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BITTE, KLETTERE AUF DIESEN BAUM! EINIGE ÜBERLEGUNGEN ZU HINDERNISSEN, DIE DIE ANGEHÖRIGEN GEFÄHRDETER GRUPPEN VOM TRETEN AUF DEN ARBEITSMARKT VERHINDERN

Zusammenfassung:

„Die verlorene Generation“, „die vernarbte Generation“, „wirtschaftliche und soziale Not“ – diese Ausdrücke kennzeichnen einige Dokumenten der Internationalen Arbeitsorganisation und der Europäischen Kommission, die sich mit den Fragen der Beschäftigung Jugendlicher befassen. Diese trostlosen Ausdrücke sind leider nicht nur eine übertriebene Rhetorik, weil die Arbeitslosenquote unter Jugendlichen dauernd und beträchtlich hoch und deren Lage auf dem Arbeitsmarkt instabil sind. Die durch die Wirtschaftskrise verursachten Entlassungen und Vermehrung von unsicheren Beschäftigungsformen treffen die Jugendlichen am meisten. Dieser Beitrag untersucht (auch andere) Hindernisse der Beschäftigung auch jener Jugendlichen, die einer oder mehreren sog. „gefährdeten Gruppen“ gehören und bietet Kommentare über verschiedene Maßnahmen, die zum Entfernen dieser Hindernisse unternommen sind. Der Begriff „gefährdete Gruppe“ wird auch erörtert, mit besonderer Rücksicht auf die behinderten Personen. Die Autorin vertritt die Auffassung, dass die Ausbildungspolitik, Arbeitsrecht und Arbeitsmarkt zusammen mit sozialen Schutzmaßnahmen sich gegenseitig ständig verstärken sollen, und deren Interaktion mit einer rechtsschützenden Heiligen Dreifaltigkeit und nicht mit einem Bermuda Dreieck resultieren sollte, in welchem die Rechte mysteriös verschwinden. Ungarn dient in dieser Arbeit als Fallstudie, welche auf die Rolle der Hard Law- und Soft-Law-Maßnahmen, der aktiven und passiven Arbeitsmarktpolitik zum Zweck der Überwindung von Ungleichheiten, aber auch auf ihre Potentialen und Begrenzungen hinweisen sollte. Darüber hinaus bietet die Autorin Kommentare hinsichtlich der Schwierigkeiten, die auf der Suche nach der Arbeit erscheinen, wie auch nach der Beschäftigung. Im Beitrag wird auch die Wichtigkeit der Maßnahmen zum Ausdruck gebracht, die den Forderungen des Arbeitsmarktes entgegenkommen und gleichzeitig besondere Bedürfnisse der gefährdeten Gruppen in Betracht nehmen.

Schlagwörter: gefährdete Gruppen, Jugendlichen, Behinderung, Schwangerschaft, soziale Inklusion, Ausbildung, Beschäftigung, Ungarn, Empower Project.

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Original scientific paper
UDK: 349.2:331.533(439)
331.5

TEMPORARY AGENCY WORK IN THE EUROPEAN UNION – THE EXPERIENCES OF THE IMPLEMENTATION OF DIRECTIVE 104/2008/EC IN HUNGARY

Abstract: Temporary agency work is a type of non-traditional form of employment; its regulation raises wide-ranging problems concerning legal policy, legal dogmatics and legislation at the level of both the European Union and the individual Member States. This study introduces the development of the regulation pertaining to temporary agency work in the European Union and in Hungary so that it could be compared to the regulation of temporary agency work of other Member States.

Directive 104/2008/EC of the European Union lays down the basic rules pertaining to temporary agency work which Member States have to transpose into their own legal order. This study describes and analyses these provisions by placing the steps of law harmonization and issues concerning the legislation on temporary agency work in Hungary and EU requirements side by side.

Key words: temporary work, Hungarian Labour Code, discrimination, EU directive on temporary work

1. TEMPORARY AGENCY WORK IN GENERAL

1.1. THE CONCEPT OF TEMPORARY AGENCY WORK, ISSUES CONCERNING TERMINOLOGY

The legal construct of temporary agency work is a characteristic type of employment method deviating from traditional labour relations.¹ Temporary agency work is a type of employment which – as a main rule – is for a definite, usually rather short, period of time and in which the employee establishes an employment relation with an employer who is exclusively or at least basically engaged in temporary agency work and the employee's performance is utilised by a third party who exercises employer's rights in spite of not being in employment relationship with the employee.²

There are various terms referring to temporary agency work in the legal instruments of the Member States of the European Union and in the special literature of labour law. The English term – which is generally accepted – does not precisely express the phenomenon. The term 'temporary work' does not in itself refer to the legal transaction – actually a realization technique – through which employment is realized. Thus the acceptance of the term 'temporary work' needed a kind of 'general agreement' within the Union. In 1982 Member States clearly defined that the construct of 'temporary work' is a tripartite employment relationship which is realized on the basis of a 'triangular employment relationship'.³

The French expressions 'travail temporaire' and 'travail intérim' are no better either. Thus this legal institution has to be defined and circumscribed in detail by enumerating the function of each actor in the Code du Travail.⁴ Almost every country applies a similar term so even countries regulating this construct have to define the term more precisely. For instance, the Spanish terms 'trabajo temporal' and 'trabajo interino', the Italian 'lavoro interinale' or the Portuguese 'trabalho temporario' do not contribute too much to the understanding of temporary agency work. The terms 'Temporärarbeit' and 'Leiharbeit' are used in German-speaking areas and the expression 'Arbeitnehmerüberlassung' is used even in the title of both the German and the Austrian relevant statutes.

1.2. TEMPORARY AGENCY WORK IN THE MEMBER STATES OF THE EUROPEAN UNION

Temporary agency work appeared sporadically though not isolatedly – with only a little difference in time period in the particular Member States – at the end of the 1960s and at the beginning of the 1970s.⁵ This method was beneficial for all the three actors. Since the general legal norms of labour law were the legal expressions of the employment methods known then, it

¹ Blanpain 1993, 4–6.

² Kiss 1999, 1.

³ Kiss 1999, 7.

⁴ Kiss 1997, 4.

⁵ Studies and monographs first dealt with this topic in the mid-60s, although European special labour law literature studied it more extensively only later. Müller 1988.

seemed obvious to find a special solution to cases in which enterprises had to employ workers in an extraordinary situation for a relatively short period of time. Utilizing the service of a third party for consideration and only 'using' the employee of this third party was a suitable solution. This solution proved to be beneficial – and even in the lack of special advantages – self-evident or the only solution.⁶ Temporary work agencies which were merely established to lend employees in an employment relationship with them to the users of the employees' services sprang up to meet the demand.⁷

However, the relatively quick spread of temporary work agencies led to social and legal problems. Social tension arose when trade unions – due to the lack of regulation – demanded the prohibition or at least the restriction of this method in more and more countries to protect workers employed in the traditional way.⁸

2. RULES OF TEMPORARY AGENCY WORK IN THE EUROPEAN UNION

2.1. ATTEMPTS TO REGULATE TEMPORARY AGENCY WORK

Attempts to regulate temporary agency work go back to the beginning of the 80s, nevertheless Commission proposals failed one after the other due to the veto of a particular Member State.⁹ Legislation could only be adopted in the field of safety and health at work when Directive 91/383/EC on the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship was adopted. Representatives of the ETUC, the UNICE and the CEEP started negotiations in May 2000¹⁰ on the stipulation of the minimum requirements of temporary agency work at Community level, however, negotiations were closed without yielding any result after twelve months.¹¹ Finally, by utilizing the results of the negotiations conducted with the social partners, the Commission adopted the proposal for a directive on working conditions for temporary workers in March 2002,¹² which was amended¹³ in November 2002¹⁴.

2.2. EU NORMS PERTAINING TO TEMPORARY AGENCY WORK

When introducing the EU norms pertaining to temporary agency work, the periods before and after 2008 should be studied separately. Until November 2008 the concept of temporary

⁶ Kiss 1999, 7.

⁷ See Temporary... 1985, 8–13.

⁸ Kiss 1999, 9.

⁹ Blanpain 2001, 249.

¹⁰ On the negotiations (and the causes of their failure) see Beirmaert 2004, 297.

¹¹ Borbély 2004, 188.

¹² COM (2002) 149 final, 2002/0072(COD)

¹³ Blanpain 2001.

¹⁴ COM(2002) 701 final, 2002/0072(COD), on the differences between the two proposals see Borbély 2004, 189.

agency work and some relevant provisions (pertaining to special temporary agency work falling within the regulatory scope of directives) were contained in Directive 91/383/EEC on the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

It should be emphasized that apart from these directives there were no effective detailed rules pertaining to temporary agency work and although these two directives contained the concept of temporary agency work, they only laid down provisions concerning health and safety at work and cross-border temporary agency work.

Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work was adopted only after lengthy negotiations full of argumentation in 2008. The positions concerning temporary agency work taken by the legislator, the trade unions and the employers, the conflicting interests and different approaches together with their changes can all be clearly noticed in this long process.

2.3. THE DEVELOPMENT OF THE REGULATION PERTAINING TO TEMPORARY AGENCY WORK IN HUNGARY

The development of the Hungarian regulation of temporary agency work clearly shows the possibilities of legislative reactions to atypical forms of employment and the collision of various arguments of legal policy. By applying existing labour law rules, the actors of the market created the construct of lending out employees in the 90s, so temporary agency work existed even with the lack of special statutory instruments. The question as to whether there is a need for the regulation of temporary agency work and if yes with what content arose with regard to this situation and the silence of statutory instruments.

In 2001 the Hungarian legislator decided to regulate temporary agency work at the level of statutes. The concept of temporary agency work existed in the norms of the European Union and also in the national laws of the Member States at that time, but the Hungarian legislator could shape this legal institution within broad limits due to the lack of detailed requirements imposed by EU directives. Thus the question as to how 'flexible' the rules should be or to what extent they should 'serve security' was proper to arise in the course of regulating temporary agency work. The codification of temporary agency work in 2001 was realized in the spirit of flexibility and it was emphasized that temporary agency work is an atypical form of employment which needs a more flexible set of rules. The rules of the time reflected a clear conception: the much lower level of employee protection at the termination of employment and the unrestricted nature of fixed term employment indicated that this kind of labour relationship helps the employing organization to better conform to market demands. This codification was suitable for creating a sector engaging in this activity (which was proved by statistics). However, the concept of flexibility used in the reasoning of the act gave rise to misunderstanding as temporary agency work in itself does not need 'flexible regulation' and it is a further issue whether the employer utilizing this service can effectively satisfy his labour force demand.

It was not a surprise then that the obvious purpose of the legislator (and then the increase in the number of temporary agency workers) triggered the fierce opposition of workers' inter-

est groups, which led to a wave of law amendments some years later. A closer look at the amendments pertaining to temporary agency work adopted after the codification shows that nearly all elements of the amendments served the protection of temporary agency workers. Such a substantial change within a couple of years cannot exclusively be attributed to the stronger or weaker prevalence of the various interests but rather to the fact that during the codification the legislator failed to provide a clear guidance concerning the purpose of temporary agency work. Had this happened, the organs applying law could have noticed improper practices and social partners would not have been at a loss either. The lack of guidance was obviously the hotbed of improper practices injuring the interests of workers. However, when amending the law, the legislator failed to go back to the root of the problem (namely failed to declare its position) but adopted several statutory instruments to address the anomalies.

Following the EU regulation of temporary agency work, in the course of meeting the obligation of transposition, the legislator amended Act XXII of 1992, the old Labour Code, by adopting Act CV of 2011 as of 1st December 2011, but it was soon replaced in December 2011 by Act I of 2012, the new Labour Code.

Act I of 2012, the new Labour Code basically took over the solutions created in the course of the above process of law harmonization building its concept on former domestic solutions, but the new code contains far fewer detailed provisions. Just for the sake of comparison: temporary agency work was regulated by fifteen lengthy sections (with several subsections due to the amendments) in the old Labour Code, while it is regulated by eight sections containing much fewer subsections in the new one. This fact together with the provisions of the new Labour Code allowing derogation enables the application of temporary agency work within a flexible framework in Hungary, taking also into consideration the possibilities of derogation allowed by EU regulation.¹⁵

Striving for flexibility in the new Labour Code is well demonstrated by the regulation of the termination of temporary work employment relationship and the whole legislative process related to it. The old Labour Code laid down special provisions pertaining to the termination of temporary work employment relationship and totally excluded the general rules in respect of terminating this legal relationship. In contrast, the new Labour Code regulates the termination of temporary work employment relationship in a totally different manner: the general rules of termination included in Sections 63-85 of the Labour Code are applicable to this legal relationship as well with the special provisions set forth in Section 220 (in its six subsections). This technique essentially differs from the former solution and the relatively small number of derogations moved the termination of temporary work employment relationship closer to the termination of general employment relationship compared to the former situation. However, this strive for flexibility in the practice of temporary agency work is well characterized by the fact that the text of the new Labour Code adopted by Parliament (substantially breaking the above principles) was modified by the legislator before its commencement by inserting a special provision pertaining to the reasoning of the termination of temporary work employment relationship and a special provision pertaining to the calculation of severance pay.¹⁶

¹⁵ Sections 214-222 of the Labour Code.

¹⁶ Act LXXXVI of 2012 on the amendments and special provisions concerning the commencement of Act I of 2012.

3. DIRECTIVE 2008/104/EC ON TEMPORARY AGENCY WORK AND THE EXPERIENCES OF THE REGULATION (HARMONIZATION) OF TEMPORARY AGENCY WORK IN HUNGARY

3.1. PROVISIONS STIPULATING THE SCOPE OF THE DIRECTIVE

The 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.¹⁷

The Directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.¹⁸

Member States may, after consulting the social partners, provide that this Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.¹⁹

3.2. PROVISIONS ABOUT DEFINITIONS

Article 3 paragraph (1) of the Directive stipulates the meaning of the key terms for the purposes of the Directive. Even when introducing the text of the Directive, emphasis should be placed on the fact that definitions are of great importance in respect of assessing Hungarian legislation; the Directive defined temporary agency work as a temporary activity and this element of the concept is fully adhered to in the defining provisions:

'Temporary-work agency' means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there *temporarily* under their supervision and direction.

'Temporary agency worker' means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work *temporarily* under its supervision and direction.

'User undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works *temporarily*.

'Assignment' means the period during which the temporary agency worker is placed at the user undertaking to work *temporarily* under its supervision and direction.²⁰

Following the transposition of the Directive, definitions are also among the first provisions of the law pertaining to temporary agency work.²¹ For the purposes of the Act temporary agency work means when an employee is hired out by a temporary agency to a user enterprise for re-

¹⁷ Article 1 paragraph (1).

¹⁸ Article 1 paragraph (2).

¹⁹ Article 1 paragraph (3).

²⁰ Article 3 paragraph (1).

²¹ Sections 214-217 of the Labour Code.

munerated temporary work, provided there is an employment relationship between the worker and the temporary-work agency (placement).²² There has to be an employment relationship between the employer hiring out the worker and the worker. This is the feature distinguishing it from the work of employment agencies (job centres), in which case the employment contract is concluded between the employer employing the employee and the employee performing work, there is no employment relationship between the job centre and the employee. This is defined in the legal concept of private employment agency work, according to which employment agency work means a set of services aimed at facilitating the meeting of those looking for and offering jobs with a view to establishing an employment relationship.

The existence of an employment relationship is not enough in itself, it has to be created between the parties 'for the purpose of hiring out', a provision of the contract to this effect is an essential element of the agreement between the assigning employer and the employee. A further distinguishing feature of the concept is that there is consideration for the assignment. This consideration includes the wage of the temporary agency worker together with its taxes and social insurance rates, expenses related to placement (travelling, accommodation etc.) and the fee of placement.

Temporary-work agency is any employer who places an employee, with whom it has an employment relationship, under contract to a user enterprise for temporary work supervised by the user enterprise.²³

User enterprise is any employer under whose supervision the worker performs temporary work.²⁴

Temporary agency worker is a worker with a contract of employment or an employment relationship with a temporary work agency with a view to being assigned to a user enterprise to work temporarily, where the employer's rights are exercised jointly by the temporary work agency and the user enterprise.²⁵

The placement of the employee between the subjects is the assignment, in the wording of the Act assignment is when the temporary agency worker is placed at the user enterprise to work temporarily.²⁶

No essential difference can be noticed between the definitions of the concepts in Hungarian law and in the Directive, so it is quite surprising that under the Hungarian Act the duration of assignment cannot exceed five years, including any period of extended assignment or re-assignment within a period of six months from the time of termination of his/her previous employment, irrespective of whether the assignment was made by the same or by a different temporary-work agency.²⁷ The duration of assignment was not part of the legal concept of temporary agency work in Hungarian labour law from 2001 to 2010. Provisions pertaining to temporary agency work did not even refer to how long the worker may be employed continuously at

²² Point a) of Subsection (1) of Section 214 of the Labour Code.

²³ Point b) of Subsection (1) of Section 214 of the Labour Code.

²⁴ Point c) of Subsection (1) of Section 214 of the Labour Code.

²⁵ Point d) of Subsection (1) of Section 214 of the Labour Code.

²⁶ Point e) of Subsection (1) of Section 214 of the Labour Code.

²⁷ Subsection (2) of Section 214 of the Labour Code.

the user enterprise (the law only provided for the requirement of equal treatment in the case of the assignment exceeding a certain time limit). However, each definition of the Directive on temporary agency work stipulates that temporary agency work is temporary. It should be emphasized that the EU Directive does not specify the period of time to be regarded as temporary. The Hungarian legislator defines the duration of assignment to be five years. As regards the application of this five-year rule, it is not the actual performance of work on the side of the worker that counts, but the fact that under the agreement between the temporary-work agency and the user enterprise there existed the possibility of the performance of assignment at the user enterprise on the basis of employment relationship regardless of the actual performance. Obviously, the assignment is an instruction by the temporary-work agency; it can unilaterally terminate it at any time, in which case the application of the six-month rule is the obligation of the temporary-work agency. This kind of solution under Hungarian law raises the question as to how the concept of 'temporariness' in the Directive can be reconciled with the fact that the employee may be assigned (to the same employer) for five years; this solution is named a toothless lion even by the most moderate.²⁸

3.3. REVIEW OF RESTRICTIONS OR PROHIBITIONS ON TEMPORARY AGENCY WORK

Article 4 of the Directive, entitled Review of restrictions or prohibitions, imposes the obligation of reviewing Member State provisions of a public law nature (such as the registration of temporary-work agencies and other conditions of temporary agency work).

Prohibitions or restrictions on the use of temporary agency work can 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.²⁹

By 5 December 2011, Member States had to, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.³⁰

These provisions are without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary work agencies. The Member States had to inform the Commission of the results of the review by 5 December 2011.³¹

The issue of the restrictions on temporary agency work in the Member States was raised by the provision of the old Labour Code under which only undertakings having a head office in Hungary were allowed to engage in temporary-work agency activities. In its Order of 16 June 2010³² the Court of Justice for the first time decided on a Hungarian labour law issue, namely on an issue concerning a provision of the old Labour Code, when it declared that the requirement imposed on temporary employment undertakings to have a head office in the territory of Hun-

²⁸ Kártyás 2014, 2.

²⁹ Article 4 paragraph (1).

³⁰ Article 4 paragraph (2).

³¹ Article 4 paragraphs (4) and (5).

³² Case C-298/09. RANI Slovakia s. r. o. v Hankook Tire Magyarország Kft.

gary to be allowed to engage in temporary agency work violated the right to the freedom to provide services.

3.4. THE PRINCIPLE OF EQUAL TREATMENT

Article 5 providing for equal treatment is undoubtedly the most frequently analysed part of the Directive, which may also be regarded as its essential part. The requirement of equal treatment appears in the Directive as a strict main rule and in the exemptions to the main rule:

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.

For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:

(a) protection of pregnant women and nursing mothers and protection of children and young people; and

(b) 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; must be complied with as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.³³

There are three exemptions to the principle of equal treatment allowed for the Member State regulations under the Directive:

As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph (1) where temporary agency workers who have a permanent contract of employment with a temporary-work agency (permanent employees) continue to be paid in the time between assignments.³⁴ The term permanent employee referred to an employee in a long-term employment situation and not necessarily one with an employment contract for an indefinite period of time.³⁵

Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph (1).³⁶

Provided that an adequate level of protection is available for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph (1).

³³ Article 5 paragraph (1).

³⁴ Article 5 paragraph (2).

³⁵ See for instance Kártyás 2009.

³⁶ Article 5 paragraph (3).

Such arrangements may include a qualifying period for equal treatment. The arrangements referred to in this paragraph shall be in conformity with Community legislation and shall be sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations. In particular, Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in paragraph (1). Such arrangements shall also be without prejudice to agreements at national, regional, local or sectoral level that are no less favourable to workers.³⁷

Several authors even questioned whether there could be temporary agency work after offering equal pay.³⁸ The Commission dealt with this issue in detail in its proposal of 2002. The argumentation of the body is not theoretical at all; it rather intended to prove that the equivalence principle is not prejudicial to the interests of temporary employment agencies.³⁹ In addition to these arguments, the Commission highlighted that the connection between the introduction of the equivalence principle and the set-back of the temporary agency work sector is not justified by practical experience.⁴⁰ There are marked differences in the opinions concerning the effect of the rules thus the Hungarian legislator (also) found itself in a difficult situation when deciding on the rules to adopt.

The requirement of equal treatment was part of the Hungarian law even before the transposition of the Directive but it prescribed the application of equal treatment only after a certain period of time in respect of all elements of pay. The retention of this situation, that is the creation of the possibility to enjoy the above exemptions, was the prime aim of legal policy in the course of the implementation. The currently effective Labour Code prescribes the application of the principle of equal treatment as follows: as the main rule the basic working and employment conditions of temporary agency workers have to be, for the duration of their assignment, at least those available to the workers employed by the user enterprise under employment relationship.⁴¹ However, as regards the payment of wages and other benefits, the provisions on equal treatment have to apply as of the one hundred and eighty-fourth day of employment at the user enterprise with respect to any worker who is engaged with a temporary-work agency in an employment relationship established for an indefinite duration and who is receiving pay in the absence of any assignment to a user enterprise.⁴²

In order to demonstrate that the rules of temporary agency work have been raising further and further issues of statutory interpretation, it has to be noted that one of the most frequently debated questions of the application of the law on temporary agency work is whether a governing agreement on temporary agency work under which temporary agency workers are not entitled to any pay in the period between assignments can be achieved or not. The new Labour Code does not *expressis verbis* provide for such a construct and the legislator did not expressly lay down provisions to this effect either. In practice this construct is deduced from the joint interpretation of several provisions of the Act and, according to the argumentation in line with this position, an agreement on waiving the employee's claim to his wages can be made on the

37 Article 5 paragraph (4).

38 See Kártyás 2009.

39 COM (2002) 149 final Explanatory Memorandum 30-34.

40 COM (2002) 149 final Explanatory Memorandum 30-34.

41 Subsection (1) of Section 219 of the Labour Code.

42 Subsection (3) of Section 219 of the Labour Code.

grounds of Section 163 of the Labour Code. It can be noted about the construct that no such express intention of the legislator is referred to in the reasoning of the Labour Code and the assessment of such a situation from the aspect of social security may be even more problematic than it is from the aspect of labour law.

3.5. ACCESS TO EMPLOYMENT, COLLECTIVE FACILITIES AND VOCATIONAL TRAINING

Article 6 of the Directive provides for the information of temporary agency workers (on vacant positions). This Article also prohibits and by doing so protects temporary agency workers from the temporary-work agency charging any fee for or prohibiting the conclusion of a ('permanent') employment relationship with the user undertaking. Further, this Article provides for the access to services available at the user undertaking (on the grounds of equal treatment).

Temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are engaged.⁴³

Temporary-work agencies shall not charge workers 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.⁴⁴

The requirement laid down in the Directive is implemented in Hungarian law by regulating the nullity of the agreement. An agreement is considered invalid if it contains a clause to ban or restrict any relationship with the user enterprise following the termination of the employment relationship on any grounds or if it contains a clause to stipulate the payment of a fee by the employee to the temporary-work agency for the assignment, or for entering into a relationship with the user enterprise.⁴⁵

3.6. REPRESENTATION OF TEMPORARY AGENCY WORKERS

Article 7 of the Directive provides that temporary agency workers have to be taken into account when forming bodies representing workers. Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency.⁴⁶

Member States may provide that, under conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and collective agreements are to be formed in the

43 Article 6 paragraph (1).

44 Article 6 paragraph (3).

45 Subsection (3) of Section 216 of the Labour Code.

46 Article 7 paragraph (1).

user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking.⁴⁷

3.7. INFORMATION OF WORKERS' REPRESENTATIVES

Article 8 of the Directive deals with the provision of information concerning the number of temporary agency workers. According to it without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (1), the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation.⁴⁸

Hungarian law implemented the obligation to provide information laid down in the Directive by providing for the obligation to regularly inform works councils. According to it the user enterprise must inform the local works council of the number of temporary agency workers employed and of the employment conditions, and of vacant positions at least once in a six-month period, and must keep the temporary agency workers it employs informed on a regular basis.⁴⁹

3.8. MINIMUM REQUIREMENTS, PENALTIES AND IMPLEMENTATION

Articles 9-11 of the Directive contain the usual closing provisions, defining among others the deadline for the transposition of the Directive by the Member States. The Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.⁵⁰

In the course of the harmonisation of Hungarian law, due to the fact that Hungary had effective provisions pertaining to temporary agency work since 2001, special attention was paid to the requirement according to which the implementation of the Directive can 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. This is without prejudice to the rights of Member States and/or the social partners to lay down, in the light of changing circumstances, different legislative, regulatory or contractual arrangements to those prevailing at the time of the adoption of this Directive, provided always that the minimum requirements laid down in this Directive are respected.⁵¹

47 Article 7 paragraph (2).

48 Article 8.

49 Subsection (4) of Section 216 of the Labour Code.

50 Article 9 paragraph (1).

51 Article 9 paragraph (2).

4. SUMMARY

The set of rules pertaining to temporary agency work has substantially been modified both in the European Union and in Hungary since the codification of temporary agency work in Hungary. When assessing the Hungarian regulation, the position stating that regulation is far from being accomplished seems to be well established. According to a further well-grounded position, although Directive 2008/104/EC on temporary agency work provided guidance for the review of the regulation – though the new Labour Code solved several old problems – the regulation of temporary agency work cannot be regarded as matured in Hungary, this legal institution is still burdened with several defects of law harmonization, constitutional doubts and practical problems.⁵²

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RAD PUTEM AGENCIJA ZA PRIVREMENO ZAPOSŁJAVANJE U EUROPSKOJ UNIJI – ISKUSTVA IMPLEMENTACIJE DIREKTIVE 104/2008/EC U MAĐARSKOJ

Sažetak:

Rad putem agencije za privremeno zapošljavanje je vrsta netradicionalnog oblika zapošljavanja; njegova regulacija potiče dalekosežne probleme koji se tiču pravne politike, pravne dogmatike i zakonodavstva na razini kako Europske Unije tako i pojedinih država članica. Rad analizira razvoj propisa s vezi s radom putem agencija za privremeno zapošljavanje u Europskoj Uniji i Mađarskoj kako bi se mogla napraviti usporedba s regulacijom rada putem agencija za privremeno zapošljavanje ostalih država članica.

Direktiva 104/2008/EC Europske Unije propisuje osnovna pravila koja se odnose na rad putem agencija za privremeno zapošljavanje koja države članice moraju implementirati u svoje zakonodavstvo. U radu se analiziraju ove odredbe usporedbom postupne harmonizacije zakona i pitanja koja se tiču zakonodavstva koje se odnosi na rad putem agencija za privremeno zapošljavanje u Mađarskoj i Europskoj Uniji.

Ključne riječi: privremeni rad, Mađarski zakon o radu, diskriminacija, direktiva Europske Unije o privremenom radu

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BESCHÄFTIGUNG DURCH AGENTUREN FÜR ZEITARBEIT IN DER EUROPÄISCHEN UNION – ERFahrungen IN DER ANWENDUNG DER RICHTLINIE 104/2008/EC IN UNGARN

Zusammenfassung:

Beschäftigung durch Agenturen für Zeitarbeit ist eine Art der nicht-traditionellen Beschäftigungsarten, deren gesetzliche Regelung eine Reihe verschiedener Probleme eröffnet, die die Rechtspolitik, Rechtsdogmatik und die Gesetzgebung der Europäischen Union und der einzelnen Mitgliedstaaten betreffen. Diese Studie befasst sich mit der Regelung der Beschäftigung durch Agenturen für Zeitarbeit in der Europäischen Union und in Ungarn, was einen Vergleich mit der gesetzlichen Regelungen der Beschäftigung durch Agenturen für Zeitarbeit in anderen Mitgliedstaaten ermöglicht.

Die Richtlinie 104/2008/EC der Europäischen Union legt wesentliche Regeln in Bezug auf die Beschäftigung durch Agenturen für Zeitarbeit fest, die in die Rechtssysteme der Mitgliedstaaten transponiert werden sollten. Diese Studie beschreibt und analysiert diese Bestimmungen vom Standpunkt der rechtlichen Harmonisierung aus und überprüft die gesetzliche Regelung der Beschäftigung durch Agenturen für Zeitarbeit in Ungarn mit Rücksicht auf die Forderungen der Europäischen Union.

Schlagwörter: Zeitarbeit, ungarisches Arbeitsgesetz, Diskrimination, die EU Richtlinie zur Zeitarbeit