

# Temporary agency work in the Hungarian Labour Code Critical analysis – with special regard to EU requirements for judicial harmonization

Trabajo temporal de agencia en el Código Laboral de Hungría  
Análisis crítico: con especial atención a los requisitos de la UE  
para la armonización judicial

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*Abstract:* From prohibition to support! The introduction of the study gives a brief overview of the history of international and Hungarian regulation of temporary agency work (TAW). The focus is on certain problematic issues of the Hungarian legal regulation of the TAW. On the one hand, the study analyses the disharmony or its concern of certain provisions of the Hungarian legislation regarding the requirements of EU legal harmonization. For example: the role of TAW in the labour market, the derogation from the principle of equal treatment in remuneration or “removing” the TAW from the scope of collective redundancies. On the other hand, the study describes the inconsistency of the Hungarian Labour Code on this subject. The study analyses the concerns of negative discrimination between TAW and all other types of employment relationship regarding the termination of employment by the employer. Namely, from the TAW point of view the regulation is obviously disadvantageous in terms of justification for termination, period of notice and eligibility for severance pay.

*Keywords:* Equal treatment, temporary agency work, temporary-work agency, user enterprise, European framework

*Abstract:* ¡De la prohibición al apoyo! El artículo aborda, en primer lugar, una breve descripción de la historia de la regulación internacional y húngara del trabajo a través de agencias de empleo temporal (TAW) para seguidamente analizar ciertos aspectos problemáticos de la regulación legal húngara de la TAW. En el segundo epígrafe, el estudio analiza la falta de armonía o su preocupación por ciertas disposiciones de la legislación húngara con respecto a los requisitos

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de armonización legal de la UE. Por ejemplo: el papel de TAW en el mercado laboral, la derogación del principio de igualdad de trato en la enumeración o “remover” el TAW del alcance de los despidos colectivos.

Por otro lado, el estudio describe la inconsistencia del Código de Trabajo húngaro en este tema. En la última parte del estudio, se analizan los efectos discriminatorios de los empleados de agencias de empleo temporal respecto a los demás tipos de relación laboral con respecto a la terminación del empleo por parte del empleador. Es decir, desde el punto de vista de TAW, la regulación es obviamente desventajosa en términos de justificación de terminación, período de notificación y elegibilidad para indemnización por despido.

*Palabras clave:* Igualdad de trato, agencias de empleo temporal, trabajadores temporales, usos de empresa, regulación comunitaria.

### **Atypical employment relationships – The purpose of the legislation**

In the regulation of the employment relationship, in addition to numerous reasons – such as increase of the number of employees in the labour market, alignment to the market needs of enterprises and the private life needs of the employees – the prevention and reduction of abuses are the very reasons why the atypical category is significant both in international and Hungarian frameworks. In examining the legislation of the European Union (EU), this consideration may be detected with regard to temporary agency work, through the establishment of the temporary nature of agency work on a directive level.<sup>1</sup> The use of temporary agency workers should not be allowed to be an equivalent alternative to the indefinite-term employment, provided that the labour force need related to any activity of the employer happens to be not temporary. All this is not an end in itself. The unjustified expansion of temporary agency work – compared to the actual needs of the employment – causes the deterioration of the condition of finding employment, and it leads to the reduction of the employee rights which are ensured by the typical employment relationship.

### **The regulated appearance and spread of temporary agency work in Europe**

What do we usually borrow? Things that we do not intend to buy because we need them only temporarily. With regard to workforce, this was the need that gave rise to the borrowable nature of employment – instead of the establishment thereof. The relatively small-scale, but already not isolated regulated appearance of this arrangement in the Western European states dates back – with relatively little difference in time – to the end of the 1960s and the start of the 1970s.<sup>2</sup> The “discovery” of temporary agency work became the solution for cases where the undertaking had to employ employees under extraordinary circumstances and for a relatively short time. Using the services of a third party for consideration and merely “using” the employee of such third party had been the appropriate instrument to solve this.<sup>3</sup>

<sup>1</sup> 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work

<sup>2</sup> Bankó, Z.– Berke, Gy. (2009), “A munkaező-kölcsönzés és a távmunka szabályozása az Európai Unióban és Magyarországon” (The Regulation of Temporary Agency Work and Teleworking in the European Union and in Hungary) (University of Pécs), 7.

<sup>3</sup> Horváth, I. (2015.), “Ideiglenesen tartózkodók – A munkaező-kölcsönzés: uniós követelmények, magyar megoldások” (Temporary Residents - Temporary Agency Work: European Union Requirements, Hungarian Solutions”; in Horváth I., (eds), Tisztelegés, Ünnepi tanulmányok Dr. Hágelmayer Istváné születésnapjára (Honouring and Celebratory Studies for the Birthday of Dr. Istvánné HÁGELMAYER), ELTE Eötvös Kiadó, (Budapest).167-184.

*The loosening of international rigour*

Our brief journey into legal history starts in 1933. In this year the Fee-Charging Employment Agencies Convention (No. 34) of the International Labour Organisation (ILO) prohibited the operation of undertakings which facilitated the meeting of the demand and supply sides of the labour market for a profit.<sup>4</sup> The international rigour subsequently loosened, therefore in 1949, the Fee-Charging Employment Agencies Convention (No. 96) allowed the operation of employment agencies conducted with a view to profit subjected to strict regulations (e.g. state supervision, permit to be renewed every year, administrative charges).<sup>5</sup>

Temporary agency work developed in the shadow of these prohibitions. The service for lending workforce was the legal loophole through which the prohibition of private employment agency became avoidable, since the scope of the ILO Convention mentioned above extends to the agency who acts as intermediary between the employee and the employer. Thus, it could not be considered to fall under the scope of the convention if the employer provided the employee who had concluded an employment relationship with employer to a third party (other employer) temporarily, with that the end of any placement did not affect the employment relationship. The legal loophole was closed in 1965. In its official opinion the ILO established that the provisions of the 1949 ILO Convention No. 96 on private employment agencies are applicable to the temporary work agencies as well. The reasoning: it is not the legal form but the nature of the labour market activity that shall be taken into consideration primarily. The ILO considered placements as agency service and declared that this service was subject to the scope of the convention on private employment agencies. The result of this: in the countries which maintained state monopoly, private undertakings were allowed to perform temporary work agency only in respect of those employee groups specified by law, where the appropriate service was not feasible through the state agencies.<sup>6</sup>

*The state regulation of temporary agency work – two waves, two legislative approaches*

The need shown for temporary agency work brought legal regulation with it only by the 1960s and 70s, which by then was still rather distrustful.<sup>7</sup> Firstly, the – later – EU Member States may be divided into two large groups according when the first laws on temporary agency work were made. The Member States which belong to the first “wave” (1965-1977) *Belgium, Denmark, France, Germany, Ireland, Netherlands, Norway and the United Kingdom* – had legal foundations which had been in existence for a long time. The members of the second group (1989-2001) — *Austria, Luxembourg, Portugal, Spain and Sweden* — adopted the laws applicable to temporary agency work during the period between 1980s and the millennium. Due to the partial overlap in time (1998-2004), this group may also include the following Member States from among the states which joined the EU in 2004 and later: *Poland, Romania, Slovenia, Czech Republic, Slovakia and Hungary*.<sup>8</sup>

<sup>4</sup> ILO Fee-Charging Employment Agencies Convention, 1933 (No. 34), Article 2 (1)

<sup>5</sup> ILO Fee-Charging Employment Agencies Convention, 1949 (No. 96), Article 10

<sup>6</sup> For the sake of completeness: By the 1990s, the approach of the ILO changed. In 1997 the Private Employment Agencies Convention (No. 181) was adopted, the Preamble of which acknowledges the role of private employment agencies in the efficient functioning of the labour market. Priority objectives are the permitting of the operation of private employment agencies and the protection of the employees who use the services. [Article 2(3)].

<sup>7</sup> Kártyás, G. (2009), “Munkaerő-kölcsönzés a közösségi irányelv elfogadása után, Munkaerő-kölcsönzés a közösségi irányelv elfogadása után” (Temporary Agency Work After the Adoption of the Community Directive, Temporary Agency Work After the Adoption of the Community Directive), *Kérdések és válaszok*, Vol. V.2., 28.

<sup>8</sup> Horváth, I. (2013), “Hazai kölcsönzés - európai szemmel; A munkaerő-kölcsönzés magyar szabályozása - európai összehasonlításban, figyelemmel a 2008/104/ EK irányelv jogharmonizációs követelményeire” (Hungarian Temporary Agency Work – for the European

The pioneers of the first wave are those states which acknowledged temporary agency work on the legislative level: *Netherlands, Denmark and Ireland*. This “trio” was soon followed by countries of significant economic influence such as *Germany, France* and the *United Kingdom*, and then *Belgium* and *Norway*. The national regulations were established in the above-mentioned “headwinds” of the ILO, and the common characteristic of which was the restriction of the temporary work agency activity.<sup>9</sup> Two legislative processes may actually be registered behind the first temporary agency work regulation “wave”. After the restrictive approach of the first stage, the reputation of temporary agency work changed by the turn of the 1980s and 1990s. The crucial reason behind all of this is that the state employment agencies were unable to manage the unemployment which affected all segments of the labour market, which caused widespread dissatisfaction regarding the governmental service.<sup>10</sup> As the role of temporary agency work in employment grew, the Member States - simultaneously with the changing of the community approach – amended their laws regulating temporary agency work accordingly in a lot of times.

Directive 2008/104/EC on temporary agency work (Directive 2008/104/EC) – which was made after 26 years of “labour and delivery” – established a common base for the EU Member State regulation of temporary agency work, with 2011 legal harmonisation obligation and in the framework of legal alignment aspects.

#### *The Dutch example – legislative reaction to the need for flexibility*

In picking out the example of the pioneering Netherlands among the first countries: they regulated temporary agency work for the first time in Europe in 1965, by introducing the permit procedure applicable to temporary agency work. Both the restrictive and the permissive regulatory approaches appear in the Dutch legislation. The first government was motivated to regulate firstly by the spreading of temporary agency work and the restriction thereof. However, all this did not affect the continuous spreading of temporary agency work, the underlying reason behind which was the fast-increasing need for flexibility which appeared in the labour markets of the European Economic Community and which brought about the review of the laws. For example, the permit procedure related to temporary agency work and numerous restrictions (for example, the determination of the longest duration of the temporary agency work) was abolished.

The Flexibility and Security Act entered into force in 1999, which – in reacting to the changed needs – aimed at codifying the wave of flexibility which appeared in the labour market. This act considered the legal status of the employees employed for the purpose of temporary agency work as something that was determined by the traditional employment contract concluded between the employee and the temporary-work agency. The opportunity to exercise the participation rights of the employee provided for the purpose of performing work at the user enterprise employer was created. While causing contradiction with the classic function of temporary agency work, the act was applicable in case where – in the absence of the speciality of the need for workforce – the services of the temporary-work agency were not necessary. After the entry into force of the act which stipulated flexibility and security at the same time, temporary agency work became a routine for undertakings and employers satisfied their a significant part of their long-term workforce need by buying the services of the temporary-work agencies.

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Observer; The Hungarian Regulation of Temporary Agency Work – In European Comparison, Considering the Legal Harmonisation Requirements of Directive 2008/104/EC) - habilitation dissertation, manuscript (Eötvös Loránd University, Budapest) 53.

<sup>9</sup> Arrowsmith, J. (2006), “Temporary Agency Work in an Enlarged European Union”. Office for Official Publications of the European Communities (Luxembourg), 13-16.

<sup>10</sup> Kártyás, G. (2009), Op. cit. 20.

## Brief Hungarian legal history

In Hungary, the governmental regulation of temporary agency work had no restrictive phase. Presumably, one of the reasons behind it is the date. The provisions which institutionalised temporary agency work were enacted in 2001 in the former Labour Code (former LC) which was passed in 1992 after the change in the political regime in 1990. The Hungarian legislation was created during a period when – based on the prohibited or tolerated category – temporary agency work had not only become acknowledged all over Europe, but the majority of the Member States had already been over the second regulatory wave, which liberalised the opportunity to use temporary agency work. In deviating from its classic function, temporary agency work became part of the former LC in 2001 as the equivalent alternative of indefinite-term employment.

In the absence of any international obligation established expressly for temporary agency work, the legislator was granted discretion to determine the function and the content of the legal institution. This is how the regulation which – on the one hand - did not include any provisions as to the reasons and/or the duration of the temporary agency work could enter into force. With regard to the conditions of employments, the former LC did not stipulate the requirement of equal treatment of temporary agency workers and the user enterprise's own employees at all. Directive 2008/104/EC tightened the belt the most regarding exactly these two legal institutions, by demanding the temporary nature of temporary agency work and equal treatment.<sup>11</sup>

The entry into effect of temporary agency work in 2001 through the amendment of the former LC – for example,

- a) through a level of employee protection upon the termination of the employment which was significantly lower than the average (e.g. exclusion of the application of statutory rules applicable to termination prohibitions in case of employment relationships established for the purpose of temporary agency work), and
- b) through the unlimited nature of the application of temporary agency work –

showed that through the employment relationship so created the legislator facilitated the adaptation of the employer organization to the market needs.<sup>12</sup> In this way a layer of employees could develop who had weaker defence position compared to those who concluded an employment contract with the user enterprise for an indefinite term, without however their employment relationship being characterized by a temporary nature.<sup>13</sup>

Until fulfilling the European Union judicial harmonisation obligation in 2011, the Hungarian regulation did not prevent legal subjects at all from using temporary agency work to “replace” indefinite-term employment relationships. As a consequence, in Hungary temporary agency work could become an instrument for realizing objectives different from the original concept and for managing problems which are originally not undertaken by temporary agency work.<sup>14</sup> It was not uncommon that immediately after the employer had terminated the employment relationship of part of its employees, the employer “hired them back” through a temporary-work agency appointed by the em-

<sup>11</sup> Horváth I. (2010), “Munkajogi triangulum - Gondolatok a munkaerő-kölcsönzésről szóló 2008/104/EK irányelv magyar harmonizációjához” (Labour Law Triangle – Thoughts on the Hungarian Harmonisation of Directive 2008/104/EC on Temporary Agency Work) Pécsi Munkajogi Közlemények, Vol.III, Issue II of November, 13-22.

<sup>12</sup> Bankó, Z. – Berke Gy. Op. cit., 24.

<sup>13</sup> Horváth, I. (2010), Op. cit., 13-22.

<sup>14</sup> Petrovics, Z. (2009), „Hogyan éljük túl a válságot? A munkaerő-kölcsönzés: Csodaszer vagy tünetek kezelése?” (How to Survive the Crisis? Temporary Agency Work: Miracle Cure or Treating the Symptoms?) 19<sup>th</sup> National HR Conference and Exhibition, (Budapest), manuscript.

ployer.<sup>15</sup> The application of the concept which utterly contradicted the purpose of temporary agency work was made “accessible” by the unrestrictedness of the use of temporary agency work. According to the comparative analysis of the era, through this the regulation of temporary agency work changed the most significantly in Hungary among the EU Member States after the turn of the millennium.<sup>16</sup>

After the fulfilment of the legal harmonisation: the provisions of concern of the Labour Code – not only those related to EU legislation

Jumping ahead 18 years, when directing our attention from the state of 2011 Hungarian legislative institutionalisation of temporary agency work to the critical points of the effective regulation, compliance with the legal harmonisation requirements of Directive 2008/104/EC had also become an unavoidable aspect of forming an opinion. The fast growth of the market share of temporary agency work made community regulation inevitable, noting that the temporary use of workforce – although not in official form – has been in operating all around Europe for almost a century.<sup>17</sup> The primary objective set related to Directive 2008/104/EC was – as an instrument of social development - the more efficient protection of temporary agency workers. According to legal literature analyses, temporary agency work becomes the perfect example of the flexible security often mentioned, considering that in respect of employment the social law of the EU is unable to guarantee the simultaneous existence and the balanced enforcement of the flexibility of the employment of employees and the requirement of protection.<sup>18</sup> The establishment of Directive 2008/104/EC made it obvious that the creation of a regulation – in the frameworks of the doctrine of flexible security - which serves the two purposes equally poses a significant challenge to the Member States.

First, I will discuss the Hungarian rules which I consider problematic with regard to the fulfilment of the legal harmonisation obligation.

### *The temporariness of temporary agency work – The most flexible Member State regulation?*

In citing the original function, Directive 2008/104/EC restricts the role of temporary agency work as labour market service in one regard. It stipulates the temporariness of the provision of any given employee to any given user enterprise.<sup>19</sup> Firstly, this brought about restriction compared to the previous regulation in all EU Member States – therefore in Hungary as well – which did not limit the duration of the assignment. Therefore, all this established the unambiguous requirement for the Hungarian legislation that temporary agency work shall no longer substitute or replace employment based on the traditional employment relationship.<sup>20</sup> Undoubtedly, the legislative content of temporariness – as legal alignment aspect in the directive – is rather difficult to specify. At the same time, the question is whether the assignment of an employee to a user enterprise for up to five years under the effective Labour Code (LC) [Section 214 (2)] complies with the community legislative intention. My

<sup>15</sup> Kártyás, G. (2009), Op. cit., 28.

<sup>16</sup> Arrowsmith, J. Op. cit., 11.

<sup>17</sup> Grapperhaus, F. (2010), “A twist of the equality logic: The Directive on Working Conditions for Temporary Agency Workers and Dutch Law”, European Labour Law Journal, Volume 1., No. 3., 406–413.

<sup>18</sup> Robin-Oliver, S. (2010), “A French reading of Directive 2008/104 on Temporary Agency Work”, European Labour Law Journal, Volume 1., No. 3., 398–405.

<sup>19</sup> Article 3 (1) e “assignment”: means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction;

<sup>20</sup> Bankó, Z. – Berke, Gy. Op. cit., 30.

question is strengthened on the one hand by that the maximum duration of Hungarian temporary agency work is the same as the maximum five-year duration of the fixed-term employment contract to be concluded by the employer and the employee [LC, Section 192 (2)]. In addition – with regard to the determination of the longest duration - the European Union regulation does not demand the requirement of temporariness in case of fixed-term employment contracts...<sup>21</sup>

On the other hand, at the time the Hungarian legal harmonisation obligation was fulfilled, the five-year term meant unprecedented length, even in comparison to other European Union Member States. The countries which restricted the possible duration of the temporary agency work even before the adoption of Directive 2008/104/EC (e.g. *France*) specified a time limitation of up to eighteen months. *Poland* went beyond that, where the duration of the temporary agency work for the purpose of substituting absent employees was set at 36 months,<sup>22</sup> as well as *Greece*, where the maximum duration for which any employee could be employed at a user enterprise was 36 months. The maximum 24 months of temporary agency work specified by the *Romanian* legal regulations could be “extended” only up to 36 months in case the contract for the temporary agency work was extended or renewed.<sup>23</sup>

### *The role of temporary agency work in the labour market – the review of restriction and prohibitions*

Upon submitting its proposal for the directive on temporary agency work in 2002, the European Commission (Commission) explained that ensuring the fundamental working conditions for temporary agency workers would preclude the concerns arising related to temporary agency work, and as a result it would allow the elimination of those restriction which already do not serve the protection of temporary agency workers.<sup>24</sup> In its Green paper published in 2006 the Commission showed that since temporary agency work had a substantial role in the European labour market, it is necessary to modernise the labour law in order to be able to stand the challenges of the 21<sup>st</sup> century.<sup>25</sup> Directive 2008/104/EK unambiguously establishes the legislative intention aimed at eliminating the market restrictions of temporary agency work: it obliges the Member States to review the restrictions and prohibitions specified by their regulations and affecting the use of temporary agency work.<sup>26</sup>

In my opinion, the Hungarian legal harmonisation treated the review of the prohibition of temporary agency work too liberally in one regard. In adopting the same approach as some other Member States (e.g. Poland, Sweden), in order to ensure the elimination of abuses – proper labour market operation acknowledged as general interest in Directive 2008/104/EC – and thereby to ensure the purpose of temporary agency work, from 2006 the former LC prohibited temporary agency work of the employee

- if the employment relationship with the user enterprise had ceased up to six months prior and

<sup>21</sup> See Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

<sup>22</sup> Pedersen, H.S. – Hansen, K.B. - Mahler, S. (2004), “Temporary agency work in the European Union (report)”, - European Industrial Relations Observatory, 27.

<sup>23</sup> Schömann, I. – Guedes, C. (2012): “Temporary Agency Work in the European Union; Implementation of Directive 2008/104/EC in the Member States”; European Trade Union Institute (Brussels), 35.

<sup>24</sup> European Commission - Employment, Social Affairs & Inclusion – Unit B2 – Labour Law (2011), “Report Expert Group: “Transposition of Directive 2008/104/EC on Temporary agency work”; 28.

<sup>25</sup> European Commission Green paper “Modernising Labour Law to meet the challenges of 21<sup>st</sup> century” [COM (2006) 708 final]

<sup>26</sup> Guamán, A. (2010), “Temporary agency work directive and its transposition in Spain”; European Labour Law Journal, Volume 1., No. 3., 414-421.

- through termination (notice) justified by reasons in connection with the operation of the employer or termination with immediate effect (dismissal without notice) during the probationary period [Former LC, Section 193/D (2)].

The LC which entered into force after the former LC in 2012 repealed a significant element of the institution of temporary agency work.<sup>27</sup> Namely, the LC does not prohibit the employer from employing its “dismissed” employees as user enterprise – bases on a contract concluded with the temporary-work agency – after the communication of the termination justified by circumstances related to the operation of the employer, as early as the day after the termination of their employment. At least it should have been stipulated by the LC that: for example, those employees who join the workforce as temporary agency workers at their old workplaces and in the same job function shall be entitled to their previous wage for six months.<sup>28</sup> It causes concern that the Hungarian regulation contradicts the following provisions of Directive 2008/104/EC, which stipulates that prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented [Article 4 (1)]. The rule of the LC itself provides a reason for abuse. Making the employer’s own employees redundant with that the employer may employ such workers in the temporary agency worker status – which provides weaker employee protection – as early as the day following the delivery of the termination.

### *The principle of equal treatment – with two problematic Hungarian exceptions*

One of the aims of Directive 2008/104/EC is ensuring 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 [Article 2.]. Depending on the previous regulations of the Member States, the principle of equal treatment may be considered as the result of the judicial harmonisation or as an already existing regulatory principle. Firstly, in those Member States which had already enforced the principle of equal treatment in respect of the temporary agency worker and the user enterprise’s own employees, these conditions could not be derogated by reason of the derogation opportunity ensured by Directive 2008/104/EC. Namely, all directives contain the general rule according to which the legal harmonisation of the Member State law shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by the Directive [Article 9 (2)]. For example, in course of the fulfilment of the legal harmonisation obligation, *Belgium, France, Poland, Portugal, Spain, the Czech Republic, Estonia, Romania, Slovakia and Slovenia* did not make use of the opportunity of derogation, the option to establish exceptions to equal treatment at all. Similarly, *Bulgaria, Latvia* and *Lithuania* also did not make use of the opportunity to make regulations which restrict the enforcement of the principle of equal treatment, the particular reason behind which is that these three countries introduced the regulation of temporary agency work in 2011, as the fulfilment of the legal harmonisation obligation stipulated by Directive 2008/104/EC. *Norway* also decided to enforce the principle of equal treatment completely.<sup>29</sup>

Of the three rules of the LC which provides opportunity to make exceptions one is undoubtedly in compliance with the European Union requirement. According to this rule, as regards pay,

<sup>27</sup> Act LXXXVI of 2012 on the Transitional Provisions and Amendments Related to the Entry into Force of the LC, Section 85 (2)

<sup>28</sup> Horváth, I. (2013), Op. cit., 173.

<sup>29</sup> Schömann, I. – Guedes, C. Op. cit., 37.



Member States may, after consulting the social partners, provide that an exemption be made to the principle of equal treatment [Article 5 (1)], where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. [Directive 2008/104/EC Article 5(2)]. According to the LC as regards the amount of wages and other benefits, the provisions on equal treatment shall apply

- a) as of the one hundred and eighty-fourth day of employment at the user enterprise
- b) with respect to any employee who is engaged with a temporary-work agency in an employment relationship established for an indefinite duration, and
- c) who is receiving pay in the absence of any assignment to a user enterprise [LC Section 219 (3) a)].

In addition, with respect to the requirement of equal treatment, the LC used derogation in a debatable manner in one case, however, in case of one provision, the LC definitely used derogation without authorization by the Directive. In Directive 2008/104/EC the Member States were give authorization that the Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme [Article 1 (3)]. According to the LC, the for the first 183 days of the assignment, the principle of equal treatment is not applicable to wages for those employees who are considered permanently absent from the labour market according to the provisions of Act CXXIII of 2004 on the Promotion of the Employment of Young Professionals, Unemployed Aged 50 Years and over, People Returning to Work after Child Care or Nursing and the Introduction of the Paid Internship Programme (Act CXXIII of 2004).<sup>30</sup>

At the same time, it is questionable whether – for the reason of supporting the labour market integration of this scope of people in itself (in order to facilitate their employment, Act CXXIII of 2004 provides tax advantage for their employment) the Hungarian labour law regulation can be reconciled with the expression “publicly supported integration programme” of the Directive, on which the temporary statutory exemption of application of the equal treatment is based? In connection with this the Commission Expert Group formed the following as an issue of interpretation: do the Member States have opportunity for derogation at employers which pursue for-profit activity and in case of persons for the employment of whom the employers receive financial support originating from state funds? In its answer the Expert Group notes that the derogation under Article 1(3) shall take place only if the employees are working in the framework of vocational, integration or retraining programmes, which is rather unlikely, if otherwise the disadvantaged employees perform their work with the same terms and conditions as other employees.<sup>31</sup> According to the interpretation referred to above it raises concern that: if an employment contract is concluded with a person who is considered as permanently absent from the labour market, then can the LC exempt the temporary-work agency from complying with the principle of equal treatment with regard to

<sup>30</sup> According to Point 1 Subsection (2) Section 1 of Act CXXIII of 2004, the following are considered as *persons permanently absent from the labour market*:

- a) young professional,
- b) the person who intends to establish a legal relationship for employment within one year (365 days) of the termination of the payment of benefit aiding childcare, childcare payment, child-raising benefit, as well as the at-home care payment of children or the care payment, or who intends to take up employment after the child had reached the age of six months and meanwhile receiving benefit aiding childcare, provided that such person is not engaged in any legal relationship for work,
- c) permanent job-seeker,
- d) job-seeker entitled to benefit substituting employment.

*Young professional* means a person who has not reached twenty-five years of age – in case of person with higher education degree, thirty years of age – and who fulfils the conditions of establishing the legal relationship for employment and has valid START card.

<sup>31</sup> European Commission - Employment, Social Affairs & Inclusion, Op. cit., 9.

wages during the first 183 days of the assignment, provided that such employees otherwise fulfil job functions which are the same as those fulfilled by the employees of the user enterprise which pursues economic activity.<sup>32</sup>

In my opinion, the other Hungarian derogation concerned definitely does not comply with the requirements set by Directive 2008/104/EC in respect of a possible user enterprise. According to the LC, as regards the amount of wages and other benefits, the provisions on equal treatment shall not be applicable for the first six months of the assignment at the user enterprise with respect to any worker who – among others – is working at a business association under the majority control of a municipal government [LC Article 219 (3)]. According to the provision applicable to the scope of Directive 2008/104/EC, the same parameters shall be applicable to the user enterprise and the temporary-work agency, it was only those employers which do not pursue economic activity regarding whom therefore the Hungarian legislator could have made a decision about any exemption from compliance with a provision of the directive regarding a fundamental working or employment condition, i.e. the payment of wages.<sup>33</sup> It is merely a “Hungarian issue” why user enterprises held in the majority ownership of the state- as public companies - are not beneficiaries of the rule which presumably decreases the fee payable for the assignment to the temporary-work agency.

#### *Contrary to another directive – exclusion of collective redundancy*

The provision of the LC which excludes the application of the statutory rules applicable to collective redundancy in case of all employment relationships established for the purpose of temporary agency work [LC Article 222. (4) does not comply with the provisions on the scope of Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. This Directive shall not apply to collective redundancies effected

- a) under contracts of employment concluded for limited periods of time or for specific tasks except where such redundancies take place prior to the date of expiry or the completion of such contracts;
- b) workers employed by public administrative bodies, and
- c) the crews of seagoing vessels [Directive 98/59/EC, Article 1(2).]

It follows from all of these provisions that if the collective redundancy is related to any employment concluded with any employer – other than any public administration employer or employer operating sea vessel – for an indefinite duration or any employment terminated by the employer before the expiry of the fixed term, then the collective redundancy falls within the scope of the European Union community law. In this regard it is irrelevant whether the employment contract was concluded for the purpose of temporary agency work.<sup>34</sup> Thus no matter how problematic it would be and would increase the costs of temporary agency work as well in practice, the employment relationship for temporary agency work in itself should not be excluded from the scope of collective redundancy.

#### *Our Hungarian internal affairs – the codification questions related to Hungarian law*

There are three provisions which are not related to the European Union legal harmonisation but to

<sup>32</sup> Horváth, I. (2013), Op. cit., 188.

<sup>33</sup> Horváth, I. (2013), “Kölcsönzős előnyök?” (Agency Benefits?) HR Plusz HVG Kiadványok lapcsalád, 42-47.

<sup>34</sup> Horváth, I. (2015), Op. cit., 167-184.

the internal concordance of the Hungarian labour law regulation, and which three provisions make exclusively the termination of employment – beyond collective redundancy – “employer-friendly” in a manner that causes concern. Firstly, in contrast to the general rule of the LC, in case of termination by the temporary-work agency as employer, the justification obligation may be avoided in case of indefinite duration employment. For the purposes of the termination rules of the LC<sup>35</sup> termination of the assignment shall be construed as a reason in connection with the temporary-work agency’s operation [LC Section 220 (1)]. Since the user enterprise has no justification obligation specified by law towards the temporary-work agency as to why the user enterprise no longer wants the work of the temporary agency worker, therefore in fact for any reason and whenever the user enterprise no longer employs the worker assigned to it, the temporary-work agency may actually terminate the employment without justification. It only has to include this in the termination notice: the assignment of the employee had ceased. Apart from the case where the employee is assigned for a fixed term and this fixed term expires, the employee – by law – will not know “why” his/her employment was terminated. Secondly, the notice period is half of the shortest period of 30 days applicable according to the general rule (15 days) [LC Article 220 (2)]. And regardless of whether the temporary agency worker spends a longer period of time in employment relationship with the temporary-work agency – the chance of which is expressly supported by the fact that an employee may work up to five years at the same user enterprise – his/her notice period will not extend at all, in contrast to the statutory rules applicable to the traditional employment relationship.<sup>36</sup> This is an especially disadvantageous rule in terms of social security as well.

Thirdly, the eligibility to severance pay is regulated in an unfavourable manner as well – from the viewpoint of the employees who contracted for temporary agency work. In respect of this right one of the crucial right acquiring conditions is that the calculation of the time spent at the employer [LC Article 77 (2)] shall be applied with the difference that upon the determination of the eligibility of severance pay, the duration of the employment relationship during the last assignment shall be taken into consideration [LC Article 222 (5)]. Therefore, it does not matter if the employee spends at least three years – which gives rise to the eligibility for severance pay – in employment relationship at the temporary-work agency, when before the delivery of the termination notice – for the very purpose of avoiding paying the severance pay – the employee still gets assigned for several days.

In my opinion, all three statutory provisions raise the concern of negative discrimination. Notably, the discrimination based on other situation<sup>37</sup>, and within that it is based on the temporary agency worker status which is no longer specified in the Equal Treatment Act, as a characteristic which cannot be changed in the employee’s employment relationship in respect of his/her person. The violation of the requirement of equal treatment may be established between the temporary agency workers and the persons who – have are in comparable situation and - are engaged in any other type of employment relationship.

<sup>35</sup> LC Article 66 (2) An employee may be dismissed only for reasons in connection with his/her behavior in relation to the employment relationship, with his/her ability or in connection with the employer’s operations.

<sup>36</sup> LC Article 70 (1) The period of notice is thirty days.

(2) Where employment is terminated by the employer, the thirty-day notice period shall be extended:

- a) by five days after three years;
- b) by fifteen days after five years;
- c) by twenty days after eight years;
- d) by twenty-five days after ten years;
- e) by thirty days after fifteen years;
- f) by forty days after eighteen years;
- g) by sixty days after twenty years of employment at the employer.

<sup>37</sup> Act CXXV of 2003 on Equal Treatment and Equal Opportunity [Equal Treatment Act]; Section 8 t)