PROTECTION OF TEMPORARY WORKERS IN 2008/104 EC DIRECTIVE ON TEMPORARY AGENCY WORK – FLEXIBILITY OR SECURITY?

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Introduction

Foreign experience shows that almost everywhere temporary workers are at risk of less favorable treatment than permanent workers. Here, under 'temporary workers', I mean not those working on a fixed-term contract but those who are recruited by a temporary-work agency to be sent for temporary work to a user enterprise. In this type of atypical employment relationship there is a duality of the employer – the first one is the person who hires a worker under a contract of employment (the temporary-work agency) and the other one is the person who actually uses the workforce and determines the working conditions (user undertaking). A triangular employment relationship is established, with the employer's rights and obligations divided between these two entities – the temporary-work agency and the user undertaking. This creates difficulties in determining the employer, i.e. the person who is liable for the discrimination of temporary workers, which leads to reduction in their employment protection and to less favorable status compared to the permanent workers in the user undertaking.

However, pay and working inequality is detrimental not only to temporary workers, but also to permanent workers as it creates conditions for the so-called 'social dumping' whereby employers will gradually replace their permanent workers with temporary workers, which will eventually lead to the precarization of the workforce. That is why the need for regulation of temporary work at the level of the European Union is indisputable. After nearly three decades of difficult negotiations and disputes between workers and employers, the regulation was achieved with a lot of efforts. It is an expression of the concept of 'flexicurity' (flexibility and security), reflecting the need to find a reasonable compromise between greater flexibility in the regulation of labor relations and maintaining a sufficiently high level of safeguards for workers' rights.

Does Directive 2008/104 EC on temporary agency work manage to find a reasonable compromise and embody the concept of 'flexicurity'? This report has not only theoretical, but also practical significance. The special contribution of

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the report is the critical analysis of the provisions of Directive 2008/104 / EC, which may help for improvement of the European regulation on the protection of temporary workers' rights.

The method of normative analysis is used, as well as the method of comparative examination of the current Bulgarian and foreign legislation.

The principle of equal treatment according to Art. 5 of the Directive. The basic provision in the Directive is Art. 5, which establishes the principle of equal treatment for temporary and permanent workers. According to Art. 5, § 1: "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". According to Art. 3, § 1, point 'e' the concept of 'basic working and employment conditions' includes: the duration of working time, overtime and night work, rests, holidays and public holidays as well as pay. Here, the scope of the concept of 'basic working and employment conditions' is narrowed. This is justified insofar as some of the issues of temporary work are covered by other directives. For example, the obligation to ensure safe and healthy working conditions is regulated by Council Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship; the posting of temporary-work agency workers - in Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

It should also be considered that in the basic working and employment conditions it is justified to be included only the conditions which depend on and are provided by the user undertaking, as the comparison is made with a hypothetical worker, employed directly by him. Therefore, among the basic conditions of work and employment there are not conditions such as the termination of the employment relationship, the disciplinary and financial liability of the worker, and the employer's responsibility towards the worker. This is understandable, as these rights, respectively obligations, are for 'the other employer' - the temporary-work agency - and do not depend on the user enterprise. However, the scope of the concept of 'basic working and employment conditions' is unjustifiably narrowed, as it does not include, for example, maternity leave and other targeted leaves, social security benefits for the duration of such leaves and for the period of leave due to temporary incapacity for work, access to forms of enhancing the qualification, collective labor rights (the right of collective bargaining and conclusion of collective agreement, the right to participate in the workers' bodies for management of the undertaking), etc.

Exceptions and deviations from the principle of equal treatment. When adopting Directive 2008/104 EC, Art. 5 has been the subject of serious disputes, and considering the interest of employers from greater flexibility in labor rela-

tions, a number of possibilities for exceptions and deviations from the principle of equal treatment have been provided as a compromise.

First, as regard pay, Art. 5, para. 2 provides possibility for the Member States, after consulting the social partners, to provide that an exemption be made to the principle of equality established in paragraph 1 where temporary agency workers with a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments. The question here is how this provision should be interpreted. If the Directive means just the pay that the temporary-work agency pays in the periods between appointments, when the worker has completed his work in a user undertaking but has not yet been sent to another user undertaking, then it is justified that the pay is less than the salary the worker was paid while working. But if this provision is interpreted as meaning that the pay the worker receives for his work may be lower than the salary he would have received if he was employed directly by the user undertaking, simply because he receives a compensation payment in the period between the appointments, then there would be a circumvention of the principle of equality of temporary and permanent workers in a user undertaking and, eventually, a discrimination against temporary workers. In my opinion the first interpretation is more correct as regards to the main purpose of the Directive, as proclaimed in Art. 2, namely: to ensure the protection of temporary agency workers. Considering that this objective is placed first in the list of objectives in that provision, it is logical to assume that this should be the main objective of the Directive.

Second, a possibility for deviation from the principle of equal treatment is provided in Art. 1, para. 3 of the Directive, which states that: "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 program". In my opinion this exception to the principle of equality is justified as far as it concerns public or publicly supported programs aimed at vocational training or retraining, i.e. when the person acquires a profession or a specialization in the process of working in the user undertaking. In this case, his lower remuneration is reasonable. The second hypothesis relates to public or publicly supported programs aimed at integrating people in a vulnerable social situation, such as disabled people, people without education, long-term unemployed, and others who are experiencing serious difficulties in finding a job. Here, the deviation from the principle of equal treatment is justified in view of the higher objective: the integration of these persons into the labor market.

Another similar departure from the principle of equal treatment of temporary workers with permanent workers is found in para. 3 of Art. 5 according to which 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, i.e. they may be different from those 'that would apply if they have been recruited directly by that undertaking to occupy the same job' (Art. 5, para. 1). This exception could be justified in some cases, for example in promoting temporary employment in regions with high unemployment, resulting in an increase in employment rate as a whole. As a whole, it seriously undermines the protection of temporary workers and of the established principle of equality with permanent workers. It is not very clear what should be understood under the vague expression 'respecting the overall protection of temporary workers' and how this 'respect for their overall protection' is combined with the possibility of an exception to the principle of equality. Obviously, here the Directive has given priority to flexibility in detriment of security.

The most significant retreat from the principle of equal treatment of temporary and permanent workers is the possibility provided in Art. 5, para. 4 of the Directive for the Member States to provide a qualifying period from the moment of appointment of a temporary worker in which the employer may disregard the principle of equality towards this worker. In the original version of the Directive, this period is 6 weeks. Eleven countries, including Bulgaria, stated they would not provide such period and the principle of equality should apply from the day the temporary worker enters the user undertaking. This position deserves a positive assessment. Other countries, like the UK, Germany, Denmark, etc., insist on a longer qualifying period (12 weeks, 26 weeks or even one year) before the principle of equality is applied to temporary workers. As a result, the final version of the Directive provides a possibility for the Member States to provide a qualifying period, but it is not determined how long that period should be. But, providing of a longer qualifying period in practice makes the principle of equality meaningless, since temporary workers usually are sent to the user undertaking for a short period of time which expires before the occurrence of the obligation of the user undertaking to apply the principle of equality. For example, in the UK, in the May 2008 agreement concluded between the social partners at national level, this period is 12 weeks. At the same time, according to the statistics, more than half of the British workers (55%) employed by temporary-work agencies have contracts for a period less than 12 weeks [1, p. 333]. As Nicholas Kuntouris and Rachel Horton rightly point out: "It is hard to envisage how a provision excludes over half of the category of workers the Directive is intended to protect could be compatible with the 'adequate protection"requirement" [1, p. 333].

Allowing a qualifying period for the application of the principle of equality to a temporary worker makes it possible for employers to misuse it by employing

the same worker with short-term contracts many times in a row, and each time a new qualifying period will start to run for him, which prevents the entry into force of the equal working conditions proclaimed in Art. 5, para. 1. Therefore, the provision of Art. 5, para. 5 of the Directive obliges the Member States "to take appropriate measures, in accordance with national law and practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive". The Member States shall inform the Commission about such measures. This can be introduced in the legislation prohibiting the conclusion of successive contracts with the same worker working for the same user enterprise or at least a ban on working in the same or similar position at the same user enterprise, as the UK has chosen for example. Such measure could be, for example, a prohibition on the conclusion by a user undertaking of successive contracts for the same worker. Another option is a prohibition on the employment of this worker on the same or similar position, as it is in the UK. The United Kingdom's choice is criticized by Nicholas Countouris and Rachel Horton, who believe that such a measure will not be effective for user undertakings that have a wide variety of low-skilled jobs for temporary workers [1, p. 333].

The Bulgarian legislation adopted as result of the implementation of the Directive deserves approval, since no qualifying period is provided, and the equal working conditions apply to temporary workers unconditionally from the first day they are sent to the user undertaking Art. 107r, para. 5 of the Labor Code of Bulgaria.

Protection of the employment rights of temporary workers. The provision of Art. 6, para. 2 of the Directive protects the employment rights of temporary workers. According to this provision "Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void". This provision is extremely important for the overall protection of workers. By prohibiting temporary agencies to obstruct the conclusion of a permanent contract between the user undertaking and the worker, permanent employment is encouraged which is more favorable to temporary workers. A prohibition for temporary employment agencies to withhold the worker's fee (Article 6, para. 3 of the Directive) also ensure the freedom of the user undertaking and the worker to contract directly with each other. The Bulgarian legislature went even further by prohibiting temporary employment agencies from obstructing the conclusion of a permanent contract between the user undertaking and the worker, not only after termination of the appointment of the latter, but even during that appointment. Next, with a view to guaranteeing the employment rights of temporary workers, Art. 6, para.

4 of the Directive proclaims the right of the temporary agency workers to 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. However, this right is not unconditional, as Art. 6, para. 4 ends with the words "unless the difference in treatment is justified by objective reasons". It is hard to imagine that objective reasons can prevent temporary workers from gaining access to the amenities and collective facilities of the user enterprise.

The provision of Art. 9, para. 2 of the Directive is important for ensuring the labor rights of temporary workers, as it explains how the Directive should be interpreted and implemented in the national legislation, namely that the implementation of the Directive 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. This clarification is extremely important as it is possible for Member States which have not yet provided exceptions to the principle of equality of temporary and permanent workers, to use the implementation of the Directive as grounds for providing such exceptions.

Finally, among the provisions guaranteeing the rights of temporary workers, Art. 10 must be pointed out. This provision obliges Member States to provide for appropriate measures in case of non-compliance with the Directive by temporary-work agencies or user undertakings. To achieve their purpose, the sanctions shall be "effective, proportionate and dissuasive".

Conclusion

In conclusion, it should be noted that Directive 2008/104 EC on temporary agency work is a step forward in the protection of temporary workers - a category of workers who are at risk of less favorable treatment than permanent workers due to the specifics of their so-called "triangular" labor relations. The main obstacles to the adoption of this Directive were two.

On the one hand, it was difficult to synchronize the very different national legal regulations for temporary employment. Therefore the Directive regulates only a relatively limited set of issues through the minimum standards method.

On the other hand, the protection of the labor rights of temporary workers contradicts the interests of employers of greater flexibility in labor relations and of minimization of labor costs. That is why the Directive is a compromise between flexibility and security. Its aim is to combine these two priorities and to embody the concept of "flexicurity". But, considering the numerous exceptions to the principle of equal treatment for temporary and permanent workers provided by the Directive, we can conclude that it does not sufficiently protect the temporary workers. These exceptions negate the very principle of equality and allow

temporary workers to be placed at a disadvantage. It can definitely be said that the Directive gives priority to flexibility to the detriment of security.

References:

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Abstract

This report is an attempt to critically analyze the provisions of Directive 2008/104 EC on temporary agency work aimed at guaranteeing the rights of temporary workers.
The report aims to clarify how the Directive managed to find a reasonable compromise between more flexibility in regulating labor relations and the providing of adequate level of protection for temporary workers.
The conclusion of the author is that Directive 2008/104 EC does not sufficiently protect temporary workers. It gives priority to flexibility to the detriment of security.

Key words: Directive 2008/104 EC, temporary employment agency, temporary workers, non-discrimination, guaranteeing labour rights.

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