EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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"Protecting Marginal Workers -
Identifying who is a worker with particular reference to the scope of the Part-Time Workers, Fixed Term Workers and Agency Workers' Directives

FINAL REPORT

1. Introduction

The 14th Annual Congress of the European Association of Labour Court Judges took place on the 11th and 12th June 2010 in the Aula Giallombardo of the Corte di Cassazione in the heart of Rome and at the Residenza Ripetta in via Ripetta. The subject of the Congress was "Protecting Marginal Workers – identifying who is a worker with particular reference to the scope of the Part-time Workers, Fixed Term Workers and Agency Workers' Directives".

The Congress was attended by 39 judges from 17 countries of the European Union and the EEA. Before the Congress the delegates had prepared National Reports[1] based on a questionnaire[2] prepared by Gerrard Boot and

[1] Appendix III

Taco van Peijpe, judges from the Netherlands. We received National Reports from 18 countries. These Report were incorporated into a synthesis[3]

The Congress was opened in the baroque splendour of the Aula Giallombardo in the Corte di Cassazione. We had the honour of an opening address from the First President of the Corte di Cassazione, Vincenzo Carbone, on the globalisation of the law and the changing division of power between states and the courts. We also heard from Michele de Luca, President of the Labour Chamber of the Corte di Cassazione, Giacomo Oberto, Secretary-General of the International Association of Judges, and Helmut Zimmerman, President of the EALCJ.

This was followed by a keynote address by Vincenzo di Cerbo, a Judge of the Labour Chamber of the Corte di Cassazione on the subject of "Are the Part-time Workers' Directive and the Agency Workers' Directive enough to provide protection for marginal workers?" This was followed by a Panel Discussion chaired by Judge Gerrard Boot involving Stefano Giubboni of Perugia University and Luisa Ficari of Tuscia University.

We then repaired to the gentler comforts of the Residenza Ripetta where we conducted three technical sessions, followed by a Plenary Session. All the proceedings were recorded by Judge Dawn Shotter.[4] The Programme is annexed to this Report.[5]

This report does not simply summarise the proceedings, but seeks to extract the essence of the issues we were discussing and to pick out points of particular interest.

2. "Workers" and "employees"

The original Treaty of Rome of 1960 set out, as one of the fundamental principles of the Common Market, as it then was, that "freedom of movement for workers shall be secured within the Community". The treaty refers to "worker" rather than "employee", but it is by no means certain that the intention was to make any distinction between the two terms[6]. In any event, the Treaty did not try to define the meaning or scope of "worker". However, some Directives have applied only to "contracts of employment"[7]. The Directives we are specifically dealing with refer to "fixed-term workers who have an employment contract or employment relationship as defined by law, collective agreement or practice in each member State".[8] The same phrase is

[2] Appendix I
[3] Appendix II
[4] Appendix V
[5] Appendix IV
[6] See, for example, the Report of the Czech Republic, p. 111.
[7] Collective Redundancies Directive 98/59/EC Article 2(a)
[8] Framework Agreement on Fixed-Term Work annexed to Directive 99/70/EC

used in respect of part-time workers[9] and Agency Workers.[10] In the Agency Workers Directive Article 1 refers to the contract of employment or relationship with the Temporary Employment Agency and not the enterprise where the worker is working, but the horizontal obligation not to discriminate, in Article 5.1, applies to both the agency and the user undertaking.

This seems to show that there are workers who are not "employees" and, more controversially, there may be employees who have an "employment relationship" but no "contract of employment".

It is also clear that the Directives do not contemplate a single definition of "employee" for all the countries of the EU and, indeed, contemplate that a collective agreement within a particular country might have a different definition of employee from that pertaining in the general law of that country.

It is this potential for different national definitions and interpretations of the scope of the Directives, as well as their implementation and enforcement, which gives added relevance and resonance to this Congress

3. Role of the national judiciary in global harmonisation.

The importance of a gathering of Judges from the national courts of the Members States, rather than a gathering of European lawyers who are more accustomed to seeing European Law as a single entity, was brought out right from the start of our Congress by the Address of Vincenzo Carbone, First President of the Corte di Cassazione.

He referred back to the meeting of Presidents of the Supreme Courts of the EU in Dublin on 19th March 2010 where they discussed the globalisation of the law and of rights. It is, perhaps, an indication of how far the EU has matured and developed that such a meeting of presidents of national Supreme Courts should take place at all.

The absolute sovereignty of individual countries has to given way to the primacy of the European Court of Justice ("the Luxembourg Court"), interpreting the Treaties and Directives of the EC, together with the Charter of Fundamental Rights,[11] and recognising the importance of the European Charter of Human Rights and the judgments of the European Court of Human Rights ("the Strasbourg Court").

However, the process of harmonisation between the states does not only come from above. It is part of the role of the judiciary at all levels to interpret

[9] Framework Agreement on Part-time Work Clause 2.1 (97/81/EC Annex
[10] Directive on Temporary Agency Work Art. 1
[11] Community Charter of thee Fundamental Social Rights of Workers, 10th December 1989, a subject discussed by the EALCJ in its 1987 Congress and dealt with in "Fundamental Social Rights at Work in the European Community" ISBN 0-7546-2054-9 Ashgate 1999.

the law in the light of the supranational principles from these sources. This can cause tensions with national governments who resent this restriction on their powers.

Judges tend to believe that the problems they face in the national courts are unique to their own country, but the process of comparison demonstrates that these problems are, for the most part, trans-national, though they may take specific forms in individual countries. Just as the problems are often common problems, the solutions also show considerable similarity, though it is important also to consider the differences.[12] It is also clear, that the national constitutional courts will not meekly accept the provisions of the Treaties and, indeed, may look beyond EU law to wider human rights considerations.[13] In short, a judge is subject to the law, but the law must encompass justice.

This means that from the Community of Law, aemanating from the European Court of Justice, the national courts of the EU and international norms, emerges shared values, legal principles, fundamental rights and judicial processes.

A rather different aspect of "globalisation" was raised by Vincenzo di Cerbo, Judge of the Corte di Cassazzione, in his keynote address. The globalisation of the economies means that the court has to look at the economic impact of its decisions. This issue was raised many times during the Congress. There is a tension between the *realpolitik* of looking at the economic effect of the judgment and the purity of making a decision based on the law and the facts, without consideration of any economic repercussions.

A judgment extending protection to workers within one country may encourage the employer to move his base of operations to another country, within or outside the EU, where the rights of workers are less developed or where pay rates are lower. On the other hand "*La legge e uguale per tutti."*[14] This maxim is inscribed on the wall of the Corte de Cassazione and we were anxious that the law should not "protect the strong and penalise the weak"[15] by refusing protection to marginal workers, in order to favour established workers already protected by collective agreements.

The central skills required for being a Judge involve not only a knowledge of the law, but also judgment, wisdom and understanding. Judges are all individuals and their principles and concepts of justice are derived from the social conditions and the mores of their countries. The discussions we have always demonstrate that those principles are similar across the different countries and make it easier to believe in the harmonisation of the laws. However, there will always be differences of emphasis between judges of different countries and different judges from the same country.

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[12] These issues are considered more fully by Vincezo Carbone in *"I guidici e la globalizzazione dei diritte delle tutele"* in *Il Corriere Giuridico* of May 2010 p.676

[13] Judgment of the German Constitutional Court, 30.6.2009) on the Lisbon Treaty.

[14] "All are equal before the law"

[15] A phrase coined during the Congress

The outcome of our discussions was that all members recognise the importance of ensuring that marginal workers receive protection comparable to that of more established workers and we were all concerned that a restrictive interpretation of the scope of worker protection can result in the protection of the strong and the exclusion of the weak.

However, some placed greater emphasis on the freedom of individuals to choose different forms of working and others were concerned about the unintended consequences of extending protection - driving work abroad, or driving workers into the black economy, where they are left without protection.

The contrary principle is that labour law was created to protect the weak from pure economic forces and, as such, cannot be seen simply as a means of interpreting the intention of the parties, but also as a statutory code restricting economic law.

No-one doubts that, within the context of the law, Judges seek to do justice between the parties. However, some feel more constrained than others by the precise wording of the laws, by judicial precedent and by the need for clear proof of the facts relied on.

4. The categories of workers

It seems likely that the term "worker" in the Treaty of Rome was intended to cover anyone who did work, whether employed or self-employed, public or private sector. The use of the term "fixed-term workers who have a contract of employment or an employment relationship" implies that there are workers who do not have a contract of employment or employment relationship. Some jurisdictions[16] have sought to fix upon a definition of "worker" which is wider than "employee" but does not encompass all self-employed people. Other countries[17] have sought to categorise people as *parasubordinati* or economically dependant workers, without the using the term "workers" as a term of art.

1) Employee

The Directives make clear that the definition of "employee" and "worker" is a matter for the national law. This means that there are many Directives which depend, for their scope of application, on what national courts decide is meant by a worker and which workers are included within the definition of employee. This obviously creates a difficulty for lawyers seeking to apply these Directives consistently in all Member States.

There was a debate about the extent to which it is open to individual countries to restrict the definition of these terms and whether they can exclude certain categories of workers from the definition. The UK Supreme Court has recently

[16] Particularly the UK
[17] Notably Italy and Germany

referred to the European Court of Justice[18] the scope of the UK definition of worker, in particular in relation to whether Judges are included asking the question –

> "Is it for national law to determine whether or not judges as a whole are 'workers who have an employment contract or employment relationship' within the meaning of clause 2.1 of the Framework Agreement, or is there a Community norm by which this matter must be determined?"

The concept of a "Community norm" seems to relate to the *acquis europėenne.* There is undoubtedly a body of European Law which has grown up around the Treaties and Directives and the UK Supreme Court obviously considered that "worker" may well have some European meaning based on a community norm.

The Directives use the two terms "contract of employment" and "employment relationship". This seems to refer to two different approaches to the meaning of employment.

The traditional basis of employment came from the concept of "subordination", which is the equivalent of the English concept of "master and servant". Anyone who is in a subordinate position to another is that person's employee whatever their contractual relationship. If taken to its logical conclusion this means that many types of menial workers, who have sometimes been excluded, are more likely to come within the definition of employee than professional people, such as doctors and lawyers, who are unwilling to accept direction from their employers while carrying out their professional work.

However, it is now widely[19] accepted that all people who are integrated into the business and are paid directly by the business are employees, even if they have a degree of independence as to the manner in which they carry out their duties. So subordination is not the only basis for an employment relationship.

As stated above, the definition refers to both a "contract of employment" and an "employment relationship". The idea that employment derives solely from a private contract between the employer and the employee is part of the 19th Century idea of *laissez faire.* There was a substantial debate among the delegates about the extent to which the worker and the business are bound by any agreement between the parties that the relationship is not employment, but a "service contract", under which the worker remains self-employed.

This problem was epitomised by the situation in the Netherlands. In the past the response of Dutch judges to this issue is that they will look at the reality of the situation and not at the precise terms of the individual contract. However, there have been moves in the Netherlands to allow workers to define themselves as self-employed, thereby obtaining tax advantages and a degree of freedom as to the manner and times when they carry on their business. This appears to have been working well. It represents a move away from rigid

[18] C393/10 O'Brien v Ministry of Justice
[19] But not universally

definitions. By contrast in Finland a person working for the Salvation Army was found to be an employee, even though both sides had specifically agreed that he was not. This approach is common in many other countries.

The dilemma caused by this approach was well summarised by Judge Tunde Hando, the President of the Hungarian Labour Court, "the government tries to bring people within the employment relationship; the employers try to escape it".[20] Where there is equality of bargaining power, it may be desirable to allow the parties (or the parties to the collective agreement) to decide whether a particular role comes within the protection of employment. However, more often than not the formal contract is drafted by the employers who seek to avoid giving their workers protection by giving them a contract which expresses that they are self-employed. Such contracts can be seen as a sham and the courts can decide that the worker is an employee even in the face of a provision in the written contract that they should be regarded as subject to a service contract.[21]

There was agreement between all the delegates that, at some point, the court can intervene to declare that a particular relationship is employment, even if the contract prepared by the employer seeks to define the relationship as self-employment. However, that point will vary from country to country and, to some extent, from judge to judge. It seems that this is part of the measure of appreciation allowed to each Member State in implementing and enforcing the Directives.

There was specific discussion about delivery drivers. In many countries the enterprise requiring their goods to be delivered has sought not to employ their delivery drivers directly, but to allow them to own their own lorries, even though the lorries carry the business's livery and the drivers work only for the business and do not make deliveries for other companies. This was acknowledged as a marginal case and one which might depend on the exact terms of the contract and what has actually happened in practice.

Four refinements of this general problem were considered.

a) The nature of the relationship can be resolved by certification, by the Labour Inspectorate or other body. This does exist in some countries, but, in Italy, the feeling was that it creates more problems than it solves. It certainly leads to further bureaucracy.
b) It is normally assumed that the nature of the relationship is defined at the beginning. However, employers may seek to change the contractual terms during the course of the employment and, as a result, the actual nature of the relationship may change. This issue has particular significance in

[20] "Since the price of labor includes not only the remuneration, but also social security and health insurance payments, employers try, in order to reduce costs, to get rid of these payments by terminating the employment relationship with their employees and then re-hiring them as self-employed persons carrying on a business on their own account, who pay the health insurance and social security premiums themselves." – Report of the Czech Republic

[21] Also referred to as a "contract for services"

relation to agency workers, who may become increasingly embedded in the organisation of the enterprise where they work, but it can also arise with people working on a self-employed basis under a service contract, who become increasing part of the organisation, even to the extent of having management responsibility or making decisions on behalf of the company.

c) On a transfer of an undertaking, the transferee may wish to make substantial changes and, indeed, may be permitted to do so for economic, technical or organisational reasons. Quite apart from the validity of these changes, they may affect the employment status of the workers.
d) If a contract seeks to define the relationship as one of self-employment and the court decides that it is a sham, what is the effect on the contract? Is it void, or should it be interpreted as a contract of employment, ignoring the non-conforming terms? The obvious danger is that, if the contract is regarded as void, or illegal, the "employee" loses all protection, including the limited protection provided to contract workers.

In some jurisdictions particular categories of workers are excluded from full employment rights. This is considered below.

In summary, it is difficult to be sure how much variation there is between the different national courts as to the meaning and scope of "employment". There is certainly some variation in the extent to which private agreement is allowed to override the apparent nature of the relationship and some countries take a narrower view of the scope of "employment", particularly, as set out below, in relation to seasonal and casual workers.

Many delegates[22] expressed concern about the lack of a European definition of "employee" or "worker". This tends to mean that the scope is subject to judicial decision and the lack of harmonisation means that a person moving from one country to another might find his status treated differently by the two national jurisdictions.

However, the National Reports and the discussions tended to demonstrate the similarities between the different countries, both in the nature of the problems they have had to resolve and the solutions.

2) "Workers" and *"parasubordinati"*

A separate category of worker is gradually emerging, who is not an employee, nor in any real sense in business of his own account.

These persons are described in Italy as *parasubordinati* and in Germany as "*artbeiterähnliche personen".* This concept is paralleled in UK law by the development of the concept of a "worker" who has contracted personally to do

[22] In particular the delegates from Austria, Germany and Ireland

work, but may or may not come within the definition of an employee. However, other countries[23] do not recognise any intermediate category.

The exact rights of these people were not debated in detail, but, in general people do not have protection from dismissal[24] and they may not have the full protection of the collective agreement[25], but they do have the right to recover their pay and they will usually have full health and safety protection, possibly including the protection of the Working Time Directive, which does not contain a definition of a worker.

Several Judges referred to "casual workers" as a category with limited protection. An example given was berry pickers in Finland, who are seasonal migrant workers. However, it also refers to people who work irregular hours - for example bar workers who may work only "as and when required" under "zero hours" contracts, also called "on demand" contract. There is nothing in the normal definition of "employee" to exclude such people. They are "subordinate" to their employer; they must do what they are told, but there was a view that their marginal status, outside the main body of the organisation, excluded them from full employment rights, including protection from dismissal and the benefit of fringe benefits such as pensions and sick pay.

One analysis of such people is that they are employees while they are working. Thus a seasonal worker who works for a farmer for a period of several weeks working regular hours for an hourly wage should be treated as an employee for that period and is entitled to full rights of sick pay, notice of termination etc. The same applies to a casual bar worker engaged for one particular shift. However, there can also be an umbrella contract whereby that person remains in employment during periods when he or she is not being called on to work. Thus a "bank nurse" or a zero hours fast food worker can be regarded as an employee and be treated as fully employed. In Germany there is specific protection for such workers. If they do not have guaranteed hours, they are deemed to be entitled to a minimum of 10 hours per week. In Germany a zero hours contract which had, in practice, amounted to full-time work over a substantial period has been held to be a full-time contract, which therefore, is not subject to a reduction in hours if the employer chooses.

However, this was not the general view. The decision in Finland had been that the berry pickers were not employees. And in UK it has been decided that bank nurses are not employees of the hospital for the purposes of continuity of service, even though they have an umbrella contract.

3) Excluded categories of workers

During the course of the Congress many groups of workers were referred to and, in many cases, there was some uncertainty about whether they were

[23] Such as Finland
[24] As in Germany
[25] This depends on the precise terms of the collective agreement itself

included within the Scope of the three Directives and, indeed, other employment protection.

- Senior managers and directors. There was, perhaps, limited sympathy for senior managers, because they have a degree of independence and contracting strength, which enables them to cloak themselves in the protection of the normal civil law.

  However, labour courts do have to resolve disputes where senior managers and directors have been dismissed or, indeed, cases where senior directors are claiming redundancy pay from the State when the business has been declared insolvent.

  There is, in reality, no reason why senior managers should not be entitled to the same protection as other workers, but the principle of subordination or control can be used to argue that they are not in fact subordinate to the business, but, in contrast are in control.[26]

- Partnerships are normally governed by different provisions from employment. Partners are on an equal footing with each other, though some may have a larger percentage of the ownership of the business than others. The concept of the salaried partner has grown up in recent years. This person is not entitled to a proportion of the assets of the partnership and such a person may just be an employee with a fancy job title. In Finland attempts have been made to evade employment relationships (and the Posted Workers' Directive) by artificial partnerships where migrant workers are called partners, but are really in a subordinate relationship. This has been overridden by the courts.

- Franchise holders are traditionally considered to be self-employed but where they are under close control from the franchiser, they may be regarded as being in an employment relationship, despite the terms of the agreement[27]

- Sales agents or commission agents may sit uncomfortably between employment and self-employment. In Germany they have been recognised by statute as a separate group and are not treated as employees.

- Journalists were another category considered. Journalists demand the freedom to write what they want and to protect their sources. Some are under long term contract; others are free-lance. It has always been accepted that free-lance journalists are self-employed, even though they are not, in any real sense, in business on their own account. However, in some countries[28], all journalists are

[26] As has been found to be the case in Finland
[27] As held to be the case in Finland – see Finland National Report.
[28] E.g. Hungary,

regarded as being outside normal employment obligations and protection.

- Footballers and other sportsmen and coaches were another category mentioned. They have freedom to play as they wish during the game, but despite their high earnings, they are under the control of the manager and the Club and are required, for example, to attend for training. [29]

- Office-holders are a more serious category. They includes judges, police officers (in some countries) and, to some extent, civil servants[30]. Like footballers and journalists, they are certainly obliged to carry out their functions themselves, and not to delegate their duties to someone else. On the other hand, they maintain their independence in making judgments in the exercise of their office. In several countries they have been found not to be employees and this issue has recently been referred to the European Court of Justice.[31] In some other countries[32] office-holders who are appointed, rather than entering into a contract, are treated as a separate category of employment relationship

- Clergymen, it has been said, owe obligation only to God. But that is a canard. Like judges and surgeons they are obliged to attend at appropriate times to conduct services; they owe duties in relationship to the upkeep of the church and attending to their flock. These are temporal, not spiritual duties and, therefore, they are entitled to the same protection as others if, for example, they are dismissed without justification.

- Civil servants are regarded in many countries as office-holders rather than employees, carrying out their duties in the public interest and not as the result of a private contract. This principle is particularly preserved in France, where their cases go to a different court and where their rights actually exceed those of mere employees.

- Seasonal workers come at the other end of the spectrum. They are undoubtedly subordinate to their bosses, but, it is suggested, their engagement is too informal and insubstantial to amount to employment. In Finland the berry pickers have been held not to be employees, though this may be less a question of an excluded category, but more a question about the level of control over them by their bosses.

[29] In Finland the position of a baseball umpire has been held not to be an employment relationship. In Hungary sports coaches are usually excldued
[30] In Germany all these categories are excluded from the definition of employment, but still have equivalent rights based on administrative law.
[31] C393/10 O'Brien v Ministry of Justice
[32] Such as the Czech Republic

- Some employers seek to make a distinction between direct "permanent" employees and direct temporary employees, but most jurisdictions do not acknowledge any clear distinction and, therefore, though both have full employment rights, there is nothing to stop employers favouring "permanent" employees against "temporary" employees. The standard contract is for an indeterminate duration, which is neither temporary nor permanent. However, it seems that, for example, the Norwegian system does not allow temporary employees to be be treated differently, e.g in relation to redundancy selection, from permanent employees, though temporary employees do become permanent after 4 years.

- Casual workers are mentioned above. Again there is concern about the informal nature of the arrangement. More particularly there is concern about whether they should have rights when they are not working e.g. would a casual bar person who works when it suits him and the employer be entitled to sickness benefit? In Hungary casual workers have been established as a specific separate category of worker, with identified rights.

- Home workers (or tele-workers) are often not regarded as employees because they do not work fixed hours, but are paid by results. However, such workers are often among the most disadvantaged since they are often poor women who have domestic responsibilities and cannot work away from home. In some countries[33] there is specific legislation to protect such workers, but, (despite considerable efforts by the Commission) they are not protected by any of the Directives[34]

- Volunteers do not receive any pay. Is the right to pay an essential part of employment? In the United Kingdom, volunteers have been found not to be workers.

- Illegal workers may well be the most vulnerable category of all, but we leave them with no rights at all, even to the extent that they are not entitled to recover pay for the work they have done.[35]

5. The Scope of Protection

There are, broadly speaking, two available approaches to providing protection for workers. One is to provide specific rights, such as the right not to be unfairly dismissed, the right to sick pay, annual leave, insolvency protection etc. and health and safety provisions, such as the Working Time Directive. These are rights given to all people within the scope of the relevant legislation,

[33] Eg Czech Republic and Estonia
[34] Except perhaps the Working Time Directive, which has no definition of "worker".
[35] In 2009, in the Czech Republic 151 out of a total of 2,150 employment agencies lost their licences due to employing illegal foreign workers.

usually either “workers” or “employees”. This is known as “vertical protection”. The other approach is to identify a potentially disadvantaged group and give them the right to equality of treatment with other groups. This is known as “horizontal protection”.

The concept of horizontal protection began with sex equality rights, initially relating to pay. Although this legislation applied to both men and women, the reality was that the legislature identified women as a disadvantaged group and sought to ensure that they were treated equally with men.

The second group to be identified in the legislation were members of racial and ethnic minorities. Since then disadvantaged groups identified include disabled people, homosexuals, religious groups and specific nationalities.

The legislatures identified that such people might be disadvantaged indirectly by employers setting provisions, criteria or practices which are applied to everyone, but put one group at a particular disadvantage. If that happens, then the provision, criterion or practice has to be objectively justified.

The classic example of this, which is particularly relevant to our present consideration, is an enterprise which restricts part-time work or puts part-time workers at a disadvantage. This is not gender specific, but it does disadvantage people with child-care responsibilities and, in practice, the majority of such people are women.

The three Directives we are concentrating on all take the “horizontal” approach. They identify three groups of people who are considered to be at a disadvantage, namely fixed-term workers, part-time workers and agency workers, and give them the right not to be treated less favourably than workers on indeterminate contracts (described in the directive as “permanent workers”)[36], full-time workers and direct employees respectively.

At the Congress, criticism was made of this approach by Stefano Giubboni during the panel discussion. It moves away from the traditional labour law approach, which is based on collective agreements, backed up by core rights. However, this did not lead to any detailed theoretical discussion of this change of approach, the delegates being more interested in the practical effects of the Directives.

The concern, in short, is that if the main body of workers lose protection, then the horizontal approach means that all groups of workers lose protection. The argument, however, goes deeper, because traditional labour law has tended to work on the basis that there is a unified group of “workers” who need to be protected by collective agreements and rights. Such traditional approach does not fully acknowledge the extent to which certain groups of workers are at a disadvantage compared with other groups of workers.

[36] Cl.4.1 Framework agreement annexed to Council Directive 1999/70/EC

The classic example of this is the continuing resistance by male dominated unions to the attempts of women to obtain equal pay, especially where this equalisation results in a reduction in pay for the men.

The overall principle is described in the Directive as "the principle of non-discrimination". Discrimination, in this context, means treating people differently and this, in turn, involves the concept of the comparator –

- "In respect of employment condition, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time …"[37]
- "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation…"[38]
- "The basis working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at lease those that would apply if they had been recruited directly by that undertaking to occupy the same job."[39]

The change in the wording of the non-discrimination clause in the Agency Workers' Directive reflects a crucial difficulty encountered with the operation of other two Directives. It is very likely that there will not be another employee who is in a precisely comparable position to the fixed-term employee or the part-time employee. If there is no such person, the person suffering unfavourable treatment has no remedy.

This raises the concept of the hypothetical comparator. The Equal treatment Directive[40] defines direct discrimination as "where one person is treated less favourably, on the grounds of sex, than another is, has been or **would be** treated". Creating a hypothetical person is a rather clumsy conceit and leads to many difficulties. For example, can one hypothesise a pregnant man? For this reason the Agency Worker's Directive instead contemplates what would have happened if the actual worker had been directly employed.

The difficulty in relation to the two older Directives, however, is that they require an actual comparator and any actual full-time or "permanent" employee is likely to be different either in the terms of his or her employment or in other personal features, such as experience or qualifications. This issue has been decided in the UK where the Supreme Court[41] upheld a claim by part-time on-call firemen for parity with full-time fire-fighters, particularly in relation to pension schemes[42]. The Court emphasised that judges should look for the similarities, not the differences, in comparing the terms and conditions of full-time and part-time employees. This is an example of judicial interpretation enabling the purposes for which the legislation was passed to be fulfilled.

[37] Cl 4.1 Framework agreement anned to Council Directive 97/81/EC
[38] Cl 4.1 Council Directive 1999/70/EC
[39] Art 5.1 Council Directive 2008/104/EC
[40] 2006/54/EC Article 2.1(a)
[41] Then still called the House of Lords
[42] Matthews v Kent & Medway Fire Authjority [2006] UKHL 8

6. Fixed-Term Workers

For many years the principal form of employment has been that which is described (inaccurately) as "permanent". It could be better described as "indeterminate" because such employment is normally terminable on notice, though such termination may be subject to the overriding provisions of labour law, which may protect employees from unfair dismissal, either by deeming the employment to have continued despite the purported termination or providing for compensation. Most jurisdictions provide that the employment relationship is *ad nutum* and can be determined by either party at will without notice, even though dismissal without notice gives rise to legal action under labour law legislation. Such employment, therefore, is not "permanent" since it can be brought to an end for many reasons, but it is indeterminate because it is not subject to any specific automatic termination date

There has, however, always been an alternative system, whereby people are employed for a specific fixed term or until a date which will become ascertainable, such as the end of a particular project or even the loss of government funding[43]. Such fixed term contracts are regarded as a protection for many employees. The most obvious examples are football managers and senior company executives, who often negotiate several years of fixed term contracts, which are aimed to protect them from the whims of fans and shareholders respectively. These contracts do not contain a provision for early termination on notice, though, as many football managers have found, the employment relationship can still be terminated prematurely, but not without the obligation to pay compensation.

A less satisfactory system of fixed term contracts was the old annual hiring fairs whereby farm labourers were engaged for a year at a time. This gave them rights and obligations for the coming year, but left them vulnerable to summary removal from their homes and livelihoods if their employer decided not to re-engage them.

The point at which fixed term contracts became a problem was when employers started to use them to replace absent employees or to expand their work-force without giving these replacement employees the full rights of the collective agreements or of statutory protection. When this is done, it is usual to make provision for termination of the fixed term contract before it expires on notice and without showing misconduct or other breach. This has been specifically excluded in Hungary where the basis on which a fixed-term contract can be determined prematurely is set out in the legislation ("extraordinary dismissal").

One particular area where such contracts are used in the public sector was identified by our President, Judge Helmut Zimmerman from Germany, who described how a large proportion of his own staff were on fixed-term

[43] This applies particularly to service contracts, such as maintenance of IT systems, and also public sector contracts, such as those given to specific charitable projects.

contracts, because the established post-holders were on maternity leave or on career breaks allowed for by the public sector to allow women time to bring up their children without losing their employment protection.

In the private sector there has been a less altruistic move to employ people on fixed-term contracts in order to avoid employment protection legislation. Such people may be employed on less favourable terms and may be excluded from the collective agreement. Such employees may not be union members and a union dominated by long-established employees may be willing to allow them to be appointed as long as their own positions are protected.

> "The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the need of both employers and workers.[44]

"Most countries have a natural inclination against fixed term contracts"[45]. As such the Fixed Term Workers Directive reflects a minimum standard, while many countries have greater restrictions on fixed term contracts. The Framework Agreement annexed to the Directive has two principal provisions, the "principle of non-discrimination"[46] and "Measures to prevent abuse".[47]

a) Measures to prevent abuse

Most of the EU countries have provisions to restrict the use of fixed-term contracts. The main way of enforcing such restrictions is to provide, in accordance with clause 5.2(b), that fixed-term contracts which do not meet the restrictions are treated as "contracts or relationships of indefinite duration". This avoids the disadvantage caused to the employee if the unjustified fixed-term contract is treated as void or illegal.

The reference above to fixed term contracts for senior employees who negotiate for a fixed term rather than an indeterminate contract in order to protect themselves, makes it clear that such fixed term contracts will normally not have provision for contractual termination by notice within the fixed period. Such a contract may therefore provide substantial additional protection compared with the standard indeterminate contract, even though they may fall "out of contract" at the end of the fixed period.

However, the mischief which the legislation is aiming to deal with is the fixed-term contract which contains an express (or implied?) provision for contractual termination before the expiry. Depending on the length of the contract, any such termination will give rise to a claim of unjustified dismissal, but an employer who is trying to retain flexibility would be unlikely to commit himself to a period of up to 2 to 5 years without such an escape clause.

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[44] Framework Agreement Preamble, para. 2
[45] Kevin Duffy, President of the Irish Labour Court
[46] Clause 4
[47] Clause 5

The various national jurisdictions, therefore, provide numerous restrictions on fixed-term contracts, many, but not all, of which are set out in the Directive. It has, however, been held that the "Measures to prevent abuse" are not directly enforceable at Community level, as they give national jurisdictions an unusually wide measure of appreciation to decide which restrictions they will put into force.

- Writing or other formality. This is required in Italy, but most countries have not adopted any specific formal requirements.
- Limited duration. The Framework Agreement does not set out any maximum permitted duration. The permitted limits vary between 2 years[48] and 5 years[49]. However, in countries where the initial fixed term does not need to be justified the employer can rely on justification as a ground for extending the term beyond the limit provided.[50] These variations tend to reflect the differing attitudes of national governments towards restrictive/protective employment legislation.
- Successive contracts. There is no point in a time limitation on fixed-term contracts if the employer can impose a second or further successive contract. The Congress did, however, discuss the definition of a successive contract. How long a break is required between contracts before the second contract ceases to be successive?[51]
- Limitation on the number of successive contracts or the total duration of the employment period. As stated above the variations are quite complex and vary between the following extremes -
    - There may be no need to justify fixed-term contracts as such, but a contract or series of contracts beyond the limit (of 2 to 5 years) does need to be justified.
    - All contracts need to be justified, but no contracts (or series of contracts) are permitted beyond the time limit.
- Treating the expiry of a fixed term contract as amounting to dismissal, thereby giving access to the right to claim a remedy for unjustified dismissal.[52]
- Giving fixed-term workers priority[53] in the event of recruitment of permanent employees

The most common protection, however, which is provided in the legislation by many countries[54], is the need to justify any fixed term contract of whatever duration. The objective must be distinct and concrete and relate to the job in question, and not designed to meet the fixed and permanent needs of the employer.

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[48] Czech Republic, Germany, Greece, Luxembourg, Slovenia
[49] Hungary, Estonia (4 years in Ireland and UK)
[50] As in Germany and United Kingdom.
[51] The maximum gap, in Estonia, is two months. Up to that period, the two contracts will be considered successive.
[52] This is the protection adopted by the UK, though, unlike other jurisdictions, the UK has a one year qualification period for unfair dismissal. Therefore, any fixed term contract of less than one year does not have this protection.
[53] This is the situation in Greece
[54] E.g. Estonia, Finland

This is a severe impediment to fixed term contracts, since it means that the employer can never be certain that it will be upheld by the courts, even if it comes within the basic parameters, and has to have concrete evidence of the nature of the temporary need it is designed to meet. The result is that the countries which have introduced this provision have only a limited number of fixed term contracts, while the use of fixed-term contracts is much more widespread in countries which allow parties to enter freely into such contracts.

This is an important area where the different countries of the EU diverge. In many countries, including Germany, Ireland and UK, there is no requirement for justification if the period of the fixed-term contract (or the successive contracts) comes within the required limit. If an employer and employee agree on a fixed term contract which is longer than that permitted by the Directive, then they have to justify it.

In other countries there is a dual limitation requiring the contract both to be for a duration which is within the limit and to be justified.

There are also different approaches as to what reasons for renewing a fixed term contract would amount to "objectives" reasons. There is no definition of justification as set out in other Directives.[55] In some counrties[56] the fixed-term contract cannot be justified at all where the employee is providing vital services which are part of the core business of the employers. Even where the purpose of the fixed-term is legitimate (e.g. maternity cover) this may not be justified if there is a continuous need for successive maternity cover for various permanent employees.[57]

By contrast, in other countries, it is likely that the wider concept of "a proportionate means to a legitimate aim" would be used.

This wide disparity in approach is due to the permissive nature of the Framework Agreement, which seems at odds with the Commission's announced intention "to propose a legally binding Community measure"[58] . None of the national Regulations has been challenged by the Commission.

It was clear from the discussions that some countries[59] had a pre-existing approach that fixed-term contracts could only be valid if justified, while other countries[60] had no restrictions at all on fixed-term contracts, whatever the employer's reasons for proposing (or imposing) such a term. The Directive has allowed this divergence to continue.

[55] In particular the Equality Directive 2000/78/EC Article 2.2(b)(i)
[56] Such as Greece and Austria
[57] As in Italy
[58] Para 3 of the "General Considerations" of the Directive.
[59] Such as Austria
[60] Such as UK

The question is whether the Directive, and the consequent (and pre-existing) national legislation, has dealt with the abuse of the system without destroying a valuable arrangement which may be in the interests of both parties.

The problem with challenging a fixed-term contract is that it would be open to the court to declare the contract void, in which case the employee would have no protection. This problem is considered above in relation to situations where the contract purports to be a service contract.[61] The Directive, however, makes clear that the Regulations can provide for the fixed-term contract to be treated as if it was a contract of indefinite duration. Although the point was questioned by delegates, the Directive seems to imply that this means that the contract is treated as having been of indefinite duration from the start and not as a new contract commencing on the termination of the fixed term.

b) Non-Discrimination

The employer may choose to offer a fixed term contract, not only to ensure that he can remove the employee at the end of the term if he so wishes, but also to exclude the employee from benefits enjoyed by other "permanent" employees.

This involves a business model, which may be supported by the unions, of having a core work-force of experienced employees who will be provided with benefits such as pensions, contractual sickness benefits, maternity rights, career breaks and higher pay. The employer will then seek to engage fixed-term employees to fulfil similar roles, but on the basis that they will not have the same pay or benefits and will be disposed of in the event of a downturn. Such a model may encourage employers to recruit in times of expansion without waiting to ensure that the expansion is long-term. Many employers limp from one major contract to another and wish to be able to dispose of employees when a contract comes to an end.

The non-discrimination provisions seek to restrict this, by insisting that fixed-term and "permanent" employees are treated the same, unless a difference of treatment can be objectively justified.

Normally this non-discrimination clause does not entitle the employee to negate the fixed term itself. However, in the UK the expiry of the fixed term is treated as a dismissal, giving rise to a right to claim unfair dismissal, and, in Greece, the fixed-term employee is entitled to priority over outside applicants if the permanent job becomes available.

The limitations in the scope of this protection are set out above. The person has to be an employee. He has to find a comparator, doing the same or similar work in the same establishment. It seemed clear that some national legislation or judicial interpretation went beyond that, allowing for comparators

[61] Or "contract for services"

to be working for associated employers or even employers operating the same form of contract. However, it seems (despite some suggestion to the contrary) that the provision does not extend to workers on an indefinite contract who are doing work which is not similar, but is of equal value.

There is no provision in the legislation outlawing indirect discrimination. This arises where a provision, criterion or practice is applied to all employees to their disadvantage, but has a disparate effect on fixed term workers. Thus excluding fixed term workers from a pension scheme may be direct discrimination, but requiring a minimum period of service before a person may join the pension scheme may have a disparate deleterious effect on fixed-term workers, who are likely to have had only short service, even though the requirement applies equally to all employees.

While we have seen that many workers are excluded from protection on the grounds that they are not employees, it seems that this Directive does provide discouragement to employers who are trying to use fixed-term contracts as a ruse to limit employee protection.

7. Part-time workers

There is a significant difference between the measures required to protect part-time workers and those implemented in respect of fixed-term workers. Part-time work is recognised as a good thing. While there may be some employees who are looking for fixed-term employment,[62] the perception is that fixed-term contracts are usually designed by employers in order to limit or evade employment rights.

This may sometimes also be true of part-time work, but there are many people who seek and, indeed, demand the right to part-time work. As a result there is no need for "measures to prevent abuse". The Part-time Workers' Directive is aimed primarily at non-discrimination.

The Directive does, however, contain a requirement that Member States consult with the social partners and review obstacles to part-time work and, where appropriate eliminate them.[63] This has led to a variety of provisions enabling full-time employees to ask to work part-time.

It was pointed out that part-time workers are often fully integrated into the business. They may be former full-timers who move to part-time for child-care reasons or as an alternative to retirement. However, there is a wide-spread perception that part-timers lose out in terms of pay, promotion, sickness rights etc. There is also a sex discrimination issue, because, looking at the work-force as a whole, the majority of part-timers are women.

[62] Particularly football managers and other people whose employment would otherwise be precarious (politicians?)
[63] Clause 5.1(a) Directive 97/81/EC

The proposition that the bulk of part-timers in a particular sector are women has led to the contention that any discrimination against part-timers is indirect discrimination against women. This has led to a good deal of litigation, much of which has ended up in the European Court of Justice.

However, the Part-Time Worker's Directive with the Framework Agreement which is annexed to it, gives specific protection from discrimination on the grounds of being a part-timer whether the claimant is a man or a woman and whether or not the particular group of part-timers is predominantly women. However, it does not provide for indirect discrimination of the kind that has been upheld assex discrimination.

"Full-timer" is not defined in the Directive. There are 168 hours in a week and there is no set period during which a person is expected to work. In some businesses the standard working week is only 35 hours, whereas some workers in the EU work 80 hours of week or even more. Collective agreements often define the length of the standard working week and the Working Time Directive limits the standard working week to an average of 48 hours. However, there is an opt-out clause.

It is, therefore, open to the member states to define the meaning of "full-time". Where there is a collective agreement, this will usually define the normal working hours. However, where there is no collective agreement, it is our understanding that it means a person working the normal number of hours, standard time, in that establishment or that industry.

A "part-timer" is defined by reference to the full-timer[64] –

> "The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker."[65]

This definition was not discussed at the Congress and there was no indication that it had caused particular problems.

The part-timer has to identify a comparable full-time worker, though, if there is no comparable full-time worker, the comparison can be related to –

> "the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements,, or practice"[66]

This allows Member States a wide variation in how they identify a comparator.

[64] It seems that, in Finland and Italy, casual, seasonalworkers are included in the definition of "part-timer worker"
[65] Clase 3.1 Framework Agreement annexed to 97/81/EC
[66] Clause 3.2 of the Framework Agreement

The principle on which it works is, of course, that of *pro rata temporis".* This is particularly applicable to work which is defined on an hourly basis. It is much more difficult to apply at managerial level, where the value of a person's work is not necessarily defined by the number of hours he or she works each week.

Much of the litigation which has come before the European Court of Justice has been about fringe benefits which have been openly denied to part-timers. This may include pensions, contractual sick pay, holiday pay, availability of overtime and opportunities for promotion. The two main defences, where a difference in treatment has been established have been –

- No suitable comparator and
- Justification in the interests of the business.

The comparator must have "the same type of employment contract or relationship" and be "engaged in the same or similar work/occupation, due regard being given to other consideration which may include seniority and qualification/skills"

The reference to "the same type of employment contract" gives the employer who wishes to disadvantage part-timers, on the face of it, an obvious opportunity. The contract provides for part-timers to be excluded from the pension scheme, the contractual sick pay, the extended paid holidays etc. Therefore the full-timer is not comparable.

This is a potentially self-defeating definition. It is obvious that the Directive did not intend that it should be so easy for employers to defend themselves in this way and it seems that national courts have sought to ensure that the differences identified represented true differences between the jobs, rather than arbitrary exclusions of part-timers.

Nevertheless, there is often a genuine contention that the part-timers are not doing exactly the same job, do not have the same responsibility, are not required to provide cover etc. This is particularly true of managers, who may be expected to provide overall oversight of the work-force which cannot be achieved by someone working only part of the week.

The same kind of argument can be used to allege justification, but it is now firmly established in all areas that an employer who wishes to justify discrimination must have done some a real cost/benefit analysis, rather than just asserting an unsubstantiated belief.

The Directive makes clear that to be actionable the discrimination must be "solely because they work part-time". It is clear, however, that this does not require any specific prejudice against part-timers. Obviously if two workers are treated differently due to nepotism, personal preference or because one is more efficient or able than the other then the discrimination will not be "because they work part-time". However, in most of the major cases it is clear that the different treatment is specific to the employee's part-time status.

As stated above, the Directive seems to apply to direct discrimination and not to implementing some provision, criterion or practice which puts part-timers as a whole at a disadvantage compared with fill-timers.

The Framework Agreement makes specific provision[67] for Member States "after consultation of the social partners" to restrict access to benefits by part-timers by requiring a certain length of service, minimum hours, or minimum earnings. We were not clear as to how much has this been used.

The other area, set out in the Directive, but not directly discussed at the Congress, is the availability of opportunities for part-time work. Many full-time workers are keen to work part-time, even though this will mean a *pro rata* reduction in their pay. Many employers are resistant to part-timers, feeling that they are not fully committed to the establishment and are not as flexible as full-timers. They may also require as much training as full-timers and cost a disproportionate amount of time to administer.

People may desire to work part-time when they have care responsibilities, for young children, disabled relatives or aged parents. Or they may wish to reduce their work-load as they approach retirement. The Directive makes no absolute requirement that Member States should legislate to give people a right to flexible working, or, at least, to require employers to consider such provisions, but the gist of clause 5.1 is clear and most countries have addressed this.

Many countries have legislation aimed to make this easier. In particular many countries[68] have requirements that employers have to give priority to existing part-time workers when full-time posts become vacant and many countries also have provisions to encourage or oblige employers to allow existing full-time employees to work part-time because this may be necessary because of child-care responsibilities or other dependents, such a aged parents. However, this may be a life-style choice e.g when a full-time employee is nearing retirement. These flexible working provisions may place an absolute obligation or just require the employer to give the proposition proper consideration.[69]

Our discussion established that the Part-time Workers' Directive, the Framework Agreement and the national legislation has provided a sound basis for forcing employers to acknowledge the role played by part-time workers and to enable their pat-time employees to obtain comparable benefits. No doubt this sphere is still being developed in the Member States.

The problems we identified were more specifically in respect of the scope of the protection, particularly as part-time workers, to obtain protection, must be defined as employees.

[67] Clause 4.4
[68] E.g Luxembourg, Norway
[69] As in UK

8. Agency Workers

The status and protection of agency workers is a more complex and controversial issue than the protection of fixed-term and part-time workers. In the past there was serious opposition to the very existence of employment agencies. It was considered that their very existence might usurp the position of the state. This has meant that countries such as Austria have had strong laws restricting the use of agency contracts and giving agency workers equal rights with direct employees. A fixed term agency contract had to be specifically justified and was liable to be treated as a permanent contract. By contrast other countries, such as the UK, had no restrictions on agency contracts[70] and allowed the agencies to enter into any agreements that they chose with the agency worker, even if that meant that the agency worker was unprotected in comparison with a direct employee.

As a result, the progress of the draft Agency Worker's Directive was a difficult one and, although it was issued in 2008,[71] the implementation deadline is 5th December 2011. As a result only a minority of member states[72] have, as yet, implemented the Directive by issuing national legislation[73]. We are not clear whether it is part of the EEA agreement[74]

The essence of an agency agreement is that the Agency agrees to provide labour to the "user undertaking",[75] either a specific person or a number of workers. The agency then enters into a contract with the worker or workers to carry out this work or, if they have workers already under contract, assigns particular workers to that task.

The particular problems which arose from this tri-partite agreement related to the relationship between the worker and the agency and the relationship between the worker and the user undertaking.

As with fixed-term contracts, the Directive at the same time seeks to remove or limit restrictions or prohibitions on the use of agency workers (thereby liberalising temporary work restrictions) and by establishing the principle of equal treatment of temporary agency workers and direct employees of the user undertaking.

The Directive does not seek to create a direct contractual relationship between the agency worker and the user undertaking, but it does place direct obligations upon the user undertaking for the benefit of the agency worker. On

[70] Though the UK, like many other countries, does require Agencies to be registered.
[71] 2008/104/EC dated 19th November 2008.
[72] Including Estonia and Greece
[73] In Germany the principle of non-discrimination was implemented before the Directive, but the Directive has not yet been formally implemented. The same applies to Hungary and Italy. By contrast, in Malta there is no clear indication that the Directive is in the process of being transcribed
[74] See the Norway and Iceland reports, which seem to take a different line on this.
[75] "'user undertaking' means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker workers temporarily.

the face of it, however, the primary obligation of equal treatment is placed upon the agency rather than the user undertaking.

In recognising the reality of this tri-partite relationship, the Directive creates (perhaps for the first time) the specific legal concept of the "user undertaking".

a) The Agency worker and the agency

Under the laws of the different Member States, there was no clarity about the nature of the relationship between the agency and the agency worker. The agency worker owed a contractual relationship to the agency, but, in practice, was not working under the direction of the agency, nor was the agency worker directly subordinate to the agency. The factual situations might vary, but the reality was often that the agency worker was, in practice, treated as the servant of the end user, being required to obey instructions directly from the end user, without prior reference to the agency.

This has led to a substantial body of law. Some jurisdictions have considered agency workers to be the employees of the agency[76]. Others have decided that the relationship is *sui juris* and therefore the agency worker does not gain the benefit of the legal protections given to direct employees, such as the right not to be dismissed without justification. In Ireland specific legislation provided dual protection whereby the agency worker could be treated as employed both by the agency and by the user undertaking. In Luxembourg the legislation requires the contract between the agency and the user undertaking to ensure that there is a solid employment relationship between the worker and the agency. However, such restrictions, aimed at protecting the agency workers, could be seen as restrictions under Article 4 which would need to be reviewed.

The significance of designating agency workers as employees of the agency is that, if they are so designated, they will be entitled to the same protection as other employees, including a right not to be unfairly dismissed by the agency. This right is not covered by the Directive. In Netherlands, for example, agency workers are not regarded as typical employees and have specific statutory rights which are less than those held by standard employees[77]

We had limited discussion about the role of collective agreements in protecting agency workers. In many countries the collective agreements do not apply to agency workers, who may have their own separate collective agreements, but in some countries[78] the collective agreement applies to agency workers as well as to directly employed temporary workers. This reduces the need for horizontal protection under the Directive.

The Congress also considered how the assignment comes to an end and the position of the agency worker when it does so.

[76] E.g Czech Republic, Finland
[77] For example they only obtain full protection from unfair dismissal after 3 years.
[78] E.g.Iceland

The contract between the agency and the user undertaking may give the user undertaking a wide discretion either to terminate the agreement or to require a different person to be provided to carry out the work. This enables the user undertaking to remove an agency worker arbitrarily, which may result, in turn, in the agency worker's contract with the agency being terminated. As there is no contract between the end user and the agency worker, the agency worker has no redress against the user undertaking even if the reason for his removal is arbitrary and unjust.

This problem was dealt with in Ireland by the deeming provisions and dual obligations, but elsewhere, prior to the provisions of the Directive, the agency worker was left to any remedy he might have against the agency.

This has led to some judge-made law as to the circumstances in which an agency worker may become a direct employee of the user undertaking. This may happen because the nature of the relationship has changed and the worker has become so imbedded in the user undertaking as to be, in effect, a direct employee.

However, this does not benefit the agency worker who has only been working in the user undertaking for a short time and/or has been strictly segregated from direct integration into the user undertaking.

The Directive does not deal with this directly. Chapter II Article 1 gives the right of equal treatment "for the duration of their assignment". It does not give protection from termination of that agreement. The reason for this is that the Directive refers always to "temporary agency work". It does not contemplate that an agency worker should work long-term for the same user undertaking.

In Austria, however, this is specifically addressed by forbidding the parties to terminate the employment relationship during the duration of the special assignment. In other words, it is treated as a fixed term contract, without the right to terminate on notice. It seems that this provision does not apply elsewhere.

Unlike the new obligation owed by the user undertaking to the worker, the protection of the agency worker as against the agency has been addressed in some countries[79] by the negotiation of collective agreements between the agencies and the agency workers. This has given agency workers rights which go beyond those set out by contract. Delegates from other countries questioned the extent to which the agency worker has rights under the Directive when between assignments. It seems that the Directive does not deal with this and, as a result, there will continue to be differences between member states in the level of protection given to agency workers, including those situations where the comparators are themselves low-paid or subject to poor working conditions.

[79] Particularly the Nordic countries

The Congress considered the position of the agency worker against the temporary work agency. Even if this relationship is not a relationship of employer and employee, it is clear that it is a contractual relationship. What is the position of the agency worker between assignments? If, as is contemplated, the assignment is temporary, it follows that it will come to an end. When it comes to an end the agency worker may look to the agency for other work. In the meantime he may remain on the books of the agency, but without any assignment to work on.

The question was asked whether this means that he is entitled to be paid, whether he is entitled to paid holidays, statutory sick pay etc. One analysis of this is that the agency worker has a contract of employment, or akin to one of employment, during the actual assignment, but, at the end of the assignment, he ceases to have any relationship with the agency, unless there is some umbrella contract. This will depend on the terms of the agreement between the agency worker and the agency.

However, again some countries have addressed this by protective legislation giving the agency worker specific rights against the agency during periods when he is still on the books of the agency, but does not have an assignment.

c) The worker and the user undertaking

Under the traditional structure of temporary employment agencies there is no contractual relationship between the temporary agency worker and the user undertaking. There may be obligation on the user undertaking in respect of the health and safety of all persons on their premises, but the standard employment rights and obligations do not apply.

The most substantial change effected by the Agency Workers' Directive is to set out the principle of equal treatment between the agency worker and directly recruited labour. The Directive makes clear that the obligation not to discriminate is placed both upon the Agency and the user undertaking. However, it is the user undertaking which will be most concerned.

This also means that in those countries[80] where agency workers have a collective agreement which entitles them to rights and conditions, the agency worker may be able to claim enhanced rights over and above the agency workers' collective agreement, because that agreement provides for lower wages than those enjoyed by comparable directly employed workers in the user undertaking.

The problem faced by the legislators is that employers legitimatelyuse temporary work agency to maintain flexibility and allow them to deal with peaks of demand or specific short-term requirements without committing themselves to the full costs of a new employee. A comprehensive requirement that temporary agency workers should immediately receive the

[80] Such as Austria and Finland

same benefits as permanent workers is both expensive and complicated to administer.

As a result the Directive contains provisions which limit the obligation. The first is the express provision in Article 1 which requires equal treatment on "for the duration of their assignment". This appears to mean that an agency worker whose assignment is terminated by the user organisation will not necessarily be able to claim discrimination or unjustified dismissal.

The second limitation is contained in Article 5.3 which allows for collective agreements (after consultation with the social partners) which may provide different arrangement "while respecting the overall protection of temporary workers"

The third limitation is in Article 5.4 which allows for agreements with the social partner allowing for different arrangements in respect of terms and conditions for temporary agency workers compared with permanent employees.

Because the Directive has not yet been widely implemented, there was no clear indication as to whether these provisions will be used by the Member States.

The Directive does not allow for justification of discrimination. This differs from the other two directives. The reason for this is that the comparison is with the terms that "would apply if they had been recruited directly by that undertaking to occupy the same job". The comparator, therefore, is not a permanent employee, but a temporary employee who is directly recruited.

This means that the horizontal rights under the other Directives are passed on to agency workers, but they do not necessarily enjoy the full rights enjoyed by agency workers.

If a user undertaking wishes to maintain a relationship with the agency worker, they may keep a directly employed temporary worker on their books even if he or she is not required. In those circumstances the worker might gain rights to holiday pay, sickness benefit, but would not be entitled to pay during such periods of lay-off unless such rights are provided by national legislation.

However, the Directive seems to contemplate that an agency worker whose assignment has come to an end will cease at that point to have any continuing rights against the user undertaking, even if he remains under contract with the agency and may, therefore, be able to claim rights, including sickness and holiday rights, against the agency.

This is a new Directive which has not yet been implemented in all Member States. It will take some time to discover how the right will be treated by the national courts and, in due course, by the European Court of Justice.

(d) Review of restrictions or prohibitions

The aims of the Directive are split between a desire to give protection to agency workers and a desire to ensure that employment agencies are able to operate without undue restrictions and prohibitions, are part of the concept of liberalising employment laws and increasing flexibility.

Article 4 of the Directive contains a fairly weak provision on restrictions and prohibitions. Restrictions and prohibitions are not directly controlled, but the member states are required to carry out a review of such restrictions and prohibitions after consultation with the social partners.

There was no real indication that employment agencies are limited in their operation in any of the Member States, though there is a continuing feeling that they should be treated with caution. However, many countries have specific legislation regulating agencies[81] and the protections for agency workers set out above undoubtedly restrict the freedom of employment agencies to enter into whatever arrangements they wish with workers and user undertakings[82].

The date for the Member States to report on these reviews is 5 December 2011 and it may then be possible to judge to what extent restrictions and prohibitions survive and to what extent member states have decided to change their laws.

9. Conclusions

The experience of 15 years' of gatherings of labour court judges from the length and breadth of the European Union has demonstrated that there is considerable congruence both about the content and interpretation of national labour laws.

The European Social Union has resulted in a body of European labour law ("the *acquis européenne")* which emanates in part from the treaties and Directives, in part from the judgments of the European Court of Justice, but also, to a considerable extent, from the principles of justice applied by the national judges. The European Association of Labour Court Judges has, hopefully, played some small part in bringing together those principles and giving the national judges the confidence of knowing that similar approaches are being taken elsewhere.

We gather confidence from the support of the First President of the Corte di Cassazione in speaking of the internationalisation of jurisprudence. It is essential to the functioning of the European Union that all the member states

[81] Eg the Employment Agencies Act 1973 in UK
[82] The Luxembourg and Slovenia legislation seems particularly restrictive.

should have an independent judiciary to apply the principles of national and European law "without fear or favour, affection or ill-will".[83] There are, of course, disagreements between the judges both as to the law and as to the best approach to the law, but there are far more areas where we agree.

In relation to labour law, the rights of workers and of employers come as much from the national laws and from collective agreements as from the European Directives. Thus rights such as protection from unjustified dismissal[84] and protection from harassment [85] come from national legislation and not from European Directives.

In this Congress we have considered the position of three potentially disadvantaged groups defined not by their personal characteristics, such as gender, ethnic origin, disability etc., but by the nature of their employment status.

The three Directives have provided both vertical (or direct) and horizontal (or comparator-based) protection. We have sought to identify difficulties of definition and enforcement. However, it has become clear that there are other groups which still fall outside the scope of protection.

Potentially excluded workers include seasonal workers, migrant workers, casual workers, domestic workers, home-workers, economically dependent self-employed workers and, above all, illegal workers. The plight of these workers merits further consideration and possible Europe-wide action.

"The black economy" was identified as a substantial problem, though it is one which is largely outside the direct experience of Labour Judges. If, as in most countries, illegal work agreements are void then there can be no protection of the workers engaged in such work, even if they are being exploited. Consideration needs to be given to finding ways to allow such workers to raise their problems to labour courts.

To some extent this can be dealt with by deeming certain contracts to come within protected categories, by ignoring the illegal elements. For example an agreement devised to avoid tax may be treated as void, or can be enforced in a way which brings it within the tax regime. Emphasis was placed on the need to ensure that lawful employment is sufficiently flexible to avoid driving employers and employees into the black economy.

Our Congress in Liverpool in 2009 showed that migrant workers from within the EU are not disadvantaged in their rights, but may be disadvantaged by ignorance of the process and protectionism from local workers. The protection of posted workers contained in the Posted Workers' Framework Directive[86] helps to ensure that migrant workers are appropriately protected,

[83] An extract form the British judicial oath.
[84] Report of Paris and Budapest Congresses 2001-2
[85] Report of Vienna Congress 2008
[86] 96/71/EC

though this protection may be at a minimum level.[87] But it provides no protection to individual migrants who find work in foreign countries.

We are aware that there is a whole body of law relating to immigration and asylum, which results in a large number of residents of EU countries ending up living there illegally or subject to complex restrictions. In some cases, their dependence on one particular employment to maintain their resident status leaves them in a position which is little short of slavery. However, the problems of non-EU immigration into EU countries was outside the scope of our discussions.

Our Congress in 2011 in Malta will focus on the need for Access to Justice, particularly for posted and other migrant workers, but also for all workers, particularly those not protected by collective agreement and union support.

In relation to this Congress, we came away convinced that the Judges have a considerable role to play in interpreting employment relationships in a way which gives protection appropriate to the true nature of the relationship, rather than allowing employers to use technicalities to seek to avoid their obligations.

18th February 2011

Colin Sara
Secretary-General

[87] Because such workers are not entitled to the protection of collective agreements unless they are formally declared to be of universal application..