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TEMPORARY WORK

Analysis of the legal position in Member States of the European Communities and proposals for a harmonisation of the laws

by

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Part 1

Analysis of the legal situation

I.

Definition of the subject of the study, search for a common terminology

The actual subject of this study, the professional supply of temporary workers concerns the situation in economic life in which an enterpreneur who may be a natural person, a company of persons or a legal entity concludes employment contracts with persons seeking work without employing them himself. The sole purpose of the conclusion of these contracts is to oblige these workers, in accordance with the instructions of the employer-contracting party, to take up employment in other enterprises for the performance of a specific piece of work or for a specific period, e.g. as a replacement of workers who are sick or on holiday (so-called temporary work). After the completion of this work the worker must hold himself at the disposal of his employer for a fresh allocation to other enterprises. From the legal point of view, this procedure represents a loan of workers to other contractors, a so-called labor leasing relationship. Its contractual bases are, in the first place, a work contract between the lender and the worker (so-called worker on loan) and, secondly, a relinquishing contract between the lender and him who borrows the services of the worker. By a special stipulation in the work contract, the worker on loan is obligated to comply with the transfer order of the lender to the borrower. The right of transfer is the most important constituent of the lender's management right in his capacity as employer of the worker on loan. In the linguistic usage of the Member States of the European Communities, the Dutch legal phrase het ter beschikking stellen van arbeidskrachten corresponds to the German concept of loan work contract. The languages of the other Member States focus more directly on the temporary nature of such professional supply of temporary workers so that the term "temporary work" (travail temporaire, travail intérimaire, lavoro temporaneo) has come into use replacing the expression "loan work."

Although it is fairly easy to understand this system from the economic point of view, certain difficulties arise when it comes to fitting it into a legal system and doctrine. There are various reasons for this: firstly, the terms of reference adopted to define the place which temporary work occupies in the legal system in relation to the employment contract as such vary greatly with

each Member State. Secondly, this raises weighty problems of distinguishing temporary work from other forms of the loan of manpower (louage de main-d'oeuvre, appalto di manodopera). This again leads to a varying assessment of the admissibility of temporary work, and all these differing views finally give rise to completely heterogeneous definitions. Any international investigation into the problem must therefore assume that any kind of harmonisation policy in the Common Market will run into considerable difficulties with regard to the legal system, legal doctrine and terminology.

It thus appears all the more important, if the work of the Commission of the European Communities is to be carried out successfully, to start by defining in an unambiguous way the supranational features of the concept of temporary work, to distinguish the latter clearly from other forms of the loan of manpower and thereby find a Community solution making it possible to arrive at a uniform terminology. These introductory remarks are intended to further this aim on the basis of the existing national laws, although nothing is said as yet about the nature of the legal relations between the temporary worker, the agency lending his services and the enterprise to which he is lent. This question will be considered in Section II of Part 1.

1. <u>Difference between temporary work and fee-charging employment agencies (bureaux de placement payants, collocamento)</u>

There are differences of opinion as to whether the professional supply of temporary work as defined above comes within the meaning of fee-charging employment agencies in

accordance with ILO Convention No. 96 on the prohibition of private fee-charging employment agencies or within the meaning of the State monopoly in the procurement of employment which has been established by law in all Member States. In reply to an inquiry by the Swedish Government the International Labour Office stated in 1965 that the professional supply of workers for temporary work was also included in the definition of the private procurement of employment which was prohibited under ILO Convention No. 96. This was because what mattered was not the form of provision (single request for procurement of employment or creation of a labour relation between the temporary worker and the agent hiring him out) but solely the actual nature of the activities of the employment agency or temporary work agency. Thus the hiring out of temporary workers was also in fact the procurement of employment[1].

The legal doctrine and practice of the Member States of the European Communities, however, have not followed this principle of including temporary work in the more general concept of fee-charging procurement of employment. They hold that there is an essential difference between the two forms, inasmuch as the legal relations concerning the procurement of employment are confined to a single instruction to the private employment agent to connect the offer of employment and request for employment, while the employment contract, independently of this negotiation procedure, is concluded with the person who will actually be using the services of

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1) Cf. B.O. LXIX No. 3, p. 409 et seq.

the worker seeking employment. When temporary workers were supplied the situation was exactly the contrary, since the worker entered into a relationship with the agent which entailed a lasting obligation and thus closely resembled an employment contract, whereas the enterprise which was actually to use the services of the temporary worker remained outside the relations created by the employment contract.

In the Federal Republic of Germany this distinction between the concept of procurement of employment and that of temporary work was confirmed by the judgment awarded by the Federal Constitutional Court on 4.4.67[2]. The Court based its decision on Article 12 of the Basic Law which guarantees the free exercise of professions according to the Constitution and of which temporary work agencies may also avail themselves. For this reason the German Federal Constitutional Court declared that Article 37, para 3 of the Act on the Employment of Manpower (AVAVG), which included the supply of temporary work in the State employment monopoly, was unconstitutional and therefore repealed it. The competent jurisdictions considered that the intrinsic difference between the private procurement of employment (forbidden) and the supplying of temporary workers (permitted) was that the latter should always be regarded as a fact if it appeared from the circumstances of the individual case that the temporary worker had entered into an employment contract relationship with the temporary work agency exclusively and that no employment contract had been concluded between the temporary worker and the enterprise

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2) Cf. Bundesverfassungsgericht (Federal Constitutional Court) 21, 261

using his services[3]. In German legal doctrine the intrinsic difference between the procurement of employment and the professional supplying of temporary workers also lies in the establishment of a labour relation between the temporary worker and the agency hiring him out, whereas in the case of the simple procurement of employment it is a question of one single request for such procurement[4].

In France too the intrinsic difference between the procurement of employment and temporary work (travail temporaire) resides in the fact that in the first case the contractual relations come to an end with a single request for procurement of employment, whereas in the case of temporary work a permanent legal relationship exists whereby the temporary worker is placed under the authority of the temporary work agency. This view was already adopted by the French Government with regard to the interpretation of ILO Convention No. 96[5].

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[3] Cf. Bundesgerichtshof (Federal Court) of 10.12.68, Betriebs-Berater 1969 p. 228; Bundessozialgericht (Federal Social Court) of 29.7.70, Betriebs-Berater 1970, p. 1011, 1398; Bavarian Oberlandesgericht (Supreme Land Court) of 22.12.70, Neue Jur. Wochenschrift 1971, p. 528 et seq.

[4] Cf Nikisch, p. 244 et seq; Hueck p. 522, 526

[5] Cf. Rés. rapp. rat. 1968, p. 196

It is expressed in varying ways in French legal writings[6].

Although in Italy any form of private procurement of employment and loaning of workers is forbidden by law[7], Italian legal doctrine has nevertheless made a thorough analysis of the legal differences between the procurement of employment and temporary work. Here again the same distinction is made: the procurement of employment is confined to one single operation by the agency responsible, with whom the worker is not bound by any labour relationship; in the case of temporary work, however, the temporary work agency assumes the functions of an employer towards the temporary worker, so that there exist between the two parties relations similar to those

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6) Cf. Camerlynck p.196; Camerlynck-Lyon-Caen p. 102, Footnote 1; Rivero-Savatier p. 335; Brun-Galland, Bilan de dix années, p. 38 et seq; Blaise p. 315 (adopting the same attitude as German jurisdiction, this work examines, on the basis of different individual examples, the question as to whether the temporary worker is really bound to the temporary work agency by relations similar to those created by an employment contract).

7) As regards the banning of the private provision of employment see Act No. 264 of 29.4.49; as regards the loaning of workers in any form see Act No. 1369 of 23.10.60 and Decree of the President of the Republic No. 1192 of 22.11.61.

created by an employment contract[8].

In the BENELUX countries the differences between the private procurement of employment and the supply of temporary workers have so far been little mentioned in legal literature[9]. It is, however, clear from the replies of the competent Ministries to the questionnaire of the Manpower Directorate of the European Communities that these countries recognise the same criteria of distinction as do the other Member States[10].

From the legal point of view, therefore, there are no points of contact between the concept of the procurement of employment and that of the professional supply of temporary workers, as the nature of the legal relations between the parties concerned differs considerably in both cases. To be realistic, however, one cannot dismiss the possibility of an abuse of the system of temporary work whereby an illicit procurement of employment is actually effected which would leave the worker socially unprotected because he would have no real employer. The dangers of such an abuse were particularly stressed in the replies of Belgium and Luxembourg to the questionnaire.

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[8] Cf Mazzoni, p. 136; Mengoni-Treu, p. 246 et seq; cf. also Cassazione of 1. 12.58, Giustizia Penale 1959 II, p. 826 with footnote by Smuraglia.

[9] Cf. only Horion, p. 200,248

[10] Cf. Doc. V /386/71 (Netherlands), V/387/71 (Belgium and Luxembourg

2. Difference between temporary work and the loan of manpower per se (prêt de main-d'oeuvre, prestito del lavoratore)

The loan of manpower also differs from the professional supply of temporary workers. It should be borne in mind that the essential criterion for defining a temporary work contract is that the temporary worker is not occupied in the enterprise of his employer, i.e. the temporary work agency, but that his main duty according to his employment contract is to carry out his work, in compliance with the instructions of his employer, in other enterprises to which he is assigned. The true loan of manpower, on the contrary, is characterised by the fact that the worker is integrated into the enterprise of his employer and works there regularly. In a more or less exceptional way, however, the worker, while remaining subject to his previously concluded employment contract, may be seconded to other enterprises in order to work there temporarily according to the instructions issued by the heads of those enterprises.

Nikisch (p. 241,244) and Horion[11] have rightly pointed out that the content of the contract is the essential criterion. In the case of temporary work the worker undertakes from the outset to work in other enterprises assigned to him. In the case of a true loan of manpower, however, the worker has a contractual obligation towards his own employer only. If the latter wishes to lend his workers to other enterprises,

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11) The employment contract according to the laws of Member States of the ECSC (Collection of labour law, published by the High Authority of the ECSC) Luxembourg 1965, p. 248 - 249

this requires an amendment of the employment contract, and hence also the consent of the worker in question. The true loan of manpower also has a different economic purpose. This purpose is not intrinsically directed towards meeting the needs of the labour market, but serves primarily to meet the business needs of enterprises which have formed a collaboration. They may require, for instance, the temporary performance of particular tasks calling for special technical qualifications, for which it would not be worth while recruiting extra staff, the exchange of experiences, mutual information and instruction between friendly enterprises, the supervision of subsidiaries by employees of the parent company.[12] The worker seconded under the true loan of manpower system is far better protected by the labour law than is the temporary worker, for he can at any time claim his full rights arising from the employment contract vis-à-vis the employer who has seconded him, even after the end of the secondment. Unlike the temporary worker, therefore, he does not have to wait until his employer assigns him to another enterprise. In the case of a true loan of manpower, therefore, the continuity of employment inherent in the labour relationship is absolutely guaranteed.

It is for this reason that the laws of the Member States consider that legally speaking the true loan of manpower is simply a modified form of the employment contract, for while certain peculiarities undoubtedly exist due to the division

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[12] Cf. the examples of the needs of enterprises quoted by Bobrowski-Gaul, p. 102.

of the worker's contractual rights and obligations between the lender on the one hand and the enterprise to which he is lent on the other, it is nevertheless a fact that this system does not contain the many legal problems inherent in temporary work. This view predominates especially in the jurisprudence and legal doctrine of the Federal Republic of Germany, France and Belgium, where, moreover, the loan of manpower is not absolutely forbidden by law[13].

In Italy the incorporation of the loan of manpower per se into the legal system raises somewhat greater difficulties owing to the total prohibition on the lending of workers imposed in Act No. 1369 of 23.10.60. The true loan of manpower system, however, is known in that country too. It is even regarded as permissible under two conditions: the first is that it results from a specific employment contract between the lender and the enterprise to which the worker is to be lent - a fact which Art. 5 of Act No. 1369 expressly regards as constituting an exemption from the prohibition on the loan of manpower. The second is that the seconded worker, on completion of the work for which he was lent, may claim the right to continue to be employed in the enterprise which seconded him. In this latter case, the Italian legal

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13) Cf. for the Federal Republic of Germany: Nikisch, p. 241 et seq.; Lueck, p. 521 et seq.; Schnorr von Carolsfeld p. 24; Bobrowski-Gaul, p. 102 et seq.; Monjau, p. 528 et seq.; Trieschmann op. cit.; for France: Lyon-Caen, p. 230; Lélennec-Juttard, p. 303; for Belgium: Morion, mentioned in Footnote 11.

doctrine considers that the admissibility of the secondment can be deduced from a restrictive interpretation based on the ratio legis: it holds that Act No. 1369 only aims to remove the professional disadvantages of lending manpower, but does not intend to prevent the mere secondment of workers to other enterprises within the framework of valid employment contracts[14].

3. Difference between temporary work and sub-contracting (sous-entreprise, subappalto) and the labour middleman (marchandage)

Although there are various differences in the legal status of sub-contractors and labour middlemen, they may be examined jointly when it comes to distinguishing them systematically from temporary work, because they present the same characteristics from this point of view. In fact, French and Italian law treat these two phenomena identically [15], whereas the German law considers that only the labour middleman comes under the labour law, and the various legal problems

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[14] Cf. Giorgio Branca, La prestazioni di lavoro in società collegate, 1965, p. 60 et seq., 104 et seq.; Mengoni-Treu, p. 256; Corrado, p. 439.

[15] For France cf. Art. 30 (b), Book I of the Code du travail (Labour Code); for Italy cf. the definitions given by Mengoni-Treu, p. 246 et seq. concerning Act No. 1369.

arising from the status of the sub-contractor come more especially under commercial and civil law[16]. Both the sub-contractor and the labour middleman undertake by a work or service contract concluded with another enterprise to carry out work or other services for this enterprise with the help of their own workers[17]. The sub-contractor is usually obliged to supply materials, machines and personnel while the labour middleman is usually only expected to supply the personnel. There is here an obvious difference from temporary work. In the case of both the sub-contractor and the labour middleman there is legally no assignment and incorporation of the workers of the temporary work agency in the enterprise to which the workers are lent. The workers concerned remain exclusively employed in the enterprise of the sub-contractor or are only required to carry out work for the labour middleman. Their work relations are not divided into a basic relationship with the temporary work agency by virtue of the labour law and a subordination to the authority of the enterprise to which they are assigned, as is the case with temporary workers. The principal enterprise benefits only from the ~~xxxxxx~~ total economic services of the sub-contractor or labour middleman, but there is no hiring out of individual workers.

This difference is frequently pointed out in the legal writings of Member States. It is also often observed that de lege lata as de lege ferenda the temporary work agency

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16) Cf. Nikisch, p. 232 et seq.; Hueck, p. 799 et seq.

17) Cf. the classical definition in the judgment of the French Cour de cassation, Chambre Sociale, on 26.5.61, D. 1961, Som. 96

should be assessed from a different legal point of view from the sub-contractor or labour middleman[18].

4. Difference between temporary work and representation (mandat, mandato, rappresentanza)

It goes without saying that if a person is authorised by a worker to conclude an employment contract on his behalf this person is not an employer, an employment agent nor a hirer out of manpower. What is involved here is merely a representation of the worker's desire to effect a legal transaction with a genuine employer. The employment contract itself is concluded directly between the represented worker and the employer. The representative does not act as an employment agent since his function is not to connect offers of employment and requests for employment, but solely to conclude individual employment contracts - usually on the instructions of the worker represented. Neither is he a lender or temporary work agency, since he is not party to the contract concluded with the worker. This situation arises particularly in Belgium, where by virtue of Art. 10 of the Act of 31.3.1898 on "Unions professionnelles" the trade unions are authorised to conclude employment contracts on behalf of

18) Cf. Camerlynck, p. 94 (No.52), 96 (No. 54); Lyon-Caen p. 229 (No.211); Camerlynck-Lyon-Caen, p. 102 Footnote 1; Brun-Galland, Bilan de dix années, p. 38 et seq.; Rivero-Savatier, p. 288 et seq, 335; Nikisch, p. 244 et seq.; Hueck, p. 522; Mazzoni, p. 135 et seq.; Mengoni-Treu, p. 246 et seq.

their members. In so doing the trade unions are neither employment agencies nor lenders of manpower[19].

Nevertheless, this legal phenomenon of the representation of workers is not without significance for the problem of temporary work. As Blaise[20] and Mazzoni [21] have already rightly pointed out, the danger exists that this representation may be fraudulently used to evade the legal bans on employment agencies or the loan of manpower. This is the case when one or more heads of enterprises authorise temporary work agencies to conclude employment contracts on their behalf with persons seeking employment. While theoretically this implies a mere representation of the will of the heads of enterprises to effect a legal transaction, in fact this may conceal an act of procurement of employment or loan of manpower. Italian jurisprudence has declared as null and void any such authorisations given with the intention

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19) Cf. Horion, p. 248-249

20) P. 315-316

21) P. 135-136

of evading the law[22].

5. Difference between temporary work and a Société de gestion du personnel (staff management company)

While France is the only country at present in which these companies play a fairly important role, it is to be presumed that in view of their value to business enterprises they will constitute a model also in the future when international combines come to be established. They are the outcome of the initiative of enterprises belonging to a combine or group of enterprises in the same production sector who no longer engage their workers themselves but create a company to be responsible for concluding employment contracts. This company then allocates to the various enterprises the workers they need[23]. Although there is in such cases a supplying or lending of workers, the

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22) Cf. Magistrature del lavoro Milano of 18.3.32 and 3.11.33, Foro della Lombardia 1933 I, p. 440 and 1935 I, p. 325, Messina of 26.5.33, Foro italiano 1934 I, p. 190; cf. also Loschiavo, Mediatorato e mandato nella disciplina della domanda ed offerta di lavoro, Foro della Lombardia 1935 I, p. 165.

23) Cf. Camerlynck, p. 94

the staff management companies are not comparable to temporary work agencies. As the French Cour de cassation[24] has already stipulated, these companies do not have the same effects on the labour market as do temporary work agencies. They confine themselves rather to the conclusion of employment contracts on behalf of a specific group of enterprises of a similar nature with which they are connected, with the aim of distributing the workers as rationally as possible among the various enterprises of the group concerned. In this respect their role is similar to that of a plenipotentiary[25]. Naturally, this formula of the future might form the subject of a Community regulation.

Conclusion

The economic process of providing manpower can take several different legal forms. Leaving aside the representation of the worker for the conclusion of an employment contract, as this does not legally constitute a provision of labour (unless it is used fraudulently), a distinction may be made systematically between the two following cases:

a). An employer makes available to a third enterprise merely the economic effects of the services performed by his workers without this resulting in any personal change in the employer/worker relationship. This is the formula

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[24] Chambre Sociale of 13.12.62, J.C.P. 1963 IV 6.

[25] Cf. also Camerlynck, p.95

adopted by the sub-contractor and the labour middleman. As the relations remain the same in respect of the labour law, no exceptional situation arises with regard to the normal employment contract, apart from a few changes in respect of liability. The general rules governing legal conflicts with regard to labour law are also applicable in the case of the sub-contractor and labour middleman at the international level.

b). An employer places his workers in their capacity as his personal labour force at the disposal of a third enterprise. The characteristics of this group can be placed under the general heading of loan of manpower. In this case there is always a change in the employer/worker relationship. If the loaned worker remains integrated in the lender's enterprise, and is again employed in that enterprise when his secondment ends (loan of manpower per se), however, or if it is merely a question of centralising the conclusion of contracts for a specific group of enterprises with a view to obtaining the most rational distribution of the labour force within that group, then the social situation of the worker can be regulated by the general provisions of the labour law.

On the other hand, problems arise in cases where an employer concludes employment contracts with persons seeking work without employing them himself, and without even being able to employ them because he has no enterprise of his own, but proposes to lend them to other enterprises either permanently or temporarily. In this case the employer/worker relationship comprises both a relation, creating a legal obligation, with the lender who actually per-

forms no real employer functions, and a practical relation of subordination to the third enterprise which, while performing the functions of an employer, is not a party to the contract. This duality is so typical that it creates difficulties in applying the legal regulations of the labour law and appears to threaten the social protection of the worker. This case forms the crux of the present study, though it will not always be possible to ignore the interconnected problems posed by the other forms of providing labour.

II.

The legal situation in the Member States

The classification of legal possibilities for relinquishing workers to other enterprises given in Section 1 indicates that specific social and legal problems arise only in the case of professional supply of temporary workers in the restricted sense, that is in cases in which the contracting partner representing the employer is not at the same time the person in whose enterprise the worker is actually employed. Only this phenomenon is considered problematic in the legal systems of the Member States; only this will occupy us in the following discussion.

1. Social and juridic antinomies of the professional supply of temporary workers

The essential breaking in two of the contracting partnership and incorporation of the temporary worker into another enterprise not belonging to the employer represents a non-typical situation of labor legislation whose legal integration presents difficulties and hence leads to a number of antinomies.

a) From the economic point of view, the professional supply of temporary workers fulfils an important cyclical function on the labor market since only by its means, in the first place, do those who seek work because they cannot or will not accept permanent employment for some reason become available to the labor market and, secondly, is the need of enterprises for temporary workers met[26].

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26) Cf. in this connection the detailed statements in Troclet-Vogel-Polsky, p. 36 et seq.; Berthelot, p. 465 et seq.; Taquet, p. 435 et seq.

From the legal point of view, the activity of these temporary work agencies is based on the right to exercise a profession and the right of establishment, which are guaranteed in all the Member States, so that a general prohibition would be illegal and, for this reason, could not come into consideration[27].

On the other hand, there is no escaping the fact that the professional supply of temporary workers actually represents a type of private employment mediation. Hence, these temporary work agencies must be prevented from engaging in the illegal activity of employment agencies internationally prohibited by the ILO Agreement No. 96 (cf. Section I, para 1 above). The Member States are attempting to resolve this antinomy in their legal systems by making the admissibility of the temporary work agencies depend on their willingness to assume toward the temporary workers they supply all the obligations which the labor law imposes on employers. The temporary work agency's willingness to accept the liabilities of an employer thus becomes the criterion for permitting the professional supply of temporary workers and distinguishing it from unpermitted job mediation. In any case, the company to which the temporary workers are assigned may not act as an employer. It does not require much intelligence to realize that what is in question is a pragmatic means of bridging the antinomy between actual necessity and the legal system[28].

b) Connected with the above is a second antinomy. The question is whether a contract which merely empowers the temporary

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27) It is particularly on the fundamental right of the free exercise of a profession that the German Federal Constitutional Court based its judgment of 4.4.67 (BVerfGE 21, 261), to the effect that temporary work agnecies were permissible and that their prohibition was unconstitutional. For France cf. in this connection Camerlynck, p. 95.

28) Cf. the highly critical Kindereit, p. 208 et seq.

work agency to relinquish the worker to other contractors but, at the same time, obligates the worker to comply with the assignment to another contractor can at all be said to have the systematic qualification of a work contract. In any case, it lacks the essential element of immediacy, the worker's obligation to work for his contracting partner. Hence, in some Member States it is sometimes considered doubtful whether the the temporary work contract is a work contract in the legal sense at all. Up until the decision by the highest court cited in footnote 3 jurisprudence in the Federal German Republic in part interpreted the temporary work contract as a separate job procurement contract which is followed by a work contract between the new contracting company and the temporary worker when the latter begins work there[29]. Belgian jurisprudence and court practice, in particular, tends to subsume professional supply of temporary workers under civil types of contract outside of labor laws. Especially if the worker's subjection to direction by the "lender" is relatively free (e.g. in case of office work, tour guides), depending on the circumstances in single cases, the law frequently accepts free service contracts or partnership contracts between the "lender" and his workers or a work-performance contract between the worker and the "borrower", which the "lender" concludes with the "borrower" on the basis of assumed authority[30].

29) Cf. Hueck, p. 522; Trieschmann, under SectionIII, para 2.

30) Cf. Troclet-Vogel-Polsky, p. 151 et seq.; Cour de cassation of 26.11.1964, JT 1965, p. 191; of 13.6.1968, cited in Troclet-Vogel-Polsky, p. 253; Cour d'appel Bruxelles of 14.6.1960, Rec. Gén. No. 20288; Tribunal de première instance de Bruxelles of 7.5.1958, Rec. Gén. No. 20044; on the other hand, acceptance of a temporary work contract on the basis of unequivocal submission of the worker to the temporary work agency according to the decisions of Cour de cassation of 7.1.1965, R.D.S. 1965, p. 60, and of 6.6.1968, cited in Troclet-Vogel-Polsky, p. 252; in criticism of this jurisdiction Taquet, p. 440 et seq. Concerning social security, the Act of 27.8.1969 has provided clarity in the sense of obligation of insurance.

This range of variation in the legal system intensifies the problem as to what legal rights and guarantees of social security accrue to the temporary worker in the interval between two jobs, in particular concerning how he can realize his right to resume work, what wage qualifications he has in the interval, and how his qualifying period and right to draw social security benefits are safeguarded. These questions cannot be satisfactorily answered by the conventional means of legal provisions found in labor laws and social security regulations and, in the final analysis, lead to the question whether the temporary work contract has the character of a contract for an indefinite period or that of a series of contracts for a specified period. Thus, in accordance with Art. 20 and 21, Book I, of the Code de travail, the French Cour de cassation--Chamber sociale--in its decision of 11.2.1970[31] is inclined to regard temporary work as a work relationship for an unspecified period in as far as conclusion of the assignment is not fixed at the outset and depends on the will of the employer or the enterprise to whom the worker is lent[32]. Nevertheless, in its judgment of 11.2.1971[33], the same Chambre sociale does not hesitate to deny the temporary worker the claim to remuneration for the time between work assignments if payment for this period has not been expressly agreed on.

c) A third antinomy arises from the peculiar nature of temporary work that results in a division between the worker's obligations based on the existing contract with the temporary work agency and his extra-contractual relationship of obedience to the new enterprise. In this way the individual responsibilities and rights inherent in the work contract are

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31) J.C.P. 1970 II 16371 with footnote by Savatier.

32) Cf. in this connection Catala-Franjou, p. 270 et seq.; critically Berthelot, p. 471 et seq.

33) Rec. Dalloz Chronique 1971, p. 233.

torn apart, which results in the following social problems:

As the temporary worker has no contractual ties with the enterprise to which he is lent, he cannot enjoy the social benefits granted to the permanent workers of that enterprise.

For the same reason the temporary worker cannot enjoy the working conditions which are prescribed in collective agreements for the enterprise to which he is lent. As, moreover, the temporary work agency acting as employer is normally not bound by any collective agreement, the temporary worker must remain content with the working conditions which the temporary work agency grants him on a free contractual basis. This implies a departure - highly questionable from the social point of view - from the principle of protection laid down in the labour law and a return to the notorious "laisser faire, laisser aller" system of formal contractual freedom. It gives the temporary work agency an unwarranted power over the temporary worker, who is economically speaking more vulnerable than other workers [34].

Temporary workers are seriously hindered in the exercise of their trade union rights and the defence of their collective interests. They have practically no representation in the enterprise to which they are lent and which exercises authority over them. It is also owing to the individual nature of their contracts that they are largely deprived of their trade union rights. They may even be assigned to enterprises of customers of temporary work agencies in order to break up or limit the effectiveness of strikes instigated by trade unions and are obliged to accept this assignment because of their contractual obligations. In this respect the temporary work contracts, in their present

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34) Collective agreements have only been concluded, though with varying success, for the biggest temporary work agencies. Thus in Belgium there is the collective agreement between Gregg Associates - alias Manpower Belgique - and the three large trade unions, C.S.C., F.G.T.B., and C.G.S.L.B. of 9.3.1971; in the Federal German Republic by the industry-wide wages agreement between the Association of Temporary Work Agencies and the German Employees' Trade Union of 30.6.1970 and a corresponding scale of salaries agreement of 2.10.1970; in France by agreements between the C.G.T. and the société Manpower-France of 9.10.1969, between the C.G.T. and SOGEP on 4.7.1970 as well as between the C.F.D.T. and Central Intérim on 4.12.1970. In France there are additional temporary work clauses in individual collective contracts (cf. survey by Catala-Franjou, p. 267 et seq.). Although the guaranteeing of working conditions for temporary workers by collective agreement is making headways, the provisions still appear inadequate because they are either limited to bare skeleton stipulations or comprise only a restricted number of typical vocations (e.g. office work) out of the actual number of temporary workers. Cf. details in this connection in Berthelot, p. 479 et seq.

form, may lead to a serious disruption of the prevailing social and economic system [35].

The legal theory that only the temporary work agency performs the functions of an employer and is the sole party responsible for fulfilling the terms of the contract contains ultimately the danger that the temporary worker cannot exercise the rights granted him by the labour law. As the temporary work agencies can operate with fairly simple equipment and staff resources, they often lack the necessary organisation and finance for performing the tasks imposed on them by the labour law and social security regulations. The temporary worker is thus in fact denied any social protection, as in the present legal situation he cannot demand this protection from the enterprise using his services [36].

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35) Cf. the following extract, quoted in the original text, from a temporary work regulation published by the Confédération française démocratique du Travail in its newssheet "action professionnelle et sociale - Dossier travail temporaire, travail intérimaire": "Les mouvements de grève sont le privilège du personnel stable d'une entreprise. Il est donc expressément interdit au personnel intérimaire, dont les statuts dépendent exclusivement de droits et obligations bien à part, de s'approprier un tel privilège." It seems clear that this amounts to a serious violation of the basic right to trade union action guaranteed in all Member States of the European Communities.

36) In the Federal Republic of Germany the view generally held up to the time of the judgment issued by the Federal Constitutional Court on 4.4.67 was that the working relations of the temporary worker - who at that time still ranked as a loaned worker, though not in the true sense - were split in two: i.e. the temporary work agency and the enterprise using his services were both equally responsible for granting the temporary worker his rights as prescribed by the labour law, and that this worker should enjoy all the working conditions prevailing in the enterprise using his services in compliance with the collective agreements. Cf. Nikisch p. 244 et seq.; Hueck p. 522; Trieschmann under Section III, para 2. Since 1967 (see footnote 3 above) German legal jurisprudence, basing itself exclusively on a formal legal argument, has abolished this carefully thought out means of providing social protection for the temporary worker. This attitude has been strongly criticised by those responsible for legal doctrine. Cf. the critical works of Seiter, Monjau and Hessel. Less vehement are Vielhaber and Sturm who, however, only touch lightly on the problem.

2. Solution of the problem by the national legal systems

All the Member States of the European Communities are at present concerned about effectively dealing with the above-mentioned social problematics of professional placing of workers by special regulations, and preventing abuses. Legislative proceedings are partly concluded and partly in the process of being concluded. Hence, no conclusive picture can be given for all the Member States. Of special importance for future development of the Common Market, however, is the necessity of promptly establishing the requisite context between the regulations on the national level and those of Community Law. Two aspects are involved: in the first place, the Member States are obligated on the basis of the EEC Treaty to formulate their internal legal regulations in a manner that will not infringe on any regulations of Community Law, especially those concerning the freedom of establishment, freedom in the supply of services, and freedom of movement for workers. Secondly, it is the responsibility of the Institutions of the European Communities to put into effect appropriate coordination measures to prevent the divergent national regulations from having a negative effect on the Common Market. Detailed explanation of the means required will be the subject of the second part of this study. For the

time being, the varying criteria underlying the national regulations must be worked out.

The attempts at a judicial solution of the problem of professional temporary work agencies on the national level can be divided into four groups:

a) The most radical possibility is the general prohibition by law of professional placing of temporary workers. Such a prohibition exists in Italy according to Act No. 1369 of 23.10.1960 and the Decree by the President of the Republic No. 1192 of 22.11.1961 supplementing the Act. In the case of violation of the prohibition, a work relationship between the temporary worker and the enterprise engaging him is simulated in accordance with Act No. 1369. Nevertheless, the problem of professional placing of workers appears to be known in Italy, at least in fact, as is indicated by Inquiry No. 473/69 of the delegate at the European Parliament, Müller, addressed to the Commission of the European Communities and the reply.

b) A second possibility consists of legal normalization of the reservations concerning approval by administrative authorities and administrative control of temporary employment agencies without, however, providing the temporary worker with substantive law protection by special regulations. This is the legal position at present valid in the Netherlands on the basis of the Wet op het ter beschikking stellen van arbeidskrachten of 31.7.1965 (Stadsblad 1965, No. 379 and the Government's resolution of 10.9.1970 (Stadsblad 1970, No. 410).

c) The third and most frequently encountered possibility is

that in which, on the one hand, the temporary work agencies are subjected to administrative control and, on the other hand, the legal relationships between temporary work agency, enterprise accepting the worker, and the temporary worker are regulated for each in his peculiar situation by special Act of law. In France this solution is embodied in the Loi No. 72 - 1 of 3.1.1972 sur le travail temporaire (J.O. 1972, p. 121). In the Federal German Republic it is provided for by the Act regulating professional placement of workers of 7.8.1972 (B.G.B. 1972, p. 1393) and in Belgium by an as yet unpublished avant-projet de loi sur le travail intérimaire[37]. In the matter of administrative procedure, these Acts or Bills differ considerably in that French law is satisfied with mere notice (déclaration) given by the temporary work agency to the responsible administrative authority for control purposes (Art. 32 et seq.) whereas German law and the Belgian bill lay down reservations in respect of approval by the authorities.

d) In the last possibility, professional placement of workers is not regulated by law and is, therefore, permitted without restrictions, but the social problems involved are solved by agreements between the Government of the Member State concerned and the temporary employment agency. Luxemburg has chosen this way by agreement between the Office national du Travail and the temporary employment agency, "Manpower/Aide-temporaire."

3. Main characteristics of the national legal provisions

The purpose of the following discussion is not to deal with the details of legal provisions concerning professional placement of workers existing or planned on the national level.

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37) The fate of the Belgian Bill is presently uncertain because of the change in Government in January 1972.

Information on that, emphasizing comparative law, is supplied by the convention reports of the Institut international du travail temporaire[38]. Our task is rather restricted to indicating, at certain points, the divergencies among the national legal systems which, in their effects on Community Law, appear of importance with regard to the question to be discussed in Part II.

a) The legal conditions allowing authorities to approve of the activity of professional employment agencies already differ widely. In the case of supplying workers across frontiers this can impair the freedom of establishment and the freedom to supply services, as will be explained in greater detail in Part II. The regulations range from those practically permitting every type of professional placement of workers without setting up specific requirements concerning the exercise of a profession (France, Luxemburg) to such that largely leave authorization up to the judgement of the competent authority (Netherlands)[39] to such that require, as legal condition, the dependability of the lender and specific organizational forms of operation in the case of temporary work agencies (Belgium, Federal German Republic)[40].

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38) Published in the Cahiers de l'Institut international du travail temporaire No. 1/1971, Nos. 2 and 3/1972.

39) Art. 6 of the Dutch Act of 31.7.1965.

40) Art. 10 § 2 of the Belgian avant-projet; § 3 of the German Act. It must be noted that the German regulation permits any organizational form of operation that puts the temporary work agency in a position to duly fulfil the customary responsibilities of an employer whereas the Belgian regulation--considerably more restricted--only allows commercial companies to function as professional employment agencies.

b) Liabilities arising from the temporary work contract are also regulated differently, which, in the case of trans-frontier placing of workers involving a number of legal systems, can lead to a clash of claims. Although all the legal systems, except Italy's--which generally prohibits professional placement of workers--are based on the principle that the temporary work agency is the contracting party in the role of employer[41], this principle is digressed from in various ways. The most serious digression is perhaps that of the Belgian avant-projet, which limits the liability of the temporary work agency with respect to the temporary worker to work remuneration and the other social security contributions (Art. 6) while making the enterprise to whom the worker is lent legally liable for all the other working conditions (Art. 14). The French Act No. 72 - 1, Art. 7, likewise makes the enterprise engaging the worker liable to fulfil certain mandatory conditions arranged by law and collective agreement. This simultaneously establishes a norm in the matter of clashing claims since the law at the actual place of work is applicable to the working conditions for which the enterprise to whom the worker is lent is liable. Other legal systems again do not embody such a division of liabilities between temporary work agency and enterprise. According to them, if the temporary work contract is valid, the temporary work agency is exclusively responsible to fulfil all the working conditions provided by law and collective agreement.

Similar divergencies result from the fact that the avant-projet of Belgium (Art. 15), the Act regarding placement of workers of the Federal German Republic (§ 10), as well as the Italian Act No. 1369 (Art. 1, para. 5), in the case of invalidity of the temporary work contract due to disallowed or unauthorized activity by a temporary work agency, by a

41) Cf. concerning legal interpretation of this principle in contrast to private job mediation Section I, para. 1 above.

legal fiction establish a work relationship with the enterprise to whom the worker is lent, and thus also digress from the principle of the temporary work agency's party position. The other legal systems, on the other hand, strictly conform to the principle of the relativity of obligatory relations between temporary work agency and temporary worker. If, in spite of invalidity of the temporary work contract, the temporary worker has worked for the new enterprise, these legal systems merely impose the general civil law regulations resulting from the invalidity, i.e. the temporary worker could make claims only against the temporary work agency as actual contracting party, whether for compensation because the latter is responsible for the invalidity, or unjustifiable profits[42], or, at best, on the basis of the actual work relationship.

c) Especially divergent, indeed diametrically opposite, are the mandatory terms of the temporary work contract stipulated by the national legal systems. This largely depends on the context relative to systematic law and social policy in which the national legal system places the temporary work relationship vis-à-vis the normal work relationship.

Thus the planned or existing legal provisions of Belgium and France attempt to limit the temporary work contract by virtue of law to exceptions for technical reasons. They take the identical position that the admissibility of professional supply of temporary workers is limited to the cases of actual need for temporary workers. Without regard to details, the following constituent facts are established concerning the admissibility of professional placement of workers:

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42) This might arise from the fact that, in spite of invalidity of the temporary work contract, the temporary work agency has received payment including the wages involved in the transaction.

- temporary replacement of a steady worker prevented from working for the period during which he is so prevented;
- temporary replacement of a suspended worker, except in the case of suspension due to a labor dispute;
- temporary replacement of a steady worker whose work relationship was terminated, until a new steady worker is engaged;
- temporary unusual accumulation of work;
- emergency;
- in France, in addition, the introduction of new work methods.

To prevent misinterpretation of the term "temporary" the regulations relative to some of the above conditions also fix a maximum time limit of 3 months for a worker's assignment[43].

Detailed discussion of the legal consequences of violation of these conditions of admissibility will not follow here since no judicature on the question is available as yet. On the basis of the systematic legal status of the mentioned provisions, it appears that a violation is more likely to lead to invalidity of the assigning contract between temporary work agency and enterprise using the worker's services than to invalidity of the temporary work contract between employment agency and temporary worker. What appears of particular importance, however, is the fact that these conditions of admissibility have a considerable effect on the formulation of the temporary work contract. To comply with them, temporary work contracts in actual practice are concluded as work contracts limited to the duration of a job assignment, which

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43) Cf. details in the Belgian avant-projet Art. 12; the French Act No. 72 - 1, Art. 2and 3.

the mentioned legal provisions of Belgium (Art. 3) and France (Art. 4) in fact lay down as the rule.

German law conceives of the temporary work contract in an exactly opposite way. In order to take into account the well-known stipulations regarding the abuse of time-limited and chain-job contracts set up by German jurisdiction, it prohibits on every point temporary work contracts which, legally or in fact, are limited to single assignments, pronounces them as invalid and--aside from a few exceptions of a salutary legal nature--as a result admits only temporary work contracts for indefinite periods, but these for all purposes[44].

Dutch regulations, by contrast, incorporate no such restrictions concerning the admissibility of temporary work contracts.

Differences in admissibility of the temporary work contract affect the varying forms of social protection which the worker receives. The risk of livelihood, which, according to French regulations, the temporary worker must take because of the mandatory restriction of the temporary work contract to a single job assignment, is covered by a legally prescribed risk compensation, the minimum amount of which is fixed by collective agreement or decree and paid by the temporary work agency in addition to the worker's remuneration. Moreover, the temporary worker gets holiday pay for each assignment. Specific hindrances to work arising from pregnancy, work accidents, and occupational illnesses as well as rendering of military service are equivalent to work assignments[45].

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44) Cf. § 3, para. 1, Nos. 3-5; § 9, Nos. 2and 3 of the German Act.

45) Cf. details in Art. 5 and 6 of the Franch Act No. 72 - 1.

On the other hand, German law has no need of special regulations for social protection since it prohibits setting a time limit on the temporary worker's contract, who maintains a fully effective work relationship to the temporary work agency during the time between work assignments and hence has all the rights given him by the labor law. This especially applies to continued payment of the work wage, to which the temporary worker has an inalienable right even between job assignments on the basis of § 11, para. 3 of the German Act.

Regulations in the other Member States include no such details relative to social protection. There the temporary workers are subject to the general labor law, which means that they must assume the risk of temporary work contracts limited to a specific period without social compensations.

d) In the framework of social security, the legal provisions of all Member States impose the respective employer responsibilities on the temporary work agency. Beyond that, however, the German Act (Art. 3) and the French Act No. 72 - 1 (Art. 18-31) make the enterprise to whom the worker is lent assume the role of employer especially with respect to the obligation to notify and pay contributions, and the legal consequences of work accidents and occupational illnesses.

Part 2

The situation with regard to Community law

I.

Effects on the Common Market

With regard to Community law, the first task is to examine what effects the diversity of the national regulations may have on the workings of the Common Market. This task will be carried out on the basis of the existing national legislation in the case of Italy, Luxembourg and the Netherlands and the Bills already mentioned in the case of Belgium, the Federal Republic of Germany and France. The interactions between these national legal and administrative regulations and the Community law can be classified into the following three groups:

The national regulations on the conditions governing establishment and the activities of temporary work agencies affect Articles 52 et seq. and 59 et seq. of the EEC Treaty on freedom of establishment and the free supply of services in general, as well as the competence of the Council to co-ordinate the legal and administrative regulations of Member States on the engagement in and exercise of non-wage-earning activities in accordance with Article 57, para 2 of the EEC Treaty in particular.

A second group comprises the national legal regulations on the conditions of validity, the obligations and the legal consequences of the invalidity of temporary work contracts

between the temporary work agency and the temporary workers as well as contracts for the supply of temporary workers concluded between the temporary work agency and the enterprise to which these workers are to be assigned. These regulations concern Articles 48 and 49 of the EEC Treaty and Regulation No. 1612/68 on the free movement of workers within the Community, insofar as the said regulations may hinder the exchange of workers between one country and another.

Finally, they affect the Commission's task which, in accordance with Article 118 of the EEC Treaty, is to promote close co-operation between the Member States in the social field, inasmuch as the national legal regulations provide for special measures of social protection of temporary workers and these cannot be implemented if the enterprise to which the temporary worker is assigned is established in a Member State other than that in which the temporary work agency concerned is established.

Before examining these mutual connections more closely, however, it must be stressed that this study can only indicate the general possible effects of the present or future legal situation on the workings of the Common Market. Only experience can tell how the Common Market will be affected in detail - this cannot be precisely estimated beforehand. Nevertheless, according to Article 3 of the EEC Treaty it is one of the tasks of the European Communities to anticipate possible disturbances in their functioning and take suitable preventive measures.

1. Guarantee of the freedom of establishment and free supply of services for temporary work agencies

With regard to the effects of national regulations on the freedom of establishment and free supply of services on the Community level, two points should be taken into consideration:

a). Articles 52 and 59 of the EEC Treaty and the General Programmes for the abolition of restrictions on the freedom of establishment and free supply of services stipulate that

the nationals of a Member State, whether natural or legal persons, may either establish temporary work agencies or engage and hire out temporary workers in other Member States under the same legal conditions as the latter's nationals even if they have no branch offices in those Member States. Realization of these stipulations of the Treaty occurs, according to Art. 54 and 62 of the EEC Treaty, through the issuing of Directives by the Council upon the recommendation of the Commission. In the area of the professional supply of workers, the national legal systems must conform to the "Council's Directive No. 67/43 of 12.1.1967 concerning realization of the freedom of establishment and the freedom to supply services for independent activities of real estate businesses and a few other services essential to business life," which, in theopinion of the Commission of the European Communities, also guarantees temporary work agencies the freedom of establishment and the freedom to supply services. Its material range of application regarding the "other services essential to business life," according to Art. 3, para. 1, is derived from Group 839 of the CITI[46]; expressly mentioned in Art. 3, para. 2, lit. a and e are private employment offices and the hiring out of office help. Relevant in this connection is the fact that, according to the footnote following the exhibits of the General Programs for providing freedom of establishment and the freedom to supply services of 18.12.1961 (Official Gazette No. 2/1962), activities not expressly included in this classification must be relegated to the next closest related group of activities; in so doing, the economic realities within the European Economic Community, especially technical development, must be taken into account. For the professional supply of workers such analogous reasoning is pos-

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46) Classification internationale type, par industrie, de toutes les branches d'activité économique, Bureau of Statistics of the United Nations, Etudes statistiques, Series M No. 4, rev. 1, New York 1958.

sible with reference to Group 839 of the CITI. It can, therefore, be considered as established that Community Law has provided the measures required for the removal of foreign restrictions in the area of professional supply of workers.

b) The fact that Community Law provides a basis for guaranteeing temporary work agencies the freedom of establishment and the freedom to supply services still leaves the question unanswered whether or not the basis is adequate for smooth exercising of this right. The rights pursuant of Directive 67/43 only permit temporary employment agencies from other Member States to engage in the steady or temporary exercise of their profession in the host state under the same legal conditions as those established by the latter for its own nationals. No unification of regulations on the Community level for exercising the profession is provided. Difficulties can now arise from the fact that the conditions permitting the activity of temporary work agencies under the national legal and administrative regulations are extremely diverse [47] and can, therefore, have a de facto impeding effect on exercise of the profession across frontiers.

In view of this diversity the legal question arises as to whether a temporary work agency established in a given

47) Cf. Part I, Section II, 2 and 3a above.

country may fulfil the conditions prescribed in that country when engaging and hiring out temporary workers in Member States with stricter conditions than those of its own country, or whether it must also comply with the stricter conditions of the Member State in which it is operating. Both alternatives involve a whole series of problems connected with the Community law. If, when engaging and hiring out temporary workers in other Member States, it sufficed for the agency in question to comply with the possibly more favourable conditions of the country in which it was established, then the social order existing in these other Member States might well be undermined by foreign temporary work agencies, since these would not be subject to the strict conditions imposed on local temporary work agencies. The latter would therefore be at a disadvantage

arises whether the individualistic attitude taken by certain countries might not make the free supply of services across frontiers within the Community a mere illusion.

Thus from the point of view of Community law neither alternative appears satisfactory. It would hardly seem possible to reach a solution by means of the machinery of the national legal systems. It is all the more necessary, therefore, to aim at a co-ordination of the conditions governing the engagement in and exercise of the activities of temporary work agencies in accordance with Article 57, para 2 of the EEC Treaty.

2. Effects on the free movement of workers

Just as the conditions of authorisation for temporary work agencies have certain effects on the freedom of establishment and free supply of services, so the current disparities in the conditions of validity for employment contracts of temporary workers and for the legal relations between temporary work agencies and the enterprises using the temporary worker's services can have certain repercussions on the free movement of workers within the Community. On this point the legal questions raised by a loan of temporary workers to countries abroad are extremely complex, and indeed virtually inextricable. The main difficulty here is that not only do various national legal systems with differing conditions of validity collide with one another, and each one tries to solve the legal conflict in its own way, but also that a number of legal relationships, i.e. the labour relations between the temporary work agency and the temporary worker on the one hand and the supply contract between the temporary work agency and the enterprise to which the

compared with the foreign agencies[48].

Conversely, however, it is conceivable that a temporary work agency which is already permitted in a Member State according to the latter's legal regulations also needs to obtain an authorisation, perhaps subject to stricter conditions, of the Member State in which it wishes to engage and hire out temporary workers. Such an eventuality would correspond to the principles of international administrative law which are in force in most national legal systems. But the question then

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[48] Example: According to Section 3 of the German Bill, permission to run a temporary work agency may be refused if the ~~xxxxxxxxxxxxx~~ agency is suspected of concluding employment contracts for a fixed period with the temporary workers. The German legislators wish thereby to prevent a temporary work agency from evading its duty - also prescribed in the German Bill - to continue to pay wages during the period between job assignments. Now it might happen that a temporary work agency which is permitted in another Member State and to which this condition of authorisation does not apply or which - in accordance with Section 3 of the Belgian Bill - is even obliged to conclude employment contracts for a fixed period, engages temporary workers on the German labour market, invoking the right to the free supply of services, concludes with these workers employment contracts for a fixed period and a specific assignment, and then hires them back to German undertakings. The conditions of authorisation imposed by German law could thus be evaded by the international supply of services.

temporary worker is assigned on the other, also clash and in some cases these relationships can be judged in differing ways under the laws governing such conflicts. This increases the possible solutions, but it also increases the law's uncertainty with regard to the free movement of workers.

One example among many may illustrate this situation: A temporary work agency established in Strasbourg is asked by enterprises in South-West Germany to supply them with temporary workers for three months each. Depending on the current economic situation, this first three-month employment will be followed by further assignments for a fixed period, either immediately or after more or less long intervals. In order to comply with this request, the temporary work agency engages German workers seeking employment from the German frontier region and concludes employment contracts with them for a period of three months each, i.e. limited to the duration of the proposed job assignment. This apparently simple situation actually raises a whole series of economic considerations and problems of legal conflicts, as follows:

a). By having German temporary workers engaged by a French temporary work agency it is hoped that the French legal system will be applicable to the temporary work contracts, for the law governing the contract (lex loci contractus) would be the law valid in Strasbourg. For according to Article 4, para 1, sentence 2 of the French Bill no. 72-1, it is permitted to limit the period of temporary work contracts to that of the job assignment. This makes it possible to evade certain compulsory regulations of the German Bill, which forbid such limitations in the periods of temporary work contracts (Section 3, para 1,

points 3 and 5) and threaten to nullify temporary work contracts which have nevertheless been concluded for a fixed period (Section 9, point 2). At the same time the temporary work agency would be able to escape the obligation imposed by Section 11, para 3 of the German Bill to continue to pay the temporary worker's wages in the period between assignments.

b). If such arrangements between German enterprises and French temporary work agencies were to become widespread, they could have an effect similar to that of a cartel which would dominate the German labour market while evading the German legal regulations. For temporary work agencies established in Germany would not be able to enjoy the advantages of bypassing the German laws and regulations on the subject and would thus be squeezed out of the German labour market.

c). Theoretically, of course, it is also conceivable that the more stringent German conditions of validity for temporary work contracts which are concluded in accordance with a foreign legal system might be regarded as coming under the "ordre public." The German effective law (lex causae) would then take precedence over the French contractual law (lex loci contractus). This is still not the ideal solution, however, It would depend on whether there exists at all in Germany a jurisdiction capable of dealing with disputes about temporary work contracts which are concluded abroad by a foreign temporary work agency; for only national courts are competent to apply the national laws of the "ordre public." But this solution would have just the opposite effects to those described above. It would considerably hamper the supplying of temporary workers by French agencies to German enterprises, since the French

agencies would have to comply with the partly contradictory regulations of two legal systems.

d). Similar problems arise with regard to the supply contract between the French temporary work agency and the German enterprises to which the temporary workers are assigned. In this case the parties might endeavour to apply the German law governing the contract because the German law imposes no practical legal restrictions on these supply contracts, whereas Article 2 of the French Bill enumerates exhaustively all the cases in which the conclusion of such contracts is permissible. These are exclusively activities which, in view of their nature or length of period, do not objectively appear to justify the employment of permanent workers. The temporary work agency established in Strasbourg would thus be induced to exercise its activities mainly on the foreign labour market, in order to evade the restrictions of the French law on supply contracts. This situation would again lead to the domination of certain labour market in a manner resembling that of a cartel.

The demonstration just made, by means of an example, of the relations between the German and French laws naturally applies to all legal systems. The survey at the end of Part 1 II 2 and 3 showing the present or future legal regulations makes it possible to imagine other examples. It is always the same problem which recurs: how to prevent the disparity in the conditions of validity of temporary work and supply contracts, and the legal conflicts arising therefrom, from enabling temporary work agencies and the enterprises using the temporary workers' services to take joint action to dominate the labour markets of certain countries in a manner resembling that of a cartel, while other labour markets which are subject to stricter conditions for the supply

of workers suffer a depression. This situation could lead to distortions of the free labour market within the Community. Here again a way out of this danger would be to co-ordinate the conditions of validity of temporary work and supply contracts.

3. Clarity of information emanating from the administrative authorities

Even if appropriate co-ordinating measures are taken to bring the national legal and administrative regulations on temporary work more into line with each other, and even if a uniform Community law on this subject were to be actually introduced, the implementation of these regulations by the administrative authorities and courts would still remain the prerogative of the Member States. The supply of workers abroad would thus have the disadvantage that when a temporary work agency extends its activities over several Member States it is often not known whether the legal conditions governing the authorisation of the agency and the validity of the contracts have been fulfilled. Greater clarity in the measures taken by the administrative authorities on the Community level would not only prevent infringements of national legal regulations by temporary work agencies operating abroad, but would help to meet the latters' need for information in cases where the supplying of workers to enterprises in other Member States is subject to the rules issued by the authorities of those countries. Thus, for instance, the Belgian Bill contains a legal provision authorising the King, subject to the approval of the "Conseil national du travail"in general or the competent "commission paritaire", to fix for individual branches of activity the percentage of temporary workers out of the total

number of permanent workers which an enterprise may not exceed when engaging temporary workers (Article 13 of the Belgian Bill). On the Community level, such information is important to the temporary work agencies because it enables them to allocate their workers in the best possible way.

The Belgian Bill (Article 10, Section 2), moreover, already provides a well planned system of information concerning enterprises in which a strike is in progress, and the Community should pay due attention to this system in order to prevent the rights and autonomy of the social partners from being impaired by the use of foreign temporary workers as strike breakers.

The co-ordination, already advocated, of the conditions governing the authorisation of temporary work agencies and the validity of temporary work and supply contracts should consequently be accompanied by administrative measures adopted on the Community level for introducing a system of information.

4. Social protection requirements

If the facts so far described call for the application of specific Community regulations on the supply of temporary workers to countries abroad, the very general question finally arises as to whether a temporary worker is adequately protected as regards his working conditions and social security when he concludes a temporary work contract with a temporary work agency established in one of the Member States but is subsequently assigned to work in enterprises in other Member States. The problem raises a legal conflict inasmuch as the question arises as to which of the two legal systems - that of the country in which the temporary work contract was concluded

or that of the country to which the worker is assigned a job - should be applied in each individual case. It is also a practical legal problem since it raises the issue as to whether and to what extent the temporary worker loses the social protection guaranteed him by law owing to this legal conflict. These questions should be examined more closely, first as regards working conditions and then as regards social security.

A. Working conditions

a). From the point of view of international law it is a fact that both de lege lata and de lege ferenda all Member States except Italy impose the legal principle that contractual labour relations can be established only between the temporary worker and temporary work agency but not between the temporary worker and the enterprise to which he is assigned (cf. above Part 1, Section II). It can therefore be assumed, on the basis of the jurisdiction of the Member States hitherto in force, that the assignment to the foreign enterprise constitutes merely an extension (détachement) of the employment contract with the temporary work agency. The result would be that in principle, even if the temporary worker is employed in other Member States, the national labour law applicable is that under which the employment contract was concluded between the temporary worker and the temporary work agency - i.e. generally the labour law which is valid in the country in which the agency is established.

There are, however, exceptions to this principle inasmuch as in Latin countries the "ordre public" character of the "lois de police et de sûreté" and under the German and Netherlands legal systems the public law regulations of the

labour legislation[49] may require the application of certain labour law provisions which are in force in the country in which the temporary worker is actually employed, even if the employment contract is subject to another legal system. The application to the working conditions of the temporary worker of the labour law binding on the enterprise to which that worker is assigned is thus not completely excluded despite the absence of any contractual labour relations. In theory it is rather the laws of the "ordre public" or the public law regulations of labour legislation which would offer a certain minimum protection to the worker in the country in which he is temporarily employed, even if the employment contract itself was subject to another legal system.

One should not be too optimistic, however, about the practical possibility of ensuring this minimum protection on the part of the enterprise to which the temporary worker is assigned. For insofar as the observance of the labour law regulations having an "ordre public" character is not officially supervised, a legal claim is necessary to enforce this observance by the enterprise in question, whether in the form of a law-suit or a

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49) With regard to the problem of the differing conceptions of the "ordre public" and t he character of the "lois de police et de sûreté" in relation to the public law regulations of labour legislation under the German and Netherlands legal systems, I would draw attention to the comments made by the expert in Document No. 14.097/V/69, Section B II, of the European Communities on the determination of the law applicable to international labour relations.

refusal to perform the work. Such a legal claim is nearly always lacking, because there is no contractual legal relation between the temporary worker and the enterprise to which he is assigned, so that there exists no contractual right to enforce compliance.

In the case of an assignment abroad, an action aimed at ensuring the observance by the temporary work agency, as the employer, of the labour law regulations which are subject to the "ordre public" applicable in the actual place of employment is often doomed to failure because the competent court according to the contractual law (lex loci contractus) is not obliged by the laws governing conflicts to apply the "ordre public" of the foreign law in force in the place of employment. It should therefore be noted that the application - conceivable in international law - of the "ordre public" to the foreign place of employment in order to ensure a minimum protection of the temporary worker vis-à-vis the enterprise to which he is assigned, as prescribed by the labour law, is not guaranteed by an adequate system of legal protection.

An exception to this shortcoming can be found in the Belgian draft bill no. 72-1 and French Bills. Both Bills entitle the temporary worker to make a special legal claim that the enterprise to which he is assigned should duly comply with the "lois de police et de sûreté" applicable in the place of employment. In this case the temporary worker enjoys an adequate legal protection against the enterprise to which he is assigned, even apart from that provided in his contract. The extent of this legal protection, however, differs according to the measures in force. Article 14 of the Belgian Bill limits it to the existing legal regulations, but includes all the provisions of labour

protection and other labour rules ("réglemantation du travail") except the duty to pay wages and to grant social benefits, for which according to Article 6, Section 1, the temporary work agency is responsible. Under Article 7 of the French Bill no. 72-1, however, the legal protection against the enterprise to which the temporary worker is assigned covers not only the legal but also the administrative and collective agreement regulations in force in the place of employment. On the other hand, the points included by this protection are enumerated exhaustively and comprise only the basic "lois de police et de sûreté": maximum duration of work, restrictions on night work, banning of work on Sundays and Bank Holidays, industrial hygiene and safety, protection of working women, children and adolescents and, if the nature of the work so requires, an industrial medical service. These provisions laid down in the Belgian draft Bill and - even more

no. 72-1

precisely - in the French Bill constitute examples for an adequate social protection of the temporary worker. They will be of considerable importance when foreign temporary work agencies supply temporary workers to Belgian or French enterprises and thus deserve to be given general attention when it comes to drafting a Community ruling on the subject.

b). From the practical legal point of view the result of this conflicting situation is that temporary workers who are assigned to a job in a Member State whose legislation does not specify any labour law obligations towards these workers on the part of the enterprise to which they are assigned lose the social protection granted them in their country of origin, insofar as the latter's laws impose a liability on that enterprise.

There are four ways in which such losses of rights may occur:

aa). As has already been said in discussing conflicts of law, it is difficult to enforce a claim against an enterprise employing the temporary worker that it should observe the "lois de police et de sûreté" in force in the foreign place of employment (or the public law regulations of labour legislation) when the foreign legal system does not impose any such legal liability on that enterprise.

In this respect, special attention should also be paid to the claims of the temporary worker for compensation for damages when that enterprise infringes these regulations. In the absence of a contractual or legal responsibility of that enterprise towards the temporary worker for complying with the "lois de police et de sûreté" or the public law

regulations of labour legislation the temporary worker can only make such claims for damages against the temporary work agency. But the latter's responsiblility cannot usually be invoked because it has not been guilty of any infringement of the regulations in question.

These losses of rights can only be avoided if in all Member States the enterprise to which the temporary worker is assigned is made legally responsible for complying with the "lois de police et de sûreté" or the public law regulations of labour legislation in respect of that worker.

bb). Losses of rights may also occur because of the dispartiy in the legal consequences of the invalidity of temporary work contracts. (see Part 1 II 3 b).

Take the case of a temporary worker whose contract has been concluded by virtue of a national law which provides for the substitution of that contract, if it is invalid, by an employment contract binding him to the enterprise to which he has been assigned. If he is placed at the service of an enterprise in a Member State whose legislation does not permit this substitution, it may happen that the temporary work contract is rightly declared invalid according to the law applicable to the contract, but that a legal action designed to compel the foreign enterprise to act as substitute and fulfil the labour law obligations is rejected. This is because the court cannot apply the law governing the contract to the legal relations between the temporary worker and the enterprise to which he is assigned but only the effective law - i.e. the legislation in force in the place where the service is to be performed. Thus the temporary worker assigned to an enterprise abroad loses the rights to which he would be entitled if he was working in his country of origin. From the social point of view this situation would incur the risk that temporary work agencies, wishing to escape the consequences of invalidity, might send their temporary workers mainly to Member States where these consequences are less grave. This opens wide the door to legal abuses. It would therefore be desirable to try to co-ordinate the consequences of invalidity so that the temporary worker is protected by a law providing that if he is assigned to an enterprise abroad, the invalid temporary work contract is replaced by an employment contract between the temporary worker

and the foreign enterprise for the anticipated period of the assignment.

cc). A similar problem arises with regard to the subsidiary liability of the enterprise using the temporary worker's services to pay wages throughout the period of the assignment if the temporary work agency is insolvent. From the social point of view it is reasonable to introduce a "double" responsibility to pay wages, because it prevents the temporary worker from being victimised by unscrupulous temporary work agencies which are only interested in their own profits and do not have the necessary financial resources to be able to fulfil their obligations. Unfortunately this principle is not recognised in most Member States, the reason given being above all the fear that if the obligations of an employer were shifted to the enterprise using the temporary worker's services, the temporary work agencies might be tempted to exercise the illicit functions of an employment agency. This argument is expressed particularly clearly in the more recent German jurisdiction, which has repudiated the older theory of the "double" work relationship (cf. footnote 36 above). It does not appear to hold water, however, because if the enterprise using the temporary worker's services is given a subsidiary liability to pay the wages, this does not in any way alter the contractual obligation of the temporary work agency to act as employer. Rather, as is the case when the law imposes a guaranty of payment, it is a question of establishing a legal co-responsibility of the enterprise using the temporary worker's services regardless of its situation vis-à-vis the employment contract, so that the worker may be protected.

Only the French Bill no. 72-1 provides in its Article 8 for a subsidiary responsibility on the part of that enterprise to make the payments prescribed in the labour law (wages, accessory wage elements and legal compensation) if the temporary work agency is insolvent. A French temporary worker employed abroad might lose these rights if the court applied, not the law of the place where the contract was concluded but the law of the foreign place where the contract was executed, to the worker's action against the enterprise invoking its liability to pay his wages.

On this point, therefore, it also appears desirable to co-ordinate the legal regulations on the liability to pay wages.

dd). As the legal regulations of Member States impose, both de lege lata and de lege ferenda, a contractual obligation on the part of the temporary work agency to pay the wages, it is also the law applicable to the contract which, if the temporary worker is employed abroad, governs the minimum wage guarantees laid down in the laws and collective agreements. It follows from this that the temporary worker cannot claim the minimum wages fixed by the laws and collective agreements in the foreign country in which he is employed, even if the cost of living and hence the minimum wages are higher there. The question arises as to whether these differences in the minimum wages might not induce heads of enterprises to engage foreign temporary workers rather than permanent workers in their own country, where labour is dearer. At any rate, this wage situation should not be overlooked when it comes to drafting a Community ruling.

B. Social Security

In the area of social security, the professional supply of workers is problematic; above all, in cases in which, due to their temporary nature according to Art. 14, para. 1, lit. a of EEC Order No. 1408171, the competent bearer of social security for the temporary work agency remains that even when the actual work is done more or less regularly at enterprises

in other Member States[50]. This could well be the rule, for the fact that job assignments are temporary in character and hence seldom last longer than 12 months lies in the nature of professional supply of workers or results from the temporal restrictions imposed on the supplying of workers by the legal provisions of some Member States.

The resulting problems in social policy are the following:
a) The element of intransparence characterizing the transfrontier supply of workers can result in the neglect of notification required under the regulations of the state responsible for social security; this intransparence is either used as a pretext to evade the obligation to give notice or the temporary work agency receives no information concerning happenings at the enterprise engaging the worker that are subject to notification. This concerns both the general giving of notice to the competent bearer of the social security and the special notification of work accidents or occupational illnesses befalling the worker at the enterprise using his services. Such neglect can result in social disadvantages to the worker.

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50) According to Art. 14, para. 1, lit. a of the published but not yet effective Order (EEC) No. 1408/71 issued by the Council on 14.6.1971 concerning application of the systems of social security to workers and their families migrating to and fro within the Community (Official Gazette No. L 149/2), this legal position will be maintained. By its judgment of 17.12.1970 (Droit Social 1971, p. 314 et seq.) the Court of Justice of the European Communities in Legal Case No. 35/70 has already decided that the regulation concerning responsibility embodied in Art. 13, lit. a of Order No. 3/1958 or Art. 14, para. 1, lit. a of Order No. 1408/71 is also applicable to professional supply of workers.

Regulations for the implementation of Order No. 1408/71 (Document KOM (71) 821 final) will help to resolve these difficulties, although not completely. In any case, concerning the notification of work accidents and initially occurring occupational illnesses, Art. 64 of the stated implementation regulations imposes the responsibility of notification on every plant owner using the worker, and that with reference to enterprises not situated in the competent Member State whose owners do not act as employers of the worker engaged there. Thus Art. 64 for the implementation of Order No. 1408/71 includes the obligation of the foreign enterprise to give notice concerning work accidents and initially occurring occupational illnesses of workers lent to it.

The legal policy requiring transparence in the matter of general notification to the competent bearer of social security regarding the temporary worker's employment subject to insurance has not been as clearly realized. Although it is correct to say that the temporary work agency is obligated to give notice on the basis of the legal nature of the temporary work relationship (cf. Part I above), it would be useful, in order to avoid the danger of evasion described above, to provide for a control by imposing an additional obligation on the enterprise to give notice of the actual start and conclusion of work at his plant. This would make it more difficult for the temporary work agency to capitalize on the lack of information on the part of the competent bearer of social security concerning engagement of the temporary worker by a foreign enterprise, and thus give no notice at all. The basic idea of such control notices is found in Art. 107 of the draft order for the implementation of Order No. 1408/71, which provides that seasonal workers be given an employment visa by the labor office of the Member State to which they have trav-

elled for employment. All that is required would be to extend this regulation to include temporary workers and stipulate that the labor office of the state where the worker is employed send a duplicate of the employment visa to the labor office of the state responsible for social security, thus facilitating the latter's check on notification prescribed by its legal system for temporary work agencies vis-à-vis the bearer of social security.

b) Another social problem arises over equal treatment of steady workers and temporary workers by the enterprise to which these are lent with regard to the qualification of accidents as work accidents and the resulting liabilities. Since it is typical of the professional supply of workers that the temporary worker is not employed in the enterprise of his de jure employer but always in strange plants taking the local accident risk, social justice would require that the temporary worker who suffers a work accident be legally treated as though he were an employee of the enterprise using his services. Equal treatment under law of the temporary worker and the steady worker of the enterprise in case of accident is not self-evident since the temporary worker has no contractual relationship to it. The French Act No. 72 - 1 in Art. 23-27 simulates a comprehensive employer function for the enterprise to which the worker is lent in the matter of legal conditions and liabilities resulting from work accidents suffered by the temporary worker. The Federal Government of Germany takes the view regarding its legal system that, at least with respect to the liabilities resulting from work accidents, the existing regulations place the temporary worker on equality with the

steady worker[51]. For the rest, however, the German Act in Art. 3 likewise undertakes certain adjustments of the Reich Insurance Code intended to place the temporary worker on the same level with the steady worker in case of work accidents and occupational illnesses. The legal systems of the other Member States lack express provisions in this respect, so that the legal situation within the European Communities is not uniform. A uniform legal solution would be commendable, say in the framework of Community Law regulations created by Order No. 1408/71.

c) A final social policy problem arises from the question of how the payment of obligatory contributions can be guaranteed in the case of professional supply of workers in a Member State other than the one responsible for the social security of the temporary worker. This is relevant where the work contract with the temporary worker is legally invalid for reasons imposed by internal state legislation, but the temporary worker, notwithstanding, carries on his activity for the enterprise engaging him subject to social insurance. Possible inability to pay the obligatory contributions on the part of the temporary work agency would also have to be considered. Subsidiary liability to contribute is imposed on the enterprise to which the temporary worker is lent according to Art. 3 § 1, No. 2 of the German Act for all cases and according to Art. 8, para. 2 and 3 of the French Act No. 72 - 1 in the case of the temporary work agency's inability to pay. This, in fact, appears to be the only feasible way to protect both the bearer of social security and the temporary worker against financial loss. Therefore, subsidiary or perhaps even full liability to contribute on the part of the enterprise to which the temporary worker is lent to the bearer of social security responsible for the temporary work agency should be introduced as Community Law regulation for trans-frontier relinquishing contracts.

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51) Cf. the official arguments for the German draft bill (Federal Council Doc. 200/71) relative to Art. 3, No. 5.

II.

Legal bases of a Community ruling

The various points calling for a Community ruling have already been enumerated in the foregoing remarks, which have also indicated the instruments with whose help such a ruling may be introduced in accordance with the EEC Treaty.

1. The following measures are necessary in the field of freedom of establishment and the free supply of services:

a). A guarantee that the nationals of a Member State may set up temporary work agencies in the other Member States under the same legal conditions as exist for the latters' nationals;

b). The guarantee that temporary work agencies which are permitted in one Member State may exercise their activities in the other Member States under the same legal conditions as exist for the temporary work agencies permitted in these Member States;

c). The co-ordination of the national legal and administrative regulations on the engagement in and exercise of the activities of temporary work agencies;

d). The introduction of compulsory notification of the authorisation granted to temporary work agencies to exercise their activities and the withdrawal of this authorisation.

These measures can only be adopted by means of directives, in accordance with the enabling provisions of Articles 54, paras 2 and 3, 57, para 2 and 63, para 2 of the

EEC Treaty.

2. The following measures are necessary in the field of the free movement of workers within the Community:

a). The harmonisation of the conditions of validity of temporary work contracts concluded between temporary work agencies and temporary workers, as well as of the supply contracts concluded between the temporary work agencies and the enterprises to which the workers are assigned;

b). The creation of a system of information in order to prevent the illegal assignment of workers.

By virtue of the powers granted under Article 49 of the EEC Treaty, these measures could take the form either of a co-ordination of the national legal and administrative regulations by means of a directive or that of a uniform Community ruling by means of a regulation.

3. With regard to the social protection of the temporary worker the provisions of the EEC Treaty do not contain any specific powers to harmonise the material working conditions and social security rights by sovereign acts of the Community. Measures to this effect, however, could be based on the general rule of competence laid down in Article 235 of the EEC Treaty or the power to issue directives provided for in Article 100 of that Treaty. In the first case it would be permissible to issue either a directive or a regulation, whereas in the second case the Council would be restricted to issuing directives.

It should be borne in mind, however, when choosing the means for introducing it, that a Community ruling on the material labour and social law will closely affect the whole

social structure of the individual Member States and that the danger of contradictions between the Community law and the bases of the national legal systems cannot be ruled out[52]. It thus appears legitimate to ask that the national legislators be given a certain freedom of action to enable them to bring the requirements of the Community law into line with the peculiar social structure of each Member State. The most suitable instrument for bringing this about is the directive, which leaves the competent services of each State a sufficiently broad margin of freedom for introducing national regulations which accord with the Community system.

In order to ensure that the Community ruling on temporary work constitutes a clear and coherent system, it is recommended that the whole instrument for its introduction should take the form of a directive in accordance with Article 189, para 3 of the EEC Treaty.

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52) Example: The French labour law requires temporary work contracts to be concluded for a definite period or for a specific enterprise. The German labour law, however, does not normally specify that temporary work contracts should be concluded for a definite period or for a specific enterprise, because this would imply an intention to evade the obligation to protect the worker in respect of dismissal. How can a uniform law on the Community level be introduced in this case without interfering with one of the two national legal systems in question in a way contradictory to its spirit?

III.

Alternative solutions for harmonising legislation

The previous remarks about the legal situation have already indicated the measures which would have to be adopted on the Community level in order to ensure that the Common Market takes action in the field of the professional supply of temporary work. Below are various proposals concerning the content of a legal instrument to this effect on the Community level, which instrument should, it is suggested in Section II above, take the form of a directive.

The first possibility would be to reach a decision on a minimum scheme which would comprise only the measures of co-ordination - mainly of an administrative character - which are absolutely essential in order to bring about the freedom of establishment, free supply of services and free movement of workers provided for in the EEC Treaty. It should be made clear, however, that such a scheme would not be able to prevent social distortions (see Section I, para 4 above) when temporary workers were placed in jobs abroad.

For this reason an optimal scheme is also suggested, whose purpose is to bring about not only an administrative co-ordination but also a concerted solution of the social problems connected with temporary work. These aims would have

to be achieved by harmonising the relevant legal and administrative regulations of the Member States.

For the legal instrument envisaged on the Community level the following title is suggested as a working hypothesis:

> "Council Directive dated .... on the achievement of the freedom of establishment and free supply of services for non-wage-earning activities, the free movement of workers and other social measures concerning the professional supply of temporary workers."

1. Administrative ruling:

A) Definition

For clarity's sake the first step is to define the enterprises, activities and legal relations which will be covered by the proposed legal instrument. In view of the similarity of conception in all Member States (cf. Part 1, Section I above) this definition might run as follows:

"This directive applies to the professional supply of workers (temporary work).

"Agents who professionally supply temporary workers are natural or legal persons who conclude employment contracts on a professional basis with workers seeking employment, for the sole purpose of assigning these workers to other enterprises.

"This directive does not affect the national prohibitions on employment agencies, in which the agent does not assume the functions of an employer by the conclusion of an employment contract.

"Neither does this directive affect the occasional seconding to

other enterprises of workers whom an employer regularly employs in his own enterprise, sub-contractor and labour middleman contracts or the allocation of workers within a combine or group of enterprises by a staff management company (gestion du personnel)".

B). Guarantee of the freedom of establishment and free supply of services

a). Equality of the right of establishment

It should be made clear by an additional statement that, on the basis of Directive No. 67/43 of the Council, in each Member State nationals from other Member States may establish temporary work agencies under the same legal conditions as nationals of that Member State.

b). Equality of the right to join professional organisations

In the same way it may be pointed out that, on the basis of Art. 6 of the Council's Directive No. 67/43, the temporary work agencies established in a Member State may join professional organizations, especially employers' associations capable of concluding collective agreements, on the same conditions and have the right to vote actively and passively in their institutions.

c). Free supply of services

In this connection the question, already discussed in Section I, para 1 (b) above, arises as to whether temporary work agencies authorised in a Member State may engage and hire out workers in other Member States without satisfying any further conditions of authorisation, or whether they must also fulfil the possibly more stringent conditions of the Member State

in which they propose to operate. As has already been said, both alternatives are unsatisfactory and it would be preferable to co-ordinate the conditions governing the running of temporary work agencies in accordance with Article 57, para 2 and Article 66 of the EEC Treaty. Naturally, a compromise formula compatible with the legal systems of all Member States would then have to be found. This might be achieved by drawing up a Community legal instrument which specifies the minimum conditions of authorisation needed to prevent abuses. Providing it fulfils these conditions, any temporary work agency authorised in a Member State should be able ipso facto to extend to other Member States its activities of engaging and hiring out temporary workers. The Member States might then be at liberty to impose by law other conditions of authorisation for the establishment of temporary work agencies on their territory, regardless of the nationality of these agencies.

In order to give the discussion a certain flexibility, the following three alternative suggestions are made on this subject:

1st solution

It is decided that temporary work agencies duly authorised in a Member State are entitled to engage and hire out workers in other Member States regardless of the conditions of authorisation in force therein.

2nd solution

Any temporary work agency authorised in a Member State and wishing to engage or hire out workers in another Member State must obtain from the competent authorities of this other Member State a certificate stating that it fulfils the

conditions of authorisation in force therein. If it does not satisfy these conditions, the authorities of this other Member State may forbid the agency concerned to engage and hire out workers on its territory.

3rd solution

The Member States are required to prescribe in their laws the following minimum conditions for the professional supply of temporary workers:

The owner of the temporary work agency, whether a natural or legal entity, must fulfil the necessary conditions for being regarded as a trader within the meaning laid down in the commercial law of the Member State in which he is established;

He must be able to prove his personal integrity, and in particular not have been previously punished for crimes or offences;

The temporary work agency must be organised in such a way that it is able to assume its legal obligations towards the temporary workers;

There must be no facts which give reason to suppose that the temporary work agency is probably acting illegally as an employment agency.

If the temporary work agency satisfying these minimum conditions is authorised to operate in a Member State, it may engage and hire out workers in other Member States without being obliged to fulfil any possibly more stringent conditions of authorisation in force therein.

The fact that these minimum conditions have been fulfilled will generally be acknowledged by a licence issued

by the competent authorities of the country in which the temporary work agency is established. If no licence is provided for in the legislation of the country concerned, the competent authorities shall attest that the above-mentioned minimum conditions have been fulfilled by issuing a certificate to the temporary work agency.

The Member States shall ensure that the licence can be withdrawn and the agency's activities banned if one of the above-mentioned minimum conditions is no longer being fulfilled.

c). Free movement of workers

As was stated above in Section I, para 2, in order to ensure the free movement of workers, which temporary work agencies and the enterprises to which the temporary workers are assigned might hinder by practices resembling those of a cartel, the conditions of validity for temporary work contracts and supply contracts must be co-ordinated. Bearing in mind the social motives underlying the Belgian, German and French Bills, the following minimum conditions of validity should be imposed, the national legislators being naturally free to add further conditions thereto:

a). Conditions of validity for temporary work contract :

The contract between the temporary work agency and the worker (temporary work contract) must be in writing.

It should contain the following particulars:
Name and address of the temporary work agency;
Christian name and surname, address and date of birth of the worker;
Date and reference number of the licence or certificate declaring the professional supply of temporary workers to be permissible, and indication of the authority which issued the licence or certificate;
Name and address of the social security institutions with which the temporary worker is insured;
Type of activity assigned to the temporary worker;
Amount of remuneration for the work and method of payment;
Benefits due in the event of sickness, holidays, maternity and other justified interruptions of work during the assignment;
Duration of the labour relationship and conditions of dismissal;
Mention of the fact that the worker is not obliged to continue to work in the enterprise employing his services as long as the normal work in this enterprise is interrupted by a strike or lock-out.

Temporary work contracts should be concluded in such a way that the regulations in force under the legislation of the Member State in question concerning the protection of the worker against dismissal are not circumvented.

Temporary work contracts which fail to comply with one of these conditions should be nullified by law. Temporary work contracts which exclude the application of the compulsory regulations of the labour laws of the Member State in which they

were concluded should also be nullified by law.

b). Conditions of validity for supply contracts

In this respect, not only should the minimum content of the contract be specified, such information being essential to the enterprise using the temporary worker's services, but also and more especially the idea contained in the Belgian and French Bills should be taken up and the number of assignments for which supply contracts may be concluded should be limited. For only in this way is it possible to prevent the labour market from being distorted by a disproportion between the number of temporary workers and the number of permanent workers, and the social structure being thereby adversely affected. The following detailed ruling is therefore proposed:

The contract between the temporary work agency and the enterprise to which the temporary worker is assigned (supply contract) must be in writing.

The supply of temporary workers is only permissible for the following cases of special need for manpower:
Temporary absence of a permanent worker;
Suspension of the employment contract with a permanent worker, unless the suspension is due to the economic situation of the enterprise;
During the interval between the ending of the labour relationship of a permanent worker and the engagement of another permanent worker, up to a maximum period of three months;
If it is temporarily necessary to increase the labour force, up to a maximum period of three months;
For the introduction of new methods of production or work, up to a maximum period of three months.

The legislation of Member States may empower the competent authorities to extend the periods indicated above in justified individual cases.

The supply contract should contain the following particulars:

Name and address of the temporary work agency;

Name and address of the enterprise to which the temporary worker is to be assigned;

Names and addresses of the temporary workers supplied;

Date and reference number of the licence or certificate declaring the professional supply of temporary workers to be permissible, and indication of the authority which issued the licence or certificate;

Name and address of the social security institutions with which the temporary worker is insured;

Mention of the fact that the enterprise to which the temporary worker is assigned is obliged to inform the temporary work agency without delay of any strike or lock-out occurring in that enterprise.

Supply contracts which fail to comply with one of these conditions should be nullified by law.

c). Settlement of conflicts of law

As the Community's legal instrument confines itself to fixing the minimum conditions essential for enabling the common labour market to function properly, the Member States must be free to lay down additional conditions of validity for temporary work contracts and supply contracts. The question may then arise as to whether to apply the conditions of validity prescribed in the Member State in which the temporary work agency is established or those prescribed in the Member

State of the enterprise using the temporary worker's services. Under the traditional rules of private international law this validity should be based on the law governing the contract (lex loci contractus). The free movement of workers could no longer be impaired if the differing conditions of validity which now seriously hamper the free movement of workers were to be standardised, so that only slight differences would remain. The following provision might accordingly be adopted:

The Member States are at liberty to impose by law additional conditions of validity for temporary work contracts and supply contracts. If the conditions of validity are not the same at the place of establishment of the temporary work agency as at the place of establishment of the enterprise using the temporary worker's services, it will suffice, in order that the temporary work contracts and supply contracts may be regarded as valid, to comply with the legal regulations of the Member State in which the contract was concluded.

D). System of information

As was already stated in Section I, para 3 above, it is only possible to ensure that the legal and administrative regulations governing temporary work are duly observed in international relations if an adequate system of information and supervision is created. To this end the Member States should be requested to adopt the following measures:

Every three months the senior competent administrative authority of each Member State shall publish a list of the temporary work agencies authorised to operate in its territory and those ~~xhuixx~~ whose licence has been withdrawn. It shall

communicate this list to the senior competent administrative authorities of the other Member States, who shall publish it in their official gazettes.

Temporary work agencies which provide temporary workers for enterprises established in other Member States are required to communicate to the competent authorities of these Member States, at their own expense, the text of the supply contract and copies of the employment contracts concluded with the temporary workers thus provided.

The enterprise to which the temporary worker is lent must submit a copy of the employment contract to the labor authority competent for him within 3 days after engagement of the temporary worker. This labor authority affixes an employment visa to the employment contract and directs it to the labor authority competent for the temporary work agency for control purposes, in particular with respect to complying with the obligation to give notice in the area of social security. Details of this exchange of information could be regulated by means of administrative regulations in accordance with Art. 121 of the EEC Treaty.

The Member States shall arrange for their competent authorities to supervise the activities of temporary work agencies on their territory no matter in what Member State the temporary work agency is established. They shall impose legal penalties in cases where:

Temporary work agencies are operating illegally on their territory;

Temporary work agencies fail to comply with their duty to supply information.

2. Harmonisation of the present legal and administrative regulations:

In order to reach the best possible solution which also includes a co-ordination of the measures of social protection of the temporary worker, and taking into account the analysis made in Section I, para 4 above, the following regulations are recommended in addition to the measures already proposed:

E). Working conditions of temporary workers

a). "Ordre public"

Notwithstanding the application of the legislation under which the temporary work contract was concluded, the enterprise using the temporary worker's services is responsible for complying with the following legal regulations in force in the actual place of employment:

Regulations on the maximum daily and weekly working hours and on the exceptions permitted;
Regulations on the banning of work on Sundays and Bank Holidays;
Regulations on the protection of children, adolescents and women including maternity protection;
Regulations on the prevention of accidents and on industrial hygiene.

If the legislation of the Member State under which the temporary work contract was concluded contains no special provisions on the holidays to be granted to temporary workers, the latter shall be entitled to a paid holiday in accordance with the general legal regulations of the Member State to whose law the temporary work contract is subject. For calculating the qualifying periods which count towards the right to a paid holiday, the various periods of the job assignments, including the intervals between these assignments during which the wages must continue to be paid, are all added together. This does not affect any more favourable legal regulations which the Member States may provide for the worker.

In the event of an assignment to Member States other than that in which the temporary work contract was concluded,

the remuneration paid must not be lower than the minimum wage prescribed by the law or collective agreements of the place of employment.

b). Liability of the enterprise using the temporary worker's services

If the employment contract concluded between the temporary work agency and the temporary worker is invalid for any reason, but the temporary worker has nevertheless been placed at the disposal of an enterprise, then an employment contract is considered to exist between the temporary worker and that enterprise for the agreed duration of the assignment. The working conditions remain those specified in the original employment contract, but the legal working conditions of the place of employment replace those provided for in the annulled clauses of the contract.

The enterprise using the temporary worker's services is also liable to meet claims for compensation for infringements of the "ordre public" provisions mentioned in the foregoing Article. For the duration of the assignment it is responsible for paying the wages if the temporary work agency is unable to do so.