“Setting up a European Observatory on cross-border activities within temporary agency work”

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1. INTRODUCTION[1]

This work is a joint research task included in a broader project on "cross-border activities within temporary agency work" commissioned by Eurociett and UNI europa within the framework of the sectoral Social Dialogue. This project is financed by the European Commission DG Employment, Social Affairs and Equal Opportunities, and it is intended to analyse the crossborder movements of temporary agency workers, and the impact and implementation of the European Directive on the posting of workers.

This is a report with a European rather than national perspective, which sets out to deliver two separate analyses, drawing a distinction between the two models or scenarios that are most commonly observed in this area of activity. On the one hand we have the posting of workers abroad, and on the other hand, the migration or movement of workers who are contracted in the host country within the working practices of temporary agency work. In either case, the common element shared by both scenarios is the existence of a triangular work relationship as defined in the Agency Work Directive (2008), whether on a national or cross-border level.

Even though it is based on written texts, the approach of this document has not been to carry out a "summary" but to prepare a text dealing with the most relevant topics, problems and challenges posed by this subject. In this sense, it will serve as a basis to understanding the relationship between two European pieces of legislation, one of which is still pending transposition.

Furthermore, in the analysis carried out regarding the texts, special emphasis has been placed on European Court of Justice case law because we consider that in general, it is less well known and clarifies the interpretation of community provisions. .Additionally, comparative studies at European level from the European Commission or the Dublin Foundation have been sufficiently analysed and disseminated by the European social partners amongst their members. These organisations have carried out their own compilation of national information, of great interest to the object of this study.

The contents of this report must be complemented, completed and fine-tuned in view of the answers obtained from the survey requesting data and practical information on the operational development of this social and economic reality issued to Eurociett and UNI europa members.

2. THE FREE MOVEMENT OF PERSONS AND THE PROVISION OF SERVICES

The free movement of persons, one of the fundamental cornerstones of the European Union, is nowadays fully consolidated. Statistics demonstrate that workforce mobility

[1] Draft prepared by Ricardo Rodríguez (LABOUR ASOCIADOS) and José María Miranda (University of Santiago de Compostela) with the collaboration of Jean Jacques Paris (SECAFI-Groupe Alpha).

across EU territories is a more commonplace reality with each new day, and all the signs point to greater mobility in the future. In particular, the EU Eastern enlargement was accompanied by a distinct increase in migration from the new member states (NMS) into the fifteen incumbent EU member states (EU-15). According to the recent study committed by the Commission[2], "*the increasing migration from the NMS into the EU-15 is associated with a diversion of migration flows: Austria and Germany, which received about 60 per cent of the immigration inflows before EU enlargement, were replaced by Ireland and the UK (in case of immigration from the NMS-8) and by Spain and Italy (in case of immigration from Bulgaria and Romania) as the main destinations of immigrants from the NMS".* While their legal access to the EU labour market may initially be subject to transitional arrangements - see table 1 -, once incorporated into it, the workers benefit fully from the greater part of EU legislation and the national legislations of the Member State in which they are working.

Furthermore, the incorporation of workers from outside the EU has, in recent years, plotted a similarly constant course. According to the report Employment in Europe 2008, (DG EMPL), during the same 2003-07 period, the number of third-party countries nationals living in the EU-15 appears to have increased by around 3.4 million. Moreover, the number of EU-15 citizens living in another EU-15 country has also risen by over 700.000[3].

In this great migratory collective, within which both staff employees and self-employed workers enjoy different levels of freedom, two principal categories can be identified. In these cases two legal systems may come up against each other, simultaneously regulating the same situation. Within this framework of mobility, the increasing flexibility of the EU services market has great impact, as we will see later.

[2] According to the study "Labour mobility in the EU in the context of enlargement and the functioning of the transitional arrangements" (2009) carried out by an European Integration Consortium on behalf of the DG Employment, Social Affairs and Equal Opportunities, the number of foreign nationals from the eight new member states (NMS-8) from Central and Eastern Europe which joined the EU on 1 May 2004, residing in the EU-15 has increased from about 900,000 persons before EU enlargement to about 1.9 million in 2007. During the same period of time, the number of foreign residents from Bulgaria and Romania in the EU has increased from about 700,000 persons to almost 1.9 million, although these countries did not join the EU until 1 Jan, 2007. It is predicted there we will observe an increase from 1.9 million in 2007 to 3.8 million in 2020 under the present institutional conditions, and to 4.4 million when the free movement is eventually introduced by all EU-15 member states.

http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=0&subCategory=0&country=0&year=2009&advSearchKey=transitional+arrangements&mode=advancedSubmit&langId=en

[3] According to this report, most of the increase in the number of EU-15 citizens resident in another EU-15 MS has been recorded in Spain, with retirees accounting for a substantial share. *Employment in Europe 2008*, chapter 3: Geographical labour mobility in the context of EU enlargement

Table 1. Member States´ policies towards workers from the new Member States

Member State		Workers from the EU-8/EU-15	Workers from BG and RO/EU-25
EU-15	**Belgium**	Free access (1 May 2009)	Restrictions with simplifications
	Denmark	Free access (1 May 2009)	Free access (1 May 2009)
	Germany	Restrictions with simplifications *	Restrictions with simplifications *
	Ireland	Free access (1 May 2004)	Restrictions
	Greece	Free access (1 May 2006)	Free access (1 January 2009)
	Spain	Free access (1 May 2006)	Free access (1 January 2009)
	France	Free access (1 July 2008)	Restrictions with simplifications
	Italy	Free access (27 July 2006)	Restrictions with simplifications
	Luxembourg	Free access (1 November 2007)	Restrictions with simplifications
	Netherlands	Free access (1 May 2007)	Restrictions with simplifications
	Austria	Restrictions with simplifications*	Restrictions with simplifications*
	Portugal	Free access (1 May 2006)	Free access (1 January 2009)
	Finland	Free access (1 May 2006)	Free access (1 January 2007)
	Sweden	Free access (1 May 2004)	Free access (1 January 2007)
	United Kingdom	Access - mandatory workers registration scheme (1 May 2004)	Restrictions with simplifications
EU-10	**Czech Republic**	No reciprocal measures	Free access - national law (1 January 2007)
	Cyprus	-	Free access (1 January 2007)
	Estonia	No reciprocal measures	Free access (1 January 2007)
	Latvia	No reciprocal measures	Free access (1 January 2007)
	Lithuania	No reciprocal measures	Free access (1 January 2007)
	Hungary	No reciprocal measures (1 January 2009)	Free access (1 January 2009)
	Malta	-	Restrictions
	Poland	No reciprocal measures (17 January 2007)	Free access (1 January 2007)
	Slovenia	No reciprocal measures (25 May 2006)	Free access (1 January 2007)
	Slovakia	No reciprocal measures	Free access (1 January 2007)
EU-2	**Bulgaria**	-	No reciprocal measures
	Romania	-	No reciprocal measures

* Restrictions also on the posting of workers in certain sectors (as of 1 May 2009); Source: DG EMPL

In the first place are those workers who move with the intention of getting a job (even temporarily) and residence in their country of destination, thereby becoming fully subject to its legislation. A classic example of this is the short-term mobility characteristic of seasonal work.

Secondly are those workers who are posted in a country of destination during a temporary period before coming back to their country of origin, and whose labour contract is subject to the legislation of the country of origin.

Although Directive 2006/123/EC[4], in as far as it deals with internal market services, has excluded issues relating to labour force movements from its area of application, and more in particular services provided by temporary work agencies, it is possible to detect a marked tendency in EU jurisprudence (according to our interpretation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services) to favour the movement of workers within the framework of transnational provisions of services.

Against this backdrop, the activity of temporary agency work (TAW) within the European Union is going to develop in an environment that favours it. The recent adoption of Directive 2008/104/EC constitutes a commitment on the part of the Union and its Member States to the positive role that Temporary Work Agencies (TWAs) can play in the current labour market, contributing to the putting into practice of active labour market policies and the development of the Lisbon Strategy.

As a result of the judgements *Höfner & Elser*, *Job Centre* and *Carra*¸ the nature of this economic activity, enshrined in the Treaty and EC Competition law regulations, cannot be questioned. More recently, the European Court of Justice (ECJ) has recently endorsed, in judgement ITC[5], the cross-border dimension of this activity, pointing out, basing on the German case, that placing obstacles to these activities contravenes the free movement of workers and the free provision of services. Only serious harm to the financial stability of a social security system or the impoverishment of skilled manpower may justify restrictions to this rule, situations which the Court only mentions in a theoretical manner.

3. LEGAL FRAMEWORK

Since 2008, two Directives have a decisive influence on the activity of cross-border temporary agency work in the European Union, although the Directive on Temporary

[4] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market preambule nr 14

[5] Ruling 11 Jan 2007, ITC, C-208/05.

Agency Work is still subject to its implementation at national level and thus not yet (fully) applicable.

A) Directive 96/71/EC, of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, which deals with the movement of workers carried out within the framework of the provision of services, was designed to guarantee a "hard core" of labour rights in the country of destination, with the possibility to extend this core of provision in the context of public policy (public order). It is concerned with the respect of certain labour rights in the country of destination, and has a trans-national scope. Its main thrust is the obligation that is made of Member States to ensure that – whatever the law applicable to the employment relationship – posted workers enjoy certain minimum protective standards in force in the Member State in whose territories the work is being carried out during the period of posting.

The transnational posting of workers by a temporary work agency constitutes a provision of services as set out in EC Treaty article 49 (ex 59). We can therefore assert that the Directive deals less with issues of "labour law" than it does with economic matters.

For this reason the ECJ formalised a set of principles that are well established in its jurisprudence as regards the free provision of services. For example, it stated on several occasions that, in agreement with article 49 of the EC Treaty, "the application of the national regulations of a Member State to the people receiving benefits established in other Member States must be specific to guarantee the realization of the goal which they pursue, and not to go beyond what is necessary so that it is reached" (principle of proportionality).

Furthermore, it is on the direct basis of article 49 of the Treaty (and not on the basis of the posting of workers Directive) that the Commission had justifiable grounds to dispute the compatibility with Community legislation of a German law which, in particular, sets out that the "temporary foreign companies of work are held to declare not only each provision of a worker to the profit of a user undertaking in Germany, but also any relative modification beyond that of the assignment of the workers" (C-490/04 Business, Commission of the European Communities against Federal Republic of Germany".

EU norms are generally applicable throughout all countries belonging to the European Economic Area (EEE), in accordance with the partnership agreement undertaken (Article 68). In particular, Directive 96/71/EC is adhered to in Norway[6], one of the countries which appears to take in one of the highest numbers of EU posted workers.

[6] Decision of the Joint Committee Nº 37/98

Although the Decision concerning Agency Work Directive 2008/104/EC is yet to be published, it is thought to be imminent.

Doubts have been raised with regard to the levels of efficiency with which the Directive on the Posting of Workers has been put into practice. On a national level, sectoral restrictions imposed in some countries, as is the case in Germany, have been the cause of protest. In the transnational dimension, the latest judicial developments (*Laval*, *Viking*¸ *Rüffert*, amongst other rulings) have put this Directive at the forefront of the current European social reality, and its implementation and interpretation could constitute one of the legislative priorities for the next Commission[7]. A greater –and more efficient– degree of cooperation between Member States to encourage the exchange of administrative information that might ease problems of application (taxes, Social Security contributions) has also been repeatedly demanded by the European Commission in several of its Communications and other documents[8]. The European Parliament has also taken a position on numerous occasions on the need to improve the implementation of this Directive[9].

B) Directive 2008/104/EC, of the European Parliament and of the Council of 19 November 2008 on temporary agency work, has drawn the curtain on a debate that has concerned Europe for almost 30 years with regard to the need to set minimum requirements for the protection of temporary agency workers. It will make obligatory a practice that is already present in the legislations of most EU Member States: the principles of equal treatment and equal pay from the first day of assignement. At the same time, it will allow Member States for a certain degree of flexibility in the implementation of those principles at national level, especially through three forms of derogations: for open-ended contracts, by upholding or concluding collective agreements or in the case that collective agreements cannot be declared universally binding, through agreement of social partners. Other rights included in this norm, as far as equality of treatment between temporary agent workers and permanent workers is

[7] It is difficult, for the time being, to determine what direction reform will take. Two competing forces are involved in the application of this Directive: the defence of workers' national interests and the safeguarding of the rights of posted workers, versus the flexibility of a market that is open to transnational competition. At the end, the main issue is addressed to how to conciliate the economic freedoms provided by the treaty and the fundamental labour rights of workers.

[8] Amongst others, COM (2006) 159, "Guidance on the posting of workers within the framework of the provision of services" and the accompanying Staff Working Document SEC (2006) 439; COM (2006) 159 and the accompanying Staff Working Document SEC (2006) 439, as well as the follow-up communication COM (2007) 304, "Posting of workers in the framework of the provision of services: Maximising its benefits and potential while guaranteeing the protection of workers" and the accompanying Staff Working Document SEC (2007) 747.

[9] European Parliament resolution on the implementation of Directive in the Member States 2003/2168(INI); Resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)); Resolution of 11 July 2007 on the Commission Communication on the Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers (P6_TA(2007)0340).

concerned, are pay, protection for pregnant women and nursing mothers, and leave entitlement. In addition, they will benefit from:

- being informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment;

- equal access to collective facilities (canteen, childcare facilities, transport service) unless the difference in treatment is justified on objective grounds;

Furthermore, Member States are expected to take suitable measures or promote dialogue between the social partners, in accordance with their national traditions and practices, in order to:

(a) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability;

(b) improve temporary agency workers' access to training for the user undertakings' workers.

This Directive must be adequately transposed into national law by 5 December 2011 For this reason, the implementation of certain specific aspects is still subject to the solutions adopted in each one of the 27 Member States. An analysis of the results achieved by this Directive is loosely scheduled for December 2013.

This Directive includes the notion of “basic employment and working conditions”, which are to be defined on national level, but include the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay.

3.1 Distinction between the two norms

The two Directives share common areas:

- Their scope of general application with regard to temporary agency work. Directive 2008/104/EC deals with this expressly. In the case of posting Directive 96/71/EC the cross-border relationship of the TAW is also mentioned expressly on various occasions:

  According to Article 1, Directive 96/71/EC shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers to the extent ……..”3(c) *being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.*”

According to Article 3(9): "*Member States may provide that the undertakings referred to in Article 1 (1) must guarantee workers referred to in Article 1(3) (c) the terms and conditions which apply to temporary workers in the Member State where the work is carried out"*

- The express reference made in Directive 2008/1004/EC to the posting of workers inasfar as its (future) implementation is concerned. "This Directive should be implemented in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services." (recital 22 of Directive 2008).

There is an important difference as regards the material scope of application:

- Directive 2008/104/EC has necessarily a **national scope** of application;

- Directive 96/71/EC has naturally a **transnational scope** of application.

This is a fundamental distinction. The application of the posting Directive takes precedence over the Agency Work Directive 2008 when dealing with the cross-border activities of Temporary Work Agencies. However, both Directives should be seen as mutually beneficial: posted temporary agency workers will benefit from the provisions laid out in the Agency Work Directive.

- Both Directives make reference to different norms in order to locate workers' protection threshold in the host Member State, and exhibit a difference of degree when it comes to the nature of these provisions: in the case of Directive 2008, in these matters, "basic working and employment conditions" should be applied in the country of destination ("*at least those that would apply if they had been recruited directly by that undertaking to occupy the same job*", according to article 5(1))

  Meanwhile, the posting Directive makes reference to the term "public policy provisions"[10] admiting the possibility that Member States might extend protective labour standards to other conditions of work beyond those

[10] Art. 3(10) of the Directive 96/71/EC "this Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions"

established in article 3(1)". The interpretation of the scope of public policy provisions (public order) in the sense in which the posting Directive approaches it is controversial. Although the Commission has provided one evidently limited interpretation ("….has to be interpreted bearing in mind the objective of facilitating the free movement of services….Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State")[11]. Faced with this interpretation rooted in the free movement of services of public policy provisions, others (Kerstin Ahlberg, 2008) have pointed out that the European Court has, in various of its judgements,[12] accepted the protection of workers as being a question of public interest. We will return to this issue at a later stage.

- Lastly, we must highlight one final distinction between the two norms when it comes to the application of the phrase "the most favourable working conditions":

    - In the posting of workers Directive, these conditions are obligatory (article 3(7)): "Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers".

    - On the other hand, the "principle of favour" in Directive 2008 is written in a different way (not obligatory-compulsory): **"**This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers." (Article 9 (1). Minimum requirements)

3.2 The importance of collective agreements

Along with these two Directives and their respective transpositions into national systems, we must also take into account the important role played by the negotiation of (universally binding) collective labour agreements as applicable to the transnational, cross-border posted worker, whether at the sectoral (TWA) level or at that of the user enterprise itself and which cover both the worker who has been posted directly (within the framework of a transnational provision of services) and those who have movedwithin the framework of the free movement of workers. . This is a question which, in a general sense, responds with marked intensity to the peculiarities of each

[11] COM(2003) 458 final. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States.

[12] Night work in bakeries: *Oebel*,Case 155/80; Sunday working: *Conforama*, Case 312/89; Working hours, health and safety not subject to economic considerations: *Sindicato de Medicos de Asistencia Publica (Simap)*, Case C-303/98

national system of labour relations (see, for example, the German case, where the full applicability of Directive 96/71/EC was restricted to three sectors – a situation that has changed since April 2009 with a reform of the *Arbeitnehmer-Entsendegesetz*)[13].

In the case of the posted worker, the regulations established in the collective agreement, should it exist, will affect: "the terms and conditions of employment" in the Member State where the work is carried out (article 3(1) of the Directive 96/71/EC).

In the case of the Agency Work Directive, there are various references to the possibility that social partners might self-regulate in areas concerning equality of treatment (article 5(3) y (4)[14], especially when there are no universally applicable collective agreements.

We are basically describing activity in EU territories, it does not mean one should forget that TWAs also post workers outside this geographical area, although the analysis of these practices that take place outside EU borders does not make up part of the subject of our study, nor that of the overall project.

4. MODELS OF CROSS-BORDER WORK INVOLVING TEMPORARY AGENCY WORK

Cross-border activity within temporary agency work within the EU tends to take form in two legally very different forms that will be analyzed by this study. In both cases, the basic criterion to be applied is that this activity takes place within the framework of a legal triangular relationship, based on an unfolding of the employer. In accordance with the Directives 91/383/EEC[15] and 2008/104/EC the triangular relationship implies:

- the temporary work agency: any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with

[13] According to the Bundesministerium für Wirtschaft und Technologie, the Act on Posting Workers was expanded to other industries, and modernised by specifying minimum working conditions. Industries that have a collective bargaining coverage of more than 50 percent and on the basis of a Joint application filed by the collective bargaining parties can be incorporated into the Act's area of application.

[14] Art. 5(3). "Member States may, after consulting the social partners, give them, 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.

(4). "Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either 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, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

[15] Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship.

temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction.

- the user undertaking: any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily;

- the worker: any person who is protected as a worker under national employment law and is placed at the disposal of the user undertaking in order to work under their direction and control.

In the event of finding ourselves within the framework of this specific triangular working relationship, and in the context of cross-border activity, in practice we can differentiate two models:

1. The first is the posting of workers from one Member State to another within the framework of a triangular, relationship. That is to say, the posting by a TWA of workers to a user undertaking located in a MS other than that of the TWA doing the posting. This is a case of typical transnational activity, within the framework of the free provision of services across the EU.

2. The second is the movement, whether by his/her own initiative or on request[16], of the worker from one Member State to another where he/she is then contracted to work by the TWA in the host State. In this second scenario several variations can be observed, although given the focus of this study we will concentrate on temporary migrations,

4.1 Posted workers within a triangular relationship framework

This type of posting is regulated by the above-mentioned Directive 96/71/EC, which defines a "posted worker" as a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works. This Directive was conceived to regulate these postings, imposing the application of the state of destination's Law, or more precisely the core of its Labour Law, some of the most important working conditions.

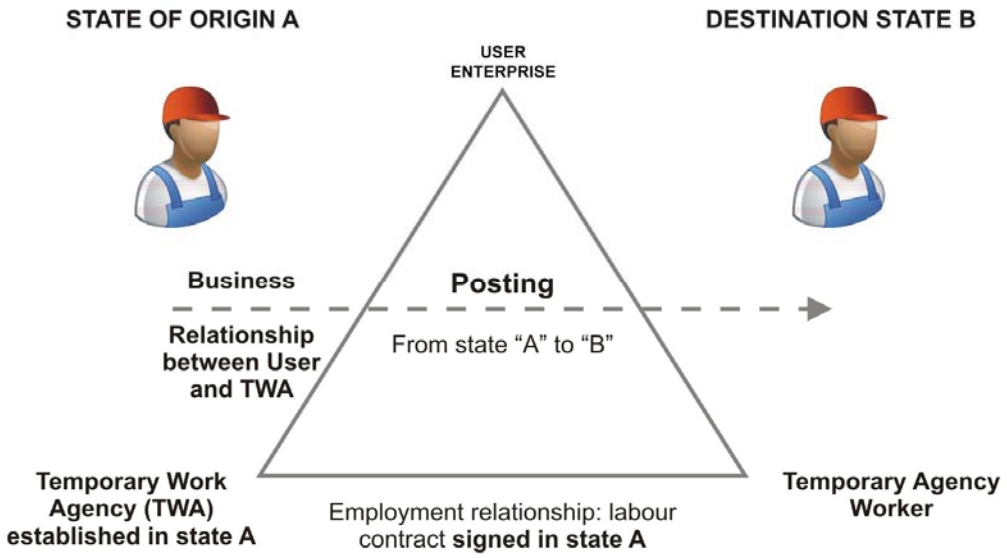
Basically, what is important in this relationship is that the posting takes place within the framework of a triangular relationship: there is a business contract between the user undertaking and a TWA located in another State, and an employment contract between the TWA and the worker to be posted, subject to the labour law of the country where the contract is agreed, without prejudice to certain exceptions.

[16] As well as moving of their own initiative, temporary agency workers may be called for, whether individually or collectively, while still in their country of origin, by a TWA (or by a user undertaking that is making use of the services of a TWA) in the host country. It is thus that their selection and recruitment may be dealt with by other undertakings in the country of origin, and their conditions of travel to the host country, where they will ultimately be contracted by the TWA, may even be covered by the collective agreement, as is the case in Holland which we will describe later.

What are involved here are two contracts of a different nature, signed in accordance with two different national legislations. It is this discrepancy in norms that makes it crucial to achieve a degree of compatibility between the business and employment aspects. For instance, the length of time over which the TWA provides a service to the user undertaking should be consistent with the maximum lengh and legally permitted employment contract for agency work in the host country.

In short, there are two contracts: a labour law contract (temporary agency and worker) and a commercial contract (user and temporary agency). Asssuming the transnational dimension of the provision of services, the law applicable at European level is the Directive 96/71/EC or eventually, the international private law.

Figure 1. Posted workers within a triangular relationship framework



Given that there is no reliable data on the number of posted workers in the EU, exact figures for the number of temporary agency workers are equally unavailable[17]. In accordance with the report *Employment in Europe 2008*, and based on records submitted by the the social security institutions of the sending countries for every posting not exceeding 12 months – including agency work - , it is estimated that the figure is no more than 1 million workers, i.e. barely 0,4% of the EU working-age population[18]. According to these Member State administrative sources, approximately 750,000 workers were posted, of which 80% were posted to the EU-15, with just 4%

[17] To arrive at an approximate figure for these movements is a task currently being tackled within the framework of this project through a poll carried out by the Working Lives Research Institute on the affiliates of Uni-Europa and Eurociett.

[18] This data refers to workers posted in another Member State, including the European Economic Area and Switzerland). It does not include France, Spain, Romania and Bulgaria's posted workers.

posted to the NMS. The rest were posted to other EEE countries and to Switzerland, or alternatively were distributed among various host countries or were involved in transport-sector activities that take in a plurality of countries.

According to the same report, we have data on the host countries which have traditionally taken in the largest numbers of these posted workers: according to figures from 2006, Germany heads the table, with 150,000, although other countries also admitted large numbers, including the United Kingdom, France and the Netherlands. Other countries are characterised as "sending" nations when it comes to this group of workers, with Poland (200,000 posted workers) or Germany (192,000) notable in this regard.

The central rule concerning the posting of workers is the respect of working conditions in the State of destination, unless they are less favourable than those of the State of origin, in which case those of the latter are applicable. According to the article 3(1) of this Directive, the hard core rules to be respected are in particular the following:

a) maximum work periods and minimum rest periods;

b) minimum paid annual holidays;

c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

e) health, safety and hygiene at work;

f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

g) equality of treatment between men and women and other provisions on non-discrimination.

Nonetheless, as pointed out by the Commission [COM (2003) 458], Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State. Basically, only the standards contemplated in Article 3 (1) must be complied with.

Within this framework, the temporary agency work regime falls within the restricted notion of public policy provisions, which in accordance with the *Arblade*[19] ruling refers to the national provisions whose observance has been considered essential for

[19] Ruling 23 Nov 1999, Arblade (C-369/96 and C-376/96).

safeguarding the political, social or economic organisation of the Member State concerned, to the point of making them obligatory to all persons in the national territory of that Member State or all legal relationships based in it.

Restrictions

As a general rule, there are four main regulatory clusters of restrictive measures to agency work (EIRO, 2008) on national level:

a) the definition of the situations in which it is permitted to make use of a TWA ('reasons for use');

b) a capping of the number of temporary agency workers that may be employed by a given company; This restriction can also be found in collective labour agreements.

c) the exclusion of temporary agency work from certain sectors; for instance: the construction sector in Spain or the public sectors in both Spain and Belgium.

d) restrictions to both number and length of temporary assignments.

When Directive 2008/104/EC has been fully implemented at national level, all the above measures will have to be revised, as a result of Article 4 of this Directive, and should only be uphold "for relative reasons of general interest, mainly for the protection of workers posted by TWAs in the areas of health and safety in the workplace, as well as for guaranteeing the good working of the labour market and to avoid possible abuses".

In any case, some of these practices have a direct impact on transnational activity. Agency Work Directive 2008/104/EC, for instance, does not intend to harmonise situations which permit the use of a TWA, in which national peculiarities are left intact. This could lead to contradictory situations in which workers carry out labour activities in the host country which are prohibited by the legislation of their country of origin. One illustrative example of this concerns the assignment period as stated in the TWA contract, given that the duration of this kind of contract varies according to each country's legislation or national collective agreement. (e.g., no limits in The Netherlands, UK, Germany and Finland or 12 to 24 months in some circumstances in Belgium, Spain and France).

We should bear in mind that once Directive 2008/104/EC is transposed, the aspects covered by its implementation will be left out of national controls as they will be considered respectful of the content of Community law in the country of origin and their compliance cannot be required twice (this doctrine in *Commission v Luxembourg*[20], on the subject of the obligations of written information on posted workers). It will be of

[20] Ruling 19 Jun 2008, *Commission vs Luxembourg* (C-319/06).

great interest to soon draw up a chart of the national conditions that will remain valid to shape the national public policy.

An issue of particular interest is the admission by the Court of Justice of clauses of joint liability of the undertaking hiring out the worker and the user undertaking, such as in judgement *Wolff & Müller*[21]. Directive 2008/104/EC invites Member States to adopt protection measures but without defining their content. The scope of these clauses varies considerably in the Member States and will not be harmonised; they should therefore be examined to verify whether they exceed the standards of the Court of Justice. Furthermore, the procedural obstacles for their effective fulfilment are also worth a close analysis.

Additionally, we should not forget that beyond strictly labour measures other legal provisions may counter-balance the free provision of services principle. Rules such as those relative to fiscal withholdings applicable to principals who contract the services of foreign contracting partners which employ nationals of third-party States have been condemned by the Court of Justice[22], and must also be expelled from national legislations.

4.2 Cross-border temporary workers

A second possible form of TWA cross-border activity is that in which the worker's movement between Member States occurs before the signing of an employment contract. This would be the case of one or more individuals, either by their own means or in some organized fashion, make the move to another Member State, where they are contracted by a TWA and posted to a user undertaking.

Thus, the cross-border element is here previous to the temporary work agency and it is made possible by the free movement of workers. In this scenario, there has been no posting of workers and, as such, Directive 96/71/EC does not apply. Within the framework of the triangular relationship, the work contract between the TWA and the worker is signed in the host country, on receipt of a request from the user undertaking.

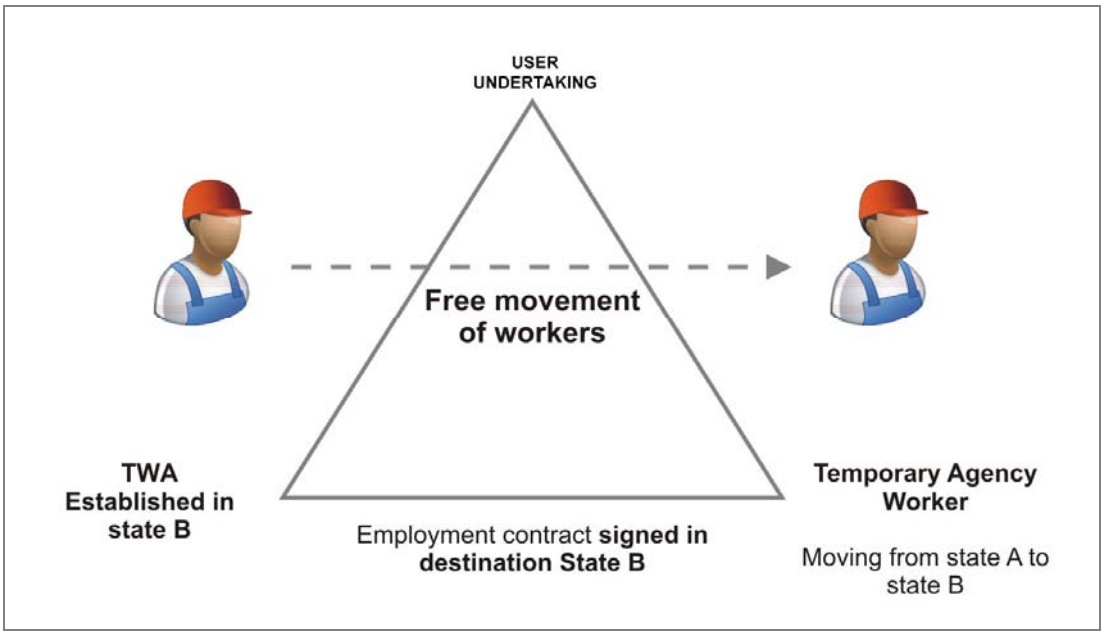
Despite the fact that it does not deal directly with the subject of temporary agency workers, it is worth highlighting, among others, the conclusion of ECJ's *Clean Car AutoService*[23], which established, along general lines, the right of all undertakers to look for their workers freely in other Member States. In this situation, for those having citizenship of a Member State, the free movement of workers is directly implied, and the regulations and legal difficulties are considerably less. Citizens from third countries, on the other hand, can be subject to rules about work permits, restrictions, etc.

[21] Ruling 12 Oct 2004, *Wolff & Müller* (C-60/03).

[22] Ruling 9 Nov 2006, Commission vs. Belgium (C-433/04)

[23] Ruling 7 May, 1998, Cleancar Autoservice (C-350/96).

Figure 2. Cross-border work (temporary with the intention to return)



Despite the lack of reliable statistics, all indications lead us to conclude that this cross-border dynamic is numerically much higher than that of posted workers by a TWA from their country of origin. That is to say that the proportion of cross-border workers or temporally migrant workers hired by TWAs in the Member State of destination is much greater than that of cross-border posted workers.

Variations

There are variations to this model of free movement. For the purposes of our study, we will concentrate on the possible solutions that social partners have found on a national level, and the commercial practices developed by TWAs which have a transnational impact. That is to say, the means of both bringing and regulating the organized and collective movement of workers who travel (without having been posted) from one MS to another in order to be hired in the latter by an agency.

The autonomy of the contracting parties plays a considerably bigger role here than in the posting of workers, and it is thus more difficult to build up a general scenario.

The most controversial points of this situation lie on the edges of Labour Law. There are no specific EU rules concerning transportation, specific insurance for the trip, housing or other elements of these workers, as these movements of people fall within the free movement of workers principle. These situations have sometimes been an open field for fraud and abuses. As a consequence, there is still room for social partners both at national and European level to reach agreements in order to improve the way in which the movement of workers is carried out, providing it with increased

safeguards, as well as for public authorities to adopt the necessary measures, where appropriate.

Therefore, the admission that a specific request for workforce (whether for a job or a service) has been made of a TWA by a user undertaking in order that it facillitate the contracting of workers from another MS, is combined with the need to encourage and promote the transparency of these collective migratory movements, so that the workers do not undertake them on their own initiative and, (whenever they do not come under the protection of the organisation which has made the request), at their own risk.

In this context, the Dutch case is well-known; to summarise, a user undertaking asks a TWA to recruit workers in another State, organising all details concerning recruitment, selection, transport…, in order for the employment contract to be signed in the Netherlands. In this case, it seems that the temporary work agency plays the role of placement. In the interests of lending transparency to this practice, which is apparently unheard of in other States, collective bargaining has begun to establish a special set of rules. These refer to temporary workers not residing in the country, and the clearest example is the Collective Employment Agreement for Temporary Employees (ABU-CAO) 2009-2014 in its Chapter 10 (articles 44-46), which will be dealt with at a later stage, and which serves as an example of the regulation of this this sort of situation including a certain extra-territorial dimension.

There is no doubt that the Netherlands is not the only Member State in which transnational temporary agency workers are commonplace, but it certainly is the clearest and most well-known example where there is a specific regulation in place. However, we should not ignore other, less known, national variations.

There is no questioning the need to explore real alternatives through collective agreements and the individual business practices used by TWAs in each country. The analysis of business practice in multinational companies is of special interest, because, as they operate in a coordinated fashion in accordance with different legal systems, they may have to deal with individual cases of Commercial Law.

The implementation of Directive 2008/104/EC will play a central role in these situations. Nonetheless, it will not harmonise the situations where a TWA may be used, which will preserve their national singularities intact.

As a result of both the differences and convergences that exist between the two situations, we have included below a table which gives an overall illustration of the statutory regulations which apply to each case.

Cross-border Triangular Relationship

Working conditions applicable in the host member state

Application	Posted agency workers	Temporary migrant agency workers
Applicable European norm	Directive 96/71/EC	Directive 2008/104/EC
National legislation	That which derives from the transposition of the Directive	Obligatory transposition by 5 December 2011
Signing of Labour contract	In the MS of origin	In the host country
Contract between user undertaking/TWA	As chosen by the two parties (Art.3 R. 593/2008); or, art.4: the provision of services contract is regulated by the law of the country where the service provider has its permanent residence	In the host country
Areas concerning working conditions which are subject to regulation	The "hard core rules" defined in Article 3(1)*	'basic working and employment conditions' relating to: (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay.
Legal regime applicable to the terms and conditions of employment	• Whatever the law applicable to the employment relationship, the entire legal system of the host country is applicable in the areas already discussed which come under norms of general efficiency (universally applicable), without prejudice to the provisions of the country of origin when these are more favourable. Anything not covered by the Directive comes under the provisions of the MS of origin. • Collective agreements universally applicable. For instance, Spain's sectoral collective agreements. But those of France would not, in principle, be applicable as they have limited effectiveness (though they might be appropriate) . Definition of universally collective	At least the basic working and employment conditions that would apply if they had been recruited directly by that undertaking to occupy the same job. Art. 5(1) Example: the whole legal system of the country in general or the specific sector or area of regulation should be applied in as far as it affects the worker or job in question. Example: non-universally applicable agreements at national, regional, local or sectoral level will be applied, only when covering the parties signing the collective agreement. A specific related example of the protective action of a collective agreement: the Dutch collective agreement which "covers" workers'

Application	Posted agency workers	Temporary migrant agency workers
	agreements according to the posting Directive, Art. 3(8)** (see below), and what was established (negatively) by the Ruffert ruling: what only affects part of a sector or a particular type of contract cannot be considered of general effectiveness In cases where there is no collective agreement	cross-border situations
Possibility of derogations and exceptions to the general system of application to working conditions	Derogations of art.3(2)*** and art(10)**** "in the case of public policy provisions" (see below)	Art. 5(3) and (4) ▪ By collective agreement, if MS agreed. ▪ After consulting the social partners at national level and on the basis of an agreement concluded by them, MS may establish arrangements concerning (different) basic working and employment conditions when either 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.
Other conditions **Duration of the contract** **Housing** **Social Security**	• The length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting. For the purpose of such calculations, account shall be taken of any previous periods for which the post has been filled by a posted worker. • In accordance with the conditions of the original working contract • Country of origin, up to 12 months or, in exceptional circumstances, 24. Beyond that point, the host country.	National norms applicable to TAW activity

Application	Posted agency workers	Temporary migrant agency workers
Rights to trade unión representation, information and consultation for temporary agency workers	In accordance with national norms – there is no common standard	Optional, (art. 7): Temporary agency workers shall count, under conditions • established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency. • MS may apply the same provisions for the user undertaking • Cross-border trade union agreements may exist to regulate trade union representation • In any case, national legislation applies in its transposition of Framework Directive 2002/14/CE
Jurisdiction	Member State in whose territory the worker is or was posted, without prejudice of another MS (origin)	Only in the host MS
Application control measures	MS of destination. Obligation to inform and cooperate with other MS and with the Commission	Normal measures of work inspections
Inland Revenue aspects (personal employment earnings, not the tax paid by the undertakings)	Application of the 183-days rule: if working less than this time, any earnings are taxable in the country of origin; if more than 183, in the country of destination	Temporary migrants pay taxes in the country of work, as they are generally residents
	In both cases, international conventions on double taxation may be of relevance, in order to avoid undue payments.	

*** Art 3(1) of Posting Directive 96/71/EC**

(a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination.

**** Art 3(8) of Posting Directive 96/71/EC.** 'Collective agreements or arbitration awards which have been declared universally applicable` means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory, provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

***** Art 3(2) of Posting Directive 96/71/EC:** In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, the minimum paid annual holidays and the minimum rates of pay, including overtime rates shall not apply, if the period of posting does not exceed eight days.

This provision shall not apply to activities in the field of building work listed in the Annex of the Directive 96/71/EC

****** Art. 3(10) of Posting Directive 96/71/EC:** This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,
- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.

In conclusion, there are both contrasts and similarities between the legal systems that regulate the working conditions of the two situations or models we have already outlined. In practice, after all, while the statutory regulations informing working conditions ought to be the same when applied to two different workers working in the same sector, this neither can, nor should, necessarily be the case. One marker that can point to a difference between the two cases is the Social Security cost of each situation, as well as the difference in tax/fiscal regimes.

The posted worker is subject to a whole network of working regulations – concerning questions exclusively outlined in Article 3(1) of the Directive – which are contained within universally applicable norms. No other regulatory content or source carries any weight with the posted worker.

The temporary migrant worker, on the other hand, is subject to the same standards as any national worker employed by a TWA. But his/her basic working conditions may be linked to collective agreements which are not generally binding or even, in certain

cases, not be covered by collective agreements[24]. The differences in treatment that may exist, when they do, are those dealt with by Directive 2008/104/EC (along with the possible exceptions and derogations that may be adopted by national legislation when transposing it) for any TWA worker as opposed to an ordinary worker (i.e not a TAW).

Rome I on the legislation which is applicable to all types of contract

As a consequence of the revision of the Rome Convention (or Rome I), the EU has revised its norms on national legislation applicable to contracts.

According to EC Regulation No. 593/2008, which will come into force at the end of 2009, there is a range of successive possibilities for choosing the law applicable to the employment contract: i) agreement between the parties, provided that it does not result in depriving the employee of protection; ii) the law of the country where the contract is executed; iii) the law of the country where the user undertaking is established; iv) or the State manifestly most closely connected.

It is worth highlighting that the law of the country where the contract is executed, which is the most usual criterion, is further explained in a very interesting manner in article 8 or the Regulation in the case of the cross-border activity of TAW: "the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country". Thus, the law of the State of origin will be applied if the cross-border activity is of a limited nature, and the rest of the work is made in the country of origin. If the work is carried out only in the State of destination, then its rules will be fully applied.

5. CROSS-BORDER ACTIVITIY, COLLECTIVE AGREEMENTS AND ECJ JUDGEMENTS

Determining the applicable collective agreement is especially important. This is an issue that generally responds to the singularities of each national industrial relations system. In the field of temporary agency work, a key objective should be to make clearly known the collective agreements that will be applicable to the hired-out cross-border worker, be it a global, sector or undertaking collective agreements. This detailed

[24] According to the information provided in the report "Temporary agency work and collective bargaining in the EU" (2009) by the European Foundation for the Improvement of Living and Working Conditions, there is a high percentage of cover provided by collective bargaining in the TAW sector. This translates as almost blanket or universal cover in MS such as Spain or Luxembourg, while a *de facto* universal cover is guaranteed in other countries through sectoral agreements, such as in Austria, Germany, Belgium, Italy or Netherlands. It is a practical reality in Sweden for white-collar workers, while cover is high in France as a result of the widespread representation of undertakings associated with employers. On the other hand, where in practice there are greater problems of cover points to the collective bargaining observed in the New Member States, where references to TAW activity is largely to be found in the legal framework.

task will help avoid situations of lack of protection or incorrect application of inappropriate conditions which erode the quality of employment sought to be offered.

A recent report (EIRO, 2009) has summed up that there are four main ways that temporary agency work uses to be regulated by collective bargaining or social dialogue:

1. The most general mechanism is the national intersector level, which includes agreements and understandings reached between the highest-level social partners and governments that might influence the development of law.

2. The second, and in many cases most significant level, is by collective bargaining within the TAW sector itself. Most countries that have traditions of sector-level bargaining have adopted this approach, especially where there is also strong use of TAW.

3. Sector-level bargaining is often supplemented at the third level, within TAW firms.

4. The fourth is collective bargaining in sectors in which user-companies are based, which is also an important means of regulating agency work in several countries.

Although this Eurofound report "Temporary agency work and collective bargaining in the EU" does not deal with the specific situation of posted temporary agency workers, it does, however, give detailed attention to the legal situation both of the TWAs as well as the collective negotiation and its characteristics in the EU-27 Member States, all of which makes the report a valuable and up-to-date complementary source in certain areas for direct consultation alongside ours.

However, it is important to bear in mind the fact thatthe majority of the conditions arrived at through universally binding collective agreements – through the various methods described earlier – would be applicable to cross-border temporary agency worker, posted or not, in accordance with the posting of workers Directive and Article 5 of the Agency Work Directive on equality of treatment and pay.

Posted agency workers

The *Laval*[25] ruling has declared that Directive 96/71/EC cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. Lacking general effectiveness, the collective agreement does not appear, in the eyes of the Court of Justice, to be a sufficiently powerful source to impose these obligations, as also inferred from the ruling

[25] Ruling 18 Dec 2007, *Laval* (C-341/05).

Rüffert[26]. This point is crucial, as several EU member states lack a universally binding collective agreement for temporary agency work.

Cross-border migrant agency workers

Temporary agency workers, whether they have been posted or not, with a contract in their country of destination are, of course, subject to the principle of equal treatment in a double dimension: if they are EU citizens, and, regardless of nationality, they benefit from the equality between ordinary and temporary workers. Thus, measures such as the collective agreement recently concluded in the Netherlands[27], which established differences for East European workers and was the subject of strong criticism by some political parties and Dutch trade unions and the general Dutch federation of temporary work agencies ABU, leading to its non-application, cannot be admitted under EU Law. The disputes aroused by the *Rüffert* ruling have no place here. Being in the field of application of a national Labour law, all of its provisions will apply to workers recruited in this way. This includes, of course, collective agreements regulating TAW.

As we have seen, the Netherlands provides an example of collective bargaining, which, while steering clear of the discriminatory practices condemned in the country itself, attempts to offer a framework that has been adapted to the reality of workers' cross-border movement. Specifically, several of the general provisions of the ABU-CAO can be exchanged for other monetary benefits, mainly concerning working time: public holidays, reserves for absenteeism, etc. This exchange is conditioned by an equivalence of values. This exchange of conditions may not result in a deterioration in the rights of the workers, who must be compensated with conditions of equal monetary value.

There are also several clauses concerning information about transport and the hiring company, accommodation, health insurance, language formalities, and other issues of interest for the workers who have been recruited in "in groups by, or on the instructions of a temporary employment agency outside the Netherlands and/or are housed in groups in the Netherlands with a view to arranging for them to perform work in the Netherlands".

Furthermore, article 46 considers the situation of those temporary employees whose contract is subject to a foreign law ("to temporary employees who are deployed from abroad by a foreign temporary employment agency to a client in the Netherlands, and whose employment contract is governed by the law of a country other than the Netherlands"). It reproduces the contents of article 3.1 of Directive 96/71/EC,

[26] Ruling 3 Apr 2008, *Rüffert* (C-346/06).

[27] Not the ABU-CAO, but that concluded in February 2009 by a small federation of 'international labour brokers' VIA .

concerning minimal dispositions. In an annex to the collective agreement it is made clear which conditions apply is such case and which not.

Neither the French (*Travail temporaire (personnels intérimaires et permanents), Brochure n° 3212*), Spanish (*V Convenio Colectivo Estatal de Empresas de Trabajo Temporal*), German (three agreements: BZA / DGB, iGZ / DGB and AMP / CGB), Swedish (*Agreement for Salaried Employees in Staff Agencies, 1 May 2007 - 30 April 2010*; English version[28]) or British (several collective agreements) systems of collective bargaining contain clauses that are comparable to these. They deserve a thorough examination, confronting them with the prescriptions of Directive 2008/104/CE.

Several judgements of the European Court of Justice are particularly relevant concerning nationals of third-party countries.

First of all, *Commission v Luxembourg24,* where the Court studied the compatibility of the legislation of that State concerning service providers established in another Member State: the demand for work permits for their workers who were nationals of non-member countries. There were two possibilities: individual permits, the issuing of which is subject to considerations relating to the employment market; and collective ones, which were granted only in exceptional cases. The main condition was that the worker has been in a relationship with their undertaking of origin through a contract of employment of indefinite duration for at least six months prior to posting. This last declaration clearly affected the activity of TWAs given that if the rule had been upheld TWAs would have been among the most affected because of the temporary nature of their activity and most of their contracts. The Court ruled against Luxembourg.

In second place, an obligation of prior control of the permits for this type of workers has been considered excessively onerous by the Court, which manifested its preference for simple notifications that enable a more intensive control *a posteriori*[29] and also discarded the automatic denials of residence permits to posted workers[30].

One last aspect also worth considering is that of TWAs established outside the Community territory. Based on the scenario of the different Member States, the following restrictions may be established: the strict prohibition of their activity; the requirement of compliance with the same conditions as those required of an undertaking of this kind in the same Member State; and the establishment of special obligations of information to the labour authority or stricter supervision rules. A report of

[28] It contains this provision that, at a first glance, does not match very well with the European legislation: "1.5 Service Abroad. Upon service abroad, the employment terms during the stay abroad shall be regulated through: agreement between the employer and the salaried employee or by special regulations for service abroad or the like at the company. In addition, the "Agreement Concerning Social Security for Salaried Employees Serving Abroad" applies to those salaried employees comprised by it".

[29] Ruling 19 Jan 2006, Commission vs. Germany (C-244/04).

[30] Ruling 21 Sep 2006, Commission vs. Austria (C-168/04).

the Council of Europe, highlights some abuses, particularly in East European countries[31].

6. ADMINISTRATIVE INTERVENTION: COOPERATION AND SURVEILLANCE

Administrative cooperation is fundamental to the smooth running of everything we have described. The importance of improvement in this area has been vehemently emphasized in as far as the cross-border rights of workers posted by temporary work agencies are concerned[32].

It was with this in mind that the Commission Recommendation of 31 March, 2008, underlined the need to facilitate the flow of information necessary to ensure the smooth running of the different affected labour systems, in particular with regard to posted workers. The whole philosophy of the document takes on special relevance when one considers the triangular work relationship implied in the case of temporary agency work. It is worthwhile highlighting the concrete demands that the Recommendation posits: the specific identification of relevant Labour Law, with express mention of working and employment conditions; access to the relevant collective agreement; linguistic availability of the above information; and optimisation of the possibilites offered by new technologies.

Likewise, the Committe of Experts on the posting of workers, created by the Commission Decision, 19 December, 2008 will play a central role in the putting into practice of what was stipulated in the earlier Recommendation. The fact that it is specifically designed to bring together "a maximum of ten representatives of the social partners (picked uniformally from managerial organisations and workers) from the sectors that frequently make use of displaced workers", demonstrates the importance of this cooperation[33].

Concerning administrative surveillance, the European Court of Justice has gradually outlined what is acceptable and what is not. It has declared[34] that it is against Community law to have adopted a provision according to which temporary work agencies established in another Member State are obliged not just to give notification of each hiring out of a worker to an undertaking using that worker's services in Germany, but also of each job to which the worker is assigned. In short, the essence of

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[31] From the Council of Europe report on *The situation of migrant workers in temporary employment agencies* (15 December 2006)

[32] House of Lords, 2006-7; Irish Congress of Trade Unions, 2008.

[33] The High Level Committee on workers' movement is set to become an ideal sounding board for the future Observatory for cross-border temporary work activity that is intended to be set up. The combined efforts of both organisms should yield a synergy that will allow the temporary agency workers to increase their contribution to the improved working of the EU labour market.

[34] Ruling 18 Jul 2007, Commission vs. Germany (C-490/04).

the pronouncement is that the freedom to provide services of TWAs in a different Member State from the Member State where the temporary work agency is established cannot be hindered by different procedures from the established procedures applicable to undertakings established in that Member State. However, the same judgement upheld the possibility of requiring TWAs to translate certain documents, pointing out that the presentation of those documents in the original languages could cause considerable difficulties to the national control authorities.

Nevertheless, in *Commission v Luxembourg* of June 19th 2008, C-319/06, the Court did not uphold the obligation to retain in Luxembourg, with an *ad hoc* agent resident there, the documents necessary for monitoring the postings of workers. The *Rüffert* judgement of April 3rd 2008 (C-346/06), in turn, condemned the legal requirements of designating as contractors for public works contracts only undertakings which, when submitting their tenders, agree in writing to pay their employees, in return of performance of the services contracted, at least the wage provided for in the collective agreement in force at the place where those services are performed

7. SOCIAL SECURITY ISSUES

In theory, issues of social security are clearly defined in the main Community norm dealing with such matters: Regulation (EC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

Article 14 of Regulation (EC) No. 1408/71 establishes that posted workers, of course including those involved in temporary agency work, will continue to be linked to their Social security system of origin for one year, and, in exceptional circumstances, for two. On examining this rule, Decision No. 181 of the Administrative Commission on the Social Security of Migrant Workers has established a detailed series of requirements for the cross-border functioning of TWAs which revolve around the notion of the constancy and significance of the activity of the undertaking in the Member State of origin. These rules are intended to combat the establishment of false delocalised companies to avoid labour costs, but it does not entirely eliminate the possibility of any undertaking functioning in two or more Member States and taking advantage of the lower costs in one of them. With the entry into force of Regulation (EC) No. 883/2004 on 1 May, 2010, two years will be the maximum period of linking to the Social security system of origin in case of posting of workers.

Thus, postings going further than the periods of time indicated imply the obligation to join the Social security system of the country of destination.

It is worth noting that Article 13.2.a of Regulation (EC) No. 1408/71 establishes that “a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is

situated in the territory of another Member State". Lacking the consideration of "posted workers", these workers would be subject to the whole national rules of their place of work. Nonetheless, since the 1970 *Manpower*[35] ruling, the Court of Justice has made clear that the link of this kind of workers, in the field of social security, is with the State where the TWA is located, and not with the user enterprise's one.

In conclusion, Community legislation provides clear solutions to the most common situations involving the transnational traffic of TWAs in as far as Social Security is concerned.

8. CONTRACT TYPES

The most detailed studies (EUROFOUND, 2008; Antoni and Jahn, 2009) coincide in pointing out that contracts of indeterminate length between worker and TWAs, within which successive postings take place, do not in practice constitute the norm at national level, which tends towards temporary contracts that apply to each posting. When TWA workers are what we have denominated "migrant" workers, it seems obvious that the contracts signed are by nature deemed temporary, as a result of the fact that (in principle, at least) the workers' return to their country of origin is implied from the outset. In this last case, we should point out that in general legal requirements concerning the length of employment contract do not tend to be formulated in the TAW sector. The only exception to this rule is Italy, where it has been established that all TAW contracts must be fixed-term[36]. In other countries typical formal aspects are subject to regulation, as are the details of contract content.

In the process of drawing up this desk research we have not been able to gain access to contract types dealing with individual temporary work carried out by workers who, according to the model we described, are posted transnationally. It must be kept in mind that these contracts are, in theory, subject to the legislation of the Member State of origin, and they will not be brought in line by the incorporation of Directive 2008/104/EC, which means that national differences will continue to exist. This issue of public order – the posting of workers with contracts, which are not valid in the country of destination – is one of the areas in which appropriate measures should be taken to improve consistency between national legislations. The lack of any specific mechanism of control on this issue does, however, make any such reform difficult to regulate.

A comparative analysis of some of the most significant contract types would be very interesting, comparing the average duration not just of contracts, but also of postings on a national level (see those collated by Vaes and Vandenbrand, 2009), as well as on a transnational level, in an attempt to identify both similarities and disparities. If further

[35] Ruling 17 Dec, 1970 Manpower (35-70).

[36] "Temporary agency work and collective bargaining in the EU". European Foundation for the Improvement of Living and Working Conditions (2009).

data appertaining to sex and age are also considered, the resultant panorama would be especially complete, and would allow for the opening up of new avenues of investigation, including that of the impact of gender on temporary agency workers and, in particular, the safeguarding of cross-border maternity rights.

9. JURISDICTION

In the case of posted temporary agency workers, the Directive sets out a legal clause in Article 6[37], which states that judicial proceedings may be initiated in the Member State in whose territory the worker is or was posted.

Furthermore, we must remember that article 19 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, establishes that legal proceedings against an employer should be carried out in the country where they are registered, which in the case of migrated workers would be the State of origin[38].

This jurisdictional regime is especially relevant to all cases of abuse concerning cross-border posted temporary agency workers due to the breach of the working conditions laid down in article 3(1) of Directive 96/71/EC. We must, however, remember that, in the first instance, control of these situations remains with the competent authorities. As we saw in the previous section, this control could also be the consequence of the administrative cooperation between the Member States[39].

10. CHALLENGES FOR THE FUTURE

From a European point of view, there are two aspects that are worthy of detailed analysis when we consider a not too distant future. This motivating reflection is due, in part, to the growing use of temporary work agencies, can also be seen as a

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[37] Article 6: "In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State"

[38] According to Article 19 of Council Regulation (EC) No. 44/2001, "An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

[39] According to article 4(2) of the Directive 96/71/EC, "Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

consequence of the economic activity that is expected to be recuperated once the recession has passed, and finally takes into account the combined effect of the new European Strategy for Growth and Jobs in the post-2010 period, and the implementation (at national level) of Directive 2008. Furthermore, it is also the result of the marked presence of multinational companies in the EU temporary agency work market.

Following the recent recast of Directive 94/45/EC[40], one interesting aspect will be to ascertain the role played by European Works Councils, or similar information and consultation bodies, mainly within the labour-providing companies (agency level). Although available information indicates their still limited development generally speaking, within a transnational framework they can be powerful tools, as long as they are provided with the necessary information, in encouraging the adequate and fair development of cross-border temporary agency work activities.

On the other hand, the representation of these temporary agency workers, one of the central requirements of Directive 2008/104/EC, and in particular cross-border collaboration aimed at filling potential gaps, is one of the main challenges for the consolidation of normal development in industrial relations within this field (Warneck, 2009; Hardy and Fitzgerald, 2008).

The second, and subsequent, aspect would be to consider the possibility of collective European framework agreements which would allow working conditions for temporary agency empoyees posted in areas that are geographically nearby to be brought in line with each other. Techniques involving open methods of coordination, through the exchange of good practice and the establishing of common benchmarks, could be another valuable tool in addressing these issues without the legal implications of organized collective bargaining

[40] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. Official Journal of the European Union of 16 May 2009.

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