indicates that agency workers on consecutive assignment need special protection, not less protection than other employees. The Directive therefore is to be

¹ Boemke, die EG-Richtlinie und ihre Einflüsse auf das deutsche Recht, Recht der Internationalen Wirtschaft 2009, p.177, 179.

understood as regulating all forms of temporary agency work but allowing for assignments of specific duration only².

This limitation of agency work goes back to the CJEU's "Jouini" ruling³: in essence, for reasons of worker protection should agencies provide for temporary replacement but not for replacing the regular workforce. An additional argument flows from the Directive's goal to further the "stepping stone – effect" of TAW: Agency workers, according to Article 6 §3 Agency Work Directive, should have the chance of being recruited by the user undertaking after carrying out an assignment there, which would almost disappear if an assignment could be kept in place for indefinite duration.

When representing a precondition for establishing agency work, the temporary nature of assignments needs a more precise definition. The directive itself does not provide for such precision. The meaning of "temporarily" nevertheless needs to be in accordance with other EU instruments dealing with forms of atypical work. Of special relevance for determining the permissible duration of assignments might be the conditions set for renewing fixed term contracts: The duration of assignment of an agency worker is "temporary" for the length of time which the user undertaking may have offered to contract with the worker had he been employed by this undertaking directly on a fixed term basis.

II. The Temporary Agency Work Directive

Of crucial importance for finally agreeing to a political compromise in preparation of the Directive has been the consent of European Social Partners for the TAW sector, Eurociett and Uni-Europa, laid down in their May 2008 joint declaration. Thereby social partners agreed on accepting as a general objective to the principle of equal treatment which will include all agency workers from their first day of assignment onwards. One aspect for the business side to concede such standards may have been the necessity for the agency business to attract more, and in some countries even better qualified,

² G.Kiss/Z. Banko: Die Arbeitnehmerüberlassung im ungarischen Arbeitsrecht und die Richtlinie über Leiharbeit, Europäische Zeitschrift für Arbeitsrecht 2010, p. 208, 214; P. Sansone, Die Gleichstellung von Leiharbeitnehmern nach deutschem und Unionsrecht (2011), p. 459, 461.

³ CJEU 13.9.2007, C-485/05, "Jouini", No. 35, 37.

workers for their business model to thrive. In that case, working conditions must become more attractive, increasing social acceptance of the TAW sector. Nevertheless, this political compromise accepts that Member States allow collective agreements to derogate from this general principle or create exceptions themselves (Article 5 Agency Work Directive).

The final version of the Directive pursues the aim of reconciling worker protection with employer flexibility. Difficult as this reconciliation may seem, the Directive obliges not only to implement the equal pay/equal treatment principle but additionally expressly states (Article 4 § 1) that any political measure discriminating against the TAW industry should be prevented. Member States are therefore obliged to regularly review and finally abolish any restriction to or prohibition of TAW, with the notable exception of requirements of registration, licensing, certification or monitoring (Article 4 § 4). On the other hand, the CJEU had already set a liberalizing agenda also for licensing requirements⁴ by controlling them against the freedom to provide services. The flexibility approach therefore is likely to be applied thoroughly, whereas the equal treatment obligation can become rather weak, according to the generous exception clauses Member States are allowed to introduce. As the Directive's two main objectives are not easily reconcilable, they give raise for much debate.

Some additional measures to prevent abusive contractual design of TAW are included in Article 5 § 5, that explicitly obliges Member States to take appropriate measures for the prevention of successive assignments that could be misused for circumventing the equal treatment principle. Regulations intended to restrict the renewal of assignments therefore are deemed to be compatible with the Agency Directive without much specific justification. Astonishingly enough, one distinct example for a ground of general interest to prohibit the use of TAW is not mentioned explicitly, and that would be the protection of workers on strike which is mentioned only in Recital No.20 of the Directive. This Recital states that Member States "may" prohibit the replacement of workers on strike by agency workers, thereby leaving it to the States' assessment whether or not to allow TAW to replace strikers.

⁴ CJEU 30.6.2011, C-397/10 "Com./Belgium"

III. Transnational TAW, Free Movement of Workers and Provision of Services

Cross-border provision of services, the economic freedom for service providers to offer their services also in a Member State they are not established in, includes the posting of workers from the country of establishment to the country where the service is offered⁵. Posted workers are sent abroad by their employers to temporarily work in the country of destination. This may include not only the regular workforce of a service provider but also the workforce of a temporary work agency established for the purpose of hiring out workers to undertakings cross-border. The business contract between agency and user undertaking in principle – without any additional choice of law clause – will be governed by the law of the Member State where the agency is established, Article 4 § 1 (c) Rome I Regulation⁶. The contract of employment in principle will be governed by the same legal regime as long as the posting does not change the place where the work is habitually carried out, Article 8 § 2 Rome I Regulation. For workers temporarily performing work in another country, the place where they habitually work will not change, so that the law of the home State applies. The applicable legal regime can nevertheless be partially replaced by overriding mandatory provisions of the host State, Article 9 Rome I Regulation, which cannot be derogated from. Those would include the equal pay/equal treatment principle laid down not only in national laws for furthering an active labour market policy, but also prescribed by the EU Agency Work Directive. If, however, such agency is providing workers for cross-border services only, so that no substantial activity (other than administration) takes place in the country where the agency is established, the applicable law will become the law of the host country⁷. This country is the one where the employee is obliged to work “habitually”, so that the contract is in principle governed by its legal order, Art. 8 (2) Rome I Convention.

⁵ CJEU 17.12.1981, 279/80 „Webb“, No. 9; 16.6.2010, C-298/00 „RANI Slovakia“, No. 36.

⁶ Regulation EC 593/2008 of 16.6.2008, OJ L 177, p. 6.

⁷ F. Bayreuther, Der Betrieb 2011, 706, 708.

1. Provision of Services and Free Movement of Workers

The EU **Services Directive 2006/123/EC** excluded generally all issues relating to labour force movements from its scope of application⁸, so that neither posting of workers nor transnational TAW are regulated by this Directive. More specifically, Article 2 § 2(e) Services Directive explicitly excludes temporary work agencies and the service they provide from the Directives' scope. Whether such workers instead may rely on the **free movement of workers provisions** depends on their relevant contractual situation: once persons leave their home country and move cross-border for the purpose of taking on a job⁹ abroad, this arrangement represents the classic case of free movement that is not regulated by the Posting of Workers Directive, as no employer is responsible for sending this worker abroad. The contract concluded in the country of destination immediately is subject to that country's domestic legislation. The foreign worker will be entitled to the same working conditions as domestic workers, including the equal pay/equal treatment principle once the employer is a temporary work agency. Once the contract of employment the migrant worker concludes in the host country is a purely "domestic" contract, no different rules concerning the applicable law apply. This in principle holds true also for cases in which the workers have been called upon – either by a temporary work agency or by a user undertaking co-operating with this agency –to move into the country of destination for contracting with the agency. These workers are treated as if they decided independently to move to the country of destination for the purpose of seeking a job there.

2. Posting of Workers

The alternative regulatory framework that could be relevant for transnational TAW is the **Posting of Workers Directive¹⁰** which, in the understanding of the CJEU, in principle is concerned with the free provision of services instead of

⁸ B. Bercusson/N. Bruun: Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire, in: K. Ahlberg/B. Bercusson/N. Bruun/H. Kontouros/C. Vigneau/L. Zappalà (ed.), Transnational Labour Regulation – A case study of temporary agency work (2008), p. 263, 269 ff., 314.

⁹ ECJ 17.12.1981, C-279/80 "Webb", para. 9; 10.2.2011, C-307/09 to C-309/09 "Vicoplus", para. 27.

¹⁰ Directive 96/71/EC, OJ (1997) L 18/1, 21 January 1997.

protection of workers, as it is no labour law Directive¹¹. As a consequence, the application of the country of destinations' domestic labour market standards also to posted workers is not justified simply "because" this serves the goal of worker protection; instead such protective standards have to comply with a strict proportionality test ensuring that they do not go beyond what is necessary for reaching the minimum standards that the Directive allows to apply¹². Neither domestic legislation nor collective agreements in the country of destination may oblige foreign employers posting their workers there to provide for better working conditions than those minimum standards¹³.

The Posted Workers Directive in principle applies once workers already employed in their home country are temporarily sent abroad for the purpose of fulfilling their employer's contractual duties from a business contract. Also transnational posting by a temporary work agency constitutes the provision of services and not normally -at least in the understanding of the CJEU – an act of free movement of workers. The argument for reaching this conclusion regularly refers to posted workers not becoming part of the country of destination's labour market. At least for temporary agency workers, this reasoning was never really adequate. Also the CJEU nowadays acknowledges that posted agency workers "gain access by means of making available of labour"¹⁴. The consequences thereof in labour law, especially in terms of applicability of the law of the host country, need to be further developed.

Article 3 § 1 (d) Posting of Workers Directive includes the conditions applicable to temporary agency work into the scope of those minimum standards the host country is entitled to impose on foreign service providers. The labour law contract between agency and its posted workers will therefore be governed by the home country's regulations, except for conditions for hiring out workers and other minimum standards applied in the host country. Member States *may* provide that agencies must guarantee workers the (identical) terms and

¹¹ L. Zappalà, in: K. Ahlberg/B. Bercusson/N. Bruun/N. Contouros/C. Vigneau/L. Zappalà (ed.), Transnational Labour Regulation – A case study of temporary agency work (2008), p. 155, 166.

¹² S. Evju: Implementing EU Law on Services: National Diversity and the Human Rights dilemma, arbeidsrett og arbeidsliv (2011), p. 287, 290.

¹³ In the view of the Commission (COM (2003) 458 final), communication from the Commission to the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States: "Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State".

¹⁴ CJEU 10.2.2011, C-307 to 309/09 „Vicoplus“, No. 35.

conditions of employment applicable to domestic agency workers, Article 3 § 9 Posting of Workers Directive. This would then – as a condition applicable to agency work, Article 3 § 1(d) Posting Directive – also be applicable to foreign service providers sending workers for carrying out work in that country. In practice, such a decision would have the effect of putting posted agency workers on an equal footing with domestic agency workers instead of guaranteeing them only the minimum standards that other posted (but non-agency) workers are entitled to according to Article 3 § 1 PWD. For an internal market it would be logical that the rules for posted agency workers do not differ in content depending on the category of either national or transnational posting. By following this line of reasoning, terms and conditions of work for posted agency workers could be harmonized at national level when transposing the Agency Work Directive by including also the conditions for posting of agency workers.

3. Temporary Agency Work

The **Directive on Temporary Agency Work** 2008/104/EC¹⁵ can change perspectives for transnational TAW significantly. Under this Directive, Member States in principle are no longer just allowed to provide agency workers some form of equal treatment, but are obliged to do just that: The principle of equal treatment and equal pay between agency workers and the user undertakings' regular workforce from the first day of assignment onwards finally emerged as representing a minimum requirement of the Directive. Under such legal regime, a considerably higher standard of important working conditions for transnational agency work could emerge than in posting situations. “Basic employment and working conditions” as defining the scope of the equal treatment principle according to Article 3 § 1(f) Agency Work Directive consist of working time, overtime, breaks, rest periods, night work, holidays and public holidays, and pay. In the Directive, the notion of “basic working conditions” is exemplified but not finally listed and refers back to domestic legislation, regulations...collective agreements etc. Among those relevant regulatory instruments only one type is missing: the individual contract of employment; the Directive explicitly refers to “binding general provisions” to

¹⁵ OJ (2008) L 327/9, 5 December 2008.

arrange for an abstract standard of equality that can be applied without demanding an individual comparator.

Member States explicitly are permitted to differ in what to include in the notion of “pay”: should this include all contractual entitlements, or exclude all extras not directly linked to the work undertaken, such as allowances or benefits once they are intended to further a long- term contractual relationship? A certain margin of discretion is explicitly foreseen for the most relevant of such occupational benefits: Article 5 § 4(2) states that Member States may exclude from the application of the equal treatment principle all occupational social security schemes such as pensions, sick pay or financial participation schemes.

The general scope of the equal treatment principle nevertheless doesn’t represent a non-discrimination clause: Contrary to the generous provisions contained in Article 4 § 1 of the Fixed-term Work Directive 1999/70/EC¹⁶, the Agency Work Directive in principle allows for different working conditions for workers regularly employed by the user undertakings and staff provided by the agency. The Agency Work Directive is not guaranteeing workers the right not to be treated less favorably at the user undertaking “because” they are employed by the agency. The fact that the contractual employer remains the agency, not the user giving directions, determines the terms and conditions of employment even though the work is not normally carried out for the employer but for the user. With this standard the Directive moves away from the approach that was followed by the CJEU when establishing the relevant comparator in equal pay anti-discrimination cases: there, the equality principle could only be successfully invoked if there was a single source responsible for the wage disparity that could correct underpayment of one of the groups¹⁷. By way of the equal pay/equal treatment standard the Agency Work Directive restrains from formulating substantive minimum provisions, which the EU is not competent to provide for (Article 153 § 5 TFEU), but sets a standard for measuring the level of protection¹⁸ by comparison that national legislation or custom is competent to concretize.

¹⁶ OJ (1999) L 175/43, 28 June 1999.

¹⁷ ECJ 13.1.2004, C-256/01 „Allonby“.

¹⁸ CJEU 13.9.2007, C-307/05 “Del Cerro Alonso”, No. 41; 15.4.2008, C-268/06 “Impact”, No. 124.

4. Impact of the Directive on transnational agency work

The impact that the Agency Work Directive will have depends on the transnational aspect to the relevant contract between worker and agency: had the employment contract been agreed upon before the worker moved to the country in which his work has to be carried out, this amounts to a typical situation of posting. Essentially, such workers are subject only to the core labour standards of the country of destination as outlined in Article 3 § 1 of the Posting Directive, providing a minimum standard only¹⁹. Apart from that, in principle the country of origin's law will apply. The host country's implementation of the Agency Work Directive will apply as one of those core standards; in all situations where the Agency Work Directive has not been fully transposed into domestic law, it can be understood as public policy provision of all EU Member States to guarantee that the basic employment conditions are applicable to transnational TAW also. If the employment contract between agency and worker had been established only after the worker moved to the country of destination, this amounts to a typical situation of (temporary) migration for work, legally regulated by the equality principle of the free movement provisions. The workers are then subject to the same legal rules and the same conditions of employment as any domestic worker employed by the same agency. The Agency Work Directive adds to the standards the dimension of entitling TA- workers – nationals and foreigners alike – to the basic conditions of employment provided to workers at the user undertaking.

IV. The Equal Pay/ Equal Treatment Principle and Exceptions thereof

Providing several working conditions applicable to workers of the user undertaking also to agency workers hired out to this undertaking relieves from the necessity to define the relevant comparator. Instead, the comparison remains hypothetical²⁰ as agency workers are entitled to such working conditions including pay as they would have received had they been recruited

¹⁹ S. Evju: Implementing EU Law on Services: National Diversity and the Human Rights dilemma, arbeidsrett og arbeidsliv (2011), p. 287, 294.

²⁰ N. Countouris/R. Horton: The Temporary Agency Work Directive: Another Broken Promise?, Industrial Law Journal, Vol. 38 (2009), p. 329, 333.

to the same job directly by the user. Working conditions therefore depend on the level of basic conditions that the user undertaking normally would agree to in contracts of employment, be they defined through statutory law, practice or policy or due to a collective agreement applicable to the undertaking. If there is another employee doing broadly the same work in the same undertaking, the comparison to this person's contractual terms would be the easiest proxy for what the agency worker would have received if he were employed by the user undertaking. But if there is no suitable comparator working at the relevant organization and time, it will suffice to use the categories defined by an applicable collective agreement or by a pay scale regularly applied throughout this undertaking.

1. Influence of collective agreements in general

The potential influence of collective agreements on the terms of agency workers' employment contracts will depend on various external factors: Agreements declared universally applicable, if provided for under the relevant legal system, will regulate conditions of employment in a certain sector. If the sector concerns the business activities of the user undertaking, due to the equal treatment principle this would also be applicable to agency workers temporarily working in that sector. Alternatively, the collective agreement may have been agreed upon for the TAW sector, covering the agency as employer. The precondition for that would be the acknowledgement of TAW as a specific business sector of its own, even though the relevant working activities change according to their respective business partners' branches. Where there are specific collective agreements for TAW, the level of entitlements in these agreements presumably are lower than those applicable to the user undertakings' business sector.

According to the TAW Directive's equal pay/equal treatment principle, agency workers would see their relevant "basic" employment conditions change according to their respective assignments. During the period of assignment, in principle only the basic conditions of a collective agreement applicable to that user undertaking seem to apply as minimum standards. TAW sector specific agreements governing the employment contract of an agency worker would be relevant only concerning such terms that are not "basic" in the meaning of the

Agency Work Directive. The main contractual duties, working time and wages, on the other hand would not be covered by a TAW collective agreement, unless they happen to be set at higher standards than those relevant for the user undertaking. Only where employment contracts with the agency do not cease to exist in synchronization with the business contract, TAW sector specific collective agreements would govern the situation between two periods of assignment. This does not seem to amount to a lot of regulatory influence of those collective agreements. In practice, TAW sector specific collective agreements quite to the contrary gain huge relevance through their power to derogate from the Directives' standards.

2. Power to derogate from equality principles

The Agency Work Directive vests Member States and social partners with a lot of actual influence on contract conditions for agency workers: Article 5 § 3 includes the possibility that social partners may derogate from the equal pay/equal treatment principle by self-regulation. This derogation power includes also the scope of the “basic” working conditions. Where Member States are able to derogate from the general principle, they remain obliged to previously consult with social partners, Article 5 § 2 and 4. Article 5 § 2 allows for an exemption to the equal pay principle after consulting social partners. Article 5 § 4 allows Member States to derogate from both principles by statutory provisions once collective agreements cannot cover all similar undertakings in a distinct sector or geographic area. For technical reasons, in such legal systems the necessary general coverage has to be provided by law, even though social partners must be given decisive influence either through prior consultation or through making already existing collective agreements the basis for any relevant derogatory provision.

a) Specific derogation for open-ended employment contracts, Article 5 § 2

An explicit exception to the equal pay – not the equal treatment – principle is included in Article 5 § 2 of the Agency Work Directive, allowing for a lesser level of remuneration where agency workers conclude a contract of

employment of indefinite duration with the agency and continue to be paid between assignments. This option is modeled along the solution nowadays²¹ prominently applied in Sweden²². It provides better protection to agency workers who do not bear the risk of unemployment if there is no immediate consecutive assignment available after the previous one ends. For this additional protection workers can be exempted from the equal pay principle (Recital 15, Agency Work Directive) so that their wage level may remain independent from any user undertaking's standards throughout the employment relationship with the agency. As there is no user undertaking in the period between assignments, there also would be no comparator whose wages could be mirrored by the contractual entitlements of the agency worker. So for the period between assignments an autonomous wage level needs to be set by individual or collective contracts, anyway. As the agency actually may have no use for the workers' service as long as they cannot be hired out, also the wages during this period might be lower than the entitlements during assignments. From this perspective, the overall level of protection is not diminished by providing for a generally lower standard of pay during assignments once this remuneration is then guaranteed also for the periods in which the employees cannot be assigned elsewhere.

However, such an exemption clause contains the potential of abuse. Even an open ended contract of employment does not guarantee continuation of the contractual relationship as it can be easily terminated for economic reasons immediately after the assignment of the worker ends. Alternatively, agency and worker can agree on dissolving the contract upon the end of assignment, which is reported to be wide spread in Austria²³. The worker's consent to such agreement is achieved either by the promise to re-hire, or by signing such agreement preceding the contract of employment itself. A comparable effect is obtained once employees are contractually obliged to accept unpaid extra-leave whenever they cannot be assigned to a user. In such situations the very reason for permitting to derogate from the equal pay principle, the protection of

²¹ Also Germany used to apply this model but repealed it under the reform agenda.

²² K. Ahlberg/N. Bruun: Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System, in: K. Ahlberg/B. Bercusson/N. Brunn/H. Kontouros/C. Vigneau/L. Zappalà (ed.), Transnational Labour Regulation – A case study of temporary agency work (2008), p. 37, 48.

²³ Schindler, die neue Leiharbeitsrichtlinie – der Umsetzungsbedarf in Österreich, Das Recht der Arbeit 2009, p. 176.

a decent level of income also in periods when the agency worker cannot be hired out, is not guaranteed. If such constructions of employment contracts for agency workers are not ruled out²⁴, the respective Member State will have to safeguard the necessary level of protection by other means. For compliance with Article 5 § 2 States would then become obliged to take appropriate measures to prevent misuse of this legal option, e.g. by introducing a certain period of time during which the workers will have to receive remuneration even if they are put on extra-leave or the agency can dismiss them for economic reasons.

b) Collective agreements providing for general derogation, Article 5 § 3

Vesting the derogative power directly to social partners without special government intervention, Article 5 § 3, allows for establishing arrangements concerning the contractual conditions for agency workers “which may differ from” the basic working conditions. This broad margin of discretion for collective agreements is subject only to the “conditions laid down by the Member States” and the precondition that they “respect the general protection of” agency workers. Collective agreements therefore are free to provide better standards for agency work than for regular contracts of employment, adding a sort of “premium” for the precariousness of such contract. On the other hand, they are equally able to level down the standards for basic conditions considerably. One of the objectives of this broad discretion is protecting the autonomy of the social partners now guaranteed under Article 28 of the EU Fundamental Rights Charter, so that courts should not review the adequacy of a collective agreement.

This argument remains valid only for substantive regulations agreed upon by social partners themselves. The power of derogating from the equality standards is therefore not simply transferrable to other actors; a collective agreement cannot restrict its content to stating that any derogation from equal treatment in individual contracts shall be permitted. Also the practice common in Germany, to allow derogation in individual contracts by referring to collective

²⁴ In the UK, Reg. 10(1)(d) Agency Work Regulation states that the agency is precluded from terminating the contract until it has complied with its obligation to pay during breaks between assignments for at least 4 weeks in aggregate.

agreements the workers are not otherwise bound by, seems equally questionable. Also in this case the derogation of the equal treatment principle is effectively set by the employer's superior bargaining power instead of the more balanced collective bargaining process.

Article 5 § 3 is agreed upon to allow Member States with a tradition of regulating working conditions through collective agreements as customarily applied by Nordic countries²⁵, to implement the Directive on this basis. In principle, this provides a good opportunity to further collective bargaining and strengthen the influence of social partners. If they can reach high quality standards for agency workers through the means of collective bargaining, they are able to attract new members. Even though also the TAW Directive implies the deregulating flexibility approach that had been customarily applied in earlier instruments concerning atypical work, this strengthening of collective bargaining allows for re-regulation at national level. A necessary precondition for achieving a high standard of protection is the relative strength of the unions who apply this flexibility instrument. If the organization rate among workers, especially in the TAW sector, is strong enough to vest unions with sufficient bargaining power, transposing the Directive through collective agreements will guarantee for an adequate standard of protection²⁶. If the same model is applied by a Member State where such precondition is not met, the outcome will become insufficient.

A specific example provides the German TAW sector: in earlier years only very few agency workers ever became union members, so that traditionally there were no collective agreements specifically covering the TAW branch. This approach changed dramatically when the relevant statute on Temporary Agency Work in 2002 introduced the option²⁷ of bargaining away the equal pay

²⁵ K. Ahlberg/N. Bruun: Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System, in: K. Ahlberg/B. Bercusson/N. Bruun/H. Kontouros/C. Vigneau/L. Zappalà (ed.), *Transnational Labour Regulation – A case study of temporary agency work* (2008), p. 37, 52; K. Ahlberg: A Story of Failure – But also of Success, in: K. Ahlberg/B. Bercusson/N. Bruun/H. Kontouros/C. Vigneau/L. Zappalà (ed.), *Transnational Labour Regulation – A case study of temporary agency work* (2008), p. 191, 253.

²⁶ K. Ahlberg/N. Bruun: Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System, in: K. Ahlberg/B. Bercusson/N. Bruun/H. Kontouros/C. Vigneau/L. Zappalà (ed.), *Transnational Labour Regulation – A case study of temporary agency work* (2008), p. 37, 48.

²⁷ B. Waas: Temporary Agency Work in Germany: Reflections on Recent Developments, *International Journal of Comparative Labour Law and Industrial Relations* 2003, p. 387, 395, 401.

principle in collective agreements. Immediately after this legislative decision, new unions were formed for contracting low wages and working conditions in the TAW sector²⁸. As they also had very low membership rates, they had no incentives to restrain from concession bargaining in order to earn approval from members. The relevant Statute allowed individual labour contracts to refer to existing collective agreements derogating from the general equal treatment principle for the purpose of applying such agreements' standards also to employment relationships which are regularly not covered²⁹. If only one such collective agreement for the TAW sector exists, no matter how few workers had joined or approved such union which agreed to it, the equal pay/equal treatment principle could be overcome for all workers in the sector.³⁰ As a consequence, also unions with a more regular approach to the collective bargaining process could not help but concede to only slightly better working conditions. As they were equally unable to win many members among agency workers they would have not enough bargaining power to force agencies into concluding agreements with better terms but instead would have left all grounds to the newcomer unions. For this reason, in a very short time the whole TAW sector was indeed covered by collective agreements; but this does not amount to a high level of worker protection but its primary purpose became derogating from the equal treatment principle at the expense of agency workers. Compensation was not provided for.

The revised German statute of 2011³¹ that is meant to implement the Agency Work Directive still upholds this regulatory approach, while introducing a new minimum level of pay for agency work that cannot be undercut by whatever collective agreement. This solution in a way combines both the approaches of the Posting of Workers Directive by setting minimum standards and of the Agency Work Directive by allowing derogation from the general principle of equality. Whether the result will be held to be in keeping with the Directives' standard of adequate protection depends on the interpretation of the notion that derogating collective agreements will have "to respect the overall protection" of agency workers. Given this precondition, it may be for the social

²⁸ M. Gouenoub: Equal Pay and Equal Treatment im Leiharbeitsverhältnis (2009), p. 132 ff..

²⁹ R. Waltermann: Fehlentwicklungen in der Leiharbeit, Neue Zeitschrift für Arbeitsrecht 2010, p. 482, 483; M. Schlachter/M. Klauk: Tarifdispositivität – eine zeitgemäße Regelung? Arbeit und Recht 2010, p. 354 f..

³⁰ Landesarbeitsgericht Hamburg, 24.3.2009, H 2 Sa 164/08.

³¹ Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes. 28.4.2011, BGBl. I. 642.

partners to create such an overall protection of workers themselves. But if they don't, this obligation falls back to the member States themselves. Does a State meet this requirement by setting one common minimum standard that cannot be undercut by collective agreements? Or is "overall protection" of workers only provided for if the basic working conditions for the great majority of agency workers remain at an at least comparable level to what the equal treatment principle guarantees?

A Member State invoking Article 5 § 3 of the Agency Work Directive is not thereby exempt from the obligation to guarantee for the adequate level of protection in the TAW sector. Once unions are – for whatever reasons – too weak to guarantee the adequate protection by collective bargaining it remains the States' responsibility to provide results complying with the Directive. Even though the autonomy of social partners must be respected, this doesn't exclude collective agreements from the scope of the equal treatment principle, now enshrined also in Article 20 EU Fundamental Rights Charter, when they act under the scope of the Agency Directive. The Directive's binding objectives have to be met by whatever means a Member State uses for transposing it into domestic law. The equal treatment principle historically counts among the Directive's main objectives, representing the counterweight to deregulating the TAW sector³²; to more or less set aside such goal cannot happen without substantial compensation³³.

As the Temporary Agency directive doesn't differentiate between national and trans-national agency work, any otherwise applicable collective agreement derogating from the equal pay/equal treatment principle generally also applies to agency workers temporarily posted to another country. This collective agreement will set conditions related to the labour market conditions in the posted workers home country. Once such an agreement is established for the purpose of derogating from the equal pay principle it is likely to set the remuneration at a lower level than what user undertakings in their home country would habitually pay. As this level probably is as such much lower than the one user undertakings in the host country pay to their regular employees, home State collective agreements might set payments

³² R. Waltermann: Fehlentwicklungen in der Leiharbeit, Neue Zeitschrift für Arbeitsrecht 2010, p. 482, 485.

³³ M. Fuchs: Das Gleichbehandlungsgebot in der Leiharbeit nach der neuen Leiharbeitsrichtlinie, Neue Zeitschrift für Arbeitsrecht 2009, p. 57, 58.

substantially lower for transnational agency workers than what co-workers at the user undertaking in the host country earn. The Posting Directive, though, provides for at least a common minimum standard: once the host country applies statutes or universally applicable collective agreements setting one level of pay for agency work throughout the country, that level must be respected also by foreign agencies posting their workers to that country.

c) Member States providing for general derogation, Article 5 § 4

Member States are not free to use the regulatory option they might prefer. Derogating from the equal treatment principle through statutory provisions is admitted only where the respective legal system does not foresee universally applicable collective agreements and no other alternatives exist for covering whole sectors in specific areas. Whenever collective agreements can – legally or factually – cover the field, Member States cannot invoke Article 5 § 4 for intervening themselves. But where preconditions are met, Member States are competent to not only derogate from the material scope of the equal pay/equal treatment principle but may also introduce a “qualifying period” until those principles actually apply. Once a Member State chooses to introduce that option it must meet the condition that an “adequate level of protection” is still provided, Article 5 § 4 (2). This option is given to Member States only, social partners acting under Article 5 § 3 are not competent to do so.

This provision was meant to allow the United Kingdom to implement the Directive on the basis of an agreement between social partners at national level that allowed for a 12-week qualifying period of working “in the same role” before agency workers become entitled to equal treatment³⁴. This exemption can be very generous to agencies as there is virtually no time limit applied once the agency worker’s “role” in the user undertaking continues to change.

With this wide margin of discretion the main obstacle for the UK to consent to the Agency Work Directive was overcome by political compromise. Whether it will serve its purpose nevertheless remains an open question, as the safeguarding obligation to provide an “adequate level of protection”

³⁴ For the details compare: Adecco Group UK & Ireland: Equal Treatment for agency workers – a guide to the Agency Workers Regulations 2010, p. 7.

intentionally reduces this margin of discretion. Whether this precondition for derogating from the general principle can be met, may to a large part depend on how many agency workers will be excluded and how long the qualifying period tends to become in practice. If the exception affects a considerable percentage of agency workers without anyhow compensating for lost equal treatment entitlements, there will be not much protection left that could qualify as amounting to an “adequate level”.

V. Conclusion

Transnational TAW represents a combination of a difficult triangular contractual relationship with a difficult practice of differentiating between already employed workers having been posted abroad and workers who are asked to move abroad before getting employed. The respective construction of the contract between agency and worker sets the frame for different protective standards in applying some sort of equality principle. The EU Temporary Work Agency Directive provides for a new concept that allows agency workers to compare working conditions provided by the agency as their employer with those conditions provided by user undertakings to their regular employees. This approach goes clearly beyond what was hitherto understood as representing a suitable comparator under EU anti-discrimination law. Such a development seems to considerably add to the protection of cross-border work. The exception clauses of the TAW Directive nevertheless allow for several ways to derogate from this general principle, so that Member States in transposing the Directive enjoy a wide margin of discretion, just how much equality they will give to (foreign) agency workers. But the Directive does not allow to simply prolonging domestic practices to exclude agency workers in general or at least for a considerable period of time from enjoyment of most of the equality rights without compensation. In order to meet the Directive’s objective of limiting the precariousness of TAW and simultaneously establishing a good reputation for agencies as employers, any acceptable exception to the general principle must preserve an adequate level of protection, not merely low-key minimum standards.