

Agency Work - from Marginalisation towards Acceptance? Agency work in EU Social and Employment Policy and the “implementation” of the draft Directive on Agency work into German law

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A. Introduction

During the last few years, agency work has received heightened legislative attention in Europe, on an EU level as well as on national level, since the early 1990s. This interest was spurred by the relative growth of the sector as well as by the hope that agency work might offer solutions to unemployment by providing enhanced flexibility. As a result, agency work is no longer considered as a form of employment to be shunned, but has gained in acceptance. This article undertakes to analyse the legislative development towards acceptance of agency work by comparing the EU approach with the German approach. Over and above the specific issue of agency work, the question whether needs for flexibility of employers and employees are capable of being reconciled by recourse to new methods of organising work and what regulatory policy is most likely to achieve this, forms a background to our considerations.

After giving an overview of the definition of agency work with a specific reference to the inherent risks and the potential of enhancing flexibility and resulting regulatory approaches, we will consider the EU strategy on regulating agency work, especially within the conceptual framework of the EU employment policy. The next step is to analyse the German case with reference to the historical development of the approach towards agency work and an analysis of the latest legislative reform and its practical consequences. The conclusion assesses whether the German legislation complies with the draft directive, which national peculiarities shape its practical effects and what recommendations may be referred for the final version of the draft EU directive.

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B. Agency work – definition, potential, regulation

I. Definition of agency work, distinction from other triangular relationships

Agency work – often also termed “temporary work” or temporary agency work¹ – is characterised by a triangular relationship between a works agency, a user firm and an agency worker.

The works agency undertakes to provide the services of choosing a capable employee (possibly including his or her training) and assigning him or her to the user firm, usually also to pay wages and along with this to take care of such formalities as to deduct social security contribution and taxes in line with statutory requirements. While the works agency often is the (formal) employer, the purpose of this employment relationship is to confer to one or several consecutive user firms the employer’s right to direct the work for which the worker is assigned. The agency worker is thus obliged to work by directives of the user firm instead of the agency. Whether only the works agency, only the user firm or both the works agency and the user firm are considered employer of the agency worker differs between different national laws.

Triangular relationships between two employers and workers also occur in a different setting, that is referred to as posting of workers. In this case, one firm employs workers to provide certain services. In order to fulfil a contract with another firm, it posts these workers to work in that other firm, while retaining the right and the obligation to actually direct their work. In this case, there is one employment contract only, that between the first firm and the worker who is posted to the second firm. Often it is difficult to distinguish posting from agency work in practice. Statutory provisions in different EU Member States impose different models of agency work to those participating in the underlying triangular relationship². Leg-

¹ The term „temporary work“ is actually used more often than agency work, inter alia by the EU institutions. However, this vocabulary unduly stresses the temporary character of agency work, although agency work based on an indefinite contract of employment is certainly the socially more desirable model. The term “temporary work” may even lead to confusion of agency work and fixed term work, as both terms are used interchangeably in legal English (see e.g. Murray, J. Normalising Temporary Work, 26 *Industrial Law Journal* (1999), 269, discussing the EU Directive on Fixed Term Work) For these reasons, we will use the terms “agency work” (not temporary work or temporary agency work), “works agency” (not temporary works agency or “employment agency”) and “agency worker” (not temporary workers) in the following.

² See Storrie, D.: *Temporary Agency work in the European Union*. Dublin: European Foundation for the Improvement of Living and Working Conditions, 2002, at 5-12; Feuerborn, *Europäischer Vergleich*, in: Schüren, P./ Feuerborn, A./ Hamann, W., *Arbeitnehmerüberlassungsgesetz. Kommentar*. 2nd ed. München: Beck 2003, 119-125. This summary also relies on the country reports given at the Pontignano Seminar 2004 on 24 and 25 July 2004 (F. Scarpelli: *Relazione al Seminario di diritto del lavoro comparato - Pontignano XXI*; “Agency Work” (unpublished, 2004); Luisa Corazza: *Italian Report Pontignano XXI*; “Agency Work” (unpublished, 2004); M.C. Rodríguez-Piñero Royo: *Temporary work and the information society: Spanish Report, Pontignano XXI*; “Agency Work” (unpublished, 2004); C. Sachs-Durand

islation may require that there is an employment relationship between the works agency and the agency worker only, or impose a split employer position on the works agency and the user firm, sometimes combined with a solidarity obligation as regards payment of wages. Statutory restrictions may also require that either the assignment (i.e. the contract between works agency and user firm) or the employment (i.e. the contract between works agency and worker) or both of these contracts are of limited duration. In other models the employment contract must be of unlimited duration. There may be specific rules as to the remuneration of the agency worker, sometimes requiring the agency to pay the worker an equivalent to what a worker employed by the user firm in the same situation would earn. If national legislation provides for specific protection either for agency workers or for posted workers, this may lead to artificial gains in the numbers of agency work or posting of workers, whichever relation receives less protection.

II. Potential for flexibility for user firms, agency workers and works agencies

Agency work is considered to have a specific potential to enhance flexibility in the labour market. This is mainly due to the opportunity for the user firm to outsource certain functions of recruitment and generally provision of labour. Taking recourse to agency work, an employer avoids or significantly reduces search costs on the labour market. When, as in most cases, agency work is only required temporarily, the user firm also avoids transaction costs incurred by dismissal or by complying with legal restrictions on fixed term employment. The user firm also is able to outsource most functions of the personnel department³.

However, there are also aspects of flexibility on the part of the employee, as e.g. the agency worker's opportunity to acquire a broad range of experiences⁴. If there is such opportunity, the worker can make use of it without incurring costs related to frequent changes of the employment relationship. In addition, works agencies may offer the opportunity to engage in on-and-off employment suitable to personal situations requiring a high degree of flexibility⁵.

Obviously, the agency is the actor that provides for both these kinds of flexibility. Accordingly, the question arises how the agency is still able to profit from its commercial activity. The answer lies in the employment conditions of the agency

& S. Robin-Olivier: French Report, Pontignano XXI; "Agency Work" (unpublished, 2004); T. Jaspers: Dutch Report, Pontignano XXI; "Agency Work" (unpublished, 2004).

³ See Storrie, *op. cit.*, at 33-34.

⁴ Storrie, *op. cit.*, at 59.

⁵ This latter aspect is mentioned in interviews with agency workers from Denmark, see Storrie, *op. cit.* at 53.

worker, which are on average less advantageous than those of other employees. Above all, agency workers are paid lower remunerations than comparable regular workers⁶. This corresponds with the fact, that most agency workers engage in this form of employment because it is for them the only alternative to (intermittent) unemployment. Thus, agency work, just as any other form of atypical employment, is a means of gaining access to an ever tighter employment market at a reduced overall price for one's labour. Again, this leads to the conclusion that agency work may become more advantageous for agency workers if there is a situation of labour shortage.

All in all, there is some hope that over and above primitive methods on saving on employment costs, there is also a qualitative aspect of enhancing flexibility through agency work. Especially large works agencies, such as ADDECCO and MANPOWER, manage a wide portfolio of employment opportunities as well as employees. This diversity may enable them to profit from economics of scale and actually reduce the costs of complying with requirements of legislation on dismissal and fixed term contracts as well as of administration of employment contracts regarding payments, social security contributions and tax deductions⁷.

As is witnessed by the averagely low quality profile of agency work, these advantages are more often than not shared between the agency and the user firms only, without any of them being passed on to the employee. This does not alter the fact that the economic advantages of agency work inherent in a heightened degree of flexibility are capable of being shared between user firms, agencies and workers. However, it seems that such sharing will not occur on its own, except if there is some incident of labour shortage. Inducing a reasonable sharing of advantages of agency work between agency, user firm and employees might be a rationale for regulating agency work.

III. Regulatory approaches to agency work

Regulatory approaches to agency work differ between the Member States of the EU and have changed in recent years.

⁶ Storrie, *op. cit.*, at 54-56. However, in a situation of labour shortage, agency work may also be used to provide a higher-pay sector without altering the collective agreements prematurely. According to Storrie, this is one aspect of agency work in nursing in Sweden and Denmark (*op.cit.*, at 54, with notes 79 and 80).

⁷ Similar hopes are expressed by Storrie, *op. cit.*, at 33.

1. Restrictive approaches

While some Member States have always had a rather liberal approach to agency work⁸, in most Member States agency work used to be a regulated sector. Above all, a works agency would need to obtain a licence in order to legally provide its services. Some Member States even outlawed commercial agency work provided by private undertakings altogether⁹. In addition, specific provisions to protect agency workers were in place in many Member States.

The reason for this restrictive approach was (and partly still is) the perception of agency work as precarious work. The main source of such precariousness lies in the risk inherent in the splitting of the employer's position. The agency worker, who has a contract of employment only with the works agency, is not able to rely on the assets of the user firm for securing his or her wages. As providing agency work may only require limited material assets, such as an office and some equipment, the wages may be less secure. Also, there was in the past some experience with abuse on the part of the works agencies. Wages were not always paid on time, and social security and tax not always deducted in full. A different risk perceived was that of agency work being used to replace regular work or to lower wages of regular workers lest they be replaced by agency workers.

2. Reasons for changes in approach

The restrictive approach is subject to change in recent years. One of the reasons, as well as outlawing as of over regulating agency work, are the negative effects going along with the resulting illegalisation of agency work. As has been mentioned, it is often difficult to distinguish agency work from posting of workers on a factual basis. Accordingly, a prohibition or over regulation of agency work will lead to provide posted work instead, although both forms of outsourcing labour are not strictly functionally equivalent. The costs of evading legislation will have to be borne, whether they are generated by the need to conceal illegal agency work or by the need to use an organisation of work less ideal for the tasks required. In the case of illegal agency work, these costs will be imposed more often than not on the agency worker, who is structurally vulnerable. In an environment of prohibited agency work, agency workers' opportunities to unionise or to gain access to collective representation are limited, which further contributes to their weak position.

⁸ Notably the UK, Ireland, Finland and Denmark (see COM (2002) 149 final, at 4), and the Netherlands since the 1970's.

⁹ This was the case in Italy until 1997 and in Spain until 1994; information from the national reports delivered by M. Rodriguez-Pinero Royo, Scarpelli and Castrozzo, *op. cit.* at note 2.

A completely different reason for a more positive attitude towards agency work is its increasing economic attractiveness as a form of outsourcing tasks. In response to the knowledge and information society¹⁰, firms need to reorganise themselves to be able to rapidly adapt to changes. Concentrating on such activities that are decisive for their business character and “slimming down” on all other activities is one way to achieve this aim. Mainly, the appropriate means will be outsourcing of tasks (using posted workers as a result) rather than outsourcing of labour (using agency work). However, when the outsourcing would also refer to administration of wages, social security contributions and tax deduction and possibly also searching and training personnel, agency work might be an adequate solution.

Both outsourcing of tasks and outsourcing of work lead to downsizing of organisational entities. These are often perceived as an economic advantage in itself for the resulting reduction in management costs. Smaller employment units may also lead to avoiding statutory thresholds for protective legislation. Last but not least, slimming down on costs may induce employers to seek for ways to avoid costs of compliance with statutory requirements of dismissal law and legislation on fixed term contracts. Even the latter is not necessarily bad, but certainly deceptive of shifting risks, often to the employee. However, not all the “new” reasons for agency work are necessarily such that their satisfaction would detriment workers. There may thus be ways of using less restrictive approaches to agency work while providing for social forms of agency work at the same time.

3. Possible responses to the need for change

In response to these changes, national legislators and the EU legislator have sought to reduce restrictions of agency work, while introducing (new or more effective) protective legislation. The rationale behind both may be to make agency work more acceptable, inducing employers and employees to make use of its advantages especially in employment environments characterised by a great need for flexibility.

C. Agency work and its regulation on EU level

As regards the EU level, we need to distinguish two divergent strategies of legal impact that have become known under the catchwords negative and positive integration.

¹⁰ On the role of agency work in the knowledge and information society see Blanpain, R. & Graham, R. *Temporary Agency Work and the Information Society*, The Hague et al: Kluwer International Law, 2004

I. Negative integration

As regards the directly effective Treaty norms that incite negative integration in the case of agency work, these are Article 49 EC on free movement of services and – although with less practical relevance so far – Article 43 on freedom of establishment. According to the established case law of the European Court of Justice, a works agency with its corporate domicile in one of the EU Member States may rely on Article 49 EC in order to provide a trans-border service of assigning workers¹¹. While the ECJ held in 1981, that Member States had a wide discretion to subject such agencies to national legislation requiring a permission, the same Court took a stricter view in 2001, when it had to decide whether a specific clause from the German legislation on agency work contravened Article 49 EC¹². That clause exempted the activity of seconding workers to a consortium in which the employer of the workers was a member from the statutory definition of agency work and thus from the requirement of obtaining a permission. However, the exemption was subject to the further requirement that the collective agreements of the same branch of industry apply to all members of the consortium¹³. Due to the general rules on conflicts of law attaining to collective labour agreement, that requirement was only fulfilled by employers domiciled in Germany. The ECJ held that a requirement to have an establishment in Germany could not be justified, even in the light of the specific precariousness inherent in contracting out of labour in the construction industry. Accordingly, we can conclude that Article 49 may render some specific parts of protective legislation in favour of agency workers as inapplicable in national law. This then is the classical case of negative integration, as the relevant protective legislation becomes ineffective, without any replacement by a different rule serving the same social aim but having less intrusive effects.

¹¹ ECJ case 279/80 (Webb) [1981] ECR 3305, concerning the question whether the owner of an English works agency that was in possession of the relevant permit required under English law may be obliged under Dutch law to obtain a second permission if its main economic activity consists of the provision of agency work for the Dutch market. The Court held that this was possible, with a view to the differences in the labour market.

¹² ECJ Case 493/99 (Commission v Germany) [2001] ECR I-8163.

¹³ The same requirement also applied to some other cases, for example for the sake of misapplication of the general prohibition of seconding of workers in the construction industry (§ 5 AÜG).

II. Positive integration

Unsurprisingly, there have been attempts to establish positive integration through Community legislation in the field of agency work.

1. Regulatory history

In its first package on regulating “atypical employment” from the 1980s, the Commission had included provisions on agency work¹⁴. However, these proposals and also their successors¹⁵, were never passed. Only at the turn of the century, legislative attention for agency work on EU level was renewed. This resulted from the programmatic conception of the European Employment Strategy developed during the Lisbon Council in 2000¹⁶ with its central pillars of employability, adaptability and entrepreneurship instituting the new temple of the “most competitive and dynamic knowledge based economy in the world, capable of sustained economic growth with more and better jobs and greater social cohesion”. In the EU employment guidelines, the reconstruction of the EU labour market with the aim of instituting a satisfactory and flexible system of organising work has been a recurrent theme. It is thus only logical, that the EU Commission, when reconsidering its proposal on conditions of agency work from the 1990s under the Nice Social Agenda, grasped the opportunity to envisage a regulatory framework that would establish agency work as a form of employment meeting entrepreneurial “needs for flexibility”, employees’ purported “need to reconcile work and private life” and the European labour market need for “job creation” and enhanced “participation and integration in the labour market¹⁷” at the same time. The EU Commission initiated social dialogue on the question and, when this failed, tabled a draft directive that attempted to combine high quality employment for agency workers with a high degree of flexibility of the works agencies. Following intensive lobbying by the International Confederation of Temporary Work Companies¹⁸, the Council failed to

¹⁴ Short reference to this is made in the explanatory memorandum to the newly proposed directive, COM (2002) 149 final, at. 8.

¹⁵ The latest successor dates from 1990, COM (90) 228 final, OJ 1990 C 224/8.

¹⁶ See Zappalà, L. *The Regulation of Temporary work in the light of Flexicurity: Between Soft law and hard law*, Centro Study di Diritto del Lavoro Europeo, Massimo d’Antona, Catania, Working Paper 21/2003, at.2-4.

¹⁷ All the citations in the last lines are from recitals 3, 4 and 11 of the amended proposal for a directive of the European Parliament and the Council on temporary work, COM (2002) 701 final.

¹⁸ CIETT-Europe. This organisation had – after the social dialogue between the ETUC for the employee side and UNICE, CEEP and UEAPME for the employer side had been suspended due to insurmountable

achieve agreement on this proposal in June 2003¹⁹. Possibly, the attempt to achieve high flexibility for both agency workers and user firms of agency work had failed to reserve enough economic incentive for works agencies from their own point of view.

2. Contents of the proposed directive

The proposed directive's explicit aim is to make maximum use of the "flexibility potential" inherent in agency work. Undertakings' needs for flexibility shall be met as well as those of employees (recital 11). This leads to the aim to establish a protective framework of agency workers and at the same time to provide works agencies with a flexible framework conducive to their activities (recital 12, see also Article 2 para. 1). This latter combination of aims might seem contradictory at first sight. Considering the inherent potentials of agency work to flexibility, we can also read it as the Community's resolution to provide for mechanisms to share profits from agency work between agencies and employees. To achieve its aim, the proposed directive combines an obligation on Member States to legalise agency work and to remove restrictions with an obligation to grant agency workers minimum rights.

Its scope of application (Article 1) embraces all public and private undertakings operating agency work and all agency workers, defined as working under the supervision of a user undertaking. The draft directive allows Member States to exempt agency work that is publicly supported and serves the purpose of training or integration from the scope of application of the implementing legislation after consulting the social partners. Obviously, the Commission was not too sure that agency work was flexible enough for the task of combating unemployment when burdened with protective regulations, although to contribute to creating jobs and smoothing of functioning of the labour market is cited as one of the Directive's aims (Article 2 para. 2).

As regards the obligation to review prohibitions and restrictions of agency work, Member States are to review all restrictions and notify the Commission of those they uphold (Article 4). Any restriction of agency work must be justified on grounds of general interest, among them the protection of agency workers. However, any national requirements for works agencies to register, obtain a licence or even to provide financial guarantees remain untouched (Article 4 para. 3).

disagreement - initiated its own social dialogue with a European Union of Agency Workers (Uni-Europe), the result of which was a positive common position with the aim of inciting the Commission to provide a new proposal for a directive, refraining from including principles such as equal treatment (http://europa.eu.int/comm/employment_social/news/2001/oct/201_de.html).

¹⁹ 2512th Council meeting Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 2 and 3 June 2003, Agenda Part A, Temporary Agency Work: Public Deliberation.

The principle of “non-discrimination”, as the heading of Article 5 still reads, obliges the Member States to provide that the basic working and employment conditions of agency workers are at least equivalent to those of employees recruited directly to the user firm (Article 5 para. 1). This rather embodies a principle of equal treatment, and explicitly allows for better treatment including higher payment of agency workers.

The principle of equal treatment had been the main reason why the social partners could not achieve agreement on agency work. The employers would not consent to any rule that would force them to forgo the price advantage of agency labour. In the Commission proposal, the principle is consequently watered down to some degree, most prominently by a wide array of exceptions. The most deceptive provision in this respect is Article 5 para. 1 second sentence, which provides that the rules in force in the user firm on protection of pregnant women, nursing mothers and children and young people as well as rules on equal treatment for men and women and to combat discrimination based on sex, race or ethnic origin, religion, belief, disabilities, age and sexual orientation must be complied with. This is a first hint that nothing else needs to be complied with strictly. Article 5 paras. 2, 3 and 4 provide for exceptions from the principle of equal treatment.

First of all, Member States may provide exemptions for any assignment that due to its nature or duration does not exceed six weeks (para. 4). This is referred to as “qualification period”, which hints to the fact that any formal restriction of the assignment is sufficient to allow deviation from the principle of equal treatment. Member States may also admit exemptions where the agency employs the worker for longer periods and provides payment between assignment (para. 2). Both these exceptions only apply to pay. As regards all the basic working and employment conditions, Member States may provide for social partners to be able do deviate from the principle of equal treatment through collective agreement (para. 3).

Other protective provisions provide for easier access of agency workers to permanent quality employment (Article 6) and for their adequate collective representation (Article 7). Agency workers shall be informed of vacancies at the user firm; any clauses restricting their ability to change to any such position must be outlawed. The latter is now notwithstanding a reasonable remuneration to be paid by the user firm to the employment agency. However, workers shall not be charged any fee. The sensitive issue of training for agency worker by works agencies or user firms is left to “suitable measures” to be taken by the Member States. Such suitable measures do not require more than to “promote social dialogue”. As regards collective representation, Member States should be obliged to provide that agency workers count towards any thresholds for establishing a worker representative body in the works agency; whether this also applies to representation at the user firm is left to the Member States’ discretion (Article 7).

3. *The perspectives of adoption and effects without or prior to adoption*

The Council, although in unbridgeable disagreement in June 2003, foresaw further discussions and also a possibility to eventually achieve agreement. Issues to consider would be qualification periods, extremely long implementation periods or further “special treatment” of the equal treatment principle.

Even if the directive is not adopted within the near future, its content is bound to be influential. As mentioned, flexibilisation of working conditions is one requirement in the employment guidelines²⁰. Enhancing the use of agency work is one way to achieve at this aim. The proposed directive may serve as a model to Member States willing to submit to the pressures inherent in the guidelines. In addition, specific Community policies will highlight the need of agency work. For example, in its opinion on the role of micro and small enterprises, the ECOSOC stresses the necessity of agency work for these companies, lest they be forced into undeclared work²¹. Accordingly, the reform of agency work in Germany effective from January 2004, attempting prematurely to implement the draft directive, remains appealing not only from a national perspective, but also as regards future European legislation.

D. Regulation of agency work in Germany

In Germany, a new conception of agency work has been at the centre of one of the “modules” of the Hartz legislative package²² provided to combat unemployment. This module provided that public employment agencies on regional level should contract out the task of integrating unemployed persons into the labour market to works agencies. These works agencies should find assignments for the unemployed that offered an opportunity for them to become a regular employee of that firm. As assigning employees with the aim of losing them to user firms is not the usual activity of works agencies and also due to perceived difficulties in finding assign-

²⁰ The Employment Guidelines 2002 (2002/117/EG, OJ L 60/60) demanded from the Member States to provide for a modernisation of organisation of work by providing for a variety of flexible employment in their legislation (OJ L 60/67 under III No 14). The Employment Guidelines 2003 (2003/578/EC, OJ L 197/13) repeat the same aim under different headings. In order to “Address Change and Promote Adaptability and Mobility in the Labour Market”, Member States are again encouraged to promote “ a diversity of contractual and working arrangements” that provide for “a better balance (...) between flexibility and security” (OJ L 197/18, under 3.) and the design of “innovative and sustainable forms of work organisation” (OJ L 197/19, top). Especially as regards “Job Creation and Entrepreneurship”, Member States are still encouraged to “simplify and reduce administrative and regulatory burdens” (OJ L 197/18, under 2).

²¹ 2003/C 221/12, [2003] OJ C 220/50, No 3.3.6., fifth indent (page 59).

²² See Keller, B., *The Hartz Commission Recommendations and Beyond: An Intermediate Assessment*, 19 *The International Journal of Comparative Labour Law and Industrial Relations* 2003, 363-386.

ments for unemployed persons, the works agencies should receive an adequate compensation for their specific efforts. As a side effect, and in line with a changed perception of agency work in general, restrictions on agency work in general were loosened. Once true to what may be referred to as a typical German tendency of over-obedience²³, the government decided to include those provisions that it perceived as necessary to implement the draft directive on agency work. As a result, first experiences with the German legislation may be used for guidance as to which direction the renewed proposal on EU level should go. As any employment regulation and especially its effects are only capable of being analysed in a socio-historic perspective, a short overview of the development of Germany's approach to agency work is given.

*I. History*²⁴

In the late 19th century, there was little restriction on agency work and job placement, activities that were used interchangeably at that time. Commercial employment agencies operated side by side with charitable ones, both subject to public licenses, as any economic activity at the time. As a reaction to abuses, federal law of 1910 provided withdrawal of a license for an employment agency if there was a public or charitable agency. This was the first step towards a public monopoly for job placement, that was reinforced by the Job Placement and Unemployment Insurance Act (*Arbeitsvermittlungs- und Arbeitslosenversicherungsgesetz - AVAVG*) of 1927. Agency work, however, remained legal. The only restriction was that the agency had to employ the workers whom it assigned (§ 54 para. 3 AVAVG 1927), as agencies that engaged freelancers who were paid only for actual assignments were deemed to provide illegal job placement. The first step towards a direct restriction of agency work occurred in 1941, when regulation by the Federal Labour Ministry recommended that public employment offices should discourage agency work. When the system of job placement and unemployment services was rebuilt after World War 2 and the Federal Employment Service was guaranteed a monopoly for any job placement activities, the new legislation considered works agencies to be engaged in job placement and consequently prohibited any commercial activity in relation to agency work (§ 37 AVAVG 1957). In 1963, the Swiss firm "ADIA INTERIM" founded an office in Hamburg, concentrating on assignment of secretarial staff. This led to legal proceedings as ADIA's commercial activity violated § 37

²³ This national character does not always prevail in relation to EU labour law, as is witnessed by the numerous cases before the ECJ in relation to the Gender Equality Directives and the necessity for the Commission to start proceedings against Germany because it failed to implement on time Directives 2000/43/EC and 2000/78/EC relating to equality of persons irrespective of race, ethnic origin, religion and believe, sexual orientation, age and disability.

²⁴ General source: Schüren, *Einleitung*, No 20-76, in: Schüren et al, *AÜG*, 2003 (op cit note 2).

AVAVG 1957. The case was referred to the Federal Constitutional Court (Bundesverfassungsgericht – BVerfG), which found that the absolute prohibition of commercial agency work contravened Article 12 of the Constitution and was not justified by the need to deter circumvention of the monopoly on job placement. The BVerfG declared the relevant statutory provision unconstitutional and void²⁵.

However, the decision also severely restricted the commercial practices of ADIA Interim and similar firms. The Constitutional Court conceded that legislation might legally consider as job placement any activity where the employee was registered as freelancer with the works agency and would only receive remuneration while being assigned to third parties. Such activity could be banned in order to defend the public monopoly on job placement. Further, the Court recommended that the legislator should provide adequate means for socially acceptable forms of agency work.

II. The AÜG 1972 – still the regulatory structure of agency work in Germany

This led to the first comprehensive legislation on agency work, the Act on Agency Work²⁶ (Arbeitnehmerüberlassungsgesetz -AÜG) 1972. Its purpose was to prevent works agencies from providing job placement services²⁷ and to provide minimum protection for employees in agency work. To this end, commercial provision of agency work was made subject to administrative permission. This permission would be under the condition that protective legislation and the specific rules to prevent commercial job placement would be applied. The specific rule to prevent job placement services was the requirement that a works agency should employ its employees for longer terms than just the contract with the user of their work. To that end, any fixed term contract between works agency and employer was prohibited. Also, the maximum term for assignment of workers under agency work contracts was limited to three months in order to make this form of employment exceptional. Works agencies could also lose their licenses if they proved unreliable, e.g. by not paying wages regularly or not deducting social security contributions correctly.

The statute effectively attempted to impose a specific model of agency work on the market. In this model, most of the risks that the employer might wish to avoid by outsourcing labour should be borne by the agency, while the employee should enjoy a stable employment relationship with payments by the employment agency

²⁵ 4 April 1967, BVerfGE 21, 265.

²⁶ Of 7 August 1972, BGBl. I, S. 1393.

²⁷ The public employment offices' monopoly on job placement had been reinforced by the Arbeitsförderungsgesetz (Employment Promotion Act – AFG), which had been passed along with the AÜG in 1972 as the successor of the AVAVG.

between assignments. To adhere to this model, the works agencies would have had to change their practices as well as their prices. They would have to employ the workers permanently instead of registering them as self-employed persons. In the beginning "crisis" of the labour market in the 1970's²⁸, it was unrealistic for agencies to obtain the payment required to institute this. Accordingly, recourse to posting of workers, where no such restrictions applied, became more frequent. In the construction industry, where agency work had been outlawed altogether in 1982, posting of workers developed as a functional equivalent to agency work.

From 1985 to 1997, the AÜG was "deregulated" in several aspects. The Employment Promotion Act (Beschäftigungsförderungsgesetz) 1985 prolonged the maximum assignment period from three to six months, and in 1997 the period was 12 months. Some forms of agency work were exempted from the requirement to obtain permission. This applied to assignment of workers to a common working project by firms to which the same collective agreement applied. This practice was especially wide spread in the construction industry. Accordingly, the exemption partly relieved the ban on agency work for the construction industry. In 1990, an exception for employers with less than 20 employees was added, who could assign workers to other firms from the same type of industry if that was necessary to avoid shortage of work. In 1994, partly as a reaction to the ECJ decision in Höfner and Elsnér²⁹, the public monopoly on job placement was lifted, although private job placement agencies were required to obtain a permission. At the same time, agency work that aimed at assignment of the long term unemployed became privileged in comparison with other forms. The Act on Reform of Employment Promotion (Arbeitsförderungsreformgesetz) 1997, besides prolonging the maximum period for assignments, legalised fixed-term employment contracts between the works agency and the assigned employee, although the employment contract should last longer than any specific assignment period, the so-called prohibition to synchronise duration of assignment and employment (Synchronisationsverbot). In addition, restrictions for works agencies to dismiss assigned employees were loosened.

However, these changes did not affect the general approach of the legislation, which remained true to the restrictive regulatory model, prohibiting commercial agency work save where the works agency obtained a permission or one of the exemptions applied. At the same time, commercial works agencies remained able to undercut wages of "regular employees" by paying their employees less than what their "colleagues" in the user firm would receive for like work.

The main remedy of agency workers was and still is the possibility to achieve a contract of employment with the user firm. If employment contracts with works

²⁸ With hindsight, it appears almost as unbelievable, that in 1974 a number of 0.9 million unemployed persons was perceived as scandalous.

²⁹ ECJ C-41/90, [1991] ECR I-147.

agencies contravene the AÜG, they are void (§ 9 AÜG), and the assigned employees are deemed to have an employment contract with the user firm on the same conditions as with the works agency. If the relevant collective agreement applicable to the user firm would provide better terms of employment, these would apply. § 10 AÜG is one of the rare examples of German law imposing an employment contract by statute. The implicit restriction of freedom of contract was justified by the need to deter from using agency work in other forms than those provided by the AÜG. The employees could not derive rights from the AÜG, except the right to become a regular employee of the user firm and to receive at least the same remuneration as that agreed with the works agency. If and when works agencies went bankrupt, this was a short-term solution to retrieve outstanding wages. However, no perspective to permanent employment was given.

III. The modernisation of the AÜG – towards socially responsible agency work?

After 2000, the legislator assumed a new approach towards agency work and the AÜG. Changes by the Works Council Act Reform Act 2001³⁰, the First Act For Modern Services On The Labour Market (Erstes Gesetz für moderne Dienstleistungen am Arbeitsmarkt³¹) and a further reform act of 2003³² aimed to implement a new model. While the general principle that commercial works agencies need an administrative permission to operate is upheld, there are new rationales behind this reform legislation. In line with the draft directive on agency work, the new legislation aims at transforming agency work into an acceptable form of employment. To this end, many restrictions are abolished, and agency workers are granted a right to equal treatment (in principle) with workers of the user firm as well as more rights to collective representation through works councils. The legislation relied heavily on collective agreements for legitimising certain aspects of agency work.

1. Need to obtain permission for commercial agency work remains, exceptions are extended

The requirement to obtain permission for running a commercial works agency will not be repealed in the near future. However, the legislation established more exceptions to this principle.

As regards assignment of workers to a common working project by firms to which the same collective agreement applies, the Federal Republic of Germany had to relax the conditions for foreign employers from the EC and EEA countries³³. They

³⁰ BetrVG Reformgesetz vom 23.7.2001, BGBl. I, S. 1852.

³¹ Act of 23 December 2002, BGBl. I, 4607.

³² Act of 23 December 2003, BGBl. I, 2848.

³³ ECJ C-493/99 (Commission versus Germany), [2001] ECR I-8163, cf. supra [20].

may also assign workers to common projects in Germany, provided that the relevant collective agreement would apply to their activities carried out during the last three years preceding the assignment if they were resident in Germany (§ 1 para. 1 3rd sentence AÜG).

As regards assignment of workers by small employees in order to avoid dismissal or shortage of work, the threshold was raised to 50 (from 20) employees (§ 1a AÜG). The relevant employment agency has to be notified of these assignments, which must not exceed 12 months. (§ 1a AÜG)

Commercial agency work in the construction industry is now possible between employers under the same collective agreement, if that agreement has erga-omnes-effect. Again, foreign employers from the EEA and EC area are privileged in comparison with other foreign employers (§ 1b AÜG).

2. No restriction on combination of commercial job placement and commercial agency work

After restrictions for commercial job placement agencies were abolished in 2002³⁴, works agencies may legally engage in commercial job placement without obtaining an additional licence. In practice, there is certainly a trend towards combining activities of personnel placement (including outplacement) and commercial agency work in one enterprise³⁵. One of the advantages of combining both is the opportunity to provide agency workers for a test period, and enable the client to employ the person.

Before the latest reform, this was considered as a violation of § 9 AÜG. According to that provision, any contractual clause that would prohibit the user firm to employ the agency worker after his or her assignment was void. The Federal Civil Court held that a contractual clause by which the user firm promised remuneration for this case would amount to circumvention of the prohibition³⁶. Accordingly, the legislator clarified in its most recent reform that these agreements are legally valid (§ 9 para. 3 second half sentence AÜG), as long as the remuneration is "adequate" (angemessen). Obviously, which remuneration is adequate is disputable³⁷.

³⁴ Repeal of § 291 para. 1 and § 293 para. 1 1st sentence of SGB III (Social Code Book III, the successor of the AFG) through Gesetz zur Vereinfachung der Wahl der Arbeitnehmervertreter im Aufsichtsrat vom 27.3.2002, see for a detailed analysis Spellbrink, W., *Wandlungen im Recht der Arbeitsvermittlung – oder: Viel Lärm um wenig?* 51 Die Sozialgerichtsbarkeit (SGb) 2004, 75-142, 153-159 (81-82).

³⁵ See Garhammer, M. *Temporary Agency Work: National reports. Germany*. Dublin: European Foundation for the Improvement of Living and Working Conditions, 2002, 25-27.

³⁶ See Federal Civil Court 3 July 2003, 58 Betriebsberater (BB) 2003, 1015.

³⁷ Benkert, D., *Änderungen im Arbeitnehmerüberlassungsgesetz durch Hartz III*, 59 BB 2004, 998-1001, at 1000, considering a fee of two or three monthly salaries as excessive.

3. No restrictions on assignment period, no specific prohibition to synchronise assignment and duration of employment contract

The most convincing symbol of the general deregulation of agency work is the fact that, as of first January 2004, there is no longer any restriction of the duration of an assignment. At the same time, the prohibition to synchronise the duration of employment contracts with the length of assignments was repealed (formerly § 3 nos. 4-6 AÜG and § 9 nos. 2 and 3 AÜG).

This does not leave agency workers without any protection against fixed term contracts. In line with directive 1999/70/EC, § 14 Act on Part Time and Fixed Term Work (Teilzeit- und Befristungsgesetz – TzBfG) restricts fixed term contracts in general. This applies to agency work as well as to other work. § 14 TzBfG enables any employer to conclude a fixed term contract without any reason for the first contract of employment with any single employee for 24 months maximum or for the first three consecutive contracts of employment, if these do not exceed 24 months. Any other fixed term contract needs to be objectively justified. In the case of works agencies, this objective justification must not refer to the fact that an assignment is only fixed term, as the fixed term nature of the assignments is the principal economic risk of any works agency³⁸. As a result, application of § 14 TzBfG amounts to a reintroduction of the “prohibition to synchronise”³⁹ after the first 24 months of employment. One possible reaction of works agencies could be to employ agency workers only up to 24 months, thus effectively reducing their term of employment.

4. Equal treatment and its exceptions

The abolition of restrictions for agency work being on fixed term is accompanied by the introduction of the equal treatment principle. From 2002 to 2003, works agencies were obliged to grant their agency workers the same essential working conditions, including remuneration, as comparable workers directly employed by the user firm, if and when their assignment lasted longer than 12 months (§ 10 para. 5 previous version AÜG.). The agency worker actually was entitled to claim these conditions (§ 10 para. 1 sentence 5 AÜG).

From 2004, the claim to equal treatment applies in general (§ 3 para. 1 no. 3, § 9 no. 2, § 10 para. 4 AÜG), with two exceptions: First, if the agency worker was unemployed before the assignment, his remuneration for the first six weeks may be lower, as long as it is at least equivalent to the unemployment benefit received be-

³⁸ See Raab, T., Europäische und nationale Entwicklungen im Recht der Arbeitnehmerüberlassung, 34 Zeitschrift für Arbeitsrecht (ZfA) 2003, 389-447, at 426.

³⁹ See Wank, R., Der Richtlinienentwurf der EG Kommission zur Leiharbeit und das „Erste Gesetz für moderne Dienstleistungen am Arbeitsmarkt“, Neue Zeitschrift für Arbeitsrecht (NZA) 2003, 14-19, at 14.

forehand. Secondly, collective agreements may deviate from the protective provision.

The relevance of the equal treatment clause and its exemptions is not to be underestimated. Commercial works agencies with permission may now employ agency workers on the same conditions as other employees may employ their workers. The only restriction is the requirement of providing essential working conditions of equal value to those in the user undertaking. This latter provision would have been the one forcing works agencies to really provide for quality agency work, had the legislator not foreseen the possibility to deviate from this by collective agreement. The low unionisation rates in the trade and insufficient experience of unions with commercial agency work may be considered the reasons why the collective agreements entered into force that fast and without any perceptible trade off on the side of the employees for foregoing the right to equal treatment (see below).

5. Collective bargaining

Collective bargaining was accorded a decisive role in several aspects. The legislator provided two stages of reform. § 19 AÜG provides, that most reform elements would not become effective before January 2004⁴⁰, except for those employers that were covered by a collective agreement. § 19 AÜG states explicitly that such collective agreement must contain rules on remuneration for agency workers in accordance with § 3 para. 1 no. 3 and § 9 para. 2 AÜG. In other words: The legislator's idea behind this specific privilege for collective agreements was that unions and employers could proceed to stage 2 of the reform consensually, and could at once exclude the employees claim to equal pay. The Act further specifies that any collective agreement leading to such a favourable situation from the perspective of works agencies would have to be concluded after November 15th 2002.

When the second stage of reform started on 1 January 2004, the obligation to pay equal wages except during a six week assignment of a formerly unemployed worker should apply to all firms except those having concluded collective agreements already. In the background, there still lurks the old model of agency work with the agency concluding a contract of a duration much longer than any single assignment with the agency worker, who is assigned to different user firms. Under this model it would indeed be impractical if the employee would earn different wages with each assignment. The legislator also had the idea that agency work could be used to combine training and work, with unassigned periods filled by

⁴⁰ Exceptions to this rule were the exception from the need to obtain permission under § 1 and § 1 b AÜG and the obligations of the works agency to inform the agency worker not only of the contents of his or her contract of employment, but also of the details of the permission, specific remuneration for times without assignment and of the contents of the AÜG in the language the employee requires (§ 11 AÜG).

training units, during which the employee would earn less than when on assignment.

6. Collective representation

Even before the 2002 changes of the AÜG, the Works Constitution Reform Act 2001 enhanced the agency workers' right to collective representation in the establishment. Agency workers on any assignment exceeding three months may participate in electing the works council (§ 7 para. 2 BetrVG – Betriebsverfassungsgesetz, Works Constitution Act), although they must not stand for election (§ 14 AÜG). As under the old legislation, any agency worker may refer to the works council of the user firm in order to pursue individual rights (§ 14 AÜG, § 84 and § 85 BetrVG). As a result of the works council's responsibility for agency workers, one would assume that the number of agency workers is considered when calculating the number of works council members in the user firm. In this regard, § 9 BetrVG after the reform referred to employees entitled to vote ("wahlberechtigte Arbeitnehmer") where it refers to employers with up to 50 employees entitled to vote and to "employees" in all other cases. As § 7 para. 2 BetrVG provides for employees of other employers being entitled to vote, it was open to dispute whether § 9 referred to these assigned workers as well. The Federal Labour Court decided on 16 April 2003 that it does not and that assigned workers do not count towards the number of works council members, although they are now entitled to participate in elections⁴¹.

As agency workers remain employees of the works agency (§ 14 AÜG), they may also vote for their works council. This double representation corresponds to the fact, that both the user firm and the works agency fulfil employers' functions: The user firm directs the actual work, and for this reason issues relating to work place safety or conflicts with other employees and also the precise requirements for overtime may call for representation in the user firm. The works agency deals with all issues relating to payment and also the general rules on working time as well as any measures for advanced training and – last but not least – dismissal, which may also call for collective representation.

7. A new regulatory model?

The German legislator refrains from imposing a regulatory model as strict as in 1972. Still, the legislative reform rests on some optimistic assumptions. The legislator obviously wanted to achieve greater flexibility for user firms, the costs of which were to be borne by works agencies. Works agencies would, due to less regulation and thus growth of their trade, become more capable of carrying the risks employ-

⁴¹ BAG 7 ABR 53/02, Der Betrieb (DB) 2003, 2128.

ers need to avoid, and could just charge them less than the user firms would incur if they had to shoulder the risks. The agency workers would enjoy all the positive consequences of agency work becoming a regular form of employment and find themselves in a better labour market position which would inter alia lead to longer duration of their employment contracts. Any remaining problems would be taken care of by regulation of the trade through collective bargaining and collective representation of agency workers through works councils both at the user firm and the works agency.

IV. Controlled self-regulation in a formerly illegalised sector – some practical consequences

This vision has not fully become reality (yet). One of the reasons is that the high hopes in collective bargaining contrasted with the fact that collective agreements covering agency work were the exception rather than the rule before reform. A 2002 sociological report on agency work in Germany⁴² reports an early agreement from 1970 between the DAG⁴³ and BZA⁴⁴, that has expired, and three other agreements from 1997 and 2000 respectively. All of these are single employer agreements, which is untypical for Germany. The 1997 agreement between Volkswagen and the metalworker union IG Metall was a reaction to demands of management to concede lower wages for several hundred workers who should be employed temporarily. By using a works agency and concluding a contract with them, the union could avoid openly breaking the collective agreement or including an exemption clause that could have been used by other firms as well. However, IG Metall was also forced to concede that agency workers could be used to undercut wages. The 2000 agreement of RANDSTAD with DAG/ÖTV is purported to extend the Dutch model of agency work to RANDSTAD's German activities. The 2000 agreement between ADECCO and six unions was restricted to agency work during the EXPO. It was however certainly an important step towards the first agreements under the exception clauses in the reformed AÜG; as these unions had started to consider collective agreements for agency work a practically viable attempt to enhance the position of temporary workers.

In addition, applying the "collective agreement exemption" to the equal treatment clause caused conceptual problems. First of all, there were disputes in doctrine as to the actual contents of the exemption. One leading commentary actually holds the view that § 3, 9, and 10 AÜG do not empower the social partners to agree on any

⁴² Garhammer, Temporary agency work national reports Germany, 2002.

⁴³ Deutsche Angestelltengewerkschaft – white collar union. DAG is now merged with other unions to VERDI.

⁴⁴ Bundesverband der Zeitarbeitsunternehmen (Federal Association of work agencies; a member of CIETT).

collective agreement not guaranteeing the agency worker a roughly equivalent of the wages of comparable workers in the user firm⁴⁵. This view, however, corresponds neither to the text of the norm nor to that what the legislator had wanted to establish. Also, the practicability of the said interpretation is doubtful. If agency workers were assigned for relatively short periods in very different establishments, a collective agreement specifically for them would provide more protection than equal treatment with the respective colleagues. In addition, the question arises whether such determination of the result of collective bargaining is still in line with the guarantee of trade union freedom under the German constitution (Article 9 para. 3 GG)⁴⁶.

The main difficulty in practice was the fact that Northern Bavarian branch of the IZN (Interest association of works agencies) concluded a collective agreement with a collective agreement association of Christian unions for agency work and employment service agencies (Tarifgemeinschaft christlicher Gewerkschaften Zeitarbeit und PSA - CGZB), while the federal associations of works agencies, BZA and IZN, concluded collective agreements with unions affiliated to the German Trade Union Congress (DGB). This led to discussions whether the Christian unions met the criteria of a union established by the Federal Labour Court (Bundesarbeitsgericht - BAG)⁴⁷. Whether this is the case, is indeed debatable⁴⁸. Accordingly, any works agency relying on the collective agreement with the CGZB would run a high risk of their contracts with agency workers being void⁴⁹. However, this did not become a practical problem, as the collective agreements concluded by the more representative unions appear as no perceptible restriction from the perspective of members of the BZA⁵⁰. Any extensive discussion as to whether the employers were

⁴⁵ Schüren, in: Schüren et al (2003, op cit note 2) § 9 nos. 222-225.

⁴⁶ Böhm W., Billig-Tarifverträge in der Zeitarbeit . Risiken für Kunden. DB 2003, 2598-2599.

⁴⁷ See Buchner, H., Leiharbeit: Ablösung der Verpflichtung zur Gewährung der im Entleiherbetrieb geltenden Arbeitsbedingungen (§ 10 Abs. 4 AÜG) durch Tarifregelungen, -DB 2004, 1042-1044.

⁴⁸ See Böhm, op. cit.

⁴⁹ Bayreuther, W., Die Vorschläge der Harz-Kommission, NZA Sonderbeilage 1/2004, 1-12, at. 7.

⁵⁰ Until the end of 2003, there were 13 collective agreements intended to legalise exceptions from the principle of equal pay for agency workers. One series of collective agreements consists of framework agreement, framework agreement for remuneration and actual agreement on remuneration; the latter may be differentiated for western and eastern Germany. Accordingly, the relatively high number of 13 boils down to three clusters of collective agreements (From: Smidt, E., Tarifverträge und veränderte Bedingungen für Leiharbeitnehmer. Diplomarbeit Universität Oldenburg, 2003, 92-155). They can be sketched as follows: (See chart on next page)

forced to accept collective agreements that would disenable them to continue with their trade as works agencies⁵¹ were proved as misguided in practice.

In addition, the quality of agency work has not (yet) changed considerably. In Germany, employers use agency work for short-term solutions. In 2002, only 44 % of assignments lasted longer than three months, 11% were even shorter than one week⁵². Agency work concentrates on lower qualified personnel, and employees are often asked to perform the least qualified work in the group to which they are assigned⁵³. Accordingly, agency work is required as a highly flexible form of employment, and less restriction may well be needed to achieve higher numbers (if that is the aim one supports). We may also conclude that whether the new legislation actually amounts to less restriction is dependent on the number of collective agreements and level of remuneration agreed upon. Without any exceptions from the principle of equal pay, agency work would not only be highly impractical for works agencies, but also economically unattractive for user firms.

Parties	Collective agreements	Lowest and highest hourly rates	
BZA / DGB	Framework Agreement, framework remuneration agreement, remuneration agreement plus specific addendum	6,85 € (East: 5,93 €)	16,66 € (East: 14,41 €)
IGZ / DGB	Framework Agreement, framework remuneration agreement, remuneration agreement plus specific addendum	6,85 € (15 % reduction for East)	16,30 €
INZ / CGB	Framework Agreement, framework remuneration agreement, 2 remuneration agreements for West & East resp.	6,70 € (East: 6,20 €)	15,30 € (East: 12,20 €)

Although the gap between payment of agency workers and regular workers became less wide, the results are surely disappointing.

⁵¹ Waas, B., Das Spannungsverhältnis von Tarifvertrag und Gesetz beim Grundsatz der Entgeltgleichheit im neuen AÜG, 58 BB 2003, 2175-2178, at 2177.

⁵² Bothfeld S./Kaiser, L., Befristung und Leiharbeit: Brücken in reguläre Beschäftigung? WSI-Mitteilungen 2003, 484-493, at 490. According to the statistics of the Federal Labour Office (<http://www.pub.arbeitsamt.de/hst/services/statistik/detail/a.html>), from January to June 2003 237,000 workers had been dismissed by work agencies. Of these, 29,993 had been employed for less than a week, 104,249 between 1 week and 3 months and 103,038 more than 3 months. This latter number reveals that duration of employment and duration of assignment does not differ very much.

⁵³ Bellmann, L., Zur Entwicklung der Leiharbeit in Deutschland. Theoretische Überlegungen und empirische Ergebnisse aus dem IAB-Betriebspanel, 53 Sozialer Fortschritt 2004, 135-141, at 140.

V. Restrictive regulatory models and restricted success of socially viable legislation

In general, the AÜG still relies on what we could categorise as command and control regulation. The requirement of obtaining permission to establish a commercial works agency serves to exert control over the trade, which is perceived as socially problematic. Under the new legislation, there are fewer prohibitions the violation of which would allow the relevant authorities to withdraw the permission. Additionally, the consequences of illegal agency work are no longer restricted to administrative orders. As the agency workers themselves are provided with viable remedies as to their remuneration, there might be more civil law consequences of illegal agency work than previously.

The command and control regulatory model is supplemented by a different model that could be considered as controlled self-regulation. In several instances, the reformed AÜG provides for collective agreements to authorise deviations. As witnessed by the fast development of collective agreements in a sector of the labour market where they were virtually unknown beforehand, the social partners felt under pressure to agree in the shadow of the law. The results seem to establish wages that are slightly above to what was the practice before the legislation came into force. Whether agency workers and their unions are in a position to exert pressure in order to establish higher rates remains to be seen, when the collective agreements expire in 2006.

E. Conclusion*I. The German AÜG reform as faithful implementation of the draft directive*

With a legislative rationale surprisingly similar to that of the Commission's approach when proposing a directive on agency work in 2002, the German legislator has reformed the statutory regime of agency work. The new legislation would faithfully implement the directive on agency work, had it been adopted by the end 2003, as assumed by the German legislator. Some restrictions of agency work are repealed (Article 4 para. 1 draft) although the requirement for works agencies to obtain permission is upheld indefinitely (Article 4 para. 3 new draft). As the statutory obligation of the agency to employ the worker unlimitedly and to provide payment between assignments, Germany would have had to provide for equal treatment as regards basic working conditions (Article 5). The six-weeks-exception is possibly not quite in line with the draft directive, as Article 5 only allows for an exception for assignments actually restricted to six weeks. However, the social dialogue exception with its much graver consequences is fully in line with the draft directive, which places no restrictions whatsoever on the social partners when agreeing to allow the reference point for equal treatment of agency workers to be shifted from the user undertaking to the commercial works agency. The German legislator did

not provide for explicit obligations to offer training to agency workers, and this would be in line with the draft directive, that only obliges Member States to either take adequate measures or take up social dialogue. As any German legislative process in the field of social policy is accompanied by consulting the relevant social actors, the second requirement is fulfilled. Germany would also have fulfilled its obligation re collective representation. There is no requirement to give collective representations bodies at the user firm more staff to enable them to cope with additional counselling of agency workers in Article 6 draft directive. The requirement that agency workers must be given a chance to vote for a collective representation body in the works agency is fulfilled. Consequently, one could be tempted to conclude that the limited success of the German legislation renders the EU approach as inadequate.

II. National peculiarities that colour the practical effects of the reform

However, there are some caveats to this. As ever, implementing a harmonisation measure into national law is subject to specific effects in line with specific national traditions. In Germany, these are characterised by a tendency to illegalise and later to restrict agency work. That legislative tendency was accompanied by a negative approach of unions to agency work. As late as 2000, German unions began to perceive positive aspects of agency work and reconsidered their general assessment that this form of work should be outlawed. Resulting from this negative approach and the restrictive negative model, agency work is to a large degree both illegalised and de-unionised. Before the changes, it was assessed that in addition to the roughly 250,000 legal agency workers, twice this number is engaged in illegal agency work⁵⁴. In this environment, the contradictory course of the legislator who stuck to a restrictive approach while providing wide exceptions to be authorised by collective agreement could not have been expected to lead to more socially responsible forms of agency work.

Under different circumstances, the implementation of the planned directive might have had different results. If commercial agency work had been unionised to a higher degree, and if unions would have devised a negotiation strategy that demanded security gains for employees in exchange for flexibility gains of employers, the result might have been different. The stoic denial of the European Trade Union Congress to give in to demands to forego equal treatment if agency workers with workers at the user firm is one example for a different strategy.

⁵⁴ Schüren, 2003 (op cit note 2), no. 34 to § 9.

III. Regulating precarious work for “flexicurity”: demands for future EU legislation

Although more positive outcomes of legislation in line with the directive are possible, there remains the legislator’s approach to the balance of flexibility and security for employees, especially when considering to regulate precarious employment, as the principal problem. We propose to consider as precarious employment any employment contract under which the employee is in greater danger of losing his or her position on the labour market than under an unlimited term and full time employment relationship that is included in collective representation structures⁵⁵. Under this perspective, a fixed term contract is more precarious than a part time contract. However, there are forms of precarious part time contracts, such as contracts under which the employee may be required to work less in accordance with the requirements of the business.

Compared to part time and fixed term contracting, agency work can be more or less precarious. If the agency worker is employed under the assumptions on which the AÜG was based, this form of employment might be less precarious. The employee would enjoy the advantages of an open-ended employment relationship, while the user firm would enjoy the advantages of a fixed term contract, albeit at slightly higher costs. Implementing this model would have been an example of balancing flexibility and security. The agency worker would have been required to provide enough flexibility to change the working environment as often as flexibility needs of employers would require. In exchange, the workers would enjoy the security of unlimited employment contracts with payments between assignments and possibly training units to enable them to cope better with frequent changes.

In the planned EU legislation, the degree to which any advantages to agency workers are left to the discretion of Member States or at the disposal of social partners is surprising. Member States are not obliged to provide for collective representation institutions in the user firm to be given additional manpower to cope with representation of agency workers. The possibility of social partners to forego the promise of equal treatment is unconditional, there is no vision of exchange of security for a change of the place of the comparable worker from one at the user firm to one of the agency. If the EU legislator truly plans to encourage a more socially responsible way of agency work, this vision should become more perceptible in the regulatory framework.

⁵⁵ Schiek, D., Das neue Teilzeit- und Befristungsgesetz – ein Beispiel für Europäisches Arbeitsrechts auf Grundlage einer Sozialpartnervereinbarung, 35 Kritische Justiz 2002, 18-42.