

Labour Law and Social Protection in a Globalized World

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Founding Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, was also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors. He passed away in October 2016.

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In 2015 Frank Hendrickx, Professor of labour law at the Faculty of Law of the University of Leuven (Belgium) joined as a co-Editor. Frank Hendrickx has published numerous articles and books and regularly advises governments, international institutions and private organisations in the area of labour law as well as in sports law. He is the Editor-in-Chief of the European Labour Law Journal and General Editor of the International Encyclopaedia of Laws.

Introduction

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The titles published in this series are listed at the end of this volume.

Labour Law and Social Protection in a Globalized World

Changing Realities in Selected Areas of Law and Policy

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CHAPTER 11

Temporary Agency Work Directive: As Hollow as Swiss Cheese?

Ronnie Eklund

To start with, it was an open question whether the Directive on Temporary Agency Work proposed by the Council¹ would lead to any new developments, considering the past failures. However, the European Parliament voted in favour of the text of the Directive agreed by the Member States at the European Employment Council in October 2008.² So the Temporary Agency Work Directive 2008/104 EC was enacted on 19 November 2008. Implementation by the Member States had been finalized by 5 December 2011.

In the past, the establishment of public employment agencies could be viewed as a policy device designed to eliminate low-quality private employment agencies. Article 1 of the ILO Employment Service Convention No. 88/1948 set the standard, stipulating that a ratifying member 'shall maintain or ensure the maintenance of a free public employment service'. It must be borne in mind that public employment agencies, whose main task is to channel job opportunities to job seekers, are bypassed in those segments of the labour market where private agencies or other persons act as intermediaries between employers/recruiters and job seekers. Such activities frustrate

* The metaphor with the Swiss Cheese comes from an earlier article of mine, assessing the impact of Directive 2008/104 on Swedish law, see R. Eklund, *Who Is Afraid of the Temporary Agency Work Directive?*, in *Skrifter till Anders Victorins Minne*, 139–166 (Iustus Förlag 2009), with further references to my articles on temporary employment agencies. The 2009 article is available at the following link: <http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund.pdf>.

1. 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.
2. European 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 TA (2008) 0507.

the objectives of the state monopoly.³ Private staff agencies came into being in the 1960s, which is not such a long time ago.⁴

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). The ILO Convention on Private Employment Agencies No. 181/1997 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.⁵

The tripartite relationship between a temporary work agency, a temporary agency worker and a user undertaking is complicated. The relationship between a temporary work agency and a user undertaking is based on a commercial contract. The relationship between a temporary work agency and a temporary agency worker is of a twofold character: a temporary agency worker is usually an employee of a temporary work agency, but at the same time the same worker is assumed to perform work for another employer, i.e., the user undertaking. In civil law it means that a contract is concluded in favour of a third party as regards their right to request that work be performed.⁶

§11.01 THE EU DEVELOPMENT

It is a long story. Several attempts have been made to place the issue of temporary agency work on the European agenda, first in 1974,⁷ and subsequently in 1980,⁸ 1982,⁹ and in 1990 - a proposal that was inspired by the 1989 Charter of Fundamental Rights of Workers.¹⁰ All have failed.

In the mid-1990s the European Commission encouraged the social partners to do something about atypical employment forms. As a result of this, Directive 97/81 on part-time work and Directive 98/70 on fixed-term employment contracts were adopted.

3. See A. Bronstein, *Temporary Work in Western Europe: Threat or Complement to Permanent Employment?* vol. 130, No. 3 International Labour Review, 293 (1991): 'It can be argued that [the temporary work agencies] undermine the monopoly which public employment agencies enjoy in many countries'.

4. Bronstein, 304.

5. By April 2018 thirty-two countries had ratified this Convention, including the following EU Member States: Belgium, Bulgaria, the Czech Republic, Finland, France, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia and Spain.

6. Similarly as regards German law, B. Waas, *The Protection of Agency Workers - Lessons from Germany?* in *Festschrift till Ann Numhauser-Henning*, 795 (Juristförlaget i Lund, 2017).

7. Council Resolution 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.

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

9. 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.

10. COM (90) 228 final. Proposal for a Council Directive on certain employment relationships with regard to working conditions.

The European social partners also conducted negotiations on temporary agency work between June 2000 and May 2001, but the talks broke down.

To maintain the political momentum the Commission launched a draft Directive on working conditions for temporary workers in March 2002,¹¹ incorporating the points 'largely' agreed upon during the negotiations between the social partners, formulating also provisions to overcome the remaining contentious issues.¹²

The initiative of the Commission failed due to the resistance of the UK, Ireland, Denmark and Germany, who blocked the proposal at a meeting in Brussels on 2–3 June 2003.¹³

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 the Temporary Agency Work Directive in order to appease the United Kingdom.¹⁴ What actually happened was that on 19 May 2008 the UK Government signed a Joint Declaration with the TUC and the CBI, stating that it would support the draft EC Directive on Temporary Agency Work, provided that certain provisions of the Working Time Directive were revised. No amendments of the Working Time Directive took place, however. In the preliminaries, it was envisaged that a twelve week qualifying period should apply to temporary agency workers before the right to equal treatment would begin to apply in the UK, disregarding the non-discrimination principle laid down by the same Directive. In the final Directive an exception to the right to equal treatment was made for 'a qualifying period' (Article 5.4, first paragraph).¹⁵

On 11 June 2008 a qualified majority of the Member States adopted a 'Political agreement on a common position'.¹⁶ On August 6 the Council adopted a common position.¹⁷ The Parliament approved the common position in October 2008.¹⁸ Directive

11. 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.

12. See for a more lucid account relating to the events concerning the draft Directive, K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, C. Vignaeu & L. Zappalà, *Transnational Labour Regulation. A Case Study of Temporary Agency Work*, 218–247 (P.I.E. Peter Lang S.A. Brussels 2008) (henceforth Ahlberg et al.).

13. The final offer from the blocking minority is summarized in Ahlberg et al., 246.

14. Ahlberg et al., 248.

15. However, in the UK, the Agency Workers Regulations 2010 (Statutory Instruments 2010:93) provide in Regulation 7 a qualifying period amounting to 12 continuous calendar weeks in *the same role* with the same hirer. The British position is also special inasmuch as according to common law a contract of employment requires a *mutuality of obligations*, which is not the case with respect to temporary agency workers where the day-to-day control devolves on the end-user, while the day-to-day securing and pay fall on the agency; see in particular J. Prassl, *The Concept of the Employer*, 40–46, 86–90 (Oxford University Press 2015), and E. Brown, *Protecting Agency Workers: Implied Contract or Legislation?*, *Industrial Law Journal*, 178–187 (2008). See a critical account of the Directive, by N. Countouris & R. Horton, *The Temporary Agency Work Directive. Another Broken Promise?*, *Industrial Law Journal*, 329–338 (2009).

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

17. See fn. 1.

18. See fn. 2.

2008/104 was accordingly adopted. In its wider context the Directive is meant to promote 'flexicurity' in the European labour market (see Recital 11 of the Directive).

§11.02 SHORT PRESENTATION OF THE 2008 DIRECTIVE

Accordingly, the Directive applies to *temporary agency work*. The Directive stipulates in Article 2 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'.

The definition of *basic working and employment conditions* is given in Article 3. It follows from Article 3.1.i that these basic conditions relate to 'the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay' in force in the user undertaking. Pay is to be defined by national law (Article 3.2).

The provisions of Article 4 concerning the *review* of restrictions or prohibitions do not include an obligation upon the Member States to discontinue all restrictions or prohibitions on the use of temporary agency work.¹⁹ Restrictions and prohibitions should, however, be justified 'on grounds of general interest'. Articles 4.2 and 4.5 are pivotal. They provide (in parts) that 'Member States shall ... review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on [grounds of general interest]', and that the 'Member States shall inform the Commission of the results of the review ...'.

The 'principle of equal treatment', which is the basic provision in the Directive, is laid down in Article 5.1. It means that the working and employment conditions for agency workers shall be 'at least those that would apply if they had been directly recruited' by the user undertaking.

However, derogations are found in Articles 5.2, 5.3 and 5.4 and this is where the Swiss Cheese metaphor comes into the picture.

Article 5.2 has come about basically to cater for the situation in Germany (and other countries). It provides that as regards *pay*, the equal treatment principle does not have to be applied 'where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid in the time between assignments'.²⁰

19. The Member States had once second thoughts as regards the necessity of eliminating such regulations, and the Commission had to give in on this point. Ahlberg et al., 224, 228, 235, 239 and 241-242.

20. With respect to developments in Germany as regards agency work when looked at from a broader institutional perspective via legislation from 1972 and 2004, a reference is made to M. Helfen, *Institutionalizing Precariousness? The Politics of Boundary Work in Legalizing Agency Work in Germany, 1949-2004*, (SAGE Publications, 2015), and M. Fuchs, *The Implementation of Directive 2008/104 on Temporary Agency Work in the UK and Germany*, *European Journal of Social Law*, 156-175 (September 2012). See also a note by M. Weiss, *The Crucial Role of Courts in German Labour Law*, in *Sui Generis, Festschrift till Stein Evju*, 736-737 (Universitetsforlaget Oslo, 2016); a Federal Labour Court has also decided that some collective agreements concluded at a level significantly below the level of equal pay, as applying to temporary agency workers,

Article 5.3 gives recognition to Swedish practice relating to collective agreements and the autonomy of the social partners. It 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]'. No reference is made here to Community law as a parameter.

Article 5.3 is no doubt a concession to the Swedish model. It is significant with respect to Sweden that approximately 95 per cent of all temporary agency workers are covered by collective agreements. Two major collective agreements apply to blue-collar workers and salaried employees, respectively. The collective agreements are different in design. Only the blue-collar workers' agreement relate to an equal treatment principle (similar to the one of the Directives). The pertinent blue-collar agreement was agreed upon already in the year of 2000.²¹ The salaried employees' collective agreement was concluded in 1988. It is based on the principle of individual and differentiated wage-setting between the temporary work agency and the employee, without any reference to the wage setting of comparable workers at the user enterprise.

Article 5.4 is a thorny piece of legislation, and has been adopted in order to appease the UK. It provides that Member States may, as long as an 'adequate level of protection is provided for temporary agency workers ... establish arrangements concerning the basic working and employment conditions which derogate from the principle established in [Article 5.1]. Such arrangements may include a qualifying period for equal treatment'.²² However, it also follows from 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]'.²³

have been held null and void. *See also* A. Zimmermann, *New Restrictions for Temporary Agency Work in Germany* in 2017, source: <https://www.linkedin.com/pulse/new-restrictions-temporary-agency-work-germany-2017-andr%C3%A9-zimmermann>, (accessed 2 May 2017). Germany has thus introduced new regulations that intend to restrict the use of temporary agency workers and to fight abuse of civil law contracts, into force on 1 April, 2017, *Bundesgesetzblatt*, vol. 1, No. 8, 258 (2017).

21. There are three cases from the Swedish Labour Court with respect to this agreement, Labour Court judgments 2009 No. 54 and 94 and 2015 No. 74. The two first cases relate to the issue of determining the average wage level as applied to comparable workers at the user enterprise. The third case relates to the issue as to whether a special bonus should be paid to the temporary agency workers (this case is reported in *International Labour Law Reports*, 59–64 (Brill Nijhoff, vol. 36, 2017).
22. *See* above fn. 15.
23. The British implementation is extremely lengthy (35 pages), *see* The Agency Workers Regulations 2010 (Statutory Instrument 2010 No. 93), in force since 1 October 2011. *See also* the Guidance issued by BIS (Department for Business, Innovation & Skills), *Agency Workers Regulations*, May 2011 (50 pages). It is also possible for a British temporary work agency to make use of Article 5.2 of the Directive (as regards pay) if there is a permanent contract of

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.’

I submit no comments with respect to Articles 6–10 of the Directive.

It should be noted, however, 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’.²⁴

§11.03 IMPLEMENTATION OF THE DIRECTIVE

The Commission has evaluated the implementation of Directive 2008/104 in 2014.²⁵

The Directive applies only to a small proportion of the overall workforce. In 2008 approximately 5 per cent of the UK workforce worked in a tri-partite agency setting,²⁶

which is an extremely high figure compared to what applies in other Member States.

All Member States have implemented the Directive, but the existing conditions differ from country to country. In some countries no regulations whatsoever existed before the Directive came into force, whereas in other countries temporary agency work was regulated by law.

The Commission has stated that it will monitor the correct application of the principle of equal treatment as laid down in Article 5.1 of the Directive.²⁷

With respect to the derogations as provided for in Article 5.2, the Commission raised a question whether the pay level of agency workers could be as low as the applicable minimum wage, if any, while minimum wages were not subject to any lower limit at all.²⁸

With respect to the derogations in Article 5.3, a few Member States have availed themselves of this option.²⁹

employment in force between the agency worker and the temporary work agency that is applicable after the qualifying period of 12 weeks; refer to regulations 10 and 11 of the Agency Workers Regulations 2010. Payments or rewards with respect to occupational sick pay, pension, financial participation schemes and other benefits are excluded from ‘pay’ in the UK: refer to regulation 6(3).

24. The recital appeared in the second draft Directive of 2002. 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 Ahlberg et al., 207–209.

25. COM (2014) 176 Final on the application of Directive 2008/104 on temporary agency work and SWD (2014) 108 Final on the application by Member States of Directive 2008/104/EC on temporary agency work.

26. See Prassl, 40.

27. COM (2014) 176 Final, 6.

28. *Ibid.*, 7.

29. *Ibid.*, 7. Sweden, for example, has implemented Arts 5.1, 5.2 and 5.3 to cover up for temporary work agencies that are not bound by the pertinent collective agreements referred to in Article 5.3. See Official Gazette 2012:854.

With respect to the derogations in Article 5.4, only the UK and Malta have taken advantage of this option.³⁰

A more thorough survey has been conducted with respect to Article 4.1 of the Directive wherein the Member States are commanded to review the restrictions or prohibitions on the use of temporary agency in order to assess whether they are justified on grounds of general interest.³¹ The conclusions of the Commission on this point are somewhat bewildering:³² it seems that the Commission does not know how to assess the meaning of a 'general interest' as laid down in Article 4.1.³³

As regards possible amendments to the Directive, the Commission states that more time is required to acquire wider experience regarding its application and to determine whether it has fully satisfied its objectives.³⁴

§11.04 CASE LAW OF THE EUROPEAN COURT OF JUSTICE

A few of the cases relating to temporary work – they are not many – before the coming into force of Directive 2008/104 are related to the freedom to provide services (earlier Article 59, now Article 56 of TFEU).

In *Webb*³⁵ a British national was engaged in supplying temporary staff to firms in the Netherlands. Under Dutch law he was required to possess a license in order to provide such services. Since Webb did not hold a license he was subject to criminal proceedings by the Dutch authorities. The Court took the view that a licensing control might be appropriate since 'provision of manpower is a particularly sensitive matter from the occupational and social point of view'.³⁶ However, the control must not be tainted by discrimination on the grounds of the nationality of the provider, and must ensure that 'it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established'.³⁷

A similar case is *Van Wesemael*.³⁸ The case relates to the provision of entertainers from a French fee-charging employment agency to Belgium which was in violation of Belgian law that requires that a temporary work agency shall hold a license to be able to conduct such activities. The Court held that 'taking into account the particular nature of certain services to be provided, such as the placing of entertainers in

30. *Ibid*, 8.

31. *Ibid*, 8–13, and Annex 2 to SWD (2014) 108 Final, 18–70.

32. G. Sebardt has submitted an astute comment: 'Everyone who has followed the process of the implementation of the Directive closely has been able to note the ambivalent stance of the Commission vis-a-vis Article 4', *Last in, First out? The Agency Work Directive and the Swedish Staffing Industry as Part of the Swedish Labour-Market Model*, in *Europe And The Nordic Collective Bargaining Model*, 175, 541 (Ed. Jens Kristiansen, Tema Nord 2015).

33. My very low-profile point of view is that the Commission has realized that it is not politically correct to submit strict benchmarks in this area.

34. COM (2014) 176 Final, 19-20.

35. Case 279/80.

36. Paragraph 18.

37. Paragraph 21.

38. Cases 110-111/78.

employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said state'.³⁹ However, when the pursuit of the employment agency's activities in the State in which the services are provided requires a license, 'such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person in another Member State holds a license issued under conditions comparable to those required by the State in which the services are provided'.⁴⁰

In *Vicoplus*⁴¹ the issue related to Polish workers who were assigned to jobs in the Netherlands by Polish companies according to the posting provision of Article 1.3.c of Directive 96/71 (posting of workers). The issue concerned fines imposed on the Polish companies that had not obtained work permits for their workers in the Netherlands. The postings took place during the transitional period of the 2003 Act on Accession wherein restrictions were laid down with respect to the freedom of movement of persons. The Court adjudicated in favour of the Netherlands. It is more significant that the Court held that workers posted by a temporary employment agency actually do enter the labour market of the Member State where they are posted. The Court held the view that a worker who has 'been hired out pursuant to Article 1.3.c of Directive 96/71 is typically assigned, during the period for which he is made available, to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking'.⁴² This statement does not imply, however, that these workers are migrating workers within the meaning of Article 45 TFEU.⁴³

Also, Directive 2001/23 on transfers of undertakings may be applicable to the transfer of a temporary employment business in a situation where part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that

39. The 'general good' concept already appeared in Case 33/74 *van Binsbergen* (however, the habitual residence requirement in the Netherlands in that case was not justified in the light of the freedom to provide services), paras 12 and 17.

40. Paragraphs 28–29. See also C-53/13 and 80/13 *Strojirny Prostejov* et al. The case concerned two Czech undertakings using the services of a temporary employment agency in Slovakia, carrying out its activities in the Czech Republic via a branch. Due to tax legislation the Czech undertakings were under an obligation to withhold advance tax on income payable to the workers whose labour they used from the Slovakian agency, while such a procedure did not apply to domestic employment agencies. This was held by the Court to be in violation of the freedom to provide services.

41. C-307-309/09.

42. Paragraph 31.

43. See for a lucid analysis H. Verschueren, *The Territorial Application of Labour Law in the EU Internal Market. On Legal Rules and Economic Interests*, in *From Social Competition to Social Dumping*, 63–83 (Eds J. Buelens & M. Rigaux, Intersentia 2016). It must be added here that workers who are sent to another Member State to provide services do not, in any way, seek access to the labour market in that second State, although they gain access to the same labour market, according to the Court, see C-113/89 *Rush Portuguesa*, para. 16 and C-49/98 *Finalarte*, para. 22.

business for the same clients and when the assets affected by the transfer are sufficient in themselves to show that the services can constitute an economic entity.⁴⁴

On the other hand, the Framework Agreement of Directive 1999/70 on fixed-term contracts does not apply to fixed-term workers placed by a temporary work agency at the disposal of a user enterprise.⁴⁵

As can be seen from the above-mentioned a temporary work agency may become a target in different legal settings.⁴⁶

Only two cases from the ECJ relate to Directive 2008/104.

The following is the first case adjudicated by the Court (Grand Chamber) applying Directive 2008/104.⁴⁷ It concerns Article 4. In this case, the Finnish Labour Court brought up an issue with respect to a specific clause in a Finnish collective agreement from 1997 concerning the use of external workers. The main point in the agreement is that the use of external workers shall be restrictive, connected to peaks of work, or other tasks of limited duration or tasks which are of specific nature. The agreement also provided that, if the temporary agency workers carry out the undertaking's usual work alongside the undertaking's permanent workers under the same management for a longer period of time, this shall be deemed as unfair practice. In this case Shell Aviation Finland had been using temporary agency workers, which AKT (the Finnish trade union) contested. The main question posed by the Finnish Labour Court was whether Article 4.1 of the Directive should be interpreted as laying down a permanent obligation on the national authorities, including the courts, to ensure by all available means that national legislation or collective agreement terms contrary to the directive shall be regarded as null and void or not applicable, respectively.

The European Court held with respect to the meaning of Article 4.1 that 'that article must be read as a whole, taking into account *its context*'.⁴⁸ In this regard, the Court pointed out that Article 4, entitled 'Review of restrictions or prohibitions', formed a part of the chapter on the general provisions of Directive 2008/104.⁴⁹ The Court observed that the Member States were obliged to review their restrictions and prohibitions on temporary agency work, and that they were required to inform the Commission of the results of the review. The Court also stated that the obligation 'is solely addressed to the competent authorities of the Member States. Such obligations cannot be performed by the national courts'.⁵⁰

44. C-458/05 *Jouini et al.* Cf. also C-386/09 (Order of the Court) *Briot* where the claim failed since the worker's fixed-term contract with a temporary work agency had expired before the transfer of a business.

45. C-290/12 *Della Rocca*.

46. In Sweden, there is an abundance of examples which relate to temporary work agencies, such as joint regulation procedures and when employment protection aspects are at stake.

47. C-533/13 *AKT* (decided 17 Mar. 2015).

48. Paragraph 24. *My italics*.

49. Paragraph 25.

50. Paragraph 28. The Advocate General adopted another approach inasmuch as he said that Article 4 did not lay down only procedural rules, but also a substantive rule (para. 37), and that it would also include the national courts as watchdogs of Art. 4.1 (paras 84–86), but held, on the other hand, that the restrictions as laid down in the pertinent collective agreement were justified on grounds of general interest (para. 124).

The Court showed restraint in the application of Directive 2008/104. It may also be noted that the Commission submitted the view in the proceedings before the Court that whenever the Commission 'learned of the existence of a restriction it could start a dialogue with the authorities of the Member State concerned in order to find the best way of bringing the provision in line with /the/ directive'.⁵¹

The second case relates to the concept of 'worker' in Article 1(1) and (2) of the Directive.⁵² Red Cross Nurses in Germany, being members of the Red Cross Association and being reimbursed for their services, performed work as any other nurse did at any health clinic, but their services were not governed by a contract of employment with the Red Cross Association. The ECJ concluded that the Directive covers the assignment by a not-for profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, even if that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.

§11.05 CONCLUSION

Transaction costs at Community level to accomplish Directive 2008/104 must have been tremendous, taking into consideration that the first draft Directive was launched already in 1980. To take into consideration transaction costs in any commercial transaction, organizational or legal context is a basic principle of law & economics.⁵³ Resources are scarce. One must often make a choice; the choices to be made are not for the squeamish. In view of this, it is tempting to conclude that this Directive should never have come about.

51. Opinion of Advocate General, para. 82.

52. C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH* (decided 17 Nov. 2016).

53. See a recent article of mine, R. Eklund, *At the Crossroads of Law and Economics – A Few Labour Court Cases Revisited*, in *Festschrift till Ann Numhauser-Henning*, 199–218 (Juristförlaget i Lund, 2017), also available at link: http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund_FSNumhauserHenning_Offprint.pdf.