

Ronnie Eklund 2017-04-17. Report to European congress in Prague 20-22 September, 2017

## **Temporary Agency Work Directive – As Hollow As Swiss Cheese?<sup>1</sup>**

To start with, it was an open question whether the Directive on Temporary Agency Work proposed by the Council would lead to any new developments, considering the past failures.<sup>2</sup> However, the European Parliament voted in favour of the text of the EU Temporary Agency Work Directive agreed by the Member States at the European Employment Council in October 2008.<sup>3</sup> So the Temporary Agency Work Directive 2008/104 EC was enacted on 19 November 2008. Implementation by the Member States should have been finalized by 5 December 2011.

To put things into perspective, first a short account is given of the development of public employment agencies and private staff agencies from the perspective of international labour law. These two constructs are linked together.

## **International Legal Background with Respect to Public Employment Exchange and Private Temporary Work Agencies**

In the past, the establishment of public employment agencies could be viewed as a policy device designed to eliminate low-quality private employment agencies. Article 1 of the ILO Employment Service Convention No. 88/1948 set the standard, stipulating that a ratifying

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<sup>1</sup> The metaphor with the Swiss Cheese comes from an earlier article of mine, assessing the impact of Directive 2008/104 on Swedish law, see R. Eklund, 'Who Is Afraid of the Temporary Agency Work Directive?', *Skrifter till ANDERS VICTORINS minne (Iustus Förlag 2009, 139-166)*, with further references to my articles on temporary employment agencies. The 2009 article is available at the following link: <http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund.pdf>.

<sup>2</sup> COMMON POSITION adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on temporary agency work, SOC 360, CODEC 764, 6 August 2008.

<sup>3</sup> European Parliament legislative resolution of 22 October 2008 on the Council common position for adopting a directive of the European Parliament and of the Council on temporary agency work, P6 TA (2008) 0507.

member 'shall maintain or ensure the maintenance of a free public employment service'. It must be borne in mind that public employment agencies, whose main task is to channel job opportunities to job seekers, are bypassed in those segments of the labour market where private agencies or other persons act as intermediaries between employers/recruiters and job seekers. Such activities frustrate the objectives of the state monopoly.<sup>4</sup> Private staff agencies came into being in the 1960s, which is not such a long time ago.<sup>5</sup>

The first international standards on private employment services were set by the ILO Convention on Fee-Charging Employment Agencies No.96/1949 (revising Convention No. 34/1933). A more recent ILO document in the same area was the ILO Convention on Private Employment Agencies No. 181/1997, which has replaced Convention No. 96/1949 in an attempt to modernize the law relating to staff agencies in order to promote flexibility in the functioning of the labour market. The aim of Article 2 of this Convention is 'to allow the operation of private employment agencies as well as the protection of the workers using their services'.<sup>6</sup>

The ILO has thus bypassed the European Union in managing to modernize the old, restrictive covenants of the 1949 Convention. This step implies quite a dramatic shift in attitudes towards temporary work agencies. However, one should bear in mind that the ILO Convention has a slightly different design than the forthcoming EU Directive on Temporary Agency Work.

The tri-partite relationship between a temporary work agency, a temporary agency worker and a user undertaking is complicated. The relationship between a temporary work agency and a user undertaking is based on a commercial contract. The relationship between a

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<sup>4</sup> See A. Bronstein, *'Temporary work in Western Europe: Threat or complement to permanent employment?'* International Labour Review, Vol. 130, 1991, No. 3, at 293: 'It can be argued that [the temporary work agencies] undermine the monopoly which public employment agencies enjoy in many countries'.

<sup>5</sup> Loc. cit., at 304.

<sup>6</sup> By November 2016 thirty-one countries had ratified this Convention, including the following EU Member States: Belgium, Bulgaria, the Czech Republic, Finland, France, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia and Spain.

temporary work agency and a temporary agency worker is of a twofold character: a temporary agency worker is usually an employee of a temporary work agency, but at the same time the same worker is assumed to perform work for another employer - the user undertaking. In civil law it means that a contract is concluded in favour of a third party as regards their right to request that work be performed.<sup>7</sup>

## **The EU Agenda**

It is a long story. Several attempts have been made to place the issue of temporary agency work on the European agenda, first in 1974,<sup>8</sup> and subsequently in 1980,<sup>9</sup> 1982,<sup>10</sup> and in 1990 - a proposal that was inspired by the 1989 Charter of Fundamental Rights of Workers.<sup>11</sup> All have failed.

However, in the mid 1990s the European Commission encouraged the social partners to do something about atypical employment forms. As a result of this, Directive 97/81 on part-time work and Directive 98/70 on fixed-term employment contracts were adopted. The European social partners also conducted negotiations on temporary agency work between June 2000 and May 2001, but the talks broke down.

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<sup>7</sup> See, as regards German law, B. Waas, *The Protection of Agency Workers - Lessons from Germany?* in FESTSKRIFT TILL ANN NUMHAUSER-HENNING (Juristförlaget i Lund, 2017), p. 795.

<sup>8</sup> Council Resolution of 21 January 1974 concerning a social action programme, OJ C13, 12.2.1974, at 1–4 and COM(73) 1600 final, Social Action Programme, Bulletin of the European Communities, Supplement 2/74, at 16, 26.

<sup>9</sup> COM (80) 351 final. Guidelines for Community action in the field of temporary work (agency work and contracts for a limited period).

<sup>10</sup> COM (82) 155 final. Proposal for a Council Directive concerning temporary work, amended in 1984, COM (84) 159 final. Amended Proposal for a Council Directive concerning the supply of workers by temporary employment businesses and fixed-duration contracts of employment.

<sup>11</sup> COM (90) 228 final. Proposal for a Council Directive on certain employment relationships with regard to working conditions.

To maintain the political momentum the Commission launched a draft Directive on working conditions for temporary workers in March 2002,<sup>12</sup> incorporating the points “largely” agreed upon during the negotiations between the social partners, formulating also provisions to overcome the remaining contentious issues.<sup>13</sup> According to the Commission the real bone of contention was the concept of ‘comparable worker’ under the proposed non-discrimination principle<sup>14</sup> Article 5.1 of the draft Directive provided therefore that ‘the basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job’.

The initiative of the Commission failed due to the resistance of the U.K., Ireland, Denmark and Germany, who blocked the proposal at a meeting in Brussels on 2–3 June 2003.<sup>15</sup> It is obvious that these countries, making up “The Gang of Four”, never had the political will to put forward any regulations governing the work of temporary work agencies. It seems that every Member State seemed to want a Directive that had as little impact as possible on their domestic regulations in the area.<sup>16</sup>

Already back in 2004 there were rumors that the Commission had a ‘dirty deal’ in view, intending to make a trade-off between the Working Time Directive, then subject to revision, and the Temporary Agency Work Directive in order to appease the United Kingdom.<sup>17</sup> As the saying goes: There’s no smoke without fire! What has actually happened was that on 19 May 2008 the U.K. Government signed a Joint Declaration with the TUC and the CBI, stating that

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<sup>12</sup> COM (2002) 149 final. Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, revised in COM (2002) 701 final. Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers.

<sup>13</sup> See for a more lucid account relating to the events concerning the draft Directive, K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, C. Vignaeu & L. Zappalà, *TRANSNATIONAL LABOUR REGULATION. A CASE STUDY OF TEMPORARY AGENCY WORK* (P.I.E. Peter Lang S.A. Brussels 2008) (henceforth Ahlberg et al), at 218–247.

<sup>14</sup> COM (2002) 149 final, at 9, but as the events developed this aspect was not the only contentious issue which was brought up.

<sup>15</sup>The final offer from the blocking minority is summarized in Ahlberg et al, at 246.

<sup>16</sup> Loc cit., at 251–2.

<sup>17</sup> Loc cit., at 248.

it would support the draft EC Directive on Temporary Agency Work, provided that certain provisions of the Working Time Directive were revised. No amendments of the Working Time Directive took place, however. In the preliminaries, it was envisaged that a 12-week qualifying period should apply to temporary agency workers before the right to equal treatment would begin to apply, disregarding the non-discrimination principle laid down by the same Directive. In the final Directive an exception to the right to equal treatment was made for “a qualifying period” (Article 5.4, first para.).<sup>18</sup>

On 11 June 2008 a qualified majority of the Member States adopted a ‘Political agreement on a common position’.<sup>19</sup> On August 6 the Council adopted a common position.<sup>20</sup> The Parliament approved the common position in October 2008.<sup>21</sup> Directive 2008/104 was accordingly adopted. In its wider context the Directive is meant to promote “flexicurity” in the European labour market (see Recital 11 of the Directive).

*Transaction costs* at Community level to accomplish the Directive must have been tremendous, taking into consideration that the first draft Directive was launched already in 1980. Taking into consideration transaction costs in any transaction is a basic principle of law & economics.<sup>22</sup>

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<sup>18</sup> However, in the UK, the Agency Workers Regulations 2010 (Statutory Instruments 2010:93) provide in Article 7 a qualifying period amounting to 12 continuous calendar weeks in the same role with the same hirer. Furthermore, the British position is special inasmuch as according to common law a contract of employment requires a *mutuality of obligations*, which is not the case with respect to temporary agency workers where the day-to-day control devolves on the end-user, while the day-to-day securing and pay fall on the agency; see in particular J. Prassl, *THE CONCEPT OF THE EMPLOYER*. (Oxford University Press 2015), at 40-46, 86-90 and E. Brown, *Protecting Agency Workers: Implied Contract or Legislation?*, *Industrial Law Journal* (2008), at 178-187. See a critical account of the Directive, by N. Countouris & R. Horton, *The Temporary Agency Work Directive. Another Broken Promise?*, *Industrial Law Journal* (2009), at 329-338.

<sup>19</sup> Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, SOC 358, CODEC 761, 11 June 2008.

<sup>20</sup> See note 2.

<sup>21</sup> See note 3.

<sup>22</sup> See a recent article of mine, R. Eklund, *At the Crossroads of Law and Economics – A Few Labour Court Cases Revisited*, in FESTSKRIFT TILL ANN NUMHAUSER-HENNING (Juristförlaget i Lund, 2017), at 199-218, also available at link: [http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund\\_FSNumhauserHenning\\_Offprint.pdf](http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund_FSNumhauserHenning_Offprint.pdf).

## Short presentation of the 2008 Directive

The Directive applies to *temporary agency work*. The purpose of the Directive is defined in Article 2. The provisions of Article 2 have been the subject of a hot debate. The aims envisaged under Article 2 of the 2002 draft Directive were twofold: 1) to ensure the protection of temporary workers, and 2) to establish a framework for the use of temporary work in order to contribute to creating jobs and the smooth functioning of the labour market.<sup>23</sup> The 2008 Directive has no longer a dual objective. Article 2 of the Directive stipulates that the purpose of the Directive is to ensure protection of temporary agency workers and to improve the quality of temporary agency work ‘while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.’

The definition of *basic working and employment conditions* is given in Article 3, together with other definitions of agency employees, their assignments, temporary agencies, working time, etc. It follows from Article 3.1.i that these basic conditions relate to ‘the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay’ in force in the user undertaking. Pay is to be defined by national law (Article 3.2).<sup>24</sup>

The provisions of Article 4 concerning the review of restrictions or prohibitions do no longer include an obligation upon the Member States to discontinue all restrictions or prohibitions on the use of temporary agency work. The Member States had once second thoughts as regards the necessity of eliminating such regulations. The Commission had to give in on this point.<sup>25</sup> It is now provided that restrictions and prohibitions should be justified “on grounds

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<sup>23</sup> See Ahlberg et al, at 241.

<sup>24</sup> The general apprehension in Community law is that the concept of “pay” covers all emoluments covered by Article 141 of the Treaty, i.e. that it is all-inclusive. However, the Commission never intended to cover additional social security benefits by the temporary agency work directive, loc cit., at 227.

<sup>25</sup> Loc cit., at 224, 228, 235, 239 and 241-2.

of general interest”. Articles 4.2 and 4.5 are pivotal. They provide (in parts) that “Member States shall .... review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on /grounds of general interest/”, and that the “Member States shall inform the Commission of the results of the review....”.

The ‘principle of equal treatment’ is laid down in Article 5.1 (formerly denominated as the principle of non-discrimination in the 2002 draft Directive). It means that the working and employment conditions for agency workers shall be “at least those that would apply if they had been directly recruited” by the user undertaking.

Derogations are found in Articles 5.2, 5.3 and 5.4.

Article 5.2 has come about basically to cater for the situation in Germany (and other countries). It provides that as regards *pay*, the equal treatment principle does not have to be applied “where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid in the time between assignments”<sup>26</sup>

Article 5.3 gives full recognition to Swedish practice relating to collective agreements and the autonomy of the social partners.<sup>27</sup> It provides that Member States may give the social partners

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<sup>26</sup> With respect to developments in Germany as regards agency work when looked at from a broader institutional perspective via legislation from 1972 and 2004, a reference is made to a Senior Research Fellow at the Management Department at Freie Universität Berlin, M. Helfen, *and Institutionalizing Precariousness? The Politics of Boundary Work in Legalizing Agency Work in Germany, 1949-2004*, (2015, SAGE Publications), and M. Fuchs, *The Implementation of Directive 2008/104 on temporary agency work in the UK and Germany*, *European Journal of Social Law*, September 2012, at 156-175. See also a note by M. Weiss, *The Crucial Role of Courts in German Labour Law*, in *SUI GENERIS, FESTSKRIFT TILL STEIN EVJU* (Universitetsforlaget Oslo, 2016), at 736-7 where it is reported that the Federal Labour Court has decided that some collective agreements concluded at a level significantly below the level of equal pay, as applying to temporary agency workers, have been held null and void. See also Waas, (above at n. 7, at 793); Germany is about to introduce new regulations that intend to restrict the use of temporary agency workers and to fight abuse of civil law contracts. The new law will come into force on 1 April, 2017.

<sup>27</sup> Cf. also recital 16 (diversity of labour markets) and 19 (autonomy of social partners), in particular the latter: “This Directive does not affect the autonomy of the social partners, nor should it affect relations between the social partners, including the right to negotiate and conclude collective agreements in accordance with national law and practices while respecting prevailing Community law”.

‘at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in Paragraph 1’ (of Article 5). It is significant with respect to Sweden that approximately 95 % of all temporary agency workers are covered by collective agreements. Firstly, the provisions make clear that the derogation from the equal treatment principle will be subject to the conditions laid down by the Member State. Secondly, such derogation must respect ‘the overall protection of temporary agency workers’. The provision will probably provide ample opportunities for a more global assessment of the working/employment conditions, in comparison with a strict listing of terms and conditions of work. Thirdly, the provisions make clear that a Member State ‘may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to’ in Article 5.1. No reference is made here to Community law as a parameter.

Article 5.4 is a thorny piece of legislation, and has been adopted in order to appease the U.K. It provides that Member States may, as long as an ‘adequate level of protection is provided for temporary agency workers – – – establish arrangements concerning the basic working and employment conditions which derogate from the principle established in [Article 5.1]. Such arrangements may include a qualifying period for equal treatment’ This model presupposes 1) that there is no system in law for declaring collective agreements universally applicable, or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, and 2) that a given Member State has consulted the social partners at the national level and acts in accordance with the agreement concluded by them. However, it follows from the second paragraph of Article 5.4 that arrangements referred to ‘shall be in conformity with Community legislation’ and that they shall be ‘sufficiently precise and accessible to allow the sectors and firms concerned to identify and comply with their obligations’, and, that, in particular, the Member State shall specify ‘whether occupational social security schemes, including pension, sick pay or financial



participation schemes are included in the basic working and employment conditions referred to in [Article 5.1]’.<sup>28</sup>

Finally, in Article 5.5 the Member States are admonished to ‘take appropriate measures ... with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.’

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

It should be noted, however, that recital 20 stipulates that the Directive does not prevent ‘national legislation or practices that prohibit workers on strike being replaced by temporary agency workers’<sup>29</sup>

## **Implementation of the Directive**

The Commission has evaluated the implementation of Directive 2008/104 in 2014.<sup>30</sup> The Directive applies to a small proportion of the overall workforce. In 2008 approximately 5 % of the UK workforce worked in a tri-partite agency setting.<sup>31</sup> All the Member States have

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<sup>28</sup> The British implementation is extremely lengthy (35 pages), see The Agency Workers Regulations 2010 (Statutory Instrument 2010 No. 93), in force since 1 October 2011. See also the Guidance issued by BIS (Department for Business, Innovation & Skills), Agency Workers Regulations, May 2011 (50 pages). It is also possible for a British temporary work agency to make use of Article 5.2 of the Directive (as regards pay) if there is a permanent contract of employment in force between the agency worker and the temporary work agency that is applicable after the qualifying period of 12 weeks, which means that a kind of minimum pay is guaranteed between assignments; refer to regulations 10 and 11 of the British Agency Workers Regulations 2010.

<sup>29</sup> The recital appeared in the second draft Directive of 2002. It had been discussed whether such a provision could be included in the Directive, but the Commission’s Legal Service indicated that it would be better if it were mentioned in the preamble, considering the content of Article 137.5 of the EC Treaty; see Ahlberg et al, at 207 and 209.

<sup>30</sup> COM (2014) 176 Final on the application of Directive 2008/104 on temporary agency work and SWD (2014) 108 Final on the application by Member States of Directive 2008/104/EC on temporary agency work.

<sup>31</sup> See Prassl, loc cit., at 40.

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

The Commission has stated that it will monitor the correct application of the principle of equal treatment as laid down in Article 5.1 of the Directive.<sup>32</sup>

With respect to the derogations as provided for in Article 5.2, the Commission raised a question whether the pay level of agency workers could be as low as the applicable minimum wage, if any, while minimum wages were not subject to any lower limit at all.<sup>33</sup>

With respect to the derogations in Article 5.3, a few Member States have availed themselves of this option.<sup>34</sup>

With respect to the derogations in Article 5.4, only the UK and Malta have taken advantage of this option.<sup>35</sup>

A more thorough survey has been conducted with respect to Article 4 of the Directive wherein the Member States are commanded to review the restrictions or prohibitions on the use of temporary agency in order to assess whether they are justified on grounds of general interest as provided for in Article 4.1.<sup>36</sup> The Member States shall also inform the Commission about the results of this review (Article 4.5). But the conclusions of the Commission are

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<sup>32</sup> COM (2014) 176 Final, at 6.

<sup>33</sup> Loc. cit., at 7.

<sup>34</sup> Loc. cit., at 7.

<sup>35</sup> Loc. cit., at 8.

<sup>36</sup> Loc. cit., at 8-13, and Annex 2 to SWD (2014) 108 Final, at 18-70.

somewhat bewildering:<sup>37</sup> it seems that the Commission does not know how to assess the meaning of a “general interest” as laid down in Article 4.1.<sup>38</sup>

In its conclusions in the 2014 report, the Commission states that it intends to continue to closely monitor the application of the Directive. As regards possible amendments to the Directive, the Commission states that more time is required to acquire wider experience regarding its application and to determine whether it has fully satisfied its objectives.<sup>39</sup>

### **Case law of the European Court of Justice**

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

In *Webb*<sup>40</sup> a British national was engaged in supplying temporary staff to firms in the Netherlands. Under Dutch law he was required to possess a license in order to provide such services. Since Webb did not hold a license he was subject to criminal proceedings by the Dutch authorities. The Court took the view that a licensing control might be appropriate since “provision of manpower is a particularly sensitive matter from the occupational and social

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<sup>37</sup> G. Sebardt has submitted an astute comment: “Everyone who has followed the process of the implementation of the Directive closely has been able to note the ambivalent stance of the Commission vis-a-vis Article 4”, *Last in, First out? The Agency Work Directive and the Swedish Staffing Industry as Part of the Swedish Labour-Market Model*, in EUROPE AND THE NORDIC COLLECTIVE BARGAINING MODEL. Ed. Jens Kristiansen (Tema Nord 2015.541) at 175.

<sup>38</sup> There is no doubt that many prohibitions or restrictions applied by the Member States with respect to the use of temporary agency work may be justified, though it is also true that some Member States have no regulations at all prohibiting or restricting temporary agency work. A number of reasons have been adduced by the Member States for upholding the prohibitions and restrictions. This is a titillating research area for a cross-border research team. My very low-profile point of view is that the Commission has realised that it is not politically correct to submit new benchmarks in this area.

<sup>39</sup> *Loc. cit.*, at 19-20.

<sup>40</sup> Case 279/80.

point of view”.<sup>41</sup> However, the control must not be tainted by discrimination on the grounds of the nationality of the provider, and must ensure that “it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established”.<sup>42</sup>

A similar case is *Van Wesemael*.<sup>43</sup> The case relates to the provision of entertainers from a French fee-charging employment agency to Belgium in violation of Belgian law which requires that a temporary work agency shall hold a license to be able to do that. The Court held that “taking into account the particular nature of certain services to be provided, such as the placing of entertainers in employment, specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the entertainer, which are binding upon any person established in the said state.”<sup>44</sup> However, when the pursuit of the employment agency’s activities in the State in which the services are provided requires a license, ‘such a requirement is not objectively justified when the service is provided by an employment agency which comes under the public administration of a Member State or when the person in another Member State holds a license issued under conditions comparable to those required by the State in which the services are provided’<sup>45</sup>

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<sup>41</sup> Para. 18. See also para. 17 about justifications based on ‘the general good’. In his opinion of 21 October 1981 the Advocate General came, in the main, to the same conclusions as the Court. In protecting temporary labour, the “general good”, as enunciated in the next case, *Van Wesemael*, was referred to.

<sup>42</sup> Para. 21

<sup>43</sup> Cases 110-111/78.

<sup>44</sup> The “general good” concept has already been enunciated already in Case 33/74 *Van Binsbergen* (the habitual residence requirement in the Netherlands was not justified with respect to the legal representative of a client in the light of the freedom to provide services), para. 12 which is explicitly referred to in the Opinion of Advocate General Warner 28 November 1978 in the *Van Wesemael* case.

<sup>45</sup> Para 28-29. See also C-53/13 and 80/13 *Strojirny Prostejov*. The case concerns two Czech undertakings using the services of a temporary employment agency in Slovakia, carrying out its activities in the Czech Republic via a branch. As users, the undertakings availed themselves, for a fixed term, of the labour of workers employed by the agency. Due to tax legislation the Czech undertakings were under an obligation to withhold advance tax on income payable to the workers whose labour they used, while this procedure did not apply to domestic employment agencies. This was held by the Court to be in violation of the freedom to provide services.

In *Vicoplus*<sup>46</sup> the issue related to Polish workers who were assigned to jobs in the Netherlands by Polish companies according to the posting provision of Article 1.3.c of Directive 96/71. The issue concerned fines imposed on the Polish companies that had not bothered to obtain work permits for their workers. The postings took place during the transitional period of the 2003 Act on Accession wherein restrictions were laid down with respect to the freedom of movement for persons. The Court adjudicated in favour of the Netherlands. It is more significant that the Court held that workers posted by a temporary employment agency actually do enter the labour market of the Member State where they are posted. The Court held the view that a worker who has “been hired out pursuant to Article 1.3.c of Directive 96/71 is typically assigned --- to a post within the user undertaking which would otherwise have been occupied by a person employed by that undertaking”.<sup>47</sup> This statement does not imply, however, that these workers are migrating workers within the meaning of Article 45 TFEU.<sup>48</sup>

It has also been made clear that Directive 2001/23 on transfers of undertakings may be applicable to the transfer of a temporary employment business in a situation where part of the administrative personnel and part of the temporary workers are transferred to another temporary employment business in order to carry out the same activities in that business for the same clients and when the assets affected by the transfer are sufficient in themselves to show that the services can constitute an economic entity.<sup>49</sup> It is also made clear that the Framework Agreement of Directive 1999/70 on fixed-term contracts does not apply to fixed-term workers placed by a temporary work agency at the disposal of a user enterprise.<sup>50</sup>

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<sup>46</sup> C-307-309/09

<sup>47</sup> Para. 31.

<sup>48</sup> See for a lucid analysis H. Verschueren, *The territorial application of labour law in the EU internal market. On Legal Rules and Economics Interests*, in FROM SOCIAL COMPETITION TO SOCIAL DUMPING. Eds J. Buelens & M. Rigaux (Intersentia 2016), at 64-84. It may be added here that workers who are sent to another Member State to provide services do not, in any way, *seek* access to the labour market in that second State, although they *gain* access to the same labour market, according to the Court, see C-113/89 *Rush Portuguesa*, para 16 and C-49/98 etcetera, *Finalarte*, para 22-23.

<sup>49</sup> C-458/05 *Jouini*. Cf. also C-386/09 (Order of the Court) *Briot* where the claim failed since the worker’s fixed-term contract with a temporary work agency had expired before the transfer of a business.

<sup>50</sup> C-290/12 *Della Rocca*.

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

The following case is the first case adjudicated by the Court (Grand Chamber) applying Directive 2008/104.<sup>51</sup> It concerns Article 4. In this case, the Finnish Labour Court brought up an issue with respect to a specific clause in a Finnish collective agreement from 1997 concerning the use of external workers. The main point in the agreement is that the use of external workers shall be restrictive, connected to peaks of work, or other tasks of limited duration or tasks which are of specific nature. It is also held in the agreement that if the temporary agency workers carry out the undertaking's usual work alongside the undertaking's permanent workers under the same management for a longer period of time the latter shall be deemed as unfair practice. It turned out that that Shell Aviation Finland had been using temporary agency workers, which AKT (the Finnish trade union) contested. The main question posed by the Finnish Labour Court was whether Article 4.1 of the Directive should be interpreted as laying down a permanent obligation on the national authorities, including the courts, to ensure by all available means that national legislation or collective agreement terms contrary to the directive shall be regarded respectively as null and void or not applicable.

The European Court held with respect to the meaning of Article 4.1 that 'that article must be read as a whole, taking into account *its context*'.<sup>52</sup> In this regard, the Court pointed out that Article 4, entitled 'Review of restrictions or prohibitions', formed a part of the chapter on the general provisions of Directive 2008/104.<sup>53</sup> The Court observed that the Member States were obliged to review their restrictions and prohibitions on temporary agency work, and that they were required to inform the Commission of the results of the review. The Court also stated

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<sup>51</sup> C-533/13 *AKT*.

<sup>52</sup> Para. 24. My italics.

<sup>53</sup> Para 25.

that the obligation 'is solely addressed to the competent authorities of the Member States. Such obligations cannot be performed by the national courts'.<sup>54</sup>

The Court showed restraint in the application of Directive 2008/104. It may also be noted that the Commission submitted the view in the proceedings before the Court that whenever the Commission 'learned of the existence of a restriction it could start a dialogue with the authorities of the Member State concerned in order to find the best way of bringing the provision in line with /the/ directive'.<sup>55</sup>

### **Addendum regarding Swedish staffing agencies from the real world**

Sweden has implemented Articles 5.1, 5.2 and 5.3 of the Directive to its domestic legislation.<sup>56</sup> It should be noted that almost the entire temporary agency work sector is covered by collective agreements, but the two major collective agreements are different in design.<sup>57</sup>

As indicated by the above-mentioned ECJ case law situations in which a temporary work agency can become involved in a legal dispute are manifold. It applies also in the Swedish context. In this report I limit myself, however, to three cases only, all of which refer to what is to be considered as "proper pay" for a temporary agency worker. None of the cases refers to or is based on the concepts of pay as laid down in Directive 2008/104. All three cases refer to the collective agreement applying in the blue-collar sector.

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<sup>54</sup> Para. 28. It may be added that the Advocate General adopted another approach inasmuch as he said that Article 4 did not lay down only procedural rules but also a substantive rule (para. 37), and that it would also include the national courts as watchdogs of Article 4.1 (paragraphs 84-86), but that the restrictions as laid down in the pertinent collective agreement were justified on the grounds of general interest (para.124).

<sup>55</sup> Opinion of Advocate General, para. 82.

<sup>56</sup> Official Gazette 2012:854.

<sup>57</sup> As applied to salaried employees an agreement was concluded between the social partners in 1988, and as applied to the blue collar-workers another umbrella agreement was concluded in 2000. Only the latter contains the equal treatment principle as far as pay is concerned. See for more details, Eklund (note 1), at 149-156.

**Labour Court judgment 2009 no 54.** The collective agreement provides in Section 5 (in parts) that pay (certain short-term assignments are exempted) 'is equivalent to the average wage level (T + P) as applied to comparable workers at the user enterprise.<sup>58</sup> P means performance pay, piecework rate, wage incentive, bonus and commission,<sup>59</sup> ---A comparable group refers to the organizational or clear vocational criteria of work at the user enterprise in order to create 'neutral wages' as a reference point for the temporary work agency's pay. In establishing the reference object, the proper worksite or area of activity will be treated as a unit'. The Court had to decide a case when the user enterprise, a large building company (NCC), had no building workers employed at its two worksites in Gothenburg. It is to these two sites that a temporary work agency sent Polish building workers. The agency was an Irish company and a member of the Swedish Association of Staffing Agencies. The Swedish Building Workers Union claimed that the wages of the Polish workers were not in compliance with the collective agreement (the difference amounted to some 875,000 Swedish crowns as applied to the two building projects). The Labour Court found that the wage level in the case should have been based on the wage level as applied to comparable groups of workers employed by the user enterprise in the Gothenburg *region* since NCC had other building workers employed there. To apply the agreement in this way was also considered to be in line with the purpose of the agreement, which was to secure that "neutral wages" should be applied by the temporary work agency according to the Court. The Court thus adjudicated in favour of the Union, and awarded exemplary damages amounting to 350,000 Swedish crowns due to a breach of the collective agreement.

In this way the Labour Court established a default rule in cases when temporary agency workers are sent to a user enterprise which does not have any workers employed at the workplace where the temporary workers have been assigned to by the temporary work agency. This conclusion did not follow explicitly from the wording of the collective

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<sup>58</sup> Hence, the equal treatment principle applies.

<sup>59</sup> In this context T means time rate of wages. When it is held that pay should reflect "the average wage level as applied to comparable workers", it is usually referred to GFL, which is a Swedish acronym for "genomsnittligt förtjänstläge" (average wage level).



agreement, but skilled judges have a built-in compass and found an “efficient” solution to the problem.

**Labour Court judgment 2009 no 94.** This case also relates to the above mentioned collective agreement, but the issue here was whether apprentices and so-called vacation trainees should form a part of a comparable group of workers, together with the regular building workers employed by another big building company (Peab). The temporary work agency had included such labour in the comparable group, and, as a result thereof their equivalent pay level was much lower than the pay level applied to regular building workers. The reason for this was that the apprentices and vacation trainees were either not fully skilled, or not fully trained. To start with, the Court found that this specific issue had not been discussed between the contracting parties when the temporary work agency’s collective agreement came into force in 2000, or at any later time. Based on this information the Court concluded that there was no consensus among the contracting parties. With respect to what the Court already stated in 2009 no 54, the Court concluded that apprentices, and to a far lesser degree so-called vacation trainees, could not be included in the group of comparable building workers.

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

**Labour Court judgment 2015 no 74.** This is again a dispute relating to the pay provision in Section 4 subsection 2 (formerly Section 5) of the same temporary work agency collective agreement. The provision provides: “The hourly or monthly pay /for temporary agency workers/ is equivalent to the average wage level (T + P) as applied to comparable workers at the user enterprise. P means performance pay, piecework rate, wage incentive, bonus and commission. --- In order to fix P, which is calculated post factum (the accounting period is set to a maximum of 3 months), it shall be based, if the local parties do not agree otherwise, on the latest known accounting period”.

The facts were the following. *Randstad Ltd* - a member of the Swedish Association of Staffing Agencies – was bound by the collective agreement in question. *Randstad Ltd* hired out workers to *Scania Ltd*. *Scania* applied a bonus system called SRB (Scania Result Bonus). A dispute arose over the question whether some parts of that bonus system formed a part of P (as stated above) and whether they corresponded to the average wage level (GFL). The petitioner (*Federation IF Metall*) argued that this was the case, since a performance wage system was applied here, where a bonus was paid according to the collective agreement. The employer parties rejected this view and argued that the bonus was something that *Scania* had unilaterally established, and that it had no relation to the productivity of a worker, but solely to the quality of the production (i.e. profit). SRB also runs on a yearly basis, and a bonus is funded by a profit-sharing foundation. The individual worker cannot liquidate his/her balance until after 4 years have passed from the funding of the bonus. The Court adjudicated in favour of the employer and declared that the bonus did not form a part of P relating to the average wage level, following Section 4 subsection 2 of the agreement with reference to the accounting period of a maximum of 3 months.

I stop there. Thank you!