Transnational Temporary Agency
Work: how much equality does the equal treatment principle provide?

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I. Introduction
In the context of regulating the cross-border provision of services, the regulation of labour relations at EU level plays the most crucial role. Transnational temporary agency workers are an integral part thereof in that workers are for a certain period of time working in a country other than that in which their contractual employer, the temporary work agency, is established. Which legal entitlements such workers may invoke depends up to a point on the legal basis of their moving cross-border: have they been posted or have they been employed as workers seeking jobs in another country? Additionally, for both types of workers the EU Agency Work Directive\(^1\) provides for certain entitlements, too. But does this amount to putting agency workers on an equal footing with regular employees? This would depend on the application of an equal treatment standard between those groups. The objective of this paper is to evaluate, what kind of equality principle is applicable to what kind of agency workers and what sort of protection is provided by the application thereof.

II. Temporary Agency Work: description and relevance
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. In some EU Member states, the use of TAW is wide spread; this sector contributes considerably to the creation of jobs\(^2\), especially in the aftermath of the economic crisis. For proponents of this type of employment relationship, this economic relevance of the sector indicates that TAW represents a very useful tool for promoting the “flexicurity” concept in the internal market. The Commission emphasized that in 2002 the main motives for employing agency workers were to deal with variations in demand or with absence of permanent staff, but cost

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advantages played an almost negligible role\(^3\). Nevertheless, working conditions of the employees concerned can be – and in several countries are – precarious. In that case the goal of reaching a fair balance between protecting workers and enhancing the positive role of agency work for the implementation of an active labour market policy is not met\(^4\). Measures need to be taken to improve the image of the sector and increase social acceptance for agency work. Why there has hitherto been little social acceptance for the TAW sector but working conditions were regarded as precarious relates to both the legal and the factual side of TAW employment relationship.

The very condition of working “under the direction and supervision” of the user undertaking represents the main line of demarcation against contracts for services in which one party, with the help of its workers, undertakes to bring about a particular result. Such contractual relationships may be put into practice in a very similar manner or even identical to temporary supplying workers for assignment in other undertakings. As the business contract between the two undertakings provides contractual obligations only between the contractors themselves but not for the workers, there is no need for transferring contractual rights to give directions to the undertaking where the work is to be performed. As a result, there is no aspect of a labour relation between worker and user undertaking in this connection.

1. **Construction of contractual relationships**

Legally, the most obvious problems flow from the triangular construction of the TAW relationship, which leaves the worker with an employer responsible to provide wages and a user undertaking vested temporarily with the power to give directions and concretize the contractual obligation to work\(^5\). Among triangular contract relationships existing differences need to be taken into account, such as between contracts where the worker is employed by the agency for the purpose of working under the control of an end user and contracts where the agency acts as a placement facility, introducing job seekers to possible future employers. The Agency Work Directive (AWD) covers the first type of situation only, as indicated in its Article 2 (“the purpose of this Directive is to ensure the protection of temporary agency workers … by recognizing temporary work agencies as employers”). Differentiating between the two forms of supply of workers depends on the fact that agency workers enter the user undertaking on a temporary basis whereas placement facilities provide for permanent staff. Given that


\(^5\) R. Vatinet: La mise a disposition de salaries, Droit social 2011, 656, 663.
after a period of assignment a certain number of agency workers will actually receive and accept job offers from the user undertaking, even an “employer” type of intermediary can in parallel act as a placement agency. This cannot lessen the standard of protection provided to the worker. To reach the broad protective goal of the Directive, ambiguous types of contractual triangular employment relationships for temporary assignment therefore should be understood as providing a presumption for a contract of employment between worker and agency.

The notion of “temporary agency worker” according to Article 3(1)(c) AWD 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. For all contractual relationships that come under the scope of the Directive it is decisive, however, that the assignment as such must be temporary in nature in order to comply with Article 1(1) AWD. This precondition makes it very clear that permanent assignment of workers is not permitted under this Directive. This interpretation of agency work goes back to the CJEU’s “Jouini” ruling: in essence, for reasons of worker protection agencies should provide temporary replacements but not serve to replace the regular workforce. Agency workers, according to Article 6(3) AWD, should have the chance of being recruited by the user undertaking after carrying out an assignment there, an opportunity that would almost vanish if a temporary assignment could be kept in place for indefinite duration.

As the labour law contract between agency and worker is combined with a business contract between agency and user undertaking, more often than not the agency is interested to achieve compatibility in time between the two contracts it is bound by. Therefore the length of time the agency provides personnel to the end user tends to parallel the maximum duration of the employment contract. If such consistency is achieved the agency runs no risk of employing personnel that is not in demand with users; instead it is the worker who is left with the risk of becoming unemployed in such a situation. In technical terms the agency can reach such goal by either “synchronizing” the two types of contract from the start by concluding the labour law contract on a fixed term basis, or by dissolving the open ended labour contract immediately when the business contract will end. If, on the other hand, agencies employ a business model of hiring out better qualified personnel, it is preferable to keep employment relationships with their specialized, well trained workers more stable.

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8 Case C-485/05 Mohamed Jouini and Others v Princess Personal Service GmbH (PPS), [2007] ECR I-7301, paras. 35, 37.
2. Insecure working conditions?

Independent from the construction of the triangle, such contract provides for an insecure level of working conditions, potentially changing according to the respective place of work. Also, the risk of facing dismissal is considerably higher than that of regular employees even for such personnel who is not employed on a fixed term basis. TAW is functioning as a flexibility buffer allowing the user undertaking to react rapidly and without many legal restrictions to an economic downturn by reducing the number of wage earners they have to pay for. Legal options for improving a precarious situation through means of collective labour relations in the TAW sector are insecure at best. The union density rate among agency workers is absolutely poor in most countries⁹; due to the high turnover rate of workers changing workplaces or even industries on a regular basis they develop less likely a connection to unions as potential representatives of their interests. Additionally they may hesitate to join a union for fear of reprisal from the work agency, especially by way of not being offered new assignments. Representation at company level also has several obstacles to overcome. If agency workers are represented at their legal employer’s, the agency, such representatives are competent to bargain only for a limited amount of working conditions relevant to agency workers. If there is employees’ representation in the user undertaking representing both the regular employees and the agency workers, a conflict of interest may arise whenever the core workforce might benefit from using agency workers as flexibility buffers. Against this legal background also factual indicators for labeling TWA a precarious employment relationship can emerge.

a) Vulnerable groups

A common feature of TAW in many Member States is that it frequently relies on particular labour market groups, especially those most vulnerable for other reasons, such as young workers searching for a first job, unskilled workers, migrant workers or persons who had previously interrupted their labour market participation. These groups are obviously in an especially difficult position with regard to demanding better working conditions as they lack any meaningful exit option from TAW. Such focus on particular groups is less likely the more TAW spreads across market sectors: in countries that assign agency workers in relevant numbers also for the purpose of temporarily filling qualified positions in banking, finance or administration, the composition of the TAW workforce will include also workers with a more regular labour market career.

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⁹ European Foundation for the Improvement of Living and Working Conditions: Temporary agency work and collective bargaining in the EU (2009) p.20/21 reports a good representation rate among TAW workers only for Belgium, Denmark, Finland, and Sweden.
b) Short duration of contracts

Also the duration of assignment varies between countries: Some\textsuperscript{10} provide for a maximum duration of an assignment, or for TWA contracts to necessarily be fixed-term\textsuperscript{11}. The average duration of assignment, as opposed to the worker’s staying employed by the agency or remaining in the agency work sector at all, is rather short in many countries, so that anything between less than one week and three months is reported as an average\textsuperscript{12}. This may be accompanied by another sequence of longer-term placements of over six months to over a year, especially for white collar workers eventually more than two years. This allows for the conclusion that the common employment contract of short term duration, independent from its legal construction, normally provides for assignment into jobs without high training costs.

c) Terms and Conditions

The wages of agency workers with little previous training persistently have been considerably lower than those of regular workers\textsuperscript{13}; even if the equality principle applies concerning basic wages, frequently this does not include individually contracted wage components or bonuses. Workers tend to be entitled to minimum standards only, when non-wage contractual conditions are concerned. In case of an economic slowdown agency workers are the first to be dismissed\textsuperscript{14}; in a phase of economic recovery, though, the TAW sector tends to belong among the first to recruit personnel again\textsuperscript{15}. The very purpose of hiring personnel instead of recruiting it, thereby cutting costs and enhancing flexibility, can leave the respective worker with unstable working conditions below the average level of the respective sector and with insecure employment relationships.

d) Agency Work as a “stepping stone”

From many workers’ perspective the lack of employment stability clearly counts among the reasons against taking on TAW. According to a survey conducted in the UK\textsuperscript{16}, 58% of agency workers agree to this type of work due to the lack of alternatives. On the

\begin{itemize}
  \item[\textsuperscript{10}] European Foundation for the Improvement of Living and Working Conditions: Temporary agency work and collective bargaining in the EU (2009) p. 33.
  \item[\textsuperscript{11}] Ibid. p. 38.
  \item[\textsuperscript{12}] Ibid. p. 10.
  \item[\textsuperscript{14}] Ciett (ed.): The Agency work industry around the world (2010) p. 74 f.
  \item[\textsuperscript{15}] Sansone, P, Gleichstellung von Leiharbeitnehmern nach deutschem und Unionsrecht (2011), p. 41.
\end{itemize}
other hand, the very fact that it is primarily vulnerable groups with difficulties finding employment that do TAW can be qualified as facilitating the re-engagement of such target groups and long-term unemployed into work. Agency work thereby could help furthering or even proving their employability, or convincing user undertakings that they make for valuable employees despite having handicaps of some sorts. This may also provide a first stepping stone for migrant workers whose credentials and experience from their country of origin is lesser known to an employer and therefore initially might not be considered reliable or trustworthy by user undertakings. If, on the other hand, the arguments for the usefulness of TAW refer to the improvement of labour market participation of workers preferring temporary work such as students or (female) caretakers, this seems less convincing. Once such particular labour market groups prefer more flexibility in their working arrangements for improving their work-life balance around private commitments, they regularly would fare better when working part-time or even flex-time in a stable employment relationship that provides a reliable amount of income. So they probably end up in doing TAW as no viable alternatives are offered on their relevant labour market.

3. Advantages of agency work for user undertakings
The scarcity of such alternatives may be due to the advantages of TAW for the demand side: The responsibility for recruitment, selection and administration of personnel can be partly outsourced to the agency. In case the hired workers provide high quality work they become candidates to be selected for a permanent position with the user undertaking. In case the workers work or behave somehow inappropriately, the agency can be called upon to send someone else. Agency workers can respond to unexpected production peaks or to manpower needs in sectors affected by seasonal patterns of demand like agriculture or tourism. Once an undertaking does not wish to keep a reserve for filling periods of staff absences due to sickness, vacations or maternity leave, TAW can provide coverage for all of this, too. If TAW in some countries receives considerably worse contractual conditions, the regular workforce can be partially abandoned and later re-hired on the cheaper TAW contract conditions. User undertakings thereby can substitute staff partly by agency workers, be it through an “in-house” agency especially founded for such purpose, or through an external partner cooperating with the end-user on business contracts. Agency work allows user undertakings to make relatively unrestricted labour adjustments whenever necessary. As


\footnote{R. Waltermann, Fehlentwicklungen in der Leiharbeit, NZA 2010, 482, 484.}
they do not employ the agency workers, they do not have to dismiss them once they are no longer needed; instead of having to abide by dismissal statutes, user undertakings simply cease the business contract with the agency.

For this business model to thrive, agencies need to attract more and – at least in some countries – better qualified workers. Wherever there emerge real “alternatives” to TAW and applicants have a choice to enter or circumvent that sector, the agencies’ business model can only expand if it can be marketed to potential workers. Therefore the working conditions must become more attractive so as to attain a better image of the agencies as “good employers”, thereby increasing the social acceptance of the whole business sector. According to this perspective, the EU initiative to introduce the Agency Work Directive became finally acceptable to the industry as well as client companies.

III. History of the Temporary Agency Work Directive

At EU-level TAW was already touched upon by regulations before the adoption of the AWD, even though not in a comprehensive manner: the Health and Safety Directive 91/383/EC19 and later on also the Posting of Workers Directive 96/71/EC20 already covered certain important aspects of agency work, but the problem of sub-standard working conditions for employees in TAW sector and the questionable image of that sector as employers remained untouched. This was not due to lack of political proposals to cope with such problems, because the process of preparing such Directive took almost three decades of failed attempts21 and debates, from the Council Resolution of 21 January 1974 concerning a social action program22 to the failed Article 155 TFEU-negotiations between European Social Partners in May 2001 to the final approval of Directive 2008/104/EC in October 2008.

1. Reconciling protection and flexibility

Of crucial importance for finally agreeing to a political compromise 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 compromise that the principle of equal treatment will include all agency workers from their first day of assignment onwards, but that Member States may allow

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collective agreements to derogate from this general principle or create exceptions (Article 5 Agency Work Directive). The finally approved version of the Directive pursues the aim of reconciling worker protection with employer flexibility and therefore implements not only 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, by obliging member states to regularly review and finally abolish any restriction to or prohibition of TAW.

2. **Abolishing Restrictions of TAW**

This obligation to revise restrictive clauses in Member States’ relevant regulations of TAW includes the abolition of limiting the use of agency work, for example by creating a list of admitted grounds for using such type of contract. Such restrictions further can include a narrow definition of situations in which TAW may be used, defining the number or maximum duration of temporary assignments or the admissibility of replacing one agency worker with another (successive assignment). Alternatively, the number of agency workers that might be hired out by any one undertaking at one point in time can be restricted, or the use of TAW forbidden in certain sectors such as construction. Article 4(1) AWD allows for upholding such regulations only when “justified on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented”.

When interpreting this provision it is adequate to take ILO Convention No. 181 (1997) on Private Employment Agencies into account, which explicitly permits States to prohibit “private employment agencies from operating in respect of certain categories of workers or branches of economic activities”, Article 2(4)(a). To reconcile the different approaches of the respective international instruments it will be necessary to interpret the Directive’s exception clause relating to the proper functioning of the labour market in a manner that includes proven abuses of TAW in market segments that lack proper control mechanisms. This very reason is regularly stated for restricting the use of TAW in the construction industry, and if there is adequate factual evidence of a

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24 Compare the study on the construction sector in the Netherlands: www.flexmarkt.nl/nieuws/aanpak-illegale-arbeid-blijkt-effektief-3138.html

structural malfunctioning of control in this sector, such exemption could be maintained even under Article 4(1) AWD. Some additional mentioning of preventing abusive contractual design of TAW is already included in Article 5(5), which even 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 needing much specific justification.

Astonishingly enough, one specific example for a ground of general interest to prohibit the use of TAW is not mentioned explicitly, i.e. 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.

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

Since the fundamental right of free movement of workers from May 2011 onwards can be invoked also by nationals of most of the Central European Member States, workforce mobility across EU territories is due to increase even further. 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 offered, so that such 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 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 Regulation. The contract of employment will in principle 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 in principle applies. The applicable legal regime will at least partially be replaced by overriding mandatory provisions of the host state, Article 9 Rome I Regulation, which cannot be derogated from. This 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. Therefore the legal regime applicable to transnational work depends on the construction of the relevant contract.

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 application, 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 of the Treaty depends on their relevant contractual situation: once persons leave their home country and move cross-border for the purpose of taking on a job abroad, this represents the classic case of free movement that is regulated neither by the Posting of Workers Directive nor by the Agency Work Directive, as no employer is responsible for sending the worker abroad. An employment contract concluded in the country of destination immediately is subject to that country’s domestic legislation. Such foreign workers 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. As the contract of employment that the migrant worker concludes in the host country is a purely “domestic” contract, no different rules concerning the applicable law apply: as the transnational element took place prior to the establishment of contractual relations, it will not count as a relevant element to the performance of the contract of employment. The result is also independent from the duration of the contract. This type of mobility may be short-term, especially in seasonal work or agriculture, where workers contract only for fulfilling a specific task and moving back to their home countries after


30 Case 279/80 Webb, para. 9; Joined Cases C-307/09 to C-309/09 Vicoplus SC PUH, BAM Vermeer Contracting sp. Zoo, Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid, CJEU 10.2.2010 (“Vicoplus”), para. 27.

finishing, but this will not prevent it from being exempt from the EU Directives mentioned above.

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 such agency – to move into the country of destination for contracting with the agency. Such workers are treated as if they decided independently to move to the country of destination for the purpose of seeking a job there. Even though there are no EU labour law rules applicable to such situation, it remains questionable whether all financial consequences of movement should be borne by the workers alone if they were asked to come for contracting purposes. An undertaking “calling” for foreign workers to move to their place of establishment will have to take on responsibility for the cost of transportation, specific trip insurance or housing of the workers. This is relevant for avoiding situations of abuse and fraud especially relating to fixed term contracts of short duration, even though there are no rules at EU level explicitly providing for a solution to such dilemma.

2. Posting of Workers
The alternative regulatory framework that could be relevant for transnational TAW is the Posting of Workers Directive which, in the understanding of the CJEU, in principle is concerned with the free provision of services instead of protection of workers, as it is no labour law directive. 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 apply. Neither domestic legislation nor collective agreements in the country of destination may oblige foreign employers posting their workers to such country to provide for better working conditions than those minimum standards. For posted agency workers, the relevance of this set of rules will be looked after in greater detail.


33 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”.

The Posting of Workers Directive (PWD) 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 with another contractor. 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 mentions that posted workers are not considered to participate in the country of destination’s labour market. At least for agency workers, this conclusion has always been questionable: their contractual employer, the agency, does not participate in any labour market through other services but providing manpower, so that the very purpose of transnational temporary work agencies is the sending abroad of workers whose work will take place in the foreign labour market only. Also the CJEU nowadays acknowledges that posted agency workers “gain access by means of making available of labour”34. The consequences thereof, especially in terms of applicability of the law of the host country, need to be further developed.

As the contract of employment of a posted worker regularly will have been concluded in the country of origin, in principle that country’s legislation will be applicable to it with the notable exception of those rules of the country of destination that the PWD requires or permits to apply35. There is no difference in cases where the employer is a temporary work agency. This result is obvious once both undertakings, agency and user undertaking, are established in the same Member State and the user undertaking later sends the personnel who have been provided by the agency to work abroad. Here, the hiring out of workers to a user undertaking would be governed exclusively by domestic legislation, whereas in the event of a posting the rules transposing the PWD are applicable. If the agency itself is posting a worker cross-border to a user undertaking established in another member State, not only the Posting of Workers Directive but also the Agency Work Directive will have to be taken into account.

Article 3(1)(d) PWD includes “the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings” among the minimum standards a host country may impose on foreign service providers. The Directive prescribes an exhaustive list of matters that can be made applicable. Other contractual conditions applicable to employees of the user undertaking have no relevance for the employment relationship between a temporary worker and the agency36. Transnational

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34  “Vicoplus“, para. 35.
36  The German Federal Labour Court explicitly stated that temporary agency workers cannot, without an explicit reference in their contract of employment, be subjected to contractual
service provision by an agency could therefore have the consequence that the two contracts the agency enters into will be governed by effectively different legal regimes: the labour law contract in principle by the home country’s regulations, but with the exception for conditions for hiring out workers and other minimum standards applied in the host country, and the business contract by the rules of the home country only. As a result of the discrepancy in norms, risks and challenges from potentially lacking compatibility emerge. This status of legal complexity can get even more complicated according to Member States’ respective decision on how to transpose the Directive’s equality standards. They *may* provide that agencies must guarantee workers the (identical) terms and conditions of employment applicable to domestic agency workers, Article 3(9) PWD. This would then – as a condition applicable to agency work, Article 3(1)(d) PWD – also be applicable to foreign service providers sending workers to carry out work in that country. In practice, such 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. As this Directive only allows for such regulatory option for Member States, they do not have to implement a non-discrimination clause for posted agency workers in comparison to domestic ones.

3. Temporary Agency Work

a) Basic conditions

The *Agency Work Directive* can have changed perspectives for transnational TAW significantly. Next to extending the rules on protection of pregnant women, nursing mothers, children and young people and the anti-discrimination principle applicable to the user undertaking also to the agency, it establishes a specific equality principle: The principle of equal treatment and equal pay between agency workers and the regular workforce from the first day of assignment onwards, which was acknowledged already in several Member States, finally was agreed to represent a minimum requirement of the Directive. Under such a legal regime, a considerably better standard of important working conditions for transnational agency work could emerge than for other posting situations. “Basic employment and working conditions” as included in the equal treatment principle by Article 3(1)(f) AWD 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 defined and refers back to domestic legislation, regulations … collective agreements etc. In this list of relevant regulatory instruments only one type is missing: the individual contract of employment.

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standards applicable to the user undertaking, e.g. a term of exclusion: Bundesarbeitsgericht, 23.3.2011 – 5AZR 7/10.
The Directive explicitly refers to “binding general provisions” to arrange for an abstract standard of equality that can be applied without demanding an individual comparator. Member States nevertheless are permitted to differ in what to include in the notion of “pay”: e.g. whether this should 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) explicitly 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 does not provide for a non-discrimination clause under the Agency Work Directive. Contrary to the more generous provisions contained in Article 4(1) of the Fixed-term Work Directive 1999/70/EC\(^{37}\), 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 in essence 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 undertaking 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 undertaking.

b) Relationship between the Posting of Workers Directive and the Agency Work Directive

The Agency Work Directive quite obviously deals with labour law issues, not primarily economic matters. It nevertheless states in Recital 22 that implementation of the Directive must be in compliance the Treaty provisions regarding the freedom to provide services and the freedom of establishment and “without prejudice to Directive 96/71/EC”. This formula allows for the conclusion that in cases of overlapping scope of application, the Posting of Workers Directive might take precedence over the Agency Work Directive. As the latter is concerned with primarily domestic agency work and additionally with some transnational situations, the PWD necessarily has a transnational scope as “posting” by definition demands a transnational component. For cross-border temporary agency work, which represents a posting situation once the contract of employment with the agency preceded the movement of the worker to the host country, the PWD therefore could become the applicable rule more specific to the transnational aspect of the contractual relationship. Nevertheless, the fact that the Agency Directive represents a special instrument of worker protection whereas the Posting Directive in

the understanding of the Court is an internal market instrument indicates an application of the specialty rule in the opposite direction. In order to give the protective dimension of the Agency Directive some useful effect also for posted agency workers, this standards must be read into the Posting Directive.

Establishing a specific relationship between the two Directives is of importance for cases, in which their respective approach differs. The content of the applicable basic rules of worker protection is, as has been already described above, among those differing provisions. Giving preference to the Posting of Workers Directive in this situation might undercut the protective standards of the Agency Work Directive. To avoid this result, Article 3(9) PWD (as indicated above) opens broad options for providing posted agency workers identical entitlements as domestic ones. 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. If Member States do not wish to follow that line, it remains still necessary to respect the protective dimension of the Agency Work Directive by reading those standards into the Posted Workers Directive. This is not in contradiction with the approach in Recital 22, which intends to avoid national policy developments deviating from EU standards. Basic working conditions developed in and even prescribed by another EU Directive could not stand accused of representing unjustified restrictions to economic freedoms. Also the country in which the temporary work agency is established is bound by the notion of basic working conditions laid down in the Agency Work Directive as far as domestic TAW is concerned. How could it then become an inadequate restriction to the freedom to provide services to apply that same Directive when providing for transnational TAW? In essence, even for transnational TAW the basic working conditions, for which equal treatment with the regular workforce of the user undertaking is prescribed, must be guaranteed.

Another difference between the Posting Directive and the Agency Directive concerns the difference in application of the “favourability principle”, the application of which is set in Article 3(7) PWD as an obligation (“Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers”), whereas Article 9(1) of the Agency Work Directive provides only for an option (“this directive is without prejudice to the Member States’ right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers.”). In this case, the Agency Work Directive gives a margin of discretion to Member States that could be easily harmonized with the Posting of Workers Directive by including the stricter favourability provision.
4. Impact of the Agency Work Directive on the different forms of transnational agency work

In conclusion, the legal systems regulating the working conditions of transnational TAW present some decisive differences and similarities. 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, governed by the Posting of Workers Directive. Essentially, such workers are subject only to the core labour standards of the country of destination as outlined in Article 3(1) PWD, providing a minimum standard only.38 Apart from that, in principle the country of origin’s law will apply. The Agency Work Directive will apply after transposition in the country of destination as one of those core standards; apart from that and 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, on the other hand the employment contract between agency and worker had been established only after such worker moved to the country in which the contractual obligations will be carried out, 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. Who is responsible for bearing the costs of moving into the country to where the worker is called is not explicitly regulated in the relevant EU instrument. The Agency Work Directive adds to the standards the dimension of entitling TAW workers – nationals and foreigners alike – to the basic conditions of employment provided to workers at the user undertaking. With such 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 groups.39 The Agency Work Directive follows the different approach of obliging the agency to pay the difference between the worker’s contractual


wage and the amount that the user undertaking would give if the worker was one of their regular employees. By way of the equal pay/equal treatment standard the Agency Work Directive refrains from formulating substantive minimum provisions, which the EU is not competent to provide for (Article 153(5) TFEU), but sets a standard for measuring such level of protection by comparison that national legislation or custom is competent to concretize.

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

Providing basic working conditions applicable to workers of the user undertaking also to agency workers hired out to this undertaking implies a release from the necessity to define the relevant comparator whose working conditions can be asked for also by agency workers. Instead a hypothetical comparison is relevant as the agency worker is entitled to such working conditions including pay as they would have received had they been recruited to the same job directly by the user undertaking. The worker therefore is entitled to the relevant 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 those persons’ 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 might 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 therefore depend on their respective scope of application. Agreements declared universally applicable, if provided for under the relevant legal system, will regulate the content of conditions of employment in a certain sector; if the relevant sector is defined by the business activities of the user undertaking, due to the equal treatment principle this would also include agency workers who are temporarily working in that sector. Alternatively, the collective agreement may have been agreed


upon specifically 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 are carried out in their respective business partners’ branches. Even where there are specific collective agreements for TAW, the level of entitlements in such agreements presumably would differ from what is contracted in the user undertakings’ business sector. Pursuant to the equal pay/equal treatment principle, agency workers would see their relevant employment conditions change according to their respective assignments. During the period of assignment, theoretically only the basic conditions of a collective agreement applicable to that undertaking would apply. Any TAW–sector specific agreement 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, would then not normally be covered by any TAW collective agreement, remaining almost marginalized for the duration of assignment. Only for such agency workers whose employment contract with the agency does not cease to exist in synchronization with the business contract, any TAW sector specific collective agreement will remain meaningful in between two periods of assignment. In practice, though, TAW sector specific collective agreements gain a lot of relevance through their power to derogate from the Directives’ standards.

2. **Power to derogate from general principles**

The Agency Work Directive vests Member States and collective agreements 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 (3). The respective involvement of social partners therefore follows rather different standards: Article 5(2) allows for an exemption to the equal pay principle after consulting social partners. The model implemented by Article 5(3) favours self-regulating by social partners. Article 5(4) allows Member States to reach the same results 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) AWD, 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 Swedish solution\textsuperscript{42} that provides better protection to agency workers who do not bear all the risks of unemployment if there is no immediate second assignment available once the previous one ends. For this additional protection they can be exempted from the equal pay principle (Recital 15 AWD) so that their wage level may remain stable throughout the employment relationship with the agency instead of fluctuating alongside their respective assignments. 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 has no use for the worker’s service as long as they cannot be hired out, also the wages during this period might be considerably 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 remuneration, even at a somewhat lower level, is then guaranteed also for the periods in which the employees effectively do not work.

On the other hand, such 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. A comparable effect is obtained once employees are contractually obliged to accept unpaid extra-leave whenever they cannot be assigned to a user undertaking. In such situations the very reason for permitting to derogate from the equal pay principle, the protection of a decent level of income also in periods where the agency worker cannot be hired out, is not guaranteed. If such constructions of employment contracts for agency workers are not ruled out, 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. This objective could be reached by introducing a certain period of time during which such workers will have to receive the money due between assignments even if they are put on extra-leave or the agency can dismiss them for economic reasons.

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

Vesting the power to derogate directly with social partners without special government intervention, Article 5(3), allows of 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. One of the objectives of this provision is protecting the autonomy of social partners now guaranteed under Article 28 of the EU Charter of Fundamental Rights, 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 in individual contracts shall be permitted.

Article 5(3) was agreed upon to allow Member States with a tradition of regulating working conditions through collective agreements as customarily applied by Nordic countries\textsuperscript{43}, to implement the Directive on this basis. If the organization rate among workers, especially in the TAW sector, is strong enough to vest unions with sufficient bargaining power, such model of transposing the Directive will guarantee for an adequate standard of protection\textsuperscript{44}. If, on the other hand, the same model is applied by a Member State where such precondition is not met, the outcome will become questionable.

A specific example for such questionable outcome 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 option\textsuperscript{45} of bargaining away the equal pay principle in

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collective agreements. Immediately after this legislative decision, new unions were formed for the purpose of contracting low wages and working conditions in the TAW sector. As they still had very low membership rates, there was no need 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 that derogate from the general equal treatment principle for the purpose of applying such agreements’ standards also to employment relationships which are regularly not covered by such agreement. Along this line it became easy for agencies as employers to do away with the equal pay/equal treatment principle once and for all workers, whether or not they had ever joined a union. 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 not have enough bargaining power to force agencies into concluding agreements with better terms; instead they would have left the field entirely to the newcomer unions. For this reason, in a very short time the whole TAW sector was indeed covered by collective agreements whose primary purpose became derogating from the equal treatment principle at the expense of agency workers. Compensation was not provided for.

The revised Statute of 2011 that is meant to implement the Agency Work Directive still upholds this regulatory approach, while providing for a minimum standard of pay 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 meet the Directives’ standards 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 but is not necessarily the duty of the social partners to create such overall protection of workers themselves. It also might suffice once they respect what the respective Member State is responsible to provide. 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

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47 R. Waltermann:, Fehlentwicklungen in der Leiharbeit, NZA 2010, 482, 483.
48 Landesarbeitsgericht Hamburg, 24.3.2009, H2Sa 164/08.
49 Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes. 28.4.2011, BGBl. I. 642
counts among the main objectives, representing the counterweight to deregulating the TAW sector\textsuperscript{50}; to more or less set aside such goal cannot happen without very substantial compensation\textsuperscript{51}. But did the State itself meet this requirement by setting a 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 that invokes Article 5(3) of the Agency Work Directive is not thereby exempt from the obligation to guarantee the adequate level of protection in the TAW sector. Once unions are – for whatever reasons – too weak to force such adequate level through by means of collective bargaining it remains the State’s responsibility to provide results complying with the Directive.

As the Temporary Agency directive doesn’t differentiate between national and transnational agency work, any collective agreement derogating from the equal pay/equal treatment principle generally also applies to agency workers temporarily posted to another country. The collective agreement relevant for posted agency workers therefore will relate to the labour market conditions in the workers home country. Once such an agreement is established derogating from the equal pay principle, it would set the remuneration at a lower level than what user undertakings in their home country would habitually pay. As this level probably is much lower than the one user undertakings in the host country pay to their regular employees, for transnational agency workers home State collective agreements might provide substantially less than what co-workers at the user undertaking in the host country earn. The Posting Directive, though, provides for means to implement at least a common minimum standard: once the host country provides for 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.

\textbf{c) Member States providing for 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”

\textsuperscript{50} R. Waltermann, Fehlentwicklungen in der Leiharbeit, NZA 2010, 482, 485.

\textsuperscript{51} M. Fuchs, Das Gleichbehandlungsgebot in der Leiharbeit nach der neuen Leiharbeits-Richtlinie, NZA 2009, 57, 58.
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 treatment. The main obstacle for the UK to consent to the Agency Work Directive was thereby overcome by introducing such a clause as a political compromise. Whether it will serve its purpose nevertheless remains to be seen, as the safeguarding clause concerning the necessary “adequate level of protection” reduces the margin of discretion given to Member States. Whether this adequate level as a precondition for derogating from the general principle can be met, may to a large part depend on how many agency workers will be excluded by applying the relevant length of qualifying period. If the result 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”.

VI. Perspectives

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 applying different protective standards in applying some sort of equality principle. The EU Agency Work Directive provides for a new concept that allows agency workers to compare working conditions provided by the agency as their employer with those conditions that are provided by the user undertaking to their regular employees. This approach goes clearly beyond what was hitherto understood as representing a suitable comparator under EU anti-discrimination law. This development seems to considerably add to the protection of cross-border work. The exception clauses of the Agency Work 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 – and in comparison to whom – they will give to foreign agency workers. But the Directive does not allow to simply continue domestic practices to exclude agency workers in general or 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.