A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment—Lessons To Be Learned from European and German Labor Law?

Bernd Waas

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Abstract:
Demonstrates that the Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work contains a quid pro quo. Explains the content of this "quid pro quo" by looking both at deregulation of temporary agency work and protection of temporary agency workers under the principle of equal treatment. In this context, considers the European Directive on Temporary Agency Work, though the focus will be on German law, which was amended recently in order to implement the provisions of the Directive.

I. Introduction

In the year 2008 the European Union legislated in the area of temporary agency work by issuing Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work. The purpose of this Directive is:

[T]o ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment . . . is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working. [FN1]

Thus, the Directive contains a quid pro quo: on the one hand it aims at doing away with existing statutory restrictions. Accordingly, Article 4(1) of the Directive states that:

[P]rohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. [FN2]

On the other hand, the Directive establishes the so-called principle of equal treatment, “The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user *48 undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.” [FN3]

This Article further explains the content of this “quid pro quo” by looking both at deregulation of temporary agency work in Part III and protection of temporary agency workers under the principle of equal treatment in Part IV. In this context, the European
Directive on Temporary Agency work will be considered, though the focus will be on German law, which was amended recently in order to implement the provisions of the Directive. The Act amending the existing Act on Temporary Agency Work (Arbeitnehmerüberlassungsgesetz) was officially published on April 29, 2011. [FN4]

First, however, Part II provides a quick look at the “models” of temporary agency that can be found in Europe.

II. Models of Temporary Agency Work in Europe

In all Member States of the European Union, temporary agency work is understood to lead to a tripartite relationship between a temporary agency, a worker, and a user-undertaking. Though temporary agency work by and large has been the subject of deregulating efforts of national legislators all over Europe, there are still considerable differences. [FN5] In some countries, like Denmark, the United Kingdom, and Sweden, temporary agency work is still not dealt with on the basis of specific statutes. Other countries, like Germany, the Netherlands, and France, have far-reaching specific legislation in place in this area.

What is more, there are different “models” of temporary agency work to be found in Europe; in particular, a model which relates temporary agency work essentially to the temporary agency and another model which relates it essentially to the user-undertaking (or hirer-out). In the latter model, which can be found in most Member States of the EU, the relationship between the worker and the user-undertaking forms the “center of gravity,” while the temporary agency is rather an agent or go-between. Workers are regularly hired by temporary agencies on fixed-term contracts, while terms and conditions of employment of the worker are the same as those of regular staff of the user-undertaking. At the same time, it is the agency worker who essentially bears the risk of being without pay in times between assignments. The former model is the “traditional” model of temporary agency work in Germany. It is characterised by temporary agencies being exclusively responsible for the working conditions of their workers who regularly were hired on contracts whose terms were not fixed and who accordingly were paid by the temporary agencies (as their employers) in times of nonassignment. [FN6]

III. Deregulation of Temporary Agency Work

A. European Union Law

As was already mentioned, “prohibitions or restrictions” on the use of temporary agency work must be justifiable on grounds of “general interest” according to Article 4(1) of the Directive. By the end of 2011, Member States will have to, “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.” [FN7] All of this, however, shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees, or monitoring of temporary work agencies. [FN8] In other words, while supervision of temporary agencies by state authorities is not touched upon, restrictions and prohibitions which in many Member States of the European Union may exist will not be tolerated anymore.
B. German law

1. Development of the Regulation of Temporary Agency Work: A Look Back
In Germany, the history of legislation on temporary agency work is a history of a “step by step liberalization.” For a long time, temporary agency work was forbidden and could even be punished as a criminal offense. It was only in 1967 that temporary agency work was in principle regarded as admissible following a decision of the Federal Constitutional Court (Bundesverfassungsgericht) to this effect. [FN9] In 1971, the Act on Temporary Agency Work (Arbeitnehmerüberlassungsgesetz) took effect. Temporary agency work was for the first time comprehensively regulated on the basis of a statute. In the following years the maximum duration of hiring-out *50 workers was gradually extended. The most important step, however, in deregulating temporary agency work was taken in the year 2002. [FN10] In an attempt to ensure that temporary agency work could make a meaningful contribution to a growth of jobs, measures were taken by the legislator to make its use easier; the maximum duration of hiring-out of workers (two years at that time) was completely abolished. Other restrictions were abolished, too. For instance, the legislature did away with a provision according to which a temporary agency was prevented from hiring a worker for the time of a certain assignment only (so-called prevention of “synchronizing”). Other provisions also were abolished; namely, the prohibition of employing temporary agency workers on the basis of repeatedly concluding fixed-term contracts (so-called prohibition of fixing of terms or Befristungsverbot) was eliminated. The prohibition of repeatedly rehiring temporary agency workers within a period of three months after having terminated the employment relationship by way of dismissal (so-called prohibition of rehiring or Wiedereinstellungsverbot) was done away with, too. On the other hand, the employment relationship between a temporary agency and a temporary worker was made the subject of the regular rules applying to the fixing of terms of employment contracts. Under these rules, a fixing of terms in principle requires an “objective ground.” [FN11] Only if the duration of the contract does not exceed two years is the fixing of a term admissible without objective grounds. [FN12]

2. The Future
Against this background one may ask whether Directive 2008/104/EC with its underlying purpose of deregulating temporary agency work will make a difference in Germany. The answer is yes. The Directive will bring about further liberalization of temporary agency work. The most important *51 illustration of that might be the legal situation in the construction industry. According to § 1b(1) of the Act on Temporary Agency Work the use of temporary agency work in this area is, in principle, forbidden. This prohibition must be seen against the background of a relatively high degree of moonlighting and illegal employment in this sector. Apart from that, in enshrining the prohibition, the legislature felt that temporary agency workers were in particular need of having health and safety ensured at work. Whether the prohibition of temporary agency work in the construction sector will still be justifiable on the basis of these considerations is at least doubtful, [FN13] for the Directive seems to work on the assumption that generally temporary agency workers will be sufficiently protected if the principle of equal treatment is applied to them. [FN14] This may explain why upholding the prohibition of temporary agency work in the building sector is regarded by some scholars as violating European Union law. [FN15] It must be added, however, that the legislature, when it amended the existing Act on Temporary Agency Work, left the
prohibition in § 1b essentially untouched. It remains to be seen whether this is really in line with the Directive.

IV. Protection of Temporary Agency Workers: The Principle of Equal Treatment

A. European Union Law

Article 5 of Directive 2008/104/EC enshrines the so-called principle of equal treatment. According to Article 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.*” [FN16] There are, however, two major exemptions to the application to the principle. The first applies to temporary agency workers who are not hired on the basis of a fixed-term contract with the agency only. According to Article 5(2), Member States may, with regard to pay and 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 continue to be paid in the time between assignments.” [FN17] The second exemption applies to collective bargaining agreements. According to Article 5(3): 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. [FN18]

B. German Law: The Principle of Equal Treatment

The principle of equal treatment was established in Germany in 2002 already, long before the Directive came into effect. [FN19] It formed part of what could be called the “German quid pro quo”--abolishing restrictions of temporary agency work on the one hand (no maximum duration for assignments, no prohibition of “synchronizing” the contract between the agency, the worker, and the assignment period, etc.) and enshrining the principle of equal treatment on the other. The principle of equal treatment formed part of the Draft Directive on Temporary Agency Work which was already on the table at that time. Thus, the German legislature could be regarded as anticipating what was already in the pipeline. When the principle was introduced, however, it was met with serious doubts. One of the doubts stemmed from the fact that temporary agency work in Germany was traditionally agency-oriented as described above. The two major elements of this model were an unlimited employment contract with the agency with terms and conditions of employment in the user-undertaking of no relevance for temporary agency workers and, as a result and in contrast to most other Member States of the European Union, with no principle of equal treatment applying. Against this background the introduction of the principle of equal treatment was criticized by some *scholars for not only contributing to a lot of paperwork on the part of employers, but also establishing an unjustified doubling of temporary agency workers’ legal protection. On the one hand,
these workers had a full pay claim on the basis of an unlimited employment contract even if the agency could not hire them out, and on the other hand, it was the situation in the user-undertaking which became decisive for the amount of pay. [FN20]

1. Principle of Equal Treatment and Exceptions
According to § 3(1) no. 3 and 9 no. 2 of the Act on Temporary Agency Work, a temporary agency is, in principle, obliged to grant the agency work “the same basic working conditions including pay” that apply in the establishment of the hirer-out for the period of assignment to that establishment. However, there were exemptions to the application of this principle from the beginning. Under the old law, the temporary agency was not obliged to obey the principle of equal treatment if the agency hired a worker who was unemployed immediately before being hired, was at no point of time a worker of the agency, and received a net salary which was at least equivalent to the amount of unemployment benefits which the worker received before (§ 3(1) no. 3 sentence 1 and 9, no. 2 sentence 1 of the Act on Temporary Agency Work). This exemption, however, justified the nonapplication of the principle of equal treatment for no longer than six weeks. The according provision was introduced in 2002 in order to provide an incentive to offer jobs to unemployed persons and to make it easier for such persons to reenter the labor market. In practice, this provision soon proved to be of almost no relevance. As a consequence, it was abolished by the legislature and does not form part of the new Act on Temporary Agency Work anymore.
The second, and by far more important, exception applied and still applies to collective bargaining. According to § 3(1) no. 3 sentence 2 and 9, no. 2 sentence 2 of the Act on Temporary Agency Work, the principle of equal treatment may be disposed of on the basis of a collective bargaining agreement. As a result, working conditions are fixed by collective agreements instead of being derived from the principle of equal treatment for all temporary agencies and workers who are bound to collective agreements. On the basis of a pure grammatical construction of the law, the power of the parties to a collective agreement to dispose of the principle of equal treatment is not subject to any restrictions, which has been criticized by many from the outset. [FN21]
In addition, the Act on Temporary Agency Work allows for so-called references to collective agreements by parties who are not bound to the collective agreement. As a consequence, temporary agencies and workers can dispose of the principle of equal treatment by simply referring to the according collective agreement in their employment contracts (the so-called “reference clause”), the only prerequisite being that the employment relationship falls within the area of the collective agreement’s application. As a result of such “reference clause,” the collective agreement becomes an implied term of the employment contract.

2. Equal Treatment and Collective Bargaining
As far as collective bargaining is concerned, the legal situation calls for being examined in more detail. Under German law, collective agreements are “normal contracts” insofar as rights and duties of the parties to the agreement are created by them. The most prominent example for such a right may be the so-called “peace duty” which forms an obligation between the parties to the collective bargaining agreement; a trade union on the one hand and an individual employer or, as is more often the case in Germany, an employers’ association on the other.
In addition to that, a collective agreement has normative effect. According to § 4(1) of the Act on Collective Bargaining Agreements (Tarifvertragsgesetz) a collective
agreement is directly binding on employers and employees (and, what is more, cannot be set aside by them) as far as both parties are bound to it. Persons who are bound to a collective agreement are, first, employers who personally entered into such agreement with a trade union (so-called enterprise collective agreement) and, second, employers and workers, if they are members of the associations who concluded the collective agreement. In other words, collective agreements have no erga omnes effect. As a result, for a collective bargaining agreement to be applicable on an individual employment relationship, two requirements must be met when leaving aside so-called enterprise collective agreements: the employer must belong to the relevant employers’ association and the worker must belong to the relevant trade union. If that is the case, the regulations of the collective agreement takes priority over the principle of equal treatment as far as temporary agency work is concerned.

When the principle of equal treatment was established in Germany, there were quite a number of scholars who expressed doubts on the ground that the according provision may not conform to constitutional law. In particular, it was argued that the provision violated the freedom to bargain collectively as laid down (as part of freedom of association) in Article 9(3) of the Basic Law (Grundgesetz), the German Constitution, by subjecting employers to equal pay claims and leaving them with the option to try to get the consent of trade unions to fix lower standards. It was asked what interest should trade unions entertain in fixing wages lower than the statutory minimum derived from the application of the principle of equal treatment. [FN22] The Federal Constitutional Court, however, threw out an according claim holding that if there was an inroad into Article 9(3) of the Basic Law such violation was justified for the legislature could claim to protect the constitutional rights of temporary agency workers. [FN23] In practice, it soon became clear that there was an easy way out of the principle of equal pay for employers. When the principle of equal treatment was established, the big trade unions in Germany, almost all of which belong to the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund or DGB), were quick to form a so-called collective bargaining group (Tarifgemeinschaft). This bargaining group concluded collective agreements with two big employers associations in the temporary agency area. [FN24] These collective agreements came into force on January 1, 2004 and have been modified again and again since then. The wages fixed in these collective agreements are lower than the pay for regular staff. What is more, some employers were able to benefit from collective agreements that were concluded with an umbrella organization of small Christian trade unions which provided for even lower pay. Finally, some employers in the sector concluded so-called “enterprise collective agreements.” All of this may explain why pay in the sector is far lower than what could be expected when the principle of equal treatment was established. [FN25] Normally, the fixing of an unattractive pay rate would lead to the collective agreements quickly becoming negligible; members would simply leave a trade union that proved to be willing to conclude such agreements. By doing so, they would soon not be bound to such agreements anymore. In the area of temporary agency work, the situation is different, however, because the statutory principle of equal pay can be disposed of by way of referring to according collective agreements. As a consequence, a worker may be able to escape the normative effects of a collective agreement by simply leaving the union that concluded the agreement. The employer, however, may be able to use his individual bargaining power in a way to make sure that the collective agreement is referred to in the individual contract of employment and, as a consequence, will apply anyway. [FN26]
The development in practice prompted a legal debate which focused mainly on three issues: first, the legal power of smallish trade unions to arrive at such agreements; second, elements of the existing legal order that could hamper “bad” collective agreements taking full effect; and third, the use of references to collective agreements in individual employments contracts.

a. Capacity to Bargain Collectively
Under German law a trade union must pass a couple of tests in order to be attributed the capacity to bargain collectively (Tariffähigkeit). [FN27] To begin with, it must form an “association” within the meaning of Article 9(3) of the Basic Law. An association of workers is an “association” within the meaning of Article 9(3) of the Basic Law if, first, the according organization was be entered into deliberately and is governed by the rules of civil law, if it is, second, intended to be of an enduring nature in the sense that there must be at least some stability [FN28] and if it has a corporate nature with the ability, in particular, of forming a joint will. In addition to that it must be independent, especially with regard to the “social counterpart,” the employers. This means, for instance, that an association of workers must not depend on “organizational” or any other assistance provided by employers.

In order to enjoy the capacity to bargain collectively additional requirements must be met. In particular, an association of workers is required to enjoy “social power” or “effectiveness” in the sense that it must be capable of exerting pressure on the opposite side in order to force it into concluding a collective bargaining agreement. According to the Federal Labor Court the right to bargain collectively is constitutionally due to only those coalitions that are in a position to make sensible use, by entering into collective agreements, of the area left open by the state. In the view of the court this demands from a trade union to be able to exert at least so much pressure on the other side that the counterpart sees fit to set to embark on negotiations for a collective agreement. [FN29] Whether a certain union is regarded to possess such social power can only be determined on a case-by-case basis. Possible factors might include the number of members, the existence of a satisfactory permanent structure of organization, and sufficient financial funds. [FN30] Another important factor regularly is whether an association has succeeded in enticing the other side to enter into collective bargaining agreements in the past. If an association of workers was formed only recently and, as a consequence, cannot refer to a “collective bargaining history” collective bargaining capacity is determined by the Federal Labor Court on the basis of a prognosis decision. To successfully arrive at such prognosis, facts must be shown that make it likely that the “social counterpart” will not be able to ignore the trade union in the future. In this context, the courts regularly examine the “organizational strength” of the trade union as well as its ability to exert pressure on the other side. [FN31]

To simply stick to these rules in the area of temporary agency work would be tricky. Under existing legislation, the principle of equal treatment is the basic rule while collective agreements form the tools of setting lower standards. As a consequence, the position of the parties with regard to collective bargaining is different from what regularly applies--normally it is the workers who have a predominant interest in bringing about collective bargaining agreements because they offer the prospect of fixing working conditions that are more beneficial than the statutory rules (which regularly set minimum standards only). With regard to temporary agency work, the situation is diametrically opposed. Because employers can avoid equal treatment only by
concluding derogating collective agreements, it is the employers who have the predominant interest in bringing about such agreements. The upshot is that while in general it may be a strong indicator of “social power” or “effectiveness” of an association of workers if such association proved to be able to bringing about collective agreements it is no such thing as far as collective bargaining in the area of temporary agency work is concerned.

*58 In 2010, the Federal Labor Court had to decide upon the capability to bargain collectively of an umbrella organization of small Christian trade unions. In order to overcome doubts with regard to the “social power” or “effectiveness” of each member organization, these trade unions had joined forces and concluded collective agreements with the umbrella organization, as such being the partner to the according collective agreement. [FN32] In its judgment, the Federal Labor Court denied the umbrella organization the capability to bargain collectively, the rationale being based rather on “technical” matters than on an examination of “social power” or “effectiveness.” The court in particular did not address the question whether or no collective agreements which were concluded by the umbrella organization “in the shadow” of the principle of equal treatment were suitable indicators of its “social power” or “effectiveness” in the first place. [FN33] The capacity to conclude collective agreement was negated in any event leading to collective agreements concluded by the organization becoming retroactively invalid. Employers who were bound to these agreements in principle have to face pay claims of their workers based on the principle of equal treatment. Moreover, they have to pay extra social security contributions. [FN34] With regard to employers who referred to the according collective agreements, the legal situation is a bit more complicated because some of these employers apparently tried to make provision in case of the according collective agreements being found to be void. The effect of such contractual arrangements is still not entirely clear but it must be doubted whether they will reliably protect employers from the pay claims of their workers. [FN35]

b. Limits to Derogating Collective Agreements
As soon as it became clear that trade unions entered the scene that proved to be willing to fix conditions of employment far below the standard of “equal pay,” labor law experts started thinking about possible legal boundaries of such collective agreements. According to § 138 of the German Civil Code (Bürgerliches Gesetzbuch) an agreement which is against bonos mores (public policy) is null and void. Against this background, it was argued that exactly that would be the case with regard to *59 some collective agreements concluded by smaller trade unions. [FN36] Because of the constitutional guarantee of the freedom of association, the Federal Labor Court has proven to be reluctant to subject collective agreements to a judicial review which is based on public policy, however. In a judgment which was delivered in 2004, the court held instead that it was prepared to apply the according standards only insofar as pay fixed by a collective agreement would amount to a “mere pittance.” [FN37] Notwithstanding this, some experts argued that even if there is a power to dispose of the principle of equal treatment, such power could only be used within the boundaries fixed by Article 3(1) of the Basic Law according to which “all persons shall be equal before the law.” [FN38] According to this line of thinking, parties to collective agreements may enjoy the power to derogate from statutory law. Even so, they would have to respect basic fundamental legal values as laid down in the Constitution. Some
collective agreements on temporary agency work, the argument goes, arbitrarily fixed
rates of pay without even bothering to justify the according deviations from the principle
of equal treatment. One of the commentators put it bluntly, claiming that the freedom to
bargain collectively had become an “instrument of self-disenfranchisement” with proper
consideration of the interests of workers “no longer recognizable.” [FN39]

c. A Specific Problem: Reference Clauses
The rate of unionization is low in the area of temporary agency work. This is why a
statutory principle of equal treatment was established in the first place.
Against this background it becomes clear why “references clauses” are of utmost
importance in this area. If no more is required for setting aside the principle of equal
treatment than simply referring to an according collective agreement the employer who
typically enjoys a fairly strong bargaining position on the individual level is likely to
succeed in arriving at working conditions which are less attractive for agency workers
than the conditions that would result from application of the principle of equal *60
treatment. Empirical studies show that reference clauses form the basis of the
regulation of pay in around 95% of all cases. More often than not the employer is able
to refer to collective agreements by simply making use of contract forms. [FN40]
Taking all this into consideration, it comes as no surprise that the provision on reference
clauses is subject to strong criticism. In particular, it is agued by some scholars that the
allowance of reference clauses is not in conformity with EU law. Whether this point
holds water is not entirely clear because the wording of the Directive is fairly generous
in this regard. [FN41]

3. The Future
Under the Directive on Temporary Agency Work collective agreements may differ from
the principle of equal treatment but only insofar as “the overall protection” of temporary
agency workers is respected. [FN42]

As a consequence, a proper implementation of the Directive into German law makes it
necessary to ensure that “overall protection” is guaranteed. According to § 3(1) no. 3
and 9 no. 2 of the Act on Temporary Agency Work the principle of equal treatment can
still be disposed of by collective bargaining agreements. In addition, it will still be
admissible to refer to collective agreements and by doing so making their provisions
implied terms of the according contracts of employment. However, a collective
agreement can only derogate from the principle of equal treatment if it does not fix a
rate of pay which is lower than a minimum pay rate which will be fixed in a statutory
instrument. If a collective agreement fixes a lower rate of pay, the principle of equal
treatment applies (§ 10(4) sentence 3 of the new Act on Temporary Agency Work).
*61 This statutory instrument is further dealt with in § 3a of the new Act on Temporary
Agency Work. According to § 3a trade unions and employers’ associations may
propose a minimum pay rate if they are, first, competent for members who work in the
temporary agency sector, though their competence must not be restricted to that
sector, and, second, if they concluded collective bargaining agreements fixing minimum
rates of pay on the federal level. These pay rates may vary, however, from one place of
work to another. The proposal must be uniform in the sense that the rate of pay must
be the same for periods of assignment and periods during which the employee is not
hired out. In addition to that, a period of validity must be proposed. Finally, the
according trade unions and employers’ associations must give written reasons for their
proposal (§ 3a(1) of the Act on Temporary Agency Work). If all these requirements are met, the competent ministry may issue a statutory instrument on the basis of which the according pay rate will apply to all employers and agency workers who fall within the area of application of the underlying collective agreement (§ 3a(2) of the Act on Temporary Agency Work). When deciding upon the extension of the collective agreement the ministry must take into account existing collective agreements in the sector as far as they were concluded on the federal level. Apart from that, the (relative) representativeness of each of the parties demanding an extension of their agreement must be taken into account (§ 3a(3) sentence 3 of the Act on Temporary Agency Work). In particular, if more than one collective bargaining agreement is proposed for an extension, the ministry must examine the representativeness of the parties. By deciding upon which organization is representative, the number of workers employed by the employers’ association demanding extension of its collective agreement, and the number of workers who are members of the trade union demanding extension of its collective agreement are key factors (§ 3 a(4) of the Act on Temporary Agency Work).

[FN43]

V. Conclusion

Temporary agency work has been deregulated to some extent both on the European and the German level. At the same time, the principle of equal treatment was established on both levels. Arriving at a feasible compromise of interests has proved to be far more difficult than was expected. In particular, establishing a “quid pro quo” had serious repercussions in the area of collective bargaining.

[FNd1]. Professor Dr. Bernd Waas, Goethe University Frankfurt.


[FN2]. Id. at 12.

[FN3]. Id.


[FN6]. See Rolf Wank, Neuere Entwicklungen im Arbeitnehmerüberlassungsrecht 1 (2003) (Ger.).

[FN7]. Directive 2008/104/EC of the European Parliament and of the Council of Nov. 19, 2008 on Temporary Agency Work. 2008 O.J. (L327) 9, 12 (“If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.”).
[FN8]. Id.


[FN11]. According to § 14 (1) sentence 2, an objective ground exists “in particular” if “the need for certain manpower is only temporary” (no. 1), “the term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment” (no. 2), “a worker is employed in order to substitute for another worker” (no. 3), “the nature of work justifies the fixing of the term” (no. 4), “the fixing of the term serves the purpose of testing the worker” (no. 5), “grounds which are related to the person of the worker justify the fixing of the term” (no. 6), “the worker is remunerated from budget funds, these funds are earmarked for fixed-term employment only under the according budget rules and the worker is employed accordingly” (no. 7), or “the fixing of the term is based on an amicable settlement before a court” (no. 8).

[FN12]. Section 14(2) sentence 1 of the Part-Time and Fixed-Term Employment Act. Within the period of two years such contract may be extended three times at most. According to the so-called “prohibition of follow-up,” a fixing of the term of a contract without objective grounds is not admissible if in the past an employment contract existed between the parties concerned (§ 14(2) sentence 1). This provision is to be interpreted restrictively, however, according to a recent judgment of the Federal Labor Court; see Federal Labor Court of Apr. 6, 2011--7 AZR 716/09.

[FN13]. See, e.g., Wolfgang Böhm, Umsetzung der EU-Leiharbeitsrichtlinie - mit Fragezeichen?, Der Betrieb (DB) 473 (2011) (Ger.).

[FN14]. Apart from that Directive 96/71/EC of Dec. 16, 1996 concerning the posting of workers in the framework of the provision of services must be taken into account. According to Art. 3(1) of this Directive:
Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Art.1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down: by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable ....
Id. Insofar as they concern activities further defined in an Annex to the Directive, according to Article 1(3) the Directive is applicable to temporary employment undertakings or placement agencies that “hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.” Id.

[FN15]. See, e.g., Peter Schüren & Rolf Wank, Die Neue Leiharbeitsrichtlinie und Ihre Umsetzung in Deutsches Recht, in Recht der Arbeit (RdA) 6 (2011) (Ger.).

[FN17]. Id.

[FN18]. Id.


[FN23]. Bundesverfassungsgericht [Federal Constitutional Court] Dec. 29, 2004, Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 BvR 2582/03, 1 BvR 2283/03, 1 BvR 2504/03 (Ger.).

[FN24]. Bundesverband Zeitarbeit Personal-Dienstleistungen (BZA) and Interessenverband Zeitarbeit (iGZ) (Ger.).


[FN26]. See Arbeitsgericht Krefeld [Lab. Ct. Krefeld] 4 Ca 3047/10, (2011) (Ger.) (Legally speaking, an employer is not able to force a reference clause upon an agency worker unwilling to accept it.).


[FN28]. Henriette Löwisch/Volker Rieble, Münchener Arbeitsrechtshandbuch § 155 n.57 (3d ed. 2009) (Ger.).


(However, if a “young” trade union is involved in the conclusion of collective agreements in the context of its coming into existence the mere number of collective agreements being concluded is no indicator of its collective bargaining capacity without further information provided by the trade union on both members and organizational resources.); see also Bundesarbeitsgericht [Fed. Lab. Ct.] (2010)--1 ABR 88/09 (Ger).

Which, in principle, is lawful because an umbrella organization according to §§ 2(2) and (3) of the Act on Collective Bargaining Agreements may enjoy the capacity to bargain collectively.

The judgment has retroactive effect. See Bundesarbeitsgericht [Fed. Lab. Ct.] (2012), 1AZB 67/11, NZA (2012) 625 (Ger.).

See Rainer Schiegel, Arbeits--und sozialversicherungsrechtliche Konsequenzen des CGZP-Beschlusses, in Neue Zeitschrift für Arbeitsrecht (NZA) 380 (2011) (Ger.).


Directive); see also Bernd Waas, Der Gleichbehandlungsgrundsatz im neuen Arbeitnehmerüberlassungsgesetz, in Zeitschrift für europäisches Sozial- und Arbeitsrecht (ZESAR) 7 (2012) (Ger.).

[FN42]. Directive 2008/104/EC of the European Parliament and of the Council of Nov. 19, 2008 on Temporary Agency Work, 2008 O.J. (L327) 9, 12 (“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.”).

[FN43]. In a cabinet meeting on Dec. 20, 2011, the Federal Government indeed passed a regulation (Statutory Instrument on Fixing Statutory Minimum Pay for Agency Workers), which came into force on Jan. 1, 2012. Under the regulation the 900,000 or so agency workers in Germany will benefit from a minimum pay of 7.01• (Eastern Germany) or 7.78• (Western Germany), respectively. From November 1, 2012 minimum pay will be raised to the levels of 7.50• (Eastern Germany) and 8.19• (Western Germany).