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Possible avenues for a more effective temporary agency work directive

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Abstract

Fifteen years after the enactment of the EU Directive 2008/104/EC on temporary agency work (TAWD) there are still considerable differences in the use of temporary agency work and in the legal situation, status, and working conditions of temporary agency workers within the European Union, even though these differences were one of the reasons for enacting the TAWD. This article evaluates whether the TAWD is still fit for its purpose – mainly, whether the objective of ensuring the protection of workers and the improvement of their working conditions have been achieved – by analysing its personal and material scope, taking into account the presence of other multiparty work arrangements. The article argues that an integral approach to multiparty work arrangements is needed to ensure the personal scope of the Directive is broad enough. Currently, the TAWD leaves (too) much room for deviation from the equal treatment principle, thereby missing a transparent level of worker protection. This makes the enforcement of the equal treatment principle significantly complicated. Lastly, the article argues that introducing a maximum period of the time that one temporary agency worker can be placed at the same user undertaking is the best way – the way with most legal certainty for all parties involved – to ensure that temporary agency work at the same user undertaking does not become a permanent situation for a temporary agency worker.

Keywords

Temporary agency work, temporary work, triangular employment, platform work, equal treatment, abuse

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1. Introduction

Of all non-standard forms of employment, temporary agency work (TAW) is probably one of the most flexible and atypical employment relationships. It is an atypical employment relationship, because it involves multiple parties: The agency-worker is employed by the temporary-work agency, but she performs the work at a user company under the supervision and direction of this user company. It is a flexible employment relationship, because it is usually of a (very) short duration and can be terminated easily. The market share of private employment agencies is growing on a global level, with the share of agency workers being the highest amongst European countries.[1] However, other types of multiparty work relationships are present on the European labour market as well, and they are not always covered by the EU Directive 2008/104/EC on temporary agency work (hereafter TAWD).

The aim of the TAWD is 'to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working' (Art. 2). This contribution evaluates whether the TAWD is still fit for its purpose – mainly whether the objective of ensuring the protection of workers has been achieved – by analysing its personal and material scope, taking into account the presence of other multiparty work arrangements. The article will also explore some possible avenues for improvement. The central research question can be formulated as follows: How should the goals of the Temporary Agency Work Directive be understood in the context of new multiparty work arrangements, and what are the possible avenues for improving the effectiveness of the Directive?

The next section (section 2) deals with the personal scope of the TAWD. First, by examining the rulings of the Court of Justice of the EU (CJEU) on the concept of 'worker' and the concept of 'economic activities'; then, by discussing other forms of multiparty work arrangements in relation to the scope of the TAWD. Section 3 will focus on the material scope of the Directive: the restrictions or prohibitions of TAW as regulated in Article 4, the principle of equal treatment, and the measures to prevent abuse as enshrined in Article 5, respectively. Article 5 will be analysed in less detail, however, in order to avoid repetition with other contributions to this special issue. Instead, an attempt will be made to formulate possible avenues for improving the effectiveness of the TAWD based on own research and the other contributions to the special issue. Section 4 ends with concluding remarks.

2. Personal scope of the Temporary Agency Work Directive

2.1 The concepts of 'worker' and 'economic activities'

Multiparty work relationships, also referred to as triangular or tripartite relationships, are becoming a common feature of the contemporary labour market. There is a very broad array of working arrangements in which workers are not directly employed by the company to which they provide their services. The ILO first coined the label 'multiparty work arrangements'[2] to capture

1. Marked cross-national variations exist; see World Employment Confederation, *Economic Report 2020*, p. 4.
2. International Labour Organisation (ILO), 'Multi-party work relationships; concepts, definitions and statistics' (2018) ICLS/20/2018/Room document 9, p.1.

the great variety of contractual arrangements, which not only include other types of tripartite employment relationships, like subcontracting, but also arrangements between multiple parties without a clear employment relationship, involving, for example, dependent contractors.[3]

The personal scope of the TAWD can be deduced from Articles 1 and 3. Article 1(1) states that the Directive applies to workers with a contract of employment or employment relationship with a temporary work agency, who are assigned to user undertakings to work temporarily under their supervision and direction. The TAWD applies to public and private undertakings that are temporary work agencies or user undertakings engaged in economic activities, whether or not they are operating for gain. As the case law shows, there are many elements that need to be present for the TAWD to apply, perhaps more than would seem on a first glance. The facts of the *Ruhrlandklink* case,[4] in which the CJEU ruled on the concepts of 'worker' and 'economic activities', show how the working arrangements in practice can deviate from the standard form of temporary agency work. In this case, there was no (private) employment agency hiring out workers, but instead a not-for-profit association, and the worker in question was a 'member' of that association.

Ruhrlandklink had signed an agreement with a non-profit association for the secondment of staff, under which the association undertook to supply nursing staff to the clinic in return for financial compensation covering personnel costs, plus a 3% flat-rate administrative charge. The nursing staff in question was comprised of members of the association who did not have an employment contract with the association under German law. The CJEU underlined that the TAWD applies not only to workers who have concluded a contract of employment with a temporary work agency, but also to those who have an 'employment relationship' with such an entity. Furthermore, the Court rejected the limitation of the concept of 'worker' to the national definition and, in particular, to those who have a contract of employment with the temporary work agency, since such a restrictive approach would undermine the effectiveness of the directive by 'inordinately and unjustifiably' limiting its scope of application.[5] Referring to Article 3(1)(a), the Court defined the concept of 'worker' as covering any person who carries out work – that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration, and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of the legal relationship between those two persons and the form of that relationship. Despite the fact that Article 3(2) provides that the Directive is without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker, the Court concluded that EU legislature did not leave it to the Member States to define that concept unilaterally, but specified itself the contours thereof in Article 3(1)(a) and specified, in addition, the contours of the definition of 'temporary agency worker' in Article 3(1)(c).[6]

Ruhrlandklinik is in line with other judgements where the CJEU has taken an expansive approach concerning the personal scope of the social law Directives.[7] The Court seeks to avert

3. See also E. Maran and E. Chieregato, 'Multiparty work relationships across Europe: A comparative overview', *ELLJ* 2022, Vol. 13 No. 4, p. 474–491.
4. CJEU 17 November 2016, C-216/15, EU:C:2016:883 (*Ruhrlandklinik*).
5. *Ruhrlandklinik*, para. 36.
6. *Idem*, para. 25–43.
7. E.g. E. Menegatti, 'Taking EU labour law beyond the employment contract: The role played by the European Court of Justice', *ELLJ* 2020 Vol. 11 No. 1, p. 26–47; D. Georgiou, 'The new EU Directive on Transparent and Predictable Working Conditions in the context of new forms of employment', *European Journal of Industrial Relations* 2022 Vol. 28 No. 2, p. 197–200.

that the scope of these Directives is unjustifiably restricted and that persons who, from the point of view of Union law, are comparable to workers under the national concept are excluded because of national specificities. In *Ruhrlandklinik*, it expressly refers to the effectiveness of the Directive to support its argument. The Court also invokes the so-called *Lawrie-Blum*[8] doctrine to define a worker according to European Union law, which is arguably a broader concept than the one commonly used in national employment tests.

How far the scope of the TAWD exactly reaches, however, is not clear. For example, when is a working person 'protected on that basis under national law'? Some Member States have already expanded the scope of at least parts of employment laws to cover some of the economically dependent workers who do not have an employment contract. Some countries have introduced intermediate categories of working persons (e.g., Italy, Germany, and Spain). Hence, it will likely be possible for some workers who do not work on the basis of an employment contract to prove that they are protected under national law on the basis of their work.[9]

However, this will be more difficult for other groups, e.g., genuinely self-employed persons. In some Member States, intermediaries increasingly focus on placing self-employed workers instead of hiring out employees, as is the case in the Netherlands where, due to a favourable fiscal climate, the number of self-employed persons has been rising in the past years.[10] Such 'matchmakers' or 'brokers' often focus on higher-waged work, e.g., the construction, ICT, legal and administrative services. Here as well, the number of court cases involving the qualification test to demarcate between true self-employed persons and (temporary agency) employees is increasing. Usually, the test first tries to establish whether the worker performs subordinated work and, second, if subordination is established, which party exercises supervision and direction. We know by now that some of these self-employed workers are in fact *quasi*-independent workers and that they might need protection on the labour market.[11]

For those *quasi*-independent workers, it is not easy to determine whether they fall under the scope of TAWD, especially when they have (very little or) no protection 'as a worker under national employment law'. In *Ruhrlandklinik*, the nursing staff in question received quite a high level of protection even though they were not employees. The CJEU considered the relationship of the nursing staff in question not 'substantially different to the employment relationship between employees having the status of workers under national law and their employer'.[12] What if these workers are indeed protected on some issues, but their position is still very different compared to the legal position of employees? The Netherlands, for instance, does not have an intermediate category, but the scope of the Minimum Wage Act has been extended to include solo self-employed workers, unless

8. CJEU 3 July 1986, Case C-66/85, ECLI: EU: C:1986:284 (*Lawrie-Blum v Land Baden-Wuürttemberg*).
9. Cf. CJEU 13 June 2019, C-317/18, ECLI:EU:C:2019:499 (*Cátia Correia Moreira*). In this case, concerning the Directive on the Transfers of undertakings, CJEU considered that the level of protection is not relevant as long as the person is protected. However, that Directive refers explicitly to *employees* and not *workers*.
10. There are alarming reports in the Netherlands of intermediaries and agencies actively approaching nurses and teachers and trying to persuade them to terminate their employment contract to instead be hired through the agency to do the same work, but as an independent contractor or on the basis of subcontracting, see for example, M. de Rijk, '#Aasgieren', *De Groene Amsterdammer* 22 February 2023.
11. For example, Dutch case law shows that the intermediaries sometimes prohibit the (*quasi*) self-employed workers from concluding employment relationships with the user undertakings, by including non-compete clauses in their contracts. Art. 6(2) of the TAWD has been invoked in national case law several times, however, it is not at all evident that the TAWD applies, see e.g., Hoge Raad 20 May 2022, ECLI:NL:HR:2022:751.
12. *Ruhrlandklinik*, para. 37–38.

they provide their services in the pursuit of a business or in the independent pursuit of a profession. The aim of this extension was to cover bogus self-employed workers but not genuinely self-employed persons. In addition, under Dutch employment law (Art. 7:658(4) of the Dutch Civil Code), user undertakings are liable for staff who do not have an employment contract, so there is also protection regarding liability. Is this enough to claim that self-employed persons are also protected under Dutch employment law as workers? Dutch scholars are divided on the issue.[13] Therefore, despite the expansive approach concerning the personal scope of TAWD by the CJEU, it is not at all certain that all workers in multiparty work relationships who need protection fall under the scope of TAWD.

Regarding the employment agencies and the user undertakings, the CJEU seems to use a broad approach as well. In *Ruhrlandklinik* the Court ruled, in accordance with the settled case law, that 'any activity consisting in offering goods or services on a given market is economic in nature'.[14] Whether or not the agencies and the user companies operate for gain, their legal form and the way in which they are financed are all not relevant aspects, since they have no bearing on the economic nature of the activities pursued.[15] Activities falling within the exercise of public powers are *prima facie* excluded from classification as economic activities, but this should be interpreted in a narrow sense.[16]

Art. 3(1)(d) of the TAWD states that a user undertaking can be a natural person as well, and the question is whether private households can be considered as undertakings engaged in economic activities. The Amsterdam Appeals Court decided, in the *Helpling* case, to reclassify the cleaners working through Helpling as temporary agency workers assigned to private households to work there under their supervision and direction.[17] However, since private households are not 'undertakings', the principle of equal treatment did not need to be applied, and the claim for applying the working conditions from the collective agreement for the cleaning sector was rejected as well. The Amsterdam Appeals Court only applied Dutch law and did not take the TAWD into consideration, so the question is how this ruling would relate to the ruling in *Manpower Lit*.

While the debate on the legal status of platform workers in general is outside the scope of this contribution, it is important to note that some forms of platform work share many organisational similarities with TAW due to their temporary and triangular nature. Different scholars have analysed whether it is possible to apply the TAWD to platform workers and whether that would help to improve their conditions of employment.[18] Rosin comes to the conclusion, like De Stefano and Aloisi, that the application of the TAWD is complicated, because in many cases the supervision and direction appears to be shared between the parties. The prevailing view seems

13. For an overview, see e.g., M.D. Ruizeveld in her case-note on Dutch Supreme Court 20 May 2022, ECLI:NL:HR:2022:751, *Tijdschrift voor Recht en Arbeid* 2022/62.
14. *Ruhrlandklinik*, para. 44.
15. *Ruhrlandklinik*, para. 46. See also CJEU 11 November 2021, C-948/19, ECLI:EU:C:2021:906 (*Manpower Lit*), para. 32.
16. *Manpower Lit*, para. 39.
17. Appeals Court of Amsterdam 21 September 2021, ECLI:NL:GHAMS:2021:2741. Also see Maran and Chieregato (n3), p. 483.
18. For example, A. Rosin, 'Applying the Temporary Agency Work Directive to Platform Workers: Mission Impossible?', *International Journal of Comparative Labour Law and Industrial Relations* 2020. Vol 36, No. 2, p. 141–168; Valerio de Stefano & Antonio Aloisi, *European Legal Framework for Digital Labour Platforms* 39 (European Commission 2018). Ratti has researched the case of crowdworkers, see L. Ratti, 'Online Platforms and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions', *Comparative Labor Law & Policy Journal* 2017 Vol. 38, p. 477.

to be that despite some differences, there is also an overlap. In some cases, platforms offer services that are comparable to those provided by temporary work agencies. Moreover, it has been reported that 'hybrid forms that combine characteristics of online talent platforms and temporary work agencies have developed. As a result, the boundaries between the two models have become blurred.'[19]

To date, the ruling by Amsterdam Appeals Court in the *Helpling* case seems to be the only one where a national Court classified the provision of work through a digital platform as a form of TAW. Helpling has filed for bankruptcy in the Netherlands. However, there is a case pending in which the Dutch trade unions have asked the Court to reclassify workers working through the Temper platform as temporary agency workers.[20] By contrast, Temper claims the workers are self-employed freelancers. Unlike Helpling, Temper works with private clients as user undertakings.

2.2 Multiparty work arrangements

When thinking about the future of temporary agency work, it is important to do so in the broader context of the developments in the labour market and to take into account other multiparty work relationships, since they are becoming an increasingly common feature of the contemporary labour market. As discussed, there is a very broad array of working arrangements in which workers are not directly employed by the company to which they provide their services.[21]

Maran and Chieregato classify the different multiparty work arrangements in three groups of contractual arrangements.[22] The first group includes the forms of triangular employment relationships that are specifically aimed at the hiring out of labour. Here, the most common arrangement is TAW. Apart from TAW, this category comprises other relationships, such as secondments and permanent staffing, and might also include some forms of platform work. The second group comprises of work arrangements focusing on the provision of services for a third party (also referred to as subcontracting or outsourcing). In this relationship, the user undertaking does not directly oversee the execution of the work and management of the workforce; instead, it is the (sub)contractor that executes the service under its own responsibility and its own staff, thus, in principle, bearing all the employer's obligations towards the workers. The third group includes the remaining work arrangements that do not fit into the first two categories, such as franchising or other organisational forms, including worker cooperatives. It also includes those relationships that emerge in the context of employment groups, in which different companies under the same holding may share their labour force.

In theory, these are distinct groups. However, in practice, the distinction between these work arrangements can be very ambiguous and it is not always clear whether certain multiparty work arrangements fall within the scope of the TAWD. Yet, this distinction has significant implications for the legal status and rights and duties of all parties involved. It is already illustrated above which difficulties can arise when trying to determine whether a non-conventional multiparty work arrangement – involving, for example, (*quasi*) self-employed workers or platform

19. Centre for European Policy Studies and Institute of Labour Economics (CEPS) and the Institute of Labour Economics (IZA), 'Online talent platforms, labour market intermediaries and the changing world of work', executive summary, p. i.
20. There is only an interlocutory ruling on procedural issues available at the time of writing, see Court of Amsterdam 21 December 2022, ECLI:NL:RBAMS:2022:7764.
21. ILO (n2).
22. Maran and Chieregato (n3), p. 474–491. Their research is based on the replies of experts from 30 European countries to a questionnaire about their domestic legislation; it received financial support from the EU Programme for Employment and Social Innovation, EaSI.

workers – falls within the scope of the TAWD. Below, we will delve deeper into the non-conventional multiparty work arrangements. First, within category one (the hiring out of labour), the difficulties regarding the long-term hiring out of labour are discussed. Second, the distinction between the first two main categories is discussed, i.e., the distinction between hiring out of labour and performing services.[23]

2.2.1 Providing labour to user undertakings. Conventional temporary work agencies traditionally bear the responsibility for the recruitment of workers looking for temporary jobs, and matching these workers with user companies that are in search of temporary workers. Besides conventional temporary work agencies, other types of labour market intermediaries have emerged, offering different types of work arrangements through which workers are hired out to user companies. These intermediaries, called, e.g., staffing or recruitment agencies, multiservice or payroll companies, matchmakers or brokers, differ in one way or another from traditional temporary work agencies. The intermediaries focusing on the self-employed and some forms of platform work have already been discussed. Some agencies or intermediaries are, for example, merely employers on paper, taking care of the administration and payment of wages and bearing the formal employer responsibilities, while the user company remains responsible for recruitment and selection. In addition, they differ from traditional TAW in that they hire out workers on a non-temporary basis. A good example are the Dutch 'payroll companies' – as they call themselves – that have been advertising themselves in recent years as companies that take over all employer responsibilities from the user undertaking, acting as the formal employer and often providing staf on a long-term basis, while the user can still recruit and select the workers it wants.[24] However, the distinction is not always clear; sometimes traditional temporary work agencies provide payroll services besides their normal activities as agencies, meaning that they place workers on a long-term basis as well, and leave the recruitment to the user undertakings.[25]

Maran and Chieregato report that long-term labour placement is prohibited in many Member States of the EU.[26] For example, in France, Germany, Italy and Spain, it is only permitted in specific circumstances. However, it is not the case in every Member State. In the Netherlands, the above-described arrangements involving payroll companies are permitted as a special type of TAW.[27] Since the new 'payroll regime' came into force in 2020, it is legally a less flexible contract than the original TAW, because the payroll workers are entitled to the same employment conditions as the employees at the user undertaking. Moreover, the payroll employer needs to take the normal dismissal procedures into account. In short, the payroll worker is now – in theory, at least – better protected than the temporary agency worker. However, in practice, it can be very difficult to distinguish between true TAW and payroll work. For example, an employment relationship can start as a regular temporary agency assignment and turn into a long-term placement exclusively with one user undertaking. The criteria formulated in legislation to distinguish payroll work from

23. The third group of remaining multiparty arrangements falls largely outside the scope of this contribution.
24. However, these payroll-companies should be distinguished from companies who only do the (financial) administration, such as the administration of wages and other official records, which would fall in group two, i.e., providing services. See Maran and Chieregato (n3) p. 487–488.
25. For example, the biggest temporary work agency in the Netherlands, Randstad, also offers payroll services.
26. Maran and Chieregato (n3) p. 481.
27. See the contribution by M. Kullmann in this special issue.

TAW can be easily manipulated in practice, leaving the worker with the difficult task of proving that there has indeed been an abuse of law.[28]

Furthermore, as Kullmann explains, the question arises as how this payroll regime relates to the CJEU case law on the 'temporariness' of agency work assignments.[29] On several occasions in the TAWD, it is stressed that the workers work temporarily at the user undertaking. However, the Directive does not explain how this 'temporariness' should be designed. There are no norms attached to the temporary character of TAW. From the *JH/KG*[30] and *Daimler*[31] cases it can be concluded, in short, that Member States must take appropriate measures to preserve the temporary nature of TAW, but it is left to their discretion to decide what measures to take. In the *ALB FILS Kliniken* case, the CJEU ruled that in order for an employment relationship to fall within the scope of TAWD, an employer must have the intention to assign the worker concerned, temporarily, to a user undertaking both when the contract of employment is concluded and when each of the assignments is effectively made.[32] When this intention is lacking, the working arrangement falls outside the scope of the TAWD. It is still uncertain what the effects of this ruling will be on multi-party employment relationships that are of a permanent rather than a temporary nature. Even though it is important that agency workers work temporarily at the user undertaking, as will be further clarified below,[33] it is undesirable for long-term placements to be permitted, but left out of the scope of TAWD without any assurance that the equal treatment principle needs to be applied.

2.2.2 Providing labour vs. *providing services.* The main distinction between hiring out workers and providing services (hereafter 'subcontracting' or 'contracting') is that in the latter, the contractor is entirely responsible for the execution of the service, including the management of its execution with its own staff and resources. Since the supervision and direction are supposed to remain with the subcontractor, subcontacting is not covered by the TAWD. Moreover, the labour law implications of subcontracting have not been systematically regulated at the EU level.[34] An important exception is the joint liability in subcontracting chains for the payment of wages and social contributions in the case of transnational subcontracting (Art. 12 of the Posting of Workers Directive (PWD)). However, this is an exception, since it only applies to the construction sector.[35] The recent proposal from the European Commission for a Directive on corporate sustainability due diligence[36] might have a broader reach. The proposed Directive aims to make multinational enterprises liable for the violation of environmental obligations or human rights, including labour rights, perpetrated by their subsidiaries, and also by those entities with whom the company has established business relationships in the context of value chain operations.[37] As specified in Art. 3(e) of the Proposal, 'business relationship' means a relationship with a contractor, subcontractor or any other legal

28. E.g., F.G. Laagland, 'Payrolling: the story continues', *Tijdschrift voor Recht en Arbeid* 2019/85.
29. See the contribution by Miriam Kullmann in this special issue.
30. CJEU 20 Oktober 2020, C-681/18, ECLI:EU:C:2020:823.
31. CJEU 17 March 2022, C-232/20, EU:C:2022:196.
32. CJEU 22 June 2023, C-427/21, ECLI:EU:C:2023:505 (*ALB FILS Kliniken*), para.44.
33. See section 3.3 where 'abuse' is discussed.
34. Maran and Chieregato (n3), p. 484. As the authors explain, there are specific situations where EU law could apply, e.g., in the case of (joint) liability for health and safety or transfer of undertakings.
35. See the contribution by M. Houwerzijl in this special issue.
36. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final).
37. See also Maran and Chieregato (n3), p. 485.

entities ('partner') with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or that performs business operations related to the products or services of the company for or on behalf of the company. At the national level, the increasingly significant business practice of contracting is generally regulated through civil contract or commercial law.

The fact that subcontracting is not, in principle, considered temporary agency work, and that the TAWD does not apply, *inter alia,* means that the contracted workers do not have the right to equal treatment regarding basic working conditions as the employees of the user undertaking. Instead, the subcontractor can apply its own working conditions, provided for, for example, in its own collective agreement. Therefore, one of the areas where subcontracting can have consequences is in wages. In many cases, it is low-waged work that is outsourced, like cleaning and catering. Through outsourcing and subcontracting, undertakings can shift (a part of) employment to smaller organisations operating in competitive markets. In this way, a large employer creates a mechanism through which to pay workers 'closer to the additional value they create'.[38] However, it is not only 'marginal activities' that are being outsourced; core-activities are also increasingly being outsourced.[39] Many scholars relate this to the so-called 'fissuring' of the workplace, a term coined by David Weil[40] to describe a change in organisation models in which the undertakings increasingly outsource various activities and functions within the undertaking, but maintain substantial control over the outcomes of that work.[41] Interestingly, it is not only happening in the private sector, but also in the (semi-)public sectors.

Since specific EU regulation is missing, there are also fewer scholarly reflections on the place of subcontracting in labour law. The rationale for not applying equal working conditions in the case of subcontracting could be that (sub)contracted employees do not become part of the user undertaking's labour organization and thus do not need special labour law protection, as applies to temporary agency workers. However, this is debatable. As explained above, subcontracting can also be used to circumvent collective agreements. In addition, chains of subcontracting can lead to ambiguities around employer responsibilities. For these reasons, subcontracting is sometimes considered as an attractive alternative to TAW, what can lead to sham constructions.

It is therefore not surprising that here, too, qualification problems arise as a result of difficult-to-delineate concepts - this time, the concept of 'control and direction by the third party'. In their comparative research on multiparty work arrangements, Maran and Chieregato report that in most Member States distinctive criteria are being developed (through case law or in literature) to 'distinguish between TAW and contracts for services, in order to limit the risk of resorting to subcontracting to disguise the mere supplying of workers and circumvent the restrictive rules on TAW.'[42] They refer, among others, to a ruling by the Supreme Court of Luxembourg, where the Court specified that the provision of services must imply an obligation of result; conversely, if the user undertaking is partly responsible for the definition of the tasks and the

38. D. Weil, 'Income Inequality, Wage Determination and the Fissured Workplace', in H. Boushey, J.B. DeLong & M. Steinbaum (Eds.), *After Piketty. The Agenda for Economics and Inequality*, Harvard University Press 2017, p. 223.
39. Maran and Chieregato (n3), p. 475.
40. D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Cambridge, MA: Harvard University Press 2014.
41. For example, P. Olsson and E. Sjödin, 'The fissured workplace: some responses to contemporary challenges in Sweden', *Comparative Labor Law & Policy Journal* 2015 Vol. 37 No. 1, p. 143.
42. Maran and Chieregato (n3), p. 485.

organisation of the work of the employees, or if the employees of the service provider company are placed under the direct authority of the user company and are subject to the discipline of that company, the TAW regulation must be applied.[43] However, identifying the party that actually directs, manages and exerts control over the workforce is not always easy. Indeed, numerous Court rulings deal with determining when control and direction over work performance are exercised by the user undertaking and not by the subcontractor.[44] In the Netherlands, the Supreme Court ruled that for TAW, 'control and direction' should be established the same way as when establishing employment relationships,[45] which implies a full weighing of all the facts and circumstances of a specific case. This approach is usually followed in respect of other multiparty relationships as well.[46] It requires a thorough on-site investigation, with the burden of proof resting on those who claim that the reality is different from the contractual arrangements on paper. It has been argued in the literature that the test is particularly difficult to pass when work that is outsourced is also performed 'in-house', meaning that the subcontractor performs the same activities that were in the past, or are still, performed at the user undertaking by its own employees.[47] Furthermore, as Maran and Chieregato note, there might be a difference in approach between some of the national case law on this issue and the approach taken by the CJEU in the *Martin Meat* case, where CJEU had to distinguish between hiring out and subcontracting under the PWD.[48] The Court of Justice ruled that the fact that the user undertaking exercised the power to check the performance of the work for compliance with the contract and gave general instructions to the workers of the service provider was not sufficient, as such, to question the existence of a subcontracting relationship.[49]

3. Material scope of the Directive

3.1 Restrictions and prohibitions

The aims of the TAWD are twofold (Art. 2). On the one hand, there is the requirement to review the restrictions and prohibitions on the use of TAW, which can only be justified on the grounds of general interest (Art. 4) in order to support the goal of having a suitable framework in place for the use of TAW that contributes effectively to the creation of jobs and to the development of flexible forms of working. On the other hand, the Directive aims at protecting the agency workers and improving their working conditions by ensuring that the principle of equal treatment and measures against abuse, as set out in Article 5, are in place. In the two goals of the TAWD, we see the idea of flexicurity reflected (i.e., striking a balance between flexibility and security on the labour market), which was one of the main principles guiding the EU social policy at the time. In fact, TAWD is one

43. Supreme Court of Luxembourg, No. 34041, 20 May 2010.
44. Maran and Chieregato (n3), p. 486.
45. Hoge Raad 4 November 2016, ECLI:NL:HR:2016:2356.
46. See e.g. N. Jansen, 'Contracting en ontduiking van collectieve afspraken: over onwenselijkheid en (juridische) constructies', Position Paper commissioned by the Dutch Minister of Social Affairs and Employment 2020, p. 11.
47. L.G. Verburg, 'Het belang van de economische werkelijkheid in arbeidsrechtelijke relaties, in het bijzonder in driehoeksverhoudingen', *Tijdschrift voor Recht en Arbeid* 2021/34, p. 5.
48. CJEU 18 June 2015, C-586/13, ECLI:EU:C:2015:405.
49. Rather, the fact that the service provider was liable for the failure to perform the service in accordance with the contract and the fact that that service provider was free to determine the number of workers he deemed necessary to send to the host Member State were enough evidence of the existence of a subcontracting relationship.

of the only 'hard law' documents that explicitly mentions flexicurity (recital 9). Interestingly, though, the CJEU ruling in the *TimePartner* case can also be seen as an attempt to strike a balance between flexibility and security in the matter of overall protection in terms of equal treatment. However, unlike with flexicurity, the CJEU uses a strict *quid pro quo* approach: any detrimental terms must be balanced by advantages provided for in other terms.[50]

Where exactly the balance between flexibility and security in TAW lies, will differ greatly between Member States and sometimes even between sectors and firms. Article 4 of the Directive was supposed to contribute to the development of flexible forms of working and, eventually, to job creation. When we take into account the fact that in the past TAW was widely prohibited in western Europe, Article 4 has contributed to a general acceptance of TAW or, in the words of Kountouris, even to 'normalisation of atypical work',[51] by providing that prohibitions and restrictions on the use of temporary agency work can be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work, the proper functioning of the labour market and the protection against abuses. By 5 December 2011, Member States had to review any restrictions or prohibitions on the use of TAW in order to verify whether they were justified (Art. 4(2)). After the review, the European Commission concluded that this process had thus far not led to major changes in the extent of the restrictive measures applied by the Member States, meaning that most restrictions were still in place.[52] In 2016, Sartori concluded that the measures taken after the review were marginal.[53] However, many of these restrictions and bans are laid down in collective agreements, e.g., limitations on the duration of the assignments or quantitative limits on the use of agency work, so their prevalence in practice is influenced by various factors, such as the economic outlook and the bargaining power and strategy of the social partners. In any case, one can say that the use of TAW remains a delicate issue for labour market regulation.

The CJEU ruled that Member States are free either to remove any prohibitions and restrictions which could not be justified under Art. 4(1) or, where applicable, to adapt them in order to render them compliant, where appropriate, with that provision.[54] Article 4 does not require any specific legislation to be adopted in that regard, and it does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of TAW which are not justified on grounds of general interest.[55] That is not to say, however, that this provision has no binding force whatsoever. If Member States wish to impose or maintain restrictions on the use of temporary workers, then Article 4(1) serves as a framework for that purpose.[56] The Article restricts the scope of the legislative

50. CJEU 15 December 2022, C-311/21, ECLI:EU:C:2022:983 (*TimerPartner*). Also see the contribution of N. Videbaek-Munkholm in this special issue.
51. N. Kountouris, 'EU law and the regulation of 'atypical' work', in A. Bogg, C. Costello and A.C.L. Davies, *Research Handbook on EU Labour Law*, Edward Elgar 2016, p. 264.
52. EC, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work', COM(2014) 176 fin, p. 12.
53. A. Sartori, 'Temporary Agency Work in Europe. Degree of Convergence Following Directive 2008/104/EU', *European Labour Law Journal* 2016 Vol. 7 No. 1, p. 117.
54. CJEU 17 March 2015, C-533/13, EU:C:2015:173 (*AKT/Shell Aviation*).
55. As Art. 4 only provides the framework and therefore cannot be directly enforced by individuals before the courts, the only possibility that seems to remain is for the Commission to take an infringement procedure in response to the outcome of the review process, or lack thereof.
56. This was later confirmed in CJEU 20 Oktober 2020, C-681/18, ECLI:EU:C:2020:823 (*JH/KG*).

framework open to the Member States in relation to prohibitions or restrictions.[57] At the same time, the 'grounds of general interest' of which Article 4(1) of the Directive provides an indicative, non-exhaustive list, provide ample room for Member States to maintain or even introduce new restrictions. We have seen, for example, that Germany has added new restrictions for the meat industry.[58]

One might conclude that 'the review of restrictions and prohibitions on the use of TAW has served, in the majority of cases, to legitimate the status quo, instead of giving an impetus to the rethinking of the role of agency work in modern, flexible labour markets'.[59] However, in many Member States where TAW was regulated before the transposition of the TAWD, the major liberalisations took place in the 1990s and early 2000.[60] Moreover, it is difficult to see what other framework can be provided at an EU level to address what is still a very much debated issue in different Member States, economic sectors and businesses. Whether or not certain (existing) prohibitions and restrictions are justified should be determined on a case-by-case basis, taking all the relevant circumstances into account. More generally, it is an issue open to debate and not easily resolved partly because it is part of the broader question of how to deal with outsourcing, as discussed above.

Instead of focusing on making the restrictions on the use of TAW more difficult, one can endeavour to create a robust framework for the protection of temporary agency workers involving full equal treatment as workers directly employed by user undertakings. This can help TAW in the development towards 'good jobs' instead of a flexible form of work that is primarily used as a way to compete on labour costs. This approach that can contribute to removing or reducing the existing restrictions and prohibitions on the use of TAW is discussed below.

3.2 Equal treatment

The principle of equal treatment is arguably the most important substantive norm of the TAWD. According to the CJEU, with this principle, as contained in the first subparagraph of Article 5(1) of the TAWD, the EU legislature demonstrated its intention to ensure that temporary agency workers are not, as a rule, in a less favourable situation than that of comparable workers of the user undertaking.[61] Even though a variation of the principle of equal treatment already existed in various Member States,[62] this norm has contributed the most to harmonising the Community-level framework for the protection of temporary agency workers (recital 23).[63] After all, strictly legally speaking, it is not at all obvious that workers who are formally employed elsewhere enjoy the same, albeit basic, working conditions as the employees of the user undertaking with whom they do not have a legal relationship.[64] By providing that the (basic) working and

57. *AKT/Shell Aviation*, para. 31.
58. These measures where contested before the German courts for imposing discriminatory restrictions, but the Constitutional Court rejected the claims brought by several temporary work agencies and a sausage manufacturer, see Ruling of the Federal Constitutional Court (BVerfG) of 29 December 2020. Also see IGZ, Verfassungsbeschwerde gegen sektorales Zeitarbeitsverbot eingelegt, Press release of 12/5/2021 (2021).
59. EC Report (n52), p. 19.
60. See for example Sartori (n53), p. 117–123.
61. *TimePartner*, para. 47.
62. Sartori (n53), p. 112–117.
63. In 2014, all Member States reported that they considered that the Directive had achieved its social policy goals *or* that it represented an important step in the development of a social Europe, see EC Report (n52), p. 18.
64. Cf. the ILO Convention no. 181 (Private Employment Agencies Convention, 1997) where the equal treatment-norm is absent. See also, for example, CJEU 13 January 2004, C-256/01, ECLI:EU:C:2004:18 (*Allonby*).

employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job, the TAWD overcame the consequences and difficulties when applying the CJEU's so-called 'single source test'.[65] In addition, by introducing a 'hypothetical comparator', the TAWD also overcame 'the Achilles heel of EU equality law', i.e., the identification of a comparator.[66] Arguably, the TAWD has in that way contributed to a progressive evolution of the norm of equal treatment in multiparty relationships.

However, in 2014 the Commission already concluded that the goal of the Directive had not yet been fully fulfilled. The extent of the use of derogations to the principle of equal treatment may, in the opinion of the Commission, 'in specific cases, have led to a situation where the application of the Directive has no real effects upon the improvement of the protection of temporary agency workers'.[67] Various scholars also concluded that the Directive had only led to a marginal convergence of legislations.[68] In addition, the European Pillar of Social Rights Action Plan mentions the possibility of a revision of the Temporary Agency Work Directive.

This has mainly to do with the large possibilities for derogations from the equal treatment principle. Indeed, the TAWD is characterised by a broad set of 'explicit and implicit opt-outs and exceptions'.[69] Firstly, the TAWD derogates from the principle of equal treatment to the extent that only basic working conditions should be equal. Secondly, even equal treatment regarding the basic employment and working conditions is not guaranteed, since derogations are possible, as follows from Art. 5(2) and 5(3).[70]

By allowing for such extensive deviations from the principle of equal treatment, the TAWD is rather ambiguous on the level of protection it offers to temporary agency workers. In principle, they have a right to be treated equally compared to the workers directly employed by the user undertaking, but this does not apply to all working conditions, only the basic ones. Furthermore, even in respect of the basic working conditions, it might be the case that their representative unions have concluded a collective agreement which contains different basic working conditions, provided that the overall level of protection for temporary agency workers is respected. In *TimePartner*, the CJEU put in place some safeguards regarding the overall level of protection and it ought to be credited for interpreting the possibilities for derogation to equal treatment restrictively. Still, we cannot ignore the fact that temporary agency workers can have a very different set of working conditions compared to workers directly employed by the user undertaking with whom they are working side by side and performing the same work. And even though we can trust that in general the social partners are up to the task of respecting the overall level of protection[71] and that, otherwise, the courts can review these collective agreements in order to establish whether an overall level of protection is met,[72] for the workers and employers involved, a transparent level of protection is missing. This makes enforcement of the equal treatment principle significantly complicated, especially seen

65. See G. Kártyás, 'Recent case law on equal treatment of agency workers: broad interpretation of a limited concept?', *ERA Forum* 2023 Vol. 24, p. 397–417.
66. Kountouris (n51), p. 257.
67. EC Report (n52), p. 19.
68. Sartori (n53), p. 124.
69. Kountouris (n51), p. 254.
70. The contributions of M. Houwerzijl and N. Videbaek-Munkholm in this special issue deal with the equal treatment of temporary agency workers in more depth, in the cross-border context and Art. 5(3) of the TAWD respectively.
71. However, one should keep in mind that temporary agency workers are not likely to be unionised.
72. Cf. the contribution by N. Videbaek-Munkholm in this special issue.

from the perspective of individual agency workers who are, in addition, very likely to see their employment conditions change according to their respective assignments.[73]

This problem of lacking a clear level of protection is only amplified in cases of cross-border temporary agency work. As Houwerzijl points out, what all newly arrived mobile (agency) workers have in common is that they are foreign to the laws of the Member State in which they (temporarily) work.[74] Indeed, migrant workers are often in a particularly precarious position. They have more difficulties in knowing where to turn and knowing their rights, which are already complicated because of the many possible derogations and differences. In fact, all temporary agency workers, but mobile (agency) workers in particular, deal with complex and non-transparent labour relationships involving multiparty relationships and sometimes a chain of subcontractors and intermediaries, operating in several countries, which makes the monitoring and detection of fraudulent forms of TAW extremely difficult.

The premise should be that temporary agency work is not used to compete on working conditions. It should be noted that the principle of equal treatment does not serve to protect only temporary agency workers, but also the workers directly employed by the user undertaking, and is in fact of general interest. It prevents collective agreements at the user undertakings from being disrupted, and TAW from being used as a means to save on labour costs. In the words of Davies: 'Equal treatment reduces labour market segmentation by removing the attraction of cheap labour'.[75] We can see the development towards full equal treatment – or in any case, an enhancement of equal treatment – also occurring in the Netherlands, one of the Member States with most liberalised regimes for TAW. Both the influential Committee Borstlap[76] and the Dutch Social and Economic Council have recommend giving temporary agency workers the right to equal working conditions – beyond the basic conditions – as employees directly employed by the user undertaking.[77]

A stricter equal treatment principle would possibly make TAW less attractive since it would probably contribute to higher labour costs in some sectors. However, a solid framework for the protection of temporary agency workers across Europe can contribute to further development of TAW as 'good jobs', to support the positive role that agency work can play by providing flexibility on the labour market and, thus, to help reach the goal of TAWD in the creation of jobs. After all, we have seen that in some economic sectors the use of TAW is still severely restricted or even prohibited, with some new restrictions being introduced. As has been argued, Art. 4 of the TAWD offers possibilities for such prohibitions or restrictions, and under specific circumstances they can be justified and perhaps be the best approach.[78] Nonetheless, (sectoral) bans can also have disadvantages – also for the workers involved. Arguably, the low-wage workers are usually affected the most by such bans, because their employment opportunities are restricted. Moreover, specialized workers in these sectors cannot make use of the advantages of free movement of workers and the right to work. That is why a strict and robust protection of agency workers should be the preffered option.

73. Also see the contribution of M. Houwerzijl in this special issue.
74. See the contribution by M. Houwerzijl in this special issue.
75. A. Davies, 'Regulating atypical work: beyond equality', in N. Countouris and M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press 2013, p. 243.
76. See the contribution by M. Kullmann in this special issue.
77. Commissie Regulering van Werk, In wat voor land willen we werken? Naar een nieuw ontwerp voor de regulering van werk, 23 January 2020; SER, Sociaal-ecnomisch beleid 2021-2025. Zekerheid voor mensen, een wendbare economie en herstel van de samenleving, advice 21/08, June 2021.
78. Cf. the contribution by M. Houwerzijl in this special issue.

3.3 Abuse

Article 5(5) prescribes that appropriate measures must be taken, in accordance with national law and/or practice, to prevent misuse in the application of Article 5 and, in particular, to prevent successive assignments designed to circumvent the provisions of the Directive. However, the abuse clause is not accompanied by any particular sanction or remedy in case of actual abuse, and, from the perspective of regulating at EU level, more importantly, it is not clear from the TAWD what constitutes abuse. This is problematic, since with the emergence of all kinds of multiparty work arrangements the emphasis in case law is increasingly on qualification issues and questions of abuse. As explained above, one of the main issues in recent years has been whether or not TAW should be temporary.

One of the TAWD's goals is to recognise temporary work agencies as employers. However, agencies are not like regular employers because they delegate the power of supervision and direction – the distinctive feature of the employment contract – to another entity. As Van Schadewijk argues, this delegation of power of supervision and direction is only legitimate on the condition that the assignment at the other legal entity is of a temporary nature.[79] Conversely, having another legal entity bear the employer responsibilities while the user benefits from the labour is only legitimate when this arrangement is of temporary nature. There are additional arguments for the temporary nature of TAW. Another TAWD goal is to support the creation of jobs and the development of flexible forms of working. If we understand flexibility to mean being able to 'respond swiftly to changing consumer trends, evolving technologies and new opportunities for attracting and retaining a more diverse workforce through better job matching between demand and supply'[80], then it can very well be argued that a permanent assignment of a temporary agency worker has nothing to do with flexibility.[81] That is different when the TAW assignment is of a temporary nature. Lastly, even when temporary agency workers enjoy the same basic employment conditions, they lack, for example, job security.[82] Arguably, this disadvantageous position is only legitimate if it is temporary.

It follows, from the *JH/KG* and *Daimler* cases, that the TAWD neither obliges nor prohibits the Member States from attaching a maximum period to TAW assignments. Some countries have done this; others have not. In countries where there is no limitation on the duration of assignments, like in the Netherlands, user companies and temporary employment agencies may opt for the repetitive use of TAW contracts. This divergence does not contribute to a level playing field for temporary work agencies across the EU, or for user undertakings.

The ambiguity of the anti-abuse clause has not prevented the Court from establishing some guiding principles. What emerges from the *JH/KG* case is that anti-abuse measures must exist in the light of a set of circumstances that the national judge should consider, all of which point to a period of service 'longer than what can reasonably be regarded as "temporary"' without any objective explanation. This leaves to the national court the task of examining 'whether any of the provisions of directive 2008/104 have been circumvented, especially where the series of contracts in

79. This premise can also be derived from the definition of temporary posting from the Posted Workers Directive, see M. van Schadewijk, 'The notion of 'employer': Towards a uniform European concept', *ELLJ* 2021 Vol. 12(3), p. 371–372.
80. European Commission, *Green Paper. Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708, p. 7.
81. L. Krüger, 'Temporary Agency Workers Work 'Temporarily'. A European and German interpretation of the notion "temporarily"', *ELLJ* 2016 Vol. 7 No.4, p. 582.
82. See Davies (n75).

question has assigned the same temporary agency worker to the user undertaking'.[83] However, this 'solution' for fighting abuse relies heavily on litigation and national courts for determining and sanctioning abuse. When clear limitations on the use of TAW are missing, it is difficult (for the court) to establish abuse. The Dutch Supreme Court, for example, ruled that a relationship between the agency worker and the user undertaking cannot silently change into an employment contract with the user undertaking.[84]

This is just one example of possible obstacles for determening abuse and the 'true' employer in triangular relationships. Therefore, introducing a maximum period of the time that one temporary agency worker can be placed at the same user undertaking is the best way – the way with most legal certainty for all parties involved – to 'ensure that temporary agency work at the same user undertaking does not become a permanent situation for a temporary agency worker'.[85] It is, therefore, the best way to ensure that TAW is not abused. In addition, temporary agency workers' rights can further be enhanced when they are given priority rights to employment in cases when there is a vacancy at the user undertaking for the same position.[86] This way, TAW can be a stepping stone to better employment.

4. Concluding remarks

When thinking about the future of temporary agency work, it is important to do so in the broader context of the developments in the labour market and to take into account other multiparty work relationships. The Temporary Agency Work Directive cannot be – and indeed, the jurisprudence shows that it is not – limited to conventional temporary agency work. That would jeopardise the effectiveness of the Directive. There is, however, a wide array of multiparty work arrangements. The CJEU does not accept restricting the personal scope to those who have a contract of employment with the temporary work agency, since such a restriction would undermine the effectiveness of that Directive. In line with the wording of Article 3(1)(a) and (c), included in the scope are persons whose working relationship is not substantially different to the employment relationship between employees having the status of workers under national law and their employer. Whether or not this approach is enough to capture all workers involved in multiparty work arrangements who need protection, is difficult to say. For example, the (*quasi*) self-employed workers who are in a triangular working relationship could fall outside the personal scope of the TAWD. Taking into consideration that one of the goals of the Directive is to protect workers by recognising temporary work agencies as employers (Art. 2), we could conclude that that goal is not fully met because the question remains as to whether the personal scope of the TAWD is broad enough to encompass workers in a multiparty working arrangement, who are not always considered as temporary agency workers, but whose working relationship is not substantially different.

However, this question is part of the broader uncertainties on the notion of 'worker' and the possible social protection gaps that may exist in the EU social *acquis* as well as at national level.

83. *JH/KG*, para. 69–71.
84. Supreme Court of the Netherlands 5 April 2002, ECLI:NL:HR:2002:AD8186 (*ABN Amro/Malhi*).
85. *JH/KG*, para. 60.
86. Art. 6(1) of the TAWD contains a duty to inform temporary agency workers about vacancies in the user undertaking so that they have 'the same opportunity as other workers in that undertaking to find permanent employment'. This is a rather weak obligation on the side of the user undertaking; however, Member States can opt for more advantageous rights.

Many (labour law) scholars are working on this problem, for which, unfortunately, no easy solutions exist.[87] One conclusion from the above analysis of the personal scope of the TAWD is, nonetheless, important to stress: The test for whether or not a certain multiparty work arrangement falls within the scope of the TAWD can be highly complex. It is a more complicated test than the already not straightforward employment test, because there are more parties involved and more legal criteria to be met. The CJEU might be inclined to take an expansive approach in its interpretation, but it still needs to adhere to the question of whether or not a person is protected as a worker under national employment law (Art. 3(1)(a)).[88] This leaves the Member States with quite some room for manoeuvre for defining their own scope of protection. In addition, when it is highly complex to determine whether a certain multiparty arrangement falls within the scope of the TAWD, that also makes the enforcement of TAWD rights difficult, especially when seen from the (often precarious) position of individual agency workers.

The fact that there are certain categories of multiparty work arrangements, such as the placement of self-employed workers by intermediaries and subcontracting, that have a lot in common with TAW, but which nevertheless fall outside the scope of the TAWD, undermines its effectiveness. After all, different forms of multiparty work arrangements tend to be used as substitutes for one another. If the TAWD is ever to be revised, an integral approach to multiparty work arrangements is needed to ensure the personal scope of the Directive is broad enough.

As discussed, there are no easy solutions to this problem. In most multiparty work arrangements, control and responsibilities are shared between different employing entities, between user undertakings and intermediaries. It is becoming increasingly difficult to establish who supervises and controls the work performance. That is why it is advisable to concentrate not only on the personal scope, but also on the material scope of the TAWD. When the scope is broad enough and there is a proper level of worker protection, the need for precise demarcation decreases. When workers who work side by side under one roof have the same level of protection, the legal contract becomes less relevant.

Fifteen years after the enactment of the TAWD, there are still considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union, even though these differences were one of the reasons to enact the TAWD (recital 10). The Commission's report on the application of TAWD from 2014 already showed a great variety in terms of the regulation of TAW.[89] A degree of variety across the EU is probably unavoidable and, moreover, not necessarily a problem. The Member States can adopt regulation that fits best the particularities of their labour market. What is more problematic, however, is the lack of a clear level of protection of temporary agency workers and the lack of a level playing field for intermediaries and user undertakings across the EU. This article has argued that this is primarily caused by the fact that the TAWD leaves (too) much room for deviation from the equal treatment principle and the fact that there are no clear measures against abuse in the TAWD. The solutions that offer most legal certainty would be to strengthen the principle of equal treatment and to ensure that temporary employment with the same user undertaking does not become a permanent situation for a temporary agency worker by

87. See for example S. Garben, C. Kilpatrick and E. Muir, 'Towards a European Pillar of Social Rights: upgrading the EU social *acquis*', College of Europe Policy Brief No. 1/2017, who propose introducing an autonomous definition of 'worker'.
88. Art. 3(2) TAWD is an obstruction as well.
89. EC Report (n52).

introducing a maximum period for the time that one temporary agency worker can be placed at the same user undertaking. After a temporary agency worker has worked at a user undertaking for a certain period of time, that worker should have priority rights to employment when there is a vacancy at the user undertaking for the same job.

By enhancing the equal treatment principle for TAW and introducing clear measures against abuse of TAW, a solid framework for the protection of temporary agency workers across Europe can be created, which can contribute to further development of TAW as 'good jobs' and support the positive role that agency work can play on the labour market. In this way, the goal of protection of temporary agency workers can help reach the other goal of TAWD, the creation of jobs through the development of flexible forms of working. Even though the TAWD has contributed to the establishment of a legal framework for the use of TAW, overall, the Member States and the social partners have been reluctant to lift the existing restrictions and prohibitions on the use of TAW. Even though restrictions and prohibitions can be justified on grounds of general interest as provided in Article 4(1) of the TAWD, Member States and social partners are more likely to lift or reduce the restrictions when a proper level of protection of temporary agency workers is guaranteed.

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