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Implementation of Directive 2008/104/EC in the Member States
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Isabelle Schömann and Coralie Guedes

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Preface

Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work has been transposed, on the time of the writing, in 20 national laws of the Member States and is still in the implementation process in 3 Member States. However, since the expiry of the deadline for transposition of the Directive in December 2011, the European Commission has requested them, in the form of a ‘reasoned opinion’ under EU infringement procedures, a notification, until 21 of December 2012, of measures taken to implement the Directive. In 3 other Member States, existing legislation is already in compliance with the Directive.

Directive 2008/104 constitutes a major step in the regulation of temporary agency work at EU level. In the current economic context, which is conducive to labour market deregulation, temporary agency work is a major challenge for Community law, as temporary agency workers remain in a precarious situation and therefore must be given better protection. In this respect, the Directive represents a major step forward but it is only a first step toward effective protection of agency workers. Indeed, the protection of agency workers is not the only aim of the Directive. It is also intended to further development of the sector, as temporary agency work is also seen, in particular in the view of the European Commission and the employers’ associations as a tool that could be used for job creation (Recital 19 and Art. 2 of Directive 2008/104/EC).

The main purpose of this comparative report is to analyse the domestic implementation provisions of Directive 2008/104/EC in the EU Member States. It focuses on the difficulties faced during the transposition phase and the remaining loopholes with regard to national transposition law. In addition, the report traces back along the hard path that finally led to the adoption of a Community Directive on temporary agency work, as this analysis is an interesting and relevant illustration of how difficult finding a compromise text can be at European level. Finally, the report is aimed at figuring out the questions that are arising or likely to arise with implementation of the Directive, particularly concerning transnational temporary agency work and the link between temporary agency work and the posting of workers Directive (96/71/EC).

1. Remarks on the methodological approach of the survey, including the selection of countries, are given in the Annex.
The report by the ETUI Research Department is based on the replies of ETUC affiliates to the questionnaire elaborated within the framework of NETLEX, the ETUC labour network of trade union legal experts. We warmly thank all our colleagues for their cooperation in this project. The information provided on domestic legal and conventional provisions has been complemented where necessary and where possible by research material. The information provided dates from October 2012.

We hope that this comparative report will not only provide a valuable analysis of the legal measures applicable to temporary agency work throughout Europe, but will also serve as an incentive for discussions and debate in order to achieve better protection for temporary agency workers.
Executive summary

This report on domestic transposition measures of Directive 2008/104/CE on temporary agency work is mostly based on replies to the questionnaire sent to NETLEX members in September 2011.

The deadline for transposition of the Directive was 5 December 2011. Most Member States have transposed the Directive, just a few are delayed. Transposition took place in 20 Member States and is still in the implementation process in 3 Member States; the European Commission has requested them, in the form of a 'reasoned opinion' under EU infringement procedures, to be notified, until 21 of December 2012, of measures taken to implement the Directive. In 3 Member States, existing legislation is in compliance with the Directive.

In some EU countries, transposition has been reported as being difficult and very often, in countries in which temporary agency work is regulated only through commercial law, which is potentially very harmful for agency workers.

Where the Directive has actually been implemented, the social partners have mainly been – and are still in three cases – involved in the process.

Starting with a general overview, the report then looks at the state of transposition in more detail, article by article. Rules regarding the scope of the Directive did not seem to be a controversial issue. Thus the focus will be on the following: definition of the main notions, restrictions and prohibitions; the principle of equal treatment from day one of the assignment; access to collective rights; implementation of the more favourable clause and the non-regression clause; and implementation of effective, proportionate and dissuasive sanctions.

**Definition of the main notions**

The main concepts used in the Directive are assignment, employer, basic working conditions, general interest and pay. The definition of the first three concepts was not really an issue. Indeed, assignments are defined in the same way in most Member States, temporary work agencies being most of the time considered as the employer, as the Directive requires. Two exceptions can be found: in the United Kingdom, where the user is still recognised as the employer, and in the Czech Republic, where both the user and the agency are
considered to be employers. Concerning basic working conditions, EU Member States mostly use the same notions, such as working time or annual leave, which are already mentioned in the Directive itself. With regard to general interest, it is always difficult to define, as it is intentionally vague, so that judges have a fairly broad margin of interpretation. Thus, it seems that CJEU and national case law will have to clarify this notion. The main differences between Member States lie in the definition of pay. The Directive itself leaves this task to national law. As a result, Member States chose to implement either a wide or a restrictive definition of pay. However, CJEU case law seems to be in favour of a wide understanding of the notion of pay, as including, for example, overtime supplements (CJEU 6 December 2007, Case 300/06), special bonuses paid by the employer (CJEU 21 October 1999, Case C-333/97), travel facilities (CJEU 9 February 1982, Case 12/81), compensation for attending training courses and training facilities (CJEU 4 June 1992, Case C-360/90), termination payments in case of dismissal (CJEU 27 June 1990, Case C-33/89) and occupational pensions (CJEU 13 May 1986, Case 170/84).

**Review of restrictions and prohibitions**

The review of restrictions and prohibitions required by the Directive appears to be a difficult issue, as there is no consensus on this matter and also strong lobbying from employers’ organisations wishing to remove remaining restrictions. Nevertheless, it seems that Member States are reviewing restrictions imposed on temporary agency work, the objective being to review existing restrictions in order to improve the minimum protection for temporary agency workers.

**Principle of equal treatment**

The main aim of the Directive is to lay down a principle of equal treatment from day one as the general rule. It can be said that equal treatment has become the rule in most Member States since implementation of the Directive, but sometimes the application of the principle appears to be partial. Regarding the three possibilities of derogation to the principle of equal treatment, only a few Member States actually decided to implement them.

Article 5 on equal treatment also recommends implementing measures to prevent abuses in the use of temporary agency work, focusing particularly on successive assignments. On this issue, the main trend consists of limiting duration and renewals of temporary agency work contracts; providing waiting periods between successive contracts; considering successive assignments as one single assignment; expressly forbidding successive assignments; or allowing only fixed-term assignments. It remains that implementation of the principle of equal treatment seems to be problematic in the Member States.

Article 6 tackles five different issues: information on vacant positions; the possibility of being hired by the user; fee charging in exchange for arranging for workers to be recruited by a user undertaking (which is forbidden); equal access to collective facilities; and training. Implementation seems to be fairly consensual with regard to the four first aspects. In contrast, provisions tackling the issue of training appear not to be sufficient.
Access to collective rights
Temporary agency workers’ access to representation bodies seems to be a new issue for some Member States. The report shows that agency workers are more and more represented at the user undertaking, in some cases with a condition of seniority. Nevertheless, representation at the agency remains the main option, whereas in few cases temporary agency workers can be represented in both the user undertaking and the temporary work agency. As regards information and consultation of workers’ representatives about the use of temporary agency work, the report shows that it already exists in a fair number of Member States, even if it is not always automatic.

The more favourable clause and the non-regression clause
The Directive only sets minimum standards, meaning that Member States can provide further, more favourable protections. Additionally, the so-called non regression clause secures that implementation measures shall not constitute grounds for reduction in the general level of protection in the fields covered by the Directive. This issue seems not to have attracted the attention of many national legislators.

Effective, proportionate and dissuasive measures
The last substantive rule enjoins Member States to take effective, proportionate and dissuasive measures to ensure application of the Directive. The sanctions provided by Member States’ legislation vary widely, from penal sanctions, such as fines or imprisonment, to civil sanctions, such as damages, rewriting of the employment contract or withdrawal of the license. No report clearly stresses whether sanctions are satisfactory or not, as it is probably too early to draw any detailed evaluation on this particular aspect.

In an extra section, attention is given to the articulation between the Temporary Agency Work Directive (2008/104/EC), the posting of workers Directive (96/71/EC) and the pending European Commission’s proposal on the so-called ‘Enforcement Directive’, which will (if adopted) provide mechanisms designed to enforce the Directive on posting of workers so as to propose, according to the European Commission, a clearer definition of its scope, a better understanding of the articulation of economic freedoms and protection of workers, as well as better enforcement of the Directive itself, following the well-known CJEU cases, Viking (C-438/05), Laval (C-341/05), Rüffert (C-346/06) and Commission v. Luxembourg (C-319/06). A critical assessment of this later draft directive stresses the lack of ambition of the proposal and the little impact it will have on solving the existing loopholes and deadlocks in promoting better working conditions and fundamental social rights of cross border (temporarily agency) posted workers.

Finally, the report ends with a critical assessment of the transposition measures of the Directives in the domestic legislation of the Member States, revealing worrying trends witnessed in various member states, in which, for example, the transposition measures are unsatisfactory or non-existent, or where Member States have adopted a minimal interpretation of the provisions of the Directive.
Introduction

Historical background

The path that led to the adoption of the Directive on temporary agency work has been very long. The first reference in EU law to a triangular employment relationship between an employment agency, a user and a worker goes back to 1970. In the so-called Manpower case (CJEU C-35/70), the Court of Justice of the European Union (CJEU) ruled that the employer was the employment agency.

The Council first tackled the issue of temporary work (the term “temporary agency work” was adopted later) in a resolution dating back to 18 December 1979 (OJ 1980 C2/1). The European Commission was asked to present ‘specific communications [...] regarding part-time and temporary employment’. The first text adopted was a resolution of the European Parliament in 1981, followed by a draft directive of the European Commission on temporary employment in 1982. Due to the opposition of employers’ organisations and of a large portion of Members of Parliament and the veto of the United Kingdom, the Directive was never adopted.

The adoption of the Charter of the Fundamental Social Rights of Workers in 1989, although not legally binding, gave further momentum to the process of development of EU regulation of temporary agency work (Zappala 2008). Point 7 of the Appendix I of Community Charter of the Fundamental Social Rights of Workers states that:

the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.

Thus, in 1990 three new draft directives were released by the European Commission, on health and safety for temporary workers, working conditions and the distortion of competition in case of fixed-term, part-time and temporary work. Only the first was actually adopted, in 1991; it provides a principle of equal treatment in terms of health and safety protection of workers with a...

Three years later, in its White paper (European Social Policy – a way forward for the Union, COM(94) 333, July 1994), the European Commission restated that regulating atypical work was one of the priorities of the Council. On 27 September 1995 the European Commission set up a consultation of European social partners in accordance with Article 3 of the Agreement on social policy, attached to Protocol no. 14 on social policy, enclosed in the Treaty instituting a European Community. The European social partners seemed ready to negotiate on the matter of equal treatment for atypical workers.

Since then, many institutional changes have occurred. Indeed, since the entry into force of the Amsterdam Treaty, unanimity is no longer required in the Council, and consultation of European social partners has been institutionalised and enshrined in Articles 138 and 139 of the EC (now 154 and 155 TFEU). As part of the policy of promoting the engagement of the European social partners in the formulation of EU social policy, the EC Treaty (now the Treaty of the Functioning of the European Union) provides a procedure that combines the consultation of the social partners by the Commission with the option to leave social regulation to bipartite agreement between management and labour organised at European level. According to Article 154 TFEU, the Commission, before submitting proposals in the social policy field, has to consult management and labour on the possible direction of that Community action. Moreover, if, after such consultation, the Commission considers Community action advisable, it is obliged to consult management and labour on the content of the envisaged proposal. Therefore, the European Commission launched a consultation of the European social partners on part-time, fixed-term and temporary agency work. The European social partners, however, decided to tackle the three different issues in three different agreements, which led to two agreements on the first two issues, and in the preamble of both texts, the European social partners committed themselves to further negotiations on temporary agency work (recitals 12 and 13). Temporary agency work remained on the agenda while the ILO adopted Convention 181 on Private Employment Agencies, supplemented by Recommendation 188 in 1997. Temporary agency work appeared to be in deadlock at EU level. However, the need for a Community regulation was very strong, for three main reasons. First, temporary agency work is a growing sector in Europe which thus needs to be regulated at this level. Then, temporary agency work had already been regulated partly through two Directives (91/383/EEC health and safety for atypical workers and 96/71/EC on posting of workers in the framework of the provision of services). Finally, another incentive for reaching an agreement was the accession of many new Member States in May 2004. Indeed, the accession treaties limit the freedom of movement of workers coming from the new Member States, but usually these restrictions do not apply to the freedom of services. Thus, through the use of temporary agency work, new Member States can avoid the restrictions imposed on them by the accession treaties. It may have been a strong incentive for creating a regulatory framework for temporary agency work in old Member States (Bercusson 2008).
Social dialogue

Negotiations

To begin with, employers’ organisations were not convinced of the added value of EU regulation of temporary agency work, but as the European Commission had launched a procedure according to which European social partners should be consulted, ETUC and UNICE (now BusinessEurope) had to decide whether their negotiations could lead to a better outcome (Ahlberg 2008). ‘Negotiating in the shadow of the law’ appeared to be a real incentive (see Bercusson 2008, also in Bruun, Lörcher and Schömann, 2009). In addition, the probable reason for employers’ organisations entering into negotiations was the presence of a new actor, the International Confederation of Temporary Work Businesses (CIETT). CIETT was very likely to be part of the negotiations, so if the other employers’ organisations did not negotiate, user companies would not be represented. Negotiations started in May 2000 between ETUC (the European Trade Union Confederation composed of the ETUC affiliates, representatives of the European trade union federation, such as UNI Europa) on the workers’ side and UNICE (Union of Industrial and Employers’ Confederations of Europe, now BusinessEurope), CEEP (European Centre of Enterprises of General Economic Interest) and CIETT on the employers’ side.

During the negotiation process, UNI-Europa (representing employees in the service sector) and CIETT issued a joint declaration. It is worth mentioning that both organisations had already established a sectoral social dialogue committee. In this joint declaration, they stated that: ‘on the basis that agency work may play a positive role in the labour market, the sectoral social dialogue should work toward improving the quality and the operation of the European labour market, the employment and working conditions of agency-supplied workers, as well as the professionalization of the sector’.

ETUC was very critical of this declaration, first, because UNI-Europa is a member of ETUC, but mainly because members of ETUC did not agree with the idea of temporary agency work playing a positive role in the labour market (Ahlberg 2008).

However, although an agreement seemed possible at sectoral level, it was not the case at the inter-professional level. The negotiations failed in May 2001, despite the attempt of the Greek Commissioner in charge of Employment and Social Policies, Anna Diamantopoulou, to reconcile representatives from the trade union side and the employers’ side (EIRO, June 2001).

Why did the negotiations fail?

This negotiation was already the fourth for the European social partners. After three successive achievements, there were good reasons to think that they were going to reach an agreement (Ahlberg 2008). However, disagreements on key issues appeared too strong to overcome.
Explanations of the failure of the negotiations are of two different kinds. First, trade unions and employers’ organisations disagree on some key elements of the substance of the agreement itself. The other explanations are more specific to the context of the negotiations.

Regarding the disagreements on the substance of the agreement, first there was fundamental opposition between the trade union side and the employers’ side with regard to the purpose of the agreement itself. ETUC wanted to marginalise temporary agency work or at least to provide more protection for agency workers; employers, on the other hand, wanted to promote temporary agency work as a tool of employment policies, given its positive effect on job creation (Jones 2002).

In more detail, there were four problematic points. First, they were opposed on whether to include pay in the basic employment conditions subject to the principle of equal treatment. Second, employers wished to remove all restrictions on the use of temporary agency work, while ETUC was in favour of regulation more or less similar to what was provided by the Directive on fixed-term work (Jones 2002). Third, they had divergent views with regard to the scope of the agreement, the main question being whether to include temporary agency workers with open-ended employment contracts with the agency within the scope of the agreement. However, the most burning question concerned the implementation of the equal treatment principle from day one as well as the definition of a possible comparable worker. ETUC wanted it to be a permanent worker doing the same job in the user undertaking and to enjoy equal treatment from the first day of assignment, but no agreement could be found with the employers’ organisations (Vaes and Vandenbrande 2009). As already mentioned, the context also exercised a great influence on the negotiation process.

First, it is worth mentioning that with regard to temporary agency work there were many differences between Member States’ legal frameworks, which was not the case for fixed-term and part-time work (Ahlberg 2008). Moreover, the European social partners no longer had to prove their legitimacy as actors in the European social dialogue because, as mentioned above, it was already the fourth negotiation (Ahlberg 2008).

Another key element was that disagreements and tensions emerged among employers’ representatives (particularly between UNICE and CIETT), but also among trade union representatives (Bercusson 2008). In addition, ETUC had to prove that they were not willing to accept an agreement at any price, as they had been strongly criticised with regard to the agreement on fixed-term contract (Ahlberg 2008).

Another major factor may also have been the intervention of the European Commission’s legal service. One of the main incentives in European social dialogue is that a text drafted by the European Commission is likely to be less favourable than a negotiated agreement.
During the negotiation process, the European Commission’s legal service was asked to say whether the terms ‘employment conditions’ included pay or not. They answered that including this reference may be inconsistent with Article 137 (6) EC Treaty (now Article 153 (6) TFEU). Indeed, in case of a comparable worker being a permanent worker of the user undertaking, introducing a principle of equal pay would be equivalent to regulation of the wage level for the sector and thus inconsistent with Article 137 (6) Treaty (now Article 153 (6) TFEU).

This may have had a major influence on the bargaining process, as employers became aware that the European Commission would probably do it their way. After that, employers’ representatives seemed to harden their position (Ahlberg 2008).

Finally, three other elements played a role in the failure of the bargaining process, the first being an increasing intransigence on the part of UNICE (Jones 2002), the second being a lack of initiative on the part of the Barroso Commission in the field of labour law (Bercusson 2008) and the last, as always, the strong opposition of Ireland and the United Kingdom towards EU regulation.

After the failure of the European social partners to reach an agreement and according to the procedure foreseen in the Treaty, the Commission, that suspended its legislative initiative during the time of the negotiation, will resume it and it can still decide to tackle the issue via the normal legislative procedure.

The legislative process

As the European Commission was henceforth in charge of drafting a proposal for a directive, the social partners sent all the draft texts they already had.

On 8 October 2001, UNI-Europa and CIETT released another joint declaration2 to inform the European Commission about what they expected of the future directive on temporary agency work.

As the European Commission was about to figure out, the task was not easy, even in the context of a well-established and structured legislative procedure.

The draft directive was released in March 2002 and submitted to the European Parliament, as the co-decision procedure requires. The possibility of resorting to a hypothetical comparable worker to implement the principle of equal treatment was raised for the first time (Ahlberg 2008).

In November 2002, the amended text was sent to the Council, where it remained stuck until March 2008. Indeed, despite efforts to find a compromise,

the stubborn opposition of a minority of Member State governments prevented progress in this crucial area.

In May 2004, ten more Member States joined the European Union; this major event in the construction of the EU certainly did not facilitate the task of the Council. One of the main stumbling blocks was once again the principle of equal treatment. Three derogations from the principle were proposed: the Nordic derogation, the German derogation and the British derogation, as they have been called (Vaes and Vandenbrande 2009).

The first derogation consisted of a possibility for national social partners to derogate from the principle of equal treatment through collective bargaining. Nordic countries – and in particular Sweden and Denmark, where working conditions are mostly regulated by collective agreement – did not want their bargaining power reduced by the adoption of the Directive (Vaes and Vandenbrande 2009). It is true that, from the point of view of countries that have a strong tradition of regulating employment through collective bargaining, this exception makes sense. But it contains a risk for countries in which trade unions’ or worker representatives’ bargaining power is weak.

The so-called German derogation provided that, with regard to pay, Member States, after consulting the social partners, may allow exemptions from the principle of equal treatment for workers with a permanent contract of employment with a temporary work agency. Whether to include temporary agency workers with a permanent employment contract in the scope of the Directive or not had been a key issue during the bargaining process between the European social partners. The proposed derogation seemed to be a halfway solution.

Finally, the British derogation provided the possibility of implementing a qualifying period. The risk contained in this derogation is that in most European countries temporary agency work is essentially temporary and the duration of assignments is fairly short. Providing a long qualifying period would thus exclude most workers from the scope of the Directive.

Despite the fact that a compromise seemed to have been reached on the principle of equal treatment (the principle itself and the comparable worker), a fundamental disagreement remained. Member States did not agree on the aim of the Directive: some wanted to put the emphasis on labour market flexibility, while others wanted to put it on the protection of temporary agency workers (Vaes and Vandenbrande 2009).

In 2007, during the Portuguese Presidency, greater efforts were made to reach an agreement (Vaes and Vandenbrande 2009). Moreover, most Member States were actually in favour of the Presidency text and their number would probably achieve a qualified majority. Thus, the Employment, Social Policy, Health and Consumers Affairs Council was ready to put the matter to a vote, as unanimity was not required (EIRO, January 2008). Furthermore, on 28 May 2008, the European social partners for the temporary agency work sec-
tor were able to agree on one of the main difficult issues namely the implementation of the principle of equal treatment from day one and they restated their call for a regulatory framework at EU level (EIRO, January 2009).

This later event put even more pressure on the national levels. In May 2008, the UK government and the main employers’ and trade union organisations (Confederation of British Industry and Trades Union Congress) reached an agreement on the principle of equal treatment for temporary agency workers (EIRO, July 2008). This shows clearly that disputes should also be solved at national level in order to avoid contaminating the EU-level negotiations (Bercusson 2008).

The sudden turnaround in UK opinion was probably the result of growing pressure from EU partners to make the United Kingdom drop its opposition to measures for dealing with temporary agency work. The United Kingdom is also said to have bartered its agreement on the principle of equal treatment for the continuation of the individual opt-out provision in the working time Directive, which is currently being revised (EIRO, July 2008).

As the main opponent finally decided to rally to the common position, drafting a new compromise text appeared to be possible. The text was sent to Parliament, which eventually adopted it on 22 October 2008, and the process which had started 26 years previously, in 1982, came to an end.

The final text

In times of economic and employment crisis, the question of the role of temporary employment agencies in the labour market is even more significant, especially as the sector has been strongly affected by the crisis, temporary agency work being often used by companies as a buffer to protect regular employment (Voss 2011).

At the very beginning of the process, the intention of the European Commission was to provide some protection to temporary agency workers so as to increase the acceptance of temporary agency work, but then ‘atypical work policies turned into an economically effective strategy bringing jobs and growth’ (Frenzel 2010).

It is true that atypical forms of employment, and in particular temporary agency work, as well as the questions arising with regard to equal opportunities, often lie between social and employment policies. Employment and social policies are tackled in Titles IX and X of the TFEU, which call for harmonisation and coordination, respectively. As the temporary agency work Directive has been adopted on the basis of Article 137 EC (now 153 of the TFEU), it has to be considered a social policy. But in practice, the Directive is a combination of employment and social policy, and this ‘hybridisation’ has consequences both for the form and the substance of the text. Indeed, the Directive has to reconcile two opposing aims: to provide minimum protection for temporary
agency workers and to promote labour market flexibility through temporary agency work. From the formal point of view, the Directive is a combination of soft and hard law (Zappala 2003).

This dual approach can be seen throughout the text. Starting from the beginning, the preamble is symptomatic of the need to reconcile opposing ideas. Recitals 1 and 2 refer to the Charter of Fundamental Rights of the European Union and to the Charter of the Fundamental Social Rights of Workers, respectively.

Further in the text, articles seem to tip the balance one way or the other. First, Article 2 – which defines the aim of the Directive by stating that its purpose is to ‘ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment ... is applied to temporary agency workers’, but also to ‘establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible form of working’ – clearly emphasises this ‘hybridisation’ (Zappala 2003).

Then, Article 4, which enjoins Member States to review restrictions and prohibitions of temporary agency work provided by national law, can be and should be interpreted as a ‘clear statement of the close link between a review of the existing restrictions and the improvement of the minimum protection for temporary agency workers’ (Warneck 2011, 10), following the principle of non regression. However, this can lead to great legal changes in countries in which temporary agency work is subject to strict regulation (Robin-Olivier 2009), depending on the interpretation given to the ‘general interest’. In contrast, Article 5 paragraph 1 and Article 6 are aimed at giving more protection to temporary agency workers.

Some articles have more to do with soft law. For example, Article 4 does not require any harmonisation in the re-regulation process, and Article 6 paragraph 5 only enjoins Member States to ‘take suitable measures’ and to ‘promote social dialogue’ in order to improve and promote access to training for temporary agency workers (Zappala 2003).

Although the objective of protection is present, it sometimes disappears due to the pervasiveness of the ‘employment policy aim’. One example is the possible derogation from the principle of equal treatment (Zappala 2003). Nevertheless, it is a traditional way of allowing derogation and not really inspired by flexicurity. The fact remains that this greatly reduces the level of protection because of the use of elusive concepts, such as ‘overall protection’ and ‘objective reasons’ and ‘adequate level of protection’, which, if not defined by the CJEU, will bestow great flexibility on the social partners and the legislators, and thus weaken the principle of equal treatment in countries where workers’ representatives do not have strong bargaining power (Robin-Olivier 2009).

Temporary agency work is said to meet the expectations of both employers and workers (recital 11) and must be thus promoted. This does not seem to be
consistent with figures that show that temporary agency work is more often chosen to find permanent employment (EIRO 2007). It also does not take into account either the risk of labour market segmentation resulting from the use of atypical forms of work or the imbalance that characterises employment relationships, which is at the basis of labour law (Robin-Olivier 2009). However, the principle of equal treatment from day one as provided by the Directive is a great step forward. The Directive also creates minimum protection for temporary agency workers, which is good news in a context in which social progress is rare and fragile. In comparison, the ILO Convention on private employment agencies does not provide for equal treatment for agency workers (Robin-Olivier 2009).
State of transposition and involvement of social partners

Prior to the Directive, there was no domestic legislation on temporary agency work in three Member States (Bulgaria, Denmark and the United Kingdom). In Sweden, legislation tackling the issue of temporary agency work did exist, but it has not been applied for a decade, so the implementation of the Directive is to be seen as new legislation. However, implementation seems to be an issue of intensive discussion with social partners and at national parliaments, that have led to delay in particular in Sweden (together with Cyprus and Denmark), that currently face EU infringement procedure, the European Commission requesting them, in the form of a ‘reasoned opinion’ to be notified, until 21 of December 2012, of measures taken to implement the Directive.

Twenty Member States have transposed the Directive (Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Malta, the Netherlands, Norway, Portugal, Romania, Spain and the United Kingdom). Transposition is reported to be in progress in three Member States (Cyprus, Denmark and Sweden, which currently face EU infringement procedures from the European Commission for the non-transposition of the Directive).

In Norway, the trade union Fellesforbundet has been opposed to implementation of the Directive, arguing that the possibility of concluding a temporary contract of employment has to remain subject to collective bargaining. A national strike took place in January 2012 to protest against the government’s plan to adopt the Directive. Workers feared that this would encourage the use of temporary agency work and thus threaten permanent employment and weaken trade union power. In the meantime, the Norwegian government included the Temporary Work Agency Directive in the EEA agreement and amendments to the Working Environment Act have been adopted and will come into force on 1 January 2013.

Currently, no transposition is foreseen in France and Poland, as domestic legislation is considered to be already compliant with the Directive. In Poland, the existing legislation does not however, includes the obligation to inform temporary agency workers about the possibility of taking up employment at the user undertaking. In Luxembourg the transposition procedure has not yet started, although there is need to improve the national legislation in relation to art. 6 (1), 6 (3) and 6 (5) of the Directive. We have little information on the following Member States: Cyprus, Estonia, Latvia, Lithuania, Malta and
Slovakia, as well as Iceland and Liechtenstein (EEA); for the latter, our information dates back to 2009, when trade unions and employers associations were invited to submit a first opinion.

In many countries – such as Estonia, Latvia, Malta and Lithuania – temporary agency work is regulated through commercial law, and particularly through licensing. In Lithuania, this is the first regulation on temporary agency work, as the issue was not regulated in the national context despite the fact that the guidelines for further regulations had been adopted by the government in 2007 and that ILO Convention No. 181 ratified in 2004. In Cyprus, there is no legal concept of temporary agency work. Atypical forms of work only encompass fixed-term contracts and seasonal work.

The European Commission has requested Cyprus, Denmark and Sweden to implement in their national law new EU legislation which defines conditions for temporary agency workers. Although the process of adopting national implementing measures is under way in the three Member States, there are no precise indications when this process will be completed. Consequently, temporary agency workers may be denied the guaranteed working conditions to which they are entitled under the Directive. For this reason, the European Commission has requested them to notify, under EU infringement procedures, within 2 months (until 21 of December 2012) the measures taken to implement the Directive. Once that time limit has been exceeded, the European Commission may decide to refer these Member States to the EU’s Court of Justice.

In general, the social partners have been involved in preparatory work to transpose the Directive. Negotiations between trade unions and employers’ associations appear to be difficult, especially in Bulgaria and Austria. In Ireland, the social partners failed to reach an agreement on the implementation of the Directive, but they were both consulted by the Department of Enterprise, Jobs and Innovation which adopted the 2012 legislation. State of play article by article with focus on specificities of national legislations main difficulties/loopholes
<table>
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<th>Member States</th>
<th>Existing legislation</th>
<th>Implementation</th>
<th>Involvement of social partners</th>
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<tr>
<td>Austria</td>
<td>AüG 23/3/1998 and national collective agreements</td>
<td>Arbeitskräfteüberlassungsgesetz, 4 September 2012 and will come into force on 1 January 2013</td>
<td>Yes. Intensive discussion between social partners with the Ministry of Labour.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Regulated through contract of services</td>
<td>Amendment of labour code section VIII c in Chapter V of the Labour Code entitled “Additional conditions for the performance of work through temporary work agencies” Art.107 p to Art.107, and law on Amendments and Supplements of the labour code of 15 Dec. 2011 (State Official Journal, no.7 of 24 of January 2012. 7, 2012): Art. 121 (4); Art. 127 (5); Art.130c (1); 327 (1)]</td>
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<tr>
<td>Cyprus</td>
<td>No legal concept of temporary agency work, only fixed-term contract and seasonal work</td>
<td>Infringement procedure launched by the European Commission of 21 October 2012. Cyprus should transpose the directive by 21 Dec. 2012</td>
<td></td>
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Table 1  General overview of the implementation measures

<table>
<thead>
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<th>Member States</th>
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<tr>
<td>Estonia</td>
<td>Employment Contracts Act (only Art. 6 Section 5 Art. 17 Section 5) and to Equal Treatment Act</td>
<td>Draft law adopted on 25.01.2012</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>Employment contract act 55/2001) + Act on occupational health and safety</td>
<td>On 19.12.2011 Parliament adopted Government's proposal on a new Act amending the Employment Contracts Act (55/2001) chapter 2 sections 6 and 9 and Posted Workers Act (1146/1999).</td>
<td>Currently, sectoral negotiation is on-going on issues related to pay. If no agreement can be reached, the Labour Minister might legislate (example: On 22 May 2012, temporary agencies represented by the so-called Verhandlungsgemeinschaft Zeitarbeit (VGZ), and the metal workers´ union IG Metall, agreed on a collective agreement on wage benefits for temporary agency workers in the metalworking and electrical industry</td>
</tr>
<tr>
<td>France</td>
<td>L 1251-1 and following of the Labour Code</td>
<td>Existing legislation compatible with the Directive</td>
<td></td>
</tr>
<tr>
<td>Member States</td>
<td>Existing legislation</td>
<td>Implementation</td>
<td>Involvement of social partners</td>
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<tr>
<td>Hungary</td>
<td></td>
<td>Chapter XI of act No. 105/2011 entering into force on 1/11/11</td>
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</tr>
<tr>
<td>Iceland</td>
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<td>Amendment of Icelandic law under discussion</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>Legislative Decree No. 276/2003 on Temporary Agency Work</td>
<td>February 24th 2012, the new decree amended Decree-law No. 276/2003</td>
<td></td>
</tr>
<tr>
<td>Latvia</td>
<td>Covered by general employment and commercial law as temporary agency work is not very developed</td>
<td>Labour Law, OG No.103, 6 July. Entry into force on 20 July 2011.</td>
<td></td>
</tr>
<tr>
<td>Lithuania</td>
<td>Legal framework limited to licensing</td>
<td>Law No. XI-1379 was adopted on 19 May 2011, entry into force on 1 December 2011</td>
<td></td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Law of 19/5/1994 (L 131-1 to 134-3 Labour code)</td>
<td>No, but need for amendments (art. 6.1 6.3 6.5)</td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>Covered by general employment law + licensing</td>
<td>The Temporary Agency Workers Regulations (Legal Notice 461/2010), published in the Government Gazette on 22 October 2010. Entry into force on 5 December 2011</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>WAADI (Temporary Agency Act) of 1998 Works Council Act (Wet op de Ondernemingsraden, WOR</td>
<td>Amendment of Art. 8(1) (b) and Art. 8(3)(a), Art. 8b, Art. 9a WAAD; Art.31b WOR and new Art. 8a WAADI of 12 April 2012 by bill No. 32895 and new bill of 1 July 2012 to combat fraudulent temporary work agencies.</td>
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</tr>
<tr>
<td>Member States</td>
<td>Existing legislation</td>
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<tr>
<td>Romania</td>
<td>articles 87 to 100 of the labour code + decision of the government n° 938/2004, J0 n° 589/01.07.2004</td>
<td>Law No. 40 of 2011, JO No. 225 of 31 March 2011</td>
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<tr>
<td>Slovakia</td>
<td>Act on Employment Services no. 5/2004</td>
<td>Pending amendments in discussion at the Parliament in November 2010</td>
<td></td>
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</tbody>
</table>
State of play article by article with focus on specificities of national legislations main difficulties/loopholes

Scope (Article 1)

Article 1 defines the scope of the Directive, which is the triangular employment relationship that characterises temporary agency work. The scope is fairly broad as it encompasses temporary work agencies operating for gain or not, and user undertakings in the private and public sectors.

Regarding scope, the example of two Member States should be mentioned. In Austria, the scope of application of temporary agency work legislation has been extended in accordance with the Directive, allowing for exceptions and particular rules in case of non-profit temporary work placement, placement in public undertakings – national, regional or communal – in agriculture and forestry, public vocational training programmes and cooperation for development. Austrian legislation also provides for particular rules to protect temporary agency workers (licensing, minimum requirements in the work contract, compliance with legislation).

In Germany, the scope of the national legislation has been changed on two points: (i) exceptions have been allowed regarding the intra-corporate transfer of temporary workers and (ii) the idea of temporary assignments has been included in the legal text without any definition. Therefore it is a controversial question how to transpose this important requirement of the Directive and probably the courts will have to deal with this matter.

The Directive uses various concepts whose definitions need to be clarified by national legislation. Here are a few examples of definitions provided by Member States.

The concept of an ‘assignment’

The concept of assignment exists in most Member States. It refers to the period during which agency workers are in fact working in the user undertaking. It seems that the main trend consists of limiting the duration of assignments, such as in France, Luxembourg, Slovenia, Poland and Greece.

In Belgian law, the concept of assignment does not exist. The duration of an assignment is simply the duration of the contract, or the sum of successive
contracts. The temporary nature of assignments is ensured by the list of permissible grounds for temporary agency work: replacement of a worker, temporary increase of work and exceptional work. Each of these grounds entails time-limits and/or procedures that have to ensure the temporary nature of the assignment. On 31 January 2012 the social partners signed an agreement which provides a new ground for temporary agency work, namely integration. Temporary agency workers can now be recruited on a permanent basis. It does not necessarily mean that the user undertaking is compelled to hire the temporary agency workers, but it has to justify its possible refusal.

In Czech legislation, the assignment of temporary agency workers by a temporary work agency to a user undertaking is done on the basis of a written instruction. The Act of 2011 determines the requisites of this instruction. The temporary assignment ends with the expiry of the period for which it was contracted. The temporary work agency cannot assign an employee to the same employer for a period longer than 12 months.

In Austria, it is not clear whether undertaking partly providing temporary agency work as well as workers who only partly work as temporary agency workers fall under the Directive.

The concept of ‘employer’

The Directive provides that the employer must be a temporary work agency. This is the case in most Member States, such as Belgium, the Netherlands, Italy, Denmark, Portugal, Spain, Austria, Poland, Slovenia, Luxembourg, France, Finland, envisaged in Bulgaria, Norway and Sweden.

The guide for transposition (Warneck 2011) had pointed out that in Ireland and the United Kingdom, temporary work agencies were not always regarded as employers. The new Irish legislation is now in line with the Directive.

In the United Kingdom, the main legal difficulty is the question of employment status. Indeed, agency workers may be entitled to three different types of contracts: an employment contract for employees, a workers’ contract for workers or a contract for services. Hopefully, the Directive refers to workers in the definition of its scope, which means that employees and workers are actually covered by the protection provided by the Directive. Nevertheless, agency workers with contracts for services do not fall within the scope of the Directive. The risk of manipulation is thus very high.

In Czech legislation, both the temporary work agency and the user undertaking are employers.

In Germany, the definitions of Article 3 have not been transposed into domestic law, but the jurisdiction is oriented towards them.
The concept of ‘general interest’

The Directive provides that restrictions and prohibitions have to be justified on the ground of general interest. The concept of general interest is always difficult to define, no clear definition is provided to give national judges and the CJEU a broad margin of appreciation.

For example, there is no agreement on a clear definition in Belgium, whereby trade unions put the emphasis on health and safety aspects. In current Polish legislation, no mention is made of this issue. According to CYIUB/KNSB (Bulgaria), the notion of ‘public interest’ was not well considered and ensured by the envisaged clauses in the implementation law (Amendment of Labour Code section 8, Article 107p to Article 107у (State Official Journal, No. 7, 2012). Finally, in Slovenia, general interest has been understood as relating to restrictions concerning workers on strike, safety and health issues and time limitations.

The concept of ‘basic working conditions’ (except pay)

The Directive provides that the concept of basic working conditions covers duration of working time, overtime, break, rest period, night work, holidays and public holidays (and pay). The following paragraphs give a few examples of what have been done in the Member States.

Working time is often included in basic working conditions, such as in Ireland, Belgium, France, Portugal, Italy, Spain and the United Kingdom. Rest periods (Spain, Ireland, France and the United Kingdom), breaks (Spain, Ireland, Italy and the United Kingdom), night work (Spain, Ireland, Belgium, France, Italy and the United Kingdom) annual leave and public holidays (Spain, Ireland, Belgium, France, Italy and the United Kingdom) often belong to the category of basic working conditions. Sunday work and part-time work are rarely mentioned (Belgium). It is the same regarding health and safety (France and Portugal), child and youth work (France and Belgium), overtime (Spain, Ireland, Italy and the United Kingdom) or part-time work (Belgium). Italian legislation also recalls that protection of pregnancy and gender equality are included (Art. 2 (2) c of the new Decree of 2012). In Poland, all employment conditions are covered. It is worth mentioning that comparison is made difficult because of differences in the definitions of the concepts used. Concerning the Austrian transposition measures, the issue of basic employment and working conditions stipulated by “other binding general provisions” is of concern in particular in respect of so-called “free work council agreements”, (Work council agreements that are concluded on issues not explicitly mentioned by law (Works Constitution Act - Arbeitsverfassungsgesetz Arb-VG). In such a case these issues are identified as part of all working contracts concerned, that might fall into the scope of the Directive, but which will not be covered by the Austrian Act. In Bulgaria, basic working conditions’ are defined as “work and employment conditions, set forth by laws, normative acts for implementation of laws, administrative acts, collective labour agree-
ments and/or other provisions in force in the user enterprise and concern the length of working time, overtime, rest periods during working time, daily and weekly rest periods, night work, basic and additional leave, official holidays, protection of persons under 18 years of age and women, as well as remuneration.” With regard to posting of workers, the temporary work agency and employee have to agree at least on the same minimum conditions of work as the conditions for the same type of work in the host state.

The concept of ‘pay’

Definition of the concept of pay is left to the Member States. Here are a few examples.

In some countries, such as Bulgaria (Amendment of Labour Code Section 8, Article 107p to Article 107u (State Official Journal, No. 7, 2012), the issue of pay related to working time has not been considered.

Some other Member States have implemented a fairly broad definition of the concept of pay. For example, in Belgian law, Article 10 of the 1987 Act that formulates the principle of equal pay, simply uses the word ‘pay’ (loon/ rémunération). This is generally understood to have a broad scope. In the Netherlands, ‘pay’ is understood as pay and other allowances comparable to the ones permanent workers are entitled to in the user undertaking. Current discussion of the national transposition measure in Denmark deals with the inclusion of sick pay in the definition. Polish law does not provide for a specific definition of pay for the sake of temporary agency work. The equal treatment clause refers to all employment conditions, therefore even if an element of remuneration could not be classified as ‘pay’ (for example, per diems), it falls within the notion of ‘employment conditions’. There is, however, a definition of minimum pay (Act on minimum rate of pay of 10 October 2002). The rate is announced by the Minister and was in 2011, of about 350 EUR. A higher rate can be established in a wage regulation or a collective agreement. In Luxembourg, current legislation provides for the same definitions as in the Directive. The concept of pay is a large one, including additional advantages such as bonus and accommodation. In Finnish legislation the definition of pay is broad. It includes, for example, bonuses, sick leave pay and family leave pay. In Spain, pay includes any economic return, fixed or variable.

In the United Kingdom, ‘pay’ is defined in a broad way, including basic pay based on the annual salary an agency worker would have received if recruited directly (usually converted into an hourly or daily rate, taking into account any pay increments), overtime payments, subject to any requirements regarding the number of qualifying hours, shift/unsocial hours allowances, risk payments for hazardous duties, payment for annual leave (any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate) – to avoid confusion, this should be identified separately on the agency worker’s payslip, bonus or commission payments directly attributable to the amount or quality of the work done by the individual. This can include commission linked to sales or production targets and payments related to quality
of personal performance (see sections below on bonuses linked to personal performance and performance appraisal systems). This might also include non-contractual payments which have been paid with such regularity that they are a matter of custom and practice, vouchers or stamps which have monetary value and are not ‘salary sacrifice schemes’, for example, luncheon vouchers and child care vouchers. In British law, ‘pay’ excludes occupational sick pay (the Agency Workers Regulations adopted in 2010 do not affect an agency worker’s entitlement to statutory sick pay), occupational pensions (agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012) occupational maternity, paternity or adoption pay (the Regulations do not affect an agency worker’s statutory entitlements), redundancy pay (statutory and contractual), notice pay (statutory and contractual linked to loss of employment), payment for time off for trade union duties, guarantee payments as they apply to directly recruited staff if laid off, advances in pay or loans (for example, for season tickets), expenses such as accommodation and travel expenses, payments or rewards linked to financial participation schemes such as share ownership schemes, phantom share schemes, overtime or similar payments where the agency worker has not fulfilled the qualifying conditions required of someone directly recruited. For example, an agency worker would have to be doing work over and above standard hours to qualify for overtime, not just working a shift that permanent staff tends to work on an overtime basis. On top of this are the majority of benefits in kind given as an incentive or reward for long-service, for example, where Building Society staff may be given a reduced rate mortgage, as well as employer funded training allowances, any payments that require an eligibility period of employment/service, if not met by the agency worker (same treatment as if directly recruited) or if the agency worker is no longer on assignment when the bonus is paid (if the same applies to those directly recruited, that is, no longer working for the hirer), bonuses which are not directly linked to the contribution of the individual – for example, a flat rate bonus that is given to all direct recruits to encourage loyalty or long-term service, and also additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice (see section above on bonuses and commission payments).

In contrast, a few other Member States have chosen a more restrictive approach. Current Austrian legislation is amended in respect of the notion of pay (1) to allow for the principle of equal pay to be anchored in collective agreements at plant level, and not only in national and branch level collective agreements. To date, the social partners have not been able to reach agreement on this issue. (2) Furthermore, the notion of pay is interpreted restrictively and does not include pension schemes agreed at the enterprise level. In Ireland, pay is defined as ‘basic pay, and any pay in excess of basic pay in respect of shift work, piece work, overtime, unsocial hours worked, hours worked on a Sunday’. Occupational pension schemes, financial participation schemes, sick pay schemes, benefits in kind, bonus payments, maternity and adoptive leave pay, and redundancy payments or any arrangements or payments provided for by law are not included. It is important to stress that measures concerning pay adopted in May are retroactive.
Finally, some national legislation provides for particular solutions. In Portugal, agency workers with fixed-term contracts are entitled to the minimum wage provided by the collective agreement applicable in the user undertaking or the agency corresponding to their functions, or to the wage paid to a worker performing the same job or a job having the same value. The same rules apply to agency workers with an open-ended contract during assignments. In the period between assignments, pay means the national minimum wage or the amount provided by the applicable collective agreement in the user undertaking or the temporary work agency or at least two-thirds of the wage paid for the last assignment, being the highest amount actually applicable.

In Slovenia, in the employment contract, the employer and the worker stipulate that the level of the wage and of compensation depends on the work actually performed for the user undertaking, taking into account the collective agreements and general acts that bind individual user undertakings. They also reach agreement on the level of wage compensation for the period of a premature cessation of work with the user undertaking, and/or for the period in which the employer fails to ensure work with the user undertaking. The wage compensation may not be lower than 70 per cent of the minimum wage.

In Swedish law, the user undertaking has to pay the average income at the workplace. Exemptions can be made for pensioners and students that have another primary income.

In Czech legislation, the Directive has been implemented using the wording of the Directive itself, in particular in respect of working conditions in general, including occupational health care.

In Romania, the definition of pay of temporary workers the provisions is still grounds for debate: the former version of the Labour Code stipulated that “the wages received by the temporary worker for each assignment cannot be lower than the wages received by an employee of the user undertaking who performs the same or similar work”. Following amendments, the new Labour Code stipulates: “the wages received by the temporary worker for each assignment shall be determined through direct negotiations between the user undertaking and the temporary worker, and shall not be lower than the guaranteed national minimum gross wage”. Contradiction between this wording and the principle of equal treatment was referred to the Constitutional Court, that stated that “the new provision does not – with reference to its contents – have the propensity to promote discriminatory treatment between the two categories of employees. Thus, the law only established the minimum wage a user undertaking must pay the temporary worker, which may not differ from the wage paid for a regular employee. The amount of work shall not affect the setting of the wage, but allows for the parties to negotiate the wage”. However, the most recent legal literature on Romanian law includes opinions that there is a contradiction between the principle of equal treatment enshrined in Article 5(2) of the Directive, and the provisions in Article 96 Para. (2) in the Romanian Labour Code, as the changes in this later provision lead to set that
the minimum wage of temporary workers is no longer the wage paid to the employees of the user undertaking, but the national minimum wage.

Restrictions or prohibitions (Article 4)

Article 4 provides that restrictions and prohibitions with regard to temporary agency work should be reviewed and so as to be justified only on the ground of general interest regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented (recital 18). Member states can be divided into four categories.

First, in some Member States, reviews of national restrictions or prohibitions are reported to be in progress, but no changes are yet foreseen, mainly due to strong disagreement between trade unions and employers’ organisations. For instance, the issue is currently being discussed in Belgium, but it appears to be the most difficult piece of law to implement, as there is no common view at any level. Hopes are vested in the Court of Justice’s case law not lifting restrictions (the Hennigs case may justify this hope). In Belgium there is major lobbying from the employers’ associations to lift restrictions or prohibitions. Nevertheless, the social partners have been involved in the preparatory work of the bill transposing the Directive, and they are still negotiating on various questions, such as the creation of a new permissible ground for temporary agency work, allowing the conclusion of a permanent contract.

In the Netherlands, the government recently asked the Dutch Labour Foundation (Stichting van de Arbeid) to review the restrictions and prohibitions in the Collective Labour Agreements. The Dutch government is reviewing restrictions and prohibitions in legislation. In this review, the Labour Foundation also has to be consulted. The review is still in discussion with employers, who want to lift as many such prohibitions and restrictions as possible. The Dutch Federation of Trade Unions, FNV (Federatie Nederlandse Vakbeweging), is of the opinion that restrictions and prohibitions have to be understood in the general context of the Directive. Employment contracts of indefinite duration are the general form of employment relationship. In some cases, clauses in Collective Labour Agreements about temporary agency workers are to be conceived as conditions instead of restrictions and prohibitions. Thus, most restrictions and prohibitions can be justified on grounds of general interest.

Current restrictions in Austria are under scrutiny but any change of legislation proposed by the Chamber of Industry and employers’ associations would need the agreement of the trade unions and the Chamber of Labour. Both

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3. CJEU case C-297/10 (Sabine Hennigs v Eisenbahn-Bundesamt) in which the CJEU, in a case dealing with non-discrimination on grounds of age based on Article 21 Charter, held that the respective national measures at stake were not adequate or necessary to achieve the aim pursued, and therefore they lacked proper justification.
trade unions and the Chamber of Labour reject loosening restrictions, so it is expected that no change in current restrictions and prohibitions will occur based on transposition of the Directive. However, changes via national, regional or sectoral collective agreements may take place. However, it is currently difficult to evaluate how such changes could be made.

In Finland, restrictions and prohibitions on temporary agency work in legislation have been reviewed by the government. The social partners have reviewed the restrictions and prohibitions in collective agreements. The employers’ association has argued that the restrictions in collective agreements should be removed. The government and trade unions argue that Article 4 only imposes an obligation to review but not to remove such restrictions or prohibitions. Therefore, no restrictions or prohibitions have been removed.

In Germany, there are restrictions on temporary work in the construction industry. Employers’ organisations are demanding the abolition of these restrictions, but this has not yet happened. Trade unions are demanding, for example, a strict prohibition on temporary work in case of strikes, but there has been no change on this issue either. There has been no review of collective agreements. In the same vein, another piece of law prohibits temporary agency work in the area of transport for company purposes (Art. 1(2) no. 3 Sentence 1 of the Road Haulage Act (Güterkraftverkehrsgesetz)). Both cases might be in breach of Article 4(1) of the Directive. Additionally, Art. 1(3) of the transposition law excludes certain categories of workers and situation of the scope of the law, such as (1) the secondment of workers from one employer to another employer of the same branch or industry, if the aim of the secondment is to avoid short-time work or dismissals and if such secondment is provided for in a collective agreement which is applicable to both employers (Art. 1(3) no. 1); (2) the secondment of workers (or intra-corporate transfer of workers) where both employers belong to the same group of companies, if the worker was neither taken into employment nor employed with the aim of being seconded (Art. 1(3) no. 2); (3) the secondment of workers from one employer to another, if secondment only occurs occasionally and if the worker was neither taken into employment nor employed with the aim of being seconded (Art. 1(3) no. 2a); (4) if the worker is seconded to an employer abroad under circumstances that are described in more detail in the Act (Art. 1(3) no. 4). Second, in other EU countries, restrictions exist but no review is reported to have started. For example, in Portugal, restrictions only affect so-called temporary agency work employment contracts, which are considered to be fixed-term contracts. Basically, the article of the Labour Code tackling the issue refers to the restrictions provided by articles regarding fixed-term contracts (some are nevertheless expressly excluded), namely, the replacement of absent workers, seasonal work, an increase in the activity of the company or occasional tasks. Some sectoral collective agreements provide that temporary work is not allowed due to safety and privacy issues. As no consultation of the social partners took place it is difficult to identify development in the respective sectors in respect of any change in restrictions or prohibitions.
In Greece, prohibitions and limitations already existing in national law are in full conformity with the criteria set out in Art. 4 para. 1 of Directive 2008/104/EC, so GSEE sees no need to re-examine and redefine them, especially with the prospect of abolishing them and deregulating the safeguards currently in force. This is supported by evidence based on official data showing a great expansion in the use of temporary work through agencies and of all the flexible forms of work (especially during the crisis) as a means of deregulating and dismantling the labour market and further diminishing labour costs, which are already low in Greece. Such evidence should trigger amendments for direct and permanent interventions to strengthen the protection of all workers, especially those who are employed through flexible and atypical forms of work. Nevertheless, in 2010 the maximum duration of an assignment was extended from 18 months to 36.

In Luxembourg, domestic law does not foresee expressis verbis prohibitions or restrictions on the use of temporary agency work. Nevertheless, legislation sets out very strict provisions for temporary work agency such as the requirement for authorisation by the Labour Minister, as well as the financial guarantee it has to deposit in a bank account (see Article L.131-3). On the other side, the temporary work agency can only turn to an assignment when the job concerns a particular and not a long-term task. Legislation strictly limits resort to a fixed-term contract. The rule is the permanent contract, the exception the fixed-term contract and consequently the assignment (Article L.131-8). According to the representative of the Chamber of Employees, these restrictions on the use of temporary agency work laid down in legislation are justified on grounds of general interest to ensure that the labour market functions properly and abuses are prevented.

In France, the employers’ association of temporary work agencies asked that the restrictions on the minimum duration between two assignments in the same job be loosened. However, no change in collective agreements has taken place in this respect.

In Czech legislation, section 309-8 of the Labour Code states that the scope of making use of an employment agency’s employees by a certain company may be restricted by the relevant collective agreement concluded by the user undertaking. This legal regulation in practice is convenient also for the employers and prevents unjustified substitution of core employees by agency ones. In practice, there exist such collective agreements restricting the scope of using agency workers. CMKOS deals with this issue in its annual analyses of collective agreements.

In Norway, a user undertaking can resort to temporary agency workers only under certain circumstances, but when the company is covered by a collective agreement, employer and employee’s representatives can agree on other grounds of resort to such contracts.

Third, a few Member States have actually removed some of the existing restrictions. This is the case in Spain, where the transposition of the Directive
indicates that restrictions on temporary employment in sectors at ‘special risk’ must be agreed in each sector between the social partners (employers and unions). Therefore, a temporary employment agency that wants to work in the construction sector must meet the conditions agreed between the construction companies and unions in the construction sector. The legislation states that any change in the restrictions should be addressed via collective bargaining in the respective sectors. Therefore, reviews of the restrictions have been carried out between employers and unions in the sectors concerned. As a consequence, some sectors have lifted restrictions and in others restrictions were eased. In general, there has been a tendency to understand a ‘review’ of restrictions as ‘removing’ absolutely all restrictions. It is therefore necessary that future policy or European legislation clarify this point. In Spain, to protect the health of workers it was very important to transpose the directive into national legislation.

In Romania, the ground of appeal to temporary agency work is for precise and necessarily temporary tasks. The law sets a maximum duration of 24 months, which can be extended to 36 in case of contract renewal. The regulation adopted in 2011 provides that temporary work agencies and temporary agency workers can now conclude an open-ended employment contract. In some sectors of industry, the use of temporary agency work has been forbidden. These sectoral bans have been lifted.

In Italy, some of the restrictions were lifted as the range of contracts temporary agencies can offer was extended. Moreover, the decree adopted in February 2012 provides that it is no longer necessary to justify appeal to temporary agency work when contracting ‘social benefit recipients’ and other ‘underprivileged workers’.

Polish law does not foresee any sectoral limitations on the use of temporary agency work. The government asked the social partners to indicate possible limitations, but no changes in the act have been introduced so far. No information about changes in the current legislation review has reached the social partners.

With regard to Slovenia, no information about the review is currently available.

In the Bulgarian implementation law, it was envisaged that by 31 December 2011 the state, the employers and trade unions should review the existing limitations applied to temporary agency work. It is not envisaged that such a review should be made on transposition of the Directive.

Finally, in Sweden, the only form of employment that is allowed for temporary agency work is full-time. There is no collective agreement that includes any restrictions on temporary agency work. A process of review is reported to be on-going. No restrictions or prohibitions are imposed in the UK.
Principle of equal treatment (Articles 2 and 5)

State of transposition

Article 2 of the Directive sets its aim, namely ensuring that the principle of equal treatment provided for by Article 5 is applied to temporary agency workers.

The legislation of some Member States provides a principle of equal treatment with broad scope, such as that of Lithuania, where there are no specific rules designed for this category of workers; Romania (pre-existing principle); and Norway (will come into force in January 2013). This principle could be the result of implementation of the Directive or a pre-existing principle.

In Belgian law, the equal pay for equal work/job principle applies independently of the temporary nature of the assignment, except if the collective agreement signed by the national bipartite commission for temporary agency work (also signed by the King) foresees equivalent advantages. However, the new bill proposed by the Belgian parliament lays down that the principle of equal treatment applies to temporary agency workers, too. The text itself simply transposes into Belgian law the rule of Article 5 paragraph 1 of the Directive in terms of equal treatment, protection of pregnant women and nursing mothers.

According to Polish law (Art. 15.1 of the Act on employment of temporary workers) a temporary agency worker working at the user undertaking cannot be treated less favourably concerning working conditions and other terms of employment than employees employed directly by the user undertaking for the same or similar job. Regarding pay, temporary workers also have the right to equal remuneration in comparison to regular employees of a user employer performing the same or similar job (Article 15 of the temporary employment act). The remuneration of temporary workers is paid by an agency, but on the basis of information given by a user employer. Provisions on remuneration regulation or collective agreements covering a user employer stipulating that remuneration of temporary workers is lower are unacceptable. In practice, it may happen that temporary workers perform such jobs that cannot be compared to any others performed by regular workers at an establishment and therefore obtain lower remuneration than that which would have been proposed to a regular employee.

In Slovenia, the labour market regulation act lays down that the temporary work agency acting as employer has to ensure the worker all the rights arising from employment that the worker is entitled to in accordance with regulations governing employment relationships. This is meant to guarantee equal treatment. The user undertaking also has to comply with those regulations during the assignment.

In Lithuania, the principle of equal treatment is vaguely formulated and leads to practical difficulties, for example, to define the salary a temporary agency
worker would be entitled to if he or she were directly employed by the user undertaking.

In Czech legislation, the equal treatment principle is a generally valid principle for the whole sphere of labour law, employment and labour market. The requirement to treat temporary agency workers equally is contained in Section 309-5 of the Labour Code, according to which

the employment agency and the user undertaking or establishment shall ensure that the working and wage conditions of a certain temporarily assigned employee are not worse than the conditions of the user’s comparable employees. Where the wage conditions applying to an employee who has been assigned by the agency to perform temporary work for the user undertaking or establishment are worse than the conditions applying to the user’s comparable employee, the agency must ensure equal treatment for its employee, acting either at the employee’s request or on its own initiative when it learns of such a fact in another way. The agency’s employee temporarily assigned to perform work for the user is entitled to demand the satisfaction of his rights, having thus arisen to him from the employment agency.

No exceptions concerning equal treatment are set down in the Czech legal order. The same principle concerns also social security where agency employees enjoy the same rights as other employees.

In Austria, a sectoral collective agreement had already introduced the principle of equal treatment between temporary agency workers and permanent workers of the user undertaking. Before the adoption of the bill, workers in the sector had threatened to terminate the agreement to protest against the new regulation of temporary agency work. The principle of equal treatment has been amended to meet all requirements of the Directive, including annual leave and access to collective facilities.

Article 5 of the Directive provides the possibility to implement derogations from the principle of equal treatment under certain circumstances. Some Member States have actually implemented those derogations.

In Italy, the equal treatment principle already exists in the national legislation, including social security. Nevertheless, the principle of equal treatment was enshrined in the new decree adopted to transpose the Directive. Additionally, a few agreements were concluded by temporary work agencies and the technical agency of the Ministry of Labour, Italia Lavoro, to derogate from the principle of equal treatment when contracting disadvantaged workers.

In the United Kingdom, an agreement was reached between the previous Labour Government, the TUC and the CBI. Details of this agreement include a

variety of issues, including that after 12 weeks in a given job an agency worker is entitled to equal treatment (at least the basic working and employment conditions that would apply to the worker if they had been recruited directly by that undertaking to occupy the same job). Legislation was also adopted to introduce provisions on equal pay. Since the implementation of the Directive, a new strategy seems to have developed in the United Kingdom. Temporary agency workers are made to sign new employment contracts indicating that they are now considered permanent employees. Trade unions are worried that this new practice is only a way of avoiding the principle of equal pay and equal treatment provided by the Directive. Moreover, the British legislator has introduced what is called a ‘real comparator defence’, which means that the user can argue that he has complied with the principle of equal treatment as soon as the agency worker is entitled to the same employment conditions as a real comparable employee of the user undertaking. The provision carries a risk. Indeed, the user can employ a token employee on poor conditions of employment for the purpose of comparison.

In Ireland, the principle of equal treatment is now in force and, in contrast to the United Kingdom, Ireland decided not to resort to the exception provided by the Article 5 of the Directive. The principle of equal treatment applies from the first day. Nevertheless, the exception provided by the paragraph 2 of the article 5 has been transposed. The principle of equal treatment is not applicable to temporary agency workers with a permanent employment contract. Irish law provides some conditions, however. Indeed, the temporary agency must notify the worker with this kind of contract that the principle of equal treatment will not apply in a written document. Moreover, when workers are not employed in a user undertaking, they are entitled to compensation whose amount must at least equal half of the salary paid during their previous assignment. This exception only applies regarding pay.

At first sight, Portugal seems to have implemented the Swedish derogation. National law does not regulate the activity of temporary work in line with the Directive, especially regarding enforcement of the equal treatment principle. In fact, the law separates ‘temporary work contracts’, similarly defined as in the Directive, from ‘open ended contracts for temporary work’. Article 185 of Law No. 7/2009 provides that during the period of assignment, temporary workers, whatever the form of their employment contract, are entitled to the rules applicable at the user undertaking regarding working mode, place and time, the suspension of the employment contract, health and safety at work and access to facilities. Between assignments, they are entitled to compensation whose amount at least equals the national minimum wage or the amount provided for by the applicable collective agreement in the user undertaking or the temporary work agency or at least two-thirds of the wage paid for the last assignment, being the highest amount actually applicable (Article 184). But this derogation is not in line with the Directive as it is not limited to pay. Furthermore, the social partners have not been consulted on the issue, as the Directive required. It remains that in the current not yet amended Portuguese legislation on temporary agency work, temporary workers are entitled to the minimum wage provided by the collective agreement applicable in the
temporary work agency or the user undertaking, corresponding to their functions or equal to the wage of other workers performing the same job or a job of the same value (the most favourable value). They are also entitled to social security and health care as workers in the user undertaking. After 60 days of assignment the collective agreement of the user undertaking applies to the temporary workers.

It has been reported that in some Member States the principle of equal treatment has been implemented only partially. For example, in Sweden, the equal treatment principle has been strengthened as now temporary agency workers can obtain an income corresponding to the average income at the workplace even in a company which is not covered by a collective agreement. Apart from that, no measures have been included in the law. The question is now under the control of the social partners.

In Spain, temporary agency workers are entitled to the same pay and facilities as other workers of the same company occupying the same position. Moreover, before the implementation of the Directive, temporary agency workers were already entitled to at least the remuneration provided by the statutory collective agreement applicable in the user undertaking. No derogation through collective bargaining has been implemented in Spain.

In Luxembourg, the equal treatment principle is laid down in Article L.131-13 but concerns only pay. In accordance with Article L.131-13, the pay of a temporary worker cannot be below the pay of a permanent employee in the user undertaking with the same or equivalent qualifications after a trial period. According to Article 5 of the Directive, domestic legislation has to be completed in order to include all the basic working and employment conditions of temporary agency workers, although there are no derogations and exemptions from the equal treatment principle.

In France, the principle of equal treatment applies to pay and leave.

In Finland, since 1998, temporary agency workers already have the same pension rights, sick pay and annual holidays as permanent employees of the user undertaking.

In Denmark, temporary agency workers do not enjoy the same working conditions as permanent employees of the user undertaking, particularly in terms of pensions, rights in case of dismissal and training.

Finally, under Dutch legislation there is currently no equal treatment norm for allocated workers (compared to workers in the user undertaking) regarding to basic working and employment conditions, excluding pay. The above-mentioned equal treatment norm will be incorporated in the WAADI, Article 8. Exemptions from the principle of equal treatment can be made by collective labour agreement, although the government is still evaluating this aspect. Article 5 of the Directive needs to be implemented.
In Germany, the equal treatment principle is undermined as the restriction of exemptions from equal pay (Art. 5 (2)) has not been transposed in domestic law. According to Article 5 (2) exemptions from equal pay are foreseen in case of temporary workers having a permanent contract of employment with a temporary work agency and are also paid during the time between assignments. And it is more than doubtful whether the ‘overall protection of temporary agency workers’ (Art. 5 (3)) is guaranteed. Only a so-called ‘revolving door-clause’ has been implemented (see § 9 Nr. 2 AÜG). It says that a former permanent employee who comes back to his company within six months as a temporary worker has to get equal pay. Nevertheless, it remains that even by a collective agreement no exception from the equal treatment rule is possible if the temporary worker worked for the user undertaking during the past six months. The Federal Ministry of Labour can, on proposal of the social partners, fix a minimum salary for temporary worker. Moreover, social partners in the chemical industry reached an agreement that temporary agency workers’ pay will progressively equal 90 per cent of that of permanent workers. The agreement will enter into force on 1 November 2012. But the crucial problem is the possibility of derogation from the principle of equal treatment by collective agreements – hand in hand with the possibility of transposing this derogation into individual employment contracts, to the detriment of workers. This problem has not been solved by the Directive. Finally, German transposition law foresees in Section 1(1) Sentence 3 of the new Act, that the secondment of a worker to certain consortia does not constitute temporary agency work if the employer belongs to the consortium, if all members of the consortium are covered by collective agreements from the same industry, and if all members are obliged to provide their contractual services independently in accordance with the consortium contract. As a result, the principle of equal treatment – as well as the whole Directive – is not applicable. Some authors argue that ‘this amounts to a discrimination of seconded workers in cases where a collective agreement which a member of a consortium is bound to according to its area of application and is considered fixed by the parties to the collective agreement, does not apply to the activity of the consortium. In other words, the requirement that the employer is covered by the collective agreements does not guarantee that the consortium is covered by it as well’ (European Labour Law Network 2011)

In Latvia, the Confederation of Free Trade Unions of Latvia reported that the obligation of temporary work agencies to provide temporary agency workers with the same basic working and employment conditions as the one of regular employees of the user undertaking is a problematic issue in particular with regard to pay, as most private undertakings have declared that their salaries are confidential. Consequently, a user undertaking’s information on pay is not accessible to temporary work agency. National implementation law (Art. 7 (4) of the Labour Law) does not provide for any obligation of the user undertaking to give such information for the purposes of enforcing the rights of temporary

5. See: http://www.labourlawnetwork.eu/national_labour_law_latest_country_reports/national_legislation/legislative_developments/prm/109/v__detail/id__1672/category__19/language__en_index.html
agency workers. As a result, a temporary work agency will have difficulties to enforce its obligations to provide the temporary agency worker the same level of pay as that provided to regular employees of the user undertaking.

*Austria* made use of the exemption of Art. 5 (3) on collective agreement in respect to pay. In *Norway*, the Ministry of Labour may decide if and to what extent derogations to the provisions on equal treatment, as agreed in collective agreements, may be allowed. In *Sweden*, exceptions to the principle of equal treatment in respect to pay are allowed, given that the condition that the temporary agency worker is permanently employed by the temporary work agency and is paid between assignments is respected. Furthermore, if social partners may negotiate collective agreements on working and employment conditions which deviate from the principle of equal treatment, the new legislation provides that the overall protection for workers from temporary work agencies should be respected.

**Occupational social security**

Social security appears to be included in the scope of the principle of equal treatment in pre-existing national legislation or in transposition measures.

In *Belgium*, practice shows that second pillar pension systems are fairly hard to implement for temporary agency work.

In *Greek* law, Art. 22-12 L. 2956/2001 as amended by Art. 3 L. 3846/2010 states that temporary workers, during their employment availability to the temporary work agency, as well as during their employment by the user undertaking, are covered by the health care and sickness benefits of the Social Insurance Institute – General Employees’ Insurance Fund (IKA-ETAM), but also by the supplementary pensions’ social institution (ETEAM), with the exclusion of all those covered by another main or supplementary social security institution.

In *France*, the temporary work agency has to register temporary agency workers with the social security authorities.

In *Germany*, social security contributions are also to be paid with regard to all work contracts. But in the case of low wages, poverty is probable for temporary agency workers when retiring.

In the *United Kingdom*, an agreement was reached between the previous Labour Government, the TUC and the CBI. It foresees that occupational social security schemes would be outside the equal treatment provisions.

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6. IKA-ETAM is the country’s largest employees’ social security organisation, which covers most of the population.
Measures preventing abuse

Article 5 paragraph 5 of the Directive provides that Member States shall take measures to prevent possible abuses, particularly regarding successive assignments. National laws use various ways to prevent successive assignments.

The most frequent is limitation of the duration of assignments. For example, in Poland, according to Article 20 of the Act on the employment of temporary workers, a temporary worker may perform work for one user employer for a total of 18 months during a period of 36 consecutive months. If a temporary worker performs, on a continuous basis, work involving tasks whose implementation is the responsibility of an absent employee of the user employer, the period of temporary work may not exceed 36 months. After 18 months a temporary worker may be re-directed to perform temporary work at the user employer no earlier than after 36 months. Greek law provides (Art. 22 para 6 of L. 2956/2001 as amended by Art. 3 of L. 3846/2010 and then by Art. 17 of L. 3899/2010) that the duration of the employment of the worker by the user undertaking (which includes any period of written renewal of the contract/relationship) should not exceed a period of 36 months, to avoid abusive successive assignments. In case the duration of the temporary employment exceeds that period, the employment (temporary) contract/relationship is converted into a contract of indefinite duration (permanent) with the user employer. GSEE believes that this prolonged period of 36 months (formerly it was a period of 12 months with a possible extension of 6 months in exceptional cases) is quite extensive and allows for abusive practices that have already appeared and will definitely multiply in order to circumvent the protective provisions of the legislation of temporary workers. In Luxembourg, in principle, the term of an assignment cannot exceed 12 months for the same job, renewal included. Article L.131-8, paragraph 2, line 2, nevertheless allows the Labour minister to extend the maximum period in the interest of employees who have a job that requires highly specialised knowledge and professional experience. In France, an assignment can be renewed once, for a maximum duration of 18 months (L 1251-35 and L 1251-12 of the Labour Code).

The solution is slightly different in Portugal as successive assignments are not allowed but duration of assignments is only limited in certain situations, such as an exceptional increase in the activity of the company.

Another frequent measure is the obligation to respect a waiting period between two assignments. Greek law provides that if the employment of the temporary worker continues by the user employer after expiry of the initial assignment and its possible (legitimate) renewals (even through new assignment), without a break of 45 days, it is considered that the (temporary) worker is employed by the user undertaking through an employment contract of indefinite duration, with the exception of workers of hotel and food enterprises (when they are employed for social events). GSEE believes that even with this provision the danger of abusive practices is not faced effectively, because, on the basis of the accidental criterion of the time that intervenes between the two renewals, which depends completely on managerial prerogative, the pro-
tection of the law for temporary workers is negated. In *Luxembourg*, Article L.131-11 stipulates that it is not permissible to fill the job of an employee whose assignment has expired by using the same or another employee on the basis of a fixed-term or disposal contract with an employment agency before a period passes which corresponds to one-third of the assignment term, renewal included. Finally, Article L.131-19 stipulates that domestic legislation also applies to employment agencies situated abroad that put an agency worker at the disposal of a user undertaking situated in Luxembourg. The same applies to employment agencies situated in Luxembourg that assign a temporary worker abroad. In *France*, between two assignments a waiting period is foreseen and calculated according to the length of the previous assignment (one-third of the total duration of the previous assignment including renewal if the assignment lasts 14 days or more; one-half of the duration of the previous assignment if the assignment lasts less than 14 days). In the *United Kingdom*, this is particularly important when determining the length of the qualifying period. A gap of at least six weeks between or during an assignment can break the continuity of the qualifying period. National courts are also required to examine whether ‘the most likely explanation for the structure of the assignment, or assignments’ is avoidance of the regulation on agency work (AWR, r7-4).

In some cases, national laws provide for (additionally) more original solutions. In *Poland*, temporary workers can be employed only on the basis of fixed-term contracts or a contract to perform a specific task. In *Slovenia*, the Employment Relationship Act provides that the employer may not provide workers to the user undertaking continuously or with interruptions of up to one month for more than one year in the case of the same worker performing the same work. There have been expert discussions and suggestions about how to limit assignments more effectively. In *Italy*, with regard to successive assignments, the national collective agreement for temporary agencies signed by NiDiL CGIL, Felsa CISL and UILTemp sets the maximum number of extensions (six within 36 months) of the same contract with the same agency and by the same user undertaking. The national legislation has removed any reference to the exceptionality of the use of agency work, replacing it with the possibility of use in day to day activities for technical, productive, organisational or substitution reasons. Specific limitations can be agreed upon via national agreements applied by the user undertaking in specific sectors. And in *Ireland*, in the case of an agency worker carrying out a series of same or similar assignments, it must be treated as a single assignment. Only a gap of at least three months between two assignments would break the link. In the *United Kingdom*, the Regulations refer to contracts of longer than ‘one hour’ (Agency Workers Regulation 2010 n°93, Article 10 paragraph 1-a-v) per week in order to demonstrate that providing a ‘zero hours’ contract (which may not provide sufficient mutuality of obligation, required in an employer/employee relationship) will not meet the requirements of the derogation contract.

In *British* law, the pay between assignments derogation is designed to be used where an agency worker has a contract of employment with a temporary work agency and is paid during the weeks when the worker is not assigned
to a hirer. It is because of this pay, when the worker is not assigned, that the Regulations provide for the derogation from equal treatment on pay. Temporary work agencies and hirers must not structure arrangements in a way that deprives agency workers of the protection provided by pay between assignments. This could put them at risk of a legal challenge. The TUC is already seeing a number of companies using the ‘Swedish Derogation’ to avoid the regulations.

Finally, it is worth mentioning that this issue is still under discussion in Belgium, but that in the Bulgarian implementation law of 2012, no provisions foresee any restrictive measures for avoiding violations in the form of successive (chain) assignments of temporary agency workers/employees in user undertakings. Concerns may also arise in Spain where it has been reported that previous legislation has been amended to lift restrictions related to successive assignments and in Germany, where the transposition measures include temporary assignments without any definition, leading to controversial interpretations of how to implement this measure.

Access to employment, collective facilities and vocational training (Article 6)

Article 6 sets out five important rules: (i) information of agency workers about vacant posts in the user undertaking, (ii) the possibility for them to be hired by the user after their assignment, (iii) a prohibition on charging them a fee, (iv) equal access to amenities and collective facilities and (v) training.

In Belgium, following the transposition measures, temporary agency workers will have access in the same manner as permanent employees to the services of the company, unless different treatment can be justified (use of canteens, childcare and transport facilities). The bill proposed by the government on 18 April 2012 is more or less a copy/paste of the Directive into the 1987 Act. In Sweden and Austria, national (draft) legislation has also taken over the wording of the Directive.

In contrast, Article 6 still needs to be implemented in the Netherlands and in Portugal. In Luxembourg, domestic legislation has to be amended to comply with Art. 6-1, 6-3 and 6-5 in order (i) to allow access for temporary agency workers to information on any vacant posts in the user undertaking, provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged; (ii) to ensure that workers are not charged any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking; and (iii) to ensure suitable measures and promote dialogue between the social partners in order to (a) improve temporary agency workers’ access to training and child-care facilities in temporary work agencies, even in the periods between their assignments, to enhance their career development and employability; and (b)
improve temporary agency workers’ access to the training provided for the user undertakings’ workers. In the Czech transposition law it is the task of the temporary work agency and not of the user undertaking to inform temporary agency workers about job vacancies in the user undertaking. Art. 6-2, paragraph 2 should also be implemented in domestic law. It refers to the possibility for temporary work agencies to receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers.

Looking at national legislation in more detail, provisions regarding information on vacancies in the user undertaking have been implemented in many Member States, such as Greece, Poland, Slovenia, Austria, Germany and Ireland.

The non-limitation of the possibility offered to agency workers to sign an employment contract with the user undertaking has also been implemented in many EU countries. Indeed, in Greece, clauses prohibiting the conclusion of a work contract between temporary agencies workers with the user undertaking or limiting their access to social security benefits are null and void. In Slovenia, the user undertaking has to ensure opportunities for concluding a permanent employment contract at the user undertaking, equal to the opportunities provided to workers employed in the user undertaking. The employer must allow the worker to conclude an employment contract with the user undertaking after the end of the assignment without imposing any restrictions. The employer must not require payment or any other compensation for assignment to a user undertaking or the conclusion of employment contract with a user undertaking. In France, domestic legislation must be amended to comply with Art. 6-3 to ensure that workers are not charged any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking. The situation seems to be problematic in Germany with regard to a job offer from a user undertaking because temporary agencies include in their contracts the right to demand commission from the user company (see § 9 (3) AÜG). A similar situation can be seen in the United Kingdom, where such fees are called ‘temp to perm fees’. This makes it very difficult for temporary agency workers to switch to a normal employment contract with the user company.

With regard to equal access to amenities and collective facilities, implementation does not seem to have been an issue. In Poland, the employer of the user undertaking should provide access to collective facilities to temporary agency workers. In Germany, access to the amenities or collective facilities in the user undertaking has been adopted (see §§ 13a, 13b AÜG). In Ireland, temporary agency workers must be guaranteed the same access to collective facilities and amenities as regular employees, including canteen, childcare and transport services. In Romania, before implementation of the EU Directive, temporary agency workers already had access to the same services and facilities as regular employees. They also benefit from the rights enshrined in the collective agreement applicable in the user undertaking. In Austria, a new
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bill adopted on 4 September 2012 provides that temporary agency workers are entitled to the same social benefits as other employees of the user undertaking (childcare, cafeteria, social welfare, additional breaks) and to company supplementary pensions. In Slovenia, there have been expert discussions and suggestions concerning the fact that access to collective facilities and vocational training has to be laid down explicitly in the Employment Relations Act. In Norway, the temporary agency workers shall have the same access as regular employees to the collective facilities of the user undertaking, unless different treatment is justified by objective reasons.

The most problematic issue remains the organisation of and access to training. It is useful to mention that the Directive is less binding on this point. In France, access to further vocational training should be provided by the temporary work agency, although training in respect of health and safety already takes place at the user undertaking. In Poland, a seniority of six weeks is required to have access to training programmes at the user undertaking. In Germany, nothing has been foreseen about the training and career development of temporary workers, although this provision cannot be disposed of by the Member States.

It is nevertheless worth mentioning, concerning vocational training, that a few countries have already created special funds to finance temporary agency workers’ training, in particular Spain, Austria, the Netherlands and France, as well as in the pending bill on the revision of the Employment Relationship Act in Slovenia.

Representation (Article 7)

Article 7 deals with the representation of temporary agency workers. It gives Member States an alternative: temporary workers shall at least be represented in the temporary work agency; they can also be taken into account in the user undertaking. Finally, they can be represented in both.

In Belgium, the Netherlands, Italy and Luxembourg, temporary agency workers are represented at the user undertaking. In Finland, the shop steward of the user enterprise has the right to represent temporary agency workers.

In Denmark, representation of temporary agency workers takes place at the agency, not the user undertaking. Trade unions are currently trying to switch to the representation of temporary agency workers to the user undertaking.

In a few other Member States, agency workers can be represented in the user undertaking and in the agency, under certain circumstances. For example, Article 7 does not need to be transposed in Austrian legislation, as the current works council regulation contains the same provisions as the Directive. Work representation is foreseen in the agency as well as in the user undertaking, if temporary agency workers have six months’ seniority. In France, temporary agency workers can be represented in the temporary work agency with three
months’ seniority in the past 12 months. They can also elect worker representatives with three months’ seniority and can be elected worker representatives with a seniority of six months during the past 18 months. At the user undertaking, temporary agency workers can elect workers’ representatives with a seniority requirement of 12 months and can be elected to the works council with a seniority requirement of 24 months. In Czech legislation, the temporary work agency as well as the user undertaking are employers and thus workers’ representatives (trade unions or works councils) may operate in their establishments. Compulsory representation or compulsory membership of professional and similar organisations does not exist in the Czech Republic. Works councils are quite rare and thus agency workers are more often members of trade union organisations than of works councils. There is no special representation for agency workers.

A number of Member States have not implemented specific rules regarding the representation of agency workers. For example, Polish law does not provide for specific regulations on the representation of temporary agency workers, which means that they fall within the same legal framework as ‘regular’ employees. Trade union membership is acquired by joining a trade union organisation operating at the employer’s establishment. Therefore, since the temporary work agency is the employer of temporary agency workers, it is at the agency that a trade union organisation should be created. However, some trade unions create special units for workers employed in an enterprise not covered by any trade union organisation, which could be seen as a way for temporary agency workers to join a trade union outside a temporary work agency or a user employer. Despite existing legal possibilities, there are very few trade union organisations covering temporary agency workers. In practice, it is not easy to track all trade union organisations, since according to Trade Union Act 10, workers at an undertaking may gather and establish a trade union organisation by creating a statute and registering it. One possibility allowing trade union membership of temporary agency workers at the user undertaking would be, under current law, to create multi-establishment trade union organisations, covering both a temporary work agency (or agencies) and user undertaking (or user undertakings). This is, however, problematic, since many temporary work agencies cooperate with various user undertakings, and this cooperation may be short. In Slovenian law, there are no special regulations about the representation of temporary agency workers. They can be members of a trade union organised at the employer or user undertaking. In Sweden, temporary agency workers are considered ‘normal employees’ and thus have the same rights of representation as ordinary employees.

Article 7 needs to be implemented in Portugal and Spain. In Spain, the law only provides that agency workers have the right to submit complaints through workers’ representatives in the user undertaking. The latter are also supposed to represent agency workers for the duration of their assignment in the user undertaking. In Germany, temporary agency workers need to be represented in their agency as well as in the user undertaking. In this context, the domestic law is not precise and remains unchanged. Whether temporary workers count for the purposes of calculating the threshold to form a workers’
representation in the user undertaking is controversial. According to earlier jurisdiction they do not count. In Greece, the law provides that temporary agency workers shall be included when calculating the threshold for setting workers representative bodies at the temporary work agency. They shall also be included in the user undertaking’s calculation, like regular workers employed directly for the same period of time.

**Information and consultation (Article 8)**

Article 8 states that user undertakings must provide workers’ representatives with ‘suitable information’ regarding the use of this form of work within the company.

Information and consultation on the use of temporary agency work by the employer already exists in Belgium, Spain (with regard to hiring temporary agency workers), Poland, Denmark, Austria, Luxembourg and Sweden. However, in Belgium, following the transposition measures, the user undertaking has to inform the temporary agency workers on vacant employment positions in the company. This requirement can be met by means of a general announcement in a suitable place in the undertaking. In Luxembourg, according to Article L.134-1, the employer has first to consult the works council or, if there is no works council, the union representatives when he decides to turn to temporary agency work or workers on loan. This is also required for the employer who puts employees at the disposal of other employers as a temporary loan in accordance with Article L.132-1. The user undertaking has to submit the contracts of disposal concluded with the employment agency to the works council or, if the latter does not exist, to the union representatives, if requested by them. It is important to mention that in Sweden, if the user undertaking is covered by a collective agreement, then the trade unions that have signed this agreement have a right of veto concerning the possible use of temporary agency work. In Greek law (Art. 22 para 3 of L. 2956/2001, as amended by art.3 of L. 3846/2010) the user employer must provide suitable information to bodies representing workers (trade unions or work councils) on the use and number of temporary agency workers, as well as the possibilities of recruiting temporary workers directly.

In some Member States, workers’ representatives are consulted only under certain circumstances. For example, in Denmark, information and consultation of worker representatives takes place only if agreed upon in a collective agreement. Polish law provides that in case the employer at the user undertaking intends to hire temporary agency employees for a period longer than six months, he is obliged to take steps to reach an agreement in this area with the representative trade unions. The employer at the user undertaking is also obliged to inform the representative trade union organisation on the content of the vacant job, as well as the qualifications required for the job, working time and working conditions. In France, information and consultation is foreseen once a trimester in undertakings employing more than 300
employees, once a year in undertakings with fewer than 300 employees. The works council should be informed about the number of temporary agency workers employed and, in certain cases, about the hiring of temporary agency workers. In Czech legislation, the employer must consult with the employees’ representatives concerning envisaged structural changes, rationalisation or organisational measures, measures having an impact on employment – in particular, measures in connection with collective redundancies – the current number and structure of employees (including temporary agency workers), envisaged employment development, fundamental issues of working conditions and changes. These are general requirements on consultations between employer and workers’ representatives and they also concern agency workers. Finally, in the United Kingdom, the Agency Workers Regulation extends the information that should be disclosed by employers to recognised unions. Since 1 October 2011, unions have had the right to receive information about (i) the numbers of agency workers used by the hirer, (ii) the location of the agency workers and (iii) the type of work done by the agency workers. It is also likely that recognised unions will be able, under existing legislation, to request information from an employer about agency workers’ pay and conditions and the costs associated with hiring agency workers.

Transposition of this provision has not been completed in various Member States, including Portugal and Slovenia. Article 8 needs also to be implemented in the Netherlands, amending Article 31b, 1 Works Council Act which contains an obligation for the undertaking to inform the works council once a year in writing about the numbers and different groups of workers in the undertaking.

**Minimum requirement (Article 9)**

Article 9 makes clear that the Directive provides (i) minimum protection so that Member States or national social partners can introduce more favourable provisions. The second paragraph is actually what is called a non-regression clause and implies that implementation measures of the Directive cannot lead Member States to introduce in national law any reduction in the general level of protection of workers in the fields covered by the Directive.

These provisions have been transposed in the Netherlands, Spain and are to be found in the draft Swedish bill but still need to be transposed in Belgium, Poland, Luxembourg, France and Bulgaria. These issues are already dealt with in Austria, Slovenia, Czech Republic and Germany.

**Penalties (Article 10 and also Article 5, para. 5)**

The final articles of the Directive (Articles 11, 12 and 13 deal with practical matters) tackle the issue of penalties in case of non-compliance with the domestic transposition measures of the Directive.
Penalties vary widely among Member States. First, some of them did not undergo major changes with the implementation of the Directive. This is the case, for example, of Spain, where penalties are said to be appropriate, or in Sweden, where agencies are liable in case of non-compliance with the Directive. In the Netherlands, the government is of the opinion that Article 5 para. 5 does not need implementation because the temporary agency worker can go to court or lodge a complaint with the Dutch Labour Inspectorate. The FNV is of the opinion that this is not sufficient because Article 5 para. 5 deals with abusive situations and has broader scope. Legal remedies are only one element. The Dutch bill on combatting fraudulent temporary work agencies that came into force on 1 July 2012 enforces the abolition of criminal sanctions and the introduction of administrative fines on the basis, amongst other, that administrative fines will have a more deterrent effect due to the foreseen amounts, and would thus be more efficient.

In contrast, in other Member States transposition of the Directive has been an opportunity to strengthen penalties, as in Austria, so that the non-compliant user undertaking is no longer protected, coupled with the 40 per cent increase in the level of financial penalties in case of infringement. The social partners have not yet reached agreement on other possible changes. In Italy, new sanctions have been implemented, including criminal sanctions in case of a temporary agency that charges workers fees (Art. 3 (1)a of Decree of 2012).

The main sanction used is fines (and even imprisonment), as in Greek legislation (Art. 25 of L. 2956/2001, as amended by Art. 3 of L. 3846/2010) where penalties are provided for any breach of the provisions on temporary agency work (administrative fines from 3,000 to 30,000 euros), and also in Poland, Luxembourg, France, Czech Republic and Germany. In Greece, the same penalties are imposed when an enterprise in a group of undertakings is operating for the purpose of providing workers to another enterprise of the group. Usually, the agency is liable and penalties can be related to the licence system. For example, in Belgium law, the licensing of temporary works agencies and the threat of losing the license when not complying with labour legislation has proven to be fairly effective. In case of breach of law, liability of the user undertaking leads to the conversion of the temporary agency work contract into an open ended contract with the user undertaking, giving the temporary agency worker an entitlement to compensatory damages (termination fees). In Greece, if a temporary work agency is operating without the due operating license, not only is an administrative penalty of sealing and closure imposed, but the person liable and responsible for this temporary work agency is punished with two years’ imprisonment and pecuniary punishment.

Nevertheless, in many countries, both temporary work agencies and user undertakings could possibly be liable. For example, Polish law provides penal sanctions in the law on the employment of temporary workers and fines for user undertakings or persons acting of their behalf for non-compliance with health and safety provisions and other conditions agreed in writing with a temporary work agency. A temporary work agency as employer may also be
Subject to penalties for misdemeanours enshrined in the Labour Code, as well as crimes against the rights of persons performing paid work under the Penal Code. Civil liability is foreseen in the case of breaches of the principle of equal treatment, with compensation for temporary agency workers (not less than the national minimum wage). Furthermore, the temporary work agency has a right to seek reimbursement from the employer’s equivalent of the compensation which was paid to the temporary employee. Moreover, the Labour Inspectorate is entitled to check whether due wages are paid to workers. Wages cannot be lower than the minimum rate of pay. Non-payment of wages constitutes a minor offence or (if a court has passed sentence) an offence. In Luxembourg, in principle, it is either the temporary work agency or the employer at the user undertaking who puts at the disposal of other user undertakings temporary agency workers, in violation to Article L.133-1, who bears the sanctions. Sanctions are laid down in Article L.134-3 of the Labour Code and range from fines (5,000 to 10,000 euros) to imprisonment, with fines from 1,250 to 12,500 euros in case of recidivism. The fines are calculated in relation to temporary agency workers employed at the user undertaking. In France, both the temporary work agency and the employer at the user undertaking are subject to penal sanctions of up to 3,750 euros and imprisonment in case of recidivism. According to Czech legislation (Act 251/2005 Coll. on labour inspection) an employer commits an offence by violating the duties specified in Sections 308 or 309 of the Labour Code. He may be fined up to 1 million CZK (around 40,000 euros). In Ireland, in case of non-compliance with equal treatment in terms of basic working and employment conditions, the temporary work agency is liable. If the user undertaking fails to guarantee equal access to collective facilities or to information on vacant positions, it may be held liable. Claims can be taken to the Rights Commissioner, and possibly appealed in the Irish Labour Court. The amount of the penalty can be up to two years’ wages. In the United Kingdom, the user or the Agency could be held liable, depending on the rule infringed. The main problem for agency workers is that there is no labour inspectorate; the only way to enforce the rules on agency work is litigation. But substantial compensation is not provided in case of non-compliance with the rules on agency work. There are also considerable problems of proof. Given the cost and trouble associated with litigation, agency workers may thus decide it is not worth it. Moreover, judicial actions take place usually after the employment relationship has come to an end (the only remedy is compensation). Trade unions could play a role in the process but the rate of unionisation in the agency work sector is particularly low. In Germany, the secondment of a work can only be of temporary nature. However, neither is the term secondment defined, nor is there a clear provision to clarify whether secondment must no longer be understood as merely temporary. It seems that the German legislator will let the courts interpret the term temporary. It is however doubtful whether such approach is in line with the Art. 10 of the Directive.

Some national legislation provides civil sanctions, such as requalification of the employment into a contract of an indefinite duration under certain circumstances. This is the case, for example, in Greece and in France.
Finally, the question of penalties seems to be an issue in some Member States. Indeed, in Greece, GSEE believes that the abovementioned penalties, especially the fines, cannot be considered to be effective, proportionate and deterrent. In Germany, the regulation on administrative offences and fines was slightly adjusted. Overall, the sanctions could have been more effective, proportionate and dissuasive. A problem in this context is the insufficient controls and inspections by the supervisory authorities. The situation of Portugal probably raises the most concern as there is an almost intentional void in this area and it is normally impossible to prove liability in the misuse of temporary work. In Malta, the enforcement of rights and obligations concerning the direct liability of a user undertaking towards an employee and direct liability for loss and damages between a user undertaking and a temporary agency worker may deemed to face some difficulties.

In Latvia, although the amendments to the Labour Law generally comply with the requirements of Directive 2008/104, particular attention should be paid to potential difficulties related to the enforcement of rights and obligations with regard to the direct liability of a user undertaking towards an employee and direct liability for loss and damages between a user undertaking and a temporary agency worker. In Lithuania the liability of the user undertaking is not foreseen in the transposition measures.
Articulation between the Temporary Agency Work Directive and the Posting of Workers and Enforcement Directives

Temporary agency workers may be posted abroad. This additional element involves cross-border assignments and naturally leads to a necessary articulation between the TAW Directive and the Posting of Workers Directive (96/71/EC). For this purpose the European sectoral social partners for the temporary agency work sector, UNI Europa and Eurociett, by an agreement of December 2009 established a European Observatory on Cross-Border Temporary Agency Work in order to gather and analyse good and bad practices with regard to transnational activities among temporary work agencies and to provide workers and agencies with guidance before choosing to work abroad and to support them during their cross-border assignments; to fight against unfair practices, with the aim of preventing and denouncing them; and to remind social partners taking part in the implementation of the Temporary Agency Work Directive at a national level to take the transnational aspects of the sector into account. The articulation between the Temporary Agency Work Directive and the Posting of Workers Directive has also been on the agenda of the ETUC.

Cross-border movement of workers and companies in the Temporary Agency Work sector falls under both the Temporary Agency Work Directive and the Posting of Workers and soon, if adopted, under the Enforcement Directive of the Posting of Workers Directive. However, the articulation between those two – possibly three – Directives is a particular challenging and perilous but stimulating exercise, in particular after the CJEU’s restrictive interpretation of Posting of Workers Directive as dealing in principle with the free provision of services instead of protection of workers, as it is not a labour law directive (Zappala 2008; Schlachter 2012). In its jurisprudence, the CJEU has indeed limited the scope for Member States and trade unions to take measures and action against ‘social dumping’ and to demand better protection and equal treatment of local and migrant workers in the host country. It has laid down a hierarchy of norms, with market freedoms being highest and the fundamental social rights of collective bargaining and action in only second place. The CJEU has also, in particular in the Laval, Rüffert and Commission vs Luxembourg cases, interpreted the Posting of Workers Directive as a Directive guaranteeing maximum protection with regard to the matters that can be regulated, the degree of protection that can be required and the methods that can be used to ensure that employment conditions must be equally observed.

7. Viking C-438/05; Laval C-341/05; Rüffert C-346/06; Commission v Luxembourg C-319/06.
by all national and foreign undertakings in the same region or sector (ETUC 2012). As a consequence, host Member States can apply higher or different standards by law, relying on Article 3.1 but it must be justified on a case by case basis (according to CJEU C-319/06 Commission vs Luxembourg). In the same vein, trade unions in the host Member State can take action to demand better standards by way of collective agreements, in particular to prevent ‘social dumping’ and promote fair competition between local and foreign service providers, without infringing Article 56 of the new Treaty on the Functioning of the EU, TFEU (49 EC Treaty), that is, without creating obstacles to the free movement of services, as long as it is justified by reasons of overriding public interest (see CJEU Rüffert C-319/06 and Laval C-341/06). According to the Treaty, however, directives set out minimum requirements for the protection of workers, in other words, the core of rights that must be applied, given the possibility for Member States to provide the workers concerned with more favourable conditions based on domestic legal or collectively agreed standards. In particular, member states in their role of public authorities contracting out public work should be allowed to demand observance of locally applicable collective wages and working conditions by any company, local or foreign, tendering for the contract.

In December 1996, the European Parliament and the Council adopted Directive 96/71/EC concerning the posting of workers within the framework of the provision of services, usually called the ‘Posting of Workers Directive’. The aim of the Posting of Workers Directive is to guarantee that the rights and working conditions of a posted worker are protected throughout the European Union. In this respect, it also intends to prevent ‘social dumping’ in situations where foreign service providers weaken local service providers by providing lower labour standards. For this purpose, the Posting of Workers Directive ensures all posted workers core protections, whatever the law applicable to the employment relationship, when they perform their job in another member state within the framework of the provision of services. The core protections cover various areas of labour law, such as maximum work periods and minimum rest periods, minimum paid annual holidays, or health, safety and hygiene at work. The basic assumption is therefore that the law applicable to an employment contract, which is normally country of origin law, does not change during the posting because of the temporary character of the posting. Specific mechanisms are therefore necessary to ensure that the same rules apply to foreign and host country employers/companies, at least when it comes to key issues that have a strong influence on the competitive (dis) advantages of companies and the protection of workers (wages and working conditions). Second, it is necessary to ensure that this situation is not abused or manipulated to avoid or evade host country rules.

The Posting Directive intends therefore to regulate whether and under what conditions the host country rules regarding wages and working conditions (laid down in law or collective agreement) overrule the possible law and other

8. See: http://www.etuc.org/a/7044
rules of the country of origin (or any other country) applicable to the employment contract. With the restrictive interpretation of the Posting of Workers Directive by the CJEU, compliance with the aim of the Directive becomes more difficult, in particular as regards the guarantee of fair competition and respect for workers’ rights (recital 9 of the Posting of Workers Directive), while safeguarding the fundamental social rights of collective bargaining and collective action.

**Are cross-border temporary agency workers also posted workers?**

Article 1 of the Posting of Workers Directive, which defines the scope of the text, clearly states that it applies to ‘temporary employment undertaking[s] or placement agenc[ies], [which] hire out a worker to a user undertaking established or operating in the territory of a member state, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting’, also called cross-border temporary agency work. In concrete terms, a temporary agency worker who has been hired by a temporary work agency in country A is posted by the same agency to work in country B for a user undertaking.

For its part, the Temporary Agency Work Directive does not explicitly exclude cross-border temporary agency work from its scope, as Article 1 states that ‘this Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction’. The European Commission explained in 2002 that: ‘The specific aim of this new legislation is to clarify and harmonise the conditions for posting workers at national level. It can be seen as an extension of arrangements already in force for transnational posting of temporary workers’ (2002/0072(COD)).

However, according to the CJEU, transnational posting by a temporary work agency constitutes the provision of services and not normally an act of the free movement of workers. Grounds for this conclusion relate systematically to posted workers not as parts of the country of destination’s labour market. According to Schlachter (2012), however, ‘at least for temporary agency workers, this reasoning was never really adequate’. Even in the case of posted agency workers the CJEU has stated in the Vicoplus case (C-307 to C-309/09) that [posted agency workers] ‘gain access by means of making available of labour’. Consequently, and in particular in terms of labour law and protection of workers, it appears that for the minimum protection for transnational temporary agency workers (as well as for posted workers), some harmonisation of EU law and CJEU jurisprudence would be welcome.
Does the minimum protection for posted workers correspond to that provided to temporary agency workers on cross-border assignments?

Following the CJEU’s jurisprudence, the Posting of Workers Directive deals essentially with the free provision of services and much less with the protection of workers. Consequently, protective standards of the domestic labour law of the host country are applicable only when they pass a strict proportionality test to ensure that such protection does not go beyond what is necessary for attaining the minimum standards that the Directive allows (Ejvu 2011). Therefore, as mentioned by the European Commission (COM (2003) 458 final) ‘Member States are not free to impose all their mandatory labour law provisions [whether domestic legislation or collective agreements] on service providers established in another Member State’. Terms and conditions that the host country should provide, as laid down in Article 3 (1) are (a) maximum work periods and minimum rest periods, (b) minimum paid annual holidays, (c) minimum rates of pay, including overtime rates – this point does not apply to supplementary occupational retirement pension schemes, (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, (e) health, safety and hygiene at work, (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people and (g) equality of treatment between men and women and other provisions on non-discrimination, when available in law, regulation, administrative acts and/or collective agreements and arbitration awards.

However, Article 3 (1) (d) and (9) of the Posting of Workers Directive incorporates the conditions applicable to temporary agency work into the scope of those minimum standards the host country is entitled to impose on foreign service providers. As a consequence, the work contract between temporary work agencies and their temporary agency workers will be ruled by the home country’s regulations. As far as minimum rates of pay are concerned, the member state to whose territory the worker is posted can stipulate that temporary work agencies must guarantee workers the terms and conditions of employment applicable to their domestic agency workers: on one hand, this can lead to aligning the working conditions of cross-border temporary agency workers with those of domestic agency workers in the host country. On the other hand, however, implementation of this provision would certainly conflict with the freedom to provide services (Laulom 2012). Here again the different aim and legal basis of the Temporary Agency Work Directive (worker protection – former Article 137(2) TEC) and the Posting of Workers Directive (free movement of persons and services – former Articles 57 (2) and 66 TEC) are conflicting, creating discriminatory measures for cross-border workers. Indeed, cross-border temporary agency workers will be better off than other posted (but non-temporary agency) workers who will be guaranteed only minimum standards. According to Schlachter (2012), ‘for an internal market it would be logical that the rules for [cross-border temporary] agency workers do not differ in content depending on the category of either national or transnational posting’ and to wish that ‘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’.

What about the principle of equal treatment?

The need to articulate the TAW Directive and the Posting of Workers Directive is actually linked to a possible application of the principle of equal treatment between transnational temporary agency workers and permanent workers of the user undertaking. In fact, this need is not obvious as the comparison is not made at the same level, the comparable worker being either a national temporary agency worker or a worker at the user undertaking.

According to the Lex specialis doctrine applied to legal interpretation, a law governing a specific subject matter overrides a law that only governs general matters and would give precedence to the Temporary Agency Work Directive. Recital 22 of the Temporary Agency Work Directive states that: ‘This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.’ Does this mean that a balance between the implementation of the Temporary Agency Work Directive and the freedom to provide services in case of transnational temporary agency work should be found, while running the risk of creating discriminatory measures? When looking at the Posting of Workers Directive, does the expression ‘without prejudice’ (in recital 19) mean that in case of transnational temporary agency workers, the application of the Temporary Agency Work Directive is excluded, the Posting of Workers Directive being the only one to apply? Nothing could be less certain. Interestingly, the CJEU has ruled that the implementation provisions contained in a Community Directive did not automatically exclude any infringement of the freedom to provide services (Mazzoleni case, C-165/98). Furthermore, any infringement of the freedom to provide services must be justified on the ground of a reason of overriding public interest (for example, the Seco case, 62/81). The protection of workers is actually one of these reasons (see, for example, the Wolff and Müller case, C-60/03), one of the aims of the Temporary Agency Work Directive. The measure in question has to be necessary in order to achieve the declared objective; the objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-EU trade. It is at this point that the Posting of Workers Directive might play a role.

What would the Enforcement Directive of the Posting of Workers Directive bring to the debate?

The European Commission is currently examining a proposal on the so-called Enforcement Directive, which will (if adopted) put in place mechanisms de-
signed to implement the Directive on Posting of Workers. After considerable controversy and an intense debate among EU institutions, academics and social partners triggered by the CJEU case law, the European Commission intends ‘without re-opening Directive 96/71/EC (…) to improve, enhance and reinforce the way in which this Directive is implemented, applied and enforced in practice across the European Union by establishing a general common framework of appropriate provisions and measures for better and more uniform implementation, application and enforcement of the directive, including measures to prevent any circumvention or abuse of the rules’ (COM 2012). 9

Furthermore, the minimalist approach taken by the European Commission is further emphasised when opting for an Enforcement Directive instead of the revision of the Posting of Workers Directive itself. Additionally, according to the ETUC, the crucial aspect of the principle of equal treatment is not dealt with so as to secure a proper guarantee for workers and the proposal will not prevent abuses of workers’ rights, as among other things it does not propose effective and dissuasive measures to combat fraud and so-called letter-box companies. In particular, control and monitoring by the Member State of establishment as well as the proposed national control measures are too restrictive and not even binding upon Member States.

Furthermore, the Enforcement Directive would clarify that the Posting of Workers Directives applies without prejudice to more favourable instruments of Union law: if the Temporary Agency Work Directive provides more favourable terms and conditions of employment for the worker, then it should apply. Depending on the circumstances, it may be that the Enforcement Directive is more favourable to the worker; in the latter case, it should take precedence.

Additionally, cross-border (temporary agency) posted workers’ rights will be adequately guaranteed only if the proposal for an Enforcement Directive is established on a dual legal basis, so as to prevent that the Enforcement Directive is not a purely internal market instrument based solely on Article 53 (1) and 62 TFEU. A social dimension must be included by adding Article 153 TFEU (social policy). Additionally, posted workers should be protected regardless of their status or change in status. In this respect, the articulation with the Rome I regulation and with Temporary Agency Work Directive should be clarified, as well as the criteria for defining posting (Is the undertaking genuine? Are the workers actually posted?). Effective dissuasive measures to combat fraud and prevent abuses, so as to prevent successive assignments to the same post and so-called letter-box companies, for example, still need to be elaborated. Joint and several liability is currently limited to the construction sector and to direct subcontractor situations and should be extended to any sectors and should include chain liability. Listed and binding control and monitoring measures should be under the supervision of the host country with a mechanism of prior declaration before posting. Finally, the possibility for workers to

9. Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services 2012/0061 (COD)
lodge complaints should not be limited to particular issues and trade unions should be allowed to take action on behalf of workers, including without their approval, to implement the Enforcement Directive, but also obligations arising from the Posting of Workers Directive.

While from an economic perspective open borders and markets within the EU are of major importance for the rapid recovery of Europe’s competitive position, the ETUC recognises that workers everywhere in Europe are increasingly questioning the added value of such measures for them (ETUC 2010). The side-effects of the internal market and increased cross-border mobility of companies and workers are endangering social cohesion. In this context, the Posting of Workers Directive plays a pivotal role not only as key device to prevent unfair competition on wages and working conditions in situations of temporary cross-border provision of services, but also and even more so the main instrument to maintain the social dimension of the internal market.
Conclusion

The long-lasting and difficult debate that finally led to the adoption of the Directive on Temporary Agency Work shows how significant this issue is at European level. Meanwhile, as the process has been very lengthy, the objectives of the European legislator have changed. At the beginning of the process, the aim pursued by the European Commission was to regulate temporary agency work and to ensure minimum protection for agency workers. Nowadays, temporary agency work is also seen as a tool for the creation of jobs and growth emblematic of flexicurity, in particular in the discourse of the European Commission and the employers’ associations. As a consequence, if ensuring workers protection is still one of the objectives, flexibilisation has also become an element to take into account (Lhernould 2012). Compared to all other forms of employment, temporary agency work has the worst record for working conditions, judged in particular on a number of indicators, including repetitive labour, and the supply of information to employees about workplace risks (ETUC 2007). Indeed, temporary agency workers tend to have less control over the sort of work they do and how they do it, to get less training, to have a higher rate of workplace accidents and are less well-informed about safety, and to do more shift work and have less time to complete jobs.

With the Directive, as an essential piece of social legislation guaranteeing the protection of workers and in particular the implementation of a principle of equal treatment from the first day of their assignment, there are hopes that the situation will improve towards better working conditions for temporary agency workers. However, the review of prohibitions and restrictions as well as possibilities of derogation may lead to more partial and inconsistent implementation of the Directive in the Member States (Lhernould 2012).

Finally, there are main causes for concern, ranging from the proper implementation of the equal treatment from day one, the review of restrictions and prohibitions that might lead to the diminution of workers’ rights and protection, to issues related to proper access to workers’ collective rights and training and proper protection in case of dismissal.

Finally, some critical trends have been witnessed in various Member States. Indeed, the use of temporary agency work in the public sector is foreseen in some Member States to replace civil servants (France) or it is seen as worsening the existing protection (Greece). Transposition measures are sometimes unsatisfactory (Bulgaria, Germany), or Member States adopt a minimal inter-
interpretation of the provisions of the Directive (UK). Some other examples (albeit not an exhaustive list) show the reluctance of Member States to respect the words and spirit of the Directive: for example, in Bulgaria and in Portugal, where the way in which the Directive is being transposed, in the economic crisis and without any consultation of the social partners, is affecting the real spirit of the Directive and allows very different interpretations of the resulting texts of the several amendments of the existing law; and also in Germany, where some articles of the Directive were ignored, others partly transposed. Moreover, vague legal terms remained undefined, which has caused a lack of legal certainty, for example on the issue of access to vocational training while on the job. In the United Kingdom, where the regulations apply in a minimalist fashion, providing as little protection as is possible under the Directive. The TUC together with Unite explore the possibility of legal action to challenge the regulations through the European Courts. Regarding equal treatment a proactive stand would be necessary as often the temporary worker simply does not have the necessary information to benefit from all the facilities and benefits available to the permanent staff. UNI-Europa has expressed concerns about possible abuses, noting that Article 5.1 of the Directive allows for a qualifying period before the principle of equal treatment is applicable, on the basis of a national social partners’ agreement; it also permits derogations and flexibilities for agency workers on permanent contracts of employment who are paid between assignments. UNI-Europa stated ‘that there is some evidence of temporary agencies employing workers on permanent contracts, thus making them permanent employees of the agency and exempt from the equal treatment requirements of the Directive’ (Eurofound 2012).11

Temporary agency work has been the most rapidly growing form of atypical work in the EU over the past 20 years (Arrowsmith 2008). If, on one side (the supply side), temporary agency work may smooth the re-engagement of the (long-term) unemployed into work, increase the participation of people that need or prefer temporary work in the labour force by both maintaining their employability and propose a form of work–life balance, it allows, on the other side (the demand side), ‘user firms to make relatively easy labour adjustments and offers transaction-cost savings by outsourcing some responsibility for recruitment and administration’ (Arrowsmith 2008). In addition, the massive and systematic use of temporary agency work allows for reductions in the ‘core’ permanent workforce, but also to respond to any production peaks, so as to get wage costs under control and achieve labour flexibility. It is most used to get lower-skill workers in competitive sectors with varying or unpredictable demand. As a consequence, temporary agency work is at the centre of the ‘flexicurity’ debate, increasing trade union concerns about the treatment of agency workers, as well as having potential implications for permanent workers. Indeed, temporary agency work may lead workers to work for less money and with less protection, under much worsen working conditions than other workers in terms of equality of treatment in pay or access to workers’

rights, such as training or collective rights. Therefore, it was of the utmost importance to legally frame this kind of work organisation in order to offer protection to temporary agency workers. The Temporary Work Agency Directive lays down the principle of equal treatment for temporary agency workers, aiming to set minimum EU-wide standards and create a level playing field for companies in different Member States.

Most Member States have been seeking ways to reconcile employment protection with employment flexibility by law, collective bargaining or a combination of both, using the European Temporary Agency Work Directive as incentive or inspiration, but domestic laws still contain loopholes in the protection of temporary agency workers. This makes European regulatory enforcement all the more important.
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