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Temporary Agency Work in European Labour Law: Evolutionary Perspectives between Harmonisation and Heterogeneity

Contents: 1. The evolutionary process of temporary agency work in the European Union. 1.1. From restrictive approaches to promotional intent within the flexicurity paradigm. 1.2. Directive 2008/104/EC as a pillar of European regulation. 2. National models compared: liberal vs restrictive approaches. 2.1. The Italian regulatory framework between flexibility enhancement and application restrictions. 2.2. Regulation in continental Europe: France and Germany between restrictions and liberalisation. 2.3. The Spanish model: the authorisation system and judgment C-441/23. 2.4. Self-regulation and the role of social partners in the Swedish and Danish systems and the *Dutch Waadi* Act. 2.5. Post-Brexit United Kingdom: the survival of the Agency Workers Regulations. 3. The principle of equal treatment and its operational variants. 3.1. Equal treatment in the directive and possible derogations. 3.2. Jurisprudence of the Court of Justice on equal treatment. 4. The "reasonable temporariness" of assignments. 4.1. Temporariness as a defining element of temporary agency work. 4.2. The "reasonable temporariness" in judgments C-681/2018 and C-232/2020. 4.3. The absence of uniform criteria and consequent case-by-case application uncertainties. 5. The singular case of staff leasing. 5.1. The currently pending preliminary question. 5.2. Textual and systematic elements underlying the preliminary question. 6. Concluding reflections: implementation status and future scenarios for a sustainable balance between flexibility and protection.

1. *The evolutionary process of temporary agency work in the European Union*

1.1. *From restrictive approaches to promotional intent within the flexicurity paradigm*

Temporary agency work constitutes one of the most emblematic institutions of the flexicurity paradigm characterising the contemporary Euro-

pean labour law framework, which continually seeks an appropriate balance between workers' protection and companies' adaptability needs[1].

The evolution of the European approach to temporary agency work indeed reflects a broader rethinking of labour policies in the European Union, marked by a shift from a protection model based on job security to one centred on employment security.

This paradigmatic shift, theorised precisely within the flexicurity concept developed by the European Commission[2], has found in the regulation of agency work one of its most significant fields of application[3].

As is well known, Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work constitutes an instrument of minimum harmonisation of standards concerning agency work and represents the culmination of a troubled legislative process that took over six years to complete, highlighting profound divergences among Member States in their approach to this form of atypical work.

Historically, the majority of European Member States had adopted restrictive or even prohibitive approaches towards temporary agency work.

Countries such as Germany, France and Italy had developed complex systems of authorisations, sectoral limitations and quantitative quotas reflecting a conception of agency work as a potentially dangerous phenomenon for the stability of employment relationships. This approach was rooted in the continental labour law tradition[4], which privileged the open-ended employment contract as the normal and socially "desirable" form of labour organisation[5].

The critical review process of these restrictive approaches had already begun in the 1990s, driven by various converging factors. Firstly, the experience of Anglo-Saxon and Nordic countries, which had already adopted

[1] Treu, *Sustainable social security. Past and future challenges in social security*, in *RDSS*, 2018, 4, pp. 621-655.

[2] Delfino, *Note su "Jobs Act", "flexicurity" e ordinamenti sovranazionali*, in *DLM*, 2015, 2, pp. 407-417.

[3] Ales, *Il Modello Sociale Europeo dopo la crisi: una mutazione genetica?*, in *DLM*, 2017, 3, pp. 485-494; Sartori, *Temporary agency work in Europe after the 2008/104/EC directive*, in *ELLJ*, 2016, 7, 1, pp. 107-124.

[4] Spattini, *Agency Work: a Comparative Analysis. E-Journal of International and Comparative Labour Studies*, ADAPT University Press, 2012, 1.

[5] Aa.Vv., *The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue*, Hamburg, 2013.

more liberal approaches, demonstrated how this contractual form could effectively contribute to job creation and facilitate labour market transitions. Secondly, empirical studies started to show that agency work, far from being a form of extreme precariousness, could represent a step towards stable employment, especially for the most vulnerable groups in the labour market[6].

The adoption of the Directive marked a paradigm shift in the European approach to regulating agency work, requiring Member States to abandon purely restrictive approaches in favour of balanced regulation combining flexibility and security[7], with the declared aim of effectively contributing to job creation and the development of flexible forms of work, recognising temporary employment agencies as a legitimate and functional actor in the European labour market[8].

1.2. *Directive 2008/104/EC as a pillar of European regulation*

The Directive obliges Member States to conduct a "review of restrictions and prohibitions" limiting the use of temporary agency work (Article 4) present in national legal systems and provides provisions to ensure equal treatment (Article 5) and access to employment, collective facilities, and vocational training (Article 6).

A fundamental premise for understanding the current state of implementation of temporary agency work in Europe is that the Directive does not aim to fully harmonise national regulations, but rather seeks to establish a common regulatory framework that prevents social and economic dumping among Member States and between workers from different States[9].

The Directive's declared objective is indeed to guarantee the protection of agency workers and to improve the quality of agency work "ensuring compliance with the principle of equal treatment towards them and recognising temporary work agencies as employers" (Article 2), while care-

[6] Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity*, in *ELLJ*, 2010, 1, 3, pp. 307-331.

[7] Ales, *Modello sociale europeo e flexicurity: una sorta di patto leonino per la modernizzazione*, in *DLM*, 2007, 3, pp. 523-534; Rosin, *Applying the Temporary Agency Work Directive to Platform Workers: Mission Impossible?*, in *IJCL*, 2020, 36, 2, pp. 141-168.

[8] Robin-Olivier, Lo Faro, *Non standard Employment contracts,* in Jaspers, Pennings, Peters (eds.), *European Labour Law*, Intersentia, 2024, pp. 327 ff.

[9] Piglialarmi, Serrani, *Lo staff leasing finisce alla Corte di Giustizia dell'Unione Europea*, in *Boll. ADAPT*, 2024.

fully regulating the use of this instrument to contribute effectively to job creation (Recital 9) and to the development of flexible forms of work with respect to minimum homogeneous protections[10].

Thus, unlike fixed-term contracts[11], the European legislator recognises temporary agency work as a promotional tool for stable employment[12], with particularly incisive protection for workers engaged in fixed-term agency work, as Member States are required to adopt "the necessary measures [...] to avoid abusive use [...] and, in particular, to prevent successive assignments aimed at circumventing the provisions of this Directive" (Article 5 para. 5).

It must be clarified from the outset that Directive 2008/104/EC, unlike Directive 1999/70/EC on fixed-term contracts, does not aim to prevent the abuse of temporary agency work[13], but rather to protect agency workers in comparison to directly employed workers[14]. Indeed, a textual analysis of the Directive clearly shows that employment through agencies at the European level is not considered hazardous; on the contrary, it is supported as a form of flexible employment that can effectively contribute to job creation.

It is therefore important, to properly approach the Directive's objectives and assess the coherence of national regulatory frameworks, to highlight that its inspiration, unlike that underlying fixed-term contract regulation, is intended to promote and not hinder recourse to temporary agency work, provided an adequate system of sanctions[15] or, more simply, "counterbalances" to flexibility established by the legislator and sectoral collective bar-

[10] Esposito, *Somministrazione di lavoro e rapporti interpositori nella nuova stagione comunitaria della flexicurity*, in Zoppoli, Delfino (eds.), *Flexicurity e tutele. Il lavoro tipico e atipico in Italia e in Germania*, Ediesse, 2008.

[11] Bollani, *La somministrazione di lavoro liberalizzata*, in Magnani, Pandolfo, Varesi (eds.), *I contratti di lavoro. Commentario al d.lgs. 15 giugno 2015, n. 81*, Giappichelli, 2016, p. 157.

[12] Passalacqua, *La somministrazione di lavoro alla prova del decreto dignità*, in *DML*, 2019, 1, pp. 97 ff.; Cataudella, *La somministrazione di lavoro dopo il c.d. decreto dignità*, in *LPO,* 2019, 1-2, pp. 1-16; Miscione, *Il lavoro somministrato dopo il "decreto dignità" e momenti di storia del diritto*, in *LG*, 2019, 2, pp. 123-136.

[13] Aimo, *La nuova disciplina sul lavoro a termine e somministrazione a confronto con le direttive europee: assolto il dovere di conformità?*, in *DLRI,* 2015, 3, p. 635.

[14] As already established by the CJEU, 11 April 2013, C-290/12, Della Rocca.

[15] Filì, *Prime note sulla somministrazione di lavoro (artt. 30-40)*, in Carinci (ed.), *Commento al d.lgs. 15 giugno 2015, n. 81: le tipologie contrattuali e lo jus variandi, ADAPT*, 2015, pp. 197 ff.; Ferrara, *Uso e abuso della somministrazione di lavoro: la reiterazione di missioni successive al vaglio della Corte di Giustizia dell'Unione Europea*, in *ADL*, 2021, 2, pp. 425 ff.

gaining, through quantitative limits and specific protective rules for agency workers such as equal treatment, the solidarity regime between agency and user undertaking, and sectoral welfare through bilateral bodies[16].

On the one hand, the Directive promotes the diffusion of agency work as a form of organisational flexibility capable of triggering virtuous employment processes; on the other, it guarantees employment quality through incisive protective instruments for workers involved in non-standard contractual forms[17].

This systematic reading of the Directive's provisions, respecting the peculiarities of labour markets and industrial relations systems in Member States, is today more necessary than ever because, as will be seen, the latest case law outcome, while abstractly aligned with the Directive's protective aims, tends to interpret, even almost "quantify", the concept of flexibility underpinning the Directive itself, thus identifying a substantial prerequisite of the temporary agency work institution[18].

The normative structure of the Directive rests on two fundamental pillars reflecting the political compromise reached between different Member States' positions[19].

The first pillar imposes on Member States the obligation to "review restrictions or prohibitions" that limit the use of temporary agency work, with the goal of favouring a more liberal approach to the use of this contractual form. Article 4 establishes that restrictions and prohibitions related to temporary agency work are justified only "for reasons of general interest regarding the protection of temporary agency workers, health and safety requirements at work, or the need to ensure the proper functioning of the labour market and to prevent possible abuses".

The second pillar, governed by Article 5, establishes the principle of equal treatment between agency workers and workers directly employed by the user company, ensuring that "the basic working and employment

[16] Ciucciovino, *I nuovi limiti al ricorso alla somministrazione dopo il D.L. 34/2014*, in Calcaterra (ed.), *La somministrazione di lavoro*, Giuffrè, Milano, 2014.

[17] Melin, Parthenopoulos, *Overview of Recent Cases Before the Court of Justice of the European Union (January-June 2024)*, in *EJSS*, 2024, 26, 3, pp. 369-386.

[18] Lamberti, *La somministrazione di lavoro come connubio tra flessibilità del mercato e tutela dei lavoratori*, in Ciucciovino, Crespi, Toscano (eds.), *Il lavoro in somministrazione in Italia: quadro regolatorio, percorsi professionali e transizioni. Un'analisi attraverso i big data*, Roma Tre-Press, 2024, pp. 48 ff.

[19] Riesenhuber, *European Employment Law. A systematic exposition*, Intersentia, 2021.

conditions are at least identical to those which would apply to them if they were directly employed by the same company to carry out the same work".

This normative architecture reflects the "dual nature" of the institution, as effectively described by Italian doctrine, which sees temporary agency work as simultaneously "pro-market" and "pro-labour"[20].

Temporary agency work, therefore, represents the legal-dogmatic emblem of the tension between companies' flexibility needs and the protection of workers' fundamental rights, while highlighting the internal contradictions – or rather, the complex heterogeneities – of European labour law[21].

This study aims to propose a comparative analysis of current temporary agency work regulation in European legal systems, requiring a methodological approach that considers the complexity of interactions between European law and national rights and combines doctrinal, normative, and jurisprudential analysis regarding the conformity of national regulation with the Directive[22].

The Court of Justice of the European Union has indeed played a decisive role in delineating the scope and interpretation of Directive 2008/104/EC, establishing – as will be seen in more detail later – stringent constraints on deregulation and promoting the principle of equal treatment and effective protection of agency workers[23]. More recently, the Court has ruled decisively on the notion of "temporariness of assignments", and at the time of writing, it is called to decide on the preliminary ruling raised by some Italian Courts on the compatibility of staff leasing with the Directive's provisions (see *infra*).

Particular attention is thus devoted to the role of Court of Justice jurisprudence[24], which in recent years has produced a series of key decisions for interpreting Directive 2008/104/EC such as the TimePartner case (C-311/21) on the "overall protection" of agency workers, the KG and Daimler rulings on limits to the "reasonable temporariness" of assignments (C-

[20] Biasi, *L'arrêt KG e la temporaneità del lavoro somministrato: essere o dover essere?*, in *DLRI*, 2021, 170, pp. 301 ff.

[21] Spattini, *cit*.

[22] Kullmann, *The 'temporariness' of temporary agency work assignments*, in *ELLJ*, 2024, 15, 1, pp. 4-16.

[23] Robin-Olivier, Lo Faro, *cit*., pp. 327 ff.

[24] Ulber, *The Role of the Social Partners and the 'Overall protection of temporary agency workers': The ECJ decision in the TimePartner case and the legal and actual situation in Germany*, in *ELLJ*, 2024, 15, 1, pp. 38-49.

681/2018 and C-232/2020), and the currently pending Italian preliminary ruling on staff leasing[25]. National judges, for their part, have helped delineate the operational limits of temporary agency work by adding important pieces to the jurisprudential mosaic.

Only a precise normative and jurisprudential triangulation enables the study of regulated flexibility and social protection dynamics in a scenario of European legal pluralism that integrates supra-national and national competences.

2. *National models compared: liberal vs restrictive approaches*

2.1. *The Italian regulatory framework between flexibility enhancement and application restrictions*

Within the Italian legal system, the regulation of the *contratto di somministrazione*, described as a complex contractual arrangement in which two contracts combine to create a dissociation between the employer and the recipient of the work performance, through an intermediation authorised by the legal system and subject to specific controls and guarantees aimed at preventing the risk that imputation of the relationship to a person different from the actual user leads to forms of circumvention of worker protections[26], is currently governed by Articles 30 to 40 of Legislative Decree No. 81/2015.

The Italian legislator's approach has echoed the "dual nature" of the European perspective[27]; the Italian compromise has been marked by regulatory discontinuities alternating between flexible and more rigid systems[28].

Nationally, until 1997, agency work was precluded by Law No. 1369/1960, which prohibited labour intermediation, effectively preventing

[25] Trib. Reggio Emilia, 7 November 2024, and Trib. Milan, 14 January 2025.

[26] Cons. St., sez. III, 3 May 2022, n. 3468.

[27] Calcaterra, *La somministrazione di lavoro dal pacchetto Treu al Decreto Dignità*, in Calcaterra, (ed.) *La somministrazione di lavoro. Problemi e prospettive tra diritto nazionale e diritto dell'Unione europea dopo il Decreto Dignità*, Editoriale Scientifica, 2019.

[28] Siena, *La Corte di Giustizia si pronuncia su missioni successive e prevenzione degli abusi nella somministrazione*, in *MGL*, 2021, 1, pp. 270 ff.; Ferrara, *Somministrazione di lavoro e tecniche anti abusive tra diritto europeo e diritto interno,* in Chiaromonte, Ferrara (eds.), *Bisogni sociali e tecniche di tutela giuslavoristica. Questioni aperte e prospettive future*, Franco Angeli, 2018, pp. 177-178.

a worker from holding employment relationships with anyone other than the actual employer exercising standard employer powers.

The legal breach in this general prohibition occurred with Law No. 196/1997, which introduced temporary agency work, reserved for authorised agencies registered in a ministerial roll, initially admitted only on a fixed-term basis and in strictly defined cases identified by legislation and collective bargaining[29].

After the regulatory phase marked by the so-called Biagi Reform (Legislative Decree 276/2003), which expanded utilisation possibilities[30], and the subsequent phase closed by Law No. 92/2012 (Article 1, para. 9 letter b), which required the presence of a justificatory reason for initial fixed-term contracts not exceeding 12 months, fixed-term agency contracts remained subject solely to quantitative limits set by collective agreements as established in Articles 20(3) and (4), with exemptions and prohibitions in para. 5: a) agency contracts could be concluded either on a fixed-term or open-ended basis; b) open-ended agency contracts were permitted only in types specifically listed or identified by collective bargaining; c) fixed-term agency contracts were subject only to compliance with quantitative limits delegated to the most representative national collective agreements.

These legislative interventions[31], in practice, encouraged increased use of the institution, which is suited to meeting market flexibility needs without imposing rigidity on organisational structure, while providing well-designed protections for workers, as explained below.

The subsequent rationalisation of labour relationship regulation effected by Legislative Decree 81/2015 essentially confirmed the previous legislation, linking the legitimacy of fixed-term agency contracts solely to compliance with quantitative limits fixed by collective agreements applied by the user employer (Article 31), while for open-ended agency contracts (so-called staff leasing), unless otherwise specified by the same collective agreements, it limited their use to no more than 20% of the user employer's

[29] Treu, *Flessibilità e tutele nella riforma del lavoro,* in *GDLRI*, 2013, 137, pp. 1-51; Carinci M.T., *Agency Work in Italy,* in *WP CSDLE "Massimo D'Antona".IT,* 36/2011; Canavesi, *Agenzie per il lavoro e lavoratori a tempo indeterminato nella somministrazione,* in *DRI,* 2023, 2, pp. 407 ff.

[30] Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera. Contributo allo studio della fattispecie lavoro temporaneo tramite agenzia,* Giappichelli, 1999.

[31] Bollani, *Contratto a termine e somministrazione nelle scelte del legislatore del 2018,* in *DPL*, 2018, 40, pp. 2367 ff.

permanent workforce, requiring exclusively the use of permanent employees hired by the agency[32].

The overall framework of the Jobs Act was thus oriented towards positive regulation rather than repression of flexible contract types[33].

In this regulatory context, the 2018 reform introduced through Decree-Law No. 87/2018, converted into Law No. 96/2018, the so-called "*Decreto Dignità*," which, opposing the previous framework, rewrote the applicable regulation of the contract in question. In brief, Article 2 of Decree-Law No. 87/2018 extended the ordinary fixed-term employment regulation to fixed-term agency contracts. Essentially, the legislator equated fixed-term agency contracts with fixed-term employment contracts, save for specific exceptions, adopting a perspective diametrically opposed to the previous national regime and also to the EU-wide framework, which had always distinguished the two contract types[34], marking a sharp reversal from the process of liberalisation that characterised the Italian system from 2003 to 2015[35]. This extension introduced causal limits, duration caps, and quantitative ceilings that significantly reduced the use of the institution[36].

Hence, under the "*Decreto Dignità*", the Italian user is currently subject to two thresholds: firstly, a 20% limit concerning permanent employees; secondly, an overall 30% limit calculated considering both fixed-term and agency workers. The 2023 "*Decreto Lavoro*" partly corrected this framework by reintroducing causelessness for the first 12 months of the relationship and delegating causal definitions for subsequent periods to collective bargaining. Moreover, Italian collective bargaining developed an articulated system of limits distinguishing between agency work at the same user (24-month

[32] Casale, *I presupposti di legittimità della somministrazione di lavoro e la conversione alle dipendenze dell'utilizzatore*, in *ADL*, 2009, 2, pp. 515 ff.

[33] Filì, Riccardi, *La somministrazione di lavoro*, in Ghera, Garofalo (eds.), *Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act 2*, Cacucci, 2015, pp. 303-304.

[34] Treu, *Una seconda fase della "flexicurity" per l'occupabilità*, in *DRI*, 2017, 3, pp. 597-633; Calcaterra, *Lo staff leasing dall'ostracismo alla liberalizzazione*, in Calcaterra (ed.), *La somministrazione di lavoro. Problemi e prospettive tra diritto nazionale e diritto dell'Unione europea dopo il Decreto Dignità*, Editoriale Scientifica, 2019.

[35] Ciucciovino, Toscano, *Il contributo del lavoro delle agenzie di somministrazione al mercato del lavoro italiano: bilancio e prospettive*, in Ciucciovino, Crespi, Toscano (eds.), *Il lavoro in somministrazione in Italia: quadro regolatorio, percorsi professionali e transizioni. Un'analisi attraverso i big data*, Roma Tre-Press, 2024, pp. 7 ff.

[36] Giubboni, *Somministrazione di lavoro e tecniche antiabusive alla prova del diritto dell'unione europea*, in *RIDL*, 2021, 1, I, pp. 27 ff.

limit, subject to user collective bargaining provisions) and work at different users (48-month limit)[37].

While the progressive liberalisation of agency work produced positive utilisation performance, the tightening enacted by the *Decreto Dignità* significantly impacted actual use[38].

Empirical data from the Observatory at Roma Tre University, in which the author participates, show that the introduction of new limits caused a reduction in use, confirming concerns expressed by scholars[39] regarding the effects of restrictive policies on labour market flexibility[40].

2.2. *Regulation in continental Europe: France and Germany between restrictions and liberalisation*

Both France and Germany have developed approaches to agency work reflecting their distinct labour law traditions and specific labour market conditions.

The French model of agency work, *travail temporaire or intérim*, is characterised by a precise legal structure codified in the *Code du travail*, particularly Articles L.1251-1 *et seq.*, exhibiting a structurally restrictive approach limit-

[37] The two National Collective Labour Agreements, signed by ASSOLAVORO and ASSOSOMM on the employer side and FELSA-CISL, NIDIL-CGIL, UILTEMP on the union side, currently effective as of 22 July 2025 (and in previous versions), thoroughly govern the maximum duration and sequence of fixed-term contracts in Art. 21, establishing that for agency work with the same user, the computation criteria and maximum duration are identified by the collective agreement applied by the user, with a fallback maximum duration of 24 months for contract succession. For agency work with different users, the total succession duration of fixed-term contracts between agency and worker cannot exceed 48 months.

[38] Lamberti, Caravaggio, *La somministrazione di lavoro: analisi di impatto nel mercato del lavoro tra esigenze di flessibilità e tutela del lavoro*, in Levrero (ed.), *Mercato del lavoro, contrattazione e salari in Italia: 1990-2021*, Roma Tre-Press, 2023, pp. 203-235.

[39] Maresca, *Contratto di lavoro e somministrazione a termine: il regime transitorio nel decreto dignità*, in *ADL*, 2018, 4, 1, pp. 10-12.

[40] The JointLAB "*Agency Work in Italy*", active since 2019 and coordinated by Professors Silvia Ciucciovino, Francesco Crespi and Alessandro Toscano, conducts research on temporary agency work in Italy and develops analyses of the employment dynamics of agency workers, with particular regard to contractual types and durations, commencements and terminations, job classifications, occupations, sectors of employment, and socio-demographic characteristics. Data analysis and processing are carried out in scientific collaboration with LabChain (Inter-university Centre for Advanced Studies on Blockchain, Innovation and Labour Policies). The Laboratory's activities are available at the following link: Laboratorio "JointLAB Lavoro in somministrazione in Italia" - JLS - Dipartimento di Economia.

ing agency use to specific reasons and imposing strict authorisation systems for agencies, with significant sanctions for abuse. In France too, the triangular legal relationship involving the *entreprise de travail temporaire* (ETT), *entreprise utilisatrice* (EU) and the temporary worker materialises through two separate contracts: the *Contrat de mise à disposition* between ETT and EU, commercial in nature; and the *Contrat de mission* between ETT and worker, labour law in nature. The French model provides procedural and substantive guarantees analogous to the Italian system, such as mandatory written form for the *contrat de mission* under penalty of requalification into an indefinite contract (CDI); the principle of equal treatment regarding working conditions, hours, safety and remuneration; and the *indemnité de fin de mission* (10% of gross remuneration) and *indemnité compensatrice de congés payés*. A major innovation is the introduction of the *contrat à durée indéterminée intérimaire* (CDII), i.e., an open-ended contract for temporary workers[41], guaranteed by a 2013 collective agreement and formalised through subsequent laws[42]. The CDII allows workers stable relations with the agency despite successive assignments to different users, ensuring income continuity through the *Rémunération minimale* even during intermission periods[43]. In particular, under the current Article L. 1251-58-6 of the Code du travail, the statutory maximum duration applicable to ordinary contracts of mission does not apply to workers employed by the agency under a CDII; by contrast, ordinary contracts of mission remain, in the absence of an applicable extended sectoral agreement, generally subject to an 18-month maximum and may be renewed twice[44]. The end-of-assignment indemnity is excluded due to the continuity of the working relationship[45].

A distinctive aspect of the French system is the role of *organismes paritaires*, bilateral entities managing sectoral welfare for agency workers. This model influenced the Italian approach in setting up *FormaTemp* and *EbiTemp*, demonstrating how bilateralism can be an effective tool to com-

[41] Vivés, *Sécuriser les intérimaires sans toucher au CDI? La création négociée du CDI intérimaire*, in *Rev.IRES*, 2016, 1.

[42] Collective agreement of 10 July 2013 signed by social partners with generalised effects by ministerial decree 22 February 2014.

[43] Aa.Vv., *cit.*

[44] *Loi Rebsamen* of 17 August 2015 introducing the CDII into the *Code du travail*; final establishment with law no. 2018-771 of 5 September 2018.

[45] D'Ascenzo, *Francia: lavoro a tempo indeterminato nella somministrazione dopo la Loi Rebsamen*, in *Boll. ADAPT*, 23 July 2018.

bine flexibility with security. In summary, the French model, akin to the Italian one, features a highly regulated system imposing strict limits both on the use of agency work and on the conditions under which it operates, with consolidated worker protections and innovations aimed at greater contractual stability and legal protection.

German doctrine describes the German model of temporary work regulation, contrasting it with the French model[46].

The German system of temporary agency work, *Arbeitnehmerüberlassung*, is among the most complex and elaborate models in Europe, shaped extensively by the Hartz reforms of 2003-2004, with the latest amendment to the *Arbeitnehmerüberlassungsgesetz* (AÜG) effective from 1 April 2017.

Germany adopted a fundamentally restrictive approach characterised by stringent authorisation requirements, well-defined time limits (18 months maximum assignment to the same user), and a multi-tiered architecture with collective agreements providing systematic derogations from the principle of equal pay. Operating as a temporary work agency requires licensing from the *Bundesagentur für Arbeit* (§ 1 AÜG); unlicensed operation entails nullity of contracts and administrative and criminal sanctions. Workers may be assigned to the same user for no more than 18 consecutive months (§1 Abs. 1b AÜG); after which they must be directly employed or reassigned elsewhere, except where collective bargaining allows exceptions.

German case law does not allow the dismissal of temporary workers at the end of an assignment to be justified solely on the ground that no alternative placement is immediately available.

The "business risk" is inherent in temporary agency business and cannot be shifted to workers; the agency must continue to pay and seek opportunities for the worker. Dismissal is only justified after prolonged unemployment and inability to requalify the employee.

Section 8 AÜG guarantees the right of temporary workers to essential working and employment conditions equal to those of user company employees (e.g., pay, holidays, working hours), except for permitted collective agreement derogations, provided overall worker protection is ensured, implementing Directive 2008/104/EC[47].

[46] Corti, *Il lavoro interinale "Modell Deutschland". Dall'europeizzazione al ritorno della regolazione*, in this journal, 2018, 3, pp. 523-556.

[47] Spinelli, *Il lavoro tramite agenzia interinale nella legislazione europea: natura temporanea senza rimedio. La vicenda di un lavoratore tedesco,* in *RIDL*, 2022, 3, 2, pp. 518 ff.

The Court of Justice of the European Union ruled specifically on the German system in case C-232/20, forbidding the use of agency work to fill permanent or ordinary stable jobs within the user enterprise. The ruling of 17 March 2022 clarified that the EU Temporary Agency Work Directive only requires the job covered to be temporary in nature, not the post itself. It emphasised the need to prevent and sanction abuse, requiring Member States to provide mechanisms to avoid abusive use, specifying that repeated and continuous placement with the same enterprise may constitute abuse if unreasonable.

The CJEU also addressed issues relating to the German system in case C-311/21 TimePartner Personalmanagement GmbH, setting fundamental principles for interpreting Article 5(3) of Directive 2008/104/EC, to which we will return later. The TimePartner case highlighted tension in the German system, showing how the extensive use of collective agreement derogations may conflict with the "overall protection" principle developed by the Court. The CJEU clarified that derogations to the equal treatment principle permitted by Directive 2008/104/EC and incorporated in the AÜG are lawful only if they ensure effective "overall protection" of agency workers through collective agreements.

The Court established that the concept of "general protection of temporary workers" does not require a specific protection level higher than that of workers generally, but collective agreements allowing differential treatment must provide "compensatory advantages" in basic working and employment conditions, so the compliance assessment must be concrete, comparing conditions of directly hired and temporary workers[48].

The Court also set criteria to evaluate whether such protection is effectively guaranteed. The *Bundesarbeitsgericht* confirmed the validity of the German system of compensatory advantages, while highlighting the need for a stricter assessment of their real balance of wage disparities.

2.3. *The Spanish model: the authorisation system and judgment C-441/23*

The temporary agency work system in Spain is governed by a comprehensive legal framework based on *Ley* 14/1994, *de 1 de junio, por la que se regulan las empresas de trabajo temporal* (ETT), continuously updated by

[48] Jaehrling, Kalina, *'Grey zones' within dependent employment: formal and informal forms of on-call work in Germany*, in *ETUI*, 2020, 26, 4, pp. 447-463.

implementing regulations including the *Real Decreto* 417/2015, *de 29 de mayo*, and very recently by Orden TES/1324/2024, *de 20 de noviembre*, which implements the *Real Decreto* 417/2015 approving the regulation of temporary work agencies.

In Spain, ETTs must obtain administrative authorisation to operate (Article 2 of *Ley* 14/1994; Article 13 of *Real Decreto* 417/2015). The authorisation is national and unique, requiring registration in a dedicated public register. ETTs are obliged to periodically report contracts activated and use updated official forms (Article 17 *Real Decreto* 417/2015; *Orden* TES/1324/2024). In implementing the equal treatment principle (Article 11 *Ley* 14/1994), agency workers are entitled to the same essential working and employment conditions as employees of the user company, with particular attention to pay, working hours, holidays, and health and safety at work (Article 22 *Ley* 31/1995 on risk prevention). Only collective bargaining may, in certain cases, provide derogations within the limits of the European Directive. The recent *Orden* TES/1324/2024 updated procedures regarding authorisation numbers, contract templates and monthly communications, aligning with the labour reform under Royal Decree-Law 32/2021, enhancing transparency and traceability of ETT operations [49].

On the question of authorisations to carry out agency work, the Court of Justice recently intervened in a Spanish case, judgment C-441/23, clarifying the criteria for classifying temporary work agencies and their workers [50]. The Court specified that an entity must be classified as a temporary work agency if its activity consists in employing workers who are temporarily assigned under the control and direction of a user company, regardless of its formal recognition as an agency in the country of origin, even if it lacks administrative authorisation as a recognised temporary work agency under national law.

This principle significantly broadens protections, including within the Directive's scope all workers temporarily at the disposal of a user en-

[49] AA.VV., *cit*.

[50] CJEU, C-441/23, concerns a Spanish case involving a worker (LM) assigned to Microsoft Ibérica through a chain of intermediation companies (Omnitel Comunicaciones, Leadmarket, Indi Marketers). Following maternity leave, the worker was dismissed and sought recognition of unlawful dismissal with joint liability of all involved companies. The CJEU clarified the scope of Dir. 2008/104/EC and the effective notion of the remuneration equal treatment principle.

terprise, irrespective of the legal qualification of their relationship, thus preventing companies from circumventing Directive protections by employing contractual arrangements that formally do not constitute authorised temporary work agencies[51].

The Court also confirmed that temporary agency workers must receive remuneration at least equal to what they would have received if directly employed by the user company, applying Article 5(1) of Directive 2008/104, reinforcing the principle of joint and several liability even in cases of unlawful dismissal.

2.4. *Self-regulation and the role of social partners in the Swedish and Danish systems and the Dutch Waadi Act*

The Nordic regulatory systems for agency work represent a distinctive model characterised by the central role of collective bargaining and a consensual approach among social partners. This tradition of self-regulation has produced systems that combine high flexibility with robust social protections, consistent with the flexicurity model developed in these countries.

The Swedish model effectively exemplifies this approach. Swedish legislation on agency work (*Lagen om uthyrning av arbetstagare - Lag* 2012:854) implemented Directive 2008/104/EC through a system that grants broad regulatory powers to collective bargaining. The legislation, in line with the Directive, requires that agency workers have at least the same working conditions and pay they would receive if directly employed by the client company for the same role. Exceptions and derogations under Article 2.2 are only permissible if established in collective agreements signed or approved by central trade union organisations. Notably, the "24-month rule" in Sweden dictates that workers employed for a total of 24 months at the same client operational unit (not necessarily consecutive but within 36 months) must be hired on a permanent basis by the client or receive compensation equivalent to two months' salary. This mechanism is an interesting example of how temporal limits can incentivise transitions to stable employment relationships without prohibiting extended agency work.

[51] Van Schadewijk, *The concept of 'temporary agency work' in EU law. C-441/23 (Omnitel Comunicaciones and Others)*, in *ELLJ*, 2025, 16, 3, pp. 411-416.

The Danish system arguably represents the most advanced example of self-regulation in the agency work sector, governed by the Act on the legal rights of temporary agency workers upon assignment by a temporary-work agency (*Lov om midlertidigt ansattes retsstilling ved udstationering af en vikarvirksomhed*), effective from 1 July 2013. Denmark imposes no specific legislative limits on assignment durations, fully entrusting operational rules to collective bargaining. This approach is enabled by a high collective bargaining coverage rate (over 80%) and a strong tradition of social partner collaboration [52]. Danish legislation also establishes the equal treatment principle: Article 3 obliges agencies to guarantee temporary workers conditions regarding working time, overtime, breaks, rest periods, night work, holidays, public holidays and remuneration that are at least equal to those applicable if the worker were directly employed by the user company. A particularly relevant element is the collective derogation clause in Article 3(5), which excludes the application of equal treatment principles when an agency is covered by a nationwide collective agreement concluded by the most representative social partners, respecting the general protection of temporary workers. The CJEU jurisprudence has progressively limited union discretion, requiring substantive judicial review even in systems like Denmark with strong social partner autonomy.

The Netherlands presents a particularly interesting case in the European agency work panorama, having developed an innovative system combining operational flexibility with robust control and worker protection mechanisms. The *Wet allocatie arbeidskrachten door intermediairs* (*Waadi* Act) constitutes the pillar of Dutch regulation together with the Civil Code (*Burgerlijk Wetboek*, Book 7 Articles 690-692). Agency work is governed by a combination of Dutch Civil Code, Collective Labour Agreements (central to the contractual discipline), company-level policies and individual employment contracts. The *Waadi* Act adopts a preventive approach favouring registration and transparency over operational restrictions. All companies engaging in agency work must register with the Business Register and obtain a *Waadi* Registration, a system facilitating oversight and preventing fraud, illegal work, and worker exploitation (Article 7 *Waadi*). The Admission for Allocation of Workers Act (Wtta) will enter into force on 1 January 2027 and

[52] Munkholm, *The 'overall protection' of temporary agency workers, the role of social partners, and the case of Denmark*, in *ELLJ*, 2024, 15, 1, pp. 17-37.

will introduce an admission system; enforcement of the prohibition on supplying or hiring workers without admission will begin on 1 January 2028.

This complex regulatory architecture demands careful compliance management. In the Netherlands, agency workers have the right to the same essential working conditions (including pay) as employees of the user for the same assignment (Article 8 *Waadi*).

Regarding contract duration and security (*ketenregeling*), since 2020 there has been a maximum of three temporary contracts within three years with intervals shorter than 6 months at the same user or agency: exceeding this limit without collective agreement exemptions triggers conversion to a permanent contract.

The Dutch model also provides innovative mechanisms managing the transition from temporary to permanent contracts. Under the *Wet meer zekerheid flexwerkers*, approved in 2026, the basic rule remains a maximum of three fixed-term contracts or three years of continuous fixed-term employment, while the interruption period required to start a new chain will be extended from six months to three years; these changes are expected to apply from 1 January 2028.

2.5. *Post-Brexit United Kingdom: the survival of the Agency Workers Regulations*

Brexit represented a moment of testing for the robustness of the British approach to regulating agency work. Contrary to expectations of immediate post-Brexit deregulation, the UK has essentially maintained in force the Agency Workers Regulations 2010, which implemented Directive 2008/104/EC and remain applicable post-Brexit through retained EU law[53].

Before Brexit, the UK agency work system was primarily regulated by the Agency Workers Regulations (AWR), effective from 1 October 2011, implementing Directive 2008/104 on temporary agency work. The UK regulations embody a pragmatic approach balancing business flexibility and worker protections. Under this system, after a 12-week qualifying period in the same role with the same user, agency workers gain the same entitlements as directly employed staff (Regulations 5-6 AWR 2010). The UK ap-

[53] O'Connor, Harvey, *Freedom of Movement and the Normative Value of the Right to Work in the United Kingdom Post-Brexit*, in *Cambridge Yearbook of European Legal Studies*, 2023, 25, pp. 174-197.

proach thus features a graduated rights progression: agency workers immediately acquire fundamental rights (national minimum wage, paid holidays, maximum working time, health and safety protections) while after 12 weeks in the same position at the same user, they obtain equal treatment regarding basic working conditions and pay.

Primary liability rests with the agency, but the user must provide access to collective facilities and opportunities; the former pay-between-assignments derogation was repealed with effect from 6 April 2020; agency workers are therefore entitled to equal pay after the 12-week qualifying period even where they have a permanent contract with the agency[54].

Brexit introduced the retained EU law regime via the European Union (Withdrawal) Act 2018, keeping all EU-derived law as UK domestic law after 31 December 2020 (IP completion day) until formally amended[55].

The AWR 2010 remain fully applicable pending future revision. The UK government has contemplated revising agency work laws within the Brexit Freedoms Bill, permitting repeal, replacement or amendment of retained EU legislation by 31 December 2023 ("sunsetting"), but to date the AWR remain substantially unchanged[56].

3. *The principle of equal treatment and its operational variants*

3.1. *Equal treatment in the directive and possible derogations*

Article 5 of Directive 2008/104/EC, as previously mentioned, represents the normative cornerstone of the principle of equal treatment in European labour law concerning temporary agency work.

The provision establishes that the agency worker must be assured, for the entire duration of the employment relationship, the basic working and employment conditions they would benefit from if directly employed

[54] Watts, *The Institutional Context for Temporary Staffing: A European Cross-national Comparative Approach*, University of Manchester, 2013.

[55] De Mars, Murray, *With or Without EU? The Common Travel Area After Brexit*, in *GLJ*, 2020, 21, pp. 815-837.

[56] Current constraints also stem from the UK-EU Trade and Cooperation Agreement (TCA) which requires maintaining worker protection levels no lower than those ensured at end 2020, under threat of EU trade countermeasures in case of "diverging down".

by the user undertaking to perform the same work. This principle unfolds across several operational dimensions: remuneration conditions, working time, occupational health and safety, and access to the user undertaking's collective facilities.

However, the Directive allows significant derogations through three distinct mechanisms: collective agreements concluded by social partners (Art. 5, para. 3), workers hired on permanent contracts by the agency and remunerated between assignments (Art. 5, para. 2), and national agreements that nonetheless guarantee an adequate level of overall protection (Art. 5, para. 4). This regulatory flexibility has generated significantly heterogeneous national interpretations, creating what doctrine describes as a regulatory mosaic. Comparative analysis of national systems highlights how differing labour law traditions influence the interpretation of "remuneration", a concept on which the Court of Justice has repeatedly ruled, notably with respect to the Spanish system in the 2022 judgment of 12 May in case C-426/20, and more recently in the 22 February 2024 judgment in case C-649/22.

Regarding the notion of "overall protection" of agency workers, the connection between the Directive's general principles and the system of collective derogations permitted therein appears pivotal.

In particular, as noted, the German model is characterised by extensive use of collective derogations from the principle of equal treatment and is based on a complex architecture of sectoral collective agreements envisaging wage derogations for agency workers relative to directly employed staff[57].

Nevertheless, the Court of Justice, in its 15 December 2022 decision in case C-311/21 (TimePartner), as will be elaborated below, has questioned this balance, requiring a more stringent assessment of the actual compensatory capacity of the benefits offered.

The Italian system presents distinctive characteristics markedly separating it from other European regimes. Legislative Decree No. 81/2015 incorporated the principle of equal treatment in Article 35, establishing that agency workers must receive "overall economic and regulatory treatment not inferior to that enjoyed by employees of the user of equivalent level,

[57] Over 95% of the sector covered by collective agreements providing wages significantly lower than direct workers.

performing equal duties". The Italian wording differs from the European Directive's notion, employing the concept of "overall not inferior treatment" seeming to limit derogation possibilities and including welfare benefits within the overall treatment, given that extensive interpretation encompasses social, welfare, and company welfare services provided by the user undertaking. Italian collective bargaining has traditionally avoided systematic derogations from the principle of equal remuneration, focusing rather on defining supplementary welfare systems via bilateral bodies such as *FormaTemp* and *EbiTemp*. This approach reflects a view of agency work as a flexibility tool not to result in wage dumping, consistent with the promotional orientation of the European Directive.

The French model adopts an intermediate stance between the German and Italian approaches. French agency work legislation enshrines the principle of equal treatment with limited derogations through collective bargaining. French collective agreements have made moderate use of these possibilities, focusing primarily on organisational and training aspects rather than systematic wage reductions.

Indeed, the French model represents a clear compromise between flexibility and protection, characterised by full wage parity defined as the same remuneration as employees of the user undertaking performing identical tasks, a precariousness allowance amounting to 10% of gross salary at each mission's end compensating instability, combined with specialised training systems[58] and the concurrent existence of bilateral funds[59].

Significant heterogeneity in implementing the equal treatment principle generates three systemic issues: a) competitive distortions: wage discrepancies among Member States (particularly pronounced in Germany) create incentives for offshoring temporary work services and regulatory "shopping". Agencies established in countries permitting broader derogations can offer more advantageous conditions in the cross-border market; b) fragmentation of social protection: heterogeneous application of the permitted derogations in Article 5 compromises the Directive's minimum harmonisation objective; c) judicial enforcement: the principle's effectiveness increasingly depends on the Court of Justice's intervention, balancing

[58] Contributions of 2.15% of the wage bill for training (exceeding 1.5% of other companies).

[59] FAF-TT (Fonds d'assurance formation du travail temporaire) and FPE-TT for training and placement.

the Directive's fundamental principles with the margin of appreciation afforded to Member States.

3.2. *Jurisprudence of the Court of Justice on equal treatment*

The case law developed by the Court of Justice helps clarify the concrete parameters of the "adequate compensation" required for collective derogations.

The evolution of the CJEU jurisprudence on the principle of equal treatment for agency workers reflects a progressive interpretive refinement that has helped delineate Article 5's application contours.

The Court of Justice's ruling in CM v. TimePartner Personalmanagement GmbH (C-311/21) of 15 December 2022 marks a turning point in interpreting the equal treatment principle enshrined in Article 5 of Directive 2008/104/EC.

The judgment tackles one of the most contentious issues in Directive application: the scope of collective bargaining derogations permitted and the boundaries necessary to guarantee "overall protection"[60].

The facts concerned an agency worker employed by the German agency TimePartner Personalmanagement GmbH and seconded to a retail company in Bavaria. Under the collective agreement for agency workers, the employee received a gross hourly wage of €9.23, significantly less than €13.64 provided by the retail sector collective agreement for directly employed workers. The central issue was the lawfulness of this wage disparity under Article 5(3) of the Directive, which allows derogations to the equal treatment principle "provided the overall protection of agency workers is respected".

The Court clarified that the "overall protection" concept does not require consideration of a specific protection level higher than that laid down for workers generally by national and EU law provisions on basic working and employment conditions, but demands that any wage or regulatory disadvantages be compensated by corresponding advantages in other working and employment conditions. Thus, when social partners authorise through collective agreements differences in basic working and employment conditions disadvantaging agency workers, such agreements must grant compen-

[60] Ulber, *cit.*, pp. 38-49.

sating benefits for the difference in treatment to comply with the overall protection principle.

The ruling introduces a concrete evaluation criterion demanding a specific comparison of disadvantages and benefits among basic working and employment conditions at the particular user undertaking: assessment is case-by-case, comparing overall conditions for a given role. The compensation principle requires that collective derogations not merely reduce agency workers' rights but should deliver equivalent counterbalances through other benefits (e.g., training, job security, additional services). This stance constitutes a clear Court position against overly permissive interpretations of collective derogations that would undermine the equal treatment principle. The TimePartner case had immediate repercussions on national case law. The *Bundesarbeitsgericht* was compelled to verify case by case whether contractual benefits effectively balance wage disparities, abandoning prior presumptive correctness characterising the German approach.

Beyond TimePartner, other decisions have clarified specific aspects of equal treatment.

The Team Power Europe case (C-784/19), arising from a Bulgarian dispute, though not directly addressing equal treatment, clarified criteria for determining when a temporary work agency is deemed to carry out "substantial activities" in a Member State, with significant implications for national collective agreement and wage system application. The European Court of Justice in C-784/19 addressed cross-border posting and the temporary agency work regime, specifically concerning social security applicable to agency workers posted from one Member State to companies in another[61].

The Court held that agency workers employed by an agency in one Member State may maintain social security coverage of that State even while working for a user company in another Member State, provided the agency carries out substantial activities (not merely administrative) in the home country.

Regarding the "substantiality" of activities, the Court clarified that mere administrative management or creation of fictitious agencies in the home country to apply more favourable social security regimes constitutes

[61] The preliminary ruling request was filed by Bulgarian administrative court after the Bulgarian tax agency refused to issue an A1 certificate to a Bulgarian temporary work agency ("Team Power Europe") for workers posted in Germany. The A1 certificate attests application of local social security legislation even when work is performed abroad.

abuse; the agency must carry out significant functions (such as recruitment, selection, concrete management) in the Member State of origin.

This case also highlights the regulatory overlap and potential conflicts between temporary agency work regulation and posting legislation. Directive 2008/104/EC and Directive 96/71/EC on posting (amended by Directive 2018/957/EU) establish normative frameworks potentially applicable concurrently in cross-border agency work[62]. A particularly problematic aspect in posting cases concerns the identification of the "comparator" for applying equal treatment: for domestic agency workers, the comparator is clearly user's directly employed staff; for cross-border workers, the situation is more complex, as the comparison might involve agency workers in the home State, user company employees, or other agency workers in the same sector.

The Court's principles seek to avoid downward pressure on national welfare systems, preventing circumvention via fictitious postings and cross-border agency work liable to affect equal treatment, in connection with operational and administrative rules through which Member States' social security systems cooperate to ensure continuous social insurance coverage and portability of social rights within the EU under Regulation 987/2009. The ruling constitutes essential reference for verifying the genuineness of postings and cross-border agency work in European context, with significant implications for coherence between social security protection and labour rights in transnational worker movements and for the authenticity of social security certificates[63].

4. *The "reasonable temporariness" of assignments*

4.1. *Temporariness as a defining element of temporary agency work*

"Temporariness" constitutes the ontological distinguishing feature of the institution of temporary agency work, serving as a cornerstone prin-

[62] Delfino, *Ultima direttiva sul distacco transnazionale dei lavoratori e trasposizione in Italia nel prisma del bilanciamento degli interessi*, in *DLM*, 2021, 2, pp. 271-290.

[63] Schlachter, *Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide?*, in *IJCL*, 2012, 28, 2, pp. 177-197.

ciple differentiating this form of employment from the stability typical of traditional subordinate employment[64].

The theoretical foundation of this requirement lies precisely in the triangular organisation of the employment relationship, whereby the agency's intermediary function presupposes a transitory need, temporally limited, of the user undertaking [65].

However, the lack of heteronomously imposed limiting rules regarding reiteration of fixed-term employment contracts within temporary agency work has generated interpretative spaces that have recently engaged both Union and national courts, requiring further investigation at this stage of analysis.

Directive 2008/104, as noted, aims to ensure that agency work preserves its "temporary" nature, while simultaneously protecting the worker's interest in quality employment and requiring Member States to adopt measures to prevent any form of abuse[66]. Nevertheless, no provision of the Directive obliges Member States to set a maximum duration in national law beyond which an assignment can no longer be considered "temporary"[67].

The interpretative threshold lies precisely in the space between what is physiological, hence temporary and compliant with the Directive, and what is pathological, constituting an abuse of temporariness[68].

The Court of Justice of the European Union has repeatedly clarified that temporariness is an inherent and structural requirement of agency work, emphasising that this feature should not be understood as limiting the job to be filled at the user undertaking, but as the modality of making the worker available. This approach conceptually distinguishes the permanent or temporary nature of the position from the temporally circumscribed duration of the agency employment relationship[69].

[64] Treu, *Le tutele del lavoratore nel mercato del lavoro*, in *DRI,* 2002, 3, pp. 396–403.

[65] Ratti, *Somministrazione di lavoro e temporaneità delle esigenze dell'impresa*, in *LG*, 2010, 2, pp. 703 ff.

[66] Ciucciovino, *I limiti al ricorso alla somministrazione dopo il Decreto Dignità*, in Calcaterra (ed.), *La somministrazione di lavoro. Problemi e prospettive tra diritto nazionale e diritto dell'Unione europea dopo il Decreto Dignità*, Editoriale Scientifica, 2019, pp. 83 ff.

[67] Lamberti, *La somministrazione di lavoro come connubio tra flessibilità del mercato e tutela dei lavoratori*, cit., p. 48.

[68] Ratti, *Natura temporanea del lavoro tramite agenzia e limiti derivanti dal diritto europeo*, in *RIDL*, 2021, 1, 2, pp. 100 ff.

[69] Manfredini, *Ancora sulla necessaria temporaneità del lavoro in somministrazione, tra conferme, dubbi e novità*, in *DRI*, 2024, 3, pp. 795 ff.

The principle of temporariness contrasts with the stability of standard employment, typified by the open-ended employment contract as the general form of labour relationship. This opposition does not imply a value hierarchy between contract types but reflects differing economic-organisational functions: while the standard contract responds to the structural and continuous needs of the undertaking, temporary agency work aims to meet transitory needs through a mechanism of controlled flexibility.

In particular, the Court of Justice, conducting a systematic assessment of the EU regulatory framework, starting from the clear presupposition that "Article 5(5), first sentence, of Directive 2008/104, in itself, does not preclude national legislation that does not limit the number of successive assignments performed by the same agency worker with the same user nor conditions the legitimacy of fixed-term temporary agency work on technical, production, organisational, or replacement reasons", considers that the same provision must be interpreted as precluding a Member State from "failing to take any measures to preserve the temporary nature of agency work and national legislation that does not provide for measures to prevent the assignment of successive missions to the same agency worker with the same user"[70], aiming to prevent circumvention of the Directive's provisions as a whole.

4.2. *The "reasonable temporariness" in judgments C-681/2018 and C-232/2020*

The Court of Justice's jurisprudential evolution regarding temporariness in agency work has been principally systematised in two landmark rulings: the KG judgment of 14 October 2020 (C-681/18) and the Daimler judgment of 17 March 2022 (C-232/20).

These rulings marked a hermeneutic turning point profoundly influencing subsequent national interpretative developments concerning the evaluation of assignment durations.

Case C-681/2018 involved a German worker who had been employed at the same user undertaking for over four years through successive fixed-term agency contracts without substantial interruption between assignments. The preliminary question concerned the compatibility of national

[70] CJEU, 14 October 2020, C-681/2018.

legislation lacking specific limits on assignment duration with Article 5(5) of Directive 2008/104/EC[71].

The Court ruled that although the Directive does not explicitly set temporal limits on agency assignments, Article 5(5) precludes a Member State from failing to adopt measures to preserve the temporary nature of agency work and from having national legislation that provides no measures preventing the assignment of successive missions to the same worker at the same user.

The Court provided three criteria to the referring judge to verify circumvention: whether successive missions lead to a duration exceeding what can reasonably be deemed temporary; whether such successive missions undermine the Directive's essence and constitute abuse; and whether, concretely, the user provides no objective justification for resorting to agency work.

Case C-232/2020 further refined these principles, introducing the notion of "reasonable temporariness". The Court held that abusive use of fixed-term agency work can occur when multiple consecutive assignments for the same worker at the same user result in a working period exceeding what can "reasonably" be classified as "temporary", considering case circumstances, sector peculiarities, and national regulatory context[72].

This formulation introduced a case-by-case evaluative criterion granting national judges discretion in determining the threshold beyond which temporariness becomes "unreasonable"[73].

However, the absence of precise "quantitative" parameters has created notable interpretative uncertainties, as evidenced by varied national judicial reactions, especially in Italy.

[71] In case KG, originating from a preliminary reference by the Brescia Court, the Court confronted a situation characterised by 17 successive assignments to the same user over approximately two years.

[72] Casiello, *La somministrazione di lavoro ovvero della temporaneità ragionevole*, in *RIDL*, 2022, 1, 2, pp. 73 ff.; CJEU, 17 March 2022, C-232/2020 (Daimler), the so-called Daimler case further clarified interpretative parameters concerning a worker assigned to the same user for 55 months. It reiterated that temporariness characterises "not the job within the user undertaking to be filled, but the means of making a worker available to that undertaking".

[73] Pantano, *I più recenti orientamenti della Corte di giustizia sulla temporaneità del rapporto di lavoro tramite agenzia interinale: il caso Daimler*, in ADL, 2023, 1, 2, pp. 112 ff.

4.3. *The absence of uniform criteria and consequent case-by-case application uncertainties*

The resulting national case law approach features a flexible evaluation system, based on concrete "case-by-case" analysis of the factual circumstances rather than predetermined rigid, uniform parameters.

Legal practitioners and companies thus operate in a regulatory framework whose concrete application depends on judicial discretionary appreciation, undermining legal certainty and predictability of dispute outcomes.

Such lack of predetermined quantitative parameters, while ensuring closer alignment with sectoral and national specificities, inevitably engenders application uncertainties, notably in establishing ex ante the boundaries of lawful agency use.

This uncertainty is further compounded by the diversity of national contexts in which the Directive applies. Sectors with pronounced seasonality, labour markets characterised by high intersectoral mobility, and collective bargaining systems with differing traditions contribute to rendering uniform standards of temporariness extremely complex[74].

Within CJEU case law developments, three core criteria have emerged for assessing temporariness: a) the overall duration of assignments, evaluated against market circumstances and sectoral specificities; b) balancing business flexibility with worker protection, verifying whether prolonged agency work compromises employment security; c) the continuity of the same worker's use, assessing whether repeated missions at the same user constitute an attempt to circumvent the regulation.

The Court specified that, in the absence of general criteria, determining utilisation limits is a matter for national judges on a case-by-case basis, considering all relevant circumstances including sector peculiarities. These parameters must be jointly assessed, preserving judicial discretion over factual evaluation[75].

The Italian Supreme Court has adopted and developed these European jurisprudential concepts through several rulings shaping the national approach on temporariness in agency work[76].

[74] Kullmann, *cit.*, pp. 4-16.

[75] Lamberti, *La somministrazione di lavoro come connubio tra flessibilità del mercato e tutela dei lavoratori*, cit., p. 48.

[76] Riccio, *La necessità temporanea del lavoro tramite agenzia: i possibili riflessi sull'ordinamen-*

Its consolidated position crystallised mainly in judgments of 21 July 2022 (No. 22861) and 11 October 2022 (No. 29570).

Judgment No. 22861/2022 established the principle that "the temporary character of agency work, though not expressly provided in Legislative Decree No. 81/15, must however be regarded as an implicit and structural requirement of this contract type, consistent with Directive 2008/104". This affirmed the autonomous relevance of temporariness as an inherent limit to the institution, independently of national legislative choices[77].

The subsequent judgment No. 29570/2022 further asserted that "the necessary temporariness of assignments must always be ensured, regardless of national legislative provisions". This imposes on Italian judges the burden to ensure temporariness even in absence of specific internal legislative rules.

The Supreme Court also clarified assessment criteria for lower courts, specifying that verification must "necessarily consider all successive temporary agency contracts, including those for which the appeal deadline has passed, as relevant factual circumstances to establish whether overall use of the agency worker has continued beyond a duration reasonably attributable as temporary".

That Legislative Decree No. 81/2015, and previously Legislative Decree No. 276/2003, contain no explicit temporary duration provision for agency work does not preclude considering temporariness as an implicit, inherent requirement in accordance with EU law obligations, without constituting a *contra legem* interpretation.

Specifically, the Supreme Court affirmed that since the temporariness rule characterises agency work regulation, repeated temporary contracts constitute a "contract in fraud of the law" where used – also via explicit or implicit agreements between supplying and user enterprises concerning the same worker – to circumvent temporariness rules[78].

Article 1344 of the Civil Code is thus invoked as a useful tool to prevent abusive succession of fixed-term contracts, entrusting the lower court to infer "from elements such as the number of fixed-term contracts, the

to interno, in *ADL*, 2023, 1, 2, pp. 163 ff.; Riccio, *Tanto tuonò che piovve. Ancora sulla necessaria temporaneità della missione nel lavoro tramite agenzia e sulle conseguenze nell'ordinamento italiano*, in *ADL*, 2024, 5, 2, pp. 1083-1109.

[77] Bronzini, *Il lavoro in somministrazione e le tutele dell'unione. Ribadite dalla Corte di giustizia le finalità antiabusive*, in *LDE,* 2, 2022.

[78] See e.g., Cass. No. 7702/2018; Cass. No. 23684/2010; Cass. No. 15515/2009.

overall time span, and any other facts emerging from the records, whether the contract has been misused fraudulently"[79].

This settled Supreme Court jurisprudence has been applied by lower courts, with numerous decisions applying principles formulated by higher courts. Significant examples include the judgments of the Milan Court No. 882/2023 and the Trieste Court No. 209/2023, addressing prolonged successive assignments at the same user.

The Milan Court notably held that "repeated successive assignments to the same position at the user undertaking lasting longer than what can reasonably be regarded as temporary constitute abusive recourse to successive missions". It further clarified that temporariness assessment must consider not only the total duration but continuity of the performance, nature of tasks, and absence of significant interruption between assignments.

Italian jurisprudential evolution reveals progressive alignment with European principles, strengthening judicial scrutiny over prolonged agency work legitimacy.

More recently, appellate jurisprudence[80] ruling on a notably prolonged agency work case aligned with these interpretations, reiterating that temporariness is inherent and structural to agency work and non-derogable. Abuse transforms the relationship into a genuine open-ended employment contract between worker and user with associated rights and obligations.

Ultimately, determining abusive agency work requires case-by-case scrutiny of whether cumulative assignments at the same user exceed a "reasonable" duration, with the threshold generally referenced by Italian fixed-term contract rules, incorporating contract renewal counts and justification grounds.

Significant uncertainties persist, especially regarding specific temporariness evaluation parameters and uniform principled application by lower courts, which tend to link the limit to fixed-term contract regulations, arguably distorting the Directive's essence, which is additional to and distinct from fixed-term employment.

[79] See Cass. No. 59/2015; Cass. No. 14828/2018; see also Giasanti, *La somministrazione illecita*, in Aimo, Izzi (eds.) *Esternalizzazioni e tutela dei lavoratori*, Utet, 2014, pp. 551 ff.

[80] App. Trieste, 26 June 2025.

5. *The singular case of staff leasing*

5.1. *The currently pending preliminary question*

Further interpretative issues have recently arisen regarding staff leasing.

Unlike temporary agency work characterised by fixed-term assignments, staff leasing – understood as agency work with an open-ended employment contract and likewise open-ended assignments – tends to transform the relationship into a long-term one, aimed at stabilising and protecting the worker, in a context that is typically stable and less subject to temporal fluctuations.

Comparative analysis of staff leasing across European legal systems reveals profoundly different approaches reflecting varied conceptions of the relationship between organisational flexibility and worker protection.

The Italian model, marked by substantial liberalisation of staff leasing, appears effectively unique within the European normative framework.

Most European systems adhere to the temporariness principle of assignments established by Directive 2008/104/EC, which requires agency work to be performed pursuant to assignments of limited duration and not indefinitely. In many Member States, as noted, agency work is limited by stringent temporal constraints, maximum quotas of temporary workers, or sectoral prohibitions, and an open-ended employment relationship with equally permanent assignments is disallowed.

Italy, by contrast, explicitly provides for staff leasing through Legislative Decree No. 81/2015, whereby the worker is employed on an open-ended contract by the agency and may be indefinitely seconded to the user undertaking, constituting a stability of relationship not found in other European jurisdictions. This regulatory choice reflects a conception of staff leasing as a "more virtuous form of flexible work", providing the worker with the employment stability that the Italian system identifies as a priority objective when it recognises the open-ended employment contract as the "common form of employment relationship"[81].

[81] See Calcaterra, *Lo staff leasing dall'ostracismo alla liberalizzazione*, in *RIDL*, 2016, 4, 1, pp. 579 ff. In Italy, open-ended agency work, initially abolished by Law 247/2007, was reintroduced by Law 191/2009. Initially allowed only for specific activities such as IT consultancy, cleaning, security, transport, library management, with collective bargaining empowered to

Current regulation permits indefinite assignments to the same user company only to workers under open-ended contracts with the agency, subject to a quantitative limitation: pursuant to Article 31(1) of Legislative Decree No. 81/2015, the number of workers employed under open-ended agency contracts cannot exceed 20% of the number of open-ended employees at the user company as of 1 January of the contract year (or at the contract signing if activity begins mid-year). Collective bargaining may set different quantitative limits. Open-ended agency work is explicitly excluded for public administrations.

In the case of open-ended employment, the law further requires that contracts set a monthly availability allowance, divisible into hourly quotas, paid by the agency to the worker during periods awaiting assignment, in amounts specified by applicable collective agreements and no lower than Ministerial Decree minimums. This availability allowance is excluded from calculation of any statutory or collective provision.

The Italian model, while distinct and potentially conflicting with the prevailing European approach conceiving agency work as a tool of short-term temporary flexibility rather than stable staff leasing, has generated debates and preliminary references to the Court of Justice for assessing its compatibility with the Directive.

Key legal issues concern: whether the Directive's temporariness principle also applies to open-ended agency work or whether this constitutes a lawful exception; whether Italian law complies with the Directive's aim to prevent abuses arising from repeated successive assignments fostering precariousness; whether Italian law guarantees equal treatment and sufficient protection for open-ended agency workers relative to directly employed workers; and whether temporariness and reasons for assignment cessation are relevant to conformity assessment between national and EU law.

5.2. *Textual and systematic elements underlying the preliminary question*

The order of 7 November 2024 by the Tribunal of Reggio Emilia submitting the first preliminary question concerning Italian staff leasing compatibility with Directive 2008/104/EC represents a significant moment in the evolution of European agency work law.

broaden allowed cases (Art. 20, co. 3, d.lgs 276/2003). The 2015 reform removed the exhaustive list of legitimate reasons, substantially liberalising the institution.

For the first time, the Luxembourg Court is asked whether open-ended agency work falls within the Directive's scope and is thus bound by its limits.

The facts concerned a worker sent on five fixed-term assignments to the same user prior to indefinite agency employment with the same user. Following termination of the commercial agency contract, the worker challenged all contracts with the agency contending both fixed-term and open-ended contracts violated Directive 104, since the employment relationship with the user must necessarily be temporary.

The Reggio Emilia judge noted that previous High Court rulings – both national and European – concerned exclusively repeated fixed-term agency work, whereas the case before the referring court involved an open-ended agency assignment.

The referral focused on two fundamental aspects: textually, Article 1 refers to workers "assigned to user undertakings to work temporarily and under their control and direction", while Article 3 consistently references "temporariness of the assignment"; these textual elements suggest exclusion of staff leasing from the Directive's scope since an indefinite assignment cannot be temporary.

However, it also highlights arguments favouring inclusion of staff leasing within the Directive given its aim to guarantee minimum protections for triangular relationships regardless of assignment duration, with the temporariness requirement relating not only to actual relationships between worker and user but also to the assignment contract concerning the same position.

Subsequently, the Milan Tribunal's order of 14 January 2025 presented a similar question focusing on indefinite worker presence at the same user without justifying cessation of missions and potential discriminatory profiles compared to directly employed workers due to the assignment's nature.

Both orders examine Directive applicability to open-ended agency work, noting the Directive protects workers in temporary, repeated assignments whereas Italian staff leasing is predicated on indefinite agency employment with stable assignments[82].

While Article 2 of Directive 2008/104/EC explicitly refers to temporary agency work and ostensibly excludes staff leasing, the provision's ab-

[82] Fenoglio, *Lo staff leasing: dieci anni di (in)applicazione*, in Aimo, Izzi (eds.) *Esternalizzazioni e tutela dei lavoratori*, Utet, 2014, pp. 471 ff.

sence of a precise "temporary" definition or explicit temporal limits leaves room for interpretations potentially including permanent or multi-annual assignments aimed at stable employment.

The Trieste Tribunal already held, in a 14 November 2023 ruling, that even staff leasing does not exclude precariousness which is only countered by guarantees of economic continuity and professionalisation. Unlimited staff leasing unrelated to temporary needs would deregulate this contractual form, easily circumventing job stability protections and inverting the exception-to-rule relationship between agency work and open-ended employment, transforming flexibility into dismissal prerogative[83].

Similarly, the Milan Tribunal[84] found that if the user's need is truly indefinite, agency work would be unnecessary, so staff leasing does not exclude precariousness, which only economic continuity and professionalisation can prevent.

Though open-ended agency workers receive an availability allowance during non-assignment periods, no protections restrict mission duration since contracts usually allow for reassignment or early termination, subject to allowance payment.

Reggio Emilia and Milan judges thus query whether Italian staff leasing – uniquely provided by national law – falls within Directive 104's scope and is bound by limits designed for temporary missions[85].

National provisions appear to conflict with Directive 2008/104/EC, especially Recital 15, which promotes the open-ended contracts as common form and Article 5.5, which calls for measures to prevent successive assignments designed to circumvent the Directive.

Conversely, the Bari Tribunal, in a 17 September 2025 decision (No. 3213), declined to raise a preliminary question, affirming staff leasing's legitimacy and that Italian law does not contradict European Temporary Agency Work rules, applying only to temporary placements. The judgment noted Article 1(2) of Legislative Decree 81/2015 and related provisions respect Directive timing and temporariness, conceiving staff leasing as stable employment with enhanced protections[86].

[83] Trib. Trieste, n. 209/2023.

[84] Trib. Milano, 9 May 2023, No. 882/2023.

[85] Salvagni, *Lo staff leasing e il requisito della temporaneità: la parola alla Corte di giustizia UE*, in *LG*, 2025.

[86] The case concerns a worker assigned continuously for around six years via agency to

The Bari judge recognised that Directive 2008/104/EC refers to temporariness in agency work, defined by its scope and definitions. Hence, staff leasing falls outside the Directive's scope rather than conflicting, since even when referring to indefinite agency work, EU law concerns only fixed-term assignments.

Rather, staff leasing ensures a flexible matching of labour supply and demand, combined with adequate worker safeguards: the termination of commercial staff leasing contracts triggers only an availability status, during which the agency is under a duty to seek the worker's redeployment. This is consistent with the protection against abuses which Directive 104 seeks to secure: what the Directive prohibits is the maintenance of assignments designed to circumvent the protective guarantees accorded to agency workers under labour law.

To fall under the Directive, a user must intend to temporarily make a worker available.

Thus, the Directive does not apply where worker functions permanently transfer from employer to a third party requiring long-term service provision. If the assignment is indefinite, the Directive's anti-circumvention purpose is inapplicable since stable work at the user already exists.

Ultimately, rejecting the claim, the Bari Tribunal concluded that the staff leasing model conforms to Union law and holds independent legal dignity given, inter alia, the absence of worker vulnerability tied to predetermined fixed-term agency work limits, stability of agency-worker relation, different objective justifications with better redeployment prospects, and possibility of new assignments[87].

Excluding staff leasing from the Directive's scope would profoundly impact European harmonisation.

Conversely, including staff leasing within the Directive would require fundamental re-evaluation of European agency work principles[88]. The concept of "temporariness" pervading the Directive would need reinterpreta-

the same user, first on fixed-term and later on open-ended contracts, alleging abusive use and seeking recognition of an open-ended employment relationship with the user.

[87] Di Rosa, *Il Tribunale di Bari disegna un nuovo orizzonte in tema di staff leasing in attesa della pronuncia della Corte di giustizia*, in *LPO on line*, 2025.

[88] Giasanti, *Somministrazione a tempo indeterminato e diritto dell'Unione Europea*, in *RGL*, 2025, 1, 2, p. 67.

tion to encompass employment forms that, while triangular, embody no fixed temporal limits[89].

6. *Concluding reflections: implementation status and future scenarios for a sustainable balance between flexibility and protection*

The comparative analysis of the implementation of Directive 2008/104/EC across national legal orders reveals an overall positive balance, but characterised by significant asymmetries.

The Directive has effectively contributed to promoting a more balanced approach to temporary agency work, overcoming the restrictive excesses that characterised many national systems and favouring recognition of the legitimate role of employment agencies in the European market.

The principle of equal treatment, the Directive's cornerstone, has found substantially compliant implementation in most Member States, though with varying modalities and intensities[90].

The Court of Justice's jurisprudence has also helped clarify the principle's application contours, specifying that collective derogations must respect agency workers' "overall protection" through genuinely compensatory advantages.

Based on this analysis, some recommendations can be outlined for the future evolution of European agency work law, which faces multiple interconnected challenges[91].

Significant critical issues persist, especially regarding the regulation of assignment temporariness. The absence of clear quantitative parameters in the Directive has generated interpretative uncertainties only partially resolved by European jurisprudence. The "reasonable temporariness" concept developed in cases C-681/2018 and C-232/2020 introduces an evaluation criterion that is, arguably, excessively "case-by-case". The temporari-

[89] Frosecchi, *La temporaneità della somministrazione di lavoro secondo la Corte di Giustizia: possibili risvolti sulla legittimità della somministrazione a tempo indeterminato*, in *RGL*, 2021, 1, 2, pp. 17 ff.

[90] Houwerzijl, *The working conditions of cross-border temporary agency workers on paper and in reality*, in *ELLJ*, 2024, 15, 1, pp. 50-67.

[91] Countouris, *La direttiva sul lavoro interinale: un'altra promessa infranta?*, in *ILJ,* 2009, 38, 3, p. 329.

ness principle's contours, lacking uniform quantitative limits, have granted Member States wide discretion over assignment duration limits and collective derogations. This has produced a "regulatory mosaic" where countries like Germany, France, and Belgium apply diverging restrictions, while others promote hybrid models or free markets, reducing legal certainty and encouraging competitive distortions[92]. Even where rigid duration criteria exist, possibilities for assignment reiteration have left interpretative gaps undermining legal predictability.

There is thus an urgent need for clarifying intervention and a possible EU legislative revision to define more clearly the objective upper limits for successive assignments; clarify the Directive's scope on open-ended agency relationships; and specify more precisely minimum "overall protection" requirements for collective derogations, including in connection with the roles and activities of bilateral bodies.

Similarly, the staff leasing issue, currently under examination by the Court of Justice, will require clarifying guidance on the limits of Community harmonisation.

Excluding open-ended agency work from Directive 2008/104/EC's scope could generate a significant regulatory gap in protection. Including it would require a rethinking of the fundamental principles underlying the European agency work approach. The very concept of "temporariness" pervading the Directive would need reinterpreting to encompass employment forms that, while maintaining triangular relationships, lack predetermined temporal limits[93].

A Directive revision explicitly including staff leasing yet defining strict, transparent requirements and criteria to assess assignment temporariness is therefore desirable, maintaining European flexibility while avoiding excessive rigidity that would undermine the institution's efficacy.

Finally, developing the role of European social partners in setting common agency work standards is recommended, valuing the social dialogue experience shaping the institution's evolution. European collective bargaining could serve as an effective tool to fill legislative regulation gaps and promote innovative flexible work management practices, including enhancing active labour policies, training models, and redeployment instruments

[92] Rosin, *cit.*, pp. 141-168.
[93] Frosecchi, *cit.*, pp. 17 ff.

supported by bilateral funds and governance shared among agencies, users, and public institutions.

Temporary agency work, born as a response to European labour market flexibility needs, has demonstrated a capacity to adapt to economic and social changes while maintaining its role as a bridge between business needs and worker protection.

Its future development will depend on European law's capacity to strike new balances harmonising innovation and protection, flexibility and security, within an increasingly complex and globalised labour market.

Abstract

The essay, starting from a comparative analysis of the regulation of labour provision within European labour law systems, aims to evaluate the implementation status of Directive 2008/104/EC and examine the evolutionary process that has seen the overcoming of restrictive approaches in favour of promotional models designed to reconcile organisational flexibility and employment protection. The investigation focuses on the most relevant national models, highlighting convergences and divergences in terms of temporal limits, the role of collective bargaining and safeguards against abuse, emphasising the interpretative outcomes of the Court of Justice of the European Union with particular regard to the "reasonable temporariness" of assignments, the principle of "equal treatment" and the applicability of the directive to the Italian case of staff leasing. The work concludes with a prospective assessment of challenges to be faced for a balanced European model of labour provision, advocating an integrated approach that values social dialogue and institutional cooperation to ensure flexibility and protection in increasingly globalised labour markets.

Keywords

Temporary agency work, Directive 2008/104/EC, Equal treatment, Reasonable temporariness, Staff leasing.