Applying Temporary Agency Work Directive to Platform Workers: Mission Impossible?

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Abstract

For the time being most of the academic labour law discussion concerning platform work has concentrated on the labour law status of platform workers. It is however unclear which norms regulate platform work if the worker is classified as an 'employee'. Platform work resembles temporary agency work (TAW) due to its fixed-term and triangular nature. Hence, it can be asked whether provisions regulating TAW can be applied to platform work.

The aim of this article is to analyse whether it is possible to apply the Temporary Agency Work Directive (TAWD) to platform workers and whether it would improve their labour conditions. It is concluded that the automatic application of the TAWD to platform work would be complicated and would not improve the labour rights of platform workers. The main obstacles include the problems connected to the assignment of supervision and direction to the user; complications in determining the working time; finding the comparator for the purposes of equal treatment and the derogation to the principle of equal treatment based on qualification period. Other possibilities for the regulation on platform work need to be found.

Keywords: platform work; temporary agency work; Temporary Agency Work Directive; atypical employment

1. Introduction

Traditional labour law is based on the 'Fordist' model in industrial relations in which the production was concentrated in large industrial businesses with narrow specialisation of jobs and competencies and hierarchical management. The core feature of this model was a standard full-time employment contract concluded for an indefinite period of time. A standard worker had determined working hours, was engaged in a bipartite relationship with an employer and worked on the employer's premises.[1] As a counterweight to this strongly subordinated position, the employee was guaranteed a range of labour and social rights.

With the changes in the organisation of production this system has started to fracture, different non-traditional modes of work have evolved. The latest transformation changing economies, societies and the working life is digitalisation. As the result of digitalisation another new form of work - namely platform-work has occurred. There are two subcategories of platform work: in the case of crowdwork an online platform matches employers and workers, often with larger

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[1] Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour law in Europe,*1(Oxford University Press 2001).

tasks being split up and divided among a 'virtual cloud' of workers.[2] Services are arranged, provided and paid entirely online. Work-on-demand via app is a form of work in which the execution of traditional working activities (transport, cleaning etc.) is channelled through apps managed by firms that intervene in setting minimum quality standards of service and in the selection and management of the workforce.[3] Platforms again can be divided into generic and specific ones. In generic platforms clients can request any task, in specific platforms only particular service is provided.[4]

Even though platform economy is at the time being small, it is growing rapidly. Some experts estimate that it could add EUR 160-572 billion to the economy of the European Union (EU). Platform economy is expected to create new opportunities for consumers and entrepreneurs and to contribute to competitiveness and growth.[5] At the same time, it raises issues regarding the application of existing legal frameworks and blurs lines between consumer and provider, employee and self-employed. This can create regulatory grey zones that are exploited to circumvent rules designed to preserve the public interest.[6] European Commission (the Commission) calls the Member States (MS) to be open to platform economy ensuring at the same time fair working conditions and adequate and sustainable consumer and social protection. The MS are encouraged to clarify their national rules and obligations applying to the participators in the platform economy.[7]

For the time being most of the academic labour law discussion concerning platform work has concentrated on the labour law status of platform workers.[8] The main question asked is whether a platform worker is an employee or an independent contractor, sometimes her/his classification to the intermediary category of workers or dependent contractors[9] has been discussed. Also, courts have mainly dealt with the labour law status of platform workers[10]. That

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[2] *New Forms of Employment*, Eurofound (4 Dec. 2019), http://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment, 7.

[3] Valerio de Stefano, *The Rise of the "Just-in-time Workforce": On-demand Work, Crowdwork, and Labor Protection in the "Gig-Economy",* 37 Comp. Lab. L. & Pol'y J. 471, 472 (2016).

[4] Adrian Todoli-Signes, *The End of the Subordinate Worker? The On-Demand Economy, the Gig-Economy, and the Need for Protection of Crowdworkers,* 33 International Journal of Comparative Labour Law and Industrial Relations 241 (2017), 247.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy, {SWD(2016) 184 final}, Brussels, 2.6.2016, COM (2016) 356 final, http://ec.europa.eu/DocsRoom/documents/16881 (4 Dec. 2019), 2.

[6] *Ibid.*

[7] *Ibid,* 16.

[8] See, for example Adrian Todoli-Signes, *supra* n.4; Mark Freedland, Jeremias Prassl, *Employees, Workers, and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom.* SSRN Electronic Journal (2017); Guy Davidov, *The Status of Uber Drivers: A Purposive Approach,* 6 Spanish Labour Law and Employment Relations Journal 6 (2017); De Stefano, *supra* n.3*;* Antonio Aloisi, *Facing the Challenges of Platform-Mediated Labour: The Employment Relationship in Times of Non-Standard Work and Digital Transformation,* SSRN Electronic Journal (2018).

[9] See, for example Miriam Cherry, Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach,* 66 American University Law Review 635 (2017).

[10] See, for example Uber BV & Ors v. Aslam & Ors [2018] EWCA Civ 2748, https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf (4 Dec.2019); Arrêt n°1737 du 28 novembre 2018 (17-20.079) - Cour de cassation- Chambre sociale ECLI:FR:CCASS:2018:SO01737, https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/1737_28_40778.html (4 Dec.2019); Decision of District Court Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198; Judgement No. 244/2018 of Labour Court No. 6 of Valencia (Spain).

is because the triangular and often temporary nature of the arrangements, relatively high autonomy of the worker in terms of working place and time, and the lack of a common workplace seem to challenge the application of traditional labour law to platform workers.[11]

Undoubtedly the clarification of the labour law status of a platform worker is crucial to determine her/his labour rights. The classification of a person as an 'employee' brings her/him to the scope of a package of protective labour laws. Nevertheless, even if we regard a platform worker as an 'employee', the work arrangement differs from traditional employment. This may complicate the labour law protection of platform workers in practice. If regulations concerning traditional employment cannot be applied, we need to consider whether norms regulating other (atypical) forms of employment are applicable. Yet, it is important to keep in mind that norms, regulating atypical work are generated mainly to solve problems connected to that specific type of work. Therefore, to apply those to platform work, the latter needs to have similar characteristics.

One of the forms of atypical work that platform work seems to be similar to is temporary agency work (TAW). Both are triangular relationships- in the case of TAW temporary-work agency, worker and user undertaking are involved; in platform work platform, worker and the user (client) participate. Similar to TAW the duration of platform work is often limited. These similarities are acknowledged by the European Parliament (the Parliament)[12] which calls the Commission to examine how far the Directive on Temporary Agency Work (2008/104/EC) [13] is applicable to specific online platforms.

Ratti has studied the possibilities to expand the provisions of the Temporary Agency Work Directive (TAWD) to crowdwork. He argues that crowdwork can be seen as a particular form of agency work, and therefore the TAWD can be applied. However, he suggests broader interpretation of the provisions of the Directive to attain its aim. Ratti discusses the personal scope of the TAWD, raises issues as regards the choice of law and finding the comparator for the purposes of equal treatment. He does not analyse the application of other provisions more specifically and excludes work-on-demand via app from his scrutiny.[14]

Simultaneously other researchers have raised concerns regarding the automatic application of the TAWD to platform workers. For example, de Stefano and Aloisi explain that the application of the TAWD is complicated, because the supervision and direction of platform workers is sometimes shared between the platform and the end user. Also, the TAWD applies only to workers with an employment relationship.[15] Risak finds that the TAWD does not solve the problem concerning the nature of the contract under which the work is performed, and it does not facilitate the enforcement of the rights of platform workers.[16]

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[11] Sacha Garben, *Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU, European Agency for Safety and Health at Work* 15 (Publications Office of the European Union 2017).

[12] European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)), OJ C 331, 18.9.2018, p. 125–134.

[13] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.

[14] Luca Ratti, *Online Platforms and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions,* 38 Comp. Lab. L. & Pol'y J. 477 (2017).

[15]Valerio de Stefano and Antonio Aloisi*, European Legal Framework for Digital Labour Platforms*, 39 (European Commission 2018).

[16] Martin Risak, *Fair Working Conditions for Platform Workers. Possible Regulatory Approaches at the EU Level*, http://library.fes.de/pdf-files/id/ipa/14055.pdf (4 Dec.2019), 9.

In this article I aim to analyse whether it is possible to apply the TAWD to platform workers and whether it would help to improve their labour conditions. I study the personal scope of the TAWD as well as the applicability of its most important provisions to platform work.

I argue that the automatic application of the TAWD to platform work is complicated and would not necessarily improve the labour rights of platform workers. The main obstacles include problems connected to the assignment of supervision and direction to the user; complications in determining the working time; finding the comparator for the purposes of equal treatment and the derogation to the principle of equal treatment based on qualification period. Other possibilities need to be found to regulate platform work.

First, I analyse the personal scope of the TAWD and its applicability to platform workers. I continue with discussing the prohibition of the restrictions to the use of TAW and analyse whether it would be justified in the case of platform work. Next, I discuss the possibilities of applying the principle of equal treatment to platform workers. Finally, I analyse the influence of derogations to the principle of equal treatment to platform workers.

2. Platform work and the personal scope of Temporary Agency Work Directive

2.1 Platform worker as a 'worker'

To apply the TAWD to platform workers, two issues need to be solved- first, platform workers need to be classified as 'workers', and second, work needs to be performed under user's supervision and direction. According to Art.1 TAWD 'This 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.' Art.3(1)a provides that '"worker" means any person who, in the Member State concerned, is protected as a worker under national employment law.' Art. 3(2) says that 'the Directive is without prejudice to national law as regards the definition of contract of employment, employment relationship or worker.'

These provisions suggest, that the personal scope of the TAWD is determined according to national law. That is how it has been understood also by Countouris and Horton[17], and Davies[18]. Both refer to the decision of the Court of Justice of the EU (CJEU) in *Danmols Inventar*[19]in which the Court held that Directive 77/187 protected individuals in the event of a business transfer only where national law classified those individuals as employees. The CJEU explained that the Directive aimed at partial harmonization and was not intended 'to establish a uniform level of protection throughout the Community.'
However, in *Betriebsrat der Ruhrlandklinik*[20] the CJEU applies the Union concept of 'worker' to determine the scope of the TAWD. The Court says that 'the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of

[17] Nicola Countouris, Rachel Horton, *The Temporary Agency Work Directive: Another Broken Promise?,* 38 Industrial Law Journal*,* 329 (2009).
[18] Anne Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity*, 1 European Labour Law Journal 307, 313 (2010).
[19] Case 105/84, *Danmols Inventar*, ECR 1985 -02639.
[20] Case C-216/15, *Betriebsrat der Ruhrlandklinik,* Digital reports (Court Reports - general).

the legal relationship between those two persons, not being decisive in that regard'.[21] The CJEU explains that the idea of Art.3(2) was to enable the MS to determine the persons falling within the scope of 'worker' for the purposes of national law, but not to determine the personal scope of the TAWD.

The Court finds that using national concept would jeopardise the attainment of the aims of the TAWD provided in Art.2. According to this provision:

> the purpose of the directive 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 is applied to those workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

Using national concept of 'worker' would permit the MS or temporary-work agencies to exclude at their discretion certain categories of persons from the protection intended by the TAWD.[22]

Similarly, Davies argues that even if no Union concept were used, it is possible to challenge the MS's definition when a significant number of the TAWD's intended beneficiaries are left unprotected because of not being classified as 'workers'. Then the MS has not properly implemented the Directive.[23] Countouris and Horton find that Art.2 providing that 'the purpose of this Directive is to ensure the protection of temporary agency workers … by recognising temporary-work agencies as employers', introduces a strong presumption that, in ambiguous cases, triangular arrangements should be construed as implying the existence of a personal work relationship between the worker and the intermediary.[24] Finally, referring to the same court practice, Ratti argues that the existence of an employment relationship cannot be denied in the case of crowdwork.[25] These arguments and a rather clear opinion of the CJEU in *Betriebsrat der Ruhrlandklinik* refer that we should use the Union concept of 'worker' to determine the personal scope of the TAWD.

Although for the time being there are no practice of the CJEU concerning the 'worker' -status of a platform worker, in *Asociación Profesional Élite Taxi*[26], the CJEU ruled that Uber provides a service in the field of transport, rather than a simple information society service. The CJEU found that 'an intermediation service…, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and must be classified as "a service in the field of transport" within the meaning of EU law.' Even though not straightforwardly touching upon the question concerning the labour law status of Uber drivers, the CJEU brought attention to circumstances that are relevant from labour law point of view. In classifying Uber as the provider of transport service, the CJEU stated '…Uber exercises decisive influence over the conditions under which that service is provided by those drivers…Uber determines at least the maximum fare by means of the eponymous application, …, and that it exercises a certain control over the quality of the

[21] *Ibid,* para. 27.
[22] *Ibid,* paras 34-37.
[23] Davies, *supra* n.18, at 314
[24] Countouris, Horton, *supra* n. 17, at 331-332.
[25] Ratti, *supra* n.14, at 506.
[26] Case C-434/15, *Asociación Profesional Élite Taxi vs. Uber Systems Spain SL*, Digital reports (Court Reports – general).

vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.'[27] This description proves Uber's control over the working process and drivers' subordination to Uber, and fits well with the Union concept of 'worker'.

If in future the CJEU addresses the question concerning the 'worker' status of Uber drivers, it is difficult to imagine that it would not give any relevance to the aspect of control described in *Asociación Profesional Élite Taxi.* As the Court has already looked beyond contract terms and appearances, it is likely to do the same in the context of labour law and classify them as 'workers'.

This assumption is also supported by the fact that the Union concept of 'worker' is broader than the national concept of 'employee'[28] and in national court practice some platform workers have been classified as 'employees' or 'workers'.[29] For example, on 28 October 2016 Employment Tribunal in the United Kingdom (UK) ruled that Uber drivers are workers and not self-employed within the meaning of the Employment Rights Act.[30] On 1 June 2018 the social court of Valencia found that the rider of a takeaway firm Deliveroo should have been treated as an employee, and not as a self-employed contractor.[31] On 28 November 2018 the Supreme Court in France held that delivery riders working for online delivery platforms such as Take Eat Easy are employees not self-employed workers.[32] On 15 January 2019 the District Court of Amsterdam classified Deliveroo riders as employees.[33]

Therefore, depending on factual circumstances platform workers can be classified as 'workers' for the purposes of Union law, which means that they cannot be fully exempted from the scope of the TAWD.

2.2 Assignment of supervision and direction to the user

Although platform workers can belong within the scope of the TAWD if being classified as 'workers', the application of the directive can become impeded if they are not assigned to a user undertaking to work temporarily under its supervision and direction.

According to Art.3(1)c '"temporary agency worker" means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction', Art.3(1)e provides that 'assignment' means 'the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.'

Platform workers do not usually perform work under the physical supervision of the platform. The lack of physical supervision is compensated by their control through technical means i.e.

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[27] *Ibid,* recital 39.
[28] Case C-75/63, *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, ECR 1964 00177.
[29] Here I do not intend to claim that the question of the labour law status of platform workers is clear.
[30] Employment Tribunal, *Mr Y Aslam, Mr J Farrar and Others v Uber and Others*, Case Numbers: 2202551/2015, 28 October 2016.
[31] Judgement No. 244/2018 of Labour Court No. 6 of Valencia (Spain).
[32] Arrêt n°1737 du 28 novembre 2018 (17-20.079) - Cour de cassation- Chambre sociale ECLI:FR:CCASS:2018:SO01737, https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/1737_28_40778.html (4 Dec.2019).
[33] Decision of District Court Amsterdam 15 January 2019, ECLI:NL:RBAMS:2019:198.

algorithmic management.[34] Based on earlier literature Ivanova *et al* identify five ways how technology can support the performance of managerial control: surveillance of labour process through tracking; collecting data and evaluating performance on this basis; automatic decision-making; automatic messaging systems, and digital choice architecture enabling the platform worker to use only one path of action or allowing the platform to control the choice-making process.[35] According to empirical studies algorithmic management is not only equal to physical supervision, but has even strengthened the control performed by the platform or the end user.[36]

As physical control is replaced by technical supervision, assigning the direction and supervision of platform workers demands handing over technical equipment used to perform that control. Nevertheless, no such equipment is usually handed over to the client, which makes the assignment of supervision and direction to the user questionable.

Also because of other reasons the assignment of direction and supervision can be difficult to detect. I elaborate this with some examples. Ivanova *et al* describe the control performed by food delivery platforms. They explain that Deliveroo riders need to swipe 'Accept' to accept the order, 'Arrived' when they are in the restaurant, 'Collected' when food is received, 'Arrived' when they are in the customer's address and 'Delivered' when food is handed over. Additionally, riders' movement and time between the steps is constantly tracked by the GPS. In case of any irregularity in the normal workflow, the rider receives a notification in the app.[37]

In this case the performance of control by the platform (through the app) is clearly detectable, which is apparently one of the reasons why platform workers in delivery firms have been often classified as employees. However, the client seems to have no possibilities to supervise or direct the work. She/he only orders and receives the food. As no assignment of direction and supervision can be detected, it would be complicated to apply the TAWD to platform workers in this kind of food delivery firms. Theoretically also the restaurant preparing the food could be regarded as the user undertaking. Yet, similar to the client, it cannot influence the working process.

Another example can be shown from transportation sector. The control performed by Uber is well described in the case *Aslam et al v. Uber BV et al*[38]. Passengers register and book their trip by downloading the app and logging on. They may state their destination and in request, can receive a fare estimation. After receiving the request, Uber estimates through their equipment (driver's smartphone and app) the closest driver to the passenger and informs her/him through smartphone. The driver is told the passenger's first name and rating, and she/he has 10 seconds to accept the trip. Once the trip is accepted, driver and passenger are put into direct telephone contact through app. The driver is not aware of the destination until pickup and learns it from the passenger or from the app by pressing 'Start Trip' button. The app

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[34] Alex Rosenblat, Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers* 10 International Journal of Communication, 3758 (2016); Mirela Ivanova, Joanna Bronowicka, Eva Kocher, Anne Degner, *The App as a Boss? Control and Autonomy in Application-Based Management*, Working Paper 2018, http://labourlawresearch.net/papers/app-boss-control-and-autonomy-application-based-management (4.Dec.2019), 7.

[35] Mirela Ivanova, Joanna Bronowicka, Eva Kocher, Anne Degner, *The App as a Boss? Control and Autonomy in Application-Based Management*, Working Paper 2018, http://labourlawresearch.net/papers/app-boss-control-and-autonomy-application-based-management (4.Dec.2019), 7.

[36] John J. Horton & Prasanna Tambe, *Labor Economists Get Their Microscope: Big Data and Labor Market Analysis,* 3 BIG DATA 130 (2015); Ratti, *supra* n.14, 486.

[37] Ivanova *et al*, *supra* n.35, at 13-14.

[38] *Aslam and Others vs Uber BV and Others, supra* n.30, at 3-4.

provides detailed directions to the destination. The driver is not bound to follow the proposed direction and is not doing so, if the passenger stipulates a different route. However, if a passenger claims for a refund on the basis that the most efficient route was not chosen, the driver needs to justify the departure of the route indicated by the app.[39]

Here passenger has a possibility at least partly to direct and supervise the work. She/he can prescribe the route that the driver needs to follow to reach the destination. Nevertheless, in obeying passenger's orders the driver risks with claims for refund. Although Uber seems only to recommend the route, in fear of a refund the driver probably follows the provided route. Hence, it is not clear, under who's direction and supervision the work (driving) is performed. Uber aims to preserve its control by threatening the driver with claims of refund, but at the same time it seeks being passenger-friendly, by suggesting that passenger could choose her/his own route. Finally, to retain the imaginary independence of the driver, it presents the provided route as only a suggestion of which the driver can, but do not have to follow. As a result, as noted by de Stefano and Aloisi, the application of the TAWD could be complicated, because the direction and supervision could be shared between the parties of the relationship.

Even if we can detect at least some assignment of direction and supervision to the passenger, practical issues arise in the application of the TAWD. Regularly Uber driver performs services to many passengers. If the passenger provides the route and we regard her/him as a user enterprise, every trip would constitute a very short-term temporary work agreement. Therefore, even if theoretically it could be possible to apply the TAWD, in practice it would be very complicated.

Next example concerns online crowdsourcing. One of the largest platforms providing crowdwork is Amazon Mechanical Turk (AMT). Through this platform workers can perform activities such as copying or translating texts, identifying spelling errors, grouping and labelling items etc. Each user must register as Requester or Provider. Requesters post tasks and indicate compensation. They set hiring conditions and can refuse to accept the task while retaining the work done. In this case worker does not get paid. Requesters can also determine the criteria the worker needs to correspond and define instructions. The platform pays for the work and can suspend or terminate the Provider's account.[40]

The direction and supervision of work in AMT appears to be performed almost exclusively by the Requester, who sets hiring conditions and defines instructions. The Requester also has a powerful tool to ensure that the work is performed according to her/his instructions- a possibility to refuse to accept the task and to pay for the work. In this case the worker clearly performs work under the direction and supervision of the user and the control of the platform over the working process seems more restricted than in the case of Uber or Deliveroo. However, AMT participates in the selection and management of the workforce and arranges the provision of services and payment through online. It retains the right to terminate the task and de-activate the profile of the Provider.[41]

Ratti argues that because the role of AMT does not end at the moment when the Provider and the Requester start their relationship, AMT is not merely a placement facilitator, but a temporary work agency. The fact that both the platform and the end user exercise some

[39] *Ibid*.
[40] Antonio Aloisi, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of 'On-Demand/Gig Economy' Platforms* 37 Comp. Lab. L. & Pol'y J., 653, 665 (2016).
[41] Ratti, *supra* n.14, at 493.

discretion and control, and the end user retains the right to monitor and evaluate the performance, fits well to the temporary agency work model foreseen in the TAWD. As a result, AMT should be considered as the employer and the Requester as the user undertaking.[42]

The final example is TaskRabbit, a platform connecting people and businesses to get everyday and skilled Tasks done. Popular tasks include handyman work, assembling furniture, help in moving, yard work, cleaning etc.[43] Prassl and Risak describe the process in TaskRabbit followingly. TaskRabbit starts the relationship by activating worker's accounts and can terminate the account in case the Tasker violates the terms of use of the platform. The platform also organizes the payment and participates in setting wage levels. Supervision and direction is shared by the platform, the worker and the user. The platform deletes inappropriate tasks from the platform and directs the worker to perform the task personally. The exact supervision of the working process depends on the task. Some users supervise and direct the work more strongly than others.[44]

In the case of TaskRabbit, the platform seems to attain similar role to temporary work agency. The platform participates minimally in the supervision and direction of the working process. This role is performed by the user. Alternatively, the Tasker is independent in the performance of work. If the user performs some supervision and direction it could be regarded as a user undertaking and the application of the TAWD can be considered.

Similar to Uber, both in the case of AMT and TaskRabbit, the application of the TAWD in practice can be difficult if the Provider performs many incidental tasks posted by different users, which then would form separate temporary employment agreements. The situation is easier if the Requester in the case of AMT is for example a big company that can offer bigger or more long-term tasks. In TaskRabbit, Taskers can apply for longer-term business tasks, that resemble more to traditional temporary agency work than taking incidental tasks.[45]

More generally Countouris and Horton find, that as a rule according to Art.2 TAWD it needs to be assumed that in triangular relationships the intermediary is regarded as a temporary-work agency. Only when it retains no link with the worker, it should be enquired whether the relationship between the worker and the user is one of employment or self-employment.[46] Hence, not only platforms such as AMT, but also platforms that mediate work-on-demand via app are temporary work agencies for the purposes of the TAWD until they prove the opposite. Alternatively, the application of the TAWD can be avoided if it is proved that the platform performs the whole control over the working process (Deliveroo; Uber if the passenger does not determine the route). But then the platform would be the sole employer with even broader obligations.

In conclusion, the difference between TAW and platform work is not such that it would justify the full exemption of platform workers from the personal scope of the TAWD. However, the application of the TAWD to platform workers needs case-by-case analysis considering the factual circumstances of a concrete relationship. The difficulties in the determination of the

[42] *Ibid.,* at 501, at 506-507.
[43] See https://www.taskrabbit.com/services (22 Jan.2020).
[44] Jeremias Prassl, Martin Risak, *Uber, Taskrabbit, and Co.:Platforms as employers? Rethinking the legal analysis of crowdwork* , 37 Comp. Lab. L. & Pol'y J. 619 (2016), 642-646.
[45] *Ibid.,* at 643.
[46] Countouris, Horton, *supra* n.17, at 331-332.

labour law status of platform worker and in the actual assignment of direction and supervision to the user can, but do not have to exempt platform workers from the protection of the TAWD.

3. Restrictions to the use of temporary agency work in the context of platform work

According to Art. 4(1) TAWD 'the 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.' Art.4(2) obliges the MS to '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.'

Frenzel argues that the limitations to the restrictions of TAW in conjunction with Art.6 TAWD aiming to facilitate the access of temporary agency workers to permanent employment in user undertaking is an example of the application of 'flexicurity' principles. Flexicurity, seeking to promote flexibility combined with employment security is underlined in the preamble of the TAWD. TAW was regarded as a mean to facilitate job creation and participation in labour market. It therefore had to become a common form of work and only limited restrictions to its use were to be allowed.[47]

This suggests that the main reason for facilitating TAW was to raise the employment rate and reduce unemployment. Simultaneously the TAWD aimed at improving the quality of TAW.[48] If the TAWD was applied to platform workers, it would mean that platform work as a form of TAW should also be facilitated. However, it needs to be analysed whether this approach is in accordance with current EU policy.

The Commission[49] finds that 'collaborative economy can make an important contribution to jobs and growth in the EU, if encouraged and developed in a responsible manner.' Collaborative platforms promote new employment opportunities, flexible working arrangements and new sources of income.[50] As regards working conditions, the Commission only notes that platform work is more unstable than traditional work and can create uncertainty as to applicable rights and the level of social protection. Then it guides us to European pillar of social rights (the Pillar).[51]

The Pillar[52] foresees securing fair working conditions. According to Art.5a:

> Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training. The transition towards open-ended forms of employment shall be fostered.

Art. 5c sets out that 'Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged.' However, Art.5d says

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[47] Helen Frenzel, *The Temporary Agency Work Directive*, 1 European Labour Law Journal 119, 124-125, 131 (2010).
[48] TAWD, *supra* n.13, Art.2.
[49] Communication on the collaborative economy, *supra* n.5.
[50] *Ibid.*, at 2.
[51] *Ibid.*, at 11.
[52] Commission recommendation on the European Pillar of Social Rights, https://ec.europa.eu/commission/publications/commission-recommendation-establishing-european-pillar-social-rights_en (4 Dec.2019).

that 'Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts…'

Quite the same is confirmed by the Parliament, which notes, that the collaborative economy is opening new opportunities and new routes into work and could serve as a point of entry to the labour market.[53] At the same time, it underlines the importance of safeguarding workers' rights and calls on the MS and the Commission to ensure fair working conditions and adequate legal and social protection.[54]

Therefore, only new forms of work that guarantee good working conditions should be facilitated. Precarious work needs to be avoided and the abuse of atypical contracts prohibited. Followingly platform work should be facilitated only if this is an innovative form of quality work and avoided, if it is regarded as precarious work. Majority of researchers[55] argue that this is precarious work. Platform workers are in practice regarded as self-employed, even though platform directs and supervises the work similarly to employment relationship. Exempting platform workers from the scope of labour law, again, leads to poor working conditions.

For the time being the standpoint of the EU regarding platform work is not clear. Nevertheless, it seems that platform work is not seen as unproblematic as TAW during the adoption of the TAWD. Considering the problems raised by the academics it would be questionable to start facilitating platform work by limiting national restrictions to its use. Yet, including platform work within the scope of the TAWD would mean that we recognize these arrangements as employment. This again would solve most of the problems connected to the insecure labour protection of platform workers. Also, the Commission sees absolute bans and quantitative restrictions to market access of collaborative platforms as a measure of last resort. They should only be applied if and where no less restrictive measures can be used.[56] Hence, allowing unlimited restrictions to the use of platform work would be problematic.

However, Art.4 TAWD does not foresee an absolute ban to the restrictions of TAW. Restrictions justified on grounds of general interest relating particularly to the protection of temporary agency workers, health and safety issues or the need to ensure proper labour market functioning and prevention of abuses are allowed. Delfino argues that the concept of 'grounds of general interest' is so wide, that it was easy for the MS to justify most of the existing restrictions or prohibitions during the adoption of the TAWD.[57]

In 2016 Sartori detected minimal impact of the TAWD to the removal of restrictions of TAW in the MS. She explains it with different interpretations of what constitutes a restriction, as well as a justification on the grounds of general interest. Many MS interpreted the former more restrictively compared to the Commission, while almost all countries considered their own restrictions justified.[58] Therefore, although the use of TAW should not be restricted, in practice restrictions in the MS still exist.

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[53] European agenda for the collaborative economy, *supra* n.12, recital 37.
[54] *Ibid.,* recital 39.
[55] See *supra* n.8.
[56] European agenda for the collaborative economy, *supra* n.12, at 4.
[57] Massimiliano Delfino, *Interpretation and Enforcement Questions in the EU Temporary Agency Work Regulation. An Italian Point of View.*2 European Labour Law Journal 287, 294 (2011).
[58] Alessandra Sartori, *Temporary Agency Work in Europe, Degree of Convergence Following Directive 2008/104/EU* , 7 European Labour Law Journal 109, 117 (2016).

If platform work was considered as TAW, the restrictions justified on grounds of general interest would be also allowed. Compared to allowing any restrictions, it would be better suited to the Commission's and Parliament's view that platforms can be a positive opportunity for jobs and growth. It could be imagined that restrictions aiming to achieve the goals set out in the Pillar (for example avoiding precarious work) would count as restrictions justified on grounds of general interest.

Art.4(4) TAWD also explicitly excludes regulation on registration, licensing and certification of private employment agencies from the review of restrictions. The examples of France and UK show that these regulations have an impact on the market of temporary-work agencies. When financial guarantees are high, and registration costly big multinational agencies dominate the market (France) and where it is the opposite small and medium size agencies are established (UK).[59]

In the case of collaborative platforms, the Commission agrees with sector-specific regulation (including business authorisation and licensing requirements) if they provide other services in addition to information service. Whether other services are provided is determined according to the following criteria: 1) platform sets the final price to be paid by the user; 2) platform sets terms and conditions, which determine the contractual relationship between the services provider and the user; 3) platform owns the key assets used to provide the service. When these criteria are all met, there are strong indications that the platform exercises control over the provider of the service, which may in turn indicate that it should be considered as also providing this service.[60]

In the context of platform work it seems that the Commission allows licensing and authorisation requirements only if the work provided through the platform is performed under the control of the platform and resembles employment. As mentioned before, not only straightforward restrictions, but also licencing and certification requirements can determine, whether and which kind of platforms have market access. This could help the MS to avoid platforms that control working process but abstain from guaranteeing labour rights to workers.

It can be concluded that one of the aims of the TAWD, namely, to facilitate TAW by limiting national restrictions and prohibitions to its use corresponds rather well to the EU policy regarding platform work. Similar to TAW platform work is regarded as an opportunity and should be facilitated until it guarantees good working conditions. The TAWD allows prohibitions and restrictions to the use of TAW on the ground of general interest as well as registration, licencing and certification regulation. These exemptions backed with EU policy would give the MS sufficient leeway to avoid the facilitation of precarious platform work.

4. Equal treatment of platform workers

4.1 Equal treatment as regards basic working conditions

The second main aim of the TAWD is to improve the quality of TAW by ensuring the application of the principle of equal treatment to temporary agency workers.[61] Art.5 (1) TAWD sets out that 'the basic working and employment conditions of temporary agency workers shall be, for the

[59] Frenzel, *supra* n.47, at 131.
[60] European agenda for the collaborative economy, *supra* n.12, at 6.
[61] TAWD, *supra* n.13, Art.2.

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.'

Many researchers argue that the wording of the article suggests that the comparison should be with a 'hypothetical' comparator. The existence of an 'actual' worker occupying the same (or a similar) job in the user undertaking is not necessary.[62] This interpretation is important in the context of platform work, because often the end-user is a private person who does not employ any other employees.

Yet, it is questionable whether the temporary agency worker needs to be compared with ('hypothetical') fixed-term or permanent employee. Moreover, who would be the comparator in the sectors exclusively filled by agency workers.[63] These issues also arise in the case of platform work. Even if we compare platform workers to fixed-term employees (and settle with their less favourable treatment compared to permanent employees), we need to determine who would be hired by the end-user if there were no option of platform work.

Risak notes that equal treatment can be applied only if platform workers are working for a business that would otherwise employ an employee and that instead opts to crowdsource labour. If the alternative is contracting directly with self-employed person, the equal treatment principle cannot apply.[64]

It also seems to be easier to determine the comparator in the case of work-on-demand via app. Then the platform workers could be compared with workers performing the same or similar work in the same area or country. Finding the comparator is more complicated in the case of crowdwork, because the work is performed more globally. For example, we need to consider whether a translator residing in Latvia and performing work to the company in Finland via AMT should be treated equally to Finnish translators hired directly by Finnish companies or with translators performing the same work in Latvia. This is not an easy question, because it is linked with the problem concerning the choice of laws and exceeds the scope of this paper. Here, it suffices to note that the application of the principle of equal treatment to platform workers can be hindered in practice because of the difficulties in determining the comparator.

If the comparator can be determined, we need to ascertain the content of 'basic working conditions'. According to Art.3(1)f TAWD:

> 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.

Hence, temporary agency worker should be treated equally as regards the basic working conditions but can be treated differently regarding other employment conditions.[65] The principle of equal treatment includes more limited working conditions compared to Fixed-Term

[62] See, for example, Delfino, *supra* n.57, at 291; Countouris, Horton, *supra* n.17, at 333.
[63] Countouris, Horton, *supra* n.17, at 334.
[64] Risak, *supra* n.16, at 15.
[65] Frenzel, *supra* n.47, at 128.

Work Directive[66]. According to Clause 4(1) of the directive 'in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'

In *Impact*[67]the CJEU found that 'clause 4 must be interpreted as articulating a principle of social law which cannot be interpreted restrictively.' In this case pay, occupational pensions, and length of service allowance have been regarded as working conditions. Examples of less favourite treatment include exclusion from a pension scheme, a redundancy policy and eligibility for service-related pay. Barnard finds that prohibition from discrimination is likely to cover also promotion opportunities.[68]

As stated by Countouris and Horton, limiting the principle of equal treatment in TAW to only basic working conditions, is clearly a step back when compared to Fixed-Term Work Directive.[69] This directive again cannot be applied to temporary agency workers. As the CJEU held in *Della Rocca*[70] 'it is explicitly stated in the fourth paragraph of the preamble to the Framework Agreement that it does not apply to fixed-term workers placed by a temporary work agency at the disposition of a user enterprise, it being the intention of the parties to conclude a similar agreement relating to temporary agency work.'.[71]

In the context of platform work the difference between working conditions covered by these two directives is even more important. As there are no EU legislation concerning platform work, we need to consider the applicability of legislation concerning other types of atypical work. The application of the TAWD is only one possibility. At this stage it cannot be claimed that this would be the only or the best way to regulate platform work. Regarding platform work as TAW means poorer working conditions compared to treating them as fixed-term workers. However, if the TAWD would be applied to platform workers, they would have a right to equal treatment as regards pay, working time, overtime, breaks, rest periods, night work, holidays and public holidays.

4.2 Pay

Researchers have different views as regards the definition and components of 'pay' used in the TAWD. Delfino finds that the term 'pay' has to be interpreted as including not only basic pay, but every type and aspect of it, such as performance pay, maternity pay, redundancy payments and paid time off for trade unions duties. This interpretation is supported by Art.157(2) of the Treaty of the Functioning of the EU[72], which states that for the purpose of the principle of equal pay for male and female workers 'pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. Also, the CJEU finds that 'pay' provided by Article 157 is not limited to basic pay, but includes overtime supplements,

[66] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP OJ L 175, 10.7.1999, p. 43–48.
[67] Case C-268/06, *Impact v Minister for Agriculture and Food and Others*, OJ C 142, 7.6.2008, p. 4–5.
[68] Catherine Barnard, *EU Employment Law,* 439, 440 (Oxford University Press 4th ed. 2012).
[69] Countouris, Horton, *supra* n.17, at 334.
[70] Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA*, Digital reports (Court Reports - general).
[71] *Ibid*, paras 36, 42.
[72] Consolidated version of the Treaty on European Union [2012] OJ C 326/13.

bonuses, travel facilities, compensation for attending training courses and training facilities, payments in case of dismissal and occupational pensions.[73]

On the contrary, Frenzel argues that the MS define which components are included, also with regard to pensions and other social security provisions.[74] However, Davies finds that too restrictive interpretation of 'pay' can be challenged on the basis that the MS has not implemented the TAWD correctly. Although the EU interpretation of 'pay' in other contexts can be used as a reference point, we need to keep in mind that in those contexts national definitions were not relevant.[75]

Art.3(2) TAWD sets out that the TAWD is without prejudice to national law as regards the definition of pay. This refers that we should use national definition. Yet, as already mentioned, in the case *Betriebsrat der Ruhrlandklinik*[76] the CJEU explained that the idea of Art.3(2) was to enable the MS to determine the persons falling within the scope of 'worker' for the purposes of national law, but not to determine the personal scope of the TAWD. The same article concerns 'pay' and could then be regarded as enabling the MS to define 'pay' for national purposes. Using EU definition in the application of the TAWD would help to achieve the aim of the directive better. As showed above, the EU concept of 'pay' is sufficiently broad to include most of the material benefits that a worker receives in exchange for work. Guaranteeing temporary agency workers only basic pay would inevitably mean that the aim to treat them equally to the workers of user undertaking would not be attained. Therefore, it is more justified to use the Union concept, including not only basic pay, but also its supplements.

As regards platform work, pay has been one of the main concerns. Platform work is often low-paid, fares fluctuate or are altered without workers consent. Compensation on a piece-rate basis is the norm and a pronounced oversupply of labour lead some workers to cut their rates below what they consider reasonable. This could be best illustrated by the example of AMT. Research has shown that 25% of the tasks offered at AMT are valued at €0.007, 70% offer €0.04 or less, and 90% pay less than €0.07. This equals an hourly rate of around €1.44.[77]

Understandably guaranteeing minimum wage has been in the centre of many proposals aiming to improve the working conditions of platform workers. For example Berg *et al*[78]from the International Labour Organisation recommend that crowdworkers designated as employees should receive the prevailing minimum wage in the employee's location. They should possibly receive (1) a local living wage; and (2) the median local wage earned by workers performing similar work.[79] Risak proposes the adoption of Platform Work Directive that should include a prohibition of platform workers' recruitment for services that are paid below minimum wages; and the establishment of a principle of equal treatment with a corporate user's existing workforce. The basic working conditions should be at least those that would apply if platform workers had been recruited directly by the user to occupy the same job or their active search for such work.[80] Todoli- Signes argues that work-on-demand via app could be regulated by a

[73] Delfino, *supra* n.57, at 290-291.
[74] Frenzel, *supra* n.47, at 128.
[75] Davies, *supra* n.18, at 319.
[76] *Betriebsrat der Ruhrlandklinik, supra* n.20.
[77] De Stefano, Aloisi, *supra* n.15, at 22-23; New forms of employment, *supra* n.2, at 115.
[78] Janine Berg, Marianne Furrer, Ellie Harmon, Uma Ran, M. Six Silberman, *Digital labour platforms and the future of work: Towards decent work in the online world* (International Labour Office 2018).
[79] *Ibid.,* at 106.
[80] Risak, *supra* n.16, at 15.

special labour law that should include, among others, an obligation to pay at least minimum wage for the time spent working for a client.[81]

Although researchers agree that the issue of pay should be solved in the case of platform work, it is not clear whether only minimum wage or wage equal to other workers performing similar work should be paid. The answer to this question determines whether the equal treatment principle as regards pay consisted in the TAWD could be applied to platform workers.

Art.5(1) TAWD laying down that the basic working conditions of temporary agency workers should be 'at least those that would apply if they had been recruited directly by that undertaking to occupy the same job' refers that their wage should be the same as if they were hired as the employee of the user undertaking. Hence, the pay cannot fall below the minimum rate, but if the agency worker can demonstrate that she/he would have been paid more than the minimum wage if being recruited directly, equal pay can be claimed.[82] This also means that agency workers can claim the payment of wages in the levels agreed in collective agreements applicable in user undertaking.[83]

The application of Art.5(1) TAWD to platform workers means that they would have the right to equal wage with directly hired employees performing the same or similar work. If the end-user does not directly hire such employees, collective agreements as well as the wages of employees hired by other employers can be a reference point. Finally, they have at least right to minimum wage. This approach seems to be in line with the EU politics regarding platform work. The EU aims to facilitate innovative forms of work, but not in the expense of reasonable working conditions. Guaranteeing only minimum wage to platform workers would inevitably lead to worse working conditions compared to directly hired employees.

4.3 Working time

Art.3(1)f foresees the equal treatment of agency workers as regards the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays.

In the context of TAW this provision did not initiate discussion over its content. In the case of platform work, the situation is different, because the freedom of the worker to establish her/his own schedules and working hours is the main feature of platform work.[84] Hence, before analysing whether the principle of equal treatment as regards working time can be applied to platform workers, we need to determine, whether working time regulations as such are applicable. For this purpose, I discuss the problems raised by Harris and Krueger[85], and de Stefano and Aloisi[86].

Harris and Krueger argue that in the case of platform work we cannot differentiate between working and non-working time. Even if the apps are turned on, the worker could be primarily engaged in personal tasks. A platform worker is undeniably working if she/he performs work

[81] Adrián Todolí-Signes, *The 'Gig Economy': Employee, Self-Employed or the Need for a Special Employment Regulation?* 23 Transfer 193 (2017).
[82] Davies, *supra* n.18, at 318.
[83] Frenzel, *supra* n.47, at 128.
[84] *Ibid*, at 202.
[85] Seth D. Harris, Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, Dicussion paper 2015-10, December 2015, 13.
[86] De Stefano, Aloisi, *supra* n.15, at 28-29.

for the customer, but then her/his relationship with the platform is unclear. [87] However, as has been shown earlier, in some cases worker's notification duties combined with technological tracking enable to determine quite precisely when the worker is working for the client. For example, in Deliveroo the steps the worker is taking from the receipt of an order until the delivery of food, and the time spent are constantly tracked. Also in the case of Uber, it is possible to determine electronically, when the request has been accepted; pressing the 'Start Trip' button to receive the directions to the destination enables to determine when the trip has begun and finally, the time spent for the trip can be calculated on the basis of the app if the suggested route has been chosen.

Determining the actual time spent for working could be difficult in the case of crowdwork. However, in the example of AMT, the Requester gives instructions for the performance of work. Most probably the deadline is defined by the Requester. This could give some indication as how much time is spent for working. Yet, the deadline can be longer than the period needed to perform the task, also different workers can spend more or less time to perform the task. As a result, we need to admit, that determining the working time in the case of crowdwork can be problematic. The same is the situation in the case of work-on-demand via app if the platform does not supervise the working process (for example TaskRabbit).

Second, de Stefano and Aloisi raise the issue concerning the autonomy of platform worker in determining her/his working time. They refer to Verhulp[88] and explain that working time is defined as an interval 'during which the person gives up autonomy and is not free to determine its behaviour'. This concept diverges from the basic structure of some platform work arrangements. [89] However, they also find that workers who can determine the organisation of their own working time are not necessarily excluded from being in an employment relationship.[90] Working time regulations are applied to employees, and if platform workers could be classified as employees, they should also be protected by those regulations. The application of working time regulations does not fully exclude the autonomy of worker in determining her/his working time. Different flexible working time arrangements are allowed in the MS.

Third, Harris and Krueger find that if a worker works for two platforms at the same time it is unclear how the law should apportion total work hours as well as waiting time between the two companies.[91] Nevertheless, this issue does not concern only platform work. A worker can also have two or more part-time jobs, a full-time job and a part-time job, and in these cases the issues concerning the protection by working time regulations also arise. Yet, it is not usually claimed that employees working in more than one job could be exempted from the scope of working time regulations.

Finally, de Stefano and Aloisi bring forward the argument that working time restrictions may be detrimental to platform workers by limiting the possibility to earn a decent wage, stay above the ranking thresholds, then be paid sufficiently or be appointed in the future.[92] Here it is worth

[87] Harris and Krueger, *supra* n.85, at 13.
[88] Verhulp E. (2017), *The Notion of 'Employee' in EU-Law and National Laws*, A Thematic Working Paper forThe Annual Conference of the European Centre of Expertise (ECE) in the field of labour law, employment and labour market policies: The Personal Scope of Labour Law in Times of Atypical Employment and Digitalisation.
[89] De Stefano, Aloisi, *supra* n.15, at 28-29.
[90] *Ibid*.
[91] Harris, Krueger, *supra* n.85, at 13.
[92] De Stefano, Aloisi, *supra* n.15, at 29.

to mention the purpose of working time regulations. Working Time Directive[93]aims to protect the health and safety of workers. Limiting the duration of working time, granting adequate breaks, rest periods and annual leave are all foreseen for this purpose. In asking whether platform workers should be protected by working time regulations we cannot forget that their health and safety also needs protection. The wage rate should be such that platform workers could earn a decent wage in reasonable working time. Also, their rankings and future earnings should not depend on their constant overtime working and giving up rest periods. Solution to this issue is not exempting platform workers from the scope of working time regulations but forbidding practices that enable to pay extra-low wages and use such rating and promotion systems.

In my opinion working time regulations can be applied to platform workers if the platform controls working process by tracking the steps taken by the worker. In this case the autonomy of the worker to determine her/his own working time is limited, and it is also possible to determine the exact time spent for working. Then also the principle of equal treatment regarding working time could be applied.[94]

The issue is more difficult if the worker is not tracked and she/he is autonomous or has some flexibility to determine her/his working time. Then it is questionable how the platform can determine the actual working time and how it can be responsible for the observance of working time regulations. It is also unclear whether waiting and searching time should be regarded as working time.

Todoli-Signes argues that workers' freedom to establish their own schedules and working hours should be included in the special regulation, but employers should be allowed to set a maximum number of working hours per worker per week.[95] That, however, presupposes that the platform knows when the worker is performing work. Risak finds that search time connected to crowdwork and standby time with platforms that expect immediate acceptance when the app is switched on, should constitute working time.[96] Therefore, working time would begin as soon as the app is switched on even if the worker is not performing work for the client, but is waiting for the order that she/he is immediately ready to react. This solution somehow contradicts with the idea of platform work that there is a sufficient pool of workers that can accept tasks even if they work part-time and occasionally. Regarding waiting time as working time would mean that the platform is obliged to pay wage for this period. As a result, it cannot afford to have so many workers.

More appropriate seems to apply national regulations concerning standby time. For example, according to Finnish law the parties of an employment agreement can agree that the employee is required to remain at home or otherwise available to be called in to work when necessary. Standby time is not included in working hours, but the length and frequency of standby time cannot excessively disrupt the employee's free time. Upon agreeing on standby time, the employer and employee must also agree on remuneration taking into account the restrictions imposed on the employee's use of free time. At least half of the time the employee spends on stand-by at home must be remunerated either in pay or by corresponding free time.[97]In the

[93] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19.
[94] See also Risak, *supra* n.16, at 15.
[95] Todoli-Signes, *supra* n.81, at 202.
[96] Risak, *supra* n.16, at 15.
[97] Työaikalaki 9.8.1996/605, Chapter 2, Section 5.

context of platform work standby time could be used only in the agreement of the worker and the platform, the worker would receive at least half of the wage and the employer's burden concerning the payment would be reduced compared to including waiting time to working time.

Regarding searching time as working time is more problematic. As time spent to search work is not considered as working time also in the case of traditional working, it seems unreasonable to include this to working time in the context of crowdwork. To conclude, equal treatment concerning working time can be applied to platform workers if the performance of work is/can be tracked by the platform and if the worker is obligated to an immediate acceptance of the task if the app is switched on.

5. Derogations to the principle of equal treatment

The TAWD allows several derogations to the principle of equal treatment. According to Art.5(2) MS can provide for an exemption to equal treatment with regard to pay for workers who have a permanent contract of employment with temporary work agency and who continue to be paid in the time between assignments.

This exemption enables to accommodate TAW models, in which the agency plays the main role and is responsible for the fulfilment of most of the employer's obligations. Contrary to the models in which the relationship between the worker and user undertaking plays central role, the worker does not bear the risk of being without pay between the assignments. The worker has a permanent contract with the agency, and the agency is obligated to pay the wage even if there are no assignments. At the same time, her/his pay do not have to be equal to those hired by user undertaking.[98]

The derogation enabled in Art.5(2) TAWD appears to be a rather good compromise. In return for having a more secure permanent contract and stable income the worker needs to accept pay that may be lower than that in user undertaking. This exception also seems to enhance the idea that agency work is a 'stepping stone' towards permanent employment[99]. The possibility to pay lower wage can motivate agencies to hire workers on permanent basis.

As discussed above, platforms often do not regard themselves as employers, which means that they have not defined whether their relationship with the worker is a fixed-term or permanent employment contract. However, solving this question is crucial to decide whether Art.5(2) TAWD can be applied to platform work. Platforms can use a model in which the user is a central player and hire workers only in fixed-term basis. Yet, as shown earlier, that may be complicated because the incidental nature of the tasks can lead to the conclusion of large amount of very short-term contract. In practice that may be so inconvenient that it would be easier for the platform to conclude a permanent contract. This means paying wages also between the tasks but gives platform more control and discretional power. It could demand the worker to be available to work during agreed working time, also a possibility to pay less could motivate platforms to conclude permanent contracts. In short, the derogation foreseen in Art.5(2) can be even more beneficial in the context of platform work than in the case of TAW.

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[98] Bernd Waas, *A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment - Lessons to Be Learned from European and German Labor Law*, 34 Comp. Lab. L. & Pol'y J., 47, 48-49 (2012).

[99] Countouris, Horton, *supra* n. 17, at 336.

Another important derogation is foreseen in Art.5(4) TAWD. It allows the MS after consultation with social partners to derogate from the equal treatment principle through a qualifying period if an adequate level of protection is provided. This possibility is reserved to countries where no legal system of universally applicable collective agreements exists. It is argued that this possibility was created mainly for the UK.[100]

In the UK the right to equal treatment applies only after the agency worker has completed a twelve-week qualifying period. Davies finds that using qualifying period is problematic in several aspects. Because of the use of qualifying period over half of temporary agency workers in the UK can be exempted from the scope of the TAWD. Also, the derogation can be abused by the agencies if they avoid hiring the worker for at least 12 weeks in order not to secure the right to equal treatment.[101]

Countouris and Horton argue that the legislation that leaves more than half of temporary agency workers without protection can hardly be considered as providing adequate level protection.[102] Therefore British legislation foreseeing this kind of qualifying period can be considered as not in accordance with the TAWD. Nevertheless, until there is no practice in the CJEU concerning the issue, it is not clear, what is the adequate length of qualifying period.

As regards platform work, using qualifying periods is even more problematic. The tasks of platform workers tend to be so incidental that it would be very difficult to work continuously for 12 weeks as in British example. The application of this requirement would mean that only a small minority of platform workers would have a right to equal treatment. As a result, the TAWD would have only slight influence on the improvement of their rights. Even if the CJEU would ascertain the content of Art.5(4) by limiting the allowed qualification period, it would not help platform workers. Already very short qualification period would justify their less favourable treatment. Hence, to have any effect Art.5(4) needs to be amended for example by restricting the use of this derogation in the case of platform work. However, in this case the unequal treatment of platform workers and other temporary agency workers needs to be grounded.

6. Conclusion

The automatic application of the TAWD to platform workers is complicated and would not guarantee the improvement of their labour rights.

The TAWD is applicable to platform workers, if they are classified as ‘workers’, and if the work is performed under user’s supervision and direction. Even though the classification of platform workers as ‘workers’ can be complicated, national courts have detected the existence of control especially in the context of work-on-demand via app and regarded platform workers as ‘employees’ or ‘workers’ according to national law. This and the fact that the EU concept of ‘worker’ is broader than national concept of ‘employee’ means that at least part of platform workers can belong within the personal scope of the TAWD.

Nevertheless, it can be complicated to apply the TAWD to platform workers because the direction and the supervision of the worker is not always assigned to the user. As the control is

[100] Frenzel, *supra* n.47, at 128; Davies, *supra* n.18, at 314.
[101] Davies, *supra* n.18, at 314.
[102] Countouris, Horton, *supra* n.17, at 333.

performed through technical equipment that is not handed over to the user, the assignment of the direction and supervision becomes questionable. If the user has no right to supervise and direct the worker, or the supervision and direction is divided between the three parties such as in the case of Deliveroo or Uber, the TAWD cannot be applied.

As regards the content of the TAWD, some norms can be easily applied to platform workers. Other provisions are not suited to this type of work. The limitation of national restrictions and prohibitions to the use of TAW correspond well to the EU policy regarding platform work. Platform work is regarded as an opportunity if leading to good working conditions and should therefore be facilitated. Simultaneously precarious forms of platform work need to be avoided. The TAWD allows restrictions to the use of TAW on the ground of general interest as well as registration, licencing and certification regulation, which give the MS sufficient leeway to avoid the facilitation of precarious platform work.

The principle of equal treatment is also applicable in the case of platform work and could theoretically improve the working conditions of platform workers. In practice, the outcome may not be such as expected. First, the TAWD foresees equal treatment only as regards basic working conditions, the application of the TAWD instead of Fixed-Term Work Directive can be less useful for platform workers. Second, because of the larger autonomy of platform workers in determining her/his working time, the application of working time regulations as well as their equal treatment as regards working time can be more complicated. It is possible to determine working time only if the platform worker has switched on the app and is constantly tracked. Third, it can be complicated to find the comparator if the alternative for using platform work is to use self-employed entrepreneur or if it is difficult to determine the working place (especially in the case of crowdwork).

The TAWD also enables the MS to derogate from the principle of equal treatment. The first derogation concerning pay is allowed if the agency has a permanent employment contract with the worker. This derogation would be even more beneficial to platform workers than to temporary agency workers. Unfortunately, the second derogation allowing the use of qualification periods can lead to the exemption of most of the platform workers from the right to equal treatment.

To conclude, the automatic application of the TAWD to platform work is complicated. Not all platforms assign control to the user and even if the assignment of control can be detected, because of practical problems the application of the principle of equal treatment can only slightly improve the conditions of platform workers. This small effect, again, can be nulled by using qualification periods by the MS. As a result, the application of the TAWD to platform work does not solve the problems connected to the working conditions of platform workers. Other possibilities need to be found.