

DIRECTIVE 2008/104/EC on Temporary Agency Work

**Presentation at the Labour Law Day of the Danish Society
of Labour Law, Copenhagen 24/05/23**

OVERVIEW

- **Why a Directive on temporary agency work?**
- **What is the Directive about?**
- **Interpretation by the Court**
- **The way forward**

Why a Directive on temporary agency work?

- Since 1985, increasing concern at the social consequences of the creation of the Single European Market: **need for a comprehensive social dimension**
- **Point 7 of the Community Charter of the Fundamental Social Rights of Workers** (adopted on 9 December 1989) provides, inter alia, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly by forms of work other than permanent contracts such as fixed-term contract work, part-time work, temporary work and seasonal work.

- The last instalment of a threefold package for atypical forms of work: fixed-term contracts, part-time work and temporary work.
- The European social partners reached agreement on the first two parts, which were transposed by means of directives in 1997 and 1999.
- The social partners did not manage to reach a European-level collective agreement on temporary agency work.
- The Commission decided to propose a directive incorporating the points agreed upon during the negotiations and formulating provisions to overcome the remaining sticking points.
- **Directive 2008/104/EC on temporary agency work adopted in November 2008, fully applicable since December 2011**

What is the directive about?

CHAPTER I - GENERAL PROVISIONS

Article 1

Scope

Article 2

Aim

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Definitions

Article 4

Review of restrictions or prohibitions

CHAPTER II - EMPLOYMENT AND WORKING CONDITIONS

Article 5

The principle of equal treatment

Article 6

Access to employment, collective facilities and vocational training

Article 7

Representation of temporary agency workers

Article 8

Information of workers' representatives

CHAPTER III - FINAL PROVISIONS

Article 9

Minimum requirements

Article 10

Penalties

Article 11

Implementation

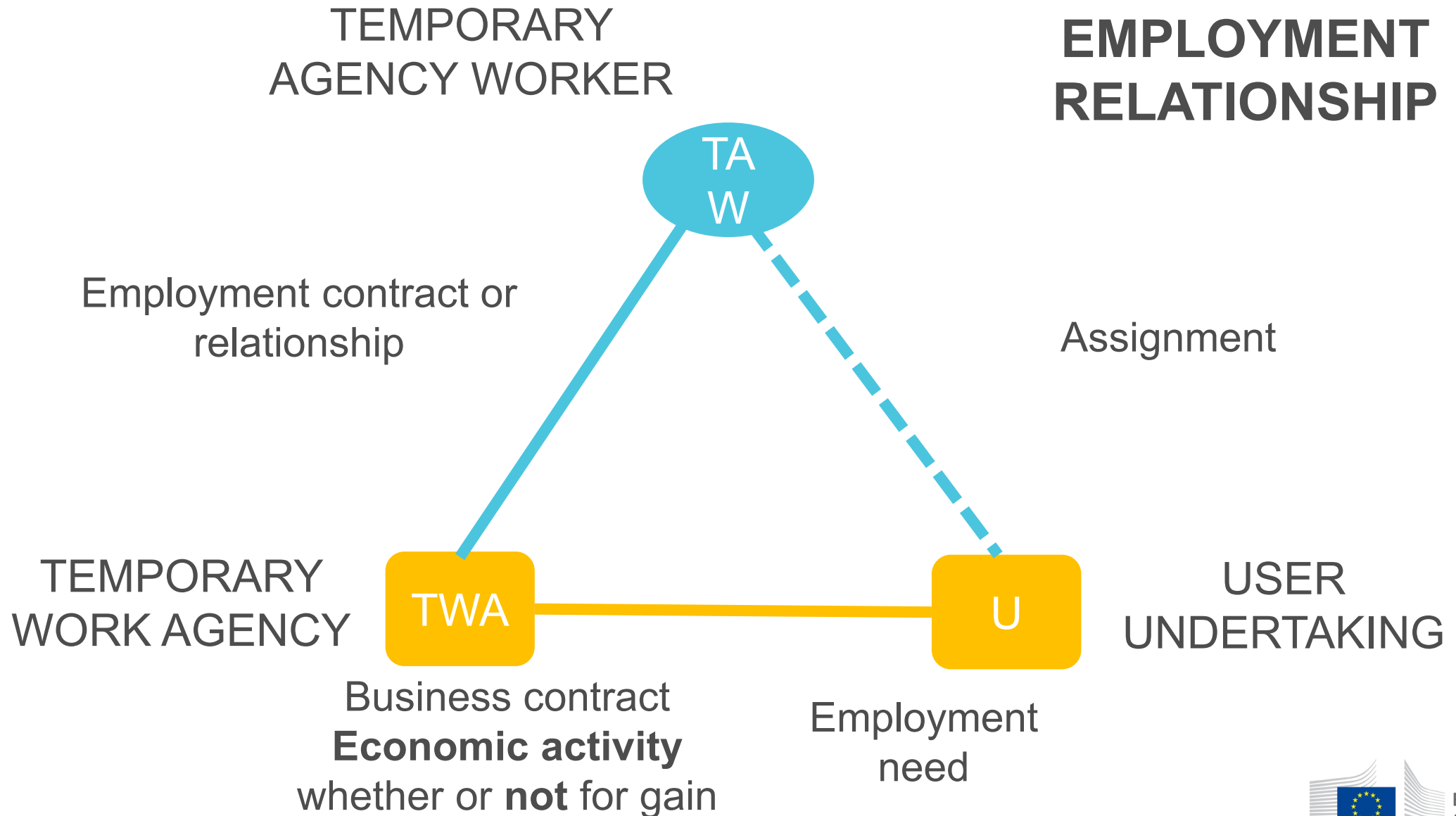
Article 12

Review by the Commission

Personal scope : Article 1 and 3

- **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**
- **Public and private undertakings which are temporary-work agencies or user undertakings **engaged in economic activities** whether or not they are operating for gain**
- **Def. (Art. 3.1): a) ‘worker’ means any person who, in the Member State concerned, is **protected as a worker under national employment law**;**
- **Def. (Art. 3.2): This Directive shall be **without prejudice to national law** as regards the definition of pay, contract of employment, employment relationship or worker**

TRIANGULAR EMPLOYMENT RELATIONSHIP



Personal scope: Case Law C-216/15 Ruhrlandklinik

- *To restrict the concept of ‘worker’ to persons falling within the scope of that concept under national law, in particular, to those who have a contract of employment with the temporary-work agency, is liable to jeopardise the attainment of those objectives and, therefore, to **undermine the effectiveness** of that directive by inordinately and **unjustifiably restricting the scope of that directive** (par 36).*
- *Indeed, such a restriction would permit the Member States or temporary-work agencies to exclude at their discretion certain categories of persons from the benefit of the protection intended by that directive even though the employment relationship between those persons and the temporary-work agency is not substantially different to the employment relationship between employees having the status of workers under national law and their employer (par 37).*

Jurisprudence on the concept of « temporality » : Case 231/20 Daimler

- **‘Temporarily’** refers to the assignment of a worker to a user undertaking (par 31)
- A temporary agency worker may be assigned to cover **permanent needs** at the user undertaking (par 38)
- Member States **may** define a maximum duration of the assignment to be considered as ‘temporary’. If not: national court decides (par 57 and 58).
- Member States are **obliged to ensure** that the assignments of Temporary Agency Workers are temporary (par72)

Aim: Article 2

Two-fold aim:

- Protection of agency workers and improvement of quality of agency work, by applying equal treatment
- Recognition of agencies as employers, contributing to creation of jobs and development of flexible forms of working (by providing that restrictive measures can only be maintained if they are justified on grounds of general interest).

ARTICLE 4 - REVIEW OF RESTRICTIONS OR PROHIBITIONS

- *Prohibitions or restrictions on the use of temporary agency work **shall be justified only on grounds of general interest** relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.*
- *By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.*

JURISPRUDENCE on ARTICLE 4 Case C-533/13 AKT

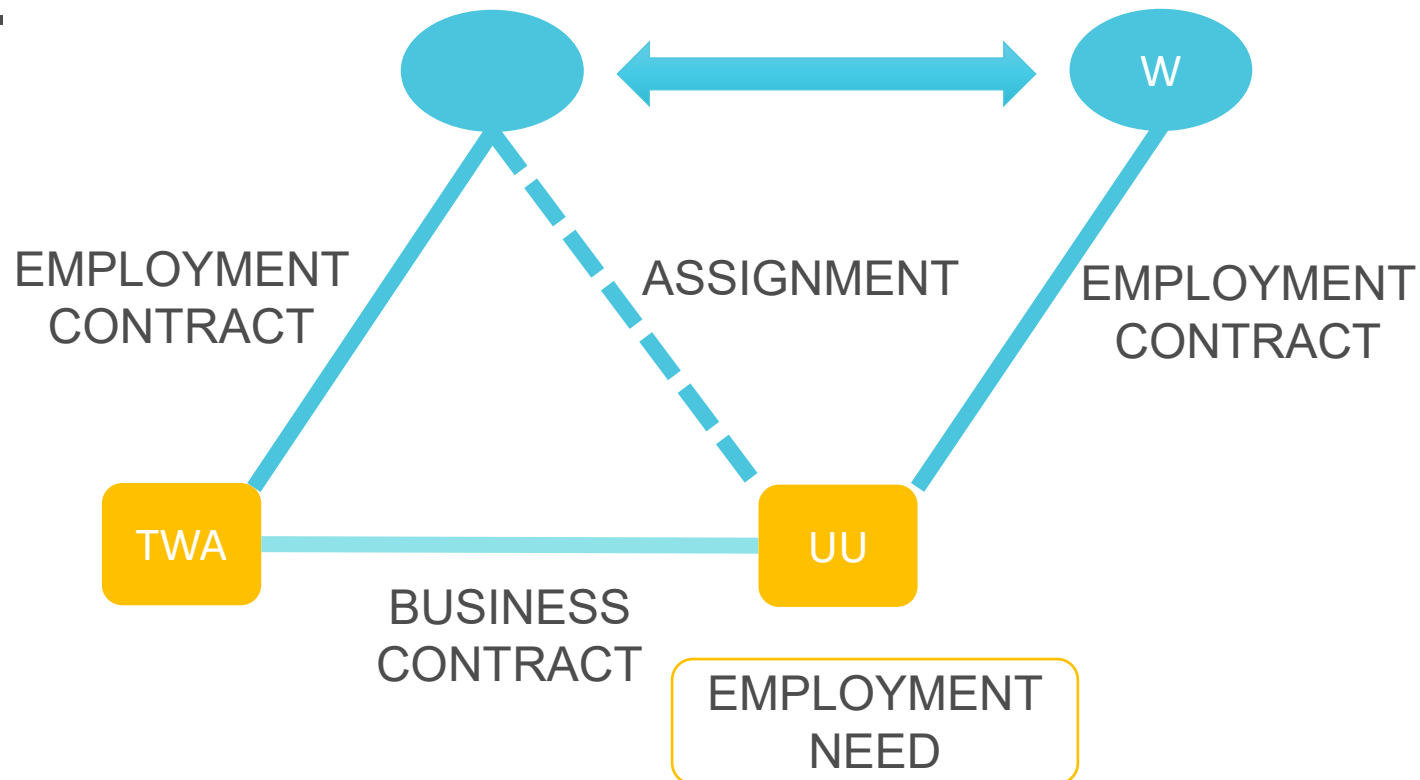
- The provision requiring that prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest is addressed only to the authorities of the Member States (para 32).
- This provision does not impose an obligation on national courts to dis-apply national rules restricting temporary agency work (para 32)
- Member States remain free either to remove any prohibitions or restrictions which could not be justified under that provision or, where applicable, to adapt them in order to render them compliant with that provision (para 30).

ARTICLE 5.1 - THE PRINCIPLE OF EQUAL TREATMENT

- *The **basic working and employment conditions** of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.*
- **Article 3(1)(f)** ‘basic working and employment conditions’ means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to: (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay.

ARTICLE 5 - THE PRINCIPLE OF EQUAL TREATMENT

- The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited **directly** by that undertaking **to occupy the same job**.



ARTICLE 5 - THE PRINCIPLE OF EQUAL TREATMENT

EXEMPTIONS

- *Art 5.2: As regards **pay**, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a **permanent contract** of employment with a temporary-work agency **continue to be paid** in the time between assignments.*
- *Art 5.3: Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding **collective agreements** which, **while respecting the overall protection of temporary agency workers**, may establish arrangements concerning the working and employment conditions of temporary agency workers which **may differ** from those referred to in paragraph 1.*

Art 5.3 JURISPRUDENCE of the Court in Case C-311/218, Timepartner

- ... **the ‘overall protection’** of those temporary agency workers is respected only if they are afforded, **in return, advantages intended to compensate for the effects of that difference in treatment.** If such an agreement serves only to weaken one or more of those basic conditions with regard to temporary agency workers, the overall protection of those workers would necessarily be diminished (par 39).
- **The advantages ...must relate to the basic working and employment conditions** defined in Article 3(1)(f), namely those concerning the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay (para 41).
- .. compliance with the obligation to respect the overall protection of temporary agency workers must be assessed, **in concrete terms**, by comparing, for a given job, the basic working and employment conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered.

ARTICLE 5 - THE PRINCIPLE OF EQUAL TREATMENT

EXEMPTIONS

- *Art 5.4 Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which **derogate** from the principle established in paragraph 1. Such arrangements may include a **qualifying period for equal treatment**.*

ARTICLE 5.5 - THE PRINCIPLE OF EQUAL TREATMENT

LIMIT TO THE EXEMPTIONS

- *Member States shall take appropriate measures, in accordance with national law and/or practice, with a view **to preventing misuse** in the application of this **Article** and, in particular, to preventing successive assignments designed to circumvent the provisions of this **Directive**.*

Art 5.5 JURISPRUDENCE OF THE COURT IN Case C-681/18, JH v KG

It follows that the obligation imposed on Member States by the first sentence of Article 5(5) of Directive 2008/104, requiring them to take appropriate measures with a view to preventing successive assignments designed to circumvent the provisions of that directive, must, in the light of its scheme and purpose, be understood as covering all the provisions of that directive (par 59).

DIRECTIVE

ARTICLE 5 EQUAL TREATMENT

ARTICLE 5(2) to (4) DEROGATIONS

Misuse of the
derogations

Successive
assignments

Article 5.5. JURISPRUDENCE OF THE COURT IN Case C-681/18, JH v KG

- *If successive assignments of the same temporary agency worker to the same user undertaking result in a period of service with that undertaking that is longer than what can reasonably be regarded as ‘temporary’, that could be indicative of misuse of successive assignments, for the purpose of the first sentence of Article 5(5) of Directive 2008/104 (para 69).*
- *...successive assignments of the same temporary agency worker to the same user undertaking circumvent the very essence of the provisions of Directive 2008/104 and amount to misuse of that form of employment relationship, since they upset the balance struck by that directive between flexibility for employers and security for workers by undermining the latter (par 70)*
- *...must be interpreted as precluding a Member State from taking no measures at all to preserve the temporary nature of temporary agency work and as precluding national legislation which does not lay down any measure to prevent successive assignments of the same temporary agency worker to the same user undertaking in order to circumvent the provisions of Directive 2008/104 as a whole (par 72)*

Article 6: Access to employment, collective facilities and vocational training

- Right to be informed of vacant posts in user undertaking
- Clauses preventing recruitment after assignment to be declared null and void
- Agencies cannot charge workers any fees
- Access to collective facilities (canteens, child-care, transport services etc.) in principle under same conditions as directly employed workers
- Improve access to training, including between assignments

ARTICLES 7 and 8

Representation of temporary agency workers (Art. 7):

- Counted in agency, user undertaking or both when calculating threshold for setting up bodies representing workers

Information of workers' representatives (Art. 8):

- User undertaking must provide suitable information on use of agency workers to bodies representing workers

The way forward

- Commission is gathering evidence on gaps and issues that might hinder effectiveness of the Directive
- Commission will continue to ensure that Directive is completely and correctly implemented and its goals achieved, in close co-operation with national governments and EU level social partners
- Infringement proceedings against Member States where necessary
- European Semester: if specific regulatory burden is identified as obstacle to growth and competitiveness, possible country-specific recommendations

Thanks for your attention!

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