

# Temporary Employment Agencies in the Nordic Countries

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The purpose of this article is to trace the origins and development of temporary manpower procurement policies in the Nordic countries.<sup>1</sup>

## 1 Legal Framework with Respect to Employment Exchange and Temporary Employment Agencies

In the past, the Nordic provisions in force concerning promotion of employment entrusted the monopoly of employment procurement to public employment agencies. The origins of this phenomenon are international. Article 1 of the ILO Employment Service Convention No. 88/1948 sets the standard stipulating that the ratifying member “shall maintain or ensure the maintenance of a free public employment service”. All the four Nordic countries have ratified this Convention.<sup>2</sup>

When discussing the issue of temporary employment agencies, 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 temporary employment agencies or other persons act as intermediaries. Such activities frustrate the objectives of the state monopoly.

The ILO Convention No. 96/1949 on Fee-Charging Employment Agencies (revising Convention No. 34/1933) either bans the activities of fee-charging employment agencies, which are conducted with a view to profit, or provides for

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<sup>1</sup> At the end of 1993 I presented before the Expert Committee of the Nordic Council a Report on the Hiring-out of Manpower in the Nordic Countries (*In- och uthyrning av arbetskraft i de nordiska länderna* September 1993, mimeographed). The term “Nordic countries” refers to: Denmark, Finland, Norway and Sweden. Iceland was not included. See a summary by Ronnie Eklund, *A Look at Contract Labour in the Nordic Countries*, in *Juridisk Tidskrift* 1995-96 No. 3, at 625-654.

<sup>2</sup> Sweden and Norway 1949, Denmark 1972 and Finland 1989. The fifth Nordic country, Iceland, never ratified the Convention.

the regulation of such agencies' activities. Finland,<sup>3</sup> Norway<sup>4</sup> and Sweden<sup>5</sup> have once ratified the Convention, but Denmark has not.

The ILO Convention No. 181/1997 concerning Private Employment Agencies, which has replaced the ILO Convention No. 96/1949, is another attempt to modernize the law related to temporary work agencies in order to promote flexibility in the functioning of the labour markets. The aim of Art. 2 of the Convention is "to allow the operation of private employment agencies as well as the protection of the workers using their services". Finland is the only Nordic country which ratified the Convention in 1999.<sup>6</sup> In Sweden ratification has been rejected with reference to the fact that negotiations are pending at the European level between the social partners with respect to temporary employment agencies.<sup>7</sup> Norway has stated that it could not ratify the Convention with reference to the domestic regulations concerning temporary employment agencies.<sup>8</sup>

Several attempts have also been made to place the issue of temporary work on the European Community agenda, first in 1982,<sup>9</sup> and later in 1990.<sup>10</sup> In the mid 1990s the E.C. Commission encouraged the social partners to do something. Later on, the social partners conducted negotiations between June 2000 - May 2001, but failed to reach a consensus. In order not to lose the political momentum, the Commission quickly launched a Proposal for a Directive on working conditions for temporary workers in March 2002, incorporating the points agreed upon during the negotiations between the social partners, formulating also provisions to overcome the remaining contentious points.<sup>11</sup> The real bone of contention is the concept of "comparable worker". The workers' representatives want to use as a point of reference a worker engaged in the user enterprise, carrying out the same or similar work. Employers disagree, stating that such comparison would be unjustified in countries where temporary workers have a permanent contract with an agency and are paid even in the time between postings.

The Commission argues that the need to enact legislation at Community level is justified on several grounds. Firstly, there is a need to extend the principle of non-discrimination. Secondly, it is necessary to pave the way for the elimination of the existing restrictions and limitations with respect to the use of temporary work agencies. Thirdly, a Community legal framework will echo the wishes of

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<sup>3</sup> Finland ratified the Convention in 1951.

<sup>4</sup> Norway ratified the Convention in 1950.

<sup>5</sup> Sweden ratified the Convention in 1950.

<sup>6</sup> RP 268/1998.

<sup>7</sup> Prop. 2000/01:93, at 13.

<sup>8</sup> St. prp. nr 66 (1997-98). *See also* Ot. prp. nr 70 (1998-99), Ch. 8 "<http://odin.dep.no/krd>".

<sup>9</sup> COM(82) 155 final. Proposal for a Council Directive concerning temporary work.

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

<sup>11</sup> COM(2002) 149 final. *Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers*, at 6-8 (EUR-Lex version).

the intersectoral social partners at Community level, and the expectations of the social partners in the temporary agency sector.

It is enough to highlight one aspect of the proposed Directive. I refer to the principle of non-discrimination with respect to employment and working conditions (Art. 5). It provides that temporary workers shall receive “at least as favourable treatment ... as a comparable worker in the user enterprise, unless the difference in treatment is justified by objective reasons”. However, Member States may make exemption “when temporary workers who have a permanent contract of employment with a temporary agency continue to be paid in the time between postings”. Furthermore, the social partners may be empowered to conclude “collective agreements which derogate from the principle [of non-discrimination] as long as an adequate level of protection is provided for temporary workers”.

On the basis of the above it is easy to conclude that the consequences for the Nordic countries are far-reaching, even when considering only one aspect of the proposed Directive.<sup>12</sup>

## **2 The Outline of the Evolution of Temporary Employment Agencies in the Nordic Countries**

Hiring-out is a common phenomenon on the labour markets of all the four Nordic countries, even though the number of persons involved cannot be stated accurately. No reliable statistics are available, but it is certain to say that less than 1 % of the entire labour force in the respective country is engaged in this way.<sup>13</sup> It is basically a phenomenon occurring in the capital and the larger cities. This practice has met, however, with unusual interest, showing remarkable differences regarding the legal approach in the four Nordic countries. This is somewhat surprising when considering the otherwise high uniformity of law in other fields in the Nordic area.

In 2002 only Norway is still bound by the ILO Convention No. 96/1949. Some suggestions concerning the ways in which to liberalize the Norwegian legal framework were made already in 1989-90, but they were never implemented.<sup>14</sup> A major shift in the Norwegian legislative scheme took place in 2000, however.<sup>15</sup>

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<sup>12</sup> *The Swedish Association of Temporary Work Businesses and Staffing Services* (SPUR) has submitted the view that the Directive has not been adapted to the Swedish labour market tradition and conditions applying to the temporary workers. Source: SPUR information 2002-04-30, “www.spur.se”.

<sup>13</sup> According to SPUR statistics, 0.87 % of the Swedish labour force was employed in temporary agencies in December 2001. According to the same source, the corresponding figures in Denmark, Finland and Norway in 2000/2001 were: 0,3 %, 0,3 % and 0,7 % respectively. Source: above note 12.

<sup>14</sup> See NOU 1992:26. *En nasjonal strategi for økt sysselsetting i 1990-årene*, at 30, 199.

<sup>15</sup> See NOU 1998:15. *Arbeidsformidling og arbeidsleie* “<http://odin.dep.no/aad/>”, Ot. prp. nr 70 (1998-99) and Innst. O. nr 34 (1999-2000).

Finland and Sweden denounced the ILO Convention No. 96/1949 in the 1990s.<sup>16</sup>

The partial deregulation with respect to hiring-out of manpower which took place in Sweden in 1991 was seen mainly as a corrective measure to the ineffectiveness of the former legislative framework spanning from 1942.<sup>17</sup> It was the Social Democratic Government which started the liberalization. A further step taken in 1993 implied that the Swedish state monopoly of employment exchange was abolished.<sup>18</sup> The *Macrotron Case*<sup>19</sup> can be seen as a component of the deregulation of the public employment exchange monopoly taking place in Sweden in 1993.<sup>20</sup> Competition aspects were thus decisive when deregulation was first suggested. The amendments in 1993 implied that private employment agencies were henceforth permitted to act on the market with a view to profit.

When Finland simplified the procedure concerning temporary agencies in 1994, this was done partly for efficiency reasons and partly in the context of the coming into force of the E.E.A. Agreement which was seen as a stepping stone towards the E.C. membership.<sup>21</sup> Later on, Finland amended its law with effect from 1 June 2001 and a more transparent system with respect to the provision of temporary manpower was introduced.<sup>22</sup>

In all the four Nordic countries, a job applicant or employee may not be charged for the services of a temporary employment agency. It follows either from the statute or the Ethical codes in force.<sup>23</sup>

### **3 Externalities when Resorting to the Use of Temporary Employment Agencies**

It can be said in brief that the practice of hiring temporary manpower from an external provider of personnel is a reflection of a need for a temporary substitute, which is often due to the simple fact that a regular employee is ill, on leave, or else in cases when there is a sudden increase in the work load, or in times when business reaches a peak. In some instances, temporary manpower may be needed for special working tasks.<sup>24</sup>

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<sup>16</sup> See RP 102/1993 and prop. 1991/92:89.

<sup>17</sup> Prop. 1990/91:124.

<sup>18</sup> Prop. 1992/93:118.

<sup>19</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH* [1991] ECR I-1979.

<sup>20</sup> See SOU 1992:116. *Privat arbetsförmedling och uthyrning av arbetskraft*, at 74-75 and prop. 1992/93:218, at 13-14.

<sup>21</sup> See RP 102/1993, 103/1993 and 239/1993.

<sup>22</sup> RP 157/2000, Employment Contracts Act of 2001.

<sup>23</sup> Denmark: *Foreningen af vikarbureauer i Danmark (FVD)*, *Ethical Code* (1998), point 5, Finland: sec. 16 of the *Manpower Services Act* (1005/93), Norway: secs. 26 and 27 of the *Act on the Promotion of Employment*, after amendments in 2000 (See Besl. O. nr 47 - 1999-2000) and Sweden: sec. 6 of the *Act on Private Job Placement and Hiring-Out of Labour*.

<sup>24</sup> See, for example, Karen M. Olsen & Hege Torp, *Fleksibilitet i norsk arbeidsliv* (1998).

All sectors of the labour market in the Nordic countries show a tendency in which the principal employer reduces, or cuts down on the so-called satellite activities or peripheral functions. It is sometimes called “outsourcing”. This means that the employer concentrates on the mainline of his business activities, still being dependent though on other providers of services. In essence, this means that some part of the employer’s labour force becomes *externalized*. This development may be described in terms of a paradigmatic shift in the production of goods and services. Classical industrialism meant that the entire production chain was *internalized* so that the company could control and co-ordinate the whole production chain, from the acquisition of the raw-material to the completion of the final product. This phenomenon is gradually disappearing, and instead a kind of “flexible specialization” is gaining ground.<sup>25</sup>

Hence, the borderline between the organization (hierarchy), on the one hand, and the market, on the other, is getting more blurred.<sup>26</sup> This is only another variant of the theme advanced by Ronald Coase, the 1991 Nobel Prize Winner in Economics, in a classical article from 1937. He proposed that it was *transaction costs* which determined whether work was to be performed inside or outside the firm: “A firm will tend to expand until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market, or to the costs of organizing another firm.”<sup>27</sup> The essential point is that transactions will be performed within the firm (“in-house”) as long as this is the most profitable arrangement. When this no longer applies, they will be externalized and passed over onto the market.

It is an open question, however, whether this strategy reduces manpower costs. It is probably true that the recruitment costs of new manpower will be reduced if the external manpower works on a short-term basis, but, on the other hand, the costs of buying external manpower may be actually higher than those of paying wages to the personnel employed in the company, taking into consideration all the marginal costs connected with the former. I know of no comprehensive Nordic study highlighting this specific issue.<sup>28</sup>

It is a well-known fact that in Sweden doctors and nurses, coming from temporary employment agencies, receive much higher wages than their

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<sup>25</sup> SOU 1993:32. *Ny anställningsskyddslag*, at 143.

<sup>26</sup> This is an area which was extensively analysed in the field of law and economics during the last few decades. A major work is Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications. A Study in the Economics of Internal Organization* (1975). See also, Ronnie Eklund, *Bolagisering - ett mode eller ett måste? Arbetsrättsliga lösningar i 21 koncerner* (1992), concerning the impact upon labour law when large and medium-large companies reorganize in order to set up subsidiaries instead of conducting the same business within the former divisions or departments of the former company.

<sup>27</sup> Ronald Coase, *The Nature of the Firm*, in *ECONOMICA* (1937), at 395.

<sup>28</sup> A general inventory of arguments *pro et contra* with respect to manpower recruitment costs is found in a Norwegian study, See Hege Torp & Stig P. Pettersen, *Markedet for korttidsarbeid. En utredning om utleie of formidling av arbeidskraft* (1989), at 141-142.

colleagues employed by the public health-care institutions.<sup>29</sup> A recent Manpower study in Norway also shows that changing jobs makes a drastic difference in terms of wages, i.e. that wages increase dramatically.<sup>30</sup> I submit the view that for the labour market to work well it is a necessary condition that there are several employers available to meet the demand for employment, i.e. that the employees affected must have other alternatives to turn to than the current employer, if they are to be able to raise their wages. It is tempting to conclude that the impact of the temporary employment agencies seems to be that a more efficient wage formation on the labour market is achieved.

It is also evident that employers occasionally use temporary employment agencies as a recruitment tool in order to see whether a temporary work relationship is likely to mature into a permanent employment relationship. The literature refers commonly to this phenomenon as “*try-and-hire*”.<sup>31</sup> This means that, to start with, an employer is able to avoid the recruitment costs and the responsibility connected with being an employer. Statutory restrictions relating to the conclusion of fixed-term contracts may be the cause of the emergence of this form of employment. This is doubtless one cogent aspect of the Swedish debate of the past few years as regards the possibility of fixed-term contracts.<sup>32</sup>

In Denmark, before the total deregulation in 1990, the principal employer would often favour the use of temporary agency workers as compared to that of temporarily employed staff, due to the fact that the Danish White-Collar Servants Act (*Funktionærloven*) imposed certain restrictions on dismissal of such temporary manpower.<sup>33</sup>

The practice of using temporary employment agencies may also reflect the shortcomings of the public employment exchange and its inability to provide employers with temporary staff.

#### **4 The Evolution and the Legal Framework with Respect to Temporary Employment Agencies**

Between the 1930s and 1950s legislation banning private employment exchange with a view to profit was introduced in all the four Nordic countries. However, it was only Sweden that regarded the provision of temporary manpower by private employment agencies as a proper form of employment exchange. This view was

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<sup>29</sup> See Ronnie Eklund, *The equal pay principle - promises and pitfalls*, in *Juridisk tidskrift* 2001-02 No. 3, at 542-555 and *Dagens Nyheter*, 21 April 2002 (*Personal väljer privat vård*). See also UK, *Daily Mail*, December 18, 2001 (*Will our nurses ever get a fair deal?*) and even Norway, “[www.service.no/index.php?id=43876&cat=2278](http://www.service.no/index.php?id=43876&cat=2278)” (*Utspekulert spill om utleie*).

<sup>30</sup> See “[www.service.no/index.php?id=7066](http://www.service.no/index.php?id=7066)” (*Normalarbeidsdagens paradoks*).

<sup>31</sup> See Henning Jakhelln, *Try and Hire - Arbeidsformidling eller vikarbyråvirksomhet?*, in *Lov, dom og bok. Festskrift til Sjur Brækhus* (1988), at 241-251.

<sup>32</sup> See prop. 1993/94:67.

<sup>33</sup> “Temporary” (“midlertidig”) employment in Denmark may not exceed three months, sec. 2 para. 4 of the said Act. See further H.G. Carlsen, *Dansk Funktionær Ret* (6 ed. 1998), at 284-288 and Kaj Petersen, *Funktionærloven* (12 ed. 1990), at 85-86, 90 et seq.

never assimilated by either Finland or Norway.<sup>34</sup> In Denmark, the same issue has never gained proper currency, since the country never ratified the ILO Convention No. 96/1949.

It is now time to shed some light on the specific ways in which temporary employment agencies have developed in the Nordic countries.

#### 4.1 Denmark

In Denmark, the activities of temporary employment agencies were not restricted by any regulations at all for a long time. It was only in 1968 when the competition between the activities of temporary employment agencies, on the one hand, and the state employment exchange, on the other, became an issue of common interest in connection with the reorganization of the Danish public employment exchange. In consequence, a separate statute concerning private employment procurement was issued, whose intention was to lay down rules concerning the supervision of temporary employment agencies.<sup>35</sup> A temporary employment agency's activities were defined as "activities for the purposes of the contracting-out of manpower if the employment entered into with the temporary employment agency relates solely to the hiring-out assignment in question".<sup>36</sup>

The subsequently issued regulations made it clear that temporary employment agencies were permitted to operate only within the *commercial* and *office sectors* of the labour market.<sup>37</sup> From then on such agencies could not do business in any other areas of the Danish labour market. The regulations also provided that the relevant contract of employment should be made in writing, and that it could not exceed three months.<sup>38</sup>

If, however, the hired-out manpower was employed on a permanent basis by a temporary employment agency, such an arrangement was looked upon as regular job contracting in Denmark. Arrangements of this kind were considered rare. In such cases the temporary employment agency assumed the entrepreneurial risk of employing regular employees, in contrast to temporary workers who would be engaged separately for each assignment.<sup>39</sup>

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<sup>34</sup> See RP 1984 No. 125 and Ot. prp. nr 53 (1970-71), at 27. See also Ot. prp. nr 70 (1998-99), Ch. 8, at 2.

<sup>35</sup> See Lov No. 249/1968 om privat arbejdsanvisning m.v. In 1970, the same provisions were made part of the *Danish Act on Employment Exchange and Unemployment Insurance*, See Lov No. 114/1970, sec. 27.

<sup>36</sup> Sec. 3(2) of Act No. 249/1968.

<sup>37</sup> See Bekendtgørelse No. 163/1970 om vikarbureauer inden for handels- og kontorområdet.

<sup>38</sup> Secs. 2 and 3, Bekendtgørelse No. 163/1970.

<sup>39</sup> See a Danish report, *VIKARBUREAU-UDVALGET*, at 4 (1980). This report was handed down by an especially appointed committee which had been assigned the task of studying the use of temporary manpower within other fields of the labour market than the commercial and office sectors, after a discussion on the topic in the Danish Parliament in 1975.

After further refinements on the Danish statutory framework performed during the 1970s and the 1980s, the Danish Parliament finally decided to deregulate the public employment exchange monopoly in 1990.<sup>40</sup> As a consequence thereof, the restrictions with respect to temporary employment agencies were also abolished. The main argument for the deregulation was that the principle of supply and demand should define the areas (and scope) of private employment exchange activities. Likewise, it was held that the protective scheme with respect to temporary work which was once applied could be dispensed with.<sup>41</sup> The political opposition in the Danish Parliament demanded, however, that a ban on charging fees on the job applicant should be inserted into the Act.<sup>42</sup> However, the Government defended the free-of-charge proposal by arguing that as long as the public employment exchange did not charge job applicants for their services, there would be no reason for a job applicant to turn to a private employment exchange which did. As said before, the Ethical code of the Danish Association of Temporary Employment Agencies (FVD) provides that a job seeker must not be charged any fees. According to a 1992 Danish survey, temporary employment agencies were beginning to feel increasing competition after the deregulation.<sup>43</sup>

In Denmark a special difficulty arose after the handing down of a 1991 arbitration award in a dispute between HK and the leading employer organisation (DA/BKA).<sup>44</sup> It was held that a temporary worker was not embraced by the White Collar Workers' Act (Funktionærloven), since the employee did not have "a position of service" ("tjenestestilling"). It was therefore argued that the "temp" had no duty to be in continuous service and could leave the assignment without notice, which also corresponded to the employees' right to reject an offer of continued employment from a temporary employment agency.<sup>45</sup> Later on, in 1997, the Danish Supreme Court corroborated this point of view, involving a short-term employment of less than a month.<sup>46</sup> However, in 1996 the Danish Court of Appeal (Sø- og Handelsretten) came to the opposite conclusion in a case where a temporary employed person was assigned to work for more than three years at a specific user enterprise. The Court held that upholding another view would amount to a circumvention of the White Collar Workers' Act.<sup>47</sup>

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<sup>40</sup> See Lov No. 840/1989. Still, an exception is made with respect to nurses where private employment exchange is not permitted, based upon Act No. 127/1956 om sygeplejersker, amended several times.

<sup>41</sup> See *Danish legislative history*, FT 1989-90. Tillæg A sp. 1447.

<sup>42</sup> *Op.cit.* No fees may be charged on nurses, above note 40.

<sup>43</sup> According to Agi Csonka, *Fri formidling - om liberaliseringen af arbejdsformidlingen* (1992).

<sup>44</sup> Award 31 July 1991 between *Handels- og Kontorfunktionærernes Forbund i Danmark* and *Dansk Arbejdsgiverforening and Butik og Kontor Arbejdsgiverforeningen*, further below note 108.

<sup>45</sup> See H.G. Carlsen, above note 33, at 53-54.

<sup>46</sup> U 1997, 1495.

<sup>47</sup> U 1996, 946.



## 4.2 Finland

In Finland, the first attempt to regulate the hiring-out of manpower was implemented by means of a national collective agreement signed in 1969 between the two major social partners of the Finnish industry (TT and FFC), as amended in 1997.<sup>48</sup> The purpose of the 1969 agreement was to limit the use of external manpower, in particular to curb the abuses connected with the use of contract labour in the building industry. The agreement stated, *inter alia*, that the temporary use of contract labour was considered unsound if the workers were employed for a longer period of time, performing work alongside the principal employer's workforce, and being placed under the same supervision.<sup>49</sup> The agreement stipulates that the use of contract labour shall be restricted to extraordinary work-loads and temporary need for qualified manpower not available among the permanent staff.

In 1984 the same issue was submitted before the Finnish Parliament.<sup>50</sup> It was found that the public employment exchange met with difficulties when trying to satisfy the demands of the labour market with regard to short-term employment. But it was also found that many entrepreneurs providing temporary manpower avoided paying taxes and social dues, which caused serious inconvenience and distorted the competition. Therefore, the activities of temporary employment agencies had to be regulated. The Finnish legislator opted for a *licensing* procedure. Accordingly, under sec. 2a of the 1959 Act on Employment Exchange a special *permit* had to be obtained from the Labour Market Department of the Ministry of Labour by employers who wished to contract out their manpower. A permit was to be granted only in cases in which the hiring-out activities were deemed to satisfy a *short-term* or *temporary demand* for manpower. As a rule, an individual employee could not be hired out for a longer period of time than six months.<sup>51</sup>

However, with effect from 1994, the permit procedure was abolished. Experience showed that the restrictions involved the Labour Market Authorities in an extensive and counter-productive red-tape, without producing positive results.<sup>52</sup> The Finnish Parliament therefore downscaled the procedure, introducing a *notification* procedure whose essence is, according to sec. 21a of the Labour Protection Supervision Act, that an employer who places his employees at another principal employer's disposal at an agreed price should notify the Labour Protecting Authority upon the commencement of the agency activities. Simultaneously, the Finnish Parliament abolished the former public

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<sup>48</sup> Cf. also, Niklas Bruun, *Uthyrtning av arbetskraft - behövs arbetsrättslig särreglering?*, in *Tidskrift*, utgiven av Juridiska Föreningen i Finland (2001), at 24-39.

<sup>49</sup> The 1969 agreement also served as a model for the subsequent provisions with respect to the employer's statutory duty to inform and negotiate with the representatives of his employees in case external manpower was engaged in accordance with sec. 9 of the 1978 *Finnish Act on Co-Operation Within Undertakings*.

<sup>50</sup> RP 125/1984 (652/1985).

<sup>51</sup> Sec. 11 of the *Regulations on the Contracting Out of Manpower* (908/85).

<sup>52</sup> RP 103/1993, at 5.

employment exchange monopoly. A new Manpower Services Act (1005/93) was instead issued.<sup>53</sup> Competitive aspects were decisive in taking this step.<sup>54</sup> It paved the way for private employment exchange with a view to profit.<sup>55</sup> However, sec. 16 of the Act still prohibits charging a job-seeker for services provided by the agency, basically in order to avoid, in that “a single individual’s need for a job becomes a commodity”.<sup>56</sup>

As a result of the subsequent Finnish ratification of the ILO Convention No. 181/1997 further amendments were made in 1999 to the 1993 Act.<sup>57</sup> The amendments relate to the requirements set by the Convention. Both private employment agencies and temporary employment agencies are subject to the new rules. Among other things, a private labour provider may be requested to supply information about his/her activities to the labour market authorities (sec. 18(2) of the Act).

In Finland, it has been assumed that a person hiring-out employees is to be regarded as an employer. Like in Denmark, hired-out employees are deemed to be only temporarily employed.<sup>58</sup> It is equally clear that the user employer shall direct and assign work to such employees, which has now been given an explicit statutory support in the new Employment Contracts Act of 2001, Ch. 1, sec. 7(3).<sup>59</sup>

### 4.3 Norway

The first temporary employment agency in the office sector in Norway was established in 1948,<sup>60</sup> which was not in violation of the ban on private employment exchange as laid down in the 1947 Act on the Promotion of Employment (sec. 26).<sup>61</sup> Provision of manpower by temporary employment agencies was not deemed to be a form of employment exchange in Norway. However, a major change with respect to temporary employment agencies came about in the years of 1971-72. A decisive motive for the introduction of a ban on temporary employment agency activities was to curb the practice of many agencies that would recruit personnel from user enterprises at far better

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<sup>53</sup> The former 1959 Act (246/59) was repealed.

<sup>54</sup> RP 102/1993, at 9.

<sup>55</sup> An exception applies to the employment exchange of seafarers, sec. 16(2) of the Act on Manpower Service. The ban reflects the fact that the ILO Convention No. 9/1920 on Placing of Seamen was ratified by Finland in 1922. However, a change came about in 1999 when Finland ratified the *ILO Recruitment and Placement of Seafarers Convention*, No. 179/1996, See RP 268/1998. No fees or other charges may be exacted from the seafarer.

<sup>56</sup> RP 102/1993, at 24.

<sup>57</sup> RP 267/1998 (418/1999).

<sup>58</sup> Bruun, above note 48, at 35 argues that it is becoming more frequent that temporary workers are employed on a regular basis.

<sup>59</sup> See RP 157/2000, at 68-69.

<sup>60</sup> NOU 1998:15, Ch. 5, at 8.

<sup>61</sup> Ot. prp. nr 149 (1945-46).

economic conditions only to hire them out to the same or other user enterprises, which often resulted in higher wage costs for the user enterprise, particularly in the engineering industry. These activities were looked upon as a very unfortunate phenomenon on the Norwegian labour market. After the intervention a ban on temporary agency work was introduced into sec. 27 of the Act on the Promotion of Employment, which provided the following:

It is not permitted to conduct a business with the purpose of placing employees at the disposal of another user employer, if the employees are directed by the user employer and the user employer has employees of his own who perform work of the same kind, or if the user employer is conducting a business of which such work forms a natural part.

The Ministry of Labour, or the party which is empowered thereto, may make exceptions in the first paragraph. The Ministry may issue such regulations.

It is also forbidden to make use of manpower from a business indicated in the first paragraph, unless an exception has been made in accordance with the second paragraph.<sup>62</sup>

One can draw several conclusions from these provisions. First of all, the user enterprise must *direct the work* and be in control of the work. If this is the case, then hiring-out of manpower can be distinguished from job contracting.<sup>63</sup> Secondly, the statute bans temporary employment provided by an agency if the user employer has *employees of his own* who can perform *the same kind of work* which is also to be performed by the hired-out manpower; the same applies if the work in question is deemed to form *a natural part* of the user employer's business. Thirdly, the employee must be *employed by the provider*. This condition makes it clear that contracting-out of manpower is distinguished from the activities of an employment exchange, where no employment relationship exists between the job applicant and the intermediary.

It is especially the second aspect mentioned which constitutes a substantial restriction on the use of hired-out labour.

Regulations related to sec. 27 were subsequently issued, providing for some exemptions from the ban,<sup>64</sup> and for a *licensing* procedure in other cases.<sup>65</sup> Two kinds of application procedures applied to a) the office sector (as defined) and b) the industry sector.

In the *office sector* the procedural requirements stipulated that the temporary employment agency in question had to be *registered* with the Labour Market Board.<sup>66</sup> According to the regulations, a temporary employment agency could

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<sup>62</sup> The third paragraph was added in 1981, Ot. prp. nr 4 (1980-81).

<sup>63</sup> See Ot. prp. nr 53 (1970-71), at 23-24.

<sup>64</sup> Some activities were *generally exempted* from the ban. Those are, for example: repair & maintenance work onboard seafaring ships, loading and unloading activities in the maritime transportation industry and the referral of substitutes to farmers in the agricultural business.

<sup>65</sup> *Forskrift om unntak fra forbudet mot utleie av arbeidskraft*. Fastsatt av Kommunal- og arbeidsdepartementet 11. Mars 1983 (amended several times) med hjemmel i lov av 27 juni 1947 nr 9 om tiltak å fremme sysselsetting § 27, second para.

<sup>66</sup> Sec. 14, Forskrifter.

not, in general, assign employees to a user employer for a period exceeding 12 months.<sup>67</sup> The licensed enterprise had also to report its activities to the Labour Market Board.<sup>68</sup>

In the *industry sector*, applying mostly to engineering, oil-related, building and construction businesses, a *permit* was required either for each single instance, or it could be granted on a general basis for a period of up to five years.<sup>69</sup> The following aspects were accorded particular importance when an application was assessed: whether there was a need for hiring-out manpower, whether the public employment exchange could satisfy that need, whether the general employment situation would be affected and whether the hired-out employees were vocationally trained to take the assignments in question. The reason for hiring-out employees in industry was to avoid lay-offs or redundancy dismissals of the employees in question.<sup>70</sup> Geographical restrictions usually applied.<sup>71</sup> Assignment of an employee to a user employer could not, as a rule, exceed six months.<sup>72</sup> Activity reports had to be submitted to the Labour Market Board.<sup>73</sup>

2000 was a turning-point in Norway inasmuch as the former framework was abolished, though not in the same way as it was done in Denmark, Finland and Sweden. Norway found that the former schemes were difficult to uphold for various reasons.<sup>74</sup> The Act on the Promotion of Employment was amended so as to permit both private employment exchange and the contracting-out of manpower. Still, businesses engaged in those activities should notify the authorities when they commence their activities and report yearly on their activities.<sup>75</sup> A few protective provisions with respect to the job-seeker or worker were preserved, however, in the statutory scheme. A hired-out employee is guaranteed the right to take up employment with the principal employer after having fulfilled the former undertaking. Furthermore, an employee who has left the principal employer to take up employment with a temporary employment agency cannot be hired-out to his former employer earlier than six months after the expiration of his former employment contract. The basis of this provision has

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<sup>67</sup> Sec. 8, Forskrifter.

<sup>68</sup> Sec. 14, Forskrifter.

<sup>69</sup> Sec. 5, Forskrifter. The practice has been to grant a permit for two years, NOU 1998:15, Ch. 5, at 13.

<sup>70</sup> NOU 1998:15, Ch. 6, at 17.

<sup>71</sup> Sec. 6, Forskrifter.

<sup>72</sup> Sec. 8, Forskrifter.

<sup>73</sup> Sec. 14, Forskrifter.

<sup>74</sup> See Ot. prp. nr 70 (1998-99), Ch. 6, at 16, NOU 1998:15, Ch. 9, at 5, ch. 10, at 6-8.

<sup>75</sup> The new law went into force on 1 July 2000. Special regulations were subsequently issued, Forskrift om privat arbeidsformidling of utleie av arbetstakere. Fastsatt av Arbeids- og administrasjonsdepartementet 27. Juni 2000 med hjemmel i lov 27 Juni 1947 om tiltak å fremme sysselsetting § 26, fourth para. and § 27, third para.

been designed to curb unsound recruitment activities of persons making use of the services of temporary employment agencies.<sup>76</sup>

So far similarities to the other neighbouring countries are striking. However, the difference between Norway and its Nordic neighbours is that Norway found another way to keep the temporary work agencies under strict control, but the core of that control shifted instead to the Worker Protection and Working Environment Act, i.e. from the public law area to the private law area. A new set of rules have come into being, whose main essence is that strict rules shall apply *to the use* of workers referred from temporary employment agencies (Ch. XI B, sec. 55K of the Act). Less strict rules apply to employers whose principal activities are not those of temporary employment agencies, but who may, nevertheless, need to contract-out their own workers (Ch. XI B, sec. 55L of the Act). This division of manpower providers follows tradition, having in mind the past regulatory framework. The new provisions apply, however, to the whole of the labour market, while, in the past, the applicability of the permit scheme was segmented.

The essence of the new rules with respect to the provision of manpower by professional temporary employment agencies (sec. 55K of the Act) is that the law's focus has shifted to the user enterprise which will not be able to use the services of a temporary agency's worker unless the user is entitled to employ a fixed-term contract employee under sec. 58A No. 1 of the Worker Protection and Working Environment Act. There are rather strict regulations on the use of temporary manpower related to fixed-term contracts in Norway.<sup>77</sup> It is debatable whether Norway's practice in the past in which a temporary agency worker was employed for each separate assignment in the office sector<sup>78</sup> was in compliance with the generally applicable provisions concerning fixed-term contracts ("midlertidig tilsetning"), stipulated in sec. 58A No. 1. According to the said Act, fixed-term contracts may be entered into, for example, "when the nature of work so requires and the work in question differs from that which is ordinarily performed in the business".<sup>79</sup> If a temporary employment agency needs a temporary worker with special skills on a regular basis, the worker should receive a permanent employment contract.<sup>80</sup>

The new regulations in sec. 55K of the Act also provides that if at some later stage a dispute arises with respect to the user enterprise's engagement of a temporary agency's worker, the ultimate outcome may be that the Court might conclude that the temporary agency's worker is *permanently employed* by the

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<sup>76</sup> Sec. 27 of the *Act on the Promotion of Employment*, also NOU 1998:15, Ch. 10, at 20. See also *Bemannings- og Rekrutteringsbransjens Forening (BRF), Ethical code*, points 9 and 10.

<sup>77</sup> There is a tacit assumption that employment should be until further notice, says Jan Fougner, *Arbeidsavtalen - utvalgte emner* (1999), at 178.

<sup>78</sup> See the 1993 Report, above note 1, at 100-103, corroborated in NOU 1998:15, Ch. 10, at 11.

<sup>79</sup> See for an overview, Odd Friberg, Jan Hougner & Lars Holo, *Arbeidsmiljøloven* (7 utg. 1998), at 432-437.

<sup>80</sup> Ot. prp. nr 50 (1993-94), at 166, accord in NOU 1998:15, Ch. 5, at 20.

user enterprise.<sup>81</sup> It is stated that the aim of the regulations is to put emphasis on the fact that permanent employment shall be the main rule in Norwegian labour law and not to allow more leeway for temporary agency work as compared to what applies to fixed-term contracts; preserving a symmetry between access to fixed-term contracts and temporary agency work in this way.<sup>82</sup> In establishments where an employer is bound by a collective agreement use of a temporary agency's workers may be extended, if the union shop steward consents to it.

If an employer who is not a temporary employment agency contracts out his own employees (sec. 55L of the Act), he may not contract out more than 50 % of the permanent labour force. The user enterprise shall consult with the union shop steward before a decision to contract-in such employees is made. If the temporary workers represent more than 10 % of the user enterprise's workforce, but not less than three persons, and when the contracting-in scheme is for more than one year, the user enterprise should obtain the consent from the relevant union shop steward. This does not apply, however, to contracting-in schemes within groups of companies.

Ultimately, if important societal interests are at stake, the Government is entitled to take action and issue regulations applicable to certain categories of employees or sectors of the labour market. Even here the historical legacy is a reminder of the same references that were made in 1970-71 when the ban with respect to temporary employment agencies was introduced. It is still a matter of concern in Norway that a high demand for labour will distort the wage levels and create unrest, especially in the health-care sector.<sup>83</sup>

An additional aspect with respect to the Norwegian protective scheme is that the courts are required to balance the interests of an employer against those of an employee in the assessment of the justifiability of dismissal in accordance with sec. 60 No. 2 of the Worker Protection and Working Environment Act. And with effect from 1995, the Act also provides that no cause for dismissal exists if redundancy related to the principal activities of the employer is the result of outsourcing "unless such a step is absolutely essential in order to maintain the continued operations of the business".<sup>84</sup> This means that Norway has introduced provisions designed to regulate business operations and restrict the employer's freedom to manage the firm.<sup>85</sup>

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<sup>81</sup> Critical remarks were directed against making the user enterprise answerable by several employer organizations, *See* Ot. prp. nr 70 (1998-99), Ch. 6, at 6-9.

<sup>82</sup> Ot. prp. nr 70 (1998-99), Ch. 6, at 21, Innst. O. nr 34 (1999-2000), at 5, NOU 1998:15, Ch. 12, at 4, 6.

<sup>83</sup> NOU 1998:15, Ch. 10, at 16, Ot. prp. nr 70 (1998-99), Ch. 6, at 19-20.

<sup>84</sup> Ot. prp. nr 50 (93-94), at 185, 237. *See also* Friberg et al, above note 79, at 455-456. A recent case is RG 1997 at 911 (Trondheim District Court). The case concerned a small family undertaking where transport activities were cancelled for economic reasons and leased out to an outside provider. In consequence, one of the employees - the chauffeur - was dismissed. The Court deemed it necessary for the employer to have acted the way he did. It was a small family undertaking with small margins of profit.

<sup>85</sup> In Sweden, the answer to the question if the user enterprise is entitled to dismiss employees in order to engage temporary agency workers differs from that of the other Nordic countries insofar as the Swedish Labour Court is not supposed to scrutinize the employer's alleged

#### 4.4 Sweden

The old Swedish Act of 1935 on the Ban of Private Employment Exchange, amended in 1942, regarded the hiring-out of manpower to constitute employment exchange. It was of no consequence whether the job seeker was employed by an intermediary, or whether the intermediary was employed by the job seeker. The primary purpose of the 1942 amendment was to put a stop to the impresario activities in the entertainment sector.<sup>86</sup> The ban was penal in nature.

The prohibition was not very successful. The 1942 amendment caused a lot of confusion in legal application with regard to the question of whether a commercial transaction should be looked upon as regular job contracting or as something else that was in violation of the law.<sup>87</sup> In court practice, the 1942 amendment was applied to typewriting agencies which sent their employees to user employers to perform work there. If the principal employer directed and assigned the work and the person sent by the typewriting agency became integrated into the principal employer's organization, which was normally the case, the 1942 amendment applied.<sup>88</sup> The fine penalties imposed by the courts in the few cases in which the supplier of temporary personnel had been found responsible for the violation of the law were extremely low. In a 1989 Supreme Court case, the fine penalty was set at some 100 U.S. dollars.<sup>89</sup> No user of temporary workers was ever held responsible for any violation of the law.

After repeated attempts to work out more effective rules in the 1960s and 1970s, the 1942 prohibition was finally lifted in 1991.<sup>90</sup> The demands of real life and a quest for flexibility had defeated the lame-duck legislation.

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economic and organisational considerations when assessing the grounds for dismissal in accordance with sec. 7 of the Employment Protection Act unless these grounds would be deemed to constitute a pretext for getting rid of specific employees on personal grounds. *See, for example*, AD 1984 No. 66 (employer's right to decide on organisational matters in relation to substitute employee's need for permanent employment). A summary of the case-law is given in Lunning, *Anställningsskydd. Kommentar till anställningsskyddslagen* (7 utg. 1998), at 251-254, 258-259.

<sup>86</sup> *See* prop. 1942:123.

<sup>87</sup> The matter was meticulously discussed in prop. 1970:166 with respect to further amendments to the 1935 Act. The Swedish Government had also approached the ILO about the activities of the typewriting agencies, and received the reply that the ILO Convention No. 96/1949 Part II should apply. *See* the Swedish Report, DsIn 1966:6. *Den ambulerande skrivbyråverksamheten*.

<sup>88</sup> *See* NJA 1962 at 680, 1989 at 629 (both cases dealt with typewriting agencies), and 1973 at 562 (contracted-out manpower in a dockyard). Even the Swedish Labour Court had to deal with the 1942 amendment with respect to the application of the so-called veto right relating to the use of manpower not formally employed by the user employer, but nevertheless utilised by the help of a third party, *See* secs. 38-40 of the *Joint Regulation Act*, *See* AD 1979 No. 31 (Finnish workers sent to a Swedish nuclear plant under erection), 1987 No. 154 (provision of day-care personnel by a third party) and 1990 No. 67 (referral of dock workers by a third party).

<sup>89</sup> NJA 1989 at 629.

<sup>90</sup> Prop. 1990/91:124, further amended by prop. 1992/93:118.

The Act on Private Job Placement and Hiring-Out of Labour of 1993 provides now a basic *definition of contracted-out labour*. Sec. 2 states that “the hiring-out of manpower implies a legal relationship between a principal employer and another employer, the purpose of which is that the latter employer places his employees at the principal employer’s disposal at an agreed price and in order to let the employees perform work in the principal employer’s business”.

The above stipulated definition has made that any discussion as to who may be regarded as an employer is superfluous; it has been made perfectly clear that it is the supplier of personnel who is to be regarded as an employer. For a long period of time this particular aspect was neglected by Swedish labour law, basically due to the 1942 amendment. It also follows from sec. 2 of the 1993 Act that the user employer must direct and assign work to be performed at the workplace. If this is not the case, the supplier of personnel is assumed to be just a job contractor.

Such a dual employer relationship may create, however, practical legal problems. For example, it seems unclear as to whether it is the user enterprise or the provider (or both?) that should be legally responsible for violations of law, should such violations occur in the user enterprise while the employees are engaged there.<sup>91</sup> The issue has been discussed only on a few occasions in Swedish case law. In the Labour Court case, AD 1990 No. 87, the user employer had violated the wage tariffs stipulated by the collective agreement with respect to the temporary staff. The employer had also violated the same payment provisions as regards his own employees. The Court held that the hired-out employees could hold “their” own employer responsible for the wrongdoings of the user enterprise. Both employers were held to be in breach of contract vis-à-vis its own workforce and were obliged to pay general damages to the trade union that represented the employees. However, the Court did not voice an opinion as to whether the user employer could be held solely responsible for the violation of the collective agreement in relation to the employees who had been hired-out.

The 1993 Act also implied the lifting of the Swedish ban on private employment exchange with a view to profit.<sup>92</sup> It was also stated, as a novelty, that a job seeker or an employee may not be charged any fees for the services of an employment exchange agency.<sup>93</sup> Violations would lead to penal sanctions.

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<sup>91</sup> The context of contracting-out schemes cannot easily be equated with the fundamentals of the labour law rules which presuppose a strict employer - employee relationship. The same may apply to what is found in groups of companies where the employees may be formally employed in one company, but will perform work in another company, *See Eklund, above note 26, at 156-183 and Niklas Bruun et al, Koncernarbetsrätt i Norden (1992), at 11 et seq. See also with respect to two and three partite employment relationships in a Norwegian report, Torp & Pettersen, above note 28, at 65-77.*

<sup>92</sup> An exception has also been made for the employment exchange of seamen, sec. 3 of the 1993 Act. The ban is a reflection of the ILO Convention No. 9/1920, ratified by Sweden in 1921. Sweden has not ratified the ILO Convention No. 179/1996, *See prop. 1999/2000:19, at 21.*

<sup>93</sup> Sec. 6 of the Act.



As in Norway, a hired-out employee is guaranteed the right to take up employment with the principal employer after having fulfilled the former undertaking.<sup>94</sup> It is obvious that permanent employment of this kind is favoured by the legislative systems of the two countries. Likewise, an employee who has left the principal employer to take up employment with a temporary employment agency cannot be hired-out to his former employer earlier than six months after the expiration of his former employment contract. This restriction has been motivated in Sweden by the fact that employees must not be subject to unfair recruitment procedures by temporary employment agencies.<sup>95</sup> It is an open question, however, whether this restriction applies to cases in which the employee has been made redundant, and subsequently taken employment with a temporary employment agency. The restriction cannot apply if, for instance, a job contractor or a temporary employment agency has taken over certain functions of the principal employer, and therefore even the employees of the principal. This may constitute a typical transfer of a part of an undertaking or business. Both the first E.C. Directive 77/187 concerning the safeguarding of the employees' rights in relation to transfers of undertakings and parts thereof, and the Swedish Employment Protection Act, as amended in 1994, provide for the automatic transfer of the said contracts of employment to the successor-employer.<sup>96</sup>

Another review of temporary employment business was made in 1997, but the Government did not take any action at that time.<sup>97</sup> Later on, the Parliamentary Labour Market Committee has asked the Government to take further action and the Government has acted accordingly.<sup>98</sup>

In Sweden, the legal position with respect to "temps" has been somewhat unclear in the light of the restrictive provisions concerning permissible types of fixed-term contracts, as stipulated in sec. 5 of the Employment Protection Act.<sup>99</sup> The Act presupposes employment for an indefinite period. Fixed-term employment is permitted, however, in cases of a "temporary work load", for example. In such cases, employment may be limited to six months. Exceptions from this rule are quasi-mandatory, which means that the provisions may be derogated from by means of a collective agreement. Another restriction laid down by case law, still following sec. 5 of the Swedish Act, is that repeated instances of temporary employment may violate the law.<sup>100</sup> It flies in the face of

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<sup>94</sup> Sec. 4 of the 1993 Act. The same is provided for in the 2000 collective agreement between the LO Trade Unions and the Tjänsteföretagens Arbetsgivarförbund, sec. 19.

<sup>95</sup> See prop. 1990/91:124, at 55 and sec. 4 of the 1993 Act.

<sup>96</sup> Sec. 6b of the *Employment Protection Act* and prop. 1994/95:102.

<sup>97</sup> SOU 1997:57. *Personaluthyrning*. It was suggested a registration procedure. However, the Government rejected the proposal with reference to the fact that voluntary accreditation was becoming established and that the branch was increasingly covered by collective agreements, See prop. 1997/98:150, at 105.

<sup>98</sup> 1999/2000:AU1, at 43. A working party was appointed 27 February 2002.

<sup>99</sup> Prop. 1992/93:218, at 34.

<sup>100</sup> See for a summary, Lars Lunning, above note 85, at 156-164. See also SOU 1997:58, at 60-62.

the possibility to allow a temporary employment agency to conclude employment contracts for each separate assignment.<sup>101</sup>

In Sweden, a collective agreement referring to temporary salaried employees in the service and office sectors was concluded in 1988 between the Swedish Commerce Employers' Association (HAO), and The Salaried Employees' Union (HTF) respectively.<sup>102</sup> The agreement presupposes that a contract of employment shall be, as a rule, for an indefinite period. However, employment of this kind is more akin to employment "out of necessity". This is a form of employment in which an employment contract usually exists, but where the employee performs gainful work occasionally and only when the employer has such work to offer.<sup>103</sup> In Sweden, the HAO once argued that such a contract of employment might entail that no job whatsoever would be offered to the affected employee. If this was to apply, this type of employment would be no better than employment entered into for each separate assignment.<sup>104</sup> However, such a view is contradictory with respect to another fact of the same agreement, stipulating that an average of 20 hours of pay per week was guaranteed. In 1998 the amount was raised to 75 % of full monthly pay, irrespective of the fact whether any offer of work had been made or not. The present agreement concluded in 2002 between HTF and several other professional unions, on the one hand, and the relevant employer organization, Swedish Service Employers' Association (Tjänsteföretagens Arbetsgivarförbund), on the other, provides that after 18 months of continuous service a temporary worker shall be guaranteed full pay. The agreement also provides that a fixed-term contract of employment may be entered into "if extra manpower is needed". This does not mean any outright delegation of powers to the employer/temporary employment agency to continue providing short-term employment in a long chain of such employment opportunities. In case of abuse the Union may terminate the employer's right to conclude temporary short-term contracts.

## 5 Coverage of Temporary Agency Workers by Collective Agreements

As mentioned above, Swedish office and commercial workers concluded a branch agreement already in 1988, with further improvements, and in 2002 the former additional agreements were made an integral part of the general branch agreement between the same parties. Very few provisions applying solely to

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<sup>101</sup> See also Reinhold Fahlbeck, *Employment Exchange and Hiring Out of Employees in Sweden*, in *Tidskrift för Retsvidenskap* (1995), at 589-622, 608-610.

<sup>102</sup> The agreement was called: *Särskilda bestämmelser för vissa tjänstemän vid kontorsserviceföretag och skrivbyråer*, being complementary to the branch agreement applying to salaried employees concluded by the same parties.

<sup>103</sup> See Ann Henning, *Tidsbegränsad anställning. En studie av anställningsformsregleringen och dess funktioner* (1984), at 212 et seq.

<sup>104</sup> Cf. SOU 1997:58, at 45-46 where it is held that temporary employment agencies, which were not bound by the relevant collective agreement, entered into contracts of employment for each separate assignment.

temporary agency workers have remained in the branch agreement. Other than that, it is meant that the branch agreement applies *in toto* to temporary agency employees.

In the year of 2000 all the 18 member trade unions of the LO (The Swedish Trade Union Confederation) and the Tjänsteföretagens Arbetsgivarförbund entered into an epochal collective agreement, giving recognition to the use of temporary employment agencies.<sup>105</sup> For a long period of time the LO has been an ardent opponent of the existence at all of temporary employment agencies. The key motive why the LO supported the conclusion of the collective agreement was that it wanted to prevent the situation in which it was cheaper for the user enterprise to engage labour if it was provided by a temporary employment agency. In other words, the LO's objective was to avoid social dumping, or distortion of competition. It has also been argued that the agreement will make the temporary employment agencies become more acceptable on the Swedish labour market.<sup>106</sup>

The agreement provides, among other things, that if no work can be offered, a guarantee wage shall be paid, which shall be set at 85 % of the worker's average earnings during her/his three last months of employment, which amount was raised to 90 % in October 2002, after six months' of continuous service in the employ of a temporary employment agency. What is special about the agreement is that it provides that the user enterprise's collective agreement shall be considered as a yardstick with respect to wages and other specific terms and conditions of work. The model constitutes a breakthrough on the Swedish labour market, i.e. that the work conditions in force at the user enterprises should apply, as compared to the collective agreement applying to salaried employees. Other aspects of the employment relationship (sick pay, holiday pay, pensions, etc.) are, on the other hand, governed by the 2000 agreement applying to temporary employment agencies. The LO agreement also provides that a temporary employment agency is entitled to conclude a fixed-term contract of employment for six months, irrespective of the provisions of the Swedish Employment Protection Act, which can be extended to 12 months with the consent of the union. It is also provided that a temporary employment agency should see to it that the working hours of the user enterprise are applied, as well as the working environment matters are the responsibility of the user enterprise.

In a 1993 Nordic Council study<sup>107</sup> I found only one case (Denmark) in which the affected employees had been thoroughly integrated into the terms of the user employer's collective agreement whose conditions had been tailored by the local trade union of the user employer. Other Danish collective agreements also showed a tendency towards partial accommodation of hired-out workers to the collective agreements which applied to the user enterprise's employees as

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<sup>105</sup> *Avtal för bemanningsföretag* (Agreement on temporary employment agencies) between Tjänsteföretagens Arbetsgivarförbund and 18 LO Trade Unions, 1 September 2000 (in force since 15 October, 2000).

<sup>106</sup> *Bemanningsavtalet - en enkel handbok*, Issued by the LO, (no year), at 4, 8.

<sup>107</sup> See above note 1.

regards benefits, such as transportation and canteen facilities, free days, safety, medicine, etc. Since then, the progress has been fast in Denmark.

It is tempting to say that the 1991 arbitration award in the HK and DA/BKA case paved the way for the development.<sup>108</sup> The facts in the dispute were the following. Two temporary employment agencies intended to adopt the general branch collective agreement between HK and DA/BKA. HK refused with reference to the provision of the agreement, stating that the Union might ask for special provisions applying to businesses where the work and working conditions did not fall under the ambit of the agreement. The Union argued that special provisions were necessary, since temporary employment agencies' business was rather different than other activities covered by the collective agreement. The Union was successful. The arbitrator found that the agreement did not acknowledge the special employment conditions applying to temporary workers.

As a consequence of this it would also allow the Union to take industrial action in order to achieve its goals.<sup>109</sup> In fact, a case of this kind was tried by the Danish Labour Court in 1999.<sup>110</sup> In that case, the union attempted to conclude a special agreement with a Danish temporary employment agency. The agency was not bound by any other collective agreement. The agency refused, which is why the union resorted to industrial action. The right to take industrial action was upheld by the Court, with reference to the fact, among other things, that there were special employment and working conditions applying to temporary workers, supporting the union's demand for a collective agreement.

Since 1993 many collective agreements relating to "temps" have been concluded in Denmark, often in the form of complementary agreements to the branch agreement, but even local agreements with single temporary work agencies are frequent. At the one extreme, one may find that the trade branch agreement applies in its entirety to temporary agency workers,<sup>111</sup> and at the other extreme, special agreements have been concluded applying solely to temporary agency workers.<sup>112</sup> A model in between is to provide for certain conditions applying solely to temporary agency workers, while the branch agreement applies for the rest. For example, in addition to the branch agreement applying to drivers, dock- and warehouse workers, such a supplementary agreement has been

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<sup>108</sup> Award 31 July 1991 between HK and DA/BKA, above note 44.

<sup>109</sup> See Per Jacobsen, *Denmark*, in *Temporary Work and Labour Law*. Ed. R. Blanpain (1993), at 83-84.

<sup>110</sup> AR 99.342, *MR VikarService Aps v. Landsorganisationen i Danmark for Specialarbejderforbundet i Danmark*.

<sup>111</sup> Branch agreement 2000-2004 relating to offices and stores, concluded between Dansk Handel & Service and HK/Handel og HK/Service.

<sup>112</sup> Such as warehouse workers, Branch agreement 2000-2004 between Dansk Handel & Service and Specialarbejderforbundet i Danmark, and nurses, home workers, social assistants etc., Framework agreements applying to respective temporary employment agency, concluded between Foreningen af Sygeplejevikarbureauer i Danmark, on the one hand, and Dansk Sygeplejeråd or Forbundet af Offentligt ansatte, on the other.

entered into.<sup>113</sup> The supplementary agreement provides, for example, that the affected agency workers are to be treated with regard to wages as the workers employed by the user enterprise. One important caveat is, however, that the temporary employment agency has to pay a minimum guarantee wage. The affected workers should also follow the working hours of the user enterprise. It is also stated that temporary workers should belong to the same trade union as the regular staff of the user enterprise, unless contracting-out is of a short-term character.

In the same way additional agreements are found in Danish industry regarding the use of workers from temporary employment agencies, no matter whether such agencies are members of the leading employer organization (DI), or not.<sup>114</sup> The issue at stake here is the seniority of the affected workers with respect to, for example, the computation of the period of notice (termination) and sick pay. The gist of the DI agreement is that a temporary employment agency which is a DI-member is responsible for the application of the branch agreement to a temporary agency worker. Each assignment accumulates seniority in such a case. The branch agreement will also apply to temporary agency workers sent by temporary employment agencies which are not members of the DI. Seniority will be accumulated only if the assignment relates to an employment of certain length at the same workplace.

In Finland, between 1970 and 2001 the generally applicable branch collective agreement applied in accordance with sec. 17 of the 1970 Employment Contracts Act. It meant that the user enterprise's agreement applied to all employees at the workplace, even those being sent by a temporary employment agency. The new Employment Contracts Act of 2001 provides another regulatory framework.<sup>115</sup> The basic idea is that a company hiring out its employees will apply the collective agreement which it is bound by, but if a company is not bound by such an agreement, the worker being hired out will be protected by the collective agreement which is honoured by the user enterprise. In the year of 2000 two collective agreements were concluded with reference to temporary agency workers in Finland. The agreements apply to accounting, IT and office personnel, on the one hand, and, restaurant musicians and discjockeys, on the other.<sup>116</sup> The agreements have been specially designed for the particular branches, providing for wages and other terms and conditions of work of the temporary agency workers. Employment may take the form of either fixed-term

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<sup>113</sup> Joint agreement 2000-2004 between Arbejdsgiverforeningen for Handel, Transport og Service and Specialarbejderforbundet i Danmark, applying to temporary employment agencies.

<sup>114</sup> Protokollat om vikarbureauer, concluded between Dansk Industri and CO-Industri, as of 20 February 1995.

<sup>115</sup> See RP 157/2000, at 14-15, 51, 76-79, 139-144. *Cf. also* Bruun, above note 48, at 36-37.

<sup>116</sup> Agreement between Arbetsgivarförbundet för speciella services/Arbetskraftsservice-branschens Arbetsgivarförening, on the one hand, and Tjänstemannaförbundet för specialbranscher (ERTO) and Finlands hotell- och restaurangförbundet and Musikernas förbund i Finland, on the other.

employment or it may have a regular, permanent character. The agreements make no references to the user enterprise's collective agreement.

In Norway, Norsk Sykeplejerforbund has recently concluded local agreements on behalf of its members having negotiated much higher wage levels than those of the nurses employed by public health authorities, including a wage guarantee.<sup>117</sup> A special situation prevails in Norway inasmuch as a user enterprise engaging temporary agency workers may certainly employ such labour, but if intention in so doing is to circumvent the collective agreement in force, the employer may be held liable for violation of the contract.<sup>118</sup>

Finally, if the user enterprise is faced with an industrial action, the prevalent view is that in Denmark,<sup>119</sup> Norway<sup>120</sup> and Sweden<sup>121</sup> temporary workers should not be sent to the workplace. What applies in Finland in a similar situation is unclear.

## 7 Summary and Conclusions

All the four Nordic countries except Denmark ratified Part II of the ILO Convention No. 96/1949 at one time. The reason why Denmark has not ratified the Convention is that it is Danish policy not to ratify any conventions unless they comply with Danish law.<sup>122</sup> Finland and Sweden have denounced the Convention since their ratifications. Only Norway is still bound by it.

The question as to whether the hiring-out of manpower is embraced by the said Convention has been treated differently in Finland, Norway and Sweden. Only Sweden has answered the question in the affirmative. This is probably why Sweden has attempted to impose her own views on her neighbouring countries, having found that manpower from Finland and Norway could be legally hired-out to Swedish firms.<sup>123</sup>

In spite of the fact that Denmark has never ratified the ILO Convention No. 96/1949, and with due regard paid also to the various points of view prevailing in the three other countries, some similarities in the evolution of attitudes towards the use of temporary employment agencies may be perceived.

In all the four countries, the origins of the legislative ban are related either to social considerations or resulting from the ratification of the ILO Convention

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<sup>117</sup> Source: "www.service.no/index.php?id=71508&cat=1599" (*Sykepleiere med vikarbyrå-avtale*).

<sup>118</sup> This view was first presented in case law in Norway, *See* ARD 1933 at 63.

<sup>119</sup> FVD, Ethical code, point 3. It may also follow from a collective agreement, such as the Protokollat of November 7, 1997 concluded between DHS and HK.

<sup>120</sup> BRF, Ethical code, point 6.

<sup>121</sup> SPUR, Ethical code, point 4. The same follows from the collective agreement between the LO Trade Unions and the Tjänsteföretagens Arbetsgivarförbund, sec. 18.

<sup>122</sup> *See* Vagn Dahl Pedersen, *Danmark og de internationale arbejdskonventioner* (1974), at 77, 120.

<sup>123</sup> *See* the joint Nordic Reports, NU 1978:5. *Uthyrnings- och entreprenadföretag i Norden - grå arbetskraft* and NU 1983:7. *Grå verksamhet*.

No. 96/1949. It would seem that Sweden was the first of all the Nordic countries to tackle the issue. The 1942 amendment to the 1935 Swedish Act,<sup>124</sup> while attempting to bring to an end the defects afflicting the impresario activities in the music business, highlighted the borderline between public employment exchange, on the one hand, and the procurement of manpower by other intermediaries, on the other.

During the 1960s and 1970s the debate on hiring-out activities seemed to have reached a peak in all the four countries. In Denmark and Norway, statutory intervention was implemented in order to either control or ban the activities of temporary employment agencies. In Sweden, the penal law sanctions were tightened up.<sup>125</sup> In Finland, a collective agreement laid down restrictions on the use of contract labour.

In the 1980s, the ideas and attitudes concerning the issue started to diverge.

The 1990s brought about, however, deregulation which went further than any of the former Nordic countries' governments had ever predicted.

In short, three distinct periods can be distinguished in the Nordic history with respect to the treatment of temporary employment agencies:

- a period of regulation which took place between the 1940s and the 1960s
- a period of adjustment and refinement of the respective legal frameworks during the 1960s and the 1970s
- a period of deregulation which started in the late 1980s and continued throughout the 1990s, when the former restrictive legal regimes were either abandoned or weakened to a considerable degree, with the exception of Norway where for a long time a view prevailed suggesting that the hiring-out of manpower was an activity that could and ought to be combatted, until the amendments abolishing the ban on temporary employment agencies were introduced in 2000. Norway has not been able, however, to break up with the past completely. It seems that Norway still believes that it is possible to regulate the organization of active working life.

In conclusion it can be said that it is quite obvious that the use of temporary workers in the Nordic countries, especially when seen in the light of the various legal solutions designed to curb or attenuate the most serious abuses of the temporary employment agencies' activities is a good example of how difficult it is to achieve approximation of laws relating to the social dimension even in such a homogeneous region of Europe as the Nordic countries.

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<sup>124</sup> Prop. 1942:123.

<sup>125</sup> Prop. 1970:166.