Särtryck ur Festskrift till Hans Stark

"The Chewing-Gum Directive" – part-time work in the European Community

RONNIE EKLUND

"THE CHEWING-GUM DIRECTIVE" – PART-TIME WORK IN THE EUROPEAN COMMUNITY

Ronnie Eklund

The questions discussed in this paper concern the substance of the part-time work Directive and the goals that Sweden wanted to achieve by joining the Council in the adoption of the Directive.[1] The answer to the last question is not clear-cut, taking into consideration the different, and to some extent lofty, aspects behind the origin of the Directive.

1. Background material

Let us go back in time and focus on the advent of the 1982 Commission Proposal on voluntary part-time work.

As far as I know, the first step taken by the Community to put the part-time employment issue on the agenda, was the 1978 opinion of the Economic and Social Committee (ESC) on part-time employment and its effects on the current state of the labour market.[2] It was noted that part-time employment was on the increase and that women predominate among the people engaged in such work. Part-time employment was considered to be "highly controversial", since it could never be seen as a substitute for a policy of expanding employment.

At that time part-time work was discussed under the catch phrase of *work sharing*, which referred to the distribution of available work opportunities to as many people as possible. This was made clear in the Council Resolution in late 1979 on the adaptation of working time.[3] Part-time work was looked upon as one variant among many, such as overtime, flexible retirement, temporary work, shift work or annual working time used in order to overcome the growing employment problems resulting from a rise in oil prices, the structural problems of the labour market

[1] Council Directive 97/81/EC, OJ No. L 14, 20.1.1998, p. 9.
[2] OJ No. C 269, 13.11.1978, p. 56.
[3] OJ No. C 2, 4.1.1980, p. 1.

and the progressive introduction of new technologies. The Council said that part-time work had to be voluntary and open to both men and women and that it could not be imposed on persons who wished to work full-time, as well as that part-time workers should have, as a rule, the same social rights and obligations as full-time workers, bearing in mind, however, the specific character of the work performed.

In early 1981 the European Parliament Resolution on the *position of women* in the European Community was adopted.[4] It highlighted the vulnerable situation of women especially regarding the *rising unemployment* in the Member States. As regards part-time work the Parliament urged that all social and financial disadvantages of part-time employment should be eliminated and that discrimination against part-time employees when granting earnings compensation in the event of general reductions in working hours should be brought to an end.

In late 1981 the Parliament returned to the same issue in the context of *work sharing* with reference to the previous 1979 Council Resolution.[5] Adaptation of the working time should be considered from the point of view of both flexibility and reduction in working time and that work should be shared in order to tackle growing unemployment. Those who opted for part-time work should be granted proportionally the same social rights as those in full-time employment. Steps were also to be taken to prevent discrimination, particularly against women, ensuring that this type of work did not lead to inferior jobs.

2. Commission proposals 1982-1983

It is against this background that the Commission presented its first proposal in 1982 for a Council Directive on voluntary part-time work.[6] It was said that the significant differences between the Member States concerning the implementation of the non-discrimination principle between part-time and full-time workers could *distort competition* between undertakings and affect the proper functioning of the common market. The principle of non-discrimination should apply to working conditions, social security schemes, remuneration, holiday and redundancy pay as well as retirement benefits. It further stated that part-time workers wishing to have or return to a full-time job or full-time workers

[4] OJ No. C 50, 9.3.1981, p. 35.
[5] OJ No. C 260, 12.10.1981, p. 54.
[6] OJ No. C 62, 12.3.1982, p. 7.

wishing to have or return to a part-time job should have priority over candidates from outside the undertaking with a vacancy in a situation in which their skills or occupational experience satisfied the requirements. Recourse to part-time work should also be had within the scope of the procedures for the information of and consultation with workers' representatives in force in the Member States.

The Economic and Social Committee endorsed the proposal with reference to the fact that it reflected many of the principles and guidelines set forth in the 1978 opinion of the Committee (see above). However, a large minority of the Committee held that the proposal would make part-time work "virtually impracticable" indicating that the planned arrangements would not promote employment.[7]

The Commission presented an amended proposal for a Council Directive on voluntary part-time work thereafter,[8] containing the same principles and guidelines framed, however, in a somewhat more attractive manner. That did not help much. The Council blocked any attempts to take further action.

3. Commission proposals 1990

The Commission regained its strength by means of the 1989 Community Charter of the Fundamental Rights of Workers. In Title 7, point 7 it was held that "the competition of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions, as regards in particular forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work." Hence, the Commission submitted three different proposals to directives, one related to certain employment relationships with regard to *working conditions*, another one related to certain employment relationships with regard to *distortions of competition* and a third one supplementing the measures to encourage improvements in the *safety and health at work* of temporary workers.[9]

[7] OJ No. C 178, 15.7.1982, p. 18.
[8] OJ No. C 18, 22.1.1983, p. 5.
[9] COM(90) 228 final – SYN 280 and SYN 281. Only the third proposal was successful, resulting in Directive 91/383/EC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ No. L 206, 29.7 1991, p. 19. The

A twofold approach was adopted in the proposals. The Commission wished to *remove distortions of competition* and *eliminate abuses* that could be caused by differences in national situations.[10] Though recognizing the companies' needs of flexibility, the Commission proposed to stop the increasing prevalence of insecurity and segmentation on the labour market, by ensuring that the employees concerned by such relationships received equal treatment comparable to that received by employees working full-time for indefinite duration. It also wanted to eliminate the distortions of competition which could be caused by differences in the social costs, resulting in particular from differences in the national rules governing these employment relationships and improve the minimum levels of health and safety at work. The proposed Directives were not supposed to apply to wage and salary earners whose average weekly working hours were less than eight. The Commission's initiatives were neither to have effect upon wage-setting in the various countries, which was an issue dealt exclusively with by the social partners.

To remove distortions of competition the Commission proposal was meant to set forth the principle of equal treatment in the areas of social protection under statutory and occupational social security schemes and in the area of the so-called indirect wage costs such as seniority, annual holidays, allowances for dismissals etc.[11] In the area of social costs the Commission found that there were dramatic differences between the Member countries, with the frontier areas being especially vulnerable. For example, in the Netherlands no distinction whatsoever was made between full-time and part-time employees, while in Germany part-time employees were not accorded social protection if they earned less than DM 470 and worked less than 15 hours per week, and no contributions were given to unemployment insurance for employees working less than 19 hours per week.[12]

With respect to the working conditions of part-time employees the proposed Directive included provisions relating to, *inter alia*, access to vocational training, providing information for workers' representatives in the event of the employer's recourse to part-time workers, providing

tug-of-war between the Commission and the European Parliament is easily seen in this context, in as much the Parliament had adopted a Resolution on an initiative aimed at a proposal for a directive on atypical employment contracts and terms of employment only a month before the Commission presented its proposals, see OJ No. C 231, 17.9.1990, p. 32. The Parliament's initiative has not even been mentioned in the Commission report.

[10] COM(90) 228 final, p. 3.

[11] OJ No. C 224, 8.9.1990, p. 6.

[12] COM(90) 228 final, pp. 15-18.

right to information where the employer intended to recruit full-time employees for an indefinite period, and ensure equal treatment for part-time workers as compared to workers employed in full-time employment as regards benefits in cash or in kind granted under social assistance schemes and to the social services of the undertaking.[13]

The further refined Commission proposals[14] failed due to the opposition of the United Kingdom which argued that the Commission's proposals would make part-time employment more expensive and more difficult to be organised, thereby reducing the opportunities for part-time work.[15] A new initiative launched in 1994 under the German Presidency in the Council met with the same fate. The British Government announced that it would not support the E.C. legislation on atypical work.[16]

4. The present E.C. regime

The next step was the advancement of the social partners (UNICE, ETUC and CEEP), launched by the Commission under Article 3 of the Social Policy Agreement of the Maastricht Treaty, and the final conclusion of the European Framework Agreement on part-time work on 6 June 1997, which, following the procedure under Article 4(2), was subsequently implemented by the Council Directive 97/81/EC of 15 December 1997[17] and extended to the United Kingdom by Council Directive 98/23/EC.[18] It has been argued that the Framework Agreement came about under the shadow of the ILO Convention No. 175

[13] OJ No. C 224, 8.9.1990, p. 4.
[14] See texts in OJ No. C 295, 26.11.1990, p. 96 (Parliament Resolution) and COM(90) 533 final – SYN 280 and 281, OJ No. C 305, 5.12.1990, p. 8 (refined Directive).
[15] Catherine Barnard, EC Employment Law, 1995, pp. 339-340.
[16] Mark Jeffery, "The Commission Proposals on 'Atypical Work': Back to the Drawing-Board ... Again", Industrial Law Journal 1995, pp. 297-299.
[17] OJ No. L 14, 20.1.1998, p. 9, see also COM(97) 392 final. The European Parliament adopted a Resolution which was extremely critical as regards the content of the Framework Agreement, OJ No. C 371, 8.12.1997, p. 60. The Resolution was based on Report A4-0352/97 (6 November 1997) submitted by the Committee on Employment and Social Affairs. Equally critical was the Opinion of the Committee on Women's Rights (20 October 1997), which was annexed to the Report. The Committee of the Regions endorsed the part-time Directive in its Opinion after the Directive was adopted by the Council on the basis that the Directive "contributes significantly to improving efficiency on the labour market", see OJ No. C 180, 11.6.1998, p. 72.
[18] OJ No. L 131, 5.5.1998, p. 10

(1994) establishing minimum standards for part-time work, and the ensuing Recommendation No. 182, even though the Framework Agreement is only an attenuated version of the ILO Convention.[19] The ILO instrument was never ratified by Sweden.[20]

The purpose of the Framework Agreement has been, first of all, to provide for *the removal of discrimination* against part-time workers and improve the quality of part-time work, and, secondly, to *facilitate the development* of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers (Clause 1). The Directive applies to "employment conditions", not to statutory social security, which means, on the other hand, that an important aspect of the previous Commission proposals has disappeared from the agenda.

Clause 2 implies that workers who work on a casual basis may be excluded wholly or partly from the terms of the Agreement, for objective reasons. Clause 3 compares the position of a "part-time worker" with the position of "a comparable full-time worker" which means a person in the same establishment "having the same type of employment contract or relationship, who is engaged in the same or similar work/ occupation, due regard being given to other considerations which may include seniority and qualification/skills."

The essence of the Directive is found in Article 4 wherein *the principle of non-discrimination* is stated. Hence, Article 4(1) provides, in respect of "employment conditions", that part-time workers "shall not be treated in a less favourable manner than comparable full-time workers, solely because they work part-time, unless different treatment is justified on objective grounds". Article 4(2) provides: "Where appropriate, the principle of *pro rata temporis* shall apply." According to Article 4(3) the Member States and/or the social partners shall arrange for the application of Article 4. And further, Article 4(4) provides that where "justified by objective reasons, Member States after consultation of the social

[19] Mark Jeffery, "Not Really Going to Work? Of the Directive on Part-Time Work, 'Atypical Work' and Attempts to Regulate It", Industrial Law Journal 1998, p. 200, Jill Murray, "Social Justice for Women? The ILO's Convention on Part-Time Work", The International Journal for Comparative Labour Law and Industrial Relations 1999, p. 4.

[20] See Regeringens skrivelse 1995/96:158 (Government Communication to Parliament on the ILO Convention and Recommendation on Part-time Work). The Government argued that Swedish practice concerning determination of the basic wage for part-time employees did not comply with the Convention provisions, in particular section 5. Concurring, Arbetsmarknadsutskottets betänkande (Parliamentary Labour Market Committee Report) 1996/97:AU03.

partners ..... may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification".

In addition, the Member States and the social partners are charged under Clause 5(1) with the responsibility to "identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them." It is further stated in Clause 5(2) that a worker's refusal to transfer from full-time to part-time work or vice versa "should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned". Furthermore, Clause 5(3) provides, *inter alia*, that "as far as possible, employers should give consideration to" requests by workers to transfer from full-time to part-time work, and from part-time to full-time work and provide timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers.

Member States may maintain or introduce more favourable provisions than those set out in the Agreement. Clause 6(3) provides, however, that the Agreement "does not prejudice the right of the social partners to conclude, at the appropriate level ..... agreements adapting and/or complementing the provisions of this Agreement in a manner which will take account of the specific needs of the social partners concerned".

It is obvious from this short overview of the part-time Directive that Sweden will have to take some steps to implement the Directive.

First it is necessary, however, to state shortly that EC law has already made a few inroads into the discriminatory pattern concerning part-time workers, since part-time employment is most prevalent among women. In such a case *indirect discrimination* may easily be proved before the ECJ.[21] But EC law has its limitations. If male workers join the ranks of part-timers, EC law will not be operative. Both groups will hence be treated equally badly.[22] In such a case, the Directive may form the basis for a fairer solution. Secondly, the part-time work Directive may have an impact on the application of charges concerning indirect discrimination with reference to equal pay or equal treatment principles under the Treaty or the Directives 75/118 and 76/207. Accordingly, the part-time Directive has thus removed the obligation to show that a full-time work

[21] See, for example, Case 170/84 *Bilka Kaufhaus v. Weber von Hartz* [1986] ECR 1607.
[22] Cf. Brian Bercusson, European Labour Law, Repr. 1997, p. 449.

requirement in fact has an adverse impact on women in a particular work-pool in order to force the employer to justify his measures.[23] Thirdly, the part-time work Directive refers to a person who is a "comparable full-time worker", engaged "in the same or a similar work/occupation" – a definition that hardly entails a comparison with another person engaged in work of equal value. Accordingly, the Directive has a much narrower application than the E.C. sex equality law related to pay for work of equal value.

5. Legislation on part-time work in Sweden

Only two provisions are found in the Swedish labour law scheme designed for part-time employment. They are found in the Employment Protection Act and the Working Hours Act.

Before proceeding it must be said that part-time employees usually enjoy the same rights as full-time employees, unless otherwise stated. The wages, for example, are usually proportional to the working time of a part-time employee, as compared to the wages of a full-time employee. From this point of view, a part-time employee has probably never been treated as an inferior category of an employee.[24]

It can be mentioned here that part-time work in the *civil service sector* was once legally regulated, and part-time employment was discouraged. After a survey made in 1946,[25] regulations were issued in the form of a Royal Circular

[23] Cf. Catherine Barnard, EC Employment Law, 2 ed. 2000, p, 432.

[24] See SOU 1946:71. Deltidsarbete i allmän tjänst m.m. (Part-time work in public service) and Utredning angående industriarbetande kvinnors deltidsarbete. Arbetsmarknadens kvinnonämnd (Survey with respect to womens´ part-time work in industry. The Labour Market Committee for Women), 1957. In the latter report, it was found that the employers favoured part-time working women for strictly labour market reasons, i.e. because there was a growing shortage of manpower. Part-time employment was also found among employees who were to some extent disabled or older. The Labour Market Committee recommended that the social partners should consider to enter into more comprehensive collective bargaining agreements (CBAs) relating to part-time employment; no such CBA ever saw the light of day.

[25] SOU 1946:71. Very few part-timers were reported to work in the state government sector – only some 600 out of the total number of 176.000 employees. It was unclear how many part-timers were employed in the municipal sector. In the private sector it was estimated that only about 700 employees worked part-time.

addressed to the state agencies.[26] The aim of the Circular was to encourage the state agencies to consider more seriously whether part-time employment should be encouraged, especially in order to make it easier for women to combine work with their traditional role as mothers during the period when they were also taking care of a child. Other Circulars were subsequently introduced, whereafter a part-time Regulation was issued in 1980.[27] It was repealed in 1991. The present 1991 Regulation on Leave of Absence applicable to the state sector states no more than that, when assessing an application for leave of absence, a state agency may take into special consideration the employee's family situation.[28]

1. In a commission report related to the reform of the Employment Protection Act from 1993 an issue was raised as to whether an employer should be under an obligation to ask the part-timer whether he/she wanted to increase the working time if the employer needed to employ new manpower.[29] The commission concluded that since there were already national CBAs in force containing clauses concerning this issue, there was no need for more general legislation.

The same issue appeared again in late 1996 in the form of a Government Bill submitted before the Parliament. The Bill had been preceded by many fruitless attempts to involve the social partners in laying down a lasting labour law framework.[30] At last the socialist Government, supported by the Centre Party, decided to submit a Bill promoting a moderate reform of the Act on Employment Protection.[31] The reform package included a new provision of the Act, section 25a, with effect on 1 January 1997, giving the right of priority to part-time employees with regard to an increase in the employee's working time. The section provides the following:

Section 25a. A part-time employee who has notified the employer of her or his wish to increase her or his working time, not exceeding full-time, has, in spite of what is provided for in section 25, the right of priority to such employment. A condition for the right of priority to apply is that the employer's need for man-

[26] SFS (Official Gazette) 1947:542. Similar provisions were also laid down in the additional regulations applying to the general regulations related to civil servants in 1948 (SFS 1948:564 relating to SFS 1948:436).
[27] SFS 1980:50.
[28] SFS 1991:1747, section 10.
[29] SOU 1993:32. Ny anställningsskyddslag (A new act on employment protection), pp. 531-535.
[30] See, in brief, Ronnie Eklund, "Deregulation of Labour Law – the Swedish Case", in Juridisk Tidskrift 1998-99 No. 3, pp. 535-538.
[31] Government bill 1996/97:16. En arbetsrätt för ökad tillväxt (A labour law for increased growth).

power shall be satisfied by means of the increase in the part-time employee's working time and that the part-time employee has qualifications which are sufficient for the actual working tasks.

If the employer has several business units, the right of priority applies to the unit in which the employee is employed on a part-time basis.

The right of priority does not apply in relation to a person who has the right to be transferred in accordance with section 7, second paragraph.

An employee cannot lay claim to her or his right of priority if the employment is in violation of section 5, first paragraph, or section 5a.

Why did the Swedish legislator intervene? The basic argument is that Section 25a supports, as a rule, the view that full-time employment is to be preferred; part-time employment is only a secondary solution.[32] The provisions of section 25a originate partly from the *gender background*. The Minister of Labour has stressed the fact that approximately 40 % of all women are part-time employed, as compared to only about 9 % of the male employees. Many women would like an extended scope of employment time in order to be able to maintain themselves. The amendment has also been placed in the context of the Swedish unemployment insurance scheme, as applied to *partially unemployed or underemployed persons*. The partially unemployed receive benefits according to a specially designed formula, containing certain restrictions which were introduced in 1995, to which the Minister alluded in the 1996/97 Bill.[33]

In fact, special provisions apply to partially unemployed persons in Sweden. Though provisions of this kind have been in force since 1956, they have undergone changes several times. The present provisions apply to part-time workers who are unemployed for only part of the working week (cf. section 40 of the Unemployment Insurance Act and section 8 of the Unemployment Insurance Regulations). This group of people is not a small one, and consists mostly of women. In 1997 the partially unemployed accounted for some 17 % of all job applicants registered with employment market offices.[34] Against this background section 25a may therefore be seen as a forceful weapon to increase the working time of part-time employees. It is an irony of fate that is has

[32] Government bill 1996/97:16, p. 45. Section 25a also applies to a fixed-term contract of employment, Labour Court judgement, AD 2000 No. 51.

[33] They were introcuded by means of a governmental regulation, SFS 1995:997.

[34] SOU 1999:27. DELTA. Utredningen om deltidsarbete, tillfälliga jobb och arbetslöshetsersättning (Commission report on part-time work, temporary jobs and unemployment benefit), p. 261.

been found that section 25a is virtually unknown among the actors on the Swedish labour market.[35]

2. In the Working Hours Act of 1982 a provision can be found relating to part-time employees who are ordered to work more than it was once agreed upon in the individual contract of employment. There is a limit of 200 additional hours per calendar year regarding such extra work, provided there exists a "special need" for it (section 10 of the Act). In such a situation it may happen that the employer will require more work on a more regular basis for a longer period of time. This may lead to the conclusion that what was once agreed upon as the stipulated working time has been *de facto* set aside.

Labour Court judgement AD 1984 No. 76 concerned the issue of "additional working hours" in conjunction with part-time employment. In that case three dressmakers had contracts of employment stating that they had a working time of 25 and 18 hours per week respectively. The dressmakers had worked more hours than that on a regular basis for quite some time. After that they were forced to go back to what the contracts provided. The Labour Court concluded that uncertainty arose, since the employer had made use of the employees to a much larger extent than provided for by the contract, and on a regular basis. The employer had never made clear to the employees that the required additional work was set in relation to the provisions of the Working Hours Act. Consequently, the employer had evaded the lay-off provisions of the Act on Employment Protection and was liable to pay both lay-off pay and damages.

6. Collective bargaining agreements on part-time work

In a few CBAs rules relating to part-time work can be found. The following account is in no way exhaustive.[36]

In the CBA applying to *municipal/county council sectors* ("AB 98") a part-time employment clause (section 4) applies to part-timers being permanently employed whose working time is less than 17 hours per week.

First of all, attempts should be made in those cases to increase the average working time to at least 17 hours per week, the reason being that various social benefits emanating from the statutes and the CBAs

[35] SOU 1999:27, p. 301.

[36] The account in Ds 2000:6. Genomförande av deltids- och visstidsdirektiven (Implementation of the Part-Time and Fixed-Term Directives), pp. 36-40 is not complete either.

are dependent on the length of the working time in order to apply. To such statutory benefits belong, for example, the unemployment benefit under the Act on Unemployment Insurance (section 12), which sets the requirement of a minimum working time for the benefit to apply, at 70 hours of work per month, or close to 17 hours of work per week during a six-month period falling within a framework period of 12 months.[37]

Secondly, the same clause provides that if the employer needs to employ new manpower he should first determine whether a person already employed at the workplace, who has notified the employer about her/his wish to increase the working time, can be offered increased working time. It is worth mentioning that this clause had been in application long before a similar provision was stipulated in section 25a of the Act on Employment Protection in 1996 (see above).

Furthermore, the municipal/county council CBA relating to additional pension benefits applies only to persons whose employment amounts to at least 40 % of a full-time position. In the same vein it is provided in the "AB 98" (general provisions related to terms and conditions of work) that additional parental benefits accrue only to those whose employment amounts to at least 40 % of a full-time position. This is a slight improvement in the light of the past when the same CBA granted such benefits to full-time employees only.

In the *private sector,* the Confederation of Swedish Employers (SAF) and the Confederation of Trade Unions in Sweden (LO) entered into a joint agreement on part-time work in 1980, after which, in most cases, the agreement has been made part of other national/branch CBAs.[38] The essential stipulation is that the parties should take into consideration that there are social benefits which do not apply to employees whose work does not exceed 16 hours a week. A part-time employee should therefore "be informed" about this fact "whenever practicable, and if the employee so wishes, the working time should be extended so as to make the social benefits apply". Part-timers should also be offered more working time if there is a demand for employment of new manpower.

[37] The unemployed must be, moreover, prepared to work at least 17 hours per week to be able to claim the unemployment benefit (section 9 of the Act). The same applies with respect to becoming a member of an unemployment fund (Act on Unemployment Funds, section 34).

[38] A similar recommendation on part-time work was made in 1974 by the same social partners.

Similarly to the municipal/county council sector CBA on pensions, privately employed white-collar employees accumulate pension benefits only if they work for at least 16 hours per week.

The *state sector's* CBA ("ALFA") is designed similarly to the one applying in the municipal/county council sectors (as above). The state CBA distinguishes between two main categories of employees. For the CBA to apply fully the employee must not work less than 40 % of full-time, which means a rather drastic dilution of the social benefits for part-time employees, as compared to persons working more than the required amount of hours. Furthermore, government employees, similarly to municipal/county council employees, do not accumulate additional pension benefits under the pertinent CBA concerning pensions if their employment constitutes less than 40 % of full-time employment.

A special provision in the state sector's CBA applies to the *allocation of the actual working time for a part-time working employee.*[39] As a rule the CBA assumes that part-time work is performed five days a week (horizontal part-time). But part-time work can also be allocated to only some of these days (vertical part-time). This is called "concentrated part-time" in the CBA (Ch. 4, section 15),[40] and is considered a privilege. However, it can be abused in the context of, for example, holidays, as when a part-timer may apply for holidays for only three out of five days per week if work is in fact performed only during three days a week. In this way the stipulated holiday period could extend to a far longer period than the equivalent period for those who are in full-time employment. This has not been regarded as proper application of the CBA. A corrective measure has therefore been introduced stipulating that the "concentrated" part-time working employee's actual working time shall be deemed as if the work in question was performed five days a week.[41]

[39] A nice distinction is found here inasmuch as the CBA in this respect includes "part-time working employees", as compared to "part-time employees" in general. The inclusion of the word "working" in the CBA is intentional, whose meaning is to include also employees who have partial leave of absence.

[40] The essence of the actual provision goes back to a CBA concluded in 1971, after an amendment of the Civil Servants Act, making it possible to conclude CBAs related to the allocation of working time; see Government Bill 1970:164 med förslag till lag om ändring i statstjänstemannalagen (1965:274) (Concerning amendments in the Civil Servants Act).

[41] The provision works in the following way. Let us assume that the "concentrated part-time" employee works 20 hours on Mondays, Tuesdays and Wednesdays. The first step is to divide 20 by 5 (normal working days for a full-time employee) which equals 4. This is then multiplied by 3 (the number of days of the actual working time of the part-timer) which gives us 12. The difference between 20 and 12 is 8. The CBA clause now implies that the employee would have to work for eight extra hours after the holidays. The employer must explicitly order the employee to do so within a short period of time.

In summary, one is tempted to say that the problems concerning the pension regulations contained in the CBAs, denying pension benefits to a large number of persons working less than 40 % of full-time is already subject to the Community law on *indirect discrimination* based upon gender. The 40 % limitation set forth by the state sector's CBA on the general conditions of work may also be argued to be in violation of Community law. It is also obvious that the part-time work Directive has provoked the social partners to take up negotiations in order to work out solutions which are in compliance with the Directive, but no solution has yet seen the light of day.[42]

7. Part-time work – welfare or unfair?

The issue of structural discrimination against women, who make up the bulk of part-time employees in the whole of Europe,[43] was never analyzed more closely in the preparatory work of the earlier E.C. part-time employment proposals – not even in the European Parliament Resolution on the position of women in the European Community of 1981.[44]

Since 1976 part-time work has been the subject of several investigations in Sweden. The main aim of the studies has been to uncover the advantages and disadvantages connected with part-time work, especially regarding women.[45]

[42] It seems that the Swedish Government is willing to endorse a solution based upon a CBA; see article by Anna Ekström in Lag & Avtal No. 5/2000. However, the attempts seem to be thwarted in as much as a Ministry of Industry report was submitted in February 2001 (Ds 2001:6.), suggesting the implementation of the non-discrimination principle in both the part-time and fixed-term directives by statute. It has not been possible to take account of that report in this article. It must be added that the 40 % limitation on part-time work found in the state sector CBA is abolished since April 2001, with express reference to the EC Part-Time Directive.

[43] On the overall basis the distribution of part-time working men and women coincide in Sweden with a general pattern in all E.U. countries; see Communiqué, European Foundation, October No. 8/2000 ("Full-time or part-time work?").

[44] OJ No. C 50, 9.3.1981, p. 35.

[45] SOU 1976:6. Deltidsanställdas villkor (Part-timers' working conditions), SOU 1976:7. Deltidsarbete 1974. En undersökning av statistiska centralbyrån (Part time work in 1974. A report from the National Bureau of Statistics), Marianne Pettersson, Deltidsarbetet i Sverige. Deltidsökningens orsaker. Deltidsanställdas familjeförhållanden (Part-time work in Sweden. The causes of the increase in part-time work. The family situation of the part-time employees), 1981, Ewa Dahlin, Ritva Gough & Lisbeth Rhodin, Deltidsarbetet i Sverige. Deltidsökningens effekter på arbetsorganisationen (Part time work in Sweden.

One of the main ways for encouraging women to enter the labour market in Sweden was the tax reform at the beginning of the 1970s, and a consciously led debate with respect to sex equality in the 1960s. It is fair to say that the main motive for promoting these changes was the *emancipation* of women in the sense that women were given a chance to earn their own living and thus become less dependent upon their husbands. Experience shows at the same time that it has been more difficult for the government to emancipate the men, i.e. to make them participate in the performance of household duties. Forcing people to do something is not a part of the liberal heritage.[46]

A crucial issue concerns the reasons for part-time work being considerably more frequent in some sectors of the labour market as compared to other sectors.[47] This is a question of the *economics of part-time work*. To start with, it is clear that there is no economic motive on the employers' side (demand) to favour part-time work, since the employers pay social dues/flat rates for their employees irrespective of their number of hours of work per week.[48] The fact that some part-time employees are not entitled to social benefits, since they work too few hours per week, is a different matter. Part-time work is more frequent in the service sector than in the manufacturing industry. The highest rate of part-time employment is found in the retail trade. High rates of part-time employment are also found in the hotel & restaurant business, in education, health care and social work. In all those sectors close to 50 % of the labour force is part-time employed. These sectors are characterised by great variations in consumer demand, both on a daily and a weekly basis.

On the other hand, high capital costs per employee signal a low rate of part-time work. Such branches include, for example, electricity, gas and

The increase in part-time work and its effects upon the work organisation), 1981, SOU 1989:53. Arbetstid och välfärd (Working time and welfare), SOU 1998:6. Ty makten är din ... Myten om det rationella arbetslivet och det jämställda Sverige (Inasmuch as the power is yours ... The myth of the rational working life and equality in Sweden), SOU 1999:27 and Arbetskraftsundersökningen (AKU). Årsmedeltal 1999, SCB (Labour Market Survey. The Average of 1999, National Bureau of Statistics).

[46] A south-east Asian experience is that successful women do not argue with their husbands who will do the dishes after a hard day at the work; a successful woman is backed up by domestic help which is a major contribution to their professional success; see an account by the Australian journalist Louise Williams, Wives, Mistresses and Matriarchs. Asian Women Today, 1998, p. 130.

[47] See to the following, Pettersson, pp. 124-134.

[48] Cf. May Tam, Part-Time Employment: A Bridge or a Trap?, 1997, pp. 112-118 who reports that U.K. employers seem to take advantage of part-timers, giving them a lower wage and fewer fringe benefits as compared to full-time employees.

waterworks, communications, postal and telecommunication services, agriculture and mining, iron & metal works, the engineering industry and the chemical industry. Less than 10 % of the labour force in those branches is part-time employed. Hence, part-time work is not the first choice of the employers when the learning process connected with the job is demanding, or when the work is team related, requiring both supervision and co-ordination between the employees as well as between the employees and their supervisors. In such cases the employer wants to keep as few employees as possible for as many hours as possible at the workplace. Too many people doing the same work in a co-ordinated way increases the indirect costs, which is why *transaction costs* come into the picture. This means that women, who also have other commitments, are not wanted in these segments of the labour market.[49]

It is a sad fact that part-time employment is frequent in those segments of the labour market in which the job-seekers are less qualified, the wages are low and the demand for services varies (retail trade, banks, care for the elderly etc.). Part-time working women have usually only elementary education; it has a negative effect on the level of sick pay, parental allowance and pension benefits.[50] Very few part-time working women are highly qualified professionals. The employers have taken advantage of this situation: it has given them an opportunity to adjust the number of staff to the demand for services by their clients and customers. Hence, part-time working women are a flexible and cheaper source of labour.[51]

Another problem is that too many women tend to stay in part-time employment against their will. [52] Part-time work may be considered to be a "woman's trap",[53] the reason being that for many badly paid part-time working women there is in fact no economic disadvantage (!) in working part-time. In the Swedish unemployment scheme, for example, part-time employees are handsomely compensated, which is counter-

[49] In a recent study, SOU 1998:6, pp. 76-85, it is argued that it was never meant that women should compete with men when they entered the labour market in the 1970s in large numbers; the women were supposed to take up employment created by the public sector, or in those segments of the labour market which had already contained typically "female" jobs, found, for example, in the municipal/county council sectors, such as health care and social work.

[50] SOU 1998:6, p. 85.

[51] SOU 1999:27, p. 127.

[52] Similar conclusions are found in Tam, p. 110. Female part-timers are more often found in dead-end jobs where promotions do not materialize.

[53] Cf. also Tam, p. 243, who speaks about a "trap" for the part-time working women.

productive from the sex equality point of view. The trap produces a "locking-in effect". Furthermore, the labour market offices as well as the employers seem to treat the partially unemployed group of employees as a secondary source of labour. Experience also indicates that it is difficult to offer education or training to female employees in part-time employment, taking into consideration their other commitments in the part-time employment. Such employees are therefore seldom offered opportunities to participate in competence/skills programmes organised by their employers, or they are less inclined to take another job or change employers.[54]

One is therefore tempted to conclude with the same closing remarks as those already submitted in the 1976 report on part-time employment.[55] In essence, the arguments stipulate the following. Women, like men, have a right to support themselves through wage-earning. Regular part-time jobs are seldom found in well-paid professions. It is a fact, and a sad one, that women who work part-time have a small chance to be able to fend for themselves. Their pay is too low, not because they work fewer hours, but because they work in badly paying branches. Part-time working women also miss out on the social benefits which are related to either the level of income or the working time. Part-time work can therefore be perceived as a factor contributing to the preservation of differences in wages between men and women and the distribution of power between men and women on the labour market. This fact does not facilitate the task of putting an end to sex segregation on the labour market. The 1976 report took a decisive stand indicating that the women's situation would change if the *total working time of all employees* was reduced. It was argued that a general shortening of weekly working hours (implied – a six-hour working day) would give all men an opportunity to work less and devote more time to the family and children, whereas women would be given a fairer chance to work full-time.

The debate relating to the reduction in the total working time still remains in the year of 2001 a highly controversial issue. The stipulated statutory working time per week in Sweden is the same as it was in 1972, i.e. 40 hours per week.[56]

[54] See SOU 1999:27, p. 283. The Swedish Government is obviously deeply concerned with this situation applying to the partially unemployed individuals, since 82 % of them are women; see Bill 2000/01:1. Vol 7. Utgiftsområde 13. Arbetsmarknad (The Yearly Budget Bill. Labour Market Issues), pp. 31-32.

[55] SOU 1976:6, pp. 77-87.

[56] The issue has been highlighted several times during the last few years, see, for example, SOU 1996:145. Arbetstid – längd, förläggning och inflytande (Working time – length, allocation and influence).

8. Tentative conclusions

One may ask in what way the part-time work Directive is supposed to cope with the part-time "trap" for women and the structural segregation of the labour market. From this point of view the Directive is a disappointment. The essential part of the Directive seems to address the issues related to part-time employment *per se*, which shows quite a different approach compared with the one taken by the Commission in the 1980s and early 1990s when part-time work was looked upon as one of many means of combatting unemployment in Europe, and perhaps even gender discrimination, but making no attempt to uncover the inequalities between men and women in the light of the frequency and distribution of part-time work in real life. What does the Directive actually offer to women with short education, working in a part-time, lowly paid occupation, such as sales and personal services, where there is little possibility of career advancement or training, and where many women's earnings lie below the threshold of entitlement to social benefits? Such workers do not have enough leverage for the advancement of their positions.[57] The conclusion that the part-time work Directive is a half-way house is therefore close at hand.

I started by asking the question as to what Sweden has achieved by subjecting herself to the regime of the part-time work Directive. I do not have a good answer, because very little is known about the considerations of the Swedish Government as regards the Council's adoption of the part-time work Directive. I am tempted to say that this is not unusual in the context of E.C. legislation, taking into consideration the notorious secrecy of deliberations of the Commission and the Council. The recent Swedish implementation of the Pregnancy Directive relating to compulsory maternity leave remains equally hidden in the archives.[58]

Looking at the Directive in a more dispassionate way one may ask whether it represents any achievement at all. Most conspicuous is, of course, the non-discrimination principle laid down in Clause 4 of the Agreement. It is, of course, better to have some non-discrimination principle than none at all, but the principle has been circumscribed in many

[57] The weaknesses of the part-time work Directive from the gender perspective is highlighted in the Opinion of the Committee on Women's Rights, annexed to the Report from the Committee on Employment and Social Affairs, A4-0352/97 (6 November 1997).

[58] See Government Bill 1999/2000:97. Obligatorisk mammaledighet (Mandatory maternity leave) and my article "Obligatorisk mammaledighet – nytt vin i gamla läglar" (Mandatory maternity leave – new wine in old glasses"), in an anthology in honour of professor Anna Christensen (2000).

ways. In the first place, different treatment may be "justified on objective grounds" – but the Directive does not explain what these grounds are. Further, the principle of *pro rata temporis* should apply only "where appropriate". Time or earning limitations may likewise be set forth, "where appropriate" if they are "justified by objective reasons" in the application of particular conditions of employment. It is also unclear whether the "employment conditions" referred to in the Directive include pay.[59] The parties' commitment to identify and review the obstacles to part-time employment as indicated in Clause 5, and to eliminate them, "where appropriate", may not mean much, but it may open instead the Pandora's box, i.e. increase the number of part-time employees. Furthermore, "as far as possible, employers should give consideration to" offering full-time or part-time employment to the employees affected, and provide "timely information" about such job-openings. This obligation is not binding at all. What is more, in Clause 6 it is provided that the parties may reserve the power to conclude agreements "adapting and/or complementing the provisions of this Agreement, in a manner which will take account of the special needs of the social partners concerned". This caveat may ultimately turn out to be the real "opt-out" of the Directive.

It would therefore seem that the part-time work Directive doesn't hold water – not better than a sieve, that is. It resembles a piece of chewing-gum which can be drawn out in all directions until it becomes so thin that it eventually ruptures – hence my nickname "The Chewing-Gum Directive".

Who are the winners? I cannot come to any other conclusion than it is the European employers who have been extremely successful in the conduct of the Social Dialogue, succeeding in diluting the part-time work proposals of the early 1980s and 1990s so that they have become considerably different from, and terribly limited as compared to, the European part-time scheme originally meant to be promoted,[60] but also in concluding a European agreement containing so many opt-outs that very little of the substance of the once proposed Directives has remained. The political price that has to be paid for it is obvious: it

[59] See discussion in Lena Maier, EU, arbetsrätten och normgivningsmakten (E.U., Labour Law and the Power of Regulation), 2000, pp. 292-294, 379. The narrow scope of the term "employment conditions" was also considered problematic by the Committee on Employment and Social Affairs in its Report, see A4-0352/97 (6 November 1997).

[60] Cf. also the European Parliament Resolution on the Commission proposal for a Council Directive concerning the framework agreement on part-time work, OJ No. C 371, 8.12.1997, p. 60.

seems to be more important for the Council and the Commission for the Social Dialogue to appear successful than to achieve results which are substantially viable.

One may therefore ask whether the Directive represents another example of a new trend in the European social policy legislation.[61] Have the social partners taken over the initiative, beginning to reserve an area of discretion of their own in order to lay down further European regulations at the national level? The idea implies bypassing the European legislature in the making of directives.[62] If that is the case, it may be predicted that the so-called "negotiated" E.C. legislation may eventually come to constitute the bulk of the European social policy norms in the future, referring most of the substantial issues to the national level. But why do it that way, when instead the principle of subsidiarity should prevail? Nevertheless, the fact that the European social partners have succeeded in taking over the initiative must be seen as a major breakthrough from the Swedish and Nordic points of view. Perhaps, given the Swedish obsession with the CBA as the primary regulatory instrument in labour issues,[63] this may have been a convincing argument for Sweden, as a member of the Council, regarding the adoption of the part-time work Directive, despite its complete legal ineffectuality as regards the content.

[61] Besides the part-time Directive the European social partners have paved the way for the Parental Leave Directive (96/34/EC), the Fixed-Term Work Directive (99/70/EC) and the Working Time of Seafarers Directive (99/63/EC).

[62] The Committee on Employment and Social Affairs in its Report (A4-0352/97, 6 November 1997) is extremely irritated over the fact that the Council endorsed the Framework Agreement, since the Committee considers that it is the European Parliament which has hitherto been the driving force behind European social policy.

[63] See the unilateral declaration by Sweden giving priority to collective bargaining agreements (CBA), Government bill 1994/95:19. Sveriges medlemskap i den Europeiska unionen (The Swedish membership in the European Union), Pt 3, App. 11, p. 25, see also the correspondence between the EC Commissioner and the Swedish Government, App. 12, pp. 6-9.