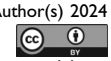
Special Issue Contribution

ELLJ

European Labour Law Journal
2024, Vol. 15(1) 4–16



DOI: 10.1177/20319525241227854
journals.sagepub.com/home/ell

The 'temporariness' of temporary agency work assignments

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Abstract
To prevent the misuse of the equal treatment principle and successive assignments designed to circumvent the TAW Directive's provisions, Member States have to take appropriate measures in accordance with national law and/or practice (Art. 5(5)). One such measure, as mentioned but not further defined by the TAW Directive itself (Art. 3(1)(b) to (e)), involves limiting the duration of assignments. Not limiting, in one way or the other, the maximum period during which a temporary agency worker may be assigned to a user undertaking then might be problematic for a Member State, and may result in the TAW Directive being transposed incorrectly. Yet, the failure of the TAW Directive itself to set a maximum duration, while also not providing criteria by which to establish whether an assignment leads to a circumvention of the provisions of the Directive (Art. 5(5)), may lead to legal uncertainty for Member States and for those making use of the legal rules on temporary agency work. Against this background, this article addresses the question of the extent to which limiting the duration of the assignment, from both a European and national perspective, can prevent the misuse and circumvention of the provisions of the TAW Directive.

Keywords
temporary agency work, temporariness of assignments, Directive 2008/104/EC, misuse of equal treatment principle, prevention of successive assignments

I. Introduction

The Temporary Agency Work Directive 2008/104/EC (hereafter TAW Directive)[1] serves several purposes. First, temporary agency work not only meets undertakings' needs for flexibility, but

1. Directive 2008/104/EC of 19 November 2008 on temporary agency work [2008] OJ L327/9.

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also the need of employees to reconcile their working and private lives. In that way, it contributes to job creation and to participation and integration in the labour market (recital 11), while striking a balance between flexibility and security in the labour market ('flexicurity') (recital 9). Second, it aims at protecting temporary agency workers, while also improving the quality of temporary agency work through the principle of equal treatment (Art. 2 in conjunction with 5). Third, while permanent employment contracts are (still) considered the general form of employment relationship (recital 15), the TAW Directive offers a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate (recital 12). That means that Member States have to recognise temporary work agencies as employers and, where applicable, they have to review any applicable limitations or prohibitions on the use of temporary agency work (Art. 4). Restrictions and prohibitions are only allowed where there is a general interest, such as the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented (recital 18).

To prevent the misuse of the equal treatment principle and successive assignments designed to circumvent the TAW Directive's provisions, Member States have to take appropriate measures in accordance with national law and/or practice (Art. 5(5)). One such measure, as mentioned but not further defined by the TAW Directive itself (Art. 3(1)(b) to (e)), involves limiting the duration of assignments. Not limiting, in one way or the other, the maximum period during which a temporary agency worker may be assigned to a user undertaking then might be problematic for a Member State, and may result in the TAW Directive being transposed incorrectly. Yet, the failure of the TAW Directive itself to set a maximum duration, while also not providing criteria by which to establish whether an assignment leads to a circumvention of the provisions of the Directive (Art. 5(5)), may lead to legal uncertainty for Member States and for those making use of the legal rules on temporary agency work.

Against this background, this article addresses the extent to which limiting the duration of the assignment, from both a European and national perspective, can prevent the misuse and circumvention of the provisions of the TAW Directive. To answer the question, the article is structured as follows. First, the meaning of the notion of temporariness, as referred to in the TAW Directive, will be explored (section 2). In doing so, I will briefly comment on the *Daimler* judgement. Before explaining why the outcome of the *Daimler* ruling is consistent with other EU Regulations, I will discuss the relevance of limiting the duration of assignments. Then I will move on to discuss the notion temporariness in Dutch labour law (section 3). Besides presenting the only court judgement that exists so far on the temporariness of assignments in the Netherlands, I will discuss a few issues that are relevant in this context from a Dutch labour law point of view.

II. Exploring the meaning of the notion of temporariness in the TAW Directive[2]

A The Daimler *ruling and the notion of temporariness*

One of the key words to be found in the TAW Directive is 'temporary'. The Directive contains definitions of 'temporary-work agency' and 'temporary agency worker', and when describing what an assignment is, the Directive states that the temporary agency worker is to be 'placed at the user

2. Parts of this section are taken from: Miriam Kullmann, 'Driehoeksrelaties bezien vanuit het Europees recht' in Femke Laagland and Jorn Kloostra (eds), *Driehoeksrelaties in het arbeidsrecht* (Deventer, Kluwer, 2023) 45–74.

undertaking to work *temporarily* under its supervision and direction' (Art. 3(1)(b), (c) and (e)) (emphasis added).[3]

In this context, the CJEU's judgement in the *Daimler* case is relevant. One of the preliminary questions asked was whether the word 'temporary' in the TAW Directive relates to the duration of the assignment of a temporary agency worker to a user undertaking, or whether it is tied to the nature of the work to be performed, so that neither permanent jobs nor jobs that are not performed to provide cover for absent employees can ever be 'tempory'.[4] The case concerned a temporary agency worker who was assigned to work at Daimler, the user undertaking, from September 2014 to May 2019. With effect from April 2017, German law determined that any assignment exceeding 18 months can no longer be considered temporary, the sanction being that the temporary agency worker is considered to have an employment relationship with the user undertaking. For this conversion to take place, only assignments starting after April 2017 are taken into account.

According to the CJEU, basing its analysis on established case law, the interpretation of Directive's personal scope depends on the wording, the context and the objectives of the TAW Directive (Art. 1).[5] As to the wording, the CJEU explicitly stressed that the term 'temporary' in Art. 1 is not intended to limit the application of temporary agency work to jobs that are not permanent or are filled with a view to replacing an absent employee. For the CJEU, the term is not used to describe the vacancy to be filled within the user undertaking, but only the manner in which a worker is made available to that undertaking, hence the duration of the assignment. The duration of the assignment might be determined by a requirement for work to be done on a certain project, a requirement to fill in for a worker on sick leave, or any other reason the user undertaking may have for using the services of a temporary work agency. As to the *context*, no provision in the TAW Directive addresses the nature of the work or the position to be filled within the user undertaking, leaving that to the Member States to determine, if they so wish, but within the boundaries set by Art. 4(1) TAW Directive. Furthermore, the term 'temporary' is also used in Art. 3(1)(b) to (e) TAW Directive, on which the CJEU ruled in *KG*. In that case, the CJEU clarified that it is the nature of the relationship between the user undertaking and the temporary agency worker that must be temporary.[6] To realise the Directive's *objectives* as outlined in recital 12 and Art. 2, which are to establish a protective framework for temporary agency workers that is non-discriminatory, transparent and proportionate, to respect the diversity of labour markets and industrial relations, and to promote the development of flexible forms of employment, job creation and the protection of temporary agency workers, it is not necessary that temporary agency workers cannot be assigned to a permanent job. In this respect, it should be highlighted that the TAW Directive also aims at facilitating access of the temporary agency worker to a permanent job with the user undertaking.[7]

3. The word 'temporary' was introduced after the first reading in the European Parliament. Amendment 23. Commission, 'Amended proposal for a Directive on working conditions for temporary workers', COM(2002) 701 final, 8, 9 and 12. The Commission intended to use 'assignment', without any specification as to its duration. Commission, 'Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers', COM(2002) 149 final.
4. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 28.
5. With reference to Case C-375/08 *Pontini* [2010] ECLI:EU:C:2010:365, point 58 and Case C-476/17 *Pelham* [2019] ECLI:EU:C:2019:624, point 28.
6. Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 61.
7. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 37 with reference to Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 51.

B The relevance of limiting the duration of the assignment

It follows from *Daimler* that the TAW Directive's aim is not, as such, to determine the moment an assignment can no longer be considered to be temporary.[8] However, limiting the duration of temporary agency work assignments can be seen as a measure that may prevent (this at least seems to be implied by Art. 5(5) TAW Directive) misuse of the equal treatment principle[9] as well as successive assignments designed to circumvent provisions of the Directive. There is some discretion here: Member States can regulate the maximum duration of assignments in law or, alternatively, they can leave it to the courts to determine when assignments are no longer temporary.[10] When faced with the question of assessing whether an assignment is temporary, the court must take into account the duration of the assignment, whether it can reasonably still be considered to be temporary, whether the balance between flexibility (for the employer) and security (for the worker) is affected, as well as whether there is an objective explanation for the (duration of the) assignment.[11] All this means taking into account the extent to which a user undertaking does not, in reality, meet a structural staffing need through agency work, thereby circumventing the provisions and thus the objectives of the TAW Directive.[12]

Successive assignments can be considered to be a misuse (Art. 1(1) and Art. 5(5) TAW Directive). Whereas the TAW Directive clearly does not intend to define the maximum duration of an assignment, it does require Member States to take one or more measures to prevent abuse (Art. 5(5)), without, however, specifying what these measures should look like.[13] Nevertheless, Art. 5(5) TAW Directive obliges Member States to ensure that the assignment of the temporary agency worker to the same user undertaking does not become permanent.[14] A temporal requirement may prevent an assignment from becoming permanent, but it may not prevent the temporary agency worker from being assigned (successively) to another user undertaking to do a similar job. For the temporary agency worker then, the temporariness requirement can thus merely mean that he will not become permanently assigned to one specific user undertaking. And despite the CJEU having emphasised in *Daimler* and as also follows from the TAW Directive, temporary agency workers are to have the possibility to find permanent employment with the user undertaking (Art. 6(1)). Therefore, Art. 6(1) TAW Directive obliges the user undertaking to inform the temporary agency worker about any vacancies so that he has the same chances of getting a permanent job as other workers employed by the user undertaking. This does justice to the stepping stone function of agency work, i.e., job creation. However, the user undertaking is not obliged to offer a permanent job; he merely has to offer the opportunity to get a permanent job under the same conditions as other workers directly employed by the user undertaking. User undertakings may also have valid reasons

8. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 53.
9. This concerns a rather narrowly construed equal treatment principle, limited to the basic working and employment conditions applicable at the user undertaking, namely, the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays as well as pay, as if the temporary agency worker had been recruited directly by that undertaking to do the same job, (Art. 5(1) in conjunction with Art. 3(1)(f) TAW Directive).
10. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 61; Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 70.
11. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 60-62; Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 69–71.
12. Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 48.
13. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 54.
14. ibid, point 56, with reference to Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 42 and 44.

for maintaining a flexible layer and thus designating specific positions that are not to be filled with permanent workers. Thus, the temporary agency worker may be offered a fixed-term position with the user undertaking for the job he did before as a temporary agency worker, or any other suitable job. Where the job differs from the one performed as a temporary agency worker, the fact that the employment contract is temporary may be justified if the employee has to complete some training before being able to perform the job. The fact that the temporary agency worker is first employed temporarily before being offered permanent employment does not, in principle, violate the principle that employment contracts of indefinite duration are the general form of employment relationship.[15]

Successive assignments to a user undertaking can, however, undermine the balance between flexibility for employers and security for workers.[16] Furthermore, where there is no objective explanation as to why successive assignments are actually needed, national courts have to assess whether the provisions of the TAW Directive are being circumvented, especially in cases where the same temporary agency worker is assigned to the user undertaking to do the same job.[17] While the CJEU gives national courts some tools for their assessment, inspiration could also be drawn from Art. 4(3) Directive 2014/67/EU on the enforcement of the PWD.[18] Elements listed in that provision that are relevant for the examination of the context of (non-transnational) temporary agency work include: the work is carried out for a limited period of time in another Member State; the date on which the posting starts; the nature of activities; any previous periods during which the post was filled by the same or by another (posted) worker. While taking these elements into consideration will help national courts, it seems that legal certainty will be created only where a maximum duration is provided for in national law. Yet, to accommodate the particular needs of temporary work agencies and user undertakings, who may for various reasons not be in favour of a legal maximum duration even if that results in (legal) uncertainty, Member States could still allow social partners to make exceptions to the rule through (generally binding) collective agreements.

As the assignment must be temporary, it does not seem to matter whether the temporary agency worker is permanently or temporarily employed by the temporary work agency. Where a temporary agency worker who is permanently employed, the equal treatment principle may be deviated from, but not from the requirement of temporariness (Art. 5(2) to (4)). Art. 5(5) read in conjunction with Art. 1(1) TAW Directive can mean that the temporariness is a means to define the TAW Directive's personal scope or to prevent successive assignments to the same user undertaking with the aim of circumventing the Directive. Assignments that are not temporary could, as such, be contrary to the TAW Directive. But this temporariness requirement, in view of Art. 5(5) TAW Directive, seems to refer specifically to successive assignments which, taken together, give rise to a an employment whose duration is longer than what can reasonably be regarded as temporary. This may then

15. This aspect has been discussed in: Miriam Kullmann, 'De tijdelijkheidseis bezien in het licht van de doelstellingen van de Uitzendrichtlijn' in Nataschja Hummel, Susanne Heeger-Hertter, Albertine Veldman, Diana de Wolff and Teun Jaspers (eds), *Heroriëntatie op arbeid en sociale bescherming* (Deventer, Kluwer, 2024) 208–09.
16. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 61 with reference to Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 70.
17. Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 62.
18. Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co operation through the Internal Market Information System (the IMI Regulation) [2014] OJ L159/11.

constitute an abuse because it circumvents the provisions of the TAW Directive.[19] Yet this raises the question as to which provisions are being ignored. As for the narrowly-framed equal treatment principle, it continues to apply in the case of successive assignments. Full equal treatment will only be realised where the temporary agency worker enters into a direct employment relationship or contract with the user undertaking. However, as has been discussed, apart from the provisions on informing the worker about vacancies and ensuring that a temporary agency worker has an equal opportunity to become permanently employed, the TAW Directive is quite silent. Successive assignments also do not, as such, risk the protection of temporary agency workers, the improvement of the quality of temporary agency work or effective job creation, as successiveness means that there are vacancies to be filled. Therefore, if a temporary work agency applies the (limited) principle of equal treatment as expressed in the TAW Directive, it seems to make little difference whether the assignment is temporary or permanent.[20] As long as the worker performs temporary agency work under an employment contract or relationship, the worker benefits from the level of protection afforded under the principle of equal treatment.

As assignments need to be limited in time, the question is whether the TAW Directive prohibits permanent assignments as such. Moreover, questions arises as to the extent to which the use of successive assignments with the same user undertaking equates to a permanent assignment, and whether a first-and-only assignment cannot be regarded as permanent. An explicit or implicit prohibition of permanent assignment does not follow from the TAW Directive. Rather, it seems that the question should be whether non-temporary assignments fall within the scope of the TAW Directive at all. Indeed, the *LD/ALB FILS Kliniken* judgment, delivered on 22 June 2023, could be interpreted to the effect that only temporary assignments fall within the scope of the TAW Directive.[21] After all, the employment contract or relationship and each of the assignments offered must have been entered into for the purpose of making the worker temporarily available to the user undertaking.[22]

LD/ALB FILS Kliniken concerned a specific case, namely, a transfer undertaking, in which the employee did not want to transfer to the new employer and used his right to remain with his employer. Should the judgment be regarded as having a broader scope of application, it seems plausible to infer from the judgment, read in conjunction with *KG* and *Daimler*, that (1) the intention of the employer must be to assign the worker concerned, and (2) to do so temporarily. The first will be easy to establish. After all, assigning workers is the very purpose of a temporary work agency. The second, however, ultimately depends on the intention of the temporary work agency and the user undertaking and the agreements made between the two in this respect. Intentions may change and practice may also lead to there being a long-term, if not permanent, need to fill a position, in which case it may then make sense to continue the existing assignment with the same temporary agency worker. Whether the duration of an assignment is longer than what can reasonably be considered temporary can only be judged in retrospect. In *LD/ALB FILS Kliniken*, the situation was clear because the tasks were permanently transferred to a third party in the context of a transfer of undertaking, and therefore the objectives of flexibility of the

19. Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 69; Case C-232/20 *Daimler* [2022] ECLI:EU:C:2022:196, point 60. See, by analogy, on FTW Directive: Case C-326/19 *EB* [2021] ECLI:EU:C:2021:438, point 52.
20. This paragraph is based on Kullmann, 'De tijdelijkheidseis bezien in het licht van de doelstellingen van de Uitzendrichtlijn' 209.
21. See also Eva F Grosheide, 'Permanente terbeschikkingstelling en het tijdelijkheidsvereiste in de Uitzendrichtlijn' (2023/95) 15 *Tijdschrift Recht en Arbeid* 38, 40.
22. Case C-427/21 *LD/ALB FILS Kliniken* [2023] ECLI:EU:C:2023:505, point 44.

undertakings, the creation of new jobs or the promotion of temporary workers' access to permanent employment pursued by the TAW Directive were not relevant.[23]

It is unclear what impact the temporary assignment, which gradually turns into a permanent situation, has on the application of the TAW Directive. In *LD v ALB FILS Kliniken*, the CJEU held that the permanent transfer of tasks performed by an employee for an undertaking with which he had concluded an employment contract to a third-party undertaking could not give rise to a fixed-term employment relationship with the latter undertaking.[24] This literal reading of Art. 1(1) TAW Directive finds support in the context of this provision, namely, that temporary agency workers must have an equal opportunity to establish a permanent employment relationship with the user undertaking.[25] Thus, the TAW Directive covers only temporary, transitory or fixed-term employment relationships and not permanent employment relationships with the user undertaking.[26] If, from the moment of concluding the employment contract, the intention is to assign an employee on a permanent basis, the conditions for the applicability of the TAW Directive are, it seems, not met and subsequently not applicable. These workers are thus not protected by the TAW Directive.

With regard to preventing abuse by using successive assignments resulting in a circumvention of the TAW Directive (Art. 5(5)), the CJEU clarified in *LD/ALB FILS Kliniken* (1) that any risk of abuse or circumvention of the TAW Directive would be excluded if the employer did not intend to (temporarily) assign one or more employees to a user undertaking and (2) the employment relationship between worker and employer continued to exist.[27] If the intention is indeed to exclude (the first and only) permanent assignment from the scope of the TAW Directive, then the risk of abuse through successive assignments would seem to be virtually absent. However, there is still a risk that permanently assigned workers are different from workers directly employed by the user undertaking. After all, the limited equal treatment principle from Art. 5 TAW Directive does not apply to this group of workers and it will be left to national law to regulate the legal status of the permanently assigned worker.

C The consistency of the TAW Directive: temporariness in other EU legal instruments

Despite the outcome of the *Daimler* ruling being unsatisfactory from the perspective of the (protection of the) temporary agency worker, the ruling is consistent with the applicable EU law on the cross-border posting of workers. The PWD does not prescribe a time limit for differentiating between short-term and long-postings, which makes the definition of 'posting', within the meaning of the PWD, quite controversial.[28] The amended PWD (EU) 2018/957 does not change

23. ibid, point 56.
24. ibid, point 47.
25. Recital 15 and Art. 6(1) and (2) TAW Directive.
26. Case C-427/21 *LD/ALB FILS Kliniken* [2023] ECLI:EU:C:2023:505, point 50. See also Case C-681/18 *KG* [2020] ECLI:EU:C:2020:823, point 62.
27. Case C-427/21 *LD/ALB FILS Kliniken* [2023] ECLI:EU:C:2023:505, point 52.
28. Olaf Deinert, *Internationales Arbeitsrecht: Deutsches und europäisches Arbeitskollisionsrecht* (Tübingen, Mohr Siebeck, 2013) 143; Aukje van Hoek and Mijke Houwerzijl, *Comparative Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* (Study to the European Commission Contract Number VT/2009/0541, 2011) 46.

this. It provides that after 12 or, where applicable, 18 months, workers posted to the host Member State are entitled to additional terms and conditions of employment (Art. 3(1bis)).[29] These periods only refer to (a change in) the applicable terms and conditions of employment after a certain period of time, with no impact on the duration of the posting as such.

The general starting point seems to be that as long as it is not permanent, a posting is temporary.[30] The posting must be for a specified and not an unspecified period.[31] In *Rush Portguesa*, the CJEU ruled that the transnational posting of workers concerns 'a temporary movement of workers' in the context of the provision of services by their employer. After completing their work in the other Member State, these 'workers return to their country of origin', implying that the posted workers have worked in the home Member State before being posted. Therefore, these workers do not gain access to the labour market of the host Member State at any time.[32]

The duration of the posting seems to be determined by the duration of the provision of services in the temporary host Member State.[33] In Art. 1(1), the PWD refers to 'undertakings … which, in the framework of the transnational *provision of services*, post workers' (emphasis added). In contrast, Art. 2(1) PWD determines that the worker '*for a limited period*, carries out his work in the territory of a Member State other than the State in which he normally works' (emphasis added). As to the duration of the service provision, inspiration can be drawn from the *Gebhard* case, in which the CJEU ruled that the temporary nature of the activities in question has to be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. Despite the temporary nature of the service, the service provider may 'equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question'.[34] Moreover, as follows from *Schnitzer*, the services may be 'provided over an extended period, *even over several years'* (emphasis added), where,for instance the services are provided in connection with the construction of a large building.[35] Services may be supplied with a greater or lesser degree of frequency or regularity by a business established in a Member State to persons established in one or more other Member States, for example, such as the giving of advice or information for remuneration.[36] Furthermore, the provision of services must be distinguished from pursuing 'a professional activity on a stable and continuous basis in another Member State', in which case this will be considered as the freedom of establishment

29. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.
30. Miriam Kullmann, 'Tijdelijke grensoverschrijdende detachering en gewoonlijk werkland: over de verhouding tussen de Rome I-Verordening en de Detacheringsrichtlijn en de rol van de Handhavingsrichtlijn' (2015) 32 *NiPR* 205, 211; Olaf Deinert, 'Arbeitnehmerentsendung im Rahmen der Erbringung von Dienstleistungen innerhalb der Europäischen Union - Rechtsprobleme der Sonderanknüpfung eines "harten Kerns" arbeitsrechtlicher Vorschriften des Arbeitsortes' (1996) 49 *Recht der Arbeit* 339, 341.
31. Mijke S Houwerzijl, *De Detacheringsrichtlijn: Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Deventer, Kluwer, 2005) 127.
32. Case C-113/89 *Rush Portuguesa* [1990] ECLI:EU:C:1990:142, point 15.
33. Mijke S Houwerzijl, 'Verschillen in toepasselijk arbeidsrecht bij tijdelijke en structurele arbeidsmigratie' in Herwig Verschueren and Mijke S Houwerzijl (eds), *Toepasselijk arbeidsrecht over de grenzen heen: België, Nederland, Europa, de wereld* (Deventer, Kluwer, 2009) 179–80.
34. Case C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411, points 27 and 28.
35. Case C-215/01 *Schnitzer* [2003] ECLI:EU:C:2003:662, point 30.
36. ibid, point 30.

(Art. 49 TFEU).[37] Establishment implies 'the actual pursuit of an economic activity through a fixed establishment in that State for an *indefinite period*' in a Member State (emphasis added).[38]

III. The temporariness of temporary agency work assignments in Dutch labour law

A Case law on the temporariness of assignments and the question of abuse

On 12 December 2022, the Cantonal Judge Rotterdam was asked to rule on whether, after being assigned for 13 years, a temporary agency worker had an employment contract of an indefinite duration with the relevant user undertaking.[39] In the underlying *Upfield* case, the worker had worked for (legal predecessors of) the same user undertaking for a continuous period of 13 years, on various assignments for two different temporary work agencies. The Cantonal Judge first noted that Dutch labour law does not provide for a limit to the duration of the number of consecutive assignments that can completed by a temporary agency worker with the same user undertaking. Moreover, the TAW Directive does not require Member States to take specific measures to limit the number of consecutive assignments; it only requires Member States to take 'appropriate measures' to prevent abuse (Art. 5(5)). In the opinion of the court, it would be up to the Dutch legislator, and not the court, to regulate by law for a maximum duration of assignment as well as lay down the sanctions applicable when this period is exceeded. This might be different, however, in the case of abuse, where support for accepting the existence of an employment contract with the user undertaking can be found in a Supreme Court ruling on abusive practices. The case concerned the circumvention of the rules of successive fixed-term contracts (Art. 7:668a Civil Code) by alternating fixed-term employment contracts with temporary agency work contracts.[40]

In the *Upfield* case, the Rotterdam court appeared to overlook its own role in considering that it is up to the Dutch legislature to provide for a maximum duration of assignment and the sanctions applicable if this period is exceeded in examining whether the norm for temporariness had been complied with.[41] In the case at hand, the worker was made assigned to the same user undertaking consecutively for almost 13 years. Such a lengthy period is not necessarily impermissible,[42] but it may be an indication of abuse.[43] The fact that in each case the court has to assess whether an assignment is (still) regarded as temporary may be considered very cumbersome and casuistic, and thus of little use in practice,[44] but this is the consequence, permissible under EU law, of not setting a maximum duration for assignments and a maximum number of consecutive assignments at EU level. If the court finds that the (temporary) assignment is abusive because it circumvents the provisions of the TAW Directive, it can pierce through the construction and accept the existence of an

37. Case C-55/94 *Gebhard* [1995] ECLI:EU:C:1995:411, point 28.
38. Case C-196/04 *Cadbury Schweppes* [2006] ECLI:EU:C:2006:544, point 54; Case C-221/89 *Factortame* [1991] ECLI:EU:C:1991:320, point 20; Case C-246/89 *Commission/UK* [1991] ECLI:EU:C:1991:375, point 21.
39. Court Rotterdam 12 December 2022, ECLI:NL:RBROT:2022:11010 (*Upfield Sourcing Nederland B.V.*).
40. Supreme Court 21 February 2021, ECLI:NL:HR:2020:312 (*Taxi Dorenbos*).
41. Frank M Dekker, 'Het Nederlands uitzendregime is niet Europa-*proof*' (2023) 15 *Tijdschrift Recht en Arbeid* 24, 25.
42. ibid.
43. Nuna Zekić, 'Hoe moet het tijdelijke karakter van uitzendwerk worden gewaarborgd? Annotatie bij Hof van Justitie van de EU 17 maart 2022, ECLI:EU:C:2022:196' (2022) 5 *Tijdschrift voor Arbeidsrecht in Context* 156, 162.
44. ibid.

employment contract between the temporary worker and user undertaking.[45] The judgment off the Supreme Court in *ABN Amro/Malhi* does not prevent this either.[46] In *Upfield*, the court ruled that there was no abuse, although it may be thought otherwise,[47] and thus the court did not get to rule on the possibility of imposing sanctions.

Even though a continuous period of 13 years constitutes an extensive period, it appears, as such, to be insufficient to prove abuse within the meaning of the TAW Directive. In this regard, the Rotterdam court ruled, first, that the contract between the worker and the temporary work agency was a genuine temporary agency work contract on a permanent basis. The worker was assigned to different user undertakings before being assigned to the user undertaking in question and the temporary work agency, besides paying wages, played a substantial role in the performance of the employment contract. Second, the court found that there was an objective explanation for the successive assignments. Given the nature of its business (manufacturing), the user undertaking had a legitimate interest in having a 'flexible layer'. As part of that flexible layer, the temporary agency worker was deployed in various branches of the undertaking, without much responsibility. Third, the court noted that in the past, the user undertaking had offered the employee a (fixed-term) employment contract, which illustrated that it was not a policy of the user undertaking not to directly employ temporary agency workers. Based on these circumstances, the court ruled that this case involved the *use* and not *abuse* of temporary agency work contracts. As a result, the court found that no employment contract existed between the worker and the user undertaking.

B Relevant issues in the Dutch legal context

Referring to the CJEU's judgements in *KG* and *Daimler*, the Dutch court's ruling seems to be in line with EU (case) law. This does not necessarily apply with regard to the fact that Dutch law does not limit the duration of assignments, which seems to violate EU law. Under Dutch law, temporary agency workers can be assigned on a temporary, long-term,or permanent basis, which seems to be contrary to EU (case) law. However, the question is whether the TAW Directive only covers temporary agency work consisting of assignments of a limited duration, as is required by the (CJEU's interpretation of the) TAW Directive, or also long-lasting or even permanent assignments. Following the *Daimler* judgment, it could be argued that only agency workers who are temporarily assigned to a user undertaking fall under the scope of the TAW Directive. Yet, as the Directive neither provides for a maximum duration for assignments nor a sanction if that duration has been exceeded, it may be questioned whether that interpretation is right. Temporary agency workers who are exclusively assigned, that is permanently or long-term, would then not be entitled to any rights granted by the TAW Directive just because their assignment is not limited in time, something the agency worker might not be able to influence at all. Also, the TAW Directive seems to presuppose that long-term or permanently assigned agency workers are better protected than those temporarily assigned and thus do not need the minimum protection offered by the TAW Directive.[48]

45. Niels Jansen, 'Een structurele personeelsbehoefte en uitzendwerk: een moeizame combinatie' (2022) 21 *Arbeidsrechtelijke Annotaties* 41, 61.
46. Supreme Court 21 February 2021, ECLI:NL:HR:2020:312 (*Taxi Dorenbos*).
47. See, for instance, Dekker, 'Het Nederlands uitzendregime is niet Europa-*proof*' 26.
48. Femke Laagland and Mart van Braak, 'Uitzending en tijdelijkheid: onlosmakelijk verbonden of niets gemeen?' (2020) 12 *Tijdschrift Recht en Arbeid* 3, 5.

There seems to a be a contradiction between the references being made to temporary agency work and assignments that are regarded as temporary and the obligation for Member States to review any restrictions on the use of temporary agency work (Art. 4(1) TAW Directive). As such, setting a time limit for assignments, it could be argued, restricts the use of temporary agency work, meaning that making assignments temporary must be justified on grounds of general interest relating to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. Following that reading, it could be asserted that permanent assignments in the context of temporary agency work seem to be the standard and that any limitation to that would be the exception.[49] The permanent assignment of agency workers, however, can be problematic from the viewpoint of the proper functioning of the labour markets, which is closely linked to the prevention of abuses. Cases where agency workers are permanently assigned to a user undertaking while maintaining their employment contract or relationship with the temporary work agency could amount to a circumvention of the applicable rules on successive fixed-term employment contracts (Art. 7:668a(1) Civil Code),[50] as they would be applicable to workers directly employed by the user undertaking. Yet, if justified by the intrinsic nature of the business operation, the user undertaking may also benefit from the exception (Art. 7:668a(5) Civil Code).

Moreover, temporary agency workers may not benefit from protection against dismissal. This is particularly the case for workers with whom the agency has agreed a so-called agency clause. Under an agency clause, the temporary agency work contract ends by operation of law when the assignment ends at the request of the user undertaking (Art. 7:691(2) Civil Code). Art. 15(3) of the generally binding collective agreement for temporary agency work (ABU Collective Agreement) provides for this exception, stating that the contract will end (a) automatically when the user undertaking, for whatever reason, can no longer hire or no longer wants to hire the temporary agency worker; or (b) because the temporary agency worker, for whatever reason, including incapacity for work, is no longer able or willing to perform the agreed work. On 17 March 2023, the Supreme Court declared part of Art. 13 (now Art. 15) of the ABU Collective Agreement void, for in both situations, the employment contract between the agency worker and the temporary work agency can only end following an explicit request on behalf of the user undertaking and not, as the provision implies, a fictiuous request.[51] The agency clause itself contradicts the general prohibition to give notice in case of sickness and during pregnancy, which the Supreme Court in the 2023 case did not find problematic (Art. 7:670 Civil Code). Unlike temporary agency workers who have agreed on an agency clause with the temporary work agency, regular employees are entitled to continued payment of wages during sickness by their employer for up to two years (Art. 7:629 Civil Code).

The Committee Borstlap, a committee tasked with assessing whether current labour laws and regulations are sufficiently tailored to address future needs and circumstances, proposed tackling long-term or even permanent assignments by limiting the duration of assignments with a specific user undertaking, linking the maximum duration to the maximum duration permitted in the use of successive fixed-term employment contracts.[52] Should the agency worker continue to work at the user

49. ibid.
50. This provision implements Clause 5 of Directive 1999/70/EC.
51. See Supreme Court 17 March 2022, ECLI:NL:HR:2023:426 (*Uitzendbureau Solutions B.V.*).
52. Commissie Borstlap, *In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk* (Eindrapport van de Commissie Regulering van Werk, 2020) 73.

undertaking after that period, it will be assumed that s/he is directly employed by the user undertaking. Despite this concrete proposal, no steps have been initiated yet to implement it. Even though, based on EU (case) law, national courts are not required to convert the employment contract between the agency worker and the agency into one between the worker and the user undertaking, they may do so under certain conditions. The reason for this is the 2002 Supreme Court ruling in *ABN Amro/Malhi*. Here, the Supreme Court was asked to rule on a case in which a temporary agency worker was assigned to work for a user undertaking for five-and-a-half years. The temporary agency worker argued that he had a permanent employment contract with the user undertaking. The Supreme Court, however, ruled that a relationship between the agency worker and the user undertaking cannot silently change into an employment contract with the user undertaking.[53] Legal certainty would prohibit such a conversion, as it would be clear for no party in that relationship at what moment the silent replacement of the relationship between the temporary agency worker and the agency would take place. The reason for this interpretation lies in the fact that under (employment) contract law, parties have to commit to each other, which can be derived from what these parties have mutually declared and inferred and what they are reasonably entitled to infer from each other's statements and conduct. The ruling would have been different if the law had limited assignments to a specified duration, assuming that if that duration was exceeded it would give rise to an employment contract or relationship between the temporary agency worker and the user undertaking.

With the introduction of the payroll regime in 2020 as a *lex specialis* of temporary agency work (Art. 7:692 Civil Code), the Dutch legislator took measures against permanent temporary agency work, through what is called payrolling. Payrolling refers to the the situation in which an undertaking makes a worker, with whom he has concluded a temporary agency work contract (Art. 7:692 in conjunction with Art. 7:690 Civil Code), exclusively available to another party (the user undertaking). The difference with temporary agency work is that it is the user undertaking which recruits and selects the worker, yet the employment contract is concluded between the payroll worker and the payroll company. Whereas an 'ordinary' temporary agency worker is merely entitled to equal treatment regarding essential employment conditions, Dutch law equates payroll workers with workers who are directly employed by the user undertaking as regards the terms and condititin of employment and protection against dismissal.[54] It could be argued that payrolling does not seem an appropriate measure within the meaning of Art. 5(5) TAW Directive, as it involves, by definition, workers being assigned permanently, or at least on a long-term basis, and exclusively to a user undertaking.[55] Yet, Art. 5(5) TAW Directive refers to measures to prevent successive assignments to user undertaking. This could be interpreted in a way that where a payroll worker works at the user undertaking on his first assignment, without that assignment being succeeded consecutively, Art. 5(5) TAW Directive would only apply where that first-time assignment is being followed up by another one.[56]

53. Supreme Court of the Netherlands 5 April 2002, ECLI:NL:HR:2002:AD8186 (*ABN Amro/Malhi*).
54. Art. 7:629a Civil Code, Art. 8a Posting of Workers by Intermediaries Act and Arts 20-23 Dismissal Regulations.
55. Nuna Zekić, 'Misbruik van uitzendwerk: Het Hof van Justitie EU geeft nadere uitleg' (2021) 30 *ArbeidsRecht* 3, 5. See also Hoofdlijnenbrief Arbeidsmarkt of 5 July 2022.
56. Cf. Joined Cases C-40/20 and C-173/20 *AQ c.s.* [2022] ECLI:EU:C:2022:985, paras 49-50 on Clause 5 of Directive 1999/70/EC.

IV Concluding remarks

The question addressed in this article was the extent to which limiting the duration of the assignment, from both a European and national perspective, can prevent the misuse and circumvention of the provisions of the TAW Directive. Obviously, limiting the maximum duration of an assignment can offer clarity as to for how long a temporary agency worker can be assigned to a user undertaking. Yet, depending on the kind of assignment, i.e., the type of work involved, a time limit might restrict the use of temporary agency work, which could contradict Art. 4(1) TAW Directive. However, it also forces the user undertaking to consider why it wishes to make use of temporary agency work and whether it would not be better to fill the position with a worker under another type of employment relationship. That the TAW Directive does not providing for a duration limit for assignments is consistent with other EU law on the (transnational) posting of workers, for which no time limits have been set at EU level. While there is no legal limit as to the duration of assignments, the tools the CJEU provided in *Daimler* might be useful for courts in assessing whether the duration of the activity is, with a view to all relevant circumstances, reasonably limited in time and whether there is an objective explanation as to why successive assignments are actually needed. Yet, the provision of a maximum duration for assignments does not change the right to equal treatment and, in particular, the scope of protection granted by that principle in the TAW Directive as long as the temporary agency worker remains employed by the temporary work agency. Moreover, as to successive assignments to the same user undertaking, a maximum duration may not prevent the temporary agency worker being assigned successively to one or more other user undertakings. While the TAW Directive also stresses that the permanent employment relationship is the standard one, it does not necessarily mean that that relationship must be between the user undertaking and the temporary agency worker. The TAW Directive itself acknowledges that temporary agency workers may be employed by the agency on a permanent basis, as well as being offered the opportunity to become permanently employed with the user undertaking. Thus, maximising the duration of assignments may have some benefits. It does, however, not necessarily contribute to achieving more equality or prevent the successiveness of assignments.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

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