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ARTICLE

Recent case law on equal treatment of agency workers: broad interpretation of a limited concept?

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Abstract
Directive 2008/104/EC calls for the equal treatment of agency workers and directly employed staff at the user company. This article focuses on the limits of this principle inherent in the Directive and on how the European Court of Justice has recently striven to interpret agency workers' right to equal treatment as broadly as possible. The article also explores how the European Court of Justice has tried to broaden the material scope of agency workers' right to equal treatment and points out the possible shortcomings of the narrow interpretation given to derogations by collective agreements. Finally, possible ways of enhancing the Directive's effectiveness are addressed.

Keywords Temporary agency work · Equal treatment of agency workers · Single source test · Basic working conditions · Derogation by collective agreements

A 26-year legislative process[1] ended on November 17, 2008, when the Directive on Temporary Agency Work was adopted.[2] Aimed at the protection of employees, the most important and most controversial provision of the Directive stipulates that the basic working conditions of agency workers shall be, for the duration of their assignment, at least those that would apply if they had been recruited directly by the

[1] The Commission's first proposal dates back to 1982 (COM (82) 155 final, "Proposal for a Council Directive concerning temporary work").

[2] Directive 2008/104/EC of the European Parliament and of the Council of 19.11.2008 on temporary agency work.

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user to occupy the same job.[3] This principle of equal treatment divided the Member States and other stakeholders during the adoption of the Directive. Consequently, its material scope is limited and it is further weakened by three possible exceptions. In its recent case law, the European Court of Justice (ECJ) has tried to interpret agency workers' right to equal treatment as broadly as possible. This approach, however, could not overstep the limits established by written law. First, the Court explored ways to give a broad understanding to the material scope of agency workers' right to equal treatment. Secondly, a narrow interpretation was given to how collective agreements can derogate from the equality principle.

This article is divided into three main parts. First, it addresses the question of defining a comparator partner for the agency worker. A look back at the case law before the Directive will show why the jurisprudence of the ECJ excluded the possibility of comparing the working conditions of agency workers and of directly employed employees of the user. Turning to the text of the Directive as adopted, this article highlights how the principle of equal treatment, based on the "fiction of direct employment", differs from the solution used in previous directives concerning atypical employment. The second part of the article concentrates on the material scope of equal treatment and the limits caused by the "basic working and employment conditions" concept. The third part provides an overview of the possible exceptions to the equality principle and how the European Court of Justice approached them, while also highlighting those terms that still require clarification. Finally, this study ends with some concluding remarks on the possible future of the agency work Directive.

1 Finding the comparator

The right of agency workers to equal treatment raises the theoretical question of whether equal treatment can be applied in relation to two employees who, although they perform work of equal value, legally work for two different employers. In the case of agency work, agency workers and the directly employed staff of the user company usually work side by side under the very same working conditions and perform exactly the same tasks. However, their legal employer is different. Unlike the user's own employees, the agency worker has concluded an employment contract with an agency. The significance of this question goes beyond agency work as nowadays the situations where employees with different employers work together within the same organisation have become common (*e.g.*, by virtue of outsourcing, permanent secondment or payrolling).[4]

1.1 Before the Directive: the "single source" test

Before the Agency Work Directive, the European Court of Justice stated in two judgments that, as a general rule, the principle of equal treatment could not be applied if

[3] Directive Art. 5(1).

[4] Maran E. and Chieregato E., "Multiparty work relationships across Europe: A comparative overview" ELLJ (2022/4).

the compared workers worked for different employers.[5] The European Court of Justice followed the same reasoning in both cases. The Court stated that there is nothing in the wording of the principle of equal pay for men and women in primary law[6] to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer.[7] However, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.[8]

Consequently, even if two workers are in a (factually) comparable situation, the equal pay principle will apply only if the pay difference can be tracked back to one single source, for instance, a collective agreement, a statutory provision or a holding company which defines the working conditions for more organisations centrally.[9] However, the Court of Justice found that the mere fact that the client company pays a fee to a service provider or to a temporary work agency is not enough to establish a single source for the pay difference between the directly employed and the outsourced/hired-out staff. Thus, the pay of workers falling into the two different groups cannot be compared.[10]

This restrictive interpretation seems to be reasonable. If the Court of Justice had accepted that the basis of comparison could be any other employer's employee performing work of equal value, it would have had rather utopian consequences. In that case, national wage levels covering all professions, both in the public and private sectors, would have to be established.[11] In his opinions in both cases, Advocate General Geelhoed explained that it would be impossible to obtain information about the reasons of the pay difference among completely independent employers, or to provide financial coverage to eliminate it. The employer's right of defence forms a constituent element of the equal pay principle, but such broad comparisons would render the exercise of this right impossible.[12] Thus the boundaries of the equal pay principle's applicability had to be drawn somewhere.

On the other hand, this narrow interpretation opened up leeway to circumvent the equal pay principle.[13] It follows from the Court's reasoning that an employer might escape the principle by re-employing former employees through an agency or by outsourcing them to an independent company. These techniques were becoming more

[5]Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*., EU:C:2002:498; Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services*, EU:C:2004:18.

[6]Treaty establishing the European Community Art. 141, now TFEU Art. 157.

[7]Case C-320/00, *Lawrence* para 17, Case C-256/01, *Allonby* para 45.

[8]Case C-320/00, *Lawrence* para 18, Case C-256/01, *Allonby* para 46.

[9]Case C-320/00, *Lawrence* Opinion paras 48–51.

[10]Case C-256/01, *Allonby* paras 45–48.

[11]Steele I., "Tracing the Single Source: Choice of Comparators in Equal Pay Claims", *Industrial Law Journal* (2005/4), 341.

[12]Case C-320/00, *Lawrence* Opinion para 56; Case C-256/01, *Allonby* Opinion para 50.

[13]Barrett G., "'Shall I Compare Thee To…?' On Article 141 EC and Lawrence", *Industrial Law Journal* (2005/1), 99.; Fredman S., "Reforming Equal Pay Laws", *Industrial Law Journal* (2008/3), 196.

and more common even twenty years ago, when these judgments were delivered.[14] While such organisational decisions can easily be made by any employers, the consequences of setting aside the principle of equal pay are borne by the employees.[15]

The Agency Work Directive, adopted in 2008, constituted the first and to date still the last step taken towards overcoming the consequences of the single source test. By prescribing equal treatment of agency workers and directly employed staff, the Directive is as yet the only piece of EU legislation which enables the comparison of pay levels where – as understood by the European Court of Justice – otherwise there is no single source behind the difference in treatment. The single source test is still in place.[16] It is only overruled in comparing agency workers to their directly employed colleagues.

1.2 The fiction of direct employment

One of the basic aims of the Directive is to ensure the protection of agency workers and to improve the quality of agency work by ensuring the principle of equal treatment.[17] Such an aim could not be attained otherwise than by guaranteeing the comparison of the agency worker and the directly employed employee of the user. Equality guaranteed only among agency workers seems as meaningless as would be interpreting equal treatment of women as meaning women should be paid equally to other women.[18]

The text of the Directive as adopted calls for equal treatment of agency workers at the user undertaking from the first day of assignment.[19] Consequently, EU law recognises that if both the agency worker and the directly hired employee supply the same performance, in other words, if the two employees are in a comparable situation based on their competences, training, responsibility, experience *etc*., then it is only the legal construction of their employment which differs – but that alone does not justify the adverse treatment of agency workers.

In order to define the user's comparable employee, the Commission developed a new concept in its amended proposal. This rule was ultimately included in the Directive.[20] It prescribes that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking,

[14] Steele I., *op. cit. supra* note 12, 342.

[15] Fredman S.: Precarious Norms for Precarious Workers. in Fudge and Owens (eds.): *Precarious Work, Women and the New Economy* (Hart, 2006), 197.

[16] In a more recent case, the Court affirmed, that if the pay conditions of workers performing equal work or work of equal value can be attributed to a single source, this comes within the scope of Art. 157 TFEU, even if the workers perform their work in different establishments. See Case C-624/19, *K and Others v Tesco Stores Ltd*., EU:C:2021:42, paras 36–38.

[17] Art. 2 of the Directive.

[18] Ahlberg K., "A Story of a Failure – But Also of Success. The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive" in Ahlberg *et al* (eds.): *Transnational labour regulation. A case study of temporary agency work* (Peter Lang, 2008), 217.

[19] Art. 5 (1) of the Directive.

[20] According to the Commission's original 2002 proposal, a comparable worker meant a worker in the user undertaking occupying an identical or similar post to that occupied by the worker posted by the temporary

at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.[21] This fiction is obviously a novel technique for imposing equality in comparison to the wording of the two other "atypical directives", which provide that part-time and fixed-term workers shall not be treated in a less favourable manner than comparable full-time and permanent workers.[22]

According to the interpretation of the Court of Justice in *Luso Temp*, this new solution is "even more targeted" for ensuring the effective protection of workers in atypical and precarious situations.[23] The Court broke down the application of this fiction to two steps. First, those basic working and employment conditions must be determined that would apply to the agency worker if he/she was hired directly by the user for the same position as the one he/she actually holds and for the same period of time. Secondly, these basic working and employment conditions should be compared to those that actually apply to the given agency worker during the assignment at the user company, based on all the relevant circumstances.[24] Apparently, the possible advantages of the fiction of direct employment are, on the one hand, that it ensures equal treatment even if there is no actual comparable, directly employed employee at the user.[25] On the other hand, all circumstances must be taken into account for the purposes of the comparison (*e.g.*, the relevant economic sector and profession, education, experience).[26]

Nonetheless, the Directive perceives equal treatment as a one-way street. The Directive does not prescribe that agency workers and the user's own employees be treated equally. Instead it guarantees that the basic working and employment conditions at the user shall be the minimum for agency workers during the assignment. As a result, it is not contrary to the Directive if they are treated better than directly

agency, account being taken of seniority, qualifications and skills. If no such worker existed, reference was to be made to the collective agreement applicable in the user undertaking or, lacking that, in the agency. Finally, if there was no collective agreement applicable at either of them, then the basic working and employment conditions of temporary workers was to be determined by national legislation and practices (COM (2002) 149 final Art. 3 (1) b), Art. 5 (5)). The disadvantage of this solution would have been that it only tentatively listed some aspects for comparison. Moreover, the parties to the collective agreement in force at the user would hardly have been interested in promoting equality of agency workers.

[21] Directive Art. 5 (1), COM (2002) 701 final Art. 5 (1).

[22] Directives 97/81/EC and 1999/70/EC Clause 4. Delfino M., "Interpretation and Enforcement Questions in the EU Temporary Agency Work Regulation: An Italian Point of View", ELLJ (2011/3), 291–292.; Davies, "The Implementation of the Directive on Temporary Agency Work in the UK: a Missed Opportunity", ELLJ (2010/3), 320–321.; Report of the Expert Group "Transposition of Directive 2008/104/EC on Temporary agency work", August 2011 (hereinafter: Expert report), 17–18. The Commission also pointed out that those Member States that ensured equal treatment by defining a comparable employee had not necessarily transposed the Directive correctly. See COM(2014) 176 final, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work" (hereinafter: Implementation report), 6.

[23] Case C-426/20, *GD and ES v Luso Temp – Empresa de Trabalho Temporário SA*, EU:C:2022:373, para 36.

[24] Case C-426/20, *Luso Temp*, para 50.

[25] Warneck W., "*Temporary agency work – guide for transposition at national level*" (European Trade Union Institute, 2011), 23.; Case C-426/20, *Luso Temp* Opinion para 60.

[26] Frenzel H., "The Temporary Agency Work Directive" ELLJ (2010/1), 127–128.

employed staff. Such situations can easily occur, for example, because the agency can recruit applicants only for higher wages in order to meet the user's urgent, albeit temporary need for workforce. In those settings, the directly employed employee cannot rely on EU law to claim equal treatment, as the Agency Work Directive steps over the single source test only the other way around.

Similarly, the Directive does not ensure – or only indirectly ensures – the comparability of agency workers assigned to the same user but by different agencies. Following the single source test, this would mean the comparison of employees' wages who are employed by two different employers, while their wages share only one common element: both are covered by the fee paid by the same user. However, this does not preclude the two agencies from applying different wage levels – even if they charge the user the same fee – due to different business policies (for example, different profit rates or overhead costs). The opposite interpretation would limit free competition between agencies. There is only an indirect link between the two agency workers' wages: neither of them may earn less than the user's own employees in a comparable situation. Thus, in the relations between agency workers working at the same user but employed by different agencies, the equal pay principle applies only as far as both agencies shall respect the wage level in force at the user as a minimum, but it is conceivable that the agencies remunerate their workers differently. As in such case the difference is not caused by a single source, agency workers cannot claim equal treatment *vis à vis* each other.

While the principle of equal treatment is required to apply from day one, it is weakened by two limitations. First, the Directive only stipulates equal treatment with regard to so-called basic working and employment conditions. Secondly, Member States are free to introduce three flexibly-formulated possible exceptions.

2 The limited material scope of equal treatment

An important difference between the Agency Work Directive and previous EU norms regulating atypical employment is the way in which it defines the scope of equal treatment. The directives on fixed-term and part-time employment require equal treatment for all employment conditions, unless an exception is justified by objective reasons or by the principle of time proportionality.[27] In contrast, the agency worker is entitled to equal treatment only if "basic working and employment conditions" are concerned, which in practice means working time and pay.[28] Nonetheless, once an employment condition falls within the "basic" category, different treatment cannot be justified. In short, the previous directives do not limit the scope of equal treatment to a closed list

[27] Directive 97/81/EC Clause 4 (1)–(2) and Directive 1999/70/EC Clause 4 (1)–(2). Art. 4 of the framework agreement on telework – while taking into account the peculiarities of telework – also prescribes equal treatment in relation to all employment conditions.

[28] According to the Directive, "basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay. Directive Art. 3 (1) f).

of working conditions, but the employer may justify different treatment by objective reasons or by reference to the *pro rata temporis* principle. Under the Agency Work Directive, equal treatment is limited to some working conditions, but within that restricted scope it applies without exceptions (at least if the Member State does not make use of the possible derogations, as to which see under heading 3 below).[29]

In this writer's view this different approach leads to weaker protection. First, agency workers' equal treatment is limited to the basic provisions of working time and pay, while significant issues are left outside of its scope. Consequently, if a working condition is not considered to be "basic", different treatment is possible even if this could not be objectively justified. A particularly important example is termination of the employment relationship, because, as empirical evidence shows, in the event of an economic downturn, agency workers are the first to be dismissed.[30] One of the main criticisms of the "limited equality" concept is that it cannot improve the job security of agency workers.[31] The same applies regarding the employer's responsibility for any damages caused to the employee or vocational training.[32] Second, the working conditions that the user does not guarantee for directly employed atypical employees – for objective reasons or due to the principle of time proportionality – will similarly not apply to agency workers hired for part-time and/or fixed-term work. This is also a consequence of the direct employment fiction.

A key question is whether this list is exemplificative and, if yes, how it can be expanded. In one Opinion, Advocate General Pitruzzella stated – although without further reasoning – that it is "not an exhaustive list".[33] This statement can only be accepted to the extent that, based on Article 9 of the Directive, Member States can introduce more favourable rules for employees. It is therefore possible for Member States that are more devoted to the social objectives of the Directive to expand the scope of basic working and employment conditions during transposition. However, there is no indication in the wording of the Directive that equal treatment shall be

[29] It should be added that the Directive prescribes the application of some further rules and working conditions applicable at the user to the agency worker. These include the measures listed in Art. 5 (1) (protection of special groups of employees and anti-discrimination) and access to the user's collective facilities (*e.g.*, canteen) according to Art. 6 (4). This codification technique is a rather debatable as this way the working conditions falling under the scope of equal treatment are listed in more separate parts of the Directive. Nonetheless this structure does not mean that only the provisions listed in Art. 3(1) shall be strictly adhered to. (Schiek D., "Agency Work – from Marginalisation towards Acceptance? Agency work in EU Social and Employment Policy and the "implementation" of the draft Directive on Agency work into German law" GLJ (2004/10), 1242.) Note also that equality as regards health and safety issues is guaranteed by Art. 2 of Council Directive 91/383/EEC of 25.6.1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

[30] Frenzel H., *op. cit*. *supra* note 27, 127.

[31] Davies A., "Regulating atypical work: beyond equality" in Countouris and Freedland M. (eds.), "*Resocialising Europe in a Time of Crisis*" (Cambridge University Press, 2013), 244.; Wynn M., "Power Politics and Precariousness: The Regulation of Temporary Agency Work in the European Union" in Fudge and Strauss K. (eds.), "*Temporary work, agencies and unfree labour: insecurity in the new world of work*" (Routledge, 2016), 51.

[32] Art. 6 (5) does not contradict to this, as this soft provision only calls for the improvement of agency workers' access to training but not for equal training opportunities.

[33] Case C-426/20, *Luso Temp* Opinion para 25.

guaranteed in respect of any other working conditions not explicitly included in the "basic" list.

Even if the list of "basic working and employment conditions" is therefore exhaustive and Member States are not obliged to expand it, it is of course debatable how broadly to interpret its elements.

2.1 The interpretation of basic working conditions

To date, one preliminary ruling has interpreted the material scope of equal treatment under the Agency Work Directive. In the *Luso Temp* case,[34] Portuguese workers alleged that national law put agency workers in a more disadvantageous position in terms of pay-off for paid leave and of extraordinary allowances for the period of paid leave than if the user had employed them directly. The Court of Justice had to decide whether these two benefits could be regarded as included in basic working and employment conditions, and thus whether the Portuguese rule was contrary to the principle of equal treatment under the Directive.

As seen above, the Directive's list specifically mentions both pay and holidays. An inseparable part of the latter is that the period of absence is remunerated, which must be replaced by an allowance in lieu upon termination of the employment relationship.[35] Consequently, in this writer's opinion, an affirmative answer follows from the normative text itself. However, the Court of Justice took a much more cautious approach, reaching this conclusion only after a careful examination of the context and purpose of the provision. It referred to its jurisprudence relating to paid leave, to Article 31 of the Charter of Fundamental Rights, and to the dual purpose of the Agency Work Directive, including the protection of agency workers.[36]

It is somewhat surprising that the Court of Justice also referred to the right to equal treatment of part-time and fixed-term workers as an analogy.[37] As seen above, in these two directives, equal treatment is not subject to any material restrictions, it applies to all working conditions.[38] For the same reason, the reference to the concept of "working conditions" according to Article 31 of the Charter of Fundamental Rights and Article 156 of the TFEU is objectionable.[39] Although these undoubtedly offer a broad framework for interpretation, it can not be ignored that the Agency Work Directive specifically limits the applicability of the equal treatment principle to "basic"

[34] Case C-426/20, *Luso Temp*.

[35] Directive 2003/88/EC Art. 7; Case C-341/15, *Hans Maschek v Magistratsdirektion der Stadt Wien – Personalstelle Wiener Stadtwerk*e, EU:C:2016:576, para 26.

[36] Case C-426/20, *Luso Temp* paras 31, 35, 38, 40–45, 47.

[37] Case C-426/20, *Luso Temp* paras 33–34.

[38] The difference between the "atypical" directives is therefore exactly the opposite of what Advocate General Pitruzzella states in his opinion: "Unlike its antecedents in previous directives on fixed-term employment and part-time employment [...] the scope of application of the working conditions specifically applies to almost all institutions of the employment relationship, which practically leaves no room for any restrictive interpretation." Case C-426/20, *Luso Temp* Opinion para 60.

[39] Case C-426/20, *Luso Temp* para 40. The same reference was used previously in the *KG* Case C-681/18. *JH v KG*, EU:C:2020:823, para 54.

working and employment conditions and precisely specifies the elements that come under the scope of that concept. It is therefore evident that in the case of agency work, the legislator decided in favour of a limited guarantee of equal treatment, a limited guarantee which can not be substantially expanded by judicial interpretation. By way of illustration, the Court referred[40] to *Diego Porras*, where it had stated that the equal treatment of fixed-term employees also covered the compensation that the employer must pay to an employee on account of the termination of a contract.[41] However, there is no doubt that termination is not a basic working and employment condition in the application of the Agency Work Directive. Consequently, under EU law fixed term workers are eligible for such compensation on an equal basis as employees in typical contracts, but agency workers are not.[42]

According to the *Luso Temp* judgment, "the balance between the promotion of employment and the security of the labour market can only be achieved if the principle of equal treatment is fully respected".[43] One might well agree with this statement, yet still it is apparent that the Agency Work Directive does not call for such full respect of equality. What is more, previously in the *Manpower Lit* case[44] the Court of Justice itself had emphasised the limited scope of equal treatment, highlighting that – among other considerations – this is the very reason why an agency worker assigned to an EU institution does not gain the legal status of a permanent union official. The facts of that case were that agency workers at the European Institute for Gender Equality (EIGE) – by reference to the principle of equal treatment as prescribed by the Directive – claimed the same remuneration elements as were enjoyed by EIGE's directly employed EU officials. The Commission contested the claim, essentially on the grounds that applying the equal treatment principle would effectively confer the status of EU official on the agency workers.[45] The European Court of Justice disagreed and emphasised that agency workers' right to equal treatment was limited to basic working and employment conditions, and that therefore there was no question of treating agency workers as having the status of permanent staff during or beyond the period of employment. Not even the respondents in the main proceedings were in any way seeking the conversion of their agency work contracts. They were merely claiming the missing remuneration.[46] The approach taken to the equality principle in *Manpower Lit* seems to be much more on point than the one taken six months later in *Luso Temp*.[47] The most jurisprudence can do is to safeguard the implementation

[40] Case C-426/20, *Luso Temp* para 34.

[41] Case C-596/14. *Ana de Diego Porras v Ministerio de Defensa*, EU:C:2016:683.

[42] The Court noted that the principle of equal treatment is still available after the termination of the agency worker's contract (Case C-426/20, *Luso Temp* para 37), although in this writer's view there is nothing in the Directive which would support the opposite.

[43] Case C-426/20, *Luso Temp* para 44. In the words of Advocate General Pitruzzella, the principle of equal treatment is the real cornerstone of the system of "flexicurity" Case C-426/20, *Luso Temp* Opinion para 39.

[44] Case C-948/19, *UAB "Manpower Lit" v E.S. and Others*, EU:C:2021:906.

[45] Case C-948/19, *Manpower Lit* paras 54–55.

[46] Case C-948/19, *Manpower Lit* paras, 57–62.

[47] The broad interpretation followed in *Luso Temp* is also striking from the aspect that in its very first ruling on the Directive the Court completely avoided giving a stronger content to the Directive by means of legal

of the "limited equality" principle. It can not overlook the point that the law does not require more.

Overall, the European Court of Justice concluded – reasonably, in this writer's opinion – that the allowance in lieu of paid leave and the extraordinary allowance for the duration of paid leave should be considered basic working and employment conditions in the application of the Agency Work Directive.[48] The Court attempted to elaborate the broadest possible interpretation of the Directive's wording and to overcome the limits of the "basic working and employment conditions" concept stemming from the text of the law itself. Although, such a broad interpretation was not necessary for the decision in the case, in the future it will be interesting to see whether this approach will bring other working conditions under the scope of equal treatment that do not even indirectly appear in the Article 3 list.

This is all the more important as the interpretation of some elements in the "basic" list still requires clarification. The primary problem is the concept of pay, and more precisely, whether the broad interpretation of "pay" in the application of equal pay for men and women as prescribed by Article 157 of the TFEU is also applicable here. This is disputed in the literature.[49] The fact that Article 3 (2) of the Directive expressly refers to the definition of pay in national law speaks against the use of this analogy. However, it is exactly the Agency Work Directive which led the European Court of Justice to confirm its recent practice, which – despite the explicit reference to national law, in order to ensure the effective application of EU law – gave the concept of "worker" a genuine EU law meaning.[50] Following this case-law,[51] it is more than likely that the Court would be ready to overrule a national regulation interpreting the concept of pay restrictively, if this jeopardised the effective enforcement of the Directive.[52] Nonetheless, the judicial practice of some Member States rejects such a broad interpretation and excludes some benefits from the scope of equal pay which would not be possible based on the Court's practice under Article 157 (for example,

interpretation. As regards Art. 4 on the revision of restrictions and prohibitions, it did not go beyond a strict grammatical interpretation, despite the fact that Szpunar AG offered the Court a number of options as to how to go about doing this in his outstandingly detailed opinion. Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*, EU:C:2015:173.

[48] In the specific case, the national court referring the question and the Portuguese government interpreted the national law differently. The Court could not decide this dispute, it only defined the framework of interpretation of EU law to the national court. Case C-426/20, *Luso Temp* paras 51–54.

[49] For a summary of the viewpoints, see: Rosin A., "Applying Temporary Agency Work Directive to Platform Workers: Mission Impossible?" *International Journal of Comparative Labour Law and Industrial Relations* (2020/2), 159.

[50] Aloisi calls this trend the "Europanisation of the definition of worker". Aloisi A., "Platform work in Europe: Lessons learned, legal developments and challenges ahead" ELLJ (2022/1), 19. See also: Kountouris N., "The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope" *Industrial Law Journal*, (2018/2), 201–209.; Menegatti E., "Taking EU labour law beyond the employment contract: The role played by the European Court of Justice" ELLJ, 2020/1.; Sagan A., "The classification as 'worker' under EU law" ELLJ (2019/4).

[51] Case C-216/15, *Betriebsrat der Ruhrlandklinik GmbH and Ruhrlandklinik GmbH*, EU:C:2016:883, paras 25–43.

[52] Rosin A., *op. cit. supra* note 49, 159–160.

the Christmas bonus in Croatia[53] or complementary social benefits in case of illness in Spain[54]).

3 Exceptions to the equal treatment principle

Due to the debates surrounding the principle of equal treatment, and especially on equal pay, the Directive includes three possible exceptions which make the general rule significantly more flexible. The legislative history[55] shows that these exceptions were necessary in order to reach political consensus on the adoption of the Directive. For that reason, the exceptions can be seen as the price that was required in order to obtain the support of certain Member States, than theoretically justified limitations on equal treatment.

Neither can the broad list of exceptions be said to be underpinned by economic reasons. During the legislative process, concerns were raised regarding whether the attractiveness and flexibility of agency work would remain if the agency worker could not be paid less than directly employed staff. However, economic considerations should only have a secondary role in the application of equal treatment. If it is justified that two persons can not be treated differently, this should not be overridden by financial considerations. As Anne Davies has pointed out regarding qualification periods for agency workers to be eligible for equal pay, such limits could make sense from a pragmatic perspective. However, from a principled standpoint, it is hard to understand the justification for requiring workers to "qualify" for so basic a right.[56] Moreover, in the case of the right of agency workers to equal pay, the economic arguments are not convincing either. In a 2002 study, CIETT,[57] the international association of agencies, summarised the results of several empirical studies and showed that for user companies, the possibility of lowering wage costs is only a minor motivation for employing agency workers. Instead, the main attraction of agency work is primarily the replacement of absent employees, and the quick and flexible supply of labour.[58] In addition, the principle of equal pay was already recognised in many Member States before the entry into force of the Directive, which did not lead to the collapse of the agency work industry.[59] Thus it is not the possibility of lowering wages which has kept the sector alive and growing.

[53] Maran E. and Chieregato E. *op. cit. supra* note 5, 478.

[54] Chacartegui C., "Resocialising temporary agency work through a theory of 'reinforced' employers' liability" in Countouris N. and Freedland M. (eds.), "*Resocialising Europe in a Time of Crisis"* (Cambridge University Press, 2013), 218.

[55] See especially: Frenzel H., *op. cit. supra* note 27, 121–125.; Wynn M., *op. cit. supra* note 32, 53–60.; Ahlberg, *op. cit. supra* note 19; Jones, "Temporary Agency Labour: Back to Square One?" *Industrial Law Journal* (2002/2); Zappala, "The Temporary Agency Workers' Directive: An Impossible Political Agreement?" *Industrial Law Journal* (2003/4).

[56] Davies, *op. cit. supra* note 23, 317.

[57] Now: World Employment Confederation.

[58] CIETT, "*Rationale of Agency Work. European labour suppliers' and demanders' motives to engage in agency work. Final report*" 2002, 27–38.; COM (2002) 149 final, "Explanatory Memorandum", 27., 29.

[59] Contreras (Director of the study), "*The Impact of New Forms of Labour on Industrial Relations and the Evolution of Labour Law in the European Union. Study for the European Parliament's Committee*

So far, the European Court of Justice has interpreted two of the three exceptions, which will be examined in detail below. As for the third exception, it is also formulated in an apparently general way, but in fact was addressed to the United Kingdom, which was necessary for the adoption of the Directive.[60] It prescribes that those Member States where there is either no system in law for declaring collective agreements universally applicable or no system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, derogate from the equal treatment principle. The Directive explicitly states that such arrangements may include a qualifying period for equal treatment but shall in any case guarantee the adequate level of protection for agency workers.[61]

This exception is built on the argument that due to the temporary nature of assignments, agency workers do not integrate into the work organisation, and thus equality with the user's own employees is only justified if the assignment exceeds a certain period.[62] In its 2002 amended proposal, the Commission seemed to share this idea and would have given the option to apply the equal pay principle only after a six-week period spent with the user.[63] However, this "integration-argument" seems unfounded. If all circumstances should be considered in order to identify a comparable employee, then this obviously includes the length of time spent at the employer (the user) or the employee's loyalty. Consequently, an agency worker can be easily compared with a newly-hired employee at the user. Moreover, it seems a rather challenging endeavour to strike the right length of qualifying period after which the equal pay principle should apply. While, as a general rule, the Directive calls for equal treatment from the first day of the assignment, the qualifying period still seeps back through this exception.[64]

The Directive obliges Member States to take appropriate measures to prevent abuses and to inform the Commission about them.[65] Therefore, any Member State applying the exceptions must also create appropriate rules to ensure that the given exception cannot be applied unreasonably broadly.[66]

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on Employment and Social Affairs (2008), 46.; Nienhüser W. and Matiaske W., "Effects of the 'principle of non-discrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries" *Industrial Relations Journal* (2006/1), 74.

[60] Countouris N. and Horton R., "The Temporary Agency Work Directive: Another Broken Promise?" *Industrial Law Journal* (2009/3), 332–333.

[61] Directive Art. 5 (4).

[62] Grapperhaus F., "*A Misconception on Equal Treatment of Temporary Workers*" (2003), <http://www.euro-ciett.org/index.php?id=91>, 7., 9., 24.

[63] COM (2002) 701 final Art. 5 (4).

[64] In the United Kingdom, the twelve week qualifying period and the generally short-term assignments meant that about half of the agency workers remained outside the scope of the equal pay principle. Countouris N., Deakin S., Freedland M., Koukiadaki A. and Prassl J., "*Report on temporary employment agencies and temporary agency work: A comparative analysis of the law on temporary work agencies and the social and economic implications of temporary work in 13 European countries*" (International Labour Office, 2016), 73–74.

[65] Art. 5 (5) of the Directive.

[66] In *KG*, the Court interpreted the second part of this subparagraph as it obliges Member States to introduce measures to prevent the circumvention of the Directive as a whole, not just the equal treatment princi-

3.1 The exception of permanent employment

This exception only applies to pay. Member States may, after consulting the social partners, provide that an exemption be made to the equal pay principle where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.[67] The existence of the two conjunctive conditions is therefore considered to be an objective reason to put aside the principle of equal pay. In this way, the legislator acknowledged the argument that these two factors put the agency worker in a situation that is not comparable to the one of the directly employed employee, although it is up to Member States to decide whether they want to make use of this exception.[68]

The interpretation of both conditions raises concerns. As regards remuneration between assignments, the Directive only requires the mere possibility of remunerated intermediate periods, but not that there should actually be such a period during the employment relationship. Even if remuneration is mandatory for the intermediate periods, it is not at all certain that such periods will arise. If the user manages its business efficiently – which it obviously strives for – then such unproductive periods will be reduced to the minimum. Parties may also synchronise the employment contract with the duration of the first assignment, which excludes any intermediate terms. In such cases it is highly uncertain whether the mere promise of pay between assignments can countervail otherwise lower wage levels. Furthermore, Member States are free to define the nature and extent of this remuneration, a situation which may also give rise to abuse.[69]

The concept of "permanent" employment is also of central importance, although it is somewhat overlooked, at least compared to the other temporal dimension of agency work, which is the temporary nature of assignments.[70] The heart of the problem is that the term "permanent" is not a synonym for indefinite duration. Permanent means a long-term legal relationship, which can even be fixed-term employment with much less security, if it lasts long enough. Similarly, an open-ended contract may not mean permanent employment if it is terminated within a short period of time. If the legislator had wanted to apply the exception only to employees with an indefinite employment relationship, then it should have used the terms with a clear meaning such as "open-ended" or "indefinite duration". As an analogy, in the Directive on fixed-term employment, the term "permanent" appears in the notion of a 'comparable permanent worker'. But here a separate interpretive provision states that such permanent worker has an employment relationship of indefinite duration.[71]

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ple. Especially, even if the "temporary" nature of the assignments is not defined by the Directive, Member States shall take some measures to preserve the temporary nature of agency work (Case C-681/18, *KG*).

[67] Directive Art. 5 (2). In the Commission's original proposal, this exception applied to all basic working and employment conditions. The amended proposal of 2002 narrowed it down to pay.

[68] COM (2002) 149 final, "Explanatory Memorandum" 9; Zappala, *op. cit. supra* note 55, 315. Before the adoption of the Directive it was not common in the Member States to require agencies to pay wages between assignments. See Contreras, *op. cit. supra* note 60, 43.

[69] Implementation report, 6.

[70] See Case C-681/18, *KG* and Case C-232/20, *NP v Daimler AG, Mercedes-Benz Werk Berlin*, EU:C:2022:196.

[71] Directive 1999/70/EC Clause 3 (2).

It also follows from *Ruber Andersen* that the length of the employment relationship and its fixed-term or indefinite nature are different concepts. This case was about the interpretation of the rule on legal remedies in the Directive on information to employees, which established an exception for "temporary" employment relationships.[72] The Court of Justice emphasised that this is not a synonym of "fixed-term employment" used in other directives,[73] but – considering the purpose of the provision – refers to legal relationships that exist for a short time. Therefore, it does not cover all fixed-term contracts.[74] Following this logic, permanent employment in the application of the Agency Work Directive can not be equated to an indefinite employment relationship. This is necessary to meet the aspiration "to interpret Community law in a way which remains faithful to, and ensures, its internal consistency".[75]

The Commission did not notice the indicated interpretation problems of "permanent" employment.[76] Although this issue has not yet been directly addressed, it seems that the European Court of Justice also considers that the permanent employment exception applies only to open-ended contracts. In the TimePartner case[77] – when comparing the exceptions in Article 5 (2) and 5 (3) – it emphasised that the former applies to permanent contracts only, while the later may be relied upon in respect of any agency worker, irrespective of whether their contract of employment with the agency is a fixed-term contract or a contract of indefinite duration.[78] Nonetheless, the European Court of Justice also recognised that agency workers with a fixed-term contract are running the risk of rarely getting paid between assignments. It concluded that in the application of the collective agreement exception (see in the next point), they "must be afforded a significant countervailing benefit as regards those basic conditions, which must be of a level in essence at least equivalent to that afforded to temporary agency workers with a permanent contract".[79]

Another question is the relation of the "temporary" nature of agency work and the term "permanent" in the exception to the equal pay principle. The two concepts apply to different periods: it is the period during which the agency worker is placed at the user undertaking to work under its supervision and direction that is required to be temporary.[80] It is the employment relationship with the agency that is required to be permanent. Still, both capture a temporal aspect of employment, which can not be defined independently. More precisely, when Member States determine what is considered a "temporary" assignment, then this must be shorter than the period required for making use of the "permanent" employment exception. For example, if a

[72] The formality of prior notification may in no case be required [. . .] for workers with a temporary contract or employment relationship. Council Directive 91/533/EEC of 14.10.1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Art. 8 (2).

[73] Directive 91/533/ECC, Directive 1999/70/EC.

[74] Case C-306/07, *Ruben Andersen v Kommunernes Landsforening*, EU:C:2008:743 paras 41–51.

[75] Case C-306/07, *Ruben Andersen* para 44.

[76] Nor the Implementation report neither the Expert report deals with these questions.

[77] Case C-311/21, *TimePartner Personalmanagement*, EU:C:2022:983.

[78] Case C-311/21, *TimePartner* para 56.

[79] Case C-311/21, *TimePartner* para 43.

[80] Directive Art. 3 (1) e); Case C-232/20, *Daimler* para 31.

Member State considers a one-year assignment to be temporary, then an employment relationship of less than one year shall not fall under the scope of Article 5 (2). This connection between the two terms was – indirectly – confirmed by Advocate General Sharpston and Tanchev in their respective opinions, as they defined the "temporary" nature of assignments – by referring to the Oxford English Dictionary – as "lasting for only a limited period of time", and "not permanent".[81]

Besides the grammatical interpretation, in my opinion, the social aim of the Directive also requires that a permanent employment relationship shall be significantly longer than a single assignment. The exception to the principle of equal pay can only be effectively compensated for if the agency worker's employment exists for a longer period of time than this, if there are periods without assignment and if the worker receives an adequate wage during the inactive periods.

In summary, the use of the permanent employment exception can only be justified if the two conditions – that is the long-term nature of the employment and the pay received between the assignments – effectively compensate for the fact that, when assigned, the agency worker only receives a lower wage than the comparable employee of the user. If this does not happen for any reason – for example, the employer terminates the "permanent" employment early or there is no idle time between assignments – then some other form of compensation must be provided for the agency worker. This could mean that the pay difference is reimbursed after the assignment, or a certain period of time is prescribed during which it will be required that agency workers receive the money due between assignments even if they are put on additional leave or the agency dismisses them for economic reasons.[82] Since the Directive obliges Member States that make use of the exceptions to adopt appropriate rules to prevent abuses,[83] similar guarantees in national law are definitely necessary.

3.2 Exception by collective agreement

Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may differ from the principle of equal treatment.[84]

The role of collective agreements in the regulation of agency work varies greatly as between the Member States.[85] While this is minimal in the Member States that joined

[81] Case C-681/18, *KG* Opinion para 51.; Case C-232/20, *Daimler* Opinion para 44. Nonetheless, the first opinion also equates within the same paragraph the 'employment contracts of an indefinite duration' with permanent employment relationships.

[82] Schlachter M., "Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide?" *International Journal of Comparative Labour Law and Industrial Relations* (2012/2), 193.

[83] Directive Art. 5 (5).

[84] Directive Art. 5 (3).

[85] Recital (16) also recognises the diversity of labour markets and industrial relations.

after 2004, collective bargaining is of primary importance in Sweden.[86] As a result, it seems that this exception can only be used by those Member States where social dialogue has already been developed in the agency work sector. The Directive does not define what should be considered an "appropriate level" collective agreement. Thus, depending on the traditions of the Member State, it could even be workplace level. It is also the competence of the Member States to determine whether the exception may be relied upon by the agreement covering the agency or the user company. However, the authorisation cannot be transferred. Thus, for example, the parties in the employment contract cannot stipulate the application of a collective agreement which derogates from the equal treatment principle, if the scope of that agreement would not otherwise extend to them.[87]

The basic requirement for the application of the exception is to respect the "overall protection" of agency workers. The Directive is silent, however, when it comes to defining this term more precisely. In any case, the Commission has emphasised that, according to the correct interpretation of the exception, if collective agreements stipulate a lower level of pay than would be required by equal treatment, it must be balanced by other provisions favourable to agency workers (for example, by better training opportunities in the time between assignments).[88]

In *TimePartner*,[89] the European Court of Justice confirmed this interpretation. This case was about a German agency worker who was assigned to a retail undertaking as an order handler. Comparable workers of the user received a gross hourly wage of €13.64 as prescribed by the relevant collective agreement for retail workers. However, the claimant's gross hourly wage was only €9.23, in accordance with the sector-level collective agreement applicable to agency workers. The agency worker challenged the collective agreement's conformity with Article 5 of the Directive.

The Court of Justice ruled that the exception for collective agreements cannot lead to a unilateral reduction of a basic working or employment condition. Instead, it only allows for balanced bargaining, which gives agency workers an advantage to compensate for the different treatment.[90] However, it cannot be derived from the text that the level of protection of agency workers shall exceed the level that national and EU law generally prescribes for all (not only agency) workers.[91] Article 5 therefore does not result in an EU law requirement that, in view of their specific situation, agency workers should be better protected than workers in general in national law.

The European Court of Justice has made the application of this exception subject to an additional requirement that goes beyond the Commission's previous interpretation. Accordingly, the benefits compensating for the effects of different treatment

[86] Countouris *et al*, *op. cit. supra* note 64, 65.; Arrowsmith J., "*Temporary agency work and collective bargaining in the EU*" (European Foundation for the Improvement of Living and Working Conditions, 2008), 15–16.

[87] Schlachter M., *op. cit. supra* note 82, 194.

[88] Expert report, 24.; Warneck, *op. cit. supra* note 26, 24.

[89] Case C-311/21, *TimePartner*.

[90] Case C-311/21, *TimePartner* paras 33–39. In addition to the grammatical interpretation, the judgment also underpinned this with the structure of Art. 5 and the dual purpose of the Directive.

[91] Case C-311/21, *TimePartner* paras 40, 44.

must also relate to basic working and employment conditions. The Court of Justice underpinned this requirement by noting that, in the case of permanent employment, Member States can provide for an exception to the right to equal pay, which shall be counterbalanced by an advantage also relating to pay (remuneration between assignments). Thus "it would be paradoxical to accept that the social partners, who are required to respect the overall protection of those workers, could do so without being obliged, in turn, to provide in the relevant collective agreement for an advantage to be granted with regard to those basic conditions".[92]

With this systematic interpretation, the European Court of Justice therefore found a connection between the two exceptions and at the same time highlighted their differences too. While the first exception is limited to pay and to employees with a permanent employment relationship and can be relied upon only with the compensation exactly provided for in the Directive, there are no such restrictions in the case of the exception by collective agreement. Thus, the parties to the collective agreement are free to determine which basic working condition will not be applied equally to agency workers and which other conditions (also basic) will compensate the worker for any such derogation, while it may also apply to agency workers in temporary (fixed-term) contracts. One way to ensure the "overall protection" of workers may be to require remuneration between assignments, but this is not mandatory.[93]

Based on the above, the basic working and employment conditions of the agency worker and the comparable employee directly employed by the user should be compared as follows. First, the basic working and employment conditions that would apply to the agency worker if he or she had been recruited directly by the user to occupy the same job should be determined. Secondly, those basic working and employment conditions have to be compared with those resulting from the collective agreement to which the agency worker is actually subject. Thirdly, in order to ensure the overall protection of agency workers, it must be assessed whether the countervailing benefits afforded can offset the difference in treatment suffered. This assessment must be carried out by reference, in concrete terms, to the basic working and employment conditions applicable to comparable workers of the user undertaking.[94]

3.2.1 Limited (wage) bargaining in agency work?

The approach elaborated in *TimePartner* significantly limits the freedom of collective bargaining. Even if a non-basic working condition was a priority for the agency workers and could properly countervail any derogation in pay or in working time, the *TimePartner* ruling excludes such bargains. Again, termination is a good example here. Social partners can not give more job stability to agency workers at the price of lower remuneration or more flexible working time provisions during assignments; even if such a trade-off might respect the "overall protection" of workers.

[92] Case C-311/21, *TimePartner* para 42.

[93] Case C-311/21, *TimePartner* paras 53–56. The Court referred again to the risk that for fixed-term agency workers the pay between assignments could not be a substantial advantage to compensate the difference in pay they suffered during their assignment.

[94] Case C-311/21, *TimePartner* paras 48–49.

Moreover, in order to establish whether the "overall protection of workers" is guaranteed, a case-by-case comparison of the concrete working conditions is necessary, which could raise a lot of practical challenges. First, the exercise of comparing can be particularly complicated if the deviation and the compensation given for it relate to different types of working conditions. It can not be decided on a subjective basis whether some bonus pay offered in return for shorter rest periods is fair compensation. Secondly, it might lead to the comparison of different collective agreements if both the agency and the user have one of these. A collective agreement is a result of a complicated *quid pro quo* bargain, which might itself be a balanced agreement, but in this situation some of its elements have to be compared to some selected elements of another bargain. The provision which enables the derogation – depending on national law – might be in either collective agreement. Thirdly, the conditions to be compared may change with each assignment. Slightly higher pay for overtime may well countervail the non-application of the holiday rules applying in one user which offers only one more day off, but that may not be enough if the next user has a more advantageous annual leave policy. Consequently, a general provision in a collective agreement which limits the agency worker's right to equal treatment as regards the basic working and employment conditions – be it in the agency's or the user's agreement – must be subjected to review with each assignment.

Advocate General Collins admitted that it may, in practice, be difficult for the social partners to be able to rely upon this derogation.[95] Nonetheless, as the Court of Justice emphasised, once the parties have deviated from the principle of equal treatment in their collective agreement, it is their responsibility to respect the overall protection of agency workers, and national Courts are entitled to review whether collective agreements are consistent with the requirements for making use of this derogation.[96] In view of this, the national legislature may lay down the conditions and criteria designed to respect the overall protection of agency workers, within the meaning of this exception, although it is not mandatory.[97]

The Court's very restrictive interpretation regarding the exception by collective agreements is rather surprising because this is perhaps the only exception that the Directive itself links to sufficient guarantees. A collective agreement itself is associated with a higher level of fairness than an individual agreement (which is sufficient, for example, to make use of the permanent employment exception). In addition, the Directive explicitly calls for the respect of the overall protection of workers. However, the Court of Justice found it necessary to further tighten this rule's application. Based on this, it is not an exaggeration to expect that it will take a similarly strict approach when the other exceptions come to be examined.

[95] According to the Opinion, a derogation concerning basic working and employment conditions can not be counterbalanced through advantages of an ancillary character. The Advocate General illustrated this by the following (rather self-explanatory) examples. A derogation from the principle of equal treatment with regard to pay could not be validly compensated for by a gift of company merchandising, or a 50% reduction in the rate of annual pay could not be countervailed by the grant of an additional day of annual leave. Case C-311/21, *TimePartner* Opinion paras 39–41.

[96] Case C-311/21, *TimePartner* paras 77–78.

[97] Case C-311/21, *TimePartner* para 68.

4 Summary

The principle of equal treatment applicable from day one is a milestone in the history of agency work and equal treatment in EU law. The Directive is the first and so far the only EU rule that oversteps the "single source test" and prioritises the equal value of the employee's work over the difference in the legal employer. Given the spread of employment forms that involve multiple employers in the fifteen years since the adoption of the Directive, the justification for applying the equality principle to agency workers is not in question, but rather its applicability to other similar situations.

The Directive's provision for equal treatment is therefore of importance in principle, even if it is rather constrained. Equal treatment is not required in matters outside the scope of the "basic conditions" concept (*i.e.*, working time and remuneration), even if any such difference can not be objectively justified. This still makes agency workers a second-class workforce in relation to the working conditions left out of the basic list, especially as regards the termination of the employment relationship. From the relevant case law, it seems that the European Court of Justice is seeking to expand the substantive scope of equal treatment. This is welcome from the point of view of the protection of agency workers, but not even the most innovative legal interpretation can overcome the obvious limitations arising from the Directive. The list of basic working and employment conditions can only be expanded by the Member State (or the social partners implementing the Directive) if it is wished to place more emphasis on the Directive's social objectives.

The level of legal harmonisation and the protection of workers are further weakened by the three exceptions to equal treatment. As regards the exception related to collective agreements, the European Court of Justice has made it clear that the derogation is not unconditional; difference in a basic working and employment condition is only possible with due compensation in a form of another condition that also belongs to the "basic list". The exception is not about degrading equal treatment, but about a balanced bargain.

This approach also seems to be applicable to the exception of permanent employment. A permanent legal relationship and remuneration between assignments can be the basis for agency workers' lower wages only if these two advantages really compensate for the disadvantage suffered in terms of remuneration. This presupposes the strict interpretation of both conditions. Determining the applicable pay level between assignments is the competence of the Member States, but its measure cannot be nominal. Permanent employment can not be simplified to open-ended contracts: the duration of the legal relationship matters. If the employment covers only a limited period of time – for example due to the early termination of the legal relationship by the employer – then there is no legal basis for setting aside the principle of equal pay.

All in all, it is not surprising that the studies evaluating the impact of the Directive report only modest results. Harmonisation has led only to a marginal convergence of the extremely disparate pre-existing national regulations,[98] a point which has also

[98] Sartori A., "Temporary Agency Work in Europe: Degree of Convergence following Directive 2008/104/EU", ELLJ (2016/1), 124.; Countouris *et al*, *op. cit*. *supra* note 64, 72.; Ratti, "Online Platforms

been acknowledged by the Commission.[99] However, the Directive represents an important step forward in extending the principle of equal treatment, and this is precisely why it is urgent to make it more effective, based on experience and new developments in the years that have passed since its adoption.

This writer sees three possible ways of achieving this. First, Member States themselves can effectively remedy the shortcomings of the Directive. It is not mandatory to use any of the exceptions. Even if the national legislator takes advantage of any of them, it can ensure with thoughtful guarantees that doing so will not lead to abuse. Similarly, Member States may ensure equal treatment in a much wider range of working conditions than the Directive requires. Secondly, the European Court of Justice can handle many legal gaps by interpreting concepts the meaning of which is not specified in the Directive. Its efforts to do so are apparent in the narrow interpretation it has given to the exceptions and the broad interpretation it has given to basic working and employment conditions, although it is also clear that the tools available to jurisprudence are limited given the soft nature of the normative text. At the same time, some concepts still need interpretation; especially "permanent employment" and "pay".

Finally, a possible amendment of the Directive may bring another historic turn.[100] At European Union level, the legislator can achieve much by correcting the Directive's inaccuracies and by clarifying exceptions or narrowing their scope. However, the most ambitious objective would be a complete rethinking of the Directive's scope, which would enable the general application of equal treatment in multi-employer situations where there is no difference in the work expected of the employees, but only in the legal background of their employment. From this long-term perspective, the Agency Work Directive is the first, rudimentary, but essential step towards a European labour market where atypical employment involving multiple employers does not preclude equal treatment between employees in a comparable situation.

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Declarations

Competing Interests The authors declare no competing interests.

and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions" *Comparative Labor Law and Policy Journal* (2017/2), 499–500.

[99] Implementation report, 19.

[100] The revision of the Directive is not on the Commission's official agenda, nonetheless the European Parliament called for the Commission to review it "to ensure fundamental social rights for all workers, including equal pay for equal work at the same location". 2016/2221(INI), "European Parliament resolution of 4.7.2017 on working conditions and precarious employment", point 29.