Niklas Bruun i Sverige
En vänbok

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The Temporary Agency Work Directive – a Pyrrhus Victory?

1. Introduction

Since the time of Niklas Bruun's participation in a research project with respect to the upcoming Directive on temporary agency work (2008/104),[1] it's been a challenge to address questions about the way in which the Directive has been implemented in Sweden and the way in which the social partners have reacted as a response to it. I have published a number of articles on the subject before. In my view, the above European legal act is rather innocuous.[2] Nevertheless, it kept Brussels busy for more than a quarter of the century. Considering the transaction costs involved (which is a basic principle of law & economics),[3] the coming into force of the Directive can be regarded as a Pyrrhus victory.

[1] Ahlberg, K., Bercusson, B., Bruun, N., Kountouros, H., Vignaeu, C. & Zappalà, L., *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (P.I.E Peter Lang SA 2008) (henceforth Ahlberg et al.),

[2] See Eklund, R., 'Who Is Afraid of the Temporary Agency Work Directive?', in *Skrifter till Anders Victorins minne* (Iustus Förlag 2009), at 139–166, with further references on temporary employment agency articles of mine. The 2009 article is available at <http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund.pdf> accessed 2 June 2017.

[3] See a recent article of mine, Eklund, R., 'At the Crossroads of Law and Economics – A Few Labour Court Cases Revisited', in Rönnmar, M. & Julén Votinius, J. (eds.), *Festskrift till Ann Numhauser-Henning* (Juristförlaget i Lund, 2017), at 199–218, also available at

The Directive was implemented in Sweden by means of a new statute in force since 2013.[4] I do not intend to pursue that track, picking up bits and pieces which may be contentious. My purpose is, instead, to focus upon the responses from the Swedish social partners. But a background description is needed to understand why things happened, or why they did not happen.

The tri-partite 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 – 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.[5]

2. The EU Agenda

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,[6] and subsequently in 1980,[7] 1982,[8] and in 1990 – a proposal that was inspired by the 1989 Charter of Fundamental Rights of Workers.[9] All have failed.

However, 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

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<http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund_FSNumhauserHenning_Offprint.pdf> accessed 2 June 2017.

[4] Official Gazette 2012:854, Government Bill 2011/12: 178 and Government Commission Report, SOU 2011:5.

[5] See, as regards German law, B. Waas, 'The Protection of Agency Workers – Lessons from Germany?' in Rönnmar & Julén Votinius, J. (n 3), at 795.

[6] 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.

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

[8] 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.

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

fixed-term employment contracts were adopted. 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,[10] incorporating the points 'largely' agreed upon during the negotiations between the social partners, formulating also provisions to overcome the remaining contentious issues.[11] According to the Commission the real bone of contention was the concept of 'comparable worker' under the proposed non-discrimination principle.[12]

The initiative of the Commission 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.[13] It is obvious that these countries, making up "The Gang of Four", never had the political will to put forward any regulations governing the work of temporary work agencies.[14]

Already back in 2004 there were rumors 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.[15] As the saying goes: There's no smoke without fire! What has actually happened was that on 19 May 2008 the U.K. 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 12-week qualifying period in the UK should apply to temporary agency workers before the right to equal treatment would begin to apply. In the final Directive, an exception to the right to equal treatment was made for 'a qualifying period' (Article 5(4) first para.).[16]

[10] 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.

[11] See for a more lucid account relating to the events concerning the draft Directive, Ahlberg et al., at 218–247.

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

[13] The final offer from the blocking minority is summarized in Ahlberg et al. (n 1), at 246.

[14] Op. cit., at 251–252.

[15] Op. cit., at 248.

[16] However, in the UK, the Agency Workers Regulations 2010 (Statutory Instruments 2010:93) provide in Article 7 a qualifying period amounting to 12 continuous calendar weeks *in the same*

On 11 June, 2008 a qualified majority of the Member States adopted a 'Political agreement on a common position'.[17] On August 6 the Council adopted a common position.[18] The Parliament approved the common position in October 2008.[19] So the Temporary Agency Work Directive 2008/104 EC was enacted on 19 November 2008. Implementation by the Member States should have been finalized by 5 December 2011.

In its wider context, the Directive is meant to promote 'flexicurity' in the European labour market.[20]

3. Short presentation of the 2008 Directive

The purpose of the Directive is defined in Article 2. The provisions of Article 2 have been the subject of a hot debate.[21] Article 2 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.'

The definition of *basic working and employment conditions* is given in Article 3. It follows from Article 3(1) that these basic conditions relate to 'the duration of working time, overtime, breaks, rest periods, night work,

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role with the same hirer. Furthermore, the British position is 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 Prassl, J., *The Concept of the Employer* (Oxford University Press 2015), at 40–46, 86–90 and Brown, E. 'Protecting Agency Workers: Implied Contract or Legislation?', Industrial Law Journal (2008), at 178–187. See a critical account of the Directive, by Countouris, N. & Horton, R. 'The Temporary Agency Work Directive. Another Broken Promise?', Industrial Law Journal (2009), at 329–338.

[17] 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.

[18] 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.

[19] 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.

[20] See recital 11 of the Directive.

[21] See Ahlberg et al. (n 1) at 241.

holidays, public holidays and pay' in force in the user undertaking. Pay is to be defined by national law (Article 3(2)).[22]

The provisions of Article 4 concerning the review of restrictions or prohibitions do 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 second thoughts as regards the necessity of eliminating such regulations. The Commission had to give in on this point.[23] 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' is laid down in Article 5(1) (formerly denominated as the principle of non-discrimination in the 2002 draft Directive). 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.

Derogations are found in Articles 5(2), 5(3) and 5(4).

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'[24]

[22] The general apprehension in Community law is that the concept of 'pay' covers all emoluments covered by Article 141 of the Treaty, i.e. that it is all-inclusive. However, the Commission never intended to cover additional social security benefits by the temporary agency work directive, op. cit., at 227.

[23] Op. cit., at 224, 228, 235, 239 and 241–242.

[24] 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 a Senior Research Fellow at the Management Department at Freie Universität Berlin, Helfen, M., *Institutionalizing Precariousness? The Politics of Boundary Work in Legalizing Agency Work in Germany*, 1949–2004, (SAGE Publications 2015), and Fuchs, M. 'The Implementation of Directive 2008/104 on temporary agency work in the UK and Germany', European Journal of Social Law, September 2012, at 156–175. See also a note by Weiss, M., 'The Crucial Role of Courts in German Labour Law', in *Sui Generis Festskrift til Stein Evju* (Universitetsforlaget Oslo, 2016), at 736–737 where it is reported that the Federal Labour Court has decided that some collective agreements concluded at a level significantly below the level of equal pay, as applying to temporary agency workers, have been held null and void. See also Waas, (n 5) at 793; Germany is about to introduce new regulations that intend to restrict the use of temporary agency workers. The new law came into force on 1 April, 2017. According to Hensche, M. (Rechtsanwalt Berlin), the amendments will have no major impact, see *Hensche Arbeitsrecht: Reform der Leiharbeit 2017*.

Article 5(3) gives full recognition to Swedish practice relating to collective agreements and the autonomy of the social partners.[25] 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). Firstly, such derogations must respect 'the overall protection of temporary agency workers'. The provision will probably provide ample opportunities for a more global assessment of the working/employment conditions, in comparison with a strict listing of terms and conditions of work. Secondly, 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 as a parameter.

Article 5(4) is a thorny piece of legislation, and has been adopted in order to appease the U.K. 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' 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. 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)]'.[26]

[25] Cf. also recital 16 (diversity of labour markets) and 19 (autonomy of social partners).

[26] The British implementation of the Directive 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

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'[27]

4. Implementation of the Directive

The Commission has evaluated the implementation of Directive 2008/104 in 2014.[28] The Directive applies 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,[29] which seems to be the highest number in Europe. All the Member States have implemented the Directive, but the existing conditions differed 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.[30]

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.[31]

With respect to the derogations in Article 5(3), several Member States (among those Austria, Ireland and Sweden) have availed themselves of this option.[32]

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agency to make use of Article 5(2) of the Directive (as regards pay) if there is a permanent contract of 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 British Agency Workers Regulations 2010.

[27] 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. (n 1) at 207 and 209.

[28] 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.

[29] See Prassl (n 16) at 40.

[30] COM (2014) 176 Final, at 6.

[31] Op. cit., at 7.

[32] Op. cit., at 7.

With respect to the derogations in Article 5(.4) only the UK and Malta have taken advantage of this option.[33]

A more thorough survey has been conducted with respect to Article 4 of the Directive wherein the Member States are commanded to review the restrictions or prohibitions on the use of temporary agency work in order to assess whether they are justified on grounds of general interest as provided for in Article 4(1).[34] The Member States shall also inform the Commission about the results of this review (Article 4(5)). But the conclusions of the Commission are somewhat bewildering:[35] it seems that the Commission does not know how to assess the meaning of a 'general interest' as laid down in Article 4(1).[36]

In its conclusions in the 2014 report, the Commission states that it intends to continue to closely monitor the application of the Directive. 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.[37]

5. Case law of the European Court of Justice

A few of the cases – 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 the Treaty.

In *Webb*[38] 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

[33] Op. cit., at 8.

[34] Op. cit., at 8–13, and Annex 2 to SWD (2014) 108 Final, at 18–70.

[35] 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', Sebardt, G., 'Last in, First out? The Agency Work Directive and the Swedish Staffing Industry as Part of the Swedish Labour-Market Model', in Kristiansen, J. (ed), *Europe and the Nordic Collective Bargaining Model* (Tema Nord 2015:541), at 175.

[36] There is no doubt that many prohibitions or restrictions applied by the Member States with respect to the use of temporary agency work may be justified. A number of reasons have been adduced by the Member States for upholding the prohibitions and restrictions. My very low-profile point of view is that the Commission has realised that it is not politically correct to submit new benchmarks in this area.

[37] COM (2014) 176 Final at 19–20.

[38] Case 279/80.

social point of view'.[39] 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'.[40]

A similar case is *Van Wesemael*.[41] The case relates to the provision of entertainers from a French fee-charging employment agency to Belgium in violation of Belgian law which required that a temporary work agency must hold a license to be able to do that. The Court held that 'taking into account the particular nature of certain services to be provided, such as the placing of entertainers in 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.'[42] 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'.[43]

In *Vicoplus*[44] 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. The issue concerned fines imposed on the Polish companies that had not bothered to obtain work permits for their workers. 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 for persons. The Court adjudicated in favour of

[39] Para. 18. See also para. 17 about justifications based on 'the general good'.
[40] Para. 21.
[41] Cases 110–111/78.
[42] The 'general good' concept has been enunciated already in Case 33/74 *Van Binsbergen* wherein the habitual residence requirement in the Netherlands was not justified with respect to the legal representative of a client in the light of the freedom to provide services, para. 12.
[43] Para 28–29. See also C-53/13 and 80/13 *Strojirny Prostejov*. The case concerns 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, while this procedure did not apply to domestic employment agencies. This was held by the Court to be in violation of the freedom to provide services.
[44] C-307–309/09.

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 … to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking'.[45] This statement does not imply, however, that these workers are migrating workers within the meaning of Article 45 TFEU.[46]

It has also been made clear that Directive 2001/23 on transfer 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 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.[47]

It is also made clear that 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.[48]

The following case is the first case adjudicated by the Court (Grand Chamber) applying Directive 2008/104.[49] 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. It is also held in the agreement 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, the latter shall be deemed as an unfair practice. It turned out that that Shell Aviation Finland had been using

[45] Para. 31.

[46] See for a lucid analysis Verschueren, H., 'The territorial application of labour law in the EU internal market. On Legal Rules and Economics Interests', in Buelens, J. & Rigaux, M. (eds), *From Social Competition to Social Dumping* (Intersentia 2016), at 64–84. It may 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 22–23.

[47] C-458/05 *Jouini*. 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.

[48] C-290/12 *Della Rocca*.

[49] C-533/13 *AKT*.

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 respectively as null and void or not applicable.

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*'.[50] In this regard, the Court pointed out that Article 4, entitled 'Review of restrictions or prohibitions', formed a part of the general provisions of Directive 2008/104.[51] 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'.[52]

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 that directive'.[53]

6. Implementation of the Directive in Sweden

Sweden has implemented Articles 5(1), 5(2) and 5(3) of the Directive to its domestic legislation.[54] It should be noted that almost the entire temporary

[50] Para. 24. My italics.
[51] Para 25.
[52] Para. 28. It may be noted that 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 Article 4(1) (paragraphs 84–86), but that the restrictions as laid down in the pertinent collective agreement were justified on grounds of general interest (para. 124).
[53] Opinion of Advocate General, para. 82.
[54] Official Gazette 2012:854.

agency work sector is covered by collective agreements,[55] but the two major collective agreements are different in design.[56]

As indicated by the above-mentioned ECJ case law the situations in which a temporary work agency can be involved in a legal dispute are manifold. This applies also in the Swedish context. with its plethora of examples. 16 cases have appeared before the Swedish Labour Court since 2003. They dealt with negotiation issues related to the Joint Regulation Act,[57] industrial action aspects relating to the Joint Regulation Act,[58] the right to re-employment relating to the Employment Protection Act,[59] whether the provisions on transfer of undertakings in the Employment Protection Act applied,[60] the employee concept,[61] posting of workers,[62] parental leave act,[63] and ethnic discrimination relating to the Discrimination Act.[64]

Three cases had to do with disputes relating to the blue-collar collective agreement and the issue of 'proper pay'.[65] Neither case referred to, or was based on the concept of pay, as laid down in Directive 2008/104. A short account of these cases follows below.

Labour Court judgment 2009 no 54: To start with: the pertinent collective agreement provides in Section 5 (in parts) that pay (certain short-term assignments are exempted)

[55] 95 per cent of the temporary agency workers are covered by collective agreements, see website of The Swedish Staffing Agencies, 2016-11-08, compared to what applies in general on the Swedish labour market, i.e. 90 per cent (but it includes the public sector where the coverage is 100 per cent see Kjellberg, A. *Kollektivavtalens täckningsgrad samt orgainsationsgraden hos arbetsgivarförbund och fackförbund* (Lund University 2017), at 16–17, 85.

[56] As applied to salaried employees an agreement was concluded between the social partners already in 1988. The temporary agency salaried worker's salary is individual and differentiated. The blue collar-worker umbrella agreement was concluded in 2000. Only the latter contains an equal treatment principle as far as pay is concerned. See for more details, Eklund (n 2), at 149–156.

[57] Labour Court judgments 2004 no 10, 2010 no 69 and 2012 no 26.

[58] Labour Court judgments 2004 no 6 and 2011 no 95.

[59] Labour Court judgments 2003 no 4 and 2007 no 72. This has been a contentious issue. Since the negotiations between the social partners in 2010 and 2013 there have been included in the pertinent collective agreements restrictions with respect to the use of temporary agency workers. See in particular a Government Commission Report, SOU 2014:55.

[60] Labour Court judgments 2008 no 51 and 2010 no 25.

[61] Labour Court judgment 2006 no 24.

[62] Labour Court judgment 2004 no 111.

[63] Labour Court judgment 2015 no 58.

[64] Labour Court judgment 2009 no 16 (as applied to recruitment).

[65] Labour Court judgments 2009 no 54, 2009 no 94 and 2015 no 74.

> is equivalent to the average wage level (T + P) as applied to comparable workers at the user enterprise.[66] P means performance pay, piecework rate, wage incentive, bonus and commission,[67] …A comparable group refers to the organizational or clear vocational criteria of work at the user enterprise in order to create 'neutral wages' as a reference point for the temporary work agency's pay.

The Court had to decide a case when the user enterprise, a large building company (NCC), had no building workers employed at its two worksites in Gothenburg. It is to these two sites that a temporary work agency sent Polish building workers. The temporary work agency was an Irish company and a member of the Swedish Association of Staffing Agencies. The Swedish Building Workers Union claimed that the wages of the Polish workers were not in compliance with the collective agreement (the difference amounted to some 875,000 Swedish crowns as applied to the two building projects). The Labour Court found that the wage level in the case should have been based on the wage level as applied to comparable groups of workers employed by the user enterprise in the Gothenburg *region* since NCC had other building workers employed there. To apply the agreement in this way was also considered to be in line with the purpose of the agreement, which was to secure that 'neutral wages' should be applied by the temporary work agency. The Court thus adjudicated in favour of the trade union, and awarded exemplary damages amounting to 350,000 Swedish crowns due to a breach of the collective agreement.

In this way, the Labour Court established a default rule in cases when temporary agency workers are sent to a user enterprise which does not have any workers employed at the workplace where the agency workers have been assigned to by the temporary work agency.

Labour Court judgment 2009 no 94: This case also relates to the above mentioned collective agreement, but the issue here was whether apprentices and so-called vacation trainees should form a part of a comparable group of workers, together with the regular building workers employed by another big building company (Peab). The temporary work agency had included such labour in the comparable group, and, as a result thereof their equivalent pay level was lower than the pay level applied to regular building workers. To start with, the Court found that this specific issue had not been discussed between the contracting parties when the temporary work

[66] Hence, the equal treatment principle applies.

[67] In this context T means time rate of wages. When it is held that pay should reflect 'the average wage level as applied to comparable worker', it is usually referred to GFL, which is a Swedish acronym for '*genomsnittligt förtjänstläge*' (average wage level).

agency's collective agreement came into force in 2000, or at any later time. The Court concluded, however, that apprentices, and to a far lesser degree so-called vacation trainees, could not be included in the group of comparable building workers.

Even in this case, the Court had to create a default rule; the collective agreement gave no guidance. From the point of view of efficiency, the Court acted as a 'gap filler'.

Labour Court judgment 2015 no 74: This is again a dispute relating to the pay provision in Section 4 subsection 2 (formerly Section 5) of the same temporary work agency collective agreement for blue collar workers. The provision provides that in order to fix P (i.e. performance pay, piecework rate, wage incentive, bonus and commission) 'which is calculated post factum (the accounting period is set to a maximum of 3 months), it shall be based, if the local parties do not agree otherwise, on the latest known accounting period'.

The facts were the following. *Randstad Ltd* – a member of the Swedish Association of Staffing Agencies – was bound by the collective agreement in question. Randstad Ltd hired out workers since long to *Scania Ltd*. *Scania* applied a bonus system called SRB (Scania Result Bonus). A dispute arose over the question whether some parts of that bonus system formed a part of P, and whether they corresponded to the average wage level (GFL). The petitioner (*Federation IF Metall*) argued that this was the case. The employer parties rejected this view and argued that SRB runs on a yearly basis, and a bonus is funded by a profit-sharing foundation. The individual worker cannot liquidate his/her balance until after four years have passed from the funding of the bonus. The Court adjudicated in favour of the employer and declared that the bonus did not form a part of P relating to the average pay level, with reference basically to the accounting period of a maximum of three months.[68]

So far about the case law, but what did the social partners do with respect to the coming into force of the new Directive and the Swedish legislation? The answer is: ABSOLUTELY NOTHING. Even though amendments to the collective agreements have been made, they were not connected to the new legislative regime.[69] A small handout[70] which is directed towards the user undertakings is published by the Association of Staffing Agencies, wherein

[68] As of 2017 the reference period according to the collective agreement is instead 12 months.

[69] My respondents have been: Hanna Byström, Chief of Negotiations at the Swedish Association of Staffing Agencies, Kent Ackholt, Ombudsman at the LO and Martin Wästfelt, Chief Legal Counsel and Johan Falk, Unionen.

[70] 'Uthyrningslagen – när du ska hyra in' (no date).

two aspects have been highlighted: access to collective facilities (in particular dressing rooms, hygiene facilities, training facilities, transportation and meal premises),[71] and access to vacant post at the user undertaking.[72] When I questioned my respondents, they had no knowledge as to whether the temporary agency workers were discriminated against in any way as regards access to collective facilities.

The number of temporary agency workers is not big – 1.4 per cent of the entire work force in Sweden in 2014. In 2011, the Association of Staffing Agencies stated that their long-term goal was a penetration rate of 3 per cent of the entire work force.[73]

There is a very high coverage rate among the temporary agencies i.e. temporary work agencies being bound by a collective agreement.[74] According to my respondents it is likely to be connected to the very special authorization process, which has been mandatory since 2007 to be able to become a member, and stay on as a member, of the employer organization, and which is governed by a board with the participation of both social partners, and which is strict.[75] The aim is to improve the quality of the activities of the temporary work agencies. It is a kind of 'eco label'.

There are, of course, various reasons for the use of temporary agency workers. On the employer side, it has been held that temporary agency workers are necessary to fill gaps in cases of longer periods of leave of absence and work peaks. It has also been argued that temporary agencies are superior in recruiting.[76] In the above-mentioned report from the engineering industry two aspects are highlighted: rapid transitions and flexibility.[77] However, the trade unions have had second thoughts about these developments. They argue, among other things, that permanent use of temporary agency workers should be restricted by means of amendments to the

[71] See Article 6(4) of the Directive.
[72] See Article 6(1) of the Directive.
[73] *Vi stärker bemanningsbranschen* (Bemanningsföretagen, April 2011), at 3. This is a rather low target considering the number of temporary agency workers and external consultants in the Swedish engineering industries according to a report in 2013 wherein the temporary agency workers and the external consultants accounted for 11,6 per cent of the total work force in the industry. See *Teknikföretags inhyrning av personal 2013* (published by The Association of Swedish Engineering Industries, October 2013), at 8. Looking at the statistics in the report it is amazing that reasons with respect to the employment protection law play a rather minor role when the engineering companies are hiring manpower from other external sources, at 18.
[74] Note 55.
[75] See website of the Swedish Association of Staffing Agencies.
[76] Jansson, L., *Bemanningsföretag – en språngbräda för integration* (Svenskt Näringsliv, April 2010), at 1.
[77] See n 73, at 5 and 17.

collective agreements, and that the duty to negotiate according to Section 38 of the Joint Regulation Act in using temporary agency workers should be more strictly enforced.[78] One aspect that has been emphasized is that a high degree of *fixed-term employees* on the labour market has a negative impact on the organization rate.[79] But in what way this is the case in the temporary agency work sector, when the main rule, according to the collective agreements, is that regular employments apply, is not evident.[80] To my knowledge, this is a subject for further research.

[78] Report *Fackliga strategier för en trygg rörlighet på* arbetsmarknaden (The Swedish Unions within Industry, April 2015), at 13–17.
[79] Op. cit., at 16.
[80] See Berg, A., *Bemanningsarbete, flexibilitet och likabehandling* (Juristförlaget i Lund 2008), at 41 where it is held that the organization rate among temporary agency workers has traditionally been low.