

Ronnie Eklund

Who Is Afraid of the Temporary Agency Work Directive?

This article is a tribute to the memory of late professor Anders Victorin. As a colleague of Professor Victorin, who assumed the position of Chairman of the Committee of Education in 1991/92, I worked closely with him, myself in the capacity as Head of the Department of Law. Professor Victorin started his outstanding academic career in the field of labour law. To my knowledge he had never submitted, however, any scientific articles on tri-partite relationships between staff agencies, agency workers and user undertakings. I have published a few articles on the subject, but this study gives no retrospective survey of the issues discussed in the aforementioned.¹

My aim is instead to identify and delineate essential features of the rapid development of staff agencies in Sweden.² Temporary work agencies, or

¹ See Ronnie Eklund, '*Entreprenader – arbetsrättsliga aspekter på en organisationsfråga*' (Contract Work – Labour Law Aspects of an Organisational Issue), *Juridisk Tidskrift* (1989-90), at 271–285; '*A Look at Contract Labour in the Nordic Countries*', *Juridisk Tidskrift* (1995-96), at 625–654; '*Public Employment Exchange and the Use of Temporary Employment Agencies in the Nordic Countries*', *Recht der Europa. Festschrift für Hilmar Fenge* (1997), at 183–205 and '*Temporary Employment Agencies in the Nordic Countries*', *Scandinavian Studies in Law* (2002), at 311–333.

² Staff agencies have been referred to by different names in the past. I have used previously the term 'Temporary employment agency'. 'Temporary work agency' is another concept. 'Temporary help service' was once used in the United States, see Mack A. Moore, '*The Temporary Help Service Industry: Historical Development, Operation, and Scope*', *Industrial and*

to use another term, staff agencies, were banned in Sweden between 1935 and 1991. There is especially one aspect which I want to draw the reader's attention to, and that is whether the Council's position on the European Community Directive on temporary agency work will lead to any new developments in this area.³ I think that it very well may, since as recently as last October the European Parliament voted in favour of the text of the EU Temporary Agency Workers Directive agreed by the Member States at the European Employment Council in June 2008.⁴ This is why the analysis below will hopefully have a high degree of contemporary relevance.

To put things into perspective a short presentation of the way in which the majority of staff agencies are regulated by collective agreements in Sweden is necessary. First, however, a short account is given of the development of public employment agencies and private staff agencies.

1 International Legal Background with Respect to Public Employment Exchange and Private Staffing Agencies

In the past, public employment agencies in Sweden had a monopoly on staff recruitment. The establishment of public employment agencies can be viewed as a policy device to eliminate low-quality private employment agencies. Article 1 of the ILO Employment Service Convention No. 88/1948 sets the standard, stipulating that a ratifying member 'shall maintain or ensure

Labour Relations Review (1965), at 554. There are fewer reasons today to call these employers 'Temporary employment agencies', or 'Temporary agencies', since most agency workers are treated as any other regular employees in Sweden. Hence, the past precariousness related to employment for each separate assignment is not practiced anymore. I will therefore call these employers 'staff agencies', which is also in accordance with the way in which these employers denominate themselves. They are in all respects acknowledged as any other employers on the labour market. The fact that the job assignment for the agency workers at the user enterprise workplace is of a 'temporary' character does not alter the overall picture. In fact, other employees in, for example, subcontracting, such as cleaning, catering, perform their work at different workplaces where also to some extent the subcontracted employee, like the agency worker, is subordinate to the user enterprise which controls the workplace. However, with respect to the EC Directive at issue I have to follow the terminology used in the Directive, i.e. 'temporary agency' and 'temporary agency worker'.

³ Common position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work, SOC 360, CODEC 764, 6 August 2008.

⁴ Parliament legislative resolution of 22 October 2008 on the Council common position for adopting a directive of the European Parliament and of the Council on temporary agency work, P6 7A(2008) 0507.

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the maintenance of a free public employment service'. Sweden ratified the Convention in 1949.⁵ It must be borne in mind that public employment agencies, whose main task it is to channel job opportunities to job seekers, are bypassed in those segments of the labour market where private staff agencies or other persons act as intermediaries between employers/recruiters and job seekers. Such activities frustrate the objectives of the state monopoly.⁶ Private staff agencies came into being in the 1960s, which is not such a long time ago.⁷

The first international standards on private employment services were set by the ILO Convention on Fee-Charging Employment Agencies No. 96/1949 (revising Convention No. 34/1933). Sweden ratified the Convention in 1950. It was denounced in 1992.⁸

A more recent ILO document in the same area is the ILO Convention on Private Employment Agencies No. 181/1997, which has replaced Convention No. 96/1949 in an attempt to modernize the law relating to staff agencies in order to promote flexibility in the functioning of the labour market. The aim of Article 2 of this Convention is 'to allow the operation of private employment agencies as well as the protection of the workers using their services'. Sweden has so far decided to postpone the ratification of the Convention with reference to the fact that negotiations had been pending at the European level between the social partners with respect to staff agencies.⁹ The ILO has thus bypassed the European Community in managing to modernize the old, restrictive covenants of the 1949 Convention. Staff agencies are instead acknowledged as serious actors on the market. This step implies quite a dramatic shift in attitudes towards temporary employment agencies.

Several attempts have also been made to place the issue of temporary agency work on the European Community agenda, first in 1974,¹⁰ and then

⁵ Legislative Bill 1949:162.

⁶ See, for example, Arturo Bronstein, 'Temporary work in Western Europe: Threat or complement to permanent employment?', *International Labour Review*, Vol. 130, 1991, No. 3, at 293: 'It can be argued that [the temporary work agencies] undermine the monopoly which public employment agencies enjoy in many countries'.

⁷ Arturo Bronstein, 'Temporary work in Western Europe: Threat or complement to permanent employment?', *International Labour Review* Vol. 130, 1991, No. 3, at 304.

⁸ Legislative Bill 1991/92:89.

⁹ Legislative Bill 2000/01:93.

¹⁰ Council regulation of 21 January 1974 concerning a social action programme, OJ C13, 12.2.1974, at 1–4 and COM(73) 1600 final, Social Action Programme, *Bulletin of the European Communities*, Supplement 2/74, at 16, 26.

in 1980,¹¹ 1982,¹² and in 1990. The latter attempt was inspired by the 1989 Charter of Fundamental Rights of Workers.¹³

The most recent breakthrough came about in 2008. The standards and operation of temporary employment agencies have been a contentious issue at European level for nearly a quarter of a century now. In the mid 1990s the European Commission encouraged the social partners to do something about atypical employment forms. As a result, Directive 97/81 on part-time work and Directive 98/70 on fixed-term employment contracts have been adopted. The social partners also conducted negotiations on temporary work between June 2000 and May 2001, but the talks broke down.

In order to maintain the political momentum the Commission therefore launched a draft Directive on working conditions for temporary workers in March 2002,¹⁴ incorporating the points “largely” agreed upon during the negotiations between the social partners, formulating also provisions to overcome the remaining contentious issues.¹⁵ The aim of the revised draft

¹¹ COM(80) 351 final. Guidelines for Community action in the field of temporary work (agency work and contracts for a limited period).

¹² COM(82) 155 final. Proposal for a Council Directive concerning temporary work, amended in 1984, COM(84) 159 final. Amended Proposal for a Council Directive concerning the supply of workers by temporary employment businesses and fixed-duration contracts of employment. See also Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 157, where it is held: “Temporary workers were, in fact, considered to be victims of numerous forms of discrimination, above all the precarious nature of their jobs as compared with those of permanent workers.” In addition to that the 1982 and 1984 designs included advanced provisions on the control and supervision of temporary employment agencies.

¹³ COM(90) 228 final. Proposal for a Council Directive on certain employment relationships with regard to working conditions. See Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 159 where it is stated: “The Commission’s intention to regulate temporary jobs [is] towards eliminating distortions in competitiveness and possible misuse that might occur due to the considerable differences between the various national systems.” For a full account, see also Annika Bergh, *Bemanningsarbete, flexibilitet och likabehandling* (Staff agency work, flexibility and equal treatment) (2008), at 89–104.

¹⁴ COM(2002) 149 final. Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, revised in COM(2002) 701 final. Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers. It is the latter revised draft that I refer to.

¹⁵ See for a lucid account relating to the events concerning the draft Directive, Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 218–247. It is argued, at 171 that “[t]he proposed directive on temporary work has a dual core: on the one hand, it is inspired by social policy aims in the establishment of a network of protection and rights for temporary workers; on the other hand, it contains employment policy aims in the form of provisions expressly oriented towards improving the functioning of the

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Directive from 2002 was ‘to ensure the protection of temporary workers and to improve the quality of temporary work ... and recognising temporary agencies as employers’; and further, ‘to establish a suitable framework for the use of temporary work to contribute to creating jobs and the smooth functioning of the labour market’ (Article 2).¹⁶ Article 3 in the revised draft Directive contains various definitions. Article 4 also refers to a ‘Review of restrictions and prohibitions’. According to Article 4.1 such restrictions and prohibitions are justified ‘only on grounds of general interest, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented’.

However, according to the Commission the real bone of contention is the concept of ‘comparable worker’ under the non-discrimination principle.¹⁷ Article 5.1 of the revised draft Directive provides that ‘the basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job’.¹⁸ However, according to Article 5.2 member states may, as regards *pay*, and after having consulted the social partners, ‘provide that an exemption be made [– – –] when temporary workers who have a permanent contract of employment with a temporary agency continue to be paid in the time between postings’.¹⁹ According to the suggested Article 5.3 member states may also give the social partners ‘the option of upholding or concluding collective agreements which derogate from the [non-discrimination] principle [– – –] as long as an *adequate level of protection* is provided for temporary

labour market’; it is further argued with respect to what the Commission stated in its Explanatory Memorandum at 222 that: ‘It is doubtful whether one could say that social partners had actually reached consensus on any matter of importance’.

¹⁶ The debate on the aims of the Directive ‘reflected a fundamental disagreement on what was to be achieved’, see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 239.

¹⁷ COM(2002) 149 final, at 9, but as the events developed this aspect was not the only contentious issue which was brought up.

¹⁸ The Swedish delegation had difficulty accepting this provision. It was not easy to find a ‘comparable worker’, since wage systems were most often individually based and differentiated, see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà: *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 224–5, 233, 252.

¹⁹ This exception is a concession towards Germany which required in the past that temporary workers had open-ended contracts. Even though the German law was amended in 1997, the normal practice in Germany still seems to be that temporary workers are employed on open-ended contracts, loc. cit. at 119, 123–4, 228.

workers'.²⁰ Again, as regards pay, member states may, pursuant to provisions of Article 5.4, decide that the [non-discrimination] principle shall not apply where a temporary assignment with the same user enterprise 'can be accomplished in a period not exceeding six weeks'.²¹

The European Commission argued in its Explanatory memorandum that the need to enact legislation at Community level is justified on several grounds.²² Firstly, there is a need to extend the principle of non-discrimination from temporary agency workers to comparable workers of user undertakings. Secondly, in order to promote temporary work, it is necessary to pave the way for the elimination of the existing restrictions and limitations with respect to the use of temporary work. Thirdly, it is urgent to supplement the existing Community law that already lays down the principle of non-discrimination as regards non-standard employment relationships. Fourthly, a Community legal framework will echo the wishes of the intersectoral actors at Community level, which is welcomed by the CIETT (International Confederation of Temporary Work Businesses) and fulfil the expectations of the social partners in the temporary agency sector.

The social partners' views on the draft Directive differed, however, from those of the Commission.²³ The employee side argued that in order to uphold the non-discrimination principle and have a point of reference the term 'a comparable worker' should be used in relation to a worker employed by the user enterprise, carrying out the same or similar work as the agency worker. It was further argued that this principle was already in force in several member states. Hence, the agency worker could be looked upon as if he/she had hypothetical employment at the user enterprise. The employer side, however, disagreed with this interpretation, stating that such comparison would be indefensible in countries where staff agency workers have employment contracts valid for an indefinite term and are paid even when they are not posted.²⁴

²⁰ Sweden fought hard in the negotiations for the freedom of trade unions and employer organisations to conclude autonomous collective agreements for agency workers, loc.cit., at 52, 228, 238 (Sweden even considered blocking the Directive if no concession on this point was achieved) and 243 (collective agreements should not be subject to judicial examination by the European Court of Justice).

²¹ The 'grace period' mentioned in this paragraph posed a highly contentious issue and acted as a stumbling block, loc.cit., at 180, 229, 240, 242, 244, 246–7, 257. The blocking minority wanted a six-month 'grace period'.

²² COM(2002) 149 final, at 10–11.

²³ COM(2002) 149 final, at 9.

²⁴ The last statement does not have a full support in the sources, since the employers at the negotiating table were prepared to discuss a non-discrimination principle, see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà,

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The initiative of the Commission has failed due to the resistance of the U.K., Ireland, Denmark and Germany, who blocked the proposal at a meeting in Brussels on 2–3 June 2003.²⁵ It is obvious that these countries, making up “The Gang of Four”, never had the political will to stipulate the regulations governing the work of temporary work agencies. Every Member State seemed to want a Directive that had as little impact as possible on their domestic regulations in the area.²⁶

One argument which could be raised against the implementation of the 2002 Directive in the Swedish context is that it is hardly reasonable to view staff agencies in a different light as compared to other employers on the labour market, who are free to set standard terms and conditions of work within the framework of their own collective agreements. Why should Swedish staff agencies be governed by the labour standards applied by the user enterprise?²⁷ This was the basic question raised by representatives of the staff agencies. Other questions may also be raised. What should apply, for example, if no ‘comparable worker’, can be found? Is it enough to pro-

Transnational Labour Regulation. A Case Study of Temporary Agency Work (2008), at 200, 202, 206, 211–2.

²⁵ The final offer from the blocking minority is summarized in Kerstin Ahlberg, Brian Bercuson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 246.

²⁶ *Loc cit.*, at 251–2.

²⁷ The Swedish Association of Temporary Work Businesses and Staffing Services (*Svenska Personal- och Rekryteringsförbundet, SPUR*), the predecessor association of staff agencies, was founded in 1967. A new organisation, the Swedish Association of Staffing Agencies (*Bemanningsföretagen*) came into being in 2003. The former once argued that the Directive had not been adapted to the Swedish labour market tradition and the conditions applying to agency workers. The staff agencies feel downgraded as being secondary employers and object, in particular, to the proposal that terms and conditions of work for agency workers should be at least equal to those of a comparable worker in the user undertaking. Source: website of SPUR, SPUR information 2002-04-30, www.spur.se. In 2008, in a statement made by Henrik Bäckström, Managing Director of *Bemanningsföretagen*, it is held that the European compromise ‘is a blow towards the Swedish model and that trade unions and employers must act first and try to persuade European Parliamentarians to stop the proposal’. The objections are: 1) Wages and conditions of work are regulated within a specific industry. Which industry is next to be regulated? 2) Since the equal treatment principle implies that the same terms and conditions will apply to the staffing agencies, they are denied an opportunity to negotiate their own conditions of work. The branch is declared incapacitated. What is there to bargain about? 3) It is the government that decides in which way the directive should be implemented. In doing so the government is intervening into an area which is already regulated by collective agreements. What is then left for the parties to negotiate about? 4) The Swedish bargaining system is subjected to inroads. The question for trade unions and employers is why they should sign collective agreements stipulating wages and conditions of work. See www.newsdesk.se/press-room/almega and comments by the Director of the Staffing Agencies Association presented at a seminar at Stockholm University on the draft Directive 2008-09-10.

pose a ‘hypothetical worker’? What is the proper wage level if individual wages and a differentiated wage system are applied by the user enterprise? It has also been noted that the suggested non-discrimination principle has an obvious weakness inasmuch as it is in the interests of both the staff agency and the user enterprise to set the staff agency workers’ wages as low as possible.²⁸

Already back in 2004 there were rumours that the Commission had a ‘dirty deal’ in view, intending to make a trade off between the Working Time Directive, then subject to revision, and Temporary Agency Work Directive.²⁹ As the saying goes: no smoke without fire! What actually happened was that the U.K. Government signed on 19 May 2008 a Joint Declaration with TUC and CBI, stating that it would give support to the draft EC Directive on Temporary Agency Work on the condition that certain provisions of the Working Time Directive are revised. The European draft Directive proposes a 12-week qualifying period for the U.K. temporary agency workers before the right to equal treatment begins, disregarding the non-discrimination principle laid down by the same Directive. On 11 June 2008 a qualified majority of the member states adopted a ‘Political agreement on a common position’ to proceed.³⁰ On August 6 the Council adopted a common position.³¹ However, the draft Directive could be a risky project should Parliament take a negative position on the suggested amendments of the Working Time Directive.³² It has also been said that the draft Directive on Temporary Agency Work is a “politically sensitive project and technically difficult undertaking”.³³

²⁸ This point is made by Annika Bergh, *Bemanningsarbete, flexibilitet och likabehandling* (Staff agency work, flexibility and equal treatment) (2008), at 352.

²⁹ Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 248.

³⁰ Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, SOC 358, CODEC 761, 11 June 2008.

³¹ COMMON POSITION adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work, SOC 360, CODEC 764, 6 August 2008.

³² COMMON POSITION adopted by the Council on 15 September 2008 with a view to the adoption of a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, 10597/2/08 REV 2 and additional Statement of the Council’s reasons, same number.

³³ Kerstin Ahlberg, *Regulating Temporary Agency Work: On the Interplay between EU-level, National Level and Different Industrial Relations Traditions*, EU Industrial Relations v. National Industrial Relations. Comparative and Interdisciplinary Perspectives, Ed. Mia Rönnmar, (2008), at 79.

2 Short presentation of the 2008 Directive

The new Directive applies to *temporary agency work*. Consequently, those previously employed as temporary workers are now referred to as *temporary agency workers*. The term ‘posting’ is not used in the new Directive.³⁴ The aim of the Directive is defined in Article 2. The provisions of Article 2 have been the subject of hot debate. The aim envisaged under Article 2 of the 2002 Directive was twofold: 1) to ensure the protection of temporary workers, and 2) to establish a framework for the use of temporary work in order to contribute to creating jobs and the smooth functioning of the labour market.³⁵ The 2008 Directive has no longer a twofold aim. Article 2 of the Directive stipulates that the purpose of the Directive is to ensure protection of temporary agency workers and to improve the quality of temporary agency work ‘while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.’

A definition of *basic working and employment conditions* is given in Article 3, together with other definitions of agency employees, their assignments, temporary agencies, working time, etc. It follows from Article 3.1.f that these basic conditions refer to ‘the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay’ in force at the user undertaking. Pay is to be defined by national law.³⁶ The provisions of Article 4 concerning the review of restrictions or prohibitions have been redrafted and no longer include an obligation upon the member states to discontinue all restrictions or prohibitions on the use of temporary agency work. The member states had once second thoughts as regards the

³⁴ One may assume that the term “posting” is consumed by the 1996 Directive 96/71/EC on posting of Workers. In order to avoid confusion another term was sought for in the Directive on temporary agency work. No doubt, the term “assignment” is a far better choice. However, it does not entail that a temporary agency worker may not be posted; it is assumed in the Directive on posted workers that such a situation is foreseen.

³⁵ See Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 241.

³⁶ The general apprehension in Community law is that the concept of “pay” covers every emoluments covered by Article 141 of the Treaty, i.e. is all-inclusive. However, the Commission never intended to cover additional social security benefits in the temporary agency work directive, see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 227.

need to eliminate such regulations. The Commission had to give in on this point.³⁷

The principle of non-discrimination in the 2002 draft Directive has been renamed in Article 5 as the 'principle of equal treatment'. Articles 5.1 and 5.2 have remained unchanged when compared to the 2002 draft Directive. Article 5.3 has been reformulated in order to give full recognition to Swedish practice relating to collective agreements and the autonomy of the social partners.³⁸ It now provides that member states may give the social partners 'at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in Paragraph 1' (of Article 5). This is a significant change. In the first place the provisions make clear that the derogation from the equal treatment principle will be subject to the conditions laid down by the member state. Secondly, such derogation must respect 'the overall protection of temporary agency workers'. It is no longer stipulated that collective agreements must refer to 'an adequate level of protection' of a temporary agency worker. The redrafted provisions will probably provide ample opportunities for a more global assessment of the working/employment conditions, in comparison with strict listing of terms and conditions of work. Thirdly, the provisions make clear that a member state 'may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to' in Article 5.1. No reference is made here to Community law.

Article 5.4 is a complete redraft, providing an entirely new solution with a view of appeasing the U.K.³⁹ It provides that member states may '[a]s long as an adequate level of protection is provided for temporary agency workers – – – establish arrangements concerning the basic working and employment

³⁷ Loc. cit., at 224, 228, 235, 239 and 241–2.

³⁸ Cf. also recital 16 and 19, in particular the latter: 'This Directive does not affect the autonomy of the social partners nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law.' The fact that the national regime must respect 'prevailing Community law' is less reassuring from the point of view of the autonomy of the social partners.

³⁹ Cf. Recital 17: 'Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, as long as an adequate level of protection is provided.'

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conditions which derogate from the principle established in [Article 5.1]. Such arrangements may include a qualifying period for equal treatment'. This model presupposes 1) that there is no system in law for declaring collective agreements universally applicable, or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, and 2) that a given member state has consulted the social partners at the national level and acts in accordance with the agreement concluded by them.

However, it follows from the second paragraph of Article 5.4 that arrangements referred to 'shall be in conformity with Community legislation' and that they shall be 'sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations', and, that, in particular, the member state shall specify 'whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions referred to in [Article 5.1]'. Finally, in Article 5.5 the member states are admonished to 'take appropriate measures ... with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.'

Articles 6–10 are practically unchanged. It shall be noted that recital 20 stipulates that the Directive does not prevent 'national legislation or practices that prohibit workers on strike being replaced by temporary agency workers'.⁴⁰

Before assessing the impact of the 2008 Directive from the Swedish point of view it is necessary to present the Swedish system of collective agreements which applies to a large segment of staff agencies.

3 Collective Agreements Applying to Staff Agencies in Sweden

Collective agreements have followed two different routes of development as regards salaried employees and workers respectively. It is best to start introducing the collective agreement applicable to salaried agency employees. It

⁴⁰ The recital appeared for the first time in the second 2002 draft. It had been discussed whether such a provision could be included in the Directive, but the Commission's Legal Service indicated that it would be better if it were mentioned in the preamble, considering the content of Article 137.5 of the EC Treaty; see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 207 and 209.

so happened that the biggest trade union (*Handelstjänstemannaförbundet*, HTF) took action when the union could no longer stand by as a mere spectator when their members were employed by staff agencies. HTF has thus paved a way for the development of the staffing industry. It is an example of the Swedish tradition at its best.⁴¹

A collective agreement referring to *temporary salaried employees*, applying to office and commercial workers in the service and office sectors, was signed in 1988 between the Swedish Commerce Employers' Association (HAO) and the Salaried Employees' Union (HTF)⁴² at a time when the former ban on the hiring-out of manpower was still in force, even though it was not effectively enforced. The main import of the agreement was that it stipulated a *guarantee wage* corresponding to 50 % of a full-time appointment when work was not offered. After numerous amendments,⁴³ the current agreement has been concluded between the Swedish Association of Staffing Agencies (*Bemanningsföretagen*) and the Salaried Employees' Union (*Handelstjänstemannaförbundet*, HTF),⁴⁴ as well as several other unions associating academic professionals (*Akademikerförbunden*). The agreement is valid from 2007 to 2010.

This collective agreement applies to all employees of staff agencies acting as employers, irrespective of whether they are members of the contracting trade union or not.⁴⁵ The agreement provides that a contract of employment shall be valid for an indefinite term unless otherwise agreed by the respective parties (staff agencies and agency workers). The different types of permissible fixed-term contracts which may be entered into are listed in

⁴¹ Loc. cit., at 48.

⁴² The agreement was called '*Särskilda bestämmelser för vissa tjänstemän vid kontors-serviceföretag och skrivbyråer*' (Special provisions concerning certain civil servants in the office service provider sector) and functioned as a complementary agreement to the branch agreement applying to salaried employees concluded by the same parties. Refer for more particulars regarding the steps taken on both sides leading to the first collective agreement and to later amendments to: Ola Bergström, Kristina Håkansson, Tommy Isidorsson & Lars Walter, *Den nya arbetsmarknaden – Bemanningsbranschens etablering i Sverige* (The new labour market – establishment of temporary employment agencies in Sweden) (2007), at 56–69.

⁴³ Regarding the progressive development of the wage guarantee over time, see *Bemanningsbranschen – personal som handelsvara?* (Temporary agency work sector – personnel as a commodity?), publ. by Unionen (2008), at 62.

⁴⁴ After amalgamation of HTF and Sif a new trade union, UNIONEN, has assumed the rights and obligations of the collective agreement after 1 January 2008.

⁴⁵ The present wage agreement applies, however, only to employees who are members of the contracting trade union. The minimum wage laid down in the wage agreement applies probably to all employees; Interview Gunnar Järsjö, Chief of Negotiations of the Staffing Agencies Association, 2008-08-11.

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the agreement⁴⁶ and are strongly reminiscent of the legal framework applied to fixed-term contracts, as laid down in the Employment Protection Act in force before the introduction of amendments in 2007, which simplified the statutory regulations.⁴⁷ Even if staff agencies might want to extend the application of the new regulations provided by the Employment Protection Act, the Staff Agencies Association's advice to their members is not to do so.⁴⁸ A special provision applies to staff agency workers only, stipulating that a fixed term contract may be concluded for 'a certain period of time to match a demand for extra manpower' in order to remedy 'short term demand for manpower', or when the assignment requires 'special skills'. Such demand for manpower may 'periodically relate to the same user employer'. However, this type of employment 'must not cover a more continuous demand for manpower'. In order to counteract any violations of the contractual terms by staff agency employers the local trade union may terminate an employer's right to conclude such fixed-term contracts.⁴⁹ This provision is meant to have a preventive effect.⁵⁰

The collective agreement further stipulates that the agency worker has a right to reject a job offer, in which case a deduction from his/her salary will normally occur.⁵¹ A staff agency worker is paid both a monthly salary which is set on an individual basis by the employer (the staff agency) and the staff worker, and a performance related salary.⁵² A salary guarantee based on monthly pay has the following form. During the first 18 months of continuous employment the employee is guaranteed a monthly pay based on 133 hours per month (just about 75 % of a full-time pay). After 18 months of continuous employment, the monthly pay is based on 150 hours per month (just about 85 % of a full time pay).⁵³ If work is performed for more than 133 hours per month or 150 hours per month

⁴⁶ Section 2.2 of the Agreement.

⁴⁷ Legislative Bill 2006/07:11.

⁴⁸ Interview Gunnar Järsjö, 2008-08-11.

⁴⁹ Section 2.2.1 of the Agreement.

⁵⁰ Interview Gunnar Järsjö, 2008-08-11.

⁵¹ Section 11.3.2 of the Agreement.

⁵² Section 12 of the Agreement.

⁵³ Annika Bergh, *Bemanningsarbete, flexibilitet och likabehandling* (Staff agency work, flexibility and equal treatment) (2008), at 312 denotes the guarantee a kind of 'unemployment insurance within the framework of the contract of employment'. The design is imperative 'if they [i.e. the staffing agencies] are to attract qualified staff', says Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 50. Cf. *Bemanningsbranschen – personal som handelsvara?*, Unionen (2008), at 12: 'In the long range perspective the sector must strive to attain full monthly pay to be able to attract staff.'

respectively, a performance related salary is paid. If work is performed on overtime, overtime compensation applies. It is the user undertaking which decides on overtime work, as this right is regarded to be part and parcel of the right to manage and distribute work in accordance with the definition of agency work in the 1993 Act on Private Job Placement and Hiring-Out of Manpower.⁵⁴ The amount of overtime work is shown by the worker's overtime hours report. It is the duty of the staff agency to see to it that the statutory maximum regulations with respect to overtime work are enforced. A special working time agreement applies.⁵⁵ The working time of the staff agency worker is adapted to the way working time is allocated at the user undertaking. If the user undertaking has concluded an agreement on overtime and overtime compensation, the provisions of that agreement will apply to the staff agency worker, instead of equivalent provisions following from the staff agency collective agreement.⁵⁶ This rule applies because the same conditions with regard to overtime should apply to the agency worker as those governing overtime regulation of the employees of the user enterprise.⁵⁷ Only if overtime regulations are not applied at the user enterprise, the specific sector provisions on overtime shall apply.

The stipulated minimum wages are rather low, being also related to age. In 2008 the minimum pay has been set at 14.000 SEK/month for full-time work for workers who have reached the age of 20, and 16.300 SEK/month for those who have reached the age of 24.

On 1 September 2000 trade unions affiliated with the Swedish Trade Union Confederation (LO) associating *blue-collar workers* concluded an epochal collective agreement with the Swedish Service Employers' Association (*Tjänsteföretagens Arbetsgivarförbund*), giving recognition to the use of temporary employment agencies on the Swedish labour market.⁵⁸ This is a breakthrough of more than just symbolic significance. For a long time LO had been an ardent opponent of such agencies.⁵⁹ The situation start-

⁵⁴ See Section 2 of the 1993 Act.

⁵⁵ Annex 1 of the Agreement.

⁵⁶ Section 4.1 of the Agreement.

⁵⁷ Interview Gunnar Järsjö, 2008-08-11.

⁵⁸ Avtal för bemanningsföretag (Agreement on temporary employment agencies) between *Tjänsteföretagens Arbetsgivarförbund* and eighteen LO Trade Unions, 1 September 2000. After amendments the present agreement expires in 2010. The employer party is now The Swedish Association of Staffing Agencies (Bemanningsföretagen). The number of LO trade unions has fallen from 18 to 15.

⁵⁹ With respect to the background and the steps considered by both sides refer to Ola Bergström, Kristina Håkansson, Tommy Isidorsson & Lars Walter, *Den nya arbetsmarknaden – Bemanningsbranschens etablering i Sverige* (The new labour market – the establishment of temporary work agencies in Sweden), (2007), at 69–80.

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ed changing in about 1997/98 through the initiative of the employer side and the Swedish Metal Workers' Union acting as the responding sounding board. Tie-in agreements were concluded here and there at local level with temporary employment agencies. Since LO could not expect that the Government would intervene, it decided to step in to avoid destabilization of the application of the local collective agreements. The entry of the LO into the discussions strengthened the position of the trade unions.⁶⁰ A key motive behind LO's support for the conclusion of collective agreements with the staff agencies was that the Confederation wanted to prevent a situation in which it was cheaper for the user enterprise to engage labour provided by a staff agency than to have permanently employed staff to do the same work. In other words, LO's incentive for concluding an agreement was to avoid social dumping, or distortion of competition on the labour market. It is also argued that the collective agreement will make the staff agencies more acceptable on the Swedish labour market.⁶¹ The employer party had been, of course, in great need of such agreement to be able to enter the boardroom of the labour market.⁶²

Provisions of the Agreement regarding the *type of employment* are more strictly formulated than the equivalent provisions in the Employment Protection Act. The main rule is that the agency worker shall be employed until further notice (indefinite term).⁶³ Instead of the fixed-term contract provisions provided for in the Employment Protection Act, the following applies. A fixed-term contract may be concluded, but it must be done in writing and may not exceed six months; it may last up to 12 months if approved by the local trade union. No other specific criteria apply. However, the statutory regulations on, for example, substitute employment, shall apply. The agency worker is on full time employment. Part-time employment may be entered

⁶⁰ Loc. cit., at 218. A similar development is seen in Germany where trade unions see collective agreements as a useful tool for strengthening the protection of agency workers, see Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 130–131.

⁶¹ *Bemanningsavtalet – en enkel handbok*, A handbook on temporary agency work issued by the LO, (no year), at 4 and 8. Perhaps the most important effect of the agreement is that staffing agencies were recognised by the LO trade unions, says Ola Bergström, Kristina Håkansson, Tommy Isidorsson & Lars Walter, *Den nya arbetsmarknaden – Bemanningsbranschens etablering i Sverige* (The new labour market – the establishment of temporary employment agencies in Sweden) (2007), at 75.

⁶² Ola Bergström, Kristina Håkansson, Tommy Isidorsson & Lars Walter, *Den nya arbetsmarknaden – Bemanningsbranschens etablering i Sverige* (The new labour market – the establishment of temporary employment agencies in Sweden) (2007), at 216.

⁶³ Section 3, subsection 1 of the Agreement.

into if approved by the relevant trade union.⁶⁴ The duty to perform work at a specific workplace is related to what is assessed to be the normal travel or commuting distance. The geographical area within which the duty to perform work should apply must be stipulated in writing in the contract of employment. If no agreement can be concluded regarding the geographical area, the municipality border applies. In Stockholm, Gothenburg and Malmö the duty to perform work includes also municipalities directly adjacent to them.

In terms of wages the agreement provides that if no work can be offered to the worker, a *guarantee wage* shall be paid, which shall be set at 90 % of the average earnings of the worker during the last three months of employment. In the employment contract, the staff agency and the worker shall agree on an individual monthly or hourly wage, which must be at least that stated in the collective agreement (which is between 16 070 SEK and 18 210 SEK per month for 2008, depending on the worker's qualifications). The above represent minimum wages. What is of special interest, however, is that the agreement also provides that when work is performed at the user enterprise, its collective agreement shall be considered as a yardstick with respect to *wages* and *general terms and conditions of work*.⁶⁵ The wage to be paid is the average wage level among comparable employees at the user enterprise.⁶⁶ Hence, the equal treatment principle applies.⁶⁷ However, assignments of up to 10 working days, including not more than 20 persons at the user undertaking, are exempted from the equal treatment principle. In that case the average wage level during the last three months is paid, though not less than the personal minimum wage. The equal pay principle is not always easy to apply, which is something that representatives of the Swedish Association of Staffing Agencies always emphasise.⁶⁸

⁶⁴ Section 4 of the Agreement.

⁶⁵ Section 1, subsection 1 of the Agreement. As a matter of fact it relates to wages, overtime pay and various working time issues.

⁶⁶ Section 5, subsection 1 of the Agreement.

⁶⁷ One survey reports a case in which agency workers were on a monthly pay, whereas the regular staff employees at the user enterprise worked on a piecework basis. The regular staff had second thoughts about the monthly paid staff workers. The staff agency ultimately undertook to transfer the staff workers to the piece-work system to avoid divisions into 'we and them'. See Lena Birgersdotter, Lisa Schmidt & Annika Karlsson, *Arbetsmiljöarbete för uthyrd personal i bemanningsföretag*, (Working Environment Measures with regard to Hired-out Manpower in Temporary Work Agencies) IVL Svenska Miljöinstitut AB (2002), at 24.

⁶⁸ Henrik Bäckström, Managing Director of the Association of Staffing Agencies presented the following examples at a seminar at Stockholm University. An 18-year old worker is sent to a user enterprise where a 55-year old worker enjoys a high wage owing to his age and seniority. The result is that the young worker is paid a salary which is much too high. In order to

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This means that another model is applied on the Swedish labour market for blue-collar workers than the one used for in the collective agreement applying to salaried staff workers. The staff agency must keep itself informed about the wage level which is applied to comparable groups of employees at the user enterprise.⁶⁹ Nothing is said about this matter in the agreement. The general provisions for staffing services provide, however, the principles that the staff agency which is a member of the employer organisation must apply in relation to the user enterprise.⁷⁰

In certain special cases the staff worker is entitled to reject a job offer and still be entitled to retained employment benefits. The most important aspects of the employment relationship relating to sick and parental pay, holiday pay, travel expenses, allowances, temporary time-off and vacation pay are governed exclusively by the terms and conditions of employment laid down in any given collective agreement applying to staff agencies for blue-collar workers, irrespective of whether the worker in question is on assignment or not.⁷¹ Staff agencies are also under an obligation to honour the labour market insurance schemes, such as pension schemes, redundancy schemes, additional sickness benefits and workers' compensation. A separate working-time agreement applies.

As regards both the white- and blue-collar sectors of the staff agencies labour market it is provided that if the user enterprise is faced with industrial action, staff agencies undertake not to send co-workers as substitutes for individuals participating in the labour market conflict.⁷²

illustrate how the equal treatment principle is applied with respect to salaried employees Mr Bäckström gave the following example. A staff manager is sent to a private enterprise and receives a far higher salary there than if the same staff manager were sent to perform the same work at a county council where the average salary level is much lower than in the private sector.

⁶⁹ See Section 5, subsection 1 of the Agreement. In calculating wages for comparable groups of employees a rule of thumb is to look at the work organisation and clear professional criteria at the user enterprise in order to make the staff agency pay 'neutral wages'. It has been reported that this is not an easy task and that the provision causes disputes, see Annika Bergh, *Bemanningsarbete, flexibilitet och likabehandling* (Staff agency work, flexibility and equal treatment) (2008), at 285–6, 349. See also LO-Tidningen No 27, Sept 13, 2002 regarding difficulties in applying the equal treatment principle.

⁷⁰ General provisions, Staffing service, ABPU-04, Section 3.3: 'The client is responsible for accurately informing the supplier about the average salaries of comparable employee groups at the client.'

⁷¹ See sections 7–13 of the Agreement.

⁷² This follows from the Ethical rules for staff agencies issued by The Swedish Association of Staffing Agencies, 2008-06-30, www.almega.se. The same applies in accordance with the collective agreement on staff agencies concluded between the LO Trade Unions and the Swedish Association of Staffing Agencies, section 17.

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There have been two other agreements concerning the staff agency sector: a staff agreement concluded between The Swedish Association of Staffing Agencies (*Bemanningsföretagen*) and the Swedish Federation of Salaried Employees in the Hospital and Public Health Sectors (*Vårdförbundet*), applying to health staff agencies from 1999,⁷³ and a very special collective agreement applying to foreign staff agencies conducting temporary activities in Sweden, concluded between the Swedish Association of Staffing Agencies and all trade unions affiliated with LO, which has been in force since November 2005. These agreements will not be discussed here, however.

4 Tentative conclusions with respect to the implementation of the 2008 Directive

To start with, it is quite amazing that so much effort has gone into regulating the working conditions of such a small number of workers on the European labour market. It is estimated that not more than 150 000 temporary agency workers were covered by the provisions of the major collective agreements relating to salaried and blue-collar workers in 2007 in Sweden.⁷⁴ This number is equivalent to approximately one percent of the entire labour force if we look at the number of temporary agency workers employed on a yearly basis, i.e. including even part-time employees, converting their working time into full-year employment. The number of agency workers is slightly higher in some other EU countries. Transaction costs at Community level must have been tremendous, taking into consideration that the first draft Directive was launched already in 1980. As it stands now, it leaves no room for approximation of laws. In spite of Recital 23 ('Since the objective of this Directive, namely to establish a harmonised Community-level framework for protection for temporary agency workers') the Directive is as hollow as Swiss cheese.⁷⁵ It reads more like some kind of a framework directive trying to find individual solutions for countries that have voiced objections.⁷⁶ It thus provides one solution for Germany, another one for

⁷³ See Annika Bergh, *Bemanningsarbete, flexibilitet och likabehandling* (Staff agency work, flexibility and equal treatment) (2008), at 262–65, 288–90, 301–3.

⁷⁴ Loc. cit., at 40, 239.

⁷⁵ Recital 12: 'This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.'

⁷⁶ The concept of a 'framework directive' is normally used when legal commitments must be formulated at a fairly high level of generality, see Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies* (2002), Vol. 40 No 4, at 664.

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Sweden and a third one for the U.K.⁷⁷ The way it is drafted in the main there does not seem to be no worry for the social actors on the Swedish labour market. There remain a few question marks (see below), and some statutory interventions are probable, but it does not destabilise or alter the Swedish labour market model as the *Laval* case has done.⁷⁸ The Swedish model can continue to develop in the way it has been developing until now. Supporters of staff agencies have submitted, however, a few issues for reconsideration.

I would like now to share a few reflections on the various provisions of the Directive in the light of Swedish law and applicable collective agreements.

Article 1 concerning the **Scope** of the Directive does not cause any difficulties. Staff agency work, as defined in Article 1.1, is in perfect harmony with the definition of that type of work found in the Swedish 1993 Act on Job Placement and Hiring-Out of Manpower. According to Article 1.3 a member state may provide that the Directive shall not apply to ‘specific public or publicly supported vocational training, integration or retraining programme’. This could apply to the Swedish staff agencies’ involvement in publicly supported labour market programmes.

Article 2 defining the **Aim** of the Directive does not deserve any further comment (see above).

In Article 3 (**Definition**) various definitions are provided. One of them is of relevance – definition in Article 3.1.f concerning ‘basic working and employment conditions’ in force in the user undertaking. It is in particular the reference to ‘pay’ that causes some concern. As mentioned before, the pay concept has a broad application in Community law. However, according to Article 3.2 it is up to each member state to define the meaning of ‘pay’. It is also stated that basic working and employment conditions in force at the user undertaking refer to ‘the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays.’ This definition is significant if, and only if, the main principle of equal treatment is applied in accordance with Art. 5.1. However, taking into account other models for the implementation of the equal treatment principle, as found under Article 5, no major consequences will ensue for the organised labour market in Swe-

⁷⁷ Recital 16 summarizes: ‘In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.’

⁷⁸ See Ronnie Eklund, ‘A Swedish Perspective on *Laval*’, and Giovanni Orlandini, ‘Trade Union Rights and the Market Freedoms’, *Comparative Labor Law & Policy Journal*, Vol. 39, Issue 4, Summer 2008, at 551–571 and 573–605, respectively.

den (as will be shown further down). In this context it is obvious that working time matters (allocation of working time, breaks, rest periods etc.) will have to be adjusted to the actual regulations at the workplace which the staff agency worker is assigned to in order to perform work. To also include in this context holidays and public holidays seems to be unnecessary. It makes sense if by ‘holidays’ and ‘public holidays’ is meant that no work can be performed at the user undertaking if the regular staff is not physically there due to, for example, holidays. It does not make sense, however, if the regulations in force relating to holidays (paid or unpaid) at the user undertaking apply to agency workers. To include ‘public holidays’ seems to be innocuous, to say the least. A public holiday is probably ‘public’ whenever work is not performed. It is hard to believe that pay related to such public holidays will be referred to here, since ‘pay’ refers exclusively to one of the basic working and employment conditions, as stipulated in Article 3.1.f.ii.

Another tentative conclusion is that the Swedish legislator should address the issue of ‘pay’ in Article 3.1.f. The reason is that there are agency workers who are not covered by collective agreements. These workers need to be covered by the provisions of the Directive.⁷⁹

Article 4 on **Review of restrictions or prohibitions** does not seem to affect the Swedish legislative framework. No restrictions of any kind have been laid down by law or collective agreements on ‘the use of temporary agency workers’. The proper form of employment is hardly to be regarded as the kind of restriction alluded to. It follows already from recital 16 that ‘[e]mployment contracts of an indefinite duration are the general form of employment relationship’. It is an open question, however, whether the restriction stipulated in Section 4(2) of the Swedish 1993 Act is to be regarded as such a restriction ‘on the use of temporary agency work’, i.e. that an employee who has left the principal employer in order to take up employment with a staff agency cannot be assigned a job with the former employer earlier than six months after the expiration of the former employment contract.⁸⁰ There are no doubt arguments *pro et contra* regarding the

⁷⁹ Niklas Bruun & Jonas Malmberg, *Anställningsvillkor för utstationerade arbetstagare i ljuset av Laval och Rüffert* (Terms and conditions of work applying to posted workers in the light of Laval and Rüffert). Publ. by Facken inom industrin, 2008-06-04, at 31 have suggested that the equal pay principle could be applied even to posted staff agency workers with reference to specific provisions in the Directive on Posted Workers.

⁸⁰ See Legislative Bill 1990/91:124, at 55. One question is whether this regulation is in fact seriously applied, see Gunilla Olofsdotter, *Flexibilitetens främlingar – om anställda i bemaningsföretag* (The outsiders of flexibility – on workers in staff agencies) (2008), Article 1, at 159.

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issue and this point has been contested.⁸¹ Representatives of staff agencies have called for its removal. However, representatives of the municipalities and county councils, who employ doctors and nurses in the public health care sector, have signalled that they wish to retain the provision.⁸² I do not believe that the restriction as stipulated by the provisions of the 1993 Act is in any way affected by the Directive. I doubt whether this restriction shall be considered as 'restriction' within the meaning of the Article.

From the provisions of section 1 of Article 4 it also follows that restrictions 'on the use of temporary agency work' are justified 'only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented'. This formulation hardly affects the rather innocuous regulation in the Swedish statute.

Article 5, **The principle of equal treatment**, has been meant, in all probability, to play a central role. This principle is already applied in Sweden with regard to LO trade unions. However, a different principle applies in the salaried employees' sector. Whether the introduction of the equal treatment principle will rewrite the map and the contractual relationship existing between the Swedish Association of Staffing Agencies and UNIONEN is an open question. Will the equal treatment principle shift the balance in this segment of the labour market? I do not think so. Both parties have too much to gain to maintain a collective agreement relationship. Be that as it may, the main rule stated in Article 5.1 provides that 'The basic working and employment conditions of temporary workers shall be, for the duration of their assignment at a user enterprise, at least those that would apply if they had been recruited by that undertaking to occupy the same job'. Article 5.3, as will be seen below, will take precedence over Article 5.1. The second paragraph of Article 5.1 must also be taken into account. It states that the rules in force in the user undertaking on, first of all, 'protection of pregnant women and nursing mothers and protection of children and young people', and secondly, 'equal treatment for men and women and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation must be complied with as established

⁸¹ See Government Communication on Terms and Conditions of Work in Staff Agencies to the Parliament, 2005/06:91, at 10–11. Accord in the Parliamentary Committee, 2005/06:AU7, at 9.

⁸² The non-socialist government after the national elections in September 2006 has not indicated (yet?) if actions will be taken.

by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.’

This second paragraph of this Article is rather unclear and one wonders about its origins. To start with, it provides that ‘the rules in force in the user undertaking ... must be complied with’. What does it really mean? And why has protection of children and young people, no matter how commendable such protection is, been included in this context? Protection of these groups follows partly from the general work environment legislation, which includes protection of pregnant women. In general, equivalent Swedish provisions relating to a wide range of issues to be found here are stipulated in various statutes and apply universally irrespective of whether somebody is a staff worker or a regular employee. This is also the case in other member states. It is unclear to me if the aforesaid provisions also mean that the user undertaking may be held liable by law for any violation. There is no explicit provision in the aforementioned paragraph on this matter. Such broader approach has been, however, adopted in the new Swedish Discrimination Act (2008:567) which will enter into force on 1 January 2009.⁸³ It will apply to discrimination based on sex, sexual orientation, disability, ethnicity, religion, other beliefs and age. The Act prohibits direct and indirect discrimination, harassment, reprisals and instruction to discriminate. In the case of harassment the employer has a duty to investigate and undertake corrective measures. It follows from a combined reading of Ch. 2, Sections 1, 3 and 18 of the Act that these obligations shall also apply to staff agency workers and that the user enterprise will be held liable by law for the proper application of the provisions. At the same time it follows from the preparatory materials of this Act that aspects such as wages, education and other forms of competence development with respect to agency workers is something that only a staff agency can be held responsible for.⁸⁴ Unclear to me is also the question of whether additional benefits relating, for example, to pregnant and nursing women, which are in force at the user undertaking as a result of a collective agreement or at the employer’s initiative must be complied with and whether they shall apply to temporary agency workers.⁸⁵ At face value it would seem to be so.

Article 5.2 applies to Germany, although it can be applied to Sweden as well, since the condition for the application of the exemption from the

⁸³ Legislative Bill 2007/08:95.

⁸⁴ Bill 2007/08:95, at 136–7. There are already less far-reaching provisions than the ones which will come into force in 2009 in, for example, the Equal Opportunities Act, see Legislative Bill 2004/05:147.

⁸⁵ Cf. Laura Carlson, *Searching for equality* (2007), at 205–218, 375–389.

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equal treatment principle is that a staff worker has a permanent contract of employment with the temporary agency and is guaranteed pay between assignments. Both criteria apply in both countries. However, the exemption applies only to 'pay'.

Article 5.3 has been so designed as to apply to Sweden. It provides that collective agreements, 'while respecting the overall protection of temporary agency workers', may establish 'arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1', i.e. the equal treatment principle as stipulated in Section 1 of Article 5 of the 2008 Directive. A global assessment is made here, and as long as there is an 'overall protection of the temporary workers' the social partners seem to be free to set the standard.⁸⁶ The weakness of this Article is that it does not reflect accurately the reality of Swedish collective agreements: they do not cover the entire class of temporary agency workers; they apply to those agency workers only who are employed by staff agencies which are bound by the collective agreement.

Article 5.4 is a lengthy and thorny piece, but this is because it has been meant to be applied in the U.K. which has more lightly regulated labour market than other European countries. First of all it is stated that it applies to member states 'in which there is no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain area or geographical area'. Additionally, its provisions apply to the social partners at national level, who may conclude agreements and 'establish arrangements concerning the basic working and employment conditions which derogate from the equal treatment principle. Such arrangements may include a qualifying period for equal treatment.'⁸⁷ We must recall that this very issue was the most contentious of all the temporary agency work issues, which made that the U.K. had rejected an earlier draft Directive on temporary work.

Article 5.5 provides that member states 'shall take appropriate measures ... with a view to preventing misuse' of the application of Article 5 and in particular 'to preventing successive assignments designed to circumvent the

⁸⁶ If Recital 19 is taken into consideration some doubts may arise: 'The Directive also does not affect the autonomy of the social partners, nor does it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing *Community law*.' (Author's italics)

⁸⁷ There is such a tripartite Joint Declaration by the British Government, the CBI and the TUC on Agency Workers, dated 19 May 2008, stipulating a qualifying period of 12 weeks before the equal treatment principle may apply.

provisions of this Directive'. The Commission shall also be notified about such measures.

Article 6 on **Access to employment, collective facilities and vocational training** is another thorny piece which will affect Sweden to a certain extent. Article 6.1 provides that vacant posts at the user undertaking should be advertised in order to give agency workers assigned to work at the user undertaking an opportunity to seek permanent employment with it. The legislator could not, however, leave this issue to be decided by the social partners entirely on their own accord. Some provisions concerning this must be laid down. Similar provisions have been recently adopted with respect to vacancies for permanent employment with regard to employees on fixed-term contracts in Section 6 f of the Employment Protection Act.⁸⁸

Another tentative conclusion which can therefore be drawn from the above is that another vacancy provision of the Employment Protection Act is much needed.

Article 6.2 will not cause any problems, since provisions of this kind are already found in the Swedish 1993 Act on Job Placement and Hiring-Out of Manpower. Section 4(1) of the Act provides that employees must not be prevented from taking up employment at the user undertaking for whom they perform or have performed work.

In accordance with Article 6.2, second paragraph, compensation at a reasonable level may be required from the user undertaking if the staff agency has assigned, recruited and trained temporary agency workers. This provision seems to be an exception in the context of workers' protection. Be that as it may, and at the risk of sounding naïve, I thought that such compensation was included in the charge for the assignment of agency workers. In any case, no measures need to be taken as regards the way this provision is formulated.

Under the provisions of Article 6.3 temporary agencies must not charge workers for their services, for example, for arranging for them to be recruited by a user undertaking, or concluding a contract of employment with the undertaking on their behalf, once the workers have carried out their assignment in that undertaking. Section 6 of the Swedish 1993 Act contains already such a ban. The provision that a job seeker or an employee may not be charged any fees for the services of an employment exchange or a staff agency was quite a novelty at the time of its introduction.⁸⁹

⁸⁸ Legislative Bill 2005/06:185.

⁸⁹ I argued for such a solution in an article published already in 1989–90, see footnote 1.

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Article 6.4 further provides that agency workers shall be given ‘access to the amenities or collective facilities ... especially canteen, child-care facilities and transport services’ under the same conditions as workers employed directly by the user undertaking.⁹⁰ In Sweden employers do not provide, as a rule, any childcare facilities. It is also difficult to imagine that agency workers would be denied access to a common canteen or transport services if such amenities were provided by the employer. To be on the safe side Sweden should amend the 1993 Act and introduce such an obligation by adopting special provisions relating to collective facilities. It is a kind of neutral provision providing for a minimum general standard to be applied to all agency workers.

The third tentative conclusion to be drawn from this presentation is that a provision relating to collective facilities should be incorporated into the 1993 Act.

Article 6.5 is an opaque provision whose origins seem to have been written in quicksand. It provides that the member states shall take ‘suitable measures’ *or* ‘shall promote dialogue with the social partners, in accordance with their national traditions and practices’ in order to improve staff agency workers’ ‘access to training and to child-care facilities ... even in periods between their assignments, in order to enhance their career development and employability’, and to ‘improve temporary agency workers’ access to training for user undertakings’ workers’ (sic!). As already mentioned, childcare facilities are not provided by Swedish companies. As regards the issue of enhancement of agency workers’ employability and career development this issue is covered by the two Swedish collective agreements mentioned before, in which the parties have promised to promote competence development of temporary agency workers in various ways. It is difficult, however, to figure out the rationale behind the requirement of improvement of ‘temporary agency workers access to training for user undertakings’ workers’. It must be noted that the provision states that it is access to training which has to be improved. I think that a thing like that comes always at a price: it is hard to imagine that a user undertaking will be so generous as to provide training for temporary workers free of charge. Experience shows instead that user undertakings approach temporary work agencies so that the lat-

⁹⁰ Cf. *Bemanningsbranschen – personal som handelsvara?* (Temporary Agency Work Sector – Personnel as a Commodity?), Publ. by Unionen (2008), at 74. ‘At some user enterprises the staff agency workers are not allowed to make use of the physical training premises or participate in joint social gatherings.’

ter shall locate and supply skilled staff for them – not unskilled labour in need of training! The whole business idea of temporary work agencies is to provide this kind of service.

Article 7 on **Representation of temporary agency workers** contains threshold rules above which bodies representing workers are to be formed at either temporary agencies, or threshold rules for worker representation where temporary agency workers may be counted as if they were workers employed by the user undertaking. Such provisions do not apply in Sweden. Threshold rules are found in the Act on Board Representation for Private Employees, but the board of a company cannot be regarded as a body of workers in this context. There are also threshold rules in the Work Environment Act with respect to the setting up of safety committees and appointment of safety delegates, but these are unaffected as long as temporary agency workers have their representatives appointed by the temporary work agency. The provisions in Article 8 on **Information of workers' representatives** with regard to the use of temporary agency workers at the user undertaking are not relevant in the Swedish context. Under the provisions of Section 38 of the Joint Regulation Act an employer is always under an obligation to initiate negotiations with the local trade union to which the employer is bound by a collective agreement whenever temporary agency workers are to be deployed. Article 9 on **Minimum requirements** indicates that more favourable provisions may be applied to workers. The implementation of the Directive does not entail either that a member state may reduce 'the general level of protection' of workers as stipulated in the Directive. In other words, Article 9 calls for no action at all.

Article 10 on **Penalties** entails a two-level approach. Article 10.1 provides that member states shall establish 'appropriate measures in the event of *non-compliance with this Directive* by the temporary work agency or the user undertaking', and that they shall 'ensure' that procedures are available to 'enable the obligations deriving from this Directive to be enforced'. Article 10.2 is also addressed to the member states, but it is *their national rules* which are targeted here. Member states must lay down rules on penalties which shall apply 'in the event of *infringements of national provisions* enacted under this Directive'. The penalties must be 'effective, proportionate and dissuasive'. In Sweden penalty provisions can be found in Section 7 of the 1993 Act on Job Placement and Hiring-Out of Manpower, and, if a violation of a collective agreement takes place, there are sanctions in the Joint Regulation Act. Penalty provisions can also be found in the Work Environment Act of 1977, as amended in 1994, prescribing that the principal employer is responsible for the health and safety of the agency workers

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at the workplace of the user employer.⁹¹ This is an application of the principle of equal treatment.⁹² The Directive further states that the ‘penalties provided for should be effective, proportionate and dissuasive’, following the pattern set in the Anti-discrimination Directive (2000/43/EC) and the two Equal Treatment Directives (2000/78 and 2006/54). This is an example of what is called in a daily jargon a ‘cut-and-paste’ technique. Assume, for example, that an employer has violated the regulation on posting vacancies which enables agency workers to apply for a permanent post, as indicated by the provisions of Article 6.1. Will the principle of proportionality be really complied with if the level of damages imposed is the same as in the case of a flagrant violation of non-discriminatory provisions?

The provisions of Article 11 on **Implementation**, Article 12 on **Review by the Commission** and Article 13 on **Entry into force** are standard provisions, and do not need to be addressed here.

5 Summary

It has taken the Member States more than 25 years to bring into existence the current Directive on temporary agency work. The Directive contains a number of labour provisions which are not congruent with the Swedish legislative regime governing labour relations. Swedish trade unions and employer representatives have managed instead to formulate a self-

⁹¹ See Ch. 3 Section 12(2) of the said Act, Legislative Bill 1993/94:186. These provisions came about in response to Directive 91/383/EC to encourage improvements in the safety and health at work of workers with a fixed-term duration of an employment relationship or with a temporary employment relationship. The safety delegate of the agency worker was also given the right of admittance to the work place where the job was performed in accordance with the provisions of Section 10(2) of Chapter 6 of the same Act. However, the safety delegate at the workplace proper has no power to act on behalf of the agency worker. Critical remarks as to this have been submitted in Ronnie Eklund, *Bolagisering – ett mode eller ett måste?* (Incorporation – a Fashion or a Must?) (1992), at 305–313. However, amendments with respect to this matter have been suggested in a recent Government Commission Report, SOU 2007:43. *Bättre arbetsmiljöregler II* (Better Working Environment Rules), pp. 67–77. It has been suggested that the safety delegate at the user enterprise’s workplace should have a possibility to act on behalf of an agency worker and force the user enterprise to undertake safety measures in order to meet the obligations following from Ch. 3 Section 12(2), and even to stop the work if the work implies immediate and serious danger to the agency worker. See further on this point, Lena Birgersdotter, Lisa Schmidt & Annika Karlsson, *Arbetsmiljöarbete för uthyrd personal i bemanningsföretag*, IVL (Working Environment Measures with regard to Hired-out Manpower in Temporary Work Agencies) Svenska Miljöinstitut AB (2002), at 20, 25–6.

⁹² See Kerstin Ahlberg, Brian Bercusson, Niklas Bruun, Haris Kountouros, Christophe Vignaeu & Loredana Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (2008), at 161.

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sustaining legislative framework in this area by means of private agreements between the above-mentioned social partners. The Swedish labour and employment law strategies could actually serve as role model for other countries. The equal treatment principle inherent in the Directive is applied in the Swedish LO trade union sector, so it is by no means an unknown quality in Swedish labour life. Even though there are still some practical problems connected with the application of the equal treatment principle, the deepest wrinkles have been ironed out. The most significant achievement as regards the equal treatment principle is that employers will have to comply with the principle of equal pay for work done at the same workplace. This will prevent user undertakings from systematically engaging underpaid temporary agency labour. I am glad to say that the Directive did not turn out to be fairytale Big Bad Wolf threatening to ensnare the member states into the system of restrictive regulatory covenants; I prefer to compare it to a chunk of Swiss cheese, where different labour market solutions tailored for individual member countries can be found in the separate hollows of the cheese flesh. Some tentative conclusions have been suggested with respect to the implementation of the Temporary Agency Work Directive in Sweden. I believe that implementation of the Directive will make the Swedish Association of Staffing Agencies far more appealing to staff agencies in the salaried sector, which do not belong to the Association today. Most of these agencies will find it easier to apply provisions of the collective agreement, owing to a flexible design of Article 5.3 of the Directive, compared with the statutory principle of equal treatment which must be applied by all unorganised staff agencies.