EMPLOYMENT EXCHANGE AND HIRING OUT OF EMPLOYEES IN SWEDEN*

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From Rigid State Planning to Freedom of The Market

Section 1 Introduction

This article is concerned with private employment exchange and hiring out of employees in Sweden. It aims at giving an analytical account of the development and demise of a strict, closely supervised, regulatory structure and its replacement by a liberal, freedom of market type, franchise. The article is short, allowing for a very succinct discussion only. However, the brevity of the text should make it possible for the reader to gain an overview without being burdened with a heavy load of technical legal analysis.

The Swedish 1993 Act on Private Employment Exchange and Hiring Out of Employees is an archetypical exponent of deregulation. The statute marks an end to a regulatory structure that had existed for nearly 60 years.

The statute is also an archetypical exponent of the present international surge towards decentralization. A strongly centralized system is replaced by a system where the market place is the stage; «all business is local».

The 1993 Act represents a complete volte-face. It seems justified to use the often misused phrase «shift of paradigm» in this connection.

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What arguments have been forwarded to justify the revocation of the rules banning private employment exchange and hiring out of employees? When the rules came into existence in the 1930's and early 1940's they were prompted by abuse and unsatisfactory conditions, sometimes even downright exploitation of job seekers. Three distinctive yet closely connected phenomena make for a situation so different from those prevailing then that fears of yore are no longer relevant or at least not very worrisome. Those are the existence of (1) free, comprehensive, high quality public employment exchange, (2) strong labor unions covering virtually the whole labor market[1] and (3) extensive labor and social legislation protecting employees.

Section 2 Some Definitions

It is necessary to start the discussion by defining concepts that form the subject matter of the text. Starting in that way is somewhat unfortunate since definitions make for dull reading. But it is necessary since the text will be in a limbo if definitions of its concepts are not given at the outset. Readers must have patience and endurance!

Contract work is defined as a contract whereby an independent contractor undertakes to perform a specific, delimited piece of work for the benefit of the other party to the contract, the user. The actual work is performed by the contractor personally or by workers employed by the contractor.

Subcontracting is defined as a contract whereby one party, the subcontractor, undertakes to furnish the other party to the contract, the user, with some specific product.

Temporary employment is defined as an employment contract for a limited period of time, typically – but not necessarily – of a rather short duration, or for a specific, delimited work task.

Employment exchange is defined as an activity aimed at procuring employment to those in search for it or manpower to employers (but excluding the hiring out of manpower as defined below).

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[1] The overall unionization rate in Sweden is 80–90 % of the working population and still rising, according to a July 1994 OECD report.

This definition encompasses exchange activities aiming at making a profit, fee-charging but not profit-aiming activities as well as non fee-charging activities.

The terms *temporary work, hiring out of employees and hiring out of manpower* will be used synonymously. The first is the more commonly used in English but the latter two are the terms used in Sweden. For that reason the latter terms will be used predominantly. The term *hiring out of employees* is used to designate a contractual relationship between an employer, the «hiring out firm» (temporary work firm, manpower firm), and a third party, the user, whereunder the employer puts one of more of its employees at the disposal of the third party for the purpose of performing work that is part of the activity of the third party. Such a worker is the employee of the hiring out firm but is wholly or partly under the authority of the user firm and is to perform work ordered by the user, possibly of a continually changing nature (depending on and within the limits of the worker's employment contract with the employer and the contract between the employer and the third party user). The hiring out firm can operate with or without the aim of making a profit but it must charge the user a fee of some kind. (If no fee is charged the arrangement will usually be referred to as «loan of workers».)

The borderline between employment exchange and hiring out of employees is that in the former case the worker becomes the employee of the third party user but in the latter case remains the employee of the hiring out firm. *Bona fide* arrangements are easily identifiable. Experience shows, however, that there is a risk that rules banning employment exchange are circumvented by arrangements that portray themselves as hiring out of employees.

The borderline between hiring out of employees and contract work hinges on whether the contract is to supply work (manpower) or a specific piece of work. This might sound like a play with words but typical cases are readily distinguishable. Contract work is, e.g., the work provided by a catering firm that operates the company cafeteria (as opposed to a cafeteria staffed by people employed by the company itself). Hiring out of work is, e.g., the work performed by a secretary who is deputizing for a secretary who is temporarily absent from work. However, experience amply demonstrates that

there are enough situations where the borderline is blurred. Contract work often gives rise to concern because experience shows that contract work, just like hiring out of employees, sometimes may involve practices of a shadowy or downright black character.

The distinction between contract work and subcontracting hinges on whether the main object of the contract is to perform a specific piece of work or instead to supply an article manufactured by means of work. Here, the definition sounds like an even more confusing play with words but, again, typical cases are easily distinguishable. One example of contract work was given above. Subcontracting is a contract whereunder the user contracts to have some part of, e.g., a machine or a car manufactured.

Contract work and subcontracting have always been allowed in Sweden so the borderline between them is of little importance in the present context. Hiring out of employees and profit-aiming employment exchange have until recently been prohibited which made the borderline between them, on the one hand, and in particular *bona fide* contract work, on the other hand, very important. For a short period of time, just 18 months between January 1992 and July 1993, the borderline between employment exchange and hiring out of manpower became an important one since the latter was allowed in principle but the former remained prohibited.

As of today the five phenomena described and defined above are all allowed under Swedish law so borderlines between them are of much less importance than previously. However, the distinctions still are of legal relevance and might conceivable regain much of their previous pre-eminence if the 1993 Statute on Private Employment Exchange and Hiring Out of Manpower is revised. For an understanding of the evolution of Swedish law in this area the distinctions are necessary.

Yet another concept should be introduced, i.e. that of a *personnel pool* – or a *manpower pool.* Just like contract work and subcontracting, the personnel pool concept has no statutory standing in Swedish law and so it cannot be defined by referring to some legal instrument and indeed the term has no precise definition in standard labor market terminology either. However, it is most often used to refer to an arrangement whereunder an employer with surplus manpower or with manpower undergoing a transformation process

of some kind, e.g. retraining for new job tasks, are administratively brought together into a pool, as it were, from which they are called upon to perform work at different work sites and possibly of a varying nature. From a practical point of view such arrangements come close to employment exchange or hiring out of employees. This is particularly so if many companies under the same ownership have set up a concern-wide pool. Life for some workers so employed is sometimes described as «the personnel pool misery». Legally speaking these arrangements are distinguished from employment exchange and hiring out in that they are confined to one single employer (or at least one concern). Largely because of this, but also because labor unions virtually always participate in creating such pools, these arrangements have never run into the legal difficulties that have faced exchange and hiring out activities.

Section 3 The 1935 Act on Employment Exchange[2]

The 1935 statute was enacted to comply with the 1933 ILO convention No 34 concerning fee-charging employment agencies. Amended several times, in particular in 1942 (prohibiting hiring out of employees; cf. below) and in 1976 (allowing profit-aiming, fee-charging international exchange of musicians and stage artists under certain conditions), the statute remained in force until the end of 1991.

The statute completely outlawed profit-aiming employment exchange (with one exception, the 1976 amendment; cf. above). Non

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[2] For an analysis in English of the 1935 act and related legislation see Fahlbeck, R, Sweden: National Report. *In* Temporary Work in Modern Society. A Comparative Study. Editors: W Albeda, R Blanpain & G M J Veldkamp (Kluwer 1978, ISBN 90 312 0070 0. The 1992 second edition of this study is limited to EU member countries so Sweden is not included.)

See also e.g. Eklund, R, New Forms and Aspects of Atypical Employment Relationships, Swedish report to the XIth World Congress of Labour Law and Social Security, Eklund, R, Tjänsteentreprenad (Arbetslivscentrum, 1986, ISSN 0348-789X), Numhauser-Henning, Hiring Procedures in Sweden (Acta Societatis Juridicae Lundensis No. 82, 1986, ISBN 91-544-1801-1) and Numhauser-Henning, Fixed-Term Contracts of Employment and Temporary Work, Swedish report to the ILO (stencil, Lund, 1988).

profit-aiming but fee-charging employment exchange was allowed upon permission by the Labor Market Board[3] under a number of conditions and on the understanding that permission would be granted only restrictively. Permission could not be granted to private individuals. The Board's policy was to grant permission only to organizations of employers or of employees or to organizations composed of both, a practice that won the tacit support of the legislative bodies. Permission was granted only if a genuine need could be shown to exist, which generally speaking meant that there was proof that the public employment exchange could not provide the service needed. The Board decided on fees and other conditions for the activity and the exchanges were under the supervision of the Board. The number of licensed fee-charging agencies was around 10 at any given time. Those existing were small and operated in marginal sectors of the economy, e.g. entertainers, stage artists, fashion models and, most importantly, office staff. The number of jobs exchanged by these agencies was minuscule when compared to the total number of jobs exchanged by the public exchange service.[4]

Non fee-charging employment exchange was allowed upon simple notification to the Board. Such agencies were subject to only minor control and regulation. Those existing were mostly operated by labor unions as part of their member-service (and to some extent functioned as labor hiring halls or labor supply shops, e.g. in the graphic industry). Some 10–15 seem to have existed at any given time.

Hiring out of employees (temporary work) was prohibited in 1942 as a kind of private, profit-aiming exchange and made a criminal offense (along with private profit-aiming exchange). Experience had demonstrated that the ban on private, profit-aiming exchange was circumvented by firms operating as hiring out firms

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[3] The Labor Market Board is a government agency in charge of implementing state labor market policies. It is composed of a central body in the capital Stockholm and of a large number of regional offices. Labor exchange is one of its most important tasks and historically speaking the first and foremost purpose of the agency.

The Labor Market Board will be referred to as the Board.

[4] To the best of my knowledge no statistics exist but the information represents the undisputed consensus of all concerned.

rather than as traditional exchange firms but under conditions that made the procurement of manpower the core of the activity. Penalties were not severe, however, and in no recorded case amounted to fines higher than the equivalent of some hundred US dollars. No jail sentence is recorded. The number of cases brought to the courts was very small, far less than one per annum.[5] Several reasons have been forwarded to explain this, e.g. the difficulty to prove criminal intent, the difficulty to draw a clear borderline between (criminal) hiring out of manpower and (legal) contract work arrangements, the relative lack of knowledge on the part of prosecutors of the relevant law involved and, unofficially but no less importantly, a rather wide-spread belief that some hiring out firms were in fact acceptable even though illegal, e.g. in the office staff business.

Not surprisingly, hiring out firms were not all that uncommon and some even operated quite openly, e.g. by advertising in leading national newspapers, most conspicuously in the field of temporary female office staff (commonly referred to at the time as *ambulatory type-writing agencies*). Despite this it is generally agreed that only a tiny percentage of the entire working population was affected by temporary work arrangements. Still, a continuos state of warfare existed between hiring out firms and the Labor Market Board. Society was very concerned and so were labor unions. The main reason for concern was not the fact that the activity was illegal per se but concerns such as the risk that employees faced exploitation or treatment as a commodity and the potential effect of undermining state labor market policies by creating an alternate, non-transparent and non-controllable labor market. Labor laws could be sidestepped by hiring out firms as well. Unions had additional reasons for concern, for example because those working for hiring out firms seemed unwilling to join unions. The business community had a stake here as well. Many hiring out firms used shady or downright illegal business practices, most conspicuously various kinds of tax fraud, resulting in lower costs for them which, in turn, adversely affected the competitiveness of serious, *bona fide* firms.

A result of the ban on hiring out firms was that business needs for

[5] A total of only six cases reached the Supreme Court between 1945 and 1992.

non-permanent work could not legally be met by utilizing hired out manpower. What other avenues were at the disposal of employers? Contracting out work and subcontracting were two possibilities. However, experience demonstrated that employers could not easily make use of any of those for truly short term needs so in most instances they represented no realistic alternative. Employing workers on a temporary basis was yet another avenue. The usefulness of this avenue depended upon the legal regulation of temporary employment and on the availability of people willing to accept temporary employment. The latter aspect will not be discussed here but temporary employment regulation will.

Traditionally, Swedish labor law was based on the idea of an employer «hiring at will» prerogative. Under that doctrine employers were at liberty not only to hire whoever they wanted but also to hire on a temporary basis. Freedom of contract prevailed.[6] The epochal 1974 Act on Employment Protection changed all that and instituted a regime of strict statutory regulation with drastic limitations on temporary employment. Only under rather exceptional circumstances were employers entitled under the statute to hire workers temporarily. However, coupled with this far-reaching ban on managerial freedom, a virtually unlimited license was introduced in the statute for the labor market parties to create deviating rules by means of collective agreements. A regime of unilateral employer freedom was replaced by a regime of bilateral control by management and unions.[7] The 1982 Act on Employment Protection

[6] It should be noted that the «hiring at will» doctrine was not old. It came into existence in the mid or late 19th century in the then infant market for unskilled manual labor for the emerging modern industry. Under the old master and servant regulation employers/«masters» were restricted in many ways. It can be said that modern labor law is concerned with doing away with the practices introduced during the infancy of modern industry. The slogan of that time – «from status to contract» – has been reversed to a great extent and today's slogan is more like «from contract to status».

[7] Not surprisingly the 1974 statute was enacted at the initiative of a social democrat government enjoying the support of wide portions of the trade union movement. For an analysis of the 1974 statute, and its 1982 (non-social democrat government initiated) successor, from the point of view of balancing competing interests between the labor market parties, see Fahlbeck, R, Employment Protection Legislation and

somewhat eased the strict limitations for employers but the business community was far from satisfied. Quite apart from whether the limitations in the 1974 and the (original) 1982 acts were justified – obviously a matter with strong political flavor – it can objectively be said that employers (and, concomitantly, individual job seekers) were indeed quite restricted.

The combined effect of the total ban on hiring out of manpower and the strict limitations on temporary employment produced a system which allowed employers little freedom of action. It was from that point of view undoubtedly a very rigid system. Flexibility was, one might say, not part of the system or, better, flexibility had been organized and put at the *de facto* disposal of labor unions. To be workable the system required a high degree of consensus between the labor market parties and of willingness to cooperate on the part of unions. I think that it can be said without bias that both these components were present to a very high degree.[8] It can probably also be said that the need to change the system originates from external factors much more than from internal. To put it differently, the need for change is due to changes in the economic environment rather than to intrinsic shortcomings in the previous labor law system, however strict and rigid.

Section 4 The 1991 Act on Private Employment Exchange and Hiring Out of Employees

In 1991 the government submitted a bill on private employment

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Labor Union Interests: A Union Battle for Survival? *In* Stanford Journal of International Law, vol XX (1985).

[8] Once in a booklet on «The Swedish Model for Industrial Relations» I concluded the discussion with the following summing up: The Swedish industrial relations system «is characterized by two strong and concurrent forces, namely: (1) *a business community* imbued with a tradition of long-range planning combined with a remarkable degree of acceptance of unionism and of trade union contributions to management decision-making; (2) *a union movement* imbued with a pragmatic quest for the material welfare of its members while accepting both employer freedom to manage the business and technological change». Cf. Fahlbeck, R, East is East and West is West? The Swedish Model for Industrial Relations, p 38. (Acta Societatis Juridicae Lundensis No. 73, 1984, ISBN 91-544-1701-5).

exchange and hiring out of employees to Parliament. The government was formed by the social democrat party. In power since the early 1930's (with the exception of the years 1976–1982 and 1991–1994) the party had been the main architect of the Swedish welfare state. A social democrat government had submitted the bill that led to the 1935 Act on Employment Exchange. Strongly supported by most labor unions, the party since then had resisted any easing of the restrictions concerning employment exchange and hiring out of manpower.

Beginning in the early 1990's the social democrat party started moving in the direction of a gradual, cautious and partial deregulation of the statutory systems that it had been the main proponent of throughout its long period in power. One expression of that new deregulatory policy was the 1991 act.

The act introduced a new approach to hiring out of employees. Hiring out was legalized in principle. Circumscribed by many conditions, *bona fide* hiring out was distinguished from employment exchange which made it possible to legalize it. The act did not force Sweden to revoke its ratification of the 1949 ILO convention No. 96 since under that convention *bona fide* hiring out is not necessarily considered employment exchange. An elaborate system for control to prevent unsatisfactory conditions was set up, involving both labor unions and the Labor Market Board.

Private, profit-aiming employment exchange continued to be illegal and to constitute a crime. One additional exception was introduced, i.e. *head-hunting*. Many firms in Sweden had long been in the business of helping companies to recruit top ranking executives. Whether head-hunting amounted to employment exchange was contested. Head-hunting firms took the position that their activities did not constitute employment exchange since they did not procure work for anyone. All they did was to propose the top candidates from among the applicants for the position in question. In 1967 a government commission concurred. It came to the conclusion that head-hunting as practiced by the firms studied by that commission was not employment exchange. The issue continued to be controversial. The 1991 legislator took the position that there was a legitimate labor market need for the services of head-hunting firms, both in the private and in the public sector. Since legalization of

head-hunting would affect only a very minute percentage of the work force it was considered that there would be no overall negative labor market repercussions if such firms were allowed to operate, subject to prior permission and close supervision by the Labor Market Board.

The act went into effect as of January 1992.

The act was derided by the business community. The chairman of the Swedish Employers' Federation, SAF, was quoted as saying that the government's proposal (which subsequently was adopted by Parliament) «belongs in the waste paper bin». SAF wanted an end to public employment exchange monopoly and a total lifting of the restrictions on hiring out firms. The non-social democrat parties, i.e. parties in the center and to the right of the political spectrum, were perhaps somewhat less explicit but their positions were identical with that of SAF.

More specific information about the act will be provided in section 5.

Section 5 The 1993 Act on Private Employment Exchange and Hiring Out of Manpower

5.1 The Philosophy of the Act. Introductory Remarks

The 1993 act does away with virtually all the regulatory structures of the 1991 act.

The statute is based on three pillars. Freedom is the first and most conspicuous: freedom of the market place, freedom of contract, freedom to establish and run private exchanges and hiring out firms. Non-intervention by society is the second. Safe-guards against abuse or exploitation of workers is the third.

The ultimate goal of the act is to promote productivity and competitiveness in Swedish economy. More specifically, the avowed contribution of the 1993 act is to promote labor market efficiency and flexibility. The philosophy of the act is that freedom for the actors concerned and non-intervention by society will help achieve these goals.

Containing only six sections[9] – no more than one page in print – a good part of the statutory text is made up of definitions.

In order to arrive at such sweeping change in legal regulation Sweden had to denounce the relevant ILO convention, i.e. No. 96 of 1949. Sweden ceased to be bound by the convention on June 4, 1993. Three weeks later, on July 1, 1993, the statute went into effect. Sweden has traditionally been a staunch proponent of ILO standards so the denouncement has not gone unnoticed. However, it must be added that Sweden is not the only country to have taken this drastic step. Denmark has done it and so have Finland and Germany. Indeed the Swedish government claimed that there is a general trend in the direction of not maintaining a *(de facto)* public monopoly in the labor employment exchange field.

This said it is time to set the record straight. What has been said so far might lead to the conclusion that deregulation has gone so far as to «throw out the baby with the bath water». Such a conclusion would be premature and indeed quite misleading. The statute is based on the firm conviction that free, comprehensive, public employment exchange of high quality will remain the cornerstone of employment exchange.[10] No one seriously believes that private exchange firms will become prominent actors in employment exchange generally and the shared notion is that they will be of marginal overall importance, primarily limited to recruitment of very qualified and/or specialized personnel. No one seriously believes that hiring out firms will mushroom and capture a sizable segment of the labor market.[11]

The Labor Market Board (and its local branches) will remain the

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[9] Originally the statute contained seven sections. Section 5 has been replaced by a statutory rule of general application in the 1982 Act on Employment Protection; cf. *infra*.

[10] It should be noted that private activity involving no exchange agency at all accounts for some 70 to 80 per cent of all job recruitment in Sweden. Such private activities are advertising by employers or job seekers, direct personal contacts with employers at the initiative of either party or tips from friends. The public employment exchange accounts for some 15 to 25 per cent of vacancies filled. See Government White Paper SOU 1992:116, section 3.1.2.

[11] The lifting of the ban on hiring out firms by the 1991 act did not result in any noticeable increase in such firms; Government White Paper SOU 1992:116, p 51.

cornerstone of labor exchange. The sheer fact that its services are free and that it is nation-wide in coverage will, it is assumed, see to it that its position in the market will not be shattered to any greater extent. The Board remains in charge of implementing labor market policies and in administering the multitude of labor market programs existing in Sweden. The Board remains the central body for information on the labor market, at macro and micro levels. One important mechanism for collecting and analyzing labor market information is the obligation on the part of employers to notify the local branches of the Board about plans to recruit employees. Introduced in 1976 in the private and local government sectors of the labor market and extended to state government employers in 1984, this obligation remains unchanged. Though far from all-comprehensive the obligation to notify does provide the Board with a wealth of data.

The 1993 act is based on the notion that public employment exchange has three distinct yet also connected functions. First, is serves as an *information bank*, i.e. a place for «sellers» and «buyers» to get to know about each other. Second, it serves as a «go-between» between employers and job seekers, helping them to reach agreement, the broker function. Third, it has a *market influencing* function. Its activities aim at stimulating both supply of and demand for manpower in order to realize one of the over-riding goals of Swedish social policy, i.e. full employment. That means to provide an adequate job to everyone who wishes to perform employment work. It is not expected that these three functions will be much affected by the 1993 statute. Private exchange firms will be brokers and add to the services of public exchange in that respect.

5.2 Some Features Common to Private Employment Exchange and Hiring Out

Increasingly, recruitment of personnel and hiring out go hand in hand.[12] This is one of the reasons why much of the regulation is common to both.

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[12] See e.g. Government White Paper SOU 1992:116, section 3.4.3.

Private employment exchange regulation is confined to the 1993 statute.[13] So is regulation concerning hiring out of manpower. The statute allows for no additional regulation by the government, any government ministry or agency. Previously existing rules authorizing the Board to issue orders of a prohibitive or corrective nature have no equivalent nor have the rules giving the Board a far-reaching supervisory and controlling power. The actual practice of the Board in the past to issue (what *de facto* amounted to Japanese style) «administrative guidance» *(gyôsei shidô)* is discontinued.

Legal control of exchange and hiring out firms is exclusively in the hands of the courts. However, the courts cannot exercise control *ex officio*. Control can be exercised only as part of criminal procedures for alleged violations of sec. 3, 4 or 6 of the act. The decision to bring such an action is in the hands of prosecutors. The Labor Market Board can bring practices of firms in the business to the knowledge of the prosecutor's office but it is not authorized to initiate procedures before the courts on its own initiative. Court control is strictly limited to the legality of the practice(s) brought before it and does not entail a control of an administrative nature. Courts cannot issue orders of a prohibitive or corrective nature. Just like in all other criminal procedures the role of the court is limited to ascertaining whether the practices brought before it constitute a crime in the meaning of the statute or not.

Under the 1993 statute no prior permission is required to start a private employment exchange or a hiring out firm, nor is notification with the Board. However, like all other businesses, such firms are subjected to the general obligation in the law of associations to register with the appropriate registration office but registration is strictly confined to legal requirements of a standardized and largely formal character. Registration procedures are in no way concerned with the legality of the exchange as such nor with the need or

[13] There is one exception, namely activities «by means of publications, transmissions or recordings to which the liberty of publication ordinance or the freedom of expression act apply»; sec. 1 of the act. The reason is that these statutes form part of Swedish constitutional law and as such they enjoy a higher position in the hierarchy of legal rules and thus take priority over the 1993 act. However, exchange activities not specifically protected by these constitutional statutes are subject to the 1993 act.

desirability of it. Registration cannot be denied when those generally prevailing conditions are met. Registration can be denied if by a previous court order the applicant is denied the right to operate a business. Such court orders can be issued to temporarily prohibit a person who has seriously abused the freedom of enterprise from operating a business. Such court orders are rare.[14]

Registration does not in any way depend on the personal qualifications of the person(s) applying for registration of a firm. Nor does the personal suitability of the applicant(s). During the deliberations leading to the 1993 act (and to its 1991 predecessor) some consideration was given to whether such factors should be taken into account, given the somewhat tainted character of many previous exchange and hiring out firms and the very sensitive nature of the business of such firms. However, the idea was rejected in the name of freedom of enterprise. Also, the legislator(s) felt that experience would demonstrate whether such safe-guards are needed.[15]

Exchange firms and hiring out firms are not subjected to any statutory rules on confidentiality. The 1980 Secrecy Act is confined to public entities, with minor exceptions that do not apply here. Some consideration was given to the secrecy issue during preparations for the 1993 act but the legislator decided to refrain form any specific rules. Information contained in automatic data files is protected by the 1973 Data Act. More importantly, however, the government argued that only if exchange firms manage to establish a relationship based on confidence will they be successful. Underlying this argument is the notion that exchange firms that do not treat

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[14] Act 1986 on Prohibition to Operate a Business. In May 1994 only 156 such orders were in effect; cf Government White Paper SOU 1995:1, p 36. The White Paper proposes stricter rules against abuseres.

[15] Some years ago the taxi business was deregulated. Much in the same way as with the 1993 legislation on private employment exchange and hiring out the idea to continue to have a system of authorization was rejected. By and large the deregulation seems to be a resounding success. However, there are problems, e.g. that questionable or downright illegal methods sometimes are used. As a consequence, in 1994 a system of recurrent authorization was reintroduced; Government Bill 1993/94:168, SFS 1994:589. The future will tell whether the private exchange and hiring out businesses will also see shady practices, prompting renewed legislative intervention.

change. The 1993 legislator basically chose to ignore similar fears when voiced during the deliberations resulting in the 1993 act. Yet another potential disadvantage is that these firms, in particular the hiring out firms, will evade their obligations towards society and towards their employees. Dubious practices are not uncommon even in a country like Sweden where respect for the law is comparatively very high. For example, the employer and the employees can decide not to report to tax authorities what the actual earnings are but some lower figures. Through such an «unholy alliance» much money can land in the pockets of the employer and the employees concerned rather than in the coffers of society. The 1993 legislator was well aware of this danger but responded by saying that it is not the task of employment exchange and hiring out legislation to combat such illegal practices.

5.3 Private Employment Exchange Under the Act

Employment exchange under the 1993 act is defined as «activity aimed at procuring work to work applicants or manpower to employers but excluding the hiring out of manpower as defined in sec 2». Despite the wording of this definition hiring out is no longer considered a form of employment exchange. The definition is not intended to bring any alterations to definitions, borderlines, concepts *et cetera* established by case law concerning employment exchange, hiring out of workers and contract work.

Private employment exchange is permitted under the act.[17] Profit-aiming exchanges enjoy the same freedom as other fee-charging exchanges. Both are subjected to only one restriction concerning their mode of operation, namely the strict ban on receiving payment from job seekers (cf. section 5.2 above). Non fee-charging exchanges face no specific statutory restrictions at all.

Private exchanges are not subjected to any requirements regard-

[17] There is one, limited, exception, viz. fee-charging exchange of seamen. The 1920 ILO convention No. 9 prohibits fee-charging exchange of seamen. The convention was ratified by Sweden in 1921. The 1993 legislator rejected proposals to revoke Sweden's ratification of it, pending further considerations. Violation of the ban is a crime under the act; sec. 7.

ing the policies they have to pursue. Public employment exchange is based on such policies. Examples of those are the promotion of gender equality, of employment opportunities for the handicapped and of labor market integration of immigrants as well as efforts to counter long term unemployment. The main reason for this, perhaps somewhat freewheeling, entrepreneurial freedom for private exchanges is that society aims at increasing labor market efficiency by allowing private exchanges but that aim would be partly thwarted if the exchanges were subjected to two rulers, market forces and government labor policies. Also, subjecting private exchanges to such requirements would necessitate a supervisory body. No other body than the Labor Market Board could possibly undertake such supervision but that would risk to undermine one important reason for permitting private exchange, namely to introduce competition, since private exchanges are the competitors of the Board.

Exchanges are free to charge any fees they choose. Price regulation will be exercised by the market.

5.4 Hiring Out of Manpower Under the Act

The 1993 act defines hiring out as «a legal relationship between a third party and an employer whereunder the employer against remuneration puts employees at the disposal of the third party for the purpose of performing work that is part of the activity of the third party». The definition is not intended to change the definitions and concepts arrived at in case law.

Hiring out was considered a form of employment exchange under the 1935 legislation. The 1991 legislation changed that, distinguishing between the two and declaring *bona fide* hiring out firms to be legal. Several restrictions applied, in particular to the hiring out firm but to some extent also to the user. The Labor Market Board had a supervisory role and it could issue orders of a corrective or prohibitive nature.

By and large the 1993 act did away with that regulatory structure. As was shown in section 5.2 administrative permissions, notifications or controls no longer exist. As was further pointed out in section 5.2 there are only few restrictions on hiring out firms. User firms are subject to none.

First, users do not have to show that there is a need of some kind in order to contract for hired in manpower. The 1991 act contained such a requirement.

Second, users are not restricted as to the length of a hiring in arrangement. Swedish employment law is based on the principle that employment should be for an unlimited period (permanent employment) unless there are reasons for temporary employment. The 1982 Act on Employment Protection spells out legitimate reasons in great detail. Furthermore, in most instances it allows for temporary employment only for specific lengths of time, spelled out in the statute. The previous 1991 act had a corresponding rule on hiring in, limiting each period of hiring in for a specific task to 4 months. Users, according to the 1991 legislator, were not to meet a permanent need for manpower with hired in people but were to hire employees directly. The 1993 act has no maximum period. Theoretically, hiring in of one and the same person can go on for years, indeed indefinitely, without there being any infringement of the act. Such a person might eventually become to such an extent integrated with the hiring in firm that he or she should rightly be considered an employee of the hiring in firm but that is another matter. The legislator points at this situation and pledges to follow labor market practices in this respect. Voices were raised during deliberations for the 1993 act to keep a fixed maximum period. It was pointed out that there is a proposal for a European Union directive and under that directive a 12 months period would apply in most instances.[18] To refute such demands the legislator pointed at the uncertain fate of this proposal. Also, and probably more importantly, the legislator argued that truly long term periods were highly unlikely since hired in manpower is more expensive than employed personnel.

Hiring out firms employ the manpower that they put at the disposal of users. What possibilities do hiring out firms have to hire employees temporarily? Can hiring out firms hire employees temporarily to match the lengths of time specified in the contracts between hiring out firms and users? As was pointed out above, Swedish employment law is based on the principle that permanent

[18] EC COM90/228.

employment be the prevailing form of employment and that temporary employment be limited to situations where there is a genuine need. The very restrictive rules in the 1974 Act on Employment Protection were eased somewhat by the 1982 Act on Employment Protection.

An argument can be made for not allowing hiring out firms to hire employees on a temporary basis. The very idea of a hiring out firms is to free firms needing temporary manpower from the troubles of finding and hiring such manpower themselves. It might seem consistent with such a role for hiring out firms to require that they keep a permanent «stock» of their «merchandise», i.e. manpower. That would lead to restrictions on their possibilities to hire employees temporarily. The 1991 act limited the possibilities of hiring out firms compared to generally prevailing rules in the 1982 Act on Employment Protection. The 1993 act did away with those restrictions. Under the 1993 act no specific rules apply to hiring out firms regarding temporary employment. The combined effect of the revocation of the restrictive rules in the 1991 act and the concomitant relaxation of restrictions on temporary employment in the 1982 Act on Employment Protection mean that managerial freedom in this respect for hiring out firms is rather far-reaching.

Still, managerial freedom is far from unlimited. Apart from the restrictions that in fact still do apply under the 1982 Act on Employment Protection one additional limitation of particular import for hiring out firms should be mentioned. Repeated instances of temporary employment by the hiring out firm of the same employee would in many instances be in violation of the 1982 Act on Employment Protection *if* the employee is hired out time and again to perform similar work each time. Such *commission-by-commission employment contracts* would suit the business needs of hiring out firms perfectly. From the point of view of the employee community they often represent a considerable hardship, often referred to as *the deputy misery*. In most instances a person will be hired out to perform similar work time and again regardless of the user for the simple reason that most people are capable of performing only one kind of work in a professionally satisfactory way. However, commission-by-commission employment contracts by hiring out firms fly in the face of the 1982 Act on Employment

Protection. Generally speaking, the act is based on the idea that a permanent need for manpower should be met by permanent employees. More specifically, the act (sec. 5 at 1) requires that employment for a specified period of time must be only for work of «a particular nature». By and large, it cannot be said that employment by a hiring out firm of employees to be hired out to perform time and again the same kind of work meets the statutory requirement that the work needed by the hiring out firm be of «a particular nature». This means that commission-by-commission employment contracts will be in violation of the 1982 act. The employee can petition the court to obtain a declaration that the employment contract is for permanent employment.

The fact of being permanently employed is important for the employee for a variety of reasons. The 1982 Act on Employment Protection contains rules for permanent employment that differ favorably for the employee from those concerning temporary employment. Many statutes attach importance to the length of employment. At the same time it must be stressed that the employer is under no obligation to provide the employee with paid work at all times. Employment contracts to the effect that employees will be paid only when work is actually performed are perfectly legal, even if they also mean that such work will be provided on a temporary and intermittent basis only.[19]

Hiring out can be made in several steps. In other words, the 1993 statute (as its 1991 predecessor) does not prohibit that an employee is hired out first by his or her employer and subsequently by the user and, perhaps, by the sub-user. There is no limit to the number of subsequent hiring out contracts so «hiring out chains» are not per se illegal. However, in many instances such chains will violate rules under mandatory case law on who is legally the employer of a particular employee but violations do not constitute criminal offenses and no civil law sanctions apply (such as damages).[20] The effect

[19] Arbitrary or discriminatory practices by the employer in providing work when work is available might constitute an actionable «breach of good labor market behavior» liable to damages.

[20] It is another story that firms that engage in «hiring out chains» often also engage in activity of a criminal nature, e.g. tax fraud.

of a non-appropriate «hiring out chain» is simply that it is not accepted by society and that it will be substituted by a legally correct employment relationship. An action to obtain a declaration to that effect can be initiated by the parties involved only, typically the disgruntled employee. Also, arrangements involving «hiring out chains» of the said nature can be vetoed by the union at the hiring in firm (cf below).

Employees and their unions at hiring out firms have only limited power to influence the way hiring out firms operate. No rules specifically designed to give the employee side at hiring out firms some particular influence exist. The employee community is entitled to the same level of influence as employees generally under the 1976 Act on Joint Regulation in Working Life.[21]

The situation is different at hiring in firms, however. There the employee community through their union(s) enjoy a veto right, i.e. the union(s) can veto the proposed arrangement by the employer. If properly exercised, the employer is obliged to submit to a veto by the union(s). Several conditions must be met. First, the union(s) must be a party to a collective agreement covering the work that prospective hired in employees are to perform. Second, the power to veto public procurement arrangements is subject to specific conditions. Public procurement covers both goods and services, e.g. services to be performed by manpower employed by a hiring out firm. However, such procurement can be vetoed only on the basis of those circumstances (spelled out in the applicable statute) that public authorities may invoke if they decide not to invite a specific hiring out firm to compete or to ignore an offer by that firm.[22]

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[21] The designation of the 1976 act is a misnomer. The act does not give the employee side any real power of «joint regulation». The goal of the act is to institute such a regime but it falls far short of actually doing so. It does provide for information to and consultation with the employee side.

[22] This limitation is intended to safeguard that union veto power does not contravene EEC regulations on public procurement. Those regulations – Directive 92/50, relating to public service contracts – have been adopted as part of Swedish law; Public Procurement Act 1992:1528. It should be noted that public agencies *may* but are not *obliged* to disregard the providers specified in the statutory rules. Despite this the union is entitled to veto arrangements involving such providers.

The limitation did not come about as a result of an initiative by the government. In

Among those cirkumstances are such as bankruptcy or failure to properly pay taxes.[23] Third, the veto power is confined to matters of legal impropriety, not matters of suitability. A proposed arrangement by the employer/hiring in firm can be vetoed only if it entails illegalities or violates generally accepted standards of branch behavior. In order to enable the union(s) to examine the proposed arrangement by the employer/hiring in firm that employer is obliged to negotiate on its own initiative with the union(s). In other words, there is a ban on unilateral employer actions here. As part of its duty to negotiate the employer is obliged to provide the union(s) with adequate information concerning relevant aspects of the proposed arrangement. Over-ruling a legitimate union veto makes the employer liable to damages of a punitive nature to the union(s).

Unions have never made extensive of their veto power in those other areas where it can be exercised and there is no reason to believe that this will be the case in the area of hiring in of manpower. However, the veto power is an important weapon even if it is not actually used because employers cannot take threats of a veto lightly. The mere possibility that a proposed arrangement might be vetoed looms over negotiations between the two sides and can influence employer behavior. True, the employer can override an

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its bill to Parliament (1994/95:76) the government had not even considered the issue, taking it for granted that the veto rules were in no way objectionable. This arrogant attitude was rectified by the Labor Market Committee in Parliament. The committee asked for the opinion of the Legal Council (Lagrådet) – a body of «wise men» consisting of four eminent judges whose task it is to examine the legality of legislation under consideration. The Legal Council found the veto rules objectionable in one respect relating to public procurement and proposed an amendment. The General Counsel of the Labor Market Committee undertook further examination of the rules and found them lacking even in other respects than those pointed at by the Legal Council. The rules on veto power were amended accordingly by Parliament; Act on Joint Regulation in Working Life, as amended 1994:1686.

This author is far from convinced that the rules are not lacking in some other respects as well. But the rules have become something of a «holy cow» to the union movement so balanced legal reasoning here seems to have been relegated to second place in discussions regarding the legality of these controversial rules.

[23] Public Procurement Act 1992:1528, as amended 1993:1468, chapter 1 section 17 and chapter 6 sections 9–11. Cf. Council Directive 92/50, Article 29.

illegitimate use of the veto power but it does so at its own risk. Miscalculating the legitimacy of a veto by the union(s) can be costly!

The union veto power was originally introduced in 1976 as part of the general strengthening of the employee side by the 1976 Act on Joint Regulation in Working Life. The veto power is and always has been a controversial part of Swedish law.[24] It was enacted over the stern opposition of the business community and the business community has lobbied ever since to have it repealed completely.[25] The 1991 act further strengthened the position of the employee side in this respect compared to the generally prevailing rules in the 1976 Act on Joint Regulation in Working Life, again over angry objections by the business community.

In the context of hiring in/hiring out, the veto rules assume a special character. Every decision to hire in manpower is potentially threatened by a veto by the union(s) of hiring in firms. However, neither the hiring out firms nor the unions of those firms can legally

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[24] Because of the controversial character of the union veto power a few additional remarks about it seem appropriate. In the first place it was introduced in a way that differed markedly from standard ways of preparing legislation in Sweden. Many considered the way it was introduced as a kind of coup. In the second place the rules have come under fire not just from the employer community but from many other quarters as well. Competition authorities have grave misgivings about the veto power since it can be used to stifle competition and thus violate competition legislation. There seems to be little doubt that the veto rules have indeed sometimes been used in such ways – or rather misused, but misuse is not always easy to prove. When reintroduced in 1994 the rules were slightly amended in order to eliminate any doubts that the veto power might result in violations of the 1992 Public Procurement Act; cf text above. The rules are also questioned by defenders of due process of the law, e.g. since unions have the power to stop entrepreneurs from doing business without these entrepreneurs being offered a chance to even defend themselves. A third example of the doubts here is that union use of the veto power often amounts to a *de facto* exercise of public police authority but private bodies – as unions of course are – are not normally entrusted to exercise such authority.

[25] That in fact happened in 1993. The Swedish parliament accepted a proposal by the non-socialist government of that time to repeal the union veto power completely, thus overriding adamant opposition by the social democrat party and most unions. The repeal was not specifically aimed at the situation of hiring in firms. The union veto power ceased to exist as of January 1, 1994. However, later the same year it was reintroduced by the social democrat government that was returned to power after the 1994 general election. It became effective again as of January 1, 1995.

influence the decision of the union(s) of hiring in firms. That means that the very business idea and the very livelihood of the employees of hiring out firms to a considerable degree are in the hands of outsiders, namely the union(s) of hiring in firms. This state of affairs causes concern from the point of view of due process of law and it is not surprising that those expressing such concern have called for the complete repeal of the veto rules (cf notes 24 and 25). Those concerned with fair competition and business efficiency have often concurred, voicing concern that the veto rules – directly or indirectly – serve to protect the (arguably less efficient) employees of potential hiring in firms.

Three parties are involved in a hiring out arrangement, the hiring out firm, the hired out worker and the hiring in user. What are the legal relationships between them under the 1993 legislation?

The relationship between the hiring out firm and the user is a contract under standard contract and commercial law. Under the 1993 act this relationship forms the basis for the definition of what constitutes «hiring out of manpower». It is «a legal relationship between a third party and an employer whereunder the employer against remuneration puts its employees at the disposal of the third party for the purpose of performing work that is part of the activity of the third party». Two conditions must be met under this definition, i.e. that it is a remunerative relationship and that the third party has an «activity» within which the workers concerned are to perform work. In the absence of any or both of these requirements the relationship is not one of «hiring out of manpower». It is not for the 1993 act to specify what legal relationship might exist in such cases. Sometimes there will instead be employment exchange. However, since even profit-aiming exchange is allowed under the act and since there are even fewer restrictions on exchange than on hiring out there should not arise situations where this causes any problem. With the exception of these two requirements, the 1993 act does not deal with the relationship between the hiring out firm and the user. Generally prevailing principles under commercial contract law apply.

With regard to the relationship between the hiring out firm and the hired out worker, the 1993 act is based on the principle that there is an employment relationship between these two parties. If no

such relationship exists between them then there is legally speaking no hiring out (but, in most instances, employment exchange). By and large the employment relationship between the hiring out firm and the worker is of a standard type. All labor and social security law apply to this employment relationship. The 1993 act does not even refer to that body of law simply because there is no need to do so. However, the 1993 act does contain two regulations specific to this particular kind of employment relationship.[26] Both go back to the 1991 act but are addressed to the employer of the hired out worker only, not to the user as well (which was the case under the 1991 act). Deliberate or negligent violation of any of these two regulations is punishable by a fine; sec. 7.

First, sec. 4 of the act stipulates that «[E]mployees must not, by contract or any other way, be prevented from accepting employment by a third party for which they presently are or previously have been working». The rule aims at protecting the employee from unwanted restrictions to work for any employer he or she wishes. Experience shows that a majority of those who quit a hiring out firm do so to become employed by a firm that they actually worked for.[27] The rule promotes flexibility in the labor market. It is based on and it formally expresses the generally prevailing principle of freedom of contract. It also prevents undue pressure on the employee on the part of the hiring out firm. A clause in the contract between the hiring out firm and the user to the effect that the user promises not to employ a hired out employee is not binding upon the employee. This means – *inter alia* – that an employment contract entered into by the hired out worker and the

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[26] The original statute contained one more specific rule, i.e. sec. 5, which prescribed, first, that the employment contract be in writing and, second, that the contract specify «type of employment as well as salary and general employment conditions». Since sec. 6 a of the 1982 Act on Employment Protection now contains a rule to the same effect, applicable to the entire labor market, the rule in the 1993 act has been repealed. Section 6 a is based on the European Community Directive 91/553.

As explained in the text above, the 1991 act contained additional rules for the hiring out employment relationship, i.e. a maximum period for each hiring out assignment and specific limitations for the hiring out firm to employ people temporarily.

[27] Government White Paper SOU 1992:116, p 51.

user is a binding employment contract under the law despite the fact that is contravenes the contract between the hiring out firm and the user.[28] (What legal consequences such a breach of the contract between the hiring out firm and the user may result in is outside the scope of the 1993 act to regulate. Under general contract law damages would be the standard sanction.)

The second rule in sec. 4 of the act of specific application to hiring out firms states that «[A]n employee who has served notice to terminate the employment relationship and accepts employment with an employer engaged in hiring out of manpower must not be hired out to the previous employer earlier than six months after that employment relationship ended». The rule primarily aims at preventing socially unwanted recruiting techniques by hiring out firms, e.g. employee raiding or employee enticement. Will an employment contract between a hiring out firm and a worker in violation of this prohibition be valid? No answer was given to that question during the preparations for the legislation. Under generally prevailing labor and contract law principles the answer probably depends on whether the *worker* acted in good or bad faith. If the worker was in good faith – i.e. the worker neither knew of this statutory prohibition or should have known about it – the employment contract will probably be valid and remain in force. However, if the worker acted in bad faith the opposite would apply. The hiring out firm can be fined if it acted deliberately or negligently; sec. 7. However, it is less probable that the validity of the employment contract would depend on whether the hiring out firm is fined or not. The reason is that such a state of the law would indirectly punish a worker acting in good faith in a situation where the worker cannot be blamed and where consequently there is no justification for punishment.

As has been said, the prohibition for workers to accept employment by hiring out firms only to be hired out to the former employer is addressed to the hiring out firm only. Under the 1991 act the prohibition was addressed to the user as well (i.e. the former employer). The main aim of the 1991 act here was to prevent users to circumvent labor legislation. This can come about if the social

[28] Under the 1991 act the employment contract would probably have been null and void since the prohibition in *that* statute was addressed to the user as well.

and economic relationship between the user and the worker de facto remains essentially the same but the obligations of an employer towards its employees are lifted from the user to the hiring out firm. That risk exists equally much under the 1993 act. Can anything be done about it under the 1993 act? The act itself does not address that question. But answers can be found in case law principles. If the relationship between the hiring out firm and the worker is fictitious or very weak a court may legitimately find that there is legally speaking no employment relationship at all between the two parties. The court may also find that the worker is legally to be considered employed by the user (i.e., in this situation, the «former» employer). In other words, the hiring out contract between the hiring out firm and the user may be found not to be a hiring out contract at all but a contract for employment exchange. Since private profit-aiming employment exchange is permitted under the 1993 act there is nothing per se illegal in such a misuse of the legal system. However, there is no freedom of contract under Swedish law with regard to who is to be considered an employee and, conversely, who is to be considered the employer of a particular worker. Courts rule here in accordance with generally prevailing principles concerning what factors constitute an employment relationship. This all means that the fact that the prohibition now discussed in the 1993 act, unlike its 1991 predecessor, does not apply to the user, is of little legal import. The courts have the authority to reclassify contractual employment relationships anyhow.[29]

The third relationship in a hiring out situation is that between the user and the (hired in) worker. Unlike its 1991 predecessor, the 1993 act does not deal with that relationship at all. The first observation to be made concerning this relationship is that it is not of a contractual nature. No contract exists between user and hired out/in worker. The worker remains the employee of the hiring out firm and contractual rights and obligations are contained exclusively in the contract between them. However, the hired out/in worker is subject to the managerial authority of the user. That does not

[29] This also applies to situations where a worker who has been hired in is subsequently hired out again. Hiring out chains, though not per se illegal under the 1993 act (cf. above), can thus be dismantled by a court.

depend on a legal relationship between them but on the contents of the employment contract between worker and hiring out firm (and on the contract between the user and the hiring out firm). The extent to which the worker is subjected to the authority of the user ultimately depends on rules under Swedish labor law concerning the relationship between an employer and an employee since those rules deal with the maximum authority that an employer can have vis-à-vis an employee. By and large the rules are based on case law, statutory regulation being virtually nonexistent other than for certain public employees.

However, the fact that there is no *contractual* relationship between user and hired in worker does not mean that there is no *legal* relationship between them. On the contrary many legal rules apply.

First, the user should have an obligation to follow all rules regarding the treatment of personnel under Swedish labor law. So far no court has been confronted with the issue of the obligations of users in this respect but there can be little doubt that users have the same obligations as employers. Legal regulation of personnel management is concerned, for example, with the ways employers assign and direct work or with protection against harassment, sexual or otherwise. Generally speaking, personnel management must be in conformity with «good labor market practice», a concept that is vague but where case law offers guidance in some respects.

Second, some labor law statutes will be partly applicable as well. The 1976 Act on Work Environment figures most prominently in this respect. This statute is concerned with safety at places of work, both physical and mental. It was amended in 1994 to adapt to the new situation created by the legalization of hiring out/in of employees.[30] Under these amendments the user has far-reaching obligations to provide safe working conditions for hired in workers. The amendments also mean that employee safety representatives of the hiring out firm will be allowed to enter the premises of the user.

[30] Government bill 1993/94:186, SFS 1994:579, effective as of October 1994.

Section 6 The Role of the Labor Market Parties and the Political Parties

Private employment exchange and hiring out of employees have been contested ever since they were prohibited in 1935 and 1942 respectively. By and large the political battle line has been one between left, on the one hand, and center-right, on the other. The social democrats have consistently taken a negative stand on hiring out of manpower and very much so on private fee-charging exchange, in particular profit-aiming firms. The non-socialist parties traditionally also supported the de facto public monopoly on employment exchange but their attitude started to change in the 1980's. Concerning hiring out of manpower there have always been advocates within the ranks of these parties for a lift of the ban, at least partially, but the parties themselves did not actively advocate that until late in the 1980's.

In the labor market the battle lines have been drawn in similar ways, only more aggressively so. Unions have consistently and with much vigor fought any attempts to introduce private profit-aiming employment exchange. Their attitudes towards hiring out firms have been similar but less adamant. In fact, some white collar unions even entered into collective agreements with hiring out agencies, despite the fact that they were of dubious legality. (Cf. section 3, text following Note 5.) For some decades the employer community has been in favor of at least a partial lifting of the prohibitions of both private employment exchange and hiring out of manpower.[31]

These battle lines in the political arena and on the labor market are reflected in the positions taken during deliberations leading to the 1991 and 1993 statutes. True, the march towards deregulation was initiated by the social democrat party. The 1991 act was its brain-child. The switch was done with great caution and without any enthusiasm, however, and motivated by changes in the economic environment rather than by a change of mind. It was a defensive move rather than an offensive one. The act maintained the ban on

[31] As a curiosity it may be noted that one of the 1963 Supreme Court cases on hiring out of manpower involved a firm owned by a person who held a high-ranking position in the Swedish Employers' Federation, later to become its chairman.

profit-aiming employment exchange and the lifting of the prohibition of hiring out was very strictly conditioned indeed. The unions were against the proposals of the government. The non-socialist parties and the employer community were also against the government but the reason here was that they felt that the government did not go far enough.

The non-socialist parties won the 1991 election and in the fall of 1991 they immediately set out to prepare for the changes that they had advocated earlier that year during parliamentary deliberations of (what was to become) the 1991 act. Their proposals leading to the 1993 act were adamantly opposed by the social democrat party and the labor unions. As a result of the general election in 1994 the social democrats were returned to power.

Will the social democrats reintroduce legislation concerning employment exchange and hiring out in the kind they carried through in 1991? Chances are that they will. But, then again, chances are that they will not, preferring to allow the 1993 act to stay in force. Some months before the election I was asked to bet whether they would so. My bet then – and today – is that they will not. Indeed, early in 1995 a government committee submitted a proposal to set up public hiring out halls, called (Arbetsföretag), as a means to Work Undertakings (Arbetsföretag), as a means to reduce unemployment.[32] These hiring out halls would employ unemployed people and hire them out temporarily. They would be operated by the Labor Market Board and its local branches. The idea has met with considerable scepticism from the labour market parties but it indicates that the 1993 act is here to stay.

Section 7 Towards the Future

The 1993 act came into effect in July 1993. It is much too early to say anything concrete about the effects of the act on labor law and on labor market practices. At this early stage the observation to be made is that the statute represents a watershed in the legal regulation of employment exchange and temporary work. Will it also come to

[32] Work Undertakings – An Additional Avenue for the Unemployed (Arbetsföretag – en ny möjlighet för arbetslösa), Government White Paper SOU 1995:2.

represent a watershed in a actual practices (if it survives the aftermath of the 1994 parliamentary elections)? Reasons have been set forth above to the effect that the statute might lead to only marginal changes.

Since (more or less illegal) private exchange and hiring out has existed for decades it might well be that the actual effect of the new statute primarily is to legalize what has been going on anyway.

But, on the other hand, it might turn out the other way. The prime reason for that is the fairly strict regulation of temporary employment in the 1982 Act on Employment Protection. This act does provide for temporary employment in many situations but the employer community has consistently called either for the complete repeal of those rules or, at least, for a less restrictive regulation. It partly got what it wanted in 1993. The partial deregulation passed by the Swedish parliament that year was greeted with enthusiasm by the employer community but it proved to be a short-lived victory. One of the first acts of the newly elected social democrat government was to submit a proposal to do away with that deregulation and to restore the status quo ante by 1994. However, those restrictive rules in the Act on Employment Protection operate in a completely new environment due to the 1993 statute on hiring out. Since there are virtually no restrictions on hiring out/hiring in of manpower employers might conceivably simple disregard the Act on Employment Protection by hiring in manpower rather than employ people on a temporary basis. If that becomes a reality the restrictive rules in the Act on Employment Protection simply cease to be of much importance in actual life.

Will Swedish employers make it a habit to turn to hiring out firms to overcome variations in demand for manpower? It is too early to predict but one important factor will of course be the number of people willing to work for hiring out firms. In the present situation with high unemployment chances are that many people will opt for such firms in the hope of getting at least some work. On the other hand it does not seem too likely that large numbers of people will since they stand to lose various benefits related to unemployment. Also, given that hiring out has been illegal for so long employers are not used to hiring in manpower. Furthermore, there probably is a feeling in Sweden that hiring in is something not quite *comme il faut*

and that serious employers will refrain from it unless there are strong reasons. By and large the union movement is against widespread use of hiring out of manpower and Sweden is a country where peace and harmony are highly valued. It would seem probable that unions will take the position that temporary need for extra manpower is met by temporary employment rather than by hiring in in all those cases where the Act on Employment Protection provides for temporary employment.

«Plus a change, plus a reste le même»[33], in other words? Not unlikely, I would suggest!

[33] The more things change, the more they remain the same. It should be noted, however, that hiring out firms seem to have expanded rapidly since legalised in 1991. It has been estimatede that as of January 1995 some 4 to 8 thousand people work on a hired out basis. Out of a working population of some 4 million people this figure corresponds to a modest 0,001 to 0,002 per cent. Estimates that the percentage of hired out people amounts to some 2 per cent of the working population in many Western countries indicate that hiring out in Sweden is (still) of insignificant proportions. Cf. an article in the daily Svenska Dagbladet, February 3, 1995, Business section, p 1 (Anna Körnung). Comparisons *before* and *after* legalisation are hazardous here since hiring out did occur even *before*, albeit illegally. Obviously, estimates of the number of illegals tend to be an exercise of conjecture!