



Equal pay for agency workers – the Hungarian experience

Gábor KÁRTYÁS*

The key question of temporary agency work is agency workers' right for equal treatment. Although Directive 2008/104/EC (hereinafter: Directive) sets equality as the general rule, however, the numerous exemptions left many agency workers without the right to claim for equality. A good illustration is the Hungarian Labour Code of 2012, which not only makes use of the possible derogations, but in certain cases – the author argues – it goes beyond them. Due to the wide range of exemptions, agency workers with short term assignments can be easily excluded from the effect of the equal pay principle. Unfortunately, statistics show that such short term assignments dominate the Hungarian practice, since the average length of agency work assignment is around three-four months.

The exclusion of certain agency workers from equal pay without proper compensation also raises the question of unconstitutional discrimination since there is no objective justification for such a distinction between various groups of agency workers. The paper compares the Directive with the Hungarian regulations and explores what changes, if any, would affect the (equal) pay of agency workers.

1. The winding road to equal treatment of agency workers

Agency workers' right for equal treatment raises the theoretical issue whether the equal treatment principle shall apply to situations with two employees performing work of equal value but being employed by two different employers. The European Court of Justice (ECJ) and the Hungarian Constitutional Court gave a negative answer to this question. Although today both EU and Hungarian law guarantees agency workers' equality, however, the broad exceptions still keep this issue

* Assistant professor of Labour Law, Pázmány Péter Catholic University, kartyas.gabor@jak.pkke.hu

unresolved. Below I summarize the road leading to the acknowledgment of agency workers' right for equal treatment.

The ECJ declared in its *Lawrence*¹ and *Allonby*² decisions that there is nothing in the wording of Article 141(1) EC Treaty to suggest that the applicability of the equal pay provision is limited to situations in which men and women work for the same employer. However, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141 (1) EC Treaty. The work and the pay of those workers cannot therefore be compared on the basis of that provision.³ Such single source of differences in the working conditions may be the legislature, the parties to a collective agreement, or the management of a corporate group.⁴

Such narrow interpretation of Article 141 seems reasonable, however, it also means, that the ECJ opened the door for employers to circumvent the equal pay principle either by rehiring their previous employees through a temporary work agency or by outsourcing them to an independent undertaking. Given the growing spread of agency work and outsourcing services, the rulings raised serious doubts on the efficiency of Article 141.⁵ Also, the *Lawrence* and *Allonby* cases showed, that the acknowledgement of equal treatment of agency workers needed further legislation.

The Hungarian Constitutional Court first assessed the principle of equal pay in one of its early decisions in 1991. It did not exclude the comparison of employees working for different employers, but highlighted that the difference in wages is unconstitutional only if it is arbitrary or unreasonable. The different economic situation of two employers forms reasonable grounds to pay different wages. The opposite argument would be contrary to free competition and market economy, as employers would be obliged to pay the same wages irrespective of their economic stand or market position.⁶

There is no written rule in Hungarian law which would limit the principle of equal pay to comparisons within one employer. However, the ministerial reasoning of the previous Labour Code avoided the broad interpretation: “[...] it is not contrary to the regulation if employers in differing economic situations or operating in various spheres of the economy pay differing wages for employees performing the same job. In such cases the wage difference is not based on the employees' gender, age, race, national origin or union affiliation, but on the employers' different economic situation.”⁷

¹ C-320/00. *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*. [2002] ECR I-07325.

² C-256/01. *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services* [2004] ECR I-00873.

³ C-320/00, para. 17–18., C-256/01 para. 45–46.

⁴ C-320/00. Opinion of Advocate General para. 48–51.

⁵ Sandra FREDMAN: Reforming Equal Pay Laws. *Industrial Law Journal*, Vol. 37, No. 3, 2008. 199.; Iain STEELE: Tracing the Single Source: Choice of Comparators in Equal Pay Claims. *Industrial Law Journal*. Vol. 34. No. 4, 2005. 341.

⁶ Constitutional Court Decision 137/B/1991.

⁷ Ministerial reasoning of Act 16 of 2001 on the amendment of the Labour Code.

Cross-employer comparisons were left unregulated even in the unified anti-discrimination act in 2003.⁸ However the Counselling Body of the Equal Treatment Authority delivered a position paper in 2007, which was based on the ECJ's practice. It declared that only wages of employees employed by the same employer shall be compared, except if the difference in wages of workers performing work of equal value is traceable to one single source (e.g. legislation or collective agreement).⁹

Agency workers' right for equal pay was first introduced to Hungarian regulation way before the adoption of Directive 2008/104/EC on temporary agency work (hereinafter: Directive). Nonetheless the rules entering into force in 2006¹⁰ were the results of a compromise – called the “limited equal pay principle” – as equal pay applied only with two constrains. First, the claim for equal pay required certain time spent in continuous assignment, second, it applied only to certain elements of pay.¹¹ Thus the legislator did not acknowledge that the agency worker and the user's directly employed employee performing work of equal value would be comparable. By such declaration the oxymoron of the “limited equal pay principle” could not have been upheld. As Anne Davies put it, restrictions on equality make sense only from a pragmatic perspective but not from a principled standpoint.¹²

It is not surprising that the statistics of the National Employment Service show that the average length of assignments was much under the term required for equal pay (183 days). For instance, in 2009 an average assignment lasted 52 days, which was even shorter for blue collar workers (44 days) or workers employed for a fixed term (35 days).¹³ As a result the vast majority of agency workers were entitled to equal pay with the user's own staff only if the agency and the user guaranteed it voluntarily.

The further broadening of the equal pay principle was blocked by the Constitutional Court's decision in 2009, which found the “limited equal pay principle” in line with the Constitution.¹⁴ The Constitutional Court ruled that agency work's special construction forms a crucial difference from the standard employment relationship, thus, there is no constitutional requirement to pay wages equal to what the user's directly employed employee receives (at least not from the first day of the assignment). In the practice of the Constitutional Court the breach of the equal treatment principle may only be established if the different treatment applies to comparable subjects. It is settled case law that if the subjects fall under different legal regimes they cannot be considered comparable, thus, subjects in totally different legal situations cannot claim for equal treatment.¹⁵

⁸ Act 125 of 2003 on equal treatment and fostering equal possibilities.

⁹ Counselling Body of the Equal Treatment Authority position paper 2/2007.

¹⁰ See act 154 of 2005 on the amendment of the Labour Code.

¹¹ Personal basic wage, pay for extra work, pay for stand-by and call-on duties.

¹² Anne DAVIES: The Implementation of the Directive on Temporary Agency Work in the UK: a Missed Opportunity. *European Labour Law Journal*, Vol. 1., No. 3., (2010)317.

¹³ Unfortunately, no data is available on the lengths of assignments after 2011. National Employment Service 2006–2011. Statistics available at: https://nfsz.munka.hu/Lapok/full_afsz_kozos_statistika/stat_osszefogl_munkaero-kolcson_tevekeny.aspx

¹⁴ Constitutional Court decision 67/2009. (VI. 19.).

¹⁵ For instance, by the same logic civil servants of government offices and local governments falling under the scope of two different acts were found to be incomparable. See also Constitutional Court decisions 27/2001. (VI. 29.), 8/2011. (II. 18.) and 29/2011. (IV. 7.)

Note, that the reasoning of the decision is based on the differences of agency work and standard employment relationship, especially on the temporary nature of the former. Consequently, the longer the assignments are, the less the different treatment can be justified. The former Hungarian regulation was based on the same principle, which gradually opened the agency workers' claim for equal pay with the growing length of the assignment.

The issue of agency worker's right for equal pay was next approached in the implementation procedure of the Directive. That is what we turn to in the next chapter.

2. Acknowledging the principle of equal treatment

The Directive requires the equal treatment of agency workers and directly employed employees in the user company from the first day of the assignment.¹⁶ Such declaration acknowledges that if both workers perform work of equal value, then it is only the legal construction of their employment what differs but it cannot be a ground for different treatment. In other words, directly employed and agency workers became comparable.

The Directive defines the user's 'comparable worker' by a fiction. That is, the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.¹⁷ Accordingly, Act 1 of 2012 on the Labour Code (came into force on 1st July 2012, hereinafter: Labour Code) stipulates that during the assignment the same basic working and employment conditions must be provided for the agency worker as for the directly employed employee.¹⁸ This is clearly another legislative technique that used in the other atypical work directives¹⁹ which define the comparable worker.²⁰ It is yet to be seen whether the two approaches of equal treatment would result any difference in practice. One possible advantage of the agency work

¹⁶ On the story of the adoption of the Directive see: Kerstin AHLBERG: A Story of a Failure – But Also of Success. The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive. In: AHLBERG ET AL. (ed.): *Transnational labour regulation. A case study of temporary agency work*. Peter Lang Publishing, 2008.

¹⁷ Directive Article 5 (1). As for the draft legislation see: COM (2002) 701 final 5 (1).

¹⁸ Labour Code Article 219 (1).

¹⁹ Directives 1999/70/EC and 97/81/EC. Massimiliano DELFINO: Interpretation and Enforcement Questions in the EU Temporary Agency Work Regulation: An Italian Point of View. *European Labour Law Journal* Vol. 2., No. 3., (2011) 291–292.; DAVIES (2010) op. cit. 320–321.

²⁰ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final (hereinafter: Implementation Report), p. 6.; Report of the Expert Group “Transposition of Directive 2008/104/EC on Temporary agency work”, August 2011 (hereinafter: Expert Group Report) 17–18.

Directive's solution is that the equal treatment principle shall apply even in situations when there is no actual comparable directly employed worker at the user.²¹

The Directive limits the agency worker's right for equal treatment to the "basic working and employment conditions". Such category embraces working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.²² This list is supplemented²³ by the rules in force in the user undertaking on the protection of pregnant women and nursing mothers and protection of children, young people; and equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation.²⁴ Member States are not obliged to grant equal treatment in any other area not covered by the Directive. The importance of such limited equality might be well illustrated by the Hungarian regulation, which contains less favourable rules on agency workers as regards the termination of the employment relationship.²⁵

Apparently, equal treatment must be respected, irrespective of whether the given working conditions are prescribed by law, collective agreement or unilateral statement of the employer etc. The only requirement is that the given provision shall be generally binding and in force in the user undertaking. The mentioned basic employment and working conditions may vary in each and every user, thus, they might change during the employment relationship if the agency worker is assigned to different companies.²⁶

According to the Labour Code, basic working and employment conditions specifically include the regulations applicable to pregnant women and nursing mothers, the protection of young employees, protective rules on wages and other allowances and finally, the requirements of equal treatment.²⁷

All issues concerning working time listed in the Directive are missing. The reason probably is that elsewhere the Labour Code prescribes that during the assignment, the employer's rights and obligations relating to working time, rest periods and keeping records thereof shall accrue upon the user.²⁸ However, in my view, this does not mean that the agency worker would automatically fall under

²¹ Wiebke WARNECK: Temporary agency work – guide for transposition at national level. *European Trade Union Institute Report*, 117., 23. (hereinafter: ETUI Report)

²² Directive Article 3 (1) point f).

²³ It seems unreasonable that these elements are not listed as "basic working and employment conditions". Dagmar SCHIEK: Agency Work – from Marginalisation towards Acceptance? Agency work in EU Social and Employment Policy and the "implementation" of the draft Directive on Agency work into German law. *German Law Journal*, Vol. 05. No. 10, 2004. 1242.

²⁴ Directive Article 5 (1).

²⁵ Gábor KÁRTYÁS: Flexible separation: Termination of the employment contract in agency work. *Hungarian Labour Law E-Journal*, 2015/1. See hllj.hu

²⁶ ETUI Report, 18.

²⁷ Labour Code Article 219 (1–2).

²⁸ Labour Code Article 218 (4) point c).

the user's generally binding provisions in these fields. For instance, it is clear from the wording of the law that it is the user who is responsible for allocating annual leave. But it does not follow that the user's collective agreement prescribing extra days over the statutory amount of annual leave would be applicable to the agency worker. The law only regulates the exercise of employer's rights but not the scope of the collective agreement or other provisions. However, the Labour Code could be easily interpreted in accordance with the Directive, as the list of basic employment and working conditions is an exemplificative one (starting with the wording "specifically include"). Thus the list is open and the basic conditions of working time mentioned in the Directive (e.g. breaks, rest periods) shall be included.²⁹ Nonetheless, it would be desirable, both from the aspect of proper harmonisation and of practical considerations, to list the working time issues expressly as basic work and employment conditions.

As regards pay, the Labour Code interprets this term in the broadest way: it shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship.³⁰ In practice there is hardly any form of remuneration that would not fall under the scope of equal treatment. The ETUI also called for a broad interpretation of pay, following the ECJ's practice concerning Article 157 of TFEU.³¹ This calls for the agency's and the user's close cooperation, which is literally required by law.³² The user shall give all information on its remuneration system to enable the agency to respect the equal pay principle. Nevertheless, it is rather a delicate issue to oblige an employer to disclose information on its wage system to the agency. A Hungarian research showed that agencies often struggle to get the necessary information, as "user companies keep wage data confidential", holding their collective agreement to be a "private issue".³³

Finally, the Directive further broadens the scope of equal treatment by prescribing that agency workers shall be given access to the amenities or collective facilities in the user undertaking (in particular any canteen, child-care facilities and transport services) under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons.³⁴ The European Commission warned, that cases, when the different treatment is objectively justified, shall be exceptional and economic reasons (i.e. the cost of collective facilities) could never be considered as objective reasons justifying a difference in treatment.³⁵

²⁹ TAKÁCS, Gábor: A munkaerő-kölcsönzés. In: GYULAVÁRI, Tamás – HÖS, Nikolett – KÁRTYÁS, Gábor – TAKÁCS, Gábor: *A Munka Törvénykönyve 2012. Egységes szerkezetben állásfoglalásokkal és magyarázatokkal*. Budapest, Komplex Kiadó, 2012. 303.

³⁰ Labour Code Article 12 (2).

³¹ ETUI Report, 19

³² Labour Code Article 217 (3), (5). GYULAVÁRI, Tamás: Speciális foglalkoztatási formák. In: *A munkajog nagy kézikönyve*. Budapest, CompLex, 2008. 264.

³³ BERKI, Erzsébet – DUDÁS, Katalin – FARKAS, Judit: *Munkaerő-kölcsönzés. Egy rugalmas foglalkoztatási forma térnyerése és a szabályozás gyakorlati hatályosulása*. Manuscript. Budapest, 2003. 27.

³⁴ Directive Article 6 (4).

³⁵ See Implementation Report, 14.; Expert Group Report, 39.

The Hungarian regulation does not contain any such specific provision on collective facilities. However, it can be derived from the act on equal treatment that the agency worker cannot be denied to use such facilities only because of the legal form of his/her employment. Such different treatment needs objective justification.³⁶ Other interpretations argue that such collective facilities are to be considered as “wage”, thus, those also fall under the equal treatment provision.³⁷ The Labour Code enables the agency and the user to stipulate in their agreement a clause that non-wage benefits shall be provided to the employee by the user enterprise directly.³⁸ The counter value of such services can be deducted from the agency’s fee.

To sum up, the Directive and the Labour Code implementing its provisions fulfilled the role, which the courts trusted to legislation in the process of acknowledging agency worker’s right for equal treatment. The general rule of equality is declared both at EU and domestic level. Its importance should not be underestimated, even if equality is still limited to certain working conditions and weakened by many exceptions. The Hungarian legislator apparently did not want to go beyond the minimum level of harmonisation, thus, the domestic rules are not more favourable to employees.

Before assessing the exceptions of equal treatment, we turn to a glimpse into Hungarian agency workers’ wage levels. Unfortunately, from 2014 there is no official data available on average wage in the agency work sector. Nonetheless, between 2009 and 2013 – according to the statistics of the National Employment Service³⁹ – agency workers’ income level was significantly lower than the gross national average wage⁴⁰, though it was still higher than the statutory minimum wage.

1. Chart: Minimum wage and average monthly wage in the agency work sector and nationally (2009–2013)⁴¹

Data on wages (HUF, 1 euro circa 320 HUF in 2019)			
Year	Minimum wage	Average monthly wage of agency workers	National monthly average wage
2009	71,500	128,668	199,837
2010	73,500	123,412	202,525
2011	78,000	137,038	213,094
2012	93,000	141,693	223,060
2013	98,000	145,162	230,714

Agency workers earn significantly lower wages than the average employee, but if we consider that three-quarters of them are blue-collar workers – and half of them work in positions requiring no qualifications – wage levels do not seem particularly low. Nonetheless, if the principle of equal pay

³⁶ Act 125 of 2003 Article 8.

³⁷ KOZMA, Anna: A munkaerő-kölcsönzés. In: KARDKOVÁCS Kolos (szerk.): *A Munka Törvénykönyvének magyarázata*. Budapest, HVG-Orac, 400. The Equal Treatment Authority also follows this interpretation, see decisions EBH/449/2013 and EBH/273/2011.

³⁸ Labour Code Article 217 (2).

³⁹ Statistics available at: https://nfsz.munka.hu/Lapok/full_afsz_kozos_statisztika/stat_osszefogl_munkaero-kolcson_tevekeny.aspx

⁴⁰ Central Statistics Office, http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_qli012b.html

⁴¹ For the source of the data see footnote 40 and 41

applied without restrictions, it would certainly have a positive effect on the wage of agency workers. As Hungarian labour law makes use of all possible derogations in the Directive, agency workers will most probably continue to earn less than comparable directly employed employees. Next we analyse the cases when the equality principle does not apply.

3. Exceptions from equal treatment

Using all possible derogations of the Directive, there are four exceptions to the main rule in Hungarian labour law, which call for serious attention in practice. On the one hand, in three cases the Labour Code requires the application of the principle of equal pay only from the 184th day (after the first half year) of the assignment:

- a) if the employment contract is established for an indefinite duration, and the employee receives pay in the absence of any assignment;
- b) the employee is a long-term absentee from the labour market (as defined by a separate act);
- c) the employee is assigned to a business association under the majority control of a municipal government or public benefit organization, or a registered public benefit organization.

When calculating the 184 days limit, repeated or prolonged assignments shall be counted together, irrespective of whether it was based on contracts concluded with the same or different agencies. On the other hand, parties can deviate from the principle of equal pay in a collective agreement.⁴² Below I assess the possible exceptions in details.

3.1. *Exception of permanent employment*

According to the first exception, regulations on wage, other benefits and equal treatment shall be applied from the 184th day of the assignment in case of agency workers contracted for indefinite duration, who are also paid between assignments.⁴³ Both terms basically depend on the employment contract concluded by the employee and the agency. The Directive considers the joint existence of these two terms as an advantage, compensating the agency worker for not being entitled to equal pay.⁴⁴ However, the interpretation of “permanent” employment in the text of the Directive is rather blurry. In my view, permanent is not clearly equivalent of indefinite duration employment, as it could

⁴² Labour Code Article 219 (3–4) and Article 222.

⁴³ Labour Code Article 219 (3) point a).

⁴⁴ Directive Article 5 (2).

also cover a fixed term contract concluded for a longer period. The terms “open-ended” or “indefinite duration” would have made the wording obvious.⁴⁵

As a result, it is left to the Member States to decide what shall be covered by the term “permanent” employment. However, there is an implied constrain in the definitions of the Directive. Article 3 makes it clear that the agency worker may work only temporarily under the supervision and direction of the user. Thus the “temporary” assignments must be shorter than the “permanent” employment required for the exclusion of the equal pay principle. For instance, if a Member State considers a one year long assignment to be temporary, then a permanent employment shall be longer than one year. What is more, the aim of the Directive calls for an interpretation that the permanent employment must be much longer than one temporary assignment. Agency workers can only be really compensated for the exclusion of equal pay by having a long lasting employment relationship which embraces more assignments and by being paid also when not assigned to any user.

It clearly seems from the Hungarian regulation that the legislator did not follow this interpretation.⁴⁶ If the contract is open-ended and the agency obliges itself to pay wage for the breaks between assignments, the principle of equal pay can be sidestepped for the first half year of the assignment. This also means that the employee can be hired out for a lower price to the user company for short term scenarios. Note that the law sets no minimum for the wage to be paid between the assignments, leaving this up to the parties’ agreement.⁴⁷ As the law requires only indefinite but not long lasting employment, the comparative advantage of long term employment and the pay between assignments can easily be lost.⁴⁸ Such a situation occurs when the employee is dismissed during the first months despite an open-ended employment relationship, or if the employee receives only a symbolic pay for the idle time or in the case of consecutive assignments without breaks.

Unfortunately, the Labour Code does not provide any compensation to the employee in such cases, although it is specifically foreseen in the Directive. It prescribes that the Member States shall take proper measures in order to prevent misuses concerning exemptions from the equal treatment principle.⁴⁹ It must be added, that the exclusion of certain agency workers from equal pay without proper compensation also raises the question of discrimination, since there is no objective justification for such a distinction between agency workers.⁵⁰

⁴⁵ As a comparison, directive 1999/70/EC on fixed term work, clause 3 (2) clearly stipulates that permanent worker means a worker with an employment contract or relationship of indefinite duration.

⁴⁶ Nor the Implementation Report or the Expert Group Report was aware of this problem.

⁴⁷ KÁRTYÁS, Gábor: Csorba kiegyenlítés: a kölcsönzött munkavállalók egyenlő bánásmódhoz való joga az új munka törvénykönyve után. *Esély*, 2013/3. 41–42.

⁴⁸ HORVÁTH, István: Így harmonizálunk mi. Az új Munka Törvénykönyve munkaerő-kölcsönzésre vonatkozó – az EU-követelményekre is figyelemmel – megállapított szabályairól. *Magyar Munkajog E-folyóirat*, 2014/1. 164–165. See hllj.hu

⁴⁹ Directive Article 5 (5).

⁵⁰ Fundamental Law Article XV.

Should the agency worker receive lower pay than his/her directly employed colleague performing work of equal value merely because the agency worker has the promise of permanent employment, and a small amount of pay for the break periods between assignments, which might never occur, such practice may also be objected based on the prohibition on abuse of rights.⁵¹ In my view, the agency shall not stipulate terms in the employment contract only to escape the principle of equal pay. However, in a labour dispute it is for the agency worker to prove, that the agency abused the exemption of permanent employment.

Hungarian regulation also raises problems concerning the twin-terms temporary and permanent. As the maximum period of assignments is five years,⁵² the permanent employment required for the exemption from the equal pay principle shall be even longer. If not, than no real advantage compensates the agency worker for being excluded from equality which would contradict both the Directive and the Fundamental Law.

3.2. Exceptions in regard to the employee and the user company

According to the second exception, the agency is exempted from the principle of equal pay during the first 183 days, if the employee is considered to be permanently absent from the labour market. This status is defined by a separate law.⁵³ Different exemptions from common charges are provided for these employees in order to enhance their employability. Their exemption from under the equal pay principle is based on the scope of the Directive, since it does not apply to employment under a specific public or publicly supported vocational training, integration or retraining programme.⁵⁴

The third exception applies if the user company is a business association in the majority ownership of a local municipality or a non-profit company. Supposedly, the legislator's intention was to provide benefits for the non-profit user company. However, the Directive only excludes from its scope organisations without business activity, which is not equivalent to the non-profit status. The Directive specifically stipulates that its scope covers all enterprises, whether or not they are operating for financial gain. Moreover, it cannot be claimed, that a business association in the majority ownership of a local municipality is necessarily a non-profit association. Finally, there are no state-funded labour market programs connected to these user companies, which could otherwise be the basis for the

⁵¹ Labour Code Article 7.

⁵² Labour Code Article 214 (2).

⁵³ Act 123 of 2004 Article 1 (2) point 1.

⁵⁴ Directive Article 1 (3).

exemption from the principle of equal pay.⁵⁵ Thus, this later exemption is contrary to the Directive.⁵⁶ It is also unclear, why the legislator wanted to favour this specific group of users.

3.3. Potential derogations in collective agreements

Finally, the collective agreement may deviate from the principle of equal treatment to the detriment of the employee.⁵⁷ Thus, the parties concluding the collective agreement are free to restrict the application of the principle of equality even for a longer period than 183 days. The level of such collective agreement is not prescribed, thus, even a workplace level agreement may set aside the equal pay regulations. In Hungarian labour law the collective agreement of the agency is applicable to the agency worker, as the employment relationship stands with the agency.⁵⁸ Thus, the deviating rules shall be stipulated in the agency's collective agreement and not in the user's.

Nevertheless, according to the Directive, such deviating regulations must “respect the overall protection” of agency workers.⁵⁹ Therefore, the principle of equal pay may only be set aside in case of a proper compensation. Collective agreements cannot limit themselves to setting levels of pay lower than those that equal treatment would require: they must be balanced by other provisions favourable to agency workers.⁶⁰ The ETUI also emphasised that a “package approach” is needed, meaning that one benefit having being cut, another must be raised.⁶¹ At this point Hungarian law is not in full conformity with the Directive, as this guarantee is missing from the Labour Code. This is highly problematic, as the European Commission expressed its will to closely monitor compliance with this requirement.⁶²

It is worth mentioning, that union coverage among Hungarian agency workers is extremely low, and most if not all agencies have no bargaining partners to conclude such agreements. Up to the author's knowledge, there is no collective agreement in force in any agencies. A sector level collective agreement might seem a better alternative in the future, but it could also be undermined by the low union representation, and naturally it would also require close cooperation of agencies.

⁵⁵ Directive Article 1 (1) and (3).

⁵⁶ See also: HORVÁTH (2014) op. cit. 150–151.

⁵⁷ Labour Code Article 222.

⁵⁸ Labour Code Article 279 (3). BERKE, Gyula – KISS, György: *Kommentár a munka törvénykönyvéhez. A munka törvénykönyve magyarázata*. Budapest, CompLex, 2012. 537.; TAKÁCS (2012) op. cit. 310–311.

⁵⁹ Directive Article 5 (3).

⁶⁰ Expert Group Report, 24.

⁶¹ ETUI Report, 24.

⁶² Implementation Report, 8.

4. Summary: Are exemptions stronger than the main rule?

Temporary agency work already had a history of a decade in Hungary, when the 2012 Labour Code was passed. However, some main concerns about the institution still seem to be unanswered. The harmonisation of the Directive guaranteed agency workers' right for equal pay only in principle. Even though the Hungarian legislator acknowledged that the employment's different legal construction alone cannot constitute differences in pay, the Labour Code made use of all possible exemptions offered by the Directive.

As a result only a minority of agency workers fall under the scope of the equal treatment principle. This is especially true for employees performing short term assignments not exceeding half a year. Unfortunately, statistics show that such short term assignments dominate domestic practice, since the average length of assignments is around a few months. Apparently Hungary is one of the Member States where – as the Commission put it – “the application of the Directive has no real effects upon the improvement of the protection of temporary agency workers.”⁶³

On the other hand, the current rules on equal treatment raise questions related to proper legal harmonisation as well as the constitutional prohibition of discrimination, thus, might be the subject of further amendments. Therefore, their application also entails inherent legal risks for the employers – agencies and users alike.

⁶³ Implementation Report, 19.