

Fighting (for) the margins: Trade union responses to the emergence of cross-border temporary agency work in the European Union

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Abstract

Recent research suggests that trade unions in the European Union have become more receptive towards temporary and migrant workers and recognise their distinct interests. This article investigates to what extent this shift in attitude informs union responses to cross-border temporary agency work, an important variant of migrant non-standard work in the European Union. This employment form entails several potential lines of intra-labour conflicts of interests, that is, insider versus outsider and domestic versus migrant workers, and thus offers a particularly promising case to study whether and how unions seek to aggregate the interests of an increasingly heterogeneous workforce. Our findings suggest that although trade unions have gained considerable regulatory influence and new capacities to mediate conflicts of interest

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between different worker groups, a considerable degree of ambiguity remains in union positions and strategies towards temporary agency work and cross-border labour. Instead of gradual steps towards full inclusion of workers regardless of status and origin, union responses are best described as selective representation.

Keywords

European Union, free movement of labour, posting of workers, temporary agency work, trade unions and non-standard employment

Introduction¹

This article examines union responses to a growing but little researched form of employment in the European Union (EU): cross-border temporary agency work (TAW). Domestic forms of TAW have received considerable attention from industrial relations scholars because of how its use threatens the unity of labour and the power resources of trade unions by splitting the workforce into groups with conflicting interests. Cross-border TAW, however, is arguably even more problematic, because it adds another potential intra-labour conflict by positioning cross-border workers in direct competition with domestic workers, potentially undercutting domestic wage and working standards. Trade unions have long been aware of this risk. Already in the 1950s French unions insisted on the inclusion of an equal pay clause in the Treaty of Rome, the founding document of the EU, to prevent an erosion of working standards through competition from workers in poorer member states. Neither of these two sets of conflicts – between regular and temporary workers, and between domestic and cross-border TAW – are new. Their combination, however, in a single form of employment is unique, thus making TAW an important case study for understanding the responses of trade unions to the growing heterogeneity of labour.

At the heart of the dual challenges of cross-border TAW is the workforce heterogeneity it introduces, which may ‘lead to a relative antagonism between the interests of different groups of employees’ (Heinze et al., 1985: 157). The defence of the interests of one group may occasionally force unions into ‘simultaneously accepting impairment of the interests of other groups’ (Heinze et al., 1985: 157). More recent research suggests that trade unions are trying to overcome this problem by including non-traditional groups of workers and representing their distinct interests (cf. Aust and Holst, 2006; Benassi and Dorigatti, 2015; Wölflé, 2008). In order to be effective, such strategies require that trade unions are willing and prepared to resolve conflicts of interests between old and new constituencies internally, to convey joint positions to employers, policymakers and their own increasingly diverse membership. In this article, we analyse the extent to which trade unions have adopted such strategies in the case of cross-border TAW, and whether

unions have been able to aggregate diverse interests across borders and status divisions.

Compared to the state of knowledge about domestic TAW (and posted work, another form of cross-border temporary labour subcontracting; see Arnholtz and Lillie, 2019) little is known about how cross-border TAW operates, the size of the market, the interaction of legislation and social partnership, or the intersection of European and national regulations of employment conditions. No reliable statistics exist, but all experts interviewed for this study confirmed that the market has grown significantly since the 2008 enactment of the EU Directive on Temporary Agency Work (2008/104/EC) and the expiration in 2011 of the maximum period of transition for labour mobility from new EU member states ascended in 2004. In this article we focus on union responses, especially in relation to how cross-border TAW operates, as well as European and country-level regulations, drawing on expert interviews with representatives of staffing agencies, their interest associations, and trade union organisations at the national member state and European levels of analysis. We examine how TAW mobility operates across three national contexts – Germany, the Netherlands and Poland – which together build the largest and most established corridor for cross-border TAW in the European Union to date. A comparison between the two receiving contexts, Germany and the Netherlands, is also promising because Dutch unions early on accepted and negotiated the conditions of TAW, while their German counterparts long resisted the deregulation of TAW (Vitols, 2008). Poland has become the largest sending country for European cross-border TA workers, and the most important source of cross-border TA workers destined for Germany and the Netherlands. Engaging in a multi-level analysis of regulatory activity at the national and European levels is important since both sets of actors, staffing agencies and trade unions have developed European-level organisational capacities for aggregating interests across and above member states, which have involved them directly in negotiating European legislation.

This article is structured as follows: in the next section we situate our study in the state of research on union responses to growing labour heterogeneity, highlighting the challenges of cross-border mobility for strategies to aggregate the interests of different groups of workers. Following this, we review the economic and regulatory dimensions of cross-border TAW in the EU and discuss implications for trade union strategies. We then detail case selection and methods, and in the subsequent sections, analyse and discuss trade union responses specific to each of the receiving and sending contexts. We conclude with a suggested agenda for future research on multi-level analyses of union responses to the growing heterogeneity of labour interests in the context of cross-border labour markets.

Preserving union unity and power: Challenges and choices

The structural challenge to trade unions posed by growing workforce heterogeneity has received renewed attention in the literature on the dualisation of labour

markets. Dualisation scholars typically argue that the massive expansion in non-standard jobs in many industrialised countries since the 1980s has made intra-labour conflicts more common, increasingly severe and difficult to manage for unions (Emmenegger et al., 2012). Workers with standard employment contracts often perceive TA workers, who offer more flexibility to employers, as a negative presence, especially where TA workers perform the same or similar tasks (Eichhorst and Marx, 2011). Even when such conflicts are absent, interests may not align. For example, Promberger (2006) cites a German works councillor, who tolerates the employment of some TA workers in his enterprise despite being opposed to TAW on principle, because of how TAW shields core workers (who are union members) from employers' flexibility demands. Hence, there may be little incentive for trade unions and their representatives to represent TA workers' interests, whether at the enterprise level, in collective agreements or in the legislative process.

TAW in its cross-border form is clearly a part of the challenge stemming from the Europeanisation of labour markets (Meardi, 2012), both in terms of potential competition between domestic workers and those from other member states, and in potential conflicts of interests between national and transnational interest representation and employment regulation. The increase in cross-border mobility in the context of the accession of Eastern European countries to the EU beginning in 2004 has revived long-standing fears of a race to the bottom in social standards and wages should employers be allowed to exploit wage and other contractual differences between the new and old member states (e.g. Krings, 2009). Moreover, differences in national systems of industrial relations can become contentious when workers receive employment contracts in countries different from where they do their work. Such differences may cause cross-national disunity among trade unions, especially since employment regulations remain one of the least Europeanised policy areas (Sciarra, 2005). National institutions of collective bargaining and social partnership therefore remain paramount for the regulation of working conditions. This means, national and not European institutions constitute the crucial power resources of national trade union organisations. Hence, attempts at expanding union activities beyond national borders may result in regime competition or may be perceived as a threat to unions' power resources at the national level (Cremers, 2016; Cremers et al., 2007; Pulignano, 2007).

These potential conflicts of interest indicate that trade unions today are confronted with a new transnational dimension of the old 'crisis of interest aggregation' (Müller-Jentsch, 1988: 177). The literature also suggests that in order to retain their influence in the context of cross-border TAW, trade unions can choose one of two strategies: they can either try to retain the power they enjoy by focusing solely on the interests of traditional constituencies, for example preventing them from being replaced by TA workers, or they can try to expand their membership and bargaining capacities to TA workers, including those who are mobile across borders. Research on union responses to non-standard and temporary cross-border labour yields some evidence of unions pursuing the latter inclusionary path. Yet it

also suggests that trade union strategies are primarily shaped by the institutional resources available to them (Pulignano et al., 2015) and by how industries and related product markets operate (Lillie, 2012). For instance, in markets where international competition is strong, cross-border cooperation of unions offers the most promising route to achieve concessions from employers. Inclusive strategies can also entail expanding bargaining capacities by entering into agreements for new worker constituencies.

Trade unions can also compensate weaknesses by strengthening the capacities they already have (Gumbrell-McCormick and Hyman, 2013: 31), for example inclusion of TA workers in collective bargaining may offset low organisation rates. Already in 2009 Arrowsmith (2009) found that in 14 out of the then 27 EU member states, some aspect of TAW was regulated by collective agreements. In Germany, the coverage of TA workers in collective agreements is higher than for standard workers, with basic working conditions between them relatively equalised (Apitzsch et al., 2015). In the Netherlands, collective agreements directly address some of the grievances that are specific to cross-border TA work, such as ensuring the application of destination country labour standards and a decent quality of housing provided by agencies. Some trade unions have even started specific initiatives to increase the organisation rates among temporary cross-border workers, for example by hiring organisers who speak sender country languages (e.g. Eldring et al., 2012). Attempts have also been made to establish new union organisations, such as the European Migrant Worker Union (EMWU). Founded in 2004, the EMWU intended to engage in collective bargaining and thus to operate as a genuine trade union specifically for temporary cross-border workers in the construction sector. Although eventually restructured as a 'servicing and information point' for migrant workers in Germany (Greer et al., 2013), Kahmann (2006) sees the EMWU as a substantial step towards the full inclusion of temporary migrant labour in the German trade union movement.

Trade unions can also pursue an inclusionary strategy by supporting political objectives that, while important to all workers, especially benefit non-traditional groups. One example in the UK is the campaign to introduce a national living wage (Heery, 2009: 438). Often, such campaigns are used to specifically address issues of cross-border workers (Bieler et al., 2008; Bronfenbrenner, 2007; Lindberg, 2011). Yet they are often temporary and limited in scope, and thus can fall short of a long-term strategy of inclusion. This may even apply in cases where TA workers are formally included as union members. Unions may still be unwilling to include their distinct interests equally in the formulation of union strategies and decision-making processes (Pernicka and Holst, 2007: 31). It is therefore important to assess in each case to what extent trade union strategies are indeed inclusive in the sense of recognising and mediating contradictory interests or are limited to cases where there are no conflicts of interests (Benassi and Dorigatti, 2015; Heery, 2009). Three types of union responses therefore need to be distinguished. We review the implications for unions' attitudes towards interest aggregation and the development of transnational bargaining capacities in Table 1.

Table 1. Types of union responses and implications for interest aggregation and bargaining capacities.

	Exclusion	Selective representation	Inclusion
Interest aggregation	Protect interests of core constituency of workers with homogeneous interests	Cooperate with non-members when interests align or do not conflict with core constituencies	Attempt to align interests of core constituencies and non-traditional groups, including active mediation of conflicts of interest
Bargaining capacities	National institutions and member-based organisational capacities	National institutions and member-based organisational capacities, with temporary extensions or segmentation of bargaining to represent non-members	Build transnational capacities with the aim of integrating national institutions and transnational capacities; build inclusive membership

By adopting exclusionary strategies unions seek to protect the interests of traditional constituencies of union members within the framework of national institutions and bargaining. Cross-border TA workers are either not represented by unions or perceived as a threat to national bargaining capacities. Partial inclusion of non-traditional groups of workers which we call 'selective representation', means unions occasionally adopt an inclusive orientation, but only when there is no conflict of interest with regular workers/union members. In contrast, when adopting fully inclusionary strategies unions seek to actively mediate conflicts of interests within labour and to develop new alignments, which become more likely when unions develop bargaining capacities across national jurisdictions. Before we examine evidence of the presence of these trade union strategies in the sending and receiving contexts, we briefly discuss the development of cross-border TAW as a new dimension of labour heterogeneity.

The European market for cross-border TAW

In order to understand the factors that shape trade union responses to cross-border TAW, it is necessary to look at how the market for cross-border TAW is structured and regulated. It is still a relatively recent labour market segment, originating in the cross-border expansion of production organisations (Coe et al., 2011), the growing global trade for personnel services (e.g. mode 4 trade in the World Trade Organization code) as well as the changing norms and increased legitimisation of TAW as a form of employment (Shire et al., 2018). In the EU, the development of cross-border TAW has been fueled by the 2008 Directive (2008/104/EC) on TAW, which has harmonised regulations and legitimated TAW in all member states (Sartori, 2016). One important implication is that since its implementation, governments and social partners have been curtailed in their ability to limit the use of TAW. Restrictions are only possible when a regulation aims at 'the protection of workers posted' (Art. 4, 2008/104/EC). The cross-border TAW market has grown particularly strongly since the accession to the EU of several Eastern European countries in 2004 and the end of transition measures restricting mobility (Pijpers, 2010), driven by the expansionist strategies of leading temporary staffing agencies into new member states (Coe et al., 2011; Peck et al., 2005).

All our informants agreed that cross-border TAW today constitutes an important and growing segment of labour mobility in the EU. The actual size of the market, however, is difficult to estimate. This is partly due to the fact that different legal vehicles are used for recruiting and placing workers across borders, that cannot be identified reliably in official data. An important distinction is between TA workers who are hired by an agency in their country of origin and posted across borders (posted agency workers), and workers who are recruited by an agency in a country of origin or destination, but who are employed by the agency at the destination (migrant agency workers). Official data on postings, which, however, is not comprehensive, suggest that posted agency work accounts

for a relatively minor share of just 0.6% in 2015 of all postings (European Commission, 2016). Data from the Polish Ministry of Labour (2015) indicate that Poland is the most important country of origin of posted TA workers. Since the 2008 enactment of the TAW Directive, industry experts estimate that the form of migrant agency work has become the more important variant and will continue to grow (Interview, Eurociett, 14 February 2014). National TAW statistics of receiving countries hint at a growing share of mobile labour employed by domestic agencies: in Germany, the share of non-German TA workers rose from 17 to 22% between 2006 and 2015, and in 2018 accounted for over a third of the TA workforce (Bundesagentur für Arbeit, 2018).

Cross-border TAW is a triangular employment relationship, in which a temporary agency places a migrant worker for a fixed period with a user firm. In terms of the regulation of employment contracts however, the distinction between posted and migrant TA worker is relevant (Shire et al., 2018: 164). Migrant TA workers, who are defined by the location of their employment contract in countries of destination, are covered by the same standards and protections as domestic TA workers. Posted TA workers, who by definition are employed by an agency in their country of origin and posted to a user enterprise in another member state for a limited time, are subject to certain minimum standards stipulated in EU legislation on posted work (Recital 14, Posted Workers Directive 1996/71/EC), but otherwise are covered by terms and protections of sending countries (though sectoral standards of the destination country may also apply). The point is that these two forms of cross-border TAW are covered by different Directives, with potentially different consequences for employment terms and social protections.

The two receiving countries, Germany and the Netherlands, which are the focus of our analysis, exhibited different patterns of using migrant agency versus posted agency workers, explained in part by the overall looser regulations on agencies in the Netherlands (Interview, Eurociett, 14 February 2014). Thus, the Netherlands has higher rates of migrant TAW, while German clients have continued to prefer posted TAW, which situates the employment relation in Poland or other sending member states. Agencies and their clients, however, develop ways to evade even the looser regulations available, in order to take better advantage of lower wages and social contributions in the countries of origin (Shire et al., 2018: 165). The German employer association representing small- and medium-size agencies described one such practice as so-called *Huckepacküberlassung* (literally ‘piggyback’ transfers). In this practice, Polish workers are employed by an agency in Poland, placed in the Polish subsidiary of a German-owned firm, then sent to Germany to work in the form of a company-internal transfer (Interview, IGZ, 10 June 2014). ‘Piggyback’ transfers thus hide both the agency and posting relation, bypassing provisions aimed at protecting cross-border workers in both EU Directives. The interaction of regulations in sending and receiving countries, and the strategic actions of agencies and their clients to optimise cost savings and minimise employer obligations, shape the actual choice of cross-border practice.

The 2008 TAW Directive introduced one important restriction on EU member states in how they regulate agency work – the obligation to revoke so-called unjustified restrictions on the use of TA workers, which in some countries had been common in both labour law and in collective agreements. At the same time however, the 2008 TAW Directive posed two options for regulating the conditions of agency workers – through either legislation or collective bargaining. This latter option played an important role in reversing trade union resistance to TAW, by opening an opportunity for unions to rejuvenate systems of collective bargaining which had been eroding in countries like Germany (discussed in the ‘The Netherlands’ and ‘Germany’ sections). These stipulations in the Directive also made agencies more willing to enter into collective agreements, as they offer a way to moderate legislated equal pay clauses (Interview, IGZ, 10 June 2014; Interview, Eurociett, 14 February 2014). An unpublished informal survey jointly conducted by IndustriALL ETU (a European industrial union federation, which includes the metal sector) and Eurociett in 2013 suggests that TAW-related collective bargaining is common. In eight of the surveyed countries, there were collective agreements that introduced deviations from the equal pay principle, and in 10 countries there were agreements that imposed a cap on the number of TA workers allowed in an enterprise.

Data and method

The research reported here adopted an actor-centred approach to examine responses and strategies of trade unions in relation to cross-border TAW.² A corridor of cross-border TAW originating in Poland and extending to Germany and the Netherlands formed the spatial context for the study. This corridor was selected on the basis of preliminary interviews with industry experts, who indicated that Poland was the single most important source country of, and Germany and the Netherlands the main destinations for, cross-border TAW. The Netherlands is also of particular interest because Dutch trade unions have been active in regulating cross-border TAW for much longer than other union organisations in the EU. The scope of research was explicitly multi-level, in order to study the interaction of national and EU level negotiations and regulations of cross-border TAW. Research in some cases also focused on sectoral levels of consultations and bargaining. In addition to trade unions, our research covered agencies’ associations, government actors and the practices of specific temporary agency firms, identified by associations and unions as important employers of cross-border TA workers. In total, we conducted interviews with representatives of seven trade union federations and sectoral unions at the national and EU levels (Germany, 2; Netherlands, 1; Poland, 2; EU, 2), eight temporary agencies engaged in cross-border recruitment and placement (three each in Germany and the Netherlands, two in Poland) and five staffing agency associations (Germany, 2; Netherlands, 1; Poland, 1; EU, 1). Temporary agencies interviewed have been anonymised, and trade unions and agency associations are named, with individual

informants documented in relation to their function. The interviews directly cited are listed at the end of the article.

Responses of European trade union organisations

Trade unions at the European level are primarily organised as federations of national member state federations and sectoral unions, with the European Trade Union Confederation at the helm. The ETUC does not have direct membership, nor does it participate in collective bargaining. Their key power resource is their ability to co-decide ‘the material of European legislation’ (Ahlberg, 2008: 192) which stems from the European Commission’s (EC) obligation, since the Treaty of Amsterdam in 1999, to engage the social partners in the drafting of any legislation in the field of social policy, including employment Directives.

The EU policy-making processes on TAW and posting show that interest aggregation is difficult not only across member states but also between industrial sectors at the EU level. The negotiation of the TAW Directive brought to light tensions between unions representing workers in the TAW client sectors, and service unions who seek to organise and represent TA workers regardless of the sectors in which they are placed. A similar division existed on the employer side, between association representing client firms (associated in *BUSINESSEUROPE*) and the European association representing temporary agency firms (at that time called *Eurociett*). Tensions escalated quickly in 2000, when the EC initiated a peak social dialogue to formulate a Directive on TAW, which included the two sets of employer associations and trade unions. On the union side, this involved the European service sector union representing all TA workers (*UNI Europa*) and the European Metalworkers’ Federation (since 2012 *IndustriALL ETU*), one of the main client industries for TA workers (cf. Ahlberg, 2008; Vosko, 2009). One key point of contention in the negotiations was the institutionalisation of collective agreements for TAW, which would mean that TAW would become a sector itself. While the service sector unions preferred collective agreements, client sector unions insisted that trade unions should resist any attempt at further legitimising TAW (Interview *IndustriALL ETU*, 3 June 2014).

When negotiations over the TAW Directive became deadlocked in 2001, *Eurociett* and *UNI Europa*, both representing TAW as a sector, bypassed the other federations involved in the *peak* dialogue by submitting a joint *sectoral* dialogue application. Sectoral dialogues are not initiated by the Commission, but by the relevant social partners of a sector, with participation restricted to one organisation from each side. Once accepted, the Commission funds a secretariat and organises annual meetings. The Commission accepted the application for a sectoral dialogue, meaning that *UNI Europa* and *Eurociett* were effectively designated as the solely recognised social partners for any further negotiations over a TAW Directive. The metal sector unions were ‘quite unhappy’ about this development, as they felt that their interests, which tended more towards their regularly employed union members and not temporary workers in the sector, were no

longer part of crucial discussions with the Commission (Interview, IndustriALL ETU, 3 June 2014). For example, metalworkers' unions tended to favour collective agreements which restricted the use of temps in enterprises. Such provisions, however, restrict the employment opportunities of TA workers, and staffing associations have been attacking them as limiting their business opportunities. The sectoral social dialogue sealed the collapse of the peak social dialogue, and foregrounded the interests of TA workers and the staffing industry in the negotiation of the TAW Directive. While channels of political influence at the European level remained open to client employers and their sectoral unions, provisions written into the 2008 Directive, such as the ban on 'unjustified restrictions' in temporary staffing, reflect the stronger influence of the staffing industry and unions representing TA workers.

The conflicts of interests between unions and employers on the staffing and industry sides persisted after the Directive was enacted in 2008, centring especially on defining and implementing prohibitions on 'unjustified restrictions'. The fact that sectoral unions continued to bargain limits on numbers of TA workers in client enterprises shifted the attention of the European staffing association, Eurociett, from the sectoral social dialogue with UNI Europa, to establishing what they called an 'informal social dialogue' with IndustriALL ETU. The aim was to stop limits on TA workers in all union sectoral and enterprise-level collective agreements (Interview, Eurociett, 14 February 2014; Interview, IndustriALL ETU, 3 June 2014). The activities of UNI Europa and IndustriALL ETU thus unfolded independently, and without inter-union coordination. We found no evidence of attempts to align interests of TA and core workers in client firms at the European level.

Sectoral trade unions have, however, made partial attempts at the European level to encourage their member state affiliates to represent TA workers within their industries. IndustriALL ETU has incorporated TAW into its 'common demands', which are meant as non-binding guidelines for national member union bargaining strategies. The 2012 'common demand' on precarious work encouraged member unions to negotiate for immediate equal treatment for TA workers (without waiting periods often included in collective agreements), and for full access to all social protections extended to regular workers at client firms. At the same time, however, it advised member unions to continue to consider limits on the number of TA workers and even outright bans on TAW in industries if deemed necessary.

Neither UNI Europa nor IndustriALL ETU reported capacities in bargaining for TA workers or for representing the interests of workers who are posted or who migrate to another EU member state: 'There is a role for us. But it's an issue also of organisation. We have about 20 staff at the European level and we are one of the biggest' (IndustriALL ETU, 3 June 2014). A similar sentiment was expressed by UNI Europa: 'It's our mission to help' and 'affiliates do help transnational workers (...) but some affiliates just have different priorities' (Interview UNI Europa, 26 November 2013). There was little UNI Europa could do if affiliates

were not engaged, because it never challenges the domestic positions affiliates take on issues out of principle.

There are only few union initiatives formulated at the European level that directly target cross-border workers. These include attempts to establish trans-European union membership. In the metalworkers' sector, the so-called solidarity agreement offers posted workers local union protection for up to 1 year including some legal support. A precondition of such inclusion, however, is proof of regular union membership in the home country (IndustriALL ETU, 3 June 2014). UNI Europa's 'global passport' scheme is similar in that it offers some benefits of local union membership, especially legal support, to posted workers. Yet it targets solely managerial staff and also requires a regular membership in at least one country. Since neither union could provide evidence of TA workers being included in such arrangements, it is unlikely that TA workers are supported by current European unionisation and representation strategies. Instead, the most likely arenas of membership and support remain the national levels of receiving and sending states.

The Netherlands

All of our informants, whether on the union or agency side, referred to the Netherlands as the most advanced EU member state when it comes to the regulation of cross-border TAW. The Netherlands is also home to Randstad, in 2019 the world's largest temporary work agency. Available industry estimates are that 14% of all Dutch temp workers are foreign recruited (Interview, ABU, 3 March 2015) and the Netherlands is the main destination for cross-border TA workers from Poland (Napierala and Fialkowska, 2013).

Dutch unions have not resisted the expansion of TAW. Instead, they were among the first national trade unions to co-regulate TAW through collective bargaining. The first collective agreement on Dutch TAW was concluded in 1971. The Dutch attitude towards TAW is usually explained as being part of the unions' strategy to maintain high employment protections, especially in times of economic restructuring (Sol and Houwerzijl, 2009: 35). Since the beginning, Dutch collective agreements have included provisions that allowed client firms to deviate from the equal treatment principle enshrined in the labour code. This mechanism was later adopted into German law and the EU TAW Directive. In the Netherlands, however, this approach of allowing for more flexible rules through collective bargaining has been used also in many other contexts. The option to deviate from equal pay through collective bargaining has since been written into Dutch labour law, in the form of a reform of the 1999 Flexibility and Security Act, (*Flexwed*), in exchange for improving the legal status of TA employment contracts. Staffing agencies supported the reform on the expectation of achieving more flexible conditions by negotiating with unions, while unions welcomed the it as an incentive for agencies to engage in collective bargaining (Sol and Houwerzijl, 2009: 38).

The most important Dutch collective agreement on domestic and cross-border TAW, the ABU Collectieve Arbeidsovereenkomst (ABU CAO), has since 1999

been concluded by the peak staffing employers' association (ABU). ABU represents about 70% of the Dutch agencies and negotiates the collective agreement with the service sector union CNV (*Dienstenbond*) and two further union federations (FNV *Bondgenoten* and *De Unie*). The ABU CAO includes a chapter on the use of cross-border workers and their working conditions (mostly implementing the minimum standards of the 1997 EU Posted Worker Directive). In order to enforce compliance with standards for cross-border workers, the Dutch social partners have used various instruments such as the creation of a squad of inspectors, referred to colloquially as the 'CAO police' (*Stichting Naleving CAO voor Uitzendkrachten*), who can inspect any enterprise that is covered by the agreement. Inspectors can impose fines of up to €100,000 and unions as well as agencies consider it to be fairly effective in imposing standards, including for cross-border TAW. Nonetheless, one of the unions party to the collective agreement, FNV *Bondgenoten*, which is also one of the largest union federations in the country, maintains its own team of inspectors to monitor pay levels. They report finding violations in '99.9 per cent of cases' (Interview, FNV *Bondgenoten*, 19 March 2015). Problems with enforcement of existing rules were also the main reason named by unions with regard to cross-border TAW:

I think it [cross-border TAW] is fine and there is no problem with it at all if everybody gets the same treatment. If it is equal pay for equal work then there is no problem. But now you are getting unfair competition from temporary staff and foreign staff vis a vis the normal staff. (Interview, FNV *Bondgenoten*, 19 March 2015)

Moreover, despite its reputation as a country with a high level of regulation, our informant criticised that collective agreements regularly extend the waiting period until equal pay becomes mandatory, thus allowing user firms to pay agency employees less than regular workers for longer durations.

That is a difficult point we actually want to get rid of but can't. But what we want is, and that is why we lobby with politicians as well, is that it is law that they are getting the same wages (...) from day one. (Interview, FNV *Bondgenoten*, 19 March 2015)

The growing intolerance of Dutch unions towards the use of collective agreements to legitimise deviations from equal treatment suggests a change in their position, from a reliance on collective bargaining towards advocacy for stronger labour law. Both staffing employers and unions representing TA workers reported that regulation through collective agreements has become increasingly difficult, precisely because it has led to more heterogeneity of wage levels and regulations (Interview, ABU, 3 March 2015; Interview, FNV *Bondgenoten*, 19 March 2015).

The inclusion of agency workers' interests through collective agreements has also not fully resolved the issue of interest aggregation. Similar to the EU level, a latent conflict is evident between the collective agreements concluded by employers in the TAW sector and the client sector (Sol and Houwerzijl, 2009: 45),

occasionally resulting in regulatory contradictions for TA workers. User sector collective agreements, for example, can impose restrictions on the number of TA workers enterprises may use. While agencies oppose such restrictions, Dutch unions recognise them as a problem of potentially foregrounding regular workers' interests and failing to fully represent TA workers' interests in collective bargaining (Sol and Houwerzijl, 2009: 50).

Apart from collective agreements, the staffing employers' association, ABU, has developed a series of codes and certifications of good practices in cross-border temp placements. ABU hopes to thus push out of the market what it considers to be 'rogue agencies' who exploit cross-border workers by undercutting wages and standards, and in some cases even engage in human trafficking (Interview, ABU, 3 March 2015; Interview, Eurociett, 14 February 2014). Large agencies have also advocated for compliance with tax and social security regulations, for which voluntary certification awards are now established. Such 'best practice' certifications have also been developed for housing standards which are to inform cross-border workers of agencies offering proper housing. Both initiatives address problems that are highly relevant for cross-border TAW. Trade unions, however, find them inadequate and prefer tougher labour laws to protect cross-border TA workers. 'We need new legislation' (Interview FNV *Bondgenoten*, 19 March 2015).

As for organisation strategies, FNV *Bondgenoten* stressed that they see cross-border TA workers as potential members (see also Berntsen and Lillie, 2016) but found that establishing a presence among this group was challenging. Apart from language barriers, attitudes of Eastern European workers towards unions were often unreceptive due to historical absence of independent unions under socialist rule. The main obstacle for reaching out to TA workers, however, was a conflict of interests with regular union members: 'To get these people together I think that is the biggest challenge. Now you see groups and groups and groups and nobody is ... there is no collective anymore. Everybody is individual' (FNV *Bondgenoten*, 19 March 2015).

Germany

Germany is the main destination for EU cross-border labour in terms of absolute numbers, and has an established domestic TAW market. In contrast to the Netherlands, cross-border temporary work as well as domestic TAW has long been highly contentious. German trade unions not only rejected attempts at deregulation of TAW until the late 1990s, but also supported the longest possible (7-year) moratorium on the free movement of labour from Eastern European member states after their accession.

Union attitudes towards TAW began to change from the late 1990s, in part due to the changes in ILO conventions, which in 1997 formally legitimated private fee-charging employment agencies (Shire et al., 2018), and with the so-called Hartz reforms of 2001–2003. A key recommendation of the Hartz commission was the deregulation of TAW following the Dutch model, which included both the

legislation of equal treatment and the possibility to deviate from it through collective agreements (Vitols, 2008). The prospect of more flexible provisions was an important incentive for agencies to pursue collective agreements with trade unions. Trade unions, on the other hand, hoped that the new role for collective bargaining would help to rejuvenate the system of German industrial relations, which had seen a steady fall in collective agreement coverage rates since the early 1990s.

To integrate the TA sector into the German collective agreement structure, trade unions in the service sector, as well as key industrial user sectors, such as the metal and chemical workers, jointly established a new entity and bargaining format under the umbrella of the German union federation DGB the *DGB-Tarifgemeinschaft Leiharbeit* (Aust and Holst, 2006: 305). The *Tarifgemeinschaft* negotiates collective agreements for the TAW sector with the two agency associations in Germany: the Employers' Association for Personnel Services (*Bundesarbeitgeberverband der Personaldienstleister*) and the Interest Association for Staffing Agencies (*Interessengemeinschaft Zeitarbeit*) representing small- and medium-size agencies. The agreements establish nationwide pay scales for TA workers, which tend to be below the wages in the main client industries, which are set in regional agreements. Collective agreement coverage is close to 100% of TA workers, which, means that effectively the entire TA workforce is exempted from the legal principle of equal pay from day one. This result has been criticised since the first major reform in 2003 and prompted the government to announce a revision, which would strengthen the equal pay rule in 2011. In order to avoid stricter legislation, the social partners agreed to establish a second set of collective agreements, concluded by user sector unions and employers, for pay supplements (*Tarifzuschläge*), so that wages of TA workers would be gradually raised to eventually match those of comparable workers at client firms.

Trade unions have been defending collective bargaining for TAW by recalling the government's threat in 2003 that it would not include an equal pay clause in the proposed new TAW legislation if trade unions did not allow deviations through collective agreements (Aust et al., 2007: 248). The fact that user sector and service sector unions jointly negotiate in the peak level *Tarifgemeinschaft* can be seen as a new mechanism for interest aggregation. Yet criticism of union complicity in expanding the use of TAW is still strong and usually directed at user sector unions, who see the advantage of protecting core workers by allowing a contained buffer of more flexible temporary employment. This was the case in 2017 when IG Metall, the metalworkers union, responded to yet a further strengthening of the equal pay for equal work principle by almost immediately negotiating a new collective agreement on wage supplements (*Tarifzuschläge*), which effectively exempted TA workers from most reformed legal provisions. The sincerity of user sector unions to represent the specific interests of TA workers has thus again been cast in doubt.³

At the same time, IG Metall is widely seen as one of the most active unions on the TAW question and it is being credited for achieving substantial improvements in the working conditions of TA workers through collective agreements (e.g.

Hassel and Schroeder, 2018). German trade unions have also become decidedly more inclusive when it comes to membership. The service sector union Ver.di, for example, temporarily devoted 2% of its membership fees to fund innovative campaigns to organise non-standard workers (Aust and Holst, 2006). IG Metall claims to have organised around 80,000 TA workers or about 7% of the total (Von Borstel, 2015) thanks to targeted campaigns. In addition, the two largest sectoral unions, Ver.di and IG Metall, have run nationwide advertisements to alert the public to the social hardship TA workers face, and have encouraged works councils to negotiate for better working conditions for TA workers at the enterprise level (Benassi and Dorigatti, 2015).

A certain degree of ambiguity about the commitment and capacity of industrial unions to represent TA workers and advocate for better working conditions nonetheless remains. IG Metall itself has argued that the support of many of their works councillors for TA workers during the global financial crisis had been insufficient and failed to prevent lay-offs of TA workers (Dribbusch, 2012: 139). IG Metall also continues to recommend works councillors to consider caps on the number of TA workers allowed at the enterprise level, effectively curtailing the employment chances of TA workers (Wölflle, 2008). The limited commitment to more inclusionary strategies is particularly pertinent in reference to cross-border TA workers. In interviews with two initiatives that directly deal with cross-border TA workers, we found a noticeable reluctance to commit own resources to support these workers (Interview, Ver.di, 21 April 2013; Interview, DGB, 20 March 2015). Such campaigns are clearly pursued as subsidiary activities, with little connection or consequence for other efforts to improve conditions for either domestic TA workers or regularly employed union members. In 2012 at Amazon Germany, for example, investigative journalists publicised the exploitative working conditions of cross-border TA workers.⁴ The documentary aired on national public TV reported how TA workers from Spain and other European countries were duped into employment with an agency rather than Amazon directly, not paid wages, and subject to excessive security, inconvenient transportation and poor housing conditions. Cross-border workers contacted the local Ver.di organisers, who, however, could not offer any organisational assistance as their resources were strictly to be used for organising regular workers as members. Not only did their own union organisation remain reluctant to help cross-border TA workers, but also trade unions in the country of origin of the workers showed no interest in supporting non-members abroad (Interview local organiser, Ver.di, 21 April 2013). Without any organisational backing or resources, the Ver.di organisers then decided that the only way to help the workers would be a media campaign. This resulted in the aforementioned documentary, which later led to parliamentary inquiries. Though later hailed as a success for unions, it was achieved not due to organisational inclusion of cross-border TAs through the extension of membership and representation, but through individual agency.

A certain degree of strategic ambiguity in union attitudes is also visible in the DGB project *Faire Mobilität* (Fair Mobility). The project currently maintains seven

offices nation wide open to all cross-border workers, whether union members or not, providing legal information in native languages and limited legal support, which in potential landmark cases includes the full coverage of legal expenses. Officials at *Faire Mobilität* maintain ‘a relatively high number of international contacts’, but with a focus on specific cases of disputes, and not on building cross-border union networks and capacities (Interview, DGB, 20 March 2015). They also stated that more needs to be done for cross-border workers on the side of unions:

We do need a debate within the union movement on temporary membership. . . . as the IGBau [Construction Workers’ Union] has been proposing but has not yet implemented as far as I know. (. . .). Until now there is no cohesive concept that everyone agrees to.

Without the prospect of organising cross-border workers, union initiatives such as *Faire Mobilität* seem confined to operate ‘outside the core organisation’, as Pries and Shinozaki (2015: 381) have argued. This is underlined by the fact that *Faire Mobilität* is primarily funded by the German government, in accordance with its obligation to establish centres of support for migrant workers within the evolving EU regulatory framework on cross-border temporary work. Hence, although *Faire Mobilität* is officially and resolutely supported by the DGB executive board, it cannot be seen as the product of inclusionary strategies on the part of trade unions.

Poland

Poland is without doubt a much more difficult environment for trade unions than the older EU members states discussed above. Only about 15% of Polish employees are covered by collective agreements, compared to 84% of Dutch and 58% of German workers (Visser, 2016). Moreover, Polish unions have never been involved in negotiating national TAW legislation, whereas this has been standard practice for European, German and Dutch trade unions. The main purpose of the Polish TAW Act of 2004, which for the first time introduced regulations, was not to legitimise TAW, but to put quasi-legal practices that had emerged in the early 1990s on a sound legal basis before the country became a member of the EU.

Collective agreements in Poland only play a role for domestic TA workers, and even then, only for a very small segment. None of them cover cross-border TA workers employed by Polish agencies. The institutional framework is partially to blame for this absence, since it restricts trade union activities in several important ways. For example, firms with less than 10 employees are not required to bargain wages and working conditions, a threshold that effectively eliminates most agencies as employers from industrial relations institutions. According to Polish union officials, the proliferation of small agencies is itself a consequence of Polish law, which imposes very few restrictions on those who wish to establish a temporary agency (Interview, OPZZ, 7 May 2015). The result is a rather atomised TAW market in Poland, which in 2015 included an estimated 5000 agencies (Interview, Polskie Forum HR, 5 May 2015). Another obstacle to bargaining on the union side

stems from the differentiation between employment and civil law contracts for employment. Employment contracts fall under the provisions of the labour code, for example with regard to working time and equal pay (which applies to all employees without probation periods). Employment contracts for agency workers are common among larger agencies, which comprise about 40% of the TA labour force. So-called civil law contracts (which include various forms of task-related employment and self-employment) offered by smaller agencies especially are exempt from the labour code (Interview, Polskie Forum HR, 5 May 2015). Until 2015, unions were legally barred from organising workers with such contracts (Lewandowski and Magda, 2017: 148). Seen against this background, it is not surprising that Polish trade unions have focused their activities on large agencies as well as on user sectors where they possess organisational resources:

Our strategy is, friendly speaking, more focused on big companies. If we have the case of posting from bigger company to the bigger company, the building site and so on, it is possible to organise, it is possible to cooperate with the unions from the hosting countries. (OPZZ, 7 May 2015)

But this was not possible when smaller agencies were involved. Furthermore, this strategy meant that several important sectors were excluded entirely.

The second most important sector for cross-border temporary staffing is of course the care sector, especially elderly care. And honestly trade unions know nothing about this. (...) trade unions are better with the work of men than the work of women. And this is women's kind of work. (Interview, NSZZ Solidarność, 8 May 2015)

The limitations on union capacity are also evident in legislation. Although tripartite social dialogues exist at the sub-national regional level in Poland, trade unions have effectively no capacity for shaping legislation (Interview, OPZZ, 7 May 2015). Only in a few cases have unions been able to include TAW-related rules into collective agreements, but usually only in the form of introducing caps on the number of temporary agency workers allowed, which are not necessarily, as discussed above, in the interests of temporary workers (Interview, NSZZ Solidarność, 8 May 2015). The lack of union political influence also explains why cooperation with trade unions as in the Netherlands or Germany has not been on the agenda even for larger agencies that wish to improve TA standards. Polskie Forum HR, the largest Polish agency association, instead focuses its efforts on labour inspections to encourage a more vigorous enforcement of existing rules (Interview, Polskie Forum HR, 5 May 2015). The main motivation behind this strategy, as in the Netherlands, is countering the reputational risk posed by the thousands of small and largely unsupervised agencies that compete against the business models of large agencies. Cooperation with unions was however not part of it. Trade unions themselves declared to have 'no tools for direct impact' on the practices

of staffing agencies (Interview, OPZZ, 7 May 2015). Representing the interests of cross-border TA workers

is important to us but if you think how many staff we have, how much money we have, how many other hot internal topics we have, I don't want to make a pink picture and say to you that this is really a hot topic. (Interview, NSZZ Solidarność, 8 May 2015)

The same interviewee also blamed strategic incapacity of unions for this outcome.

I think we are not strong enough to fight against temporary agency work. So, if we are not strong enough to fight against them, we should somehow cooperate with them... [but] there is no political will to treat them as a partner. We treat them as evil and the best idea is to get rid of them. And if you have this kind of position it is hard to expect them to treat you as a partner.

Another obstacle to any kind of social partnership in the TA sector was the fragmented representation of the agency sector, not least of all due to high competition from the large segment of small agencies.

Polish unions are also faced with a general lack of government concern about cross-border workers. Overall, the government tends to promote the expansion of the TAW market, regarding its growth as a sign of economic vitality (Lewandowski and Magda, 2017). There are no government funds, as in Germany, for initiatives that provide cross-border workers with information about destination country regulations (Interview, OPZZ, 7 May 2015). If at all, information is provided by Western European unions and agency associations such as the Dutch ABU (which provides a Polish translation of the ABU collective agreement). Any union initiative that goes beyond the traditional union constituencies of regular (and male) workers in Poland tends to be funded by outside partners. For example, a campaign to expand membership beyond traditional worker groups at NSZZ Solidarność was paid for by EU and US unions (Trappmann, 2014: 15). These efforts were highly appreciated by union officials interviewed in Poland who also made clear that they went to great lengths to represent a unified front on the European level: 'I think our biggest point is that we have the same opinion on these issues as the European trade union confederation. And believe me, this is not easy' (Interview, NSZZ Solidarność, 8 May 2015). In fact, Polish unions are more enthusiastic about the Europeanisation of the labour movement than many Western European unions who, they say, tend to view issues like Europe-wide union membership and bargaining at the European level as 'fancy Brussels stuff' (Interview, NSZZ Solidarność, 8 May 2015). At home however, Polish (and European) unions' efforts have been criticised repeatedly by the Polish government and agencies as being against the interests of Polish workers who depended on employment opportunities across the border.

Conclusions

This article has examined how trade unions at the national and European levels respond to the emergence of cross-border TAW in the EU. Contrary to claims of a decline of union power, our research finds some evidence of growing union influence but also of transnational cooperation, but both are not always in the interest of TA workers. Evidence for inclusionary strategies is most visible with regard to collective bargaining for the TA sector, but less so as far as sectoral agreements that limit the numbers of TA workers are concerned.

In most instances, union responses to cross-border TAW are better described as selective rather than inclusive representation; that is, they are not only separated from the organisational core of trade union activities, but lack mechanisms to mediate in cases of conflicts of interests between different groups of workers. It is noteworthy in this context that a key factor behind the gains of union influence on domestic and cross-border TAW are legal changes, now established at the European level through the 2008 Directive on TAW, which have forced trade unions to accept the deregulation of TAW in exchange for a larger role of collective bargaining. This is most effective, however, in destination countries where union possess bargaining capacities, and less so in sending countries, with different legacies of union political involvement. The Polish case clearly shows that European-level legal capacities are not sufficient to empower national unions to improve the conditions of cross-border workers. It also suggests that unions in new member states are far more dependent on cross-border union coordination and EU regulations for improving such capacities.

As it stands, collective agreements and gaps in union strength create new divisions, with the most salient problem for union solidarity being less across borders and more in the power imbalance between unions and staffing agencies within sending states, and between unions representing the TA sectors and those foregrounding the interests of regular workers in destination countries. In Germany, this has taken the form of separate tiers of collective agreements covering TAW. Overall, collective agreements have legitimated evasions from the principle of equal pay, and functioned to limit the employment opportunities for TA workers. More research is needed to assess how user-industry caps on TAW affect the cross-border dimension of TAW, and thus employment opportunities for workers from new EU member states. Future research should also study in more detail how heterogeneities introduced by cross-border agency workers play out at different levels of bargaining and representation of workers' interests.

Another matter for future research concerns union capacities at the European level, especially in relation to the regulation of cross-border labour in sending states. This includes interdependencies with other forms of cross-border mobility, not least of all posted work, which has been tied to extensive evasion of national employment and labour standards (Arnholtz and Lillie, 2019).

This interaction is relevant, because, as one of our interviewees in the agency sector put it:

[cross-border TAW] has to compete globally on a market which is constantly breathing in and out – so as a regulator or as a licensor you have to breathe with it. And if you don't then the market will find a way around it.

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Notes

1. In addition to the authors, research in Europe was conducted in collaboration with Markus Tünte.
2. The original research scope was inter-regional, including a systematic comparison of the making of cross-border temporary agency labour markets in Europe and East and Southeast Asia (see Shire et al., 2018). In this article, we restrict ourselves to European cases of trade union agency.
3. Critical voices can also be found inside IG Metall, for example in the IG-Metall Zoom network.
4. The documentary is available at https://www.youtube.com/watch?v=xdrkY_NpgrY.

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