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TOPIC 2
INDIVIDUAL AND COLLECTIVE DIMENSIONS OF LABOUR LAW AND PRODUCTIVE DECENTRALIZATION
(OUTSOURCING OF WORK AND LABOUR HIRING)

SWEDEN

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1) *GENERAL*

Please indicate if there is a trend in your country towards greater productive decentralization of enterprises as indicated above. If there is such a trend, answer the following questions:

a) *What are the current forms of productive decentralization?*
b) *If possible, present cases of companies operating in your country according to a productive decentralization strategy. What would the principal company typically keep under its direct control and what would it tend to delegate or outsource to*

[1] This national report has been prepared by Erik Danhard, attorney-at-law, Cederquist Law Firm, Stockholm. The content and formulation of the report have been worked out in cooperation with professor Ronnie Eklund, Stockholm University. In accordance with the instructions given in the opening passage of the questionnaire the report has thus been prepared by a 'working team'. I would like to stress the point that I am solely responsible, however, for the presentation of the actual circumstances, the choice of discussion topics as well as the legal conclusions presented in the report.

affiliated/subsidiary/partner companies? Are the latter enterprises independent of the principal company or are they controlled by it?

c) *Can you assess the impact of this strategy on individual labour relations?*
d) *Can you assess the impact of this strategy on collective labour relations?*

Strategies with respect to productive decentralisation (PD) are based on the need of companies or group of companies (henceforth 'user enterprises') to let other companies or actors (henceforth 'performance enterprises') attend to part of the production.

PD is typically carried out by means of:

- transfer of some business operations
- licensing and contract-manufacturing of products
- long term co-operation agreements with other companies
- franchising.

PD may also take place if a user enterprise engages manpower from a performance enterprise, which is typically carried out as follows:

- subcontracting with respect to a specific undertaking
- recruitment of self-employed consultants as regards less well-defined working tasks
- borrowing of manpower where certain collective agreements are applied
- hiring employees from another company, often called 'seconding '
- hiring contract labour from a temporary work agency (TWA)
- groups of employers collaborating and sharing their staff to a certain extent.

All the above methods of attaining PD are permitted in Sweden. There are a few exceptions, however. Working tasks in the public sector implying exercise of public authority must normally be performed by the employees of the public authority in question (see The Swedish Ombudsman's Official Report 2001/02, cases 780-2000 and 2598-2000). Rules restricting PD efforts can also be found in connection with activities requiring concession, or which are otherwise governed by public law regulations, such as, for example, aviation and navigation activities.

Furthermore, in special circumstances, some of the ways of attaining PD may be contrary to court practice.

The question whether there is a trend towards PD cannot be answered in a straightforward way. Companies´ activities in this area depend on several different factors. For example, the

size of a company may be of significance. For a small company there is hardly any need for PD.

Another and perhaps more important factor in this context is a company's business profile. In most general terms companies can be divided into manufacturing companies and service companies. Having big metallic ore deposits and large areas of forest vegetation, the Swedish steel, metal and forest industries have traditionally dominated the commercial and industrial life of Sweden.

Statistics from the National Institute of Economic Research concerning the amount of working hours in 2004 indicate the following. Industry and commerce account for 69% of the entire working hours in the country. The industrial goods sector accounts for 40 % of the total of working hours in industry and commerce, whereas the service sector accounts for 60 %. In 1980, industry and commerce accounted for 70 % of the total of working hours. Goods sector accounted for 53 % of the working hours in industry and commerce, and the service sector for 47 %.

The figures strongly indicate that provision of services has increased at the expense of goods production. The figures can also be explained to a certain extent in terms of corporate strategies in respect of PD. The statistics may be interpreted in the following way. If the companies whose work was performed in the past by their own employees hire contract labour to perform certain working tasks, the working hours will be statistically transferred from the goods sector to the service sector.

A Government report (Ds 2003:27 'Changing corporate and employment forms') argues that there is a trend towards more numerous but smaller enterprises. The report explains, among other things, that it is less profitable to perform transactions within an enterprise than between enterprises. In focusing on their core activities, enterprises may reduce the degree of economic risk. The summary of the report appears to conclude that it is the corporate forms in the commercial and industrial sector that underwent changes during the stated period of time, rather than corporate orientation as such.

To summarise the statistics presented above, it may be stated that even if the service sector shows a strong growth tendency, the goods sector, including industrial goods as well as services connected directly to this sector, is still the largest component of industrial and commercial life.

As mentioned above, the indicated trend may be of importance to PD. PD is most needed in manufacturing companies. By means of a well-developed strategy in this area the user enterprise may give an impression of a uniform production and standardized products, irrespective of where the single components are manufactured.

An equivalent strategy is more difficult to apply with respect to the provision of services. The whole idea of the provision of services consists often in being able to present an idea or create a trademark which can easily be identified with a given company and its staff. This approach means, of course, that replacing one's employees with contract labour is more difficult. Furthermore, as regards provision of services it is hardly possible to 'outsource production' to some other subcontractor - the provider of services is probably located at the bottom of the production chain.

The following companies, representing companies in commercial life, can exemplify strategies in the field of PD.

The Independent School

The Independent School is to large extent a service provider. The common element for the activity is a certain pedagogical model, which is based on the concept of knowledge in which different subjects are supposed to be integrated with each other. Teaching is done in the form of projects which students work on and report their progress and results.

The majority of employees at The Independent School are teachers. There is little incentive here to hire staff or employ it on a temporary basis - the pedagogical model employed by The Independent School does not work unless regular staff is employed, consisting of teachers working in close daily collaboration with each other, and showing great tenacity of purpose.

The Independent School can, of course, make use of PD as regards ancillary activities, such as maintenance of premises, provision of meals, administration, etc. With respect to the entire area of activity PD accounts for a very small part, however.

The Manufacturing Company

As regards The Manufacturing Company the situation is quite different. The Manufacturing Company provides, among other things, machinery and equipment, some of which may be placed on the premises of the customer.

The Manufacturing Company may let a contractor manufacture some of the units for ready-made processing machines. It is hardly in the interests of The Manufacturing Company that all production is done in-house. What is important though is to keep the know-how secret, preventing it being used by competitors. Another critical element consists in retaining the testing of the processing equipment by the company, since it is in The Manufacturing Company's interests vis-à-vis the customer that the product shall work properly and that the customer understands that it is The Manufacturing Company's product. For this reason contacts with the customer will always be the responsibility of the staff of The Manufacturing Company, whereas certain elements with respect to delivery and assembly may be performed by other companies.

It is important for The Manufacturing Company to preserve certain key administrative functions within its own sphere. The working tasks that should be performed by the company's own staff include, for example, legal matters, economy and personnel issues. The Manufacturing Company may benefit from delegating other, more routine, administrative tasks to other actors by means of PD.

It is difficult for The Manufacturing Company to distinguish between its collaborative partners and competitors. Companies which are deemed to be close competitors are rather few. This means, for example, that research and development, which are typically viewed as sensitive areas, will be done in close collaboration with friendly subcontractors and consultants.

The Manufacturing Company show a clear trend in which an increasing number of working tasks may be performed by persons other than own employees. This means that PD is in the process of growth. This happens in various ways, e.g. through co-operation with subcontractors conducting activities in their own name, and by means of various types of user arrangements where The Manufacturing Company is in charge of the direction of work.

The PD strategy employed by The Manufacturing Company is used, as far as can be assessed, by the majority of large manufacturing companies in Sweden. PD will not take place if the company divests itself of security-sensitive information. Furthermore, PD can be

performed only in so far as the customers do not realise that they have a relationship with a large number of individual subcontractors rather than one company.

The possible effects of companies' PD strategies on individual employment contracts and trade union relations should be discussed in a more comprehensive way. The importance of the strategy from the legal point of view is dealt with below. It is, of course, impossible to address all the effects of a company's PD strategy on the labour market, which is why only these effects which are regarded as characteristic in the Swedish context will be discussed.

If, as a result of PD, industry and commerce should become sounder, that would lead in turn to better employment protection (see point 7 below).

As regards the effects of companies' PD strategy on individual employment contracts in the narrow sense the following can be stated. When a manufacturing company conducts all its activities with the help of its employees, the production and the employment contracts will act as concomitant connectors. If, on the other hand, the above-mentioned PD-strategy is used the employer's responsibility for the workers who are necessary for the production will be divided among a number of companies.

In Sweden employment contracts can be terminated on the grounds of organizational reasons. In this context, the main rule provides, however, that the order of priority determined by the employees' period of service shall be followed. Employees with the longest period of service will be placed further up on the priority list (the seniority principle). The seniority principle applies to each and every employer separately, so that when a subcontractor is forced to perform a large-scale reconstruction, employees with a long period of employment may be dismissed anyhow. The larger the employer company, the greater the impact of the seniority principle, and consequently the seniority principle will be watered down when extensive PD measures are applied.

It is far more difficult to assess the possible impact of this strategy on the collective labour level, i.e. the relationship between employers and trade unions.

With respect to salaried employees it can be stated that in general the conditions of employment are determined by means of individual agreements between employers and employees. From the regulatory point of view involvement of several employers does not mean that much.

As regards workers who are employed within the area of applicability of the collective agreement concluded by a national trade union belonging to the Swedish Confederation of Trade Unions (LO) the situation is somewhat different, however. To start with, terms and conditions of employment concerning this group of employees are to a large extent decided upon by means of collective agreements. With reference to the fundamental organizational principles applying to trade unions within the Swedish Confederation of Trade Unions, the same collective agreement for a given sector will be applied, irrespective of whether the worker is employed by the manufacturing company itself or by a subcontractor. This principle used to be called the 'federation principle', and implies partly that trade unions shall organize workers belonging to the sector in which the company conducts its activities, partly that all workers working in a given plant shall be members of the same trade union. The fact that the same sector agreement shall be applied contains a simplification, however. Large companies conclude usually local collective agreements which supply the regulation along the lines of national sector agreements. Consequently, in large companies wages are determined to a much greater extent by company-based collective agreements. If the production is split up among many small employers, wages for the majority of workers will be determined by the collective agreement for the whole market sector and not by company-based agreements.

As regards the employees´ and the trade unions´ rights to information and negotiations these are not formally affected by PD. The labour statues do not provide any minimum number of employees that would be necessary for the duty to inform and negotiate to apply. In practice, however, the employees´ possibilities to exercise co-determination will be weaker if they are employed by a subcontractor. The worker's influence will have no impact the core activities of the user enterprise (the manufacturing company).

2) GROUPS OF COMPANIES AND UNITY OF ENTERPRISE

Please indicate if under your national law or case law it is possible to state that a principal company and its contracting affiliates, subsidiary companies or partners must be treated as if they were single enterprises for the purpose of the application of labour and social protection law. If it is possible, please indicate the criteria on the basis of which such decision can be reached and the legal effects that would follow.

Sweden has no general rules stipulating that a parent company and its subsidiaries or partner companies may be regarded as a single legal entity.

It is another matter that according to court practice it is possible in certain cases to lift the corporate veil and allocate liability for debts related to an activity to somebody else.

In certain cases, following the principle of shifting liability from the principle to the agent, the courts have found that the parent company was bound by the debts of a subsidiary. These cases concerned situations where the other company was entirely dependent on the principal company as well as being undercapitalized (see, in particular, Supreme Court Reports 1947 p. 647 and 1975 p. 45, and, further, Government Official Reports 1987:59).

Finally, in two cases the courts have found that a company has enlisted the assistance of another company on a commission basis, but from the legal point of view the arrangements were deemed to have been made within one and the same company. The above-mentioned events can be connected to the application of the principles concerning the concept of employee. The concept of employee is mandatory in Swedish law, which means that a court may disregard the formal character of a given contract, and ignore its formal designation. Following the application of these principles an employee who was employed in his own company was regarded as being employed by the user enterprise (Supreme Court Reports 1996 p. 311 and Labour Court judgment 1995 no 26). In both cases the performance enterprise was a one-man company that was entirely dependent on the principal company. In addition, this arrangement was made on the initiative of the user enterprise, where the owner of the performance enterprise was previously employed by the user enterprise.

Apart from these general principles there are special regulations entailing that in certain cases a group of companies shall be regarded as a sole company.

According to Act (1987:1245) concerning Board Representation for the Private Sector Employees (the Board Representation Act), the employees' right to appoint members of the board in a joint-stock company depends on the number of employees. Pursuant to sections 3 and 4 of the Act in certain cases not only the conditions prevailing in each constituent company but also those existing in the group company shall be taken into account.

Another special rule applies when calculating an employee's period of employment in order to determine the order of priority in connection with dismissal due to redundancy (organizational reasons). Under section 3 of the Employment Protection Act (1982:80) the employee is entitled to include his whole period of employment in the group company.

Finally, it should be noted that in certain cases a collective agreement may make it possible to bring together a number of companies and consider them as one unit. According to Employment Protection Act in case of redundancy a priority list shall be determined in each company. In the Labour Court Judgment 2004 no. 73 the Labour Court decided, however, that a collective agreement stipulating the order of priority for redundancy should be determined jointly for two companies in a group company, had certain external legal effects.

3) TRANSFER OF UNDERTAKINGS AND OTHER MODIFICATIONS IN THE LEGAL SITUATION OF AN UNDERTAKING OR PARTS THEREOF

a) *Does your national law or case law have a legal definition of "transfer of undertakings or parts thereof"? In what situations, if any, does the definition apply to the externalization (subcontracting, outsourcing) of certain operations of an undertaking?*
b) *Please describe the rules applicable in your country to the protection of workers' rights in situations involving transfer of undertakings or parts thereof.*
c) *Is it mandatory under your national law that the employees' representatives be consulted or informed at the time of the transfer of an undertaking or parts thereof? If this is so, what is the consultation procedure like? Are the employees' representatives informed or consulted when the employer intends to outsource some of its operations? Is there any obligation under your national law to negotiate on these topics?*
d) *How are the relations organised between the transferor and the transferee enterprises when the latter continues to operate on the premises of the former?*
e) *How are the relations organised between the transferred employees and the transferor enterprise when the transferee enterprise continues to operate on the transferor's premises? Does the transferor or the transferee assign tasks and determine wages and conditions of employment?*

As a member of the European Union Sweden is bound by Council Directive 2001/23/EC on the Approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses. This means that Sweden is bound by the case law of the European Court of Justice as regards the concept of transfer of undertakings.

It should be mentioned here that in connection with the adoption of the predecessor of the aforementioned EC directive in Sweden, it was held in the preparatory materials that clear subcontract cases were close to the borderline of the area of applicability of the Directive. It was also held that it was uncertain whether a subcontract performed exclusively by the staff of the subcontractor was covered by the Directive in the first place (Bill 1994/95:102, pp. 31-32).

The case law created by the Labour Court refers primarily to subcontract agreements. The case law confirms in the main the views presented in the preparatory materials. In cases of changing subcontractors, and where the succeeding subcontractor has refused to assume responsibility for the personnel, the Labour Court seldom has considered the situation as being a transfer of undertaking. The exception confirming this rule is the Labour Court judgment 2002 no 63. The Court determined that the change in subcontractors relating to the conference- and restaurant business conducted in a certain building constituted a transfer of undertaking.

If PD is performed in a situation when a user enterprise sells out its assets, including all production resources connected with, for example, part of the business operations, this should normally be regarded as a transfer of undertaking. (see Labour Court judgment 1998 no 144 with respect to the transfer of a flower shop).

Just as in the case of the concept of transfer the same protection of employees´ rights as provided by the provisions of the Directive applies in Sweden. This means that in the case of a transfer of undertaking the transferee shall take over automatically the employment contracts that are binding on the transferor. However, the employees have the right to oppose or object to such transfer.

If the employees accept employment with the transferee the conditions laid down in the transferor's collective agreement shall enjoy special protection. This applies irrespective of whether the transferee is bound by another collective agreement or not (section 28 first and third paragraphs of the Co-Determination in the Workplace Act (1976:580)).

In the case of a transfer of undertaking both the transferor and the transferee have an obligation to negotiate with the representatives of the employees. In accordance with the labour market model applied in Sweden this means that the duty to negotiate shall be discharged in relation to a trade union. The main rule provides that the duty to negotiate shall be discharged in relation to trade unions who are signatories to a collective agreement.

Since the Swedish rules reflect the provisions of the EC Directive, the obligations of the transferor and the transferee vis-à-vis the employees in the case of a transfer of an undertaking can thus be regarded to have been regulated.

On the other hand, legal and practical problems arise if a business transaction is not regarded as a transfer of undertaking, or if the employees affected by the transfer object to taking up employment with the transferee.

Some sectors possess collective agreements stipulating the rights of the employees in the case their employer, typically viewed a subcontracting company, loses a commission to a competitor. If the competitor needs additional manpower, provisions in some collective agreements indicate which employees will have priority of continued employment. In accordance with these provisions it is the employees of the subcontractor who has lost the commission that shall have priority for employment.

In the opposite case, i.e. when the transferee wants the transferor's employees to continue in employment, but the employees reject it, practical and legal problems emerge. One way of solving these problems is for the transferor to second his employees to the transferee, i.e. hire them out. Such an arrangement will usually apply for a certain period of time only, and will serve the purpose of providing manpower to the transferee for a transitory period. The seconding agreement provides, among other things, on the one hand, which company will be in charge of the direction of work and, on the other hand, what influence the two affected companies will have on the wage setting and other terms and conditions of work.

It shall be noted here that in the collective agreement applying to workers (which is the area of applicability of the collective agreement concluded by a national trade union affiliated with the Swedish Confederation of Trade Unions) and containing rules on the workers' right to supplementary compensation in case of unemployment, there are provisions that preclude such compensation in relation to a worker who has rejected continued employment in connection with a transfer of an undertaking (Adjustment Agreement between the Confederation of Swedish Enterprise (SAF) and the Swedish Confederation of Trade Unions).

4) THE LEGAL SITUATION OF THE EMPLOYEES OF CONTRACTORS AND OTHER AFFILIATED ENTERPRISES VIS-À-VIS THE PRINCIPAL/PARENT ENTERPRISE

a) Under what conditions can the principal/parent enterprise be held liable for the obligations of its contractors or other affiliated companies vis-à-vis employees of the latter in respect of the following:

i. *health, safety and occupational hazards;*
ii. *wages and other terms and conditions of employment;*

iii. *social security and other employee benefits, insurance contributions;*
iv. *other?*

b) Is it mandatory to inform the employees of contractors and other affiliated enterprises of the identity of the principal company for which their employer works?

c) Please describe any judicial decisions whereby the existence of a direct employment relationship between a principal company and the employees of its contractors or other affiliated companies has been established. What were the legal effects of these decisions?

The main rule in Swedish law provides that it is the employer, i.e. the performance enterprise, who is the bearer of all employer obligations.

As indicated in point 2 there are no other general rules that would imply that the user enterprise shall be liable in relation to the staff of the performance enterprise.

With respect to health and safety, however, there are provisions in the Work Environment Act (1977:1160) stating that a company that is in charge of a workplace or is hiring contract labour is responsible to some degree for the working environment in relation to the employees of the other employer (chapter 3 section 12 Work Environment Act). As regards the working environment the user enterprise is accordingly liable with respect to any contract employees as well as employees of a subcontractor company.

In a similar way an employer engaging contract or borrowed labour has to ensure that no discrimination on grounds of sex, ethnicity, disability or sexual orientation occurs with respect to the personnel (the Equal Opportunities Act (1991:443); the Act concerning Measures Against Discrimination in Working Life on grounds of Ethnic Origin, Religion or other Belief (1999:130); the Prohibition of Discrimination in Working Life on Grounds of Disability Act (1999:132); the Act on a Ban against Discrimination in Working Life on Grounds of Sexual Orientation (1999:133); henceforth referred to as anti-discrimination legislation). However, the liability of the user enterprise with respect to any violations of the anti-discrimination legislation affects only contract or borrowed labour as compared to the broader liability that follows from the Work Environment Act.

With respect to injuries caused by a contract or borrowed employee, the user enterprise may also be held liable to a third party. According to the principles that have been developed overtime the injured third party may submit a claim against the user enterprise if the employee of the performance enterprise has been integrated into the activities of the user

enterprise in such a manner as to appear to have been employed by the user enterprise. In some situations, the user enterprise may not be able to hold the performance enterprise accountable for loss incurred (Supreme Court Reports 1992 p. 21).

With respect to the financial liability of the user enterprise towards the employees of the performance enterprise the principles already described in point 2 above apply. According to the main rule the user enterprise cannot be held financially liable for the obligations of the performance enterprise.

The above does not mean, however, that the employees of the performance enterprise lack possibilities to put pressure on the user enterprise to pay overdue wages. Under the provisions of section 41, paragraph three, of the Co-Determination in the Workplace Act, a trade union has the right to initiate a recovery blockade against an employer who has not paid overdue wages. Such a blockade involves ordinarily stoppage of work performed by the members of the trade union and assistance of other trade unions. The recovery blockade may come to affect various aspects directly connected with the user enterprise, and may compel the user enterprise to pay the performing enterprise's debts.

A similar scenario may take place even if a trade union takes no action at all with respect to a recovery blockade. Under Swedish law individual employees have the right to stop working if the employer does not pay their wages. Even individual initiatives of the performing enterprise's employees may thus compel the user enterprise to pay their wages.

As regards general liability of the user enterprise in relation to the performance enterprise a proposal in the field of taxation law can be mentioned. A proposal suggesting making the principal employer liable for tax deductions with respect to the employees of the subcontractors has been discussed (Internal Revenue Report 2002:6). No legislation of this kind has been introduced so far.

Swedish law contains no provisions stipulating that the performance enterprise must disclose the identity of the user enterprise. In certain situations, however, a negotiation duty may apply with respect to the identity of the user enterprise. Before an employer decides on any important alteration to the working conditions of an employee, the employer has a duty to negotiate with the pertinent trade union pursuant to the provisions of section 11 of the Co-Determination in the Workplace Act (cf. also section 13 of the Co-Determination in the Workplace Act). To work within the premises of another employer or under the directions of another employer might be such an important alteration of the working conditions of an

employee. This applies to and affects only employees who do not perform work on a regular basis at other work places than their own employers, thus. The provision has therefore no importance to employees who are employed by a TWA or a subcontractor.

As indicated earlier in point 2 above in the last few years the courts in two cases has found that a user enterprise was regarded as an employer in relation to the employees of the performance enterprise.

- Supreme Court Reports 1996 p. 311 concerned building work, and the issue in the case was whether the employee of the performance enterprise was entitled to a wage guarantee in the liquidation proceedings of the user enterprise. The Supreme Court answered the question in the affirmative.

- Labour Court judgment 1995 no 26 concerned work at an architect's office. The Court found that the performance enterprise's employee had the right to termination pay from the user enterprise.

In both cases the performance enterprise was a one-man company where the person performing the work in question had been previously employed by the user enterprise. It is significant that in both cases the company structure had been created on the initiative of the user enterprise. It should be noted, however, that the relationship between two companies can be regarded as an employment contract only in exceptional cases (see, Supreme Court Reports 1996 p. 311).

5) CONTRACTING OF WORKERS AND OTHER FORMS OF WORKERS' SUPPLY

a) Can two or more legally distinct enterprises contract workers between them? If they can,

i. *How does the law protect the rights of contract employees?*
ii. *Who holds the position and authority of the employer vis-à-vis contract employees? Is it the user enterprise or the enterprise that formally employs them?*
iii. *Who assigns the working tasks, determines wages and other conditions of employment of the contract employees, and who may terminate their employment? Is it the user enterprise or the enterprise that formally employs them?*

a) *Please describe how the supply of workers through temporary work agencies (TWAs) is regulated in your country. In particular:*

i. *Cases in which contracting temporary workers is permitted;*
ii. *Industries or activities for which recruitment of temporary workers is forbidden;*
iii. *Is it mandatory in your country that TWAs be licensed? If it is, what are the conditions for issuing licenses?*
iv. *What kind of contract governs the relationship between the principal company (user enterprise), TWA and temporary workers who are posted to the user enterprise?*
v. *Is the posting of temporary workers subject to time limitations?*
vi. *What other restrictions are there on the use of temporary workers?*
vii. *How are the temporary workers' wages and other conditions of employment determined?*
viii. *Under what conditions a user enterprise may be held liable for the obligations of a temporary work agency in relation to employees posted by it?*
ix. *How are the collective labour relations between TWAs and temporary workers posted by them structured? How are the collective labour relations between the user enterprise and the posted workers structured?*
x. *Please indicate the sanctions envisaged by the legislation of your country for the illegal use of temporary workers.*

b) *Please describe any judicial decisions holding that there was a direct employment relationship between a user enterprise and the employees supplied to it under either (a) a contract work agreement or temporary posting (b), and the legal effects of such decisions.*

According to the Private Employment Agencies and Contract Labour Act (1993:440) such agencies are, as a matter of principle, free to conduct business activities connected with contract labour supply. The act contains no provisions regarding conditions governing the hiring out of contract labour, with the exception that there is a ban on charging or accepting fees from contract workers (section 6).

As a consequence thereof contract labour may be hired not only from TWAs but also from companies whose primary business activities do not consist in the supply of contract labour. There are thus no special provisions governing the activities of such agencies. For this reason it is not necessary from the Swedish perspective to try to differentiate between hiring out of contract labour from TWAs and from other enterprises in Sweden. In the following a few common problems with respect to the hiring out of manpower will be discussed, followed by certain questions that have special relevance for TWAs.

As stated above in point 1 there are certain restrictions with respect to the hiring of contract labour in the areas where public authority is exercised. Also in other activities regulated by

public law, which are dependent on obtaining concessions, there might be restrictions for a user enterprise with respect to the hiring of contract labour. This applies, e.g., to the aviation and navigation sector.

There are no general restrictions with respect to the period of time during which contract workers may be hired, irrespective of whether they have been hired through a TWA or in some other form.

In the building sector, however, collective agreements concerning borrowing of manpower between enterprises applies. This type of outsourcing is narrowly defined and applies for a limited period of time only.

Workers who are hired out to a user enterprise are deemed to be employed by the performance enterprise. That enterprise is responsible for the employees' wages (see more below). In the employment relationship with the performance enterprise the employees enjoy full protection following Swedish labour law provisions, such as employment protection, right to time off for various reasons, wage protection, etc. In addition, the user enterprise has to ensure that certain provisions of the Work Environment Act and anti-discrimination legislation are applied (see point 4 above).

Unlike contract work where there is a contractor that is in charge of the direction of work, the performance enterprise that hires out workers normally does not direct the work of the workforce. It is thus the user enterprise which is responsible for directing work on a daily basis. One has to bear in mind that the employees' employment contracts, which applies in relation to the performer enterprise, are in a way applicable vis-à-vis the user enterprise as well. Any restrictions with respect to the duty to perform stipulated work, for example, will have direct impact on the possibilities for the user enterprise to instruct workers to perform work. In the Act on Working Hours (1982:673) there are rules on maximum overtime hours. In a corresponding manner will these restrictions be of significance for the user enterprise with respect to the amount of work that can be performed by the subcontracted worker.

The performance enterprise retains, however, the overall supervisory responsibility, being also responsible for planning measures, such as employee skills and competence development, rehabilitation, right to annual leave and other forms of privileged absence. In practice the supervisory activities are divided between the user and the performance enterprise.

Normally a contract is concluded between the user enterprise and a TWA or another recruitment agency. No other contractual arrangements are necessary, which is why usually no contractual relationship exists between the user enterprise and the contract workers. It is possible, however, to supplement the contractual arrangement between the enterprises with, for example, provisions on professional secrecy between the user enterprise and the contract workers.

In principle, no contractual relationship exists between the user enterprise and the contract workers. Consequently, the user enterprise has no obligations vis-à-vis the employees provided by the TWA or similar, except as regards the working environment and prohibition of discrimination. No court cases can be cited in Sweden that would indicate that the opposite view should apply. It is conceivable that in very special cases, in particular when there is a close relationship between the user enterprise and the TWA in question, a court might find that an employment relationship should apply with respect to the user enterprise. This could perhaps take place if the principles regarding shifting liability from the principle to the agent, as mentioned in point 2 above, is applicable.

There are certain restrictions with respect to the possibilities of the user enterprise to hire contract labour regarding the collective relationship. To begin with, a collective agreement may include provisions stating that a user enterprise may not hire manpower to certain posts.

Furthermore, provisions of section 38 of the Co-Determination in the Workplace Act stipulate that before a user enterprise decides to hire manpower, negotiations must take place with the trade union in relation to which he is bound by collective agreement (see for example Labour Court judgment 2005 no 46).

This rule is combined with the possibility for the trade unions, under certain limited circumstances, to exercise so-called union veto right pursuant to provisions of section 39 of the Co-Determination in the Workplace Act. The veto right presupposes that the intended measure may be deemed, with respect to the work in question, to be in violation of legislative provisions or a collective agreement, or that the measures would otherwise contravene generally accepted practices within the parties' area of collective agreement.

By means of the provisions of sections 38 and 39 of the Co-Determination in the Workplace Act the trade unions have gained the possibility of control and can ensure, among other things, that the hiring out of manpower will be properly conducted. The union veto may be exercised, for example, if the performance enterprise is found to report taxes incorrectly, or if

it repeatedly violates important working environment or working hours provisions and the like. The union right of veto may not be exercised, however, in order to oversee the legality of the performance enterprise's business operations in a more general sense. A breach of law or agreement must be connected to the fact that the user enterprise hires contract labour instead of letting his employees to perform the work or duties of direct connection with the work (Labour Court judgment 1983 no 2).

Should a trade union decide to exercise its veto right without having good reason for it, the trade union is liable for damages to the employer, i.e. the user enterprise. Liability for damages does not normally arise in relation to the performance enterprise.

One particular issue in Sweden concerned the question whether an employer was entitled to dismiss his own staff in order to hire contract labour instead. Government Official Reports 1997:58 argues that such a procedure implies evasion of the provisions of the Employment Protection Act.

According to the Employment Protection Act organisational changes can be regarded as just cause for terminating employment contracts. Employees who are dismissed due to organizational reasons also have the right to re-employment pursuant to the provisions of the Employment Protection Act. This right to re-employment applies only if the employer appoints new staff in the proper sense of the word. Questions have been raised regarding the issue as to whether hiring contract labour during the period of employees' right to re-employment constitutes a violation of the fundamental principles stipulated in the Employment Protection Act.

Two cases, Labour Court judgments 2003 no 4 and 2004 no 40, make the legal position on the issue a bit more clear:

- In 2003 no 4 the employer was not entitled under the terms of the applicable collective agreement to employ fixed-term workers. The Labour Court found that hiring contract labour, instead of providing employment contracts of unspecified duration, did not constitute a violation of the provisions on the right to priority for re-employment pursuant to the provisions of the Employment Protection Act.

- In 2004 no 40 the employer had been ordered by the authorities to undertake certain measures relating to the working environment. Instead, the employer dismissed certain workers for organisational reasons and hired contract labour. The employee party argued

that the employer could have avoided dismissal by means of reorganisation of the working tasks. The Labour Court did not express any specific opinion about the issue as to whether the hiring of contract labour was acceptable, but found that the employer had just cause for dismissal.

It may be assumed that the decision of the Labour Court was based in both cases on the premise that hiring contract labour is a lawful activity. This applies, as a principal rule, to the same time frame in which an employer may dismiss his own employees and furthermore even though there are employees with the right of priority for re-employment.

Finally, some provisions apply to trans-national posting of workers in conjunction with the Directive (96/71) of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (the Posting of Workers Directive). The Swedish Act on the Posting of Workers (1999:678) applies to hiring of labour from other countries (section 3) as well as to other countries (section 8).

In the first case whatever the law is otherwise applicable to the employment relationship posted workers are guaranteed certain terms and conditions of employment according to the Act on the Posting of Workers (section 5). The issue of wages requires special attention – no minimum wage laws apply in Sweden. Employees who are hired from other countries may thus not make claims concerning Swedish wages with reference to the Act on the Posting of Workers. The legislator has chosen to let the issue of the wages for posted workers be subject to the way in which wages are usually set on the Swedish labour market, i.e. through negotiations, and ultimately by means of collective action of organized parties. The question as to whether this regulatory method is in compliance with the Posting of Workers Directive may be subject to the scrutiny of the European Court of Justice (Labour Court judgment 2003 no 49).

In the second case concerning trans-national posting of workers to certain countries, an employer who is domiciled in Sweden shall apply the national provisions of the country where the work is to be performed in the form of that country's legislation implementing the Posting of Workers Directive.

With respect to enterprises in which hiring out of manpower is their main activity the following remarks may also be added.

Public law provisions in Sweden do not stipulate that TWAs must be authorized, licensed or even registered. This issue has been referred to a Government commission, which is to make a comprehensive review of the legislation in force (Government Official Reports 1997:58). No amendments to the law have been yet been suggested.

On the other hand, there is voluntary authorization within the framework of the collective agreement applying to TWAs. Agencies that are affected by the collective agreement, satisfying also some other conditions, may be authorized by a special panel (Panel of Authorization), composed of the representatives of the parties to the collective agreement. At present there are about 40 TWAs which have been authorized in this way.

As regards TWAs and regulation by collective agreement, the terms and conditions of employment differ between salaried employees and workers.

The principle applied by the collective agreement covering salaried employees (Collective Agreement for Temporary Agency Employees concluded between the Service Industry's Employer's Association on the one hand, and the Salaried Employees' Union and the Swedish Confederation of Unions of University Trained Employees on the other) stipulates that the pay shall be a fixed monthly salary. Organisation of the working time is also decided upon by the agency. The Agreement contains also provisions concerning situations in which an employee is not hired out: in these cases full salary is not always paid.

As regards workers employed by TWAs the opposite prerequisites apply. The collective agreement for TWAs regarding workers has been signed between the Service Industry's Employers' Association on one side and all national trade unions affiliated in the Swedish Confederation of Trade Unions on the other. Workers' wages are determined from the point of view of wages applying at the workplace to which the worker is hired out. The working time is also determined by the conditions applying at the user enterprise. The collective agreement regarding the Swedish Confederation of Trade Unions contains also provisions relating to the fact that full wages are not always paid if the worker is not hired out.

6) FRANCHISING

a) *If available, please provide some general information on franchising regulations and practice in your country.*
b) *What is the legal position in your country of a franchisee vis-à-vis a franchisor? Is the franchisee considered an independent entrepreneur or an agent subordinated to the*

franchisor? Please describe any judicial decisions holding that a franchisee was in fact a subordinated agent to a franchisor and the legal effects of such decisions.

c) *What is the legal position of the franchisee's employees? Can they also be regarded as workers dependent on the franchisor?*

There is no legislation in Sweden applying especially to franchising.

A recent Government report (Ds 2004:55 'Informed Franchising') indicates that it is difficult to state more explicitly anything about the development of the franchising activities in Sweden. The report estimates that the franchising system in Sweden has a turnover of just about 80 billion SEK, but that the different systems vary to a large extent. The estimate relates to some 300 franchising systems including some 97,000 employees.

The report concludes that franchising is a kind of co-operation, resembling a situation in which a person acts as a commissioned agent or a mercantile agent. The report also concludes that franchising is of significance, inter alia, to labour law since it is sometimes uncertain whether the franchisee is to be deemed as an employee of the franchisor. Franchising affects the fundamental principles of contract law, such as the duty to inform and modification of unreasonable contract terms. Issues relating to competition law and intellectual property law play also an important role in franchising.

The report explains that one of the difficulties in assessing the scale of franchising is the fact that there is no registration requirement or any cohesive definition of the concept of franchising. With reference to the lack of definition it is difficult even for a national reporter to draw conclusions. In short, franchising is not a standard legal construct in Sweden.

The report makes a proposal with respect to legislation concerning information to a franchisee. The legislative proposal departs from a definition of franchising, the essence of which is an agreement between a franchisor and an independent franchisee, where the latter shall make use of the specific business concept of the franchisor and of the marketing of goods or services, provided that the franchisee shall use the trademarks and other intellectual property rights belonging to the franchisor.

Having regard to the legal definition given in the report the franchisee is thus viewed as a legal person in his own right, formally separate from the franchisor. This premise implies that the franchisee may also employ staff which will normally have no contractual relationship with the franchisor.

It might be added here that the provisions of the Co-Determination in the Workplace Act are applicable even when the person who performs work is not an employee, but his position is in principle that of an employee (so called dependent contractor). This provision makes it possible to conclude a collective agreement with respect to the terms and conditions of work for such a person. A typical case of dependent contractors is a franchisee in some franchising systems.

7) ***COLLECTIVE ACTION AND COLLECTIVE BARGAINING IN THE CONTEXT OF PRODUCTIVE DECENTRALIZATION***

a) *What is the position of your country's unions vis-à-vis productive decentralization;*
b) *Does the law provide for the collective representation of employees at a group's level? If it does, how is such representation structured?*
c) *Are there any trade unions in your country which represent the whole of the workers of a group of companies or of several enterprises working in close partnership?*
d) *Has there been collective bargaining covering the whole group of enterprises or several enterprises working in close partnership? If so, which subjects have been addressed by the bargaining?*
e) *Have you had strikes or other forms of collective action addressed against a group of enterprises or several enterprises working in close partnership?*

With respect to the trade unions' views on PD the following remarks should be submitted.

The Swedish private sector has experienced many comprehensive structural rationalisations, and yet no major conflicts on the labour market have occurred. Over the years entire branches of industry have been closed down, such as the clothing and shipbuilding industries. One explanation of the peaceful transformation is to be found in the fact that the Swedish Confederation of Trade Unions has adopted an overall strategy holding that employment protection ensues from strong companies. In other words it can be said that the Swedish Confederation of Trade Unions has shown great inclination towards change, provided that it has been deemed as beneficial to financially sound enterprises.

It may be added here that in my experience the trade unions do not reject PD as strategy for enterprises. On the other hand the unions have shown themselves to be sceptical towards some forms of PD, such as unlimited use of contract labour.

Works councils do not exist in Sweden. The Swedish system is composed of nation-wide trade unions with respect to both workers and salaried employees. Where a trade union is

bound by a collective agreement, it entertains some privileges, such as the right to appoint shop stewards, and a more extensive right of bargaining with the employer.

As already indicated under point 5, Swedish employees are organised by industrial sector. For example, the Salaried Employees' Union (HTF) organizes all salaried employees of TWAs and concludes collective agreements for the entire sector.

Alongside this sectorial organisation model, employees are also organised by profession. The professional organisational model applies primarily to employees with academic education, but also to certain other workers with vocational training, such as building workers, house painters, etc.

The above means that Swedish trade unions associate employees by sector or by a certain professional/vocational profile. It is thus normal that all employees of a company or a group of companies, or even in a given sector, are organised in the same trade union. Consequently, this union exerts influence on a variety of matters arising in a company or a group of companies, expressed ultimately by having the possibility of conducting negotiations at central level.

Representatives of local trade unions have another possibility to exert influence on other companies than their own, such as, for example, on a group of companies, by means of the provisions of the Board Representation Act and by means of collective agreements.

The Board Representation Act gives unions bound by a collective agreement with an employer the right to appoint employee members of the board of directors, provided that the company employs more than 25 employees.

Under the provisions of section 3 of the Act an employee who is employed by a parent company, performing work in a subsidiary will be deemed to be employed also by the subsidiary when the provisions of the Act are applied. Provisions of section 4 state furthermore that as regards the parent company the whole group of companies shall be regarded as an employer, and the right to board representation shall accrue on the employees of also other companies within the group.

Certain specific rules apply to group companies in accordance with the largest collective agreement regarding information and consultation in the private sector – the so called Agreement on Efficiency and Participation concluded between the Confederation of Swedish

Enterprise on one side and the Swedish Confederation of Trade Unions and the Federation of Salaried Employees in Industry and Services (PTK) on the other. Under the provisions of Article 11 of the Agreement portentous information concerning the group – including its operations abroad – shall be disseminated among all the constituent companies making up the group. With respect to issues that have importance for several units within the group the management of the group company has a duty to undertake negotiations with respective trade unions, which should be represented in a certain specified way.

The issue of industrial action directed towards groups of companies or companies that conduct business in close partnership is an issue of topical interest on the Swedish labour market. This is strictly connected with the Swedish legal system.

The main rule in Sweden is that trade unions are not affected by the peace obligation if no collective agreement exists. If, on the other hand, a company is bound by a collective agreement peace obligation applies as a matter of principle. It happens that companies declare that they do not want to be bound by any collective agreement. In such cases the trade unions wishing to conclude a collective agreement are entitled to undertake industrial action in order to force the employer to conclude a collective agreement. In this situation the peace obligation does not apply, and one trade union may assist another trade union by means of so-called sympathy action, even if the first union is not entitled to undertake industrial action due to its being bound by another collective agreement. Industrial action typically implies the fact that the attacking trade union will ask other trade unions for support. In consequence, a so-called agreement blockade will ensue, which may imply that the employer will not have any goods or necessaries delivered.

A special issue with respect to Swedish labour law and collective labour law is the extent to which an employer running a business involving the hiring out of manpower may conduct business operations applying the ordinary sector collective agreement. Trade unions within the Swedish Confederation of Trade Unions have argued that the collective agreement regarding TWAs shall apply exclusively for that kind of activity. This view entails that employees, which are being hired out, have no duty to work under other conditions than those following from the collective agreement regarding TWAs (cf. Labour Court judgment 2004 no 6). The issue has not yet been examined by the Labour Court.

8) OTHER QUESTIONS

Please present any other issues which in your country's law or practice relate to this topic and have not been addressed in this questionnaire.

In certain country regions companies do not need PD but rather 'productive centralization'. In these situations a company will have no need of contracting out work to other companies, but rather of finding another company whose activities can be associated with its own activities.

There are many industrial sectors, especially in the north of Sweden, in which seasonal work is done, which is why employers in these sectors employ staff during some part of the year only. This applies to sectors such as, for example, forestry, tourism or car testing.

It is difficult for an employee to earn a living based on wages paid during a certain part of the year only. In order to be able to remain in the region where seasonal work abounds, the worker must find some other work during the period when the main occupation does not exist.

In these cases companies experience great difficulties in keeping educated staff on the spot. As soon as employees get sufficient competence, they tend to leave the employment and move somewhere else where they can find work all year round.

In order to overcome this problem discussions about 'staff-sharing' have been conducted between companies in need of sharing their staff with other companies who perform work during other seasons, so that employees can be guaranteed work during the entire year. Such staff-sharing may take place in various legal structures, but is not problem-free with reference to the Swedish labour market regulations.