

Lund University Faculty of Law

From the Selected Works of Ann Numhauser-Henning

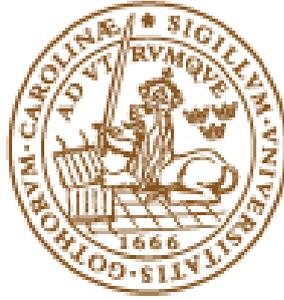
2002

Fixed-term work in Nordic labour law

Ann Numhauser-Henning, *Lund University*



Available at: https://works.bepress.com/ann_numhauser-henning/13/



LUND UNIVERSITY

Faculty of Law

Selected Works @ Lund University, Faculty of Law
<http://works.bepress.com/lundlaw>

Reference:

Fixed-term work in Nordic labour,
The international journal of comparative labour law and
industrial relations,
Vol. 18, 4, s. 429-458.

Published with permission from:
Kluwer Law International
www.kluwerlaw.com

This paper is available at:
http://works.bepress.com/ann_numhauser-henning/

ANN NUMHAUSER-HENNING*

Fixed-term Work in Nordic Labour Law

Abstract: This article describes the regulation of fixed-term work and its most recent developments in Denmark, Finland, Norway and Sweden. Regulations are analyzed against the background of the Fixed-term Work Directive 1999/70/EC. Legal developments of employment protection and the scope of fixed-term work are supposed to interrelate. Norway has the lowest incidence of fixed-term work (9 per cent in 2000) followed by (neglecting Denmark with 10.2 per cent in 1999) Sweden and then Finland (13.9 per cent and 18.2 per cent in 1999, respectively). This reflects the relative differences regarding the legal scope for fixed-term work. *Denmark* represents a legal system without any statutory restrictions on the use of fixed-term work. In *Finland* the legitimate scope for fixed-term contracts is restricted to those cases in which there are justifiable reasons. In *Sweden* legislation forms a rather intricate pattern of restrictions in the form of requirements on justifying reasons for and/or maximum duration of such contracts. *Norway* has the most strict statutory framework. The approach thus varies a great deal. The Danish solution – because of lower barriers in between the different modes of employment – is claimed to be closer to the equal treatment approach than Norwegian and Swedish law (as it stands) and is in *this* sense closer to the Fixed-term Work Directive.

* Ann Numhauser-Henning is Professor of Private Law at the Faculty of Law, Lund University, Sweden, and the coordinator of the research programme *Normative Development within the Social Dimension (NORMA)*. Norma carries out research on normative patterns and their development in the legal regulation of employment, housing, family and social security in a European integration perspective. For more information see web page <www.jur.lu.se/norma>. This article is a shortened version of a contribution to Scandinavian Studies in Law Vol. 43, *Stability and Change in Nordic Labour Law*, Stockholm 2002.

1. INTRODUCTION

The purpose of this article is to describe the regulation of fixed-term work and its most recent developments within Nordic labour law, that is the labour law of Denmark, Finland, Norway and Sweden.

The legitimate scope of fixed-term work and the conditions of fixed-term workers have been at the core of labour law discourse during the last few decades. The discussion has frequently focused on the tension between *traditional* employment and employment protection as well as on so-called *New Forms of Work* or *A-Typical Work*.¹

The discussion has been a part of the general labour-market discourse under the heading *Flexibilization of Work*. Changing conditions in the labour market are generally considered to create new conditions for labour law as well. Technological development and the globalization of economies are frequently mentioned in this context. Current conditions are hence said to involve increased demands for flexibility and market adjustment. With regard to the requirements for increased allocative flexibility on the part of employers and in economic activities, there is general consensus. Where the actual implications of such requirements are concerned, however, there is a considerable diversity of opinions.²

The labour-law flexibility discourse often stresses labour-market segmentation and the division of workers into on the one hand core-groups of workers and marginalized workers on the other hand. An early model – and maybe still the most well-known – of the new way of organizing labour is Atkinson's model of *The Flexible Firm*.³ At the centre of the employer's concern is what Atkinson calls the core group of workers. This core group consists of workers whose qualifications are of special value to the employer's activities and not easy to come by – in other words, experience and internally accomplished qualifications are impor-

1 There is no absolute consensus as regards these concepts, but *New Forms of Work* or *A-Typical Work* can be said to connote all arrangements entailing work that falls outside *traditional* employment i.e. full-time work as an employee hired on a contract of indefinite duration for work at the employer's.

2 See further, for instance, van den Berg *et al.*, *Labour Market Regimes and Patterns of Flexibility*, Arkiv Förlag, Lund, 1997, p. 17 f, on the tensions between the neo-classical position and the institutionalist position within labour economics.

3 Atkinson, 'Manpower Strategies for Flexible Organisations', in *Personnel Management*, August, London, 1984.

tant. With regard to this segment of the labour force, the relevant flexibility strategy is described as *functional flexibility* – that is, the reallocation of labour through adequate and flexible organizational and competence structures. This can also be labelled *internal flexibility*. Typically, management has no problems when it comes to offering the core group of workers both employment protection and high-quality working conditions. On the contrary, the problem is how to retain these workers. The core group of workers is thus conceived of as typically permanently employed. The second segment is the *peripheral group of workers*, workers with qualifications more easily available and thus people who can be recruited on demand. Here, the adequate managerial strategy is supposed to be *numerical flexibility*, implying more or less precarious forms of work such as part-time work and fixed-term work – or what has earlier been referred to as New Forms of Work or A-Typical Work. A third layer of workers are the *external* or *distanced workers*, that is workers who are not even integrated into the employer's organization in the sense of being employed there. This group includes workers hired out by Temporary Work Agencies, but also consultants, freelancers and, ultimately, any other form of 'out-sourcing'. One could describe both the numerical flexibility strategy and the distancing strategy as forms of *external flexibility* in the sense that adjustment and flexibility are achieved on demand mainly through means outside the employer's organization.

Labour-market developments and the increased need for allocative flexibility have generally been perceived as forming a trend towards an increase in the peripheral and distanced workforce. This entails an increase in part-time work, fixed-term work, temporary agency work and other unstable employment relationships – and a decrease in the group of core workers offered permanent, relatively secure, traditional employment. These developments impose strains on labour law, as they engender demands for the deregulation of traditional employment protection and for conditions conducive to more flexible modes of employment. In legal theory, there may be said to be two main different approaches to the causes of legal change: one emphasizes precisely the external economical, political and industrial-relations system factors just described, and the other stresses internal factors that are related to the legal system itself

and only indirectly influenced by economic developments.⁴ There is, of course, much more to the flexibility discourse than the conflict between regular/permanent employment and less secure fixed-term contracts;⁵ but the present discussion is limited to that issue. Let us just initially state that the neo-liberal approach to flexibility, or even the dualistic model of flexibility, has not been considered characteristic of the Nordic countries, which have rather been seen to represent a quasi-corporatist model of flexibility.⁶

Within the flexibility discourse, we find – as was to be expected – differing opinions among employers, employees' organizations and legislators of diverse political colours. Traditional employment and employment protection are usually defended by workers' organizations, centre-leftist political parties and institutionalist economists. On the other side we find management, more right-wing political parties and neo-classical

-
- 4 Schömann *et al.*, Mückenberger, Streeck, 1998 mentions the *Standard Employment Relationship* theory as an example of the external-factors approach and the theory of *Reflexive Labour Law* (Teubner, Rogowski and Wilthagen) as representing the internal approach, see Schömann *et al.*, *Labour Market Efficiency in the European Union, Employment protection and fixed-term contracts*, Routledge, London, 1998, pp. 10 ff. A theory which can be said to combine these functional and normative approaches is the theory of law as Normative Patterns within a Normative Field developed by the late Professor Anna Christensen and myself. The theory is developed in *Normative Development within The Social Dimension*, Norma, Lund 1996, as well as in Christensen, 'Normative Patterns and the Normative Field: A Post-Liberal View on Law', in T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*, Ashgate, England, 1998. While legal innovations are likely to be reactions to social or legal consequences of previous legal regulations, the attraction of normative patterns 'reacts' to social change, as did societal conditions have an influence on the creation of existing basic normative patterns in the first place.
- 5 See further, for instance, A. Numhauser-Henning, 'Arbetets flexibilisering', in *Studier i Arbetsrätt tillägnade Tore Sigeman utgivna av Arbetsrättsliga Föreningen*, Iustus Förlag, Stockholm, 1993, as well as Van den Berg *et al.*, 1997. Note also that in the Knowledge and Network Society, rapid changes in demand – also in respect of high-skilled crucial knowledge workers – may further the distancing managerial strategy with regard to what has generally been considered 'core-group' work, too.
- 6 See Streeck, who identifies three types of flexibility as a response to the changing economic environment: the 'neo-liberal model' directed towards the recourse of the external labour market, frequent where there are weak unions and few legal provisions for employment protection; the 'dualistic' model combining internal and external flexibility strategies; and the 'quasi-corporatist model' which involves high internal flexibility as a compensation for continuing external rigidities. See Streeck, 'The uncertainties of management and the management of uncertainty: Employers, labor relations and industrial relations in the 1980's', *Work, Employment and Society*, Vol. 1, 3, 1987, pp. 281-308; Streeck, 'Change in industrial relations: Strategy and structure', *Proceedings of an international Symposium on New Systems in Industrial Relations* 13-14 September, Tokyo, Japan Institute of Labour, 1988 and Streeck, 'Neither European nor works councils', *Economic and Industrial Democracy*, Vol. 18, 2, 1997, pp. 325-38.

economists. Lately, though, there have been signs indicating that all 'sides' are yielding to the trend towards more flexible working arrangements, stressing increased quality and equality of working conditions despite the mode of employment.

The regulation of fixed-term work is not entirely an issue for national legislators. Employment protection (and the regulation of other modes of employment than permanent employment), being at the core of labour-market performance, has never been the object of detailed regulation in international instruments. Nor has this been the case in European Community law. Even so, efforts have long been made on the part of the European Commission to regulate the scope of A-Typical Work, including fixed-term work.⁷ We have now the European Council's Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP.⁸ The purpose of the agreement is twofold: it sets out to improve/guarantee the working conditions of fixed-term workers through the application of *the principle of equal treatment or non-discrimination*; and at the same time it is meant to *restrict the permitted use of fixed-term work* by establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (Clause 1). As regards this restrictive aspect, the Directive/Framework Agreement may be said to evince a certain level of ambiguity, and it has been referred to as 'normalizing' fixed-term work.⁹

7 See the early attempts from the 1980s: the proposal for a Council Directive concerning temporary work: O. J. C. 128, 19.5.1982, p. 2; and the amended proposal for a Council Directive on voluntary part-time work: O. J. C. 18, 22.1.1983, p. 5. See also the initiatives from the 1990s: the proposal for a Directive on certain employment relationships with regard to working conditions: COM (90)0228, O. J. C. 224, 8.9.1990, p. 4; the proposal for a directive on certain employment relationships with regard to distortions of competition: COM (90)0228, O. J. C. 224, 8.9.1990, p. 6; and the proposal for a directive complementing the measures to encourage improvements in the safety and health at work of temporary workers: COM (90)0228, O. J. C. 224, 8.9.1990, p. 8 as amended by CO; (90)0533, O. J. C. 305, 5.12.1990, p.12), later on resulting in the Council Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with fixed-duration employment relationships or a temporary employment relationship: O. J. L. 206, 29.7.1991, p. 19. See also the immediate predecessor of the Fixed-term Work Framework Agreement, the Commission initiative as part of the second stage consultation with management and labour pursuant to Article 3(3) of the Agreement on Social Policy, 'Flexibility in working time and security for employees (atypical work)' of 9 April 1996, PE 220. 571.

8 The Directive is the third directive to be introduced as a result of the Social Dialogue according to (now) Articles 136-139 EC, and the second on A-typical Work following the Directive 97/81/EC on Part-time Work.

9 Murray, 'Normalising Temporary Work, The proposed Directive on Fixed-Term Work', *ILJ*, Vol. 28, n.3. September 1999, pp. 269-275.

The Directive is directly applicable to Denmark, Sweden and Finland, being Member States of the European Union (EU). The Directive was to be implemented in the Member States by 10 July 2001, with the possibility of an extra year, if necessary, in case the implementation should ensue following collective agreement. According to the EEA Joint Committee's Decision No. 43/2000 of 19 May 2000, the Directive is also applicable to the EEA area and thus to Norway as well.¹⁰

According to the Fixed-term Work Directive, a *fixed-term worker* is:

'a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event' (Clause 3.1).

Fixed-term work is thus characterized by its duration being stipulated beforehand as opposed to permanent employment which is of indefinite duration. In this context, it is appropriate to recall that the issue of the legitimate scope of fixed-term work within the flexibility discourse, which was touched upon above, may be said to presuppose the tension between regular 'secure' employment and less secure modes of employment created by the development of traditional employment protection.¹¹ Preconditions here differ in an interesting way between the Nordic countries.

In respect of the concepts referring to fixed-term work that are used in national law, it should be pointed out that in Denmark fixed-term work is mainly outside the statutory framework and no legal definition exists. Under Finnish law, the concept fixed-term (*viss tid*) is, as is the case with the Directive itself, also used with regard to contracts for a special task or with an indirect limit to its duration. In Norway, the term *midlertidig ansettelse* (temporary employment) is used as the common concept. Finally, in Swedish law fixed-term employment is generally adhered to as denoting employment of limited duration (*tidsbegränsad anställning*), a concept covering employment for a fixed term (*visstid*), fixed season, fixed task and a number of other modes of employment of limited duration.¹² In this

10 EEA Supplement to O. J. No. 32, 13.7.2000, p. 3.

11 See also, for instance, Nielsen, *European Labour Law*, Jurist- og Økonomforbundets Forlag, Copenhagen 2000, p. 150; Schömann *et al.*, 1998 p. 24 as well as the general assumptions of reflexive labour-law theory touched upon above in footnote 6.

12 In the Fixed-term Work Directive, however, the term *visstidsanställning* was used in its Swedish version. The proposed new Act to implement the Directive as regards the equal-treatment principle uses, however, the traditional concept of *tidsbegränsad anställning*.

article the term fixed-term work or employment will be used in the fairly general meaning of the Fixed-term Work Directive.

2. A STATISTICAL BACKGROUND

As was already indicated, in the wake of technological development and the globalization of markets an increased need for allocative flexibility has generally been perceived as forming a trend towards peripheral and distanced, and thus fixed-term, work. This is not the place for an earnest attempt to trace such a general development, if there is one.¹³ It might be useful, though, to present some labour-market statistics relating to the proportion of fixed-term work in the Nordic countries.

According to the OECD 1996 Employment Outlook,¹⁴ the incidence of temporary employment in the total bulk of employment in Denmark was 12.5 per cent in 1983 and 12.0 per cent in 1994; in Finland 11.3 per cent in 1982 and 13.5 per cent in 1994, and in Sweden 12.0 per cent in 1987 and 13.5 per cent in 1994. There were no figures available on Norway. While the incidence of temporary work on both occasions were considerably higher among women than among men in both Sweden and Finland (as in most countries), this was not true of Denmark.¹⁵ In any country, however, the incidence of temporary work arrangements is much higher among

13 In the 1996 Employment Outlook by the OECD, the conclusion was that there was no clear trend towards an increase in temporary work arrangements throughout the OECD countries. While there was a significant increase in some countries such as Australia, France, the Netherlands and, especially, Spain since the early 1980s, such arrangements were relatively stable in other countries such as Japan, Germany and Denmark and had even decreased somewhat in Portugal, Greece, Luxembourg and Belgium. In the United Kingdom, and possibly also in Sweden, the proportion of temporary work arrangements was considered to be procyclical, and in France and Spain the growth of such arrangements could be clearly linked to changes in legislation; *see* 1996 Employment Outlook, OECD 1996, p. 6. However, in its report *Employment in Europe 2001: Recent Trends and Prospects*, p. 17, the European Commission observes a steady increase in the incidence of fixed-term work in the EU over the last five years.

14 Table 1.6. Statistics build on the European Union Labour Force Survey, supplied by EUROSTAT, and on national labour-force surveys. In addition, the 1993 Employment Outlook by OECD contained an analysis of temporary employment.

15 In Finland the incidence among men was 9.3 per cent and 13.3 per cent among women in 1982; and 12.3 per cent as compared to 14.7 per cent in 1993. In Sweden the incidence was 9.7 per cent among men and 13.9 per cent among women in 1987, and 12.3 per cent as compared to 14.6 per cent in 1994. In Denmark, finally, the incidence were 12.2 per cent among men and 12.7 per cent among women in 1983, and 11.1 per cent and 12.9 per cent in 1994.

young people.¹⁶ At least in Sweden, there is also a much higher incidence of fixed-term contracts among immigrants than among nationals.

According to European labourforce statistics for 1999, the incidence of temporary employees – at 10.2 per cent – seems rather stable in Denmark as compared to earlier years while there was a slight increase in Sweden (13.9 per cent) and a considerable increase in Finland (18.2 per cent) as compared to 1994.¹⁷ According to national statistics, the incidence of fixed-term work in Norway was 12 per cent in 1997, decreasing to 9 per cent in 2000.¹⁸ The average incidence of fixed-term work in the EU as a whole was 13.2 per cent in 2000.¹⁹

3. GENERAL BACKGROUND AS REGARDS THE LEGAL REGULATION OF FIXED-TERM WORK IN NORDIC LABOUR LAW

As was indicated above, there is an interrelation between legal developments of employment protection in regular employment and the scope of fixed-term work. Restrictions on the use of fixed-term work are normally initiated in the context of risk of circumvention of legal restrictions on the employer's right to dismissal at will. In Norway, the issue of restricting the legitimate scope of fixed-term employment became an issue of debate quite early, owing to – as compared to the other Nordic countries – an early development of legal employment protection. In Sweden, too, the legitimate scope of fixed-term employment was to become an issue for the legislator when general employment protection was introduced in the early 1970s. In Finland legislated restrictions on the use of fixed-term contracts were introduced in 1984. In Denmark, however, employment protection – though partially legislated – is still not considered a general concern of the legislator; consequently there is, in principle, no statutory framework as regards the use of fixed-term contracts.

In Danish law the legal point of departure where the legitimate scope of fixed-term work is concerned is the freedom-of-contract principle.

16 In 1994, the share of temporary employment among people aged 16-19 years was 28.6 per cent in Denmark and 61.1 per cent in Sweden and in the age-group 20-24 years 33.1 per cent in Denmark and 39.5 per cent in Sweden, whereas the share among people aged 25 or more was only 7.6 per cent and 9.6 per cent, respectively. Danish patterns as regards fixed-term work are discussed in some detail in Schömann *et al.*, 1998.

17 Eurostat, European Social Statistics – Labour Force Survey results 1999, Luxembourg 2000, Table 28.

18 <www.ssb.no/aarbok/tab/t-0601-243.html>.

19 The European Commission's report Employment in Europe 2001, *Recent Trends and Prospects*, p. 17.

The social partners' collective bargaining and regulations by collective agreements are crucial to Danish labour law. This applies to employment protection as well, the general view being that employment protection is for the social partners to decide upon. There is thus no generally applicable employment-protection legislation in Denmark, though the EU membership has led to some specific statutory regulation. The situation of the salaried employees in the private sector is regulated by the Danish Act on White-Collar Workers (*Funktionærloven*) from 1938. The employment protection of extensive groups of employees are regulated in the Master Agreement, *Hovedaftalet*, between *Dansk arbejdsgiverforening* (DA) and *Landsorganisationen* (LO). With regard to other groups the freedom-of-contract principle prevails, and regulation may be found in collective agreements or in individual employment contracts.

Basically, the freedom-of-contract principle prevails with regard to the legitimate scope for fixed-term work in Denmark. As long as the expiring conditions are expressly agreed upon, those are the ones which prevail. Ultimately, a court of law may apply the rules on notice etc. in cases of unreasonableness or abuse. Other employment is supposed to be entered into with a right to dismissal upon notice. Here, the Act on White-Collar Workers contains an exemption for temporary employment of a maximum duration of three months, which employment can be ended immediately and without notice. The principal view of such employment is thus that it is a type of open-ended employment. The basic line in Danish labour law, however, is that there are no generally applicable just-cause requirements for open-ended employment or other general statutory employment protection.²⁰ Because of the weak statutory employment protection in Danish labour law, a contrast between permanent open-ended employment and fixed-term work of a kind that would make the legitimate scope for the latter category crucial cannot really be said to exist.²¹ On the other hand, Denmark does not seem to have the

20 The Act on White-Collar Workers does, however, contain protection against *not reasonably founded* dismissal, while *Hovedavtalen* protects against *unreasonable* dismissal. Other collective agreements contain similar requirements. Generally, such protection only applies after a minimum period of qualifying employment. There is also the more general statutory ban on discriminatory dismissals.

21 Compare Streeck on the 'neo-liberal model' and its predilection for external flexibility strategies. A similar opinion is offered by Kristiansen, *Lønmodtager beskyttelse i Dansk arbejdsret*, GadJura, Copenhagen, 1997, p. 191; however, Kristiansen also emphasizes the flexibility characteristic of Danish collective agreements.

same 'barrier' between regular and fixed-term employment as we find in, for instance, Norwegian and Swedish law.²²

The Fixed-term Work Directive and its requirements are now being considered by the Danish legislator. The social partners (DA and LO) have pointed out that it is essential for any legal implications to be designed in such a way that they do not affect existing collective agreements. At an early stage the Government, through the Ministry of Labour, held that the Directive was unlikely to affect existing legislation.²³ This approach may now have changed. In the summer of 2001 Denmark chose to implement the Part-time Work Directive by means of legislation. The Part-time Work Act²⁴ uses a combination of legislation and collective-agreement regulation giving the dominant collective agreements a kind of *erga omnes* effect new to the Danish labour market.²⁵

In the other three Nordic countries the starting-point is rather that fixed-term employment is *in principle* prohibited. This is especially true with regard to Norway, where the legal scope is carefully – and still quite strictly – regulated. In Norway there is also limited scope for deviating regulation by the social partners.

In Norway legal regulations on employment protection for state servants existed as far back as 1918. The relevant Act contained an explicit exception for the fixed-term employed. A more general discussion on the legitimate scope of fixed-term employment was raised in relation to the 1936 Workers' Protection Act (*Arbeidervernsloven*). Although this remained an issue during the 1940s and the 1950s, it was not until legal reforms in the 1970s that fixed-term employment was really dealt with. A proposal for a new employment-protection legislation put forward in 1973 by the Norwegian LO and the Social Democrats and replacing an act of 1956, was the starting-point for the Norwegian Workers' Protection and Working Environment Act (*Arbeidsmiljølagen*) introduced on 1 July 1977.

As regards fixed-term contracts (*midlertidig ansettelse*), the point of departure of the 1977 Act was – and still is – that such employment was prohibited unless explicitly permitted by law. The legitimate scope was

22 Schömann *et al.*, go as far as to say that 'it is a general principle of Danish labour law that temporary and fixed-term employees enjoy the same rights as permanent employees', Schömann *et al.*, 1998, p. 31.

23 *Underrøttelse till Folketingets Europaudvalg* from the Ministry of Labour, 10 June 1999.

24 *Lov nr 443 af 7 juni 2001 om gennemførelse av deltidssdirektivet*.

25 See Nielsen, *Laerebog i arbejdsret*, 8th ed., Jurist- og Økonombundets Forlag, Copenhagen, 2001, pp. 221ff. and p. 143.

stated in Section 57.7 of the Act and covered the situations where fixed-term employment was warranted by the actual nature of the work to be performed,²⁶ or by deputyships and training purposes. Later on, in 1985, an exception for employees in labour-market measures was added. The situation of State employees and those employed in basic schooling is regulated in special legislation.

The 1977 Act was revised in the 1990s and the provisions concerning fixed-term employment are now stipulated in Section 58 A, introduced on 6 January 1995 (No. 2). In general, though, the scope for fixed-term employment was not really changed. The general aim of the Act is still to secure protected – i.e. indefinite-duration – employment (Section 1 Paragraph 2). The current rules on the scope of fixed-term employment are by far the strictest amongst the Nordic countries. The regulation reminds one very much of the rules in the original Swedish Employment Protection Act of 1974.²⁷ According to Section 58 A Paragraph 1, fixed-term employment can only be agreed upon when it is justified by the actual nature of the work, training purposes or deputyship and it concerns employees in labour-market measures stipulated by the Ministry, leading positions (so-called *åremålstilsetting*), active sportsmen and other positions within organized sports.²⁸ Finally it can be ratified with support in a collective agreement entered into by a nation-wide trade union on the employee side, with regard to work of an artistic, research- or sports-related character. Concerning the possibility of special rules on fixed-term employment in collective agreements, what is most remarkable is that such rules may not refer to other groups of workers than the ones actually mentioned in the Act itself.

In the summer of 2001 an investigation committee was called upon to revise the current Act. It is too early to say anything about the results of the work of the committee, but as a member of the EEA-area Norway is also under the obligation to implement – among others – the Fixed-term Work Directive.

In Sweden too fixed-term work is only accepted when especially provided for by law and/or collective agreement. Here, however, the legislated list of permissible situations is considerable and the scope for deviating collective regulation is, in principle, unlimited.

26 The bill (Ot.prp.no.41/1975-1976, p. 71) mentions, as examples, constructing workers employed to complete a certain building and special experts hired to carry through a certain study and seasonal work.

27 Compare Ot.prp.nr.50 (1993-1994), p. 64 and Section 3.4 of this article.

28 Added on 17 January 1997 (No. 12).

The Swedish regulation on fixed-term work is mainly to be found in the Act on Employment Protection (1982:80 *anställningsskyddslagen*). General legislation on employment protection was not introduced in Sweden until 1974, through the first Act on Employment Protection (1974:12). General rules on the use of fixed-term contracts were also introduced in 1974.²⁹

According to the 1974 Act fixed-term work contracts were allowed only if the particular nature of the assignments provided a motive or if the employment involved practical training or a deputyship. The rules concerning categories of employment set forth in the Act could (and still can) be replaced by collective agreements. To be valid, a fixed-term work contract must either be directly authorized by law or be supported by a collective agreement.³⁰ The rules have been changed on a number of occasions since 1974.

The current rules on when fixed-term work is permissible are set forth in Sections 5, 5a and 6 of the 1982 Act in its current wording. According to Section 5, contracts concerning fixed-term work (*tidsbegränsad anställning*) may be made if the reason is found in the particular nature of the work, as regard contracts involving deputyship, practical training, or holiday/vacation work, contracts due to temporary piling-up of work, contracts valid for the time up to the date where the employee is due to take up National Service duties, or starts other comparable services, lasting for more than three months and/or contracts referring to employees who have attained retirement age.

With regard to deputies, as from 1 January 2000, the applicable rule states that when an employee has been employed as a deputy for a total of more than three years out of five by the same employer, the employment is to be considered permanent.³¹

According to Section 5a an agreed fixed-term employment is permitted, no special justifications given, for a maximum period of 12

29 See further A. Numhauser-Henning, 'Temporary Employment: A Critical Study of the Swedish Regulations Governing Categories of Employment and Their Functions', *Scandinavian Studies in Law*, Stockholm, 1986.

30 There is no general obligation on the employer to explicitly indicate the specific legal ground for the fixed-term employment concerned, though; see AD 1983 No. 113 and 1999 No. 7.

31 According to figures presented by the LO, the number of deputyships decreased from 180,000 to 158,000 – all within the municipal sector – as a result of this rule; see *På vems villkor? Om tidsbegränsade anställningar* (On who's Conditions? On Fixed-Term Employment), LO, Stockholm, September 2001. Before the reform, successive fixed-term employment as a deputy could go on for a practically unlimited period as long as it was a matter of 'genuine replacement', see AD 1984 Nos. 64 and 66, especially. As regards the concept 'genuine replacement', see, for instance, AD 1985 No. 130 and AD 2002 No. 3.

months out of three years, no employment lasting for less than one month. On first hiring staff until three years afterwards, new companies may resort to this type of contract for a maximum of 18 months out of three years concerning one and the same employee. An employer may have a maximum of five employees on this type of contract at one and the same time.³²

Section 6 states that fixed-term work contracts referring to employment for a probationary period may be made if the probationary period does not exceed six months.

According to Swedish law as is the case in Norway, certain employment-protection devices apply also to fixed-term workers. After a minimum of 12 months of employment during the last three years (or in seasonal work six months of employment during the last two years), there is a right to a one-month notice period. For workers meeting these requirements there is also a right to re-employment in case renewal is denied on the grounds of shortage of work.

According to Section 2 contracts shall, in principle, be invalid insofar as they purport to exclude or limit employees' rights. Deviations may be made by the social partners from – among a number of rules – Sections 5, 5a and 6.³³ Since 1996 there is no longer a requirement that this shall be done by means of collective agreements concluded or approved by a central organization of employees. A collective agreement at any level is enough, provided that there normally exists collective agreement on other issues at central level between the parties concerned.

Recently an Act was taken by the Parliament regarding the implementation of the Part-time Work and the Fixed-term Work Directives.³⁴ In respect of the legitimate scope of fixed-term work no changes were made to the currently valid regulations just described, whereas the new Act is intended to guarantee the equal treatment of part-timers and fixed-term workers as compared to full-timers and regular workers (*see* further Section 4.4 below). More far-reaching amendments to the employment-protection legislation, including the regulation of different modes of employment, are being contemplated, however. The Swedish National

32 *See* AD 1999 No. 7. On the sometimes complicated relation between the new mode of employment and existing rules on fixed-term employment in collective agreements, *see* AD 1998 No. 36.

33 Case law contains many cases on fixed-term employment according to collective agreement; one third out of about a hundred cases related to fixed-term employment since 1984 concern collective-agreement regulation.

34 Government Bill 2001/02:97. *See* also the Ministerial report Ds 2001:6.

Institute for Working Life has been commissioned to draft a more general reform of Swedish labour law, the proposal being scheduled for the autumn of 2002.³⁵ Quite radical changes as regards fixed-term work are known to be under discussion.

Recently the Swedish LO presented its solution for a modern and less complicated labour law.³⁶ Concerned about the increase in fixed-term work on the Swedish labour-market in the 1990s (not least among their own members), the LO expressly aims to enforce permanent employment as the normal mode of employment to increase employment protection for the fixed-term workers, to simplify rules for the benefit of both parties and to counteract any form of discrimination. *In dubio* any employment is held to be an open-ended full-time employment. Only two kinds of fixed-term employment would replace the quite numerous modes that exist today: fixed-term and deputyship employment. Fixed-term employment would not require any justification but would after 12 months of employment during the last three years automatically turn into an employment of indefinite duration adhering to regular rules on dismissal, etc. Moreover, after six months there would be a priority right to re-employment. This is also the case after 12 successive contracts within 12 months. If the employee demands it, the employer is always obliged to justify a decision not to renew a contract, a justification which can ultimately be tested in court. Deputyships would adhere to today's rules. Such a solution would on the one hand relax the rules on the legitimate scope of fixed-term work – indeed a radical view to be held coming from the LO – whereas the possibility to challenge a refusal to renew the employment contract would, on the other hand, make any fixed-term employment much more equal to open-ended employment. The maximum-duration rule would do away with the frequent use of long-term and/or successive fixed-term contracts in the Swedish labour market.

As regards Finland, however, the starting-point may be called into question. Since any fixed-term employment needs grounded reasons, the point of departure may be said to be prohibitive in principle. However, an

35 Government decisions 2000-07-13 N 2000/2486/ARM, 2001-10-04 N 2001/4141/ARM and N 2001/6439/ARM. Compare also the Government statements on an apparent will to reassess the issue of the legitimate scope for fixed-term work in the future in Government Bill 2001/02:97, p. 53, awaiting the results of the said commission.

36 *Förenkling för ökad anställningsstrygghet – ett diskussionsunderlag från LO* (Increased protection in employment by means of simplification), LO, Stockholm, October 2001. The proposal is known to have been elaborated in cooperation with the central organization of the salaried employees (TCO), which organization however withdrew from the initiative seemingly awaiting collaboration with the academics (SACO) as well.

'open-ended' rule such as the current Finnish one may also be described as a general right to use fixed-term contracts whenever there are grounded reasons.

In Finland the first limitations to the employer prerogative of dismissal at will (after a pre-notice period) was introduced by a central collective agreement in 1966. General employment-protection regulation was introduced by the 1970 Employment Contracts Act (*Lag om arbetsavtal* 30.4.1970/320). The Act has since been amended on many occasions and has now been replaced by the new Employment Contracts Act of 2001 (*Arbetsavtalslagen* 26.1.2001/55).

Originally, the Employment Contracts Act did not contain any limitations as to the use of different modes of employment. In 1984, however, the use of fixed-term contracts was limited by special stipulations in Section 2. According to this rule, an employment contract could be concluded for a fixed period of time if warranted by the nature of the task, replacement of absent workers, apprenticeship or similar reasons, or if the employer had some other well-founded reason connected with the activities of the enterprise or with the work to be performed.

The new Employment Contracts Act is an example of the trend towards the liberalization of Fixed-Term Work.³⁷ Notice periods have been shortened, and whereas dismissal still – under the general rule – requires just cause, in case of dismissals related to an individual employee the word 'exceptionally' in 'exceptionally weighty reasons' has been omitted. The general aim of this reform has been to make fixed-term employment and employment of indefinite duration more equal, at the same time making room for increased labour-market needs of flexibility. The Act is explicitly aimed to implement, among others, both the Fixed-term Work and the Part-time Work Directives.³⁸

According to Chapter 1 Section 3, an employment contract of indefinite duration is still to be the 'normal' mode of employment unless the contract is fixed-term for justifiable reasons (*grundad anledning*). When deciding what is to be considered justifiable reasons, not only the nature of the work itself must be taken into account but also the special needs of the employer with regard to the size and the organization of activities, skills among regular staff, etc. A fixed-term contract or repeated fixed-term contracts entered into without such justifiable reasons are considered to be of indefinite duration – i.e. abuse of fixed-term contracts is penalized.

37 Compare the Government Bill 157/2000 pp. 58-59. See also, for instance, Vigneau *et al.* 1999, *Fixed-term work in the EU, A European agreement against discrimination and abuse*, National Institute for Working Life, Stockholm 1999, p. 187.

38 Government Bill 157/2000, pp. 56 and 57.

According to Chapter 2, Section 2, Paragraph 2, in fixed-term or part-time work it is illegal for more unfavourable working conditions (only due to this character) to be applied than in other employment, unless this is objectively justified.³⁹ Chapter 2, Section 6 contains a rule that obliges the employer to inform about new job openings.

Chapter 13, Section 7 contains the rule on the extent to which the law is semi-compulsory, that is, the extent to which it may be superseded by collective agreements signed by nation-wide organizations. As regards fixed-term work, the only rule expressly mentioned there is Chapter 1, Section 5 on long-term qualifications and successive fixed-term contracts.

All the Nordic countries may be said to consider 'regular' employment of indefinite duration the 'normal' mode of employment, though, in the sense that the burden of proof as regards any other (i.e. fixed-term) mode of employment rests with the one (normally the employer) who claims that the employment is fixed-term. If no such limitation can be proven, the employment is considered to be of indefinite duration.

In case a fixed-term employment has been agreed upon, there is the question – at least in Finnish, Norwegian and Swedish law – whether this mode of employment is legitimate. If there is no such justification, the employment is regarded as being of indefinite duration.

Furthermore, despite the differences with regard to an initial positive or prohibitive approach to fixed-term work, in all four countries legal instruments for the sanctioning of abuse have evolved. While it would seem that Norway, and also Sweden, are in a better position when it comes to sanctioning unjustified (first) contracts, where the abuse of successive fixed-term contracts is concerned Finland and Denmark appear to be ahead of Sweden.

4. FIXED-TERM WORK REGULATION AND THE FIXED-TERM WORK DIRECTIVE IN NORDIC LABOUR LAW

4.1. Restrictions on the Use of Fixed-term Work

The question to be dealt with in some detail in this section is to what extent the different legal solutions of the Nordic countries hitherto described meet the requirements of the European Council's Directive on Fixed-term Work, now the common denominator for the Nordic countries as well. My aim is

³⁹ Note also the general requirement on justifiable reasons for *any* unequal treatment contained in par. 3 of the same rule!

not primarily to examine the scope of the rules of the Directive as such; rather, I will describe the national law of the respective Nordic countries in relation to these rules.

The Fixed-term Work Directive's purpose – apart from ensuring that working conditions for fixed-term workers are not less favourable than those of regular workers – is said to consist in restricting the permitted use of fixed-term work by establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (Clause 1). The latter aim is achieved not by setting any specific standard, but through a formal request for the introduction of one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) a set number of renewals of such contracts or relationships (Clause 5). Such measures are only necessary where there are no equivalent legal measures to prevent abuse, and they are to be introduced in a manner which takes account of the needs of specific sectors and/or categories of workers and leaves considerable scope for determination as regards the implementation and application of the Directive/Framework Agreement to the social partners. Furthermore, Member States and/or the social partners shall determine 'where appropriate' the conditions under which fixed-term contracts shall be regarded as 'successive' and the conditions under which fixed-term contracts 'shall be deemed to be contracts or relationships of an indefinite duration' (Clause 5(2)).

The requirements thus seem more formal than real, and they have been labelled so as to 'facilitate the creation of national rules which govern recourse to temporary work' and be 'little more than a platform for national level bargaining about temporary work' while not really regulating its scope – indeed the Directive presents temporary work in its non-abusive form as a fundamentally benign phenomenon.⁴⁰ Even so, the preamble clearly states that regular employment is still to be the 'normal' mode of employment.

As regards the possibility supplied by Clause 5(2) to define the concept 'successive fixed-term employment' and thus the range of the Fixed-

40 J. Murray, 'Social Justice for Women? The ILO's Convention on Part-time Work', *IJCLLIR*, n.1, 1999. See also the criticism presented by the European Parliament (PE 230.208/fin 1, 30 April 1999 A4-0261/99) as well as, for instance, M. Weiss, 'The Framework Agreement on Fixed-term Work: A German Point of View', *IJCLLIR*, n. 2, 1999, and P. Lobber, 'Regulating Fixed-term Work in the United Kingdom: A Positive Step towards Workers' Protection', *IJCLLIR*, n. 2, 1999. There are, however, more extensive interpretations of the regulation; compare for instance Bruun and Bercússon in Vigneau *et al.*, 1999.

term Directive more precisely, this has not been used in the Nordic countries. In principle this determination can be said to rest with the courts, within the concept of abuse, in all four countries. A matter of certain interest here, however, is the rule in Chapter 1, Section 5 of the new Finnish Employment Contracts Act which expressly states that with regard to employment benefits calculated in relation to length of employment, successive fixed-term contracts – also where there are shorter interruptions – are to be considered one continuous period of employment.

Below, I will examine the different national legal orders in relation to the legal measures proposed by the Directive.

4.1.1. Objective Reasons Justifying (the Renewal of) Fixed-term Work

The Directive expressly requires objective justification of the reasons for the renewal of fixed-term employment only, and not in the context of first contracts.⁴¹

In Denmark employers do not have to invoke a substantive reason for hiring workers on a fixed-term basis; instead, the freedom-of-contract principle prevails. Ultimately, however, the courts determine whether a fixed-term or fixed-task agreement, for reasons of abuse or because it is deemed unreasonable, should be considered to fall under the rules of open-ended employment, whether legislated or in a collective or individual agreement. In Finland the new Employment Contract Act requires that, in principle, any fixed-term contract – whether first or successive – has to be based on justifiable reasons. The nature of the job itself and/or conditions at the employer's dictate its lawful character. The rule in itself, however, is of an 'open-ended' nature, and it is ultimately for a court to decide whether there are sufficient grounds or not. The Act was only just introduced and there are as yet no authoritative interpretations in case law. Norway constitutes an example of a legislation which strictly adheres to the idea of fixed-term work as legitimate only when objectively justified. And the accepted justifications are rather few; the particular nature of the job, deputyship and practical training periods. There is also the additional possibility to permit fixed-term work by collective agreement, but this possibility is restricted to professionals/groups of workers where such justified reasons for fixed-term work are more or less inherent. With regard to Sweden the situations listed in Section 5 of the 1982 Employment Protection Act are situations

41 See, for instance, R. Blanpain, 'The European Agreement on Fixed-term Contracts and Belgian Law', *IJCLLR*, n. 2, 1999, pp. 85-96, P. Lorber, *ibid.*, pp. 121-136 and M. Weiss, *ibid.*, pp. 97-104 as well as the European Parliament, pp. 12 and 14 and B.3(b) (ii) (...). Differently, however, Bruun and Bercússon in Vigneau *et al.*, 1999.

where fixed-term work is considered typically warranted, and so is probationary employment according to Section 6. The 1982 Act goes further than Clause 5(1)(a) in the Framework Agreement in that it requires such legal grounds for both first and fixed-term contracts, to justify a renewal. Until 1997 Sweden as a rule required special reasons for fixed-term work, though deviating/complementing regulations in collective agreements were unlimited in scope. Maybe it is only natural to presume, however, that a branch-of-industry agreement (and now also a local agreement) is objectively justified by its very nature.⁴² In contrast, where agreed fixed-term employment is concerned no special (objective) reasons are required at all.

In all the Nordic countries, the scope of legitimate fixed-term work includes seasonal work and other employment that is fixed-term owing to the specific nature of the work. Even Norway is open to at least negotiated solutions in special branches of work beside the statutory framework. In Norway, however, in contrast to the other three Nordic countries, employment for the reason of a temporary increase in workload seems to be outside the legitimate scope for fixed-term work. In all four countries, deputyship work falls within the legitimate scope. Probationary employment also seems to meet the requirements of all four regulations. Though not dealt with here in any detail, it is also possibly true that trainees and workers under different labour market conditions and/or political measures may work under fixed-term contracts in the Nordic countries.⁴³

4.1.2. Maximum Total Duration of (Successive) Fixed-term Contracts

In Denmark there is no provision which sets a maximum duration for such contracts. Collective agreements may, however, impose such limits, and the courts may punish abuses of the fixed-term mode of employment including abuses linked to duration. In Finland there is no other rule concerning the use of fixed-term contracts than the general requirement of justifiable reasons. However, if there are no such justifiable reasons when a court

42 This goes at least for the line of argument of the Swedish legislator and, one may presume from various clauses of the framework agreement, also for Community Law. However, with regard to the hitherto general requirement on objective justification one may question whether the limited space for the Labour Court to examine the reasons of the employer in a special case (as regards a temporary peak workload, for instance) really meets the requirements of the framework agreement in this respect. The same is true with regard to probationary employment according to Section 6.

43 According to Clause 2(2) Member States after consultation with the social partners or the social partners themselves may provide that the agreement (and thus the directive) does not apply to initial vocational training and apprenticeships schemes and employment which have been concluded within the framework of a specific public training, integration and vocational retraining programme.

examines a relevant case, the contract is regarded as being of indefinite duration. The temporary character of a job itself is typically what justifies a fixed-term contract, though, and the longer the intended period the more special the requirements – or so one would expect. There is still, however, a special rule on a right for the employee to leave when the fixed-term agreed upon exceeds five years, so presumably longer fixed-term employment may be lawful in such cases. In Norway there are to my knowledge no explicit rules limiting the duration of legitimate fixed-term employment. In Sweden, finally, the rule on agreed fixed-term employment which was introduced in 1996 provides an example of a new rule in the Swedish context: it allows Fixed-Term Work without specific justification, but restricts the duration (and number of workers!) of such recruitment schemes. As regards compliance with Clause 5 of the Framework Agreement, though, the rules on fixed-term work do meet the Clause 5(1)(b) requirement for a maximum total duration of fixed-term employment contracts and relationships – single as well as successive ones. Swedish law may be said to combine two techniques of limiting the duration of first and/or successive fixed-term employment: through different rules on maximum duration according to the reason for hiring, and through setting a reference period within which the employment of a worker on a fixed-term basis is considered. The new rule in Section 5 *fine* puts a maximum on longer single or successive deputyships as from 1 January 2000. It should be noted, though, that those time limits are restricted to fixed-term work contracts of one and the same type (deputyship).

4.1.3. *The Number of Renewals of Successive Fixed-term Contracts*

In Denmark it is, as was already indicated on a number of occasions, ultimately the business of the courts to impose such limits within the concept of abuse. Successive employment is known to have been held to constitute abuse.⁴⁴ Should a fixed-term employment exceed the initially accorded time, without a new fixed-term contract being entered into, the employment is regarded as an open-ended one. In Finland there are no special rules apart from the general requirement on justifiable reasons. Every fixed-term contract is assessed on its own merits, and there is no prohibition on, for instance, successive deputyships. However, abuse of

44 In the case U 1986/730 Ö, four fixed-term contracts amounting to more than two years of employment were considered to be contrary to the rules of Section 2 *Funktionaerloven*. See also U 2000.219. However, the opposite conclusion was reached in U 2000.1445. The line between legitimate and illegitimate successive deputyships has been criticized as being blurred. Legitimate expectations of continued employment on the part of the employee as well as business necessities seem to be taken into account.

the fixed-term mode of employment is sanctioned by the employment in question being regarded as one of indefinite duration. Thus, it is ultimately for the court to determine whether a series of fixed-term contracts is abusive. The measure of restricting the number of permitted renewals of fixed-term work (Clause 5(1)(c)) is not used in Sweden. It is ultimately for the court to determine whether a series of fixed-term contracts is abusive. Here, however, as in Finland every fixed-term contract is judged on its own merits and single and successive fixed-term employment for quite a number of years is known to have been accepted. In Norway the situation seems to be much the same as in Sweden.

4.1.4. Conclusions

In its report on the Commission proposal for a Council Directive concerning the Framework Agreement on Fixed-term Work, the European Parliament observed that at least one of the three alternative measures had already been fulfilled in most Member States. Only two Member States would have to introduce completely new legal provisions to this end. The two Member States held to be in 'breach' of Clause 5 of the Framework Agreement were the UK and Ireland; but Denmark has also been mentioned alongside them in this context.⁴⁵

In principle, Denmark – by contrast to the other Nordic countries – represents a legal system which does not provide any specific regulations on fixed-term work, nor any statutory restrictions on the use of fixed-term workers. The Danish solution, so far, is agreed terms in combination with the 'abuse doctrine' applied by the courts. However, case law indicates that the possibilities to organize successive fixed-term work are not after all necessarily less restricted in Denmark than, for instance, in Sweden. Then again, there is no express legal intention to combat abuse of successive contracts, and the general Danish solution implies that issues related to fixed-term contracts primarily tend to be raised when a worker comes to the end of such a contract. The Directive seems to require something of a broader approach, both with regard to the permissibility/renewal of successive contracts and with regard to other aspects to be dealt with in the following sections of this article.

Finland is the first among the Nordic countries to expressly implement the Fixed-term Work Directive. Unlike the situation in Denmark, the freedom-of-contract principle cannot be said to prevail. Instead the legitimate scope for fixed-term contracts is restricted to whenever there

45 See, for instance, Weiss, *op. cit.*, p. 113 and Lorber, *op. cit.*, p. 127.

are justifiable reasons. The rule is open-ended in character, however, and as in Denmark it rests ultimately with the courts to decide whether a fixed-term employment or successive fixed-term employment is to be considered justified or abusive. There is no use of the measures implied by Clause 5(b) and (c) of the Framework Agreement. Such a legal solution should, in my view, meet the requirements of the Directive.

Regarding Sweden, the 1982 Act may be said to form a rather intricate pattern of restrictions in the form of requirements pertaining to (objectively justified) reasons for fixed-term work and/or the maximum duration of such contracts. Here, the 1982 Act goes further than Clause 5(1)(a) and (b) in the Framework Agreement in that it requires justified ground (a maximum duration) for any – even first – fixed-term work contracts. However, the list of permitted – justified – situations for fixed-term work is long, and the regulation is technically complex and detailed, containing no maximum-duration rules on fixed-term work generally. Since 1996 the Act also comprises a rule on agreed fixed-term employment that needs no justification whatsoever, though restricted in respect of time and the number of employees. This rule differs from the former attitude of the legislator in that it permits the use of fixed-term work as a ‘normal’ category of employment, at least in very small-undertakings. There is also the unrestricted competence of the social partners as regards deviations from the legal rules on fixed-term work. By combining different justified fixed-term contracts, an employer might use one and the same employee in this mode of employment for a considerable time too. There are no general rules limiting the duration of fixed-term work contracts even with the same employer. According to the rules on fixed-term work in the Act and in different collective agreements, the repeated renewal of fixed-term work is a frequent consequence and the Labour Court is known to judge any fixed-term employment on its own merits, not frequently (if ever) applying the ‘abuse doctrine’. The most important change in this regard lately has been the new rule on a maximum period for deputyship contracts. According to Swedish legislation, however, there is also a right to re-employment and a one-month notice period for some fixed-term workers, rights which may be taken into consideration as ‘an equivalent legal measure’. Altogether, it is my opinion that the Swedish rules on fixed-term work in the 1982 Act meet the requirements of Clause 5 in the Framework Agreement. This is also the opinion of the Swedish government.⁴⁶

46 Government Bill 2001/02:97, p. 53. The Government is, however, for other reasons prepared to reassess the issue of the legitimate scope for fixed-term work in the future but is awaiting the results of an investigations committee, *see* further above Section 3.

Norway is the Nordic country with the most strict statutory framework as regards fixed-term employment. To my mind there is no doubt that the Norwegian legislation meets the requirements of Clause 5 in the Directive. There are quite strict requirements concerning the justification of any fixed-term employment contract – whether first contracts or successive ones. Only measures contained in Clause 5(1)(a) are used, though, apart from the right to a period of notice and to being re-hired, constituting ‘equivalent measures’ in the meaning of the Directive.

4.2. The Employer's Duty to Inform

According to the Framework Agreement on fixed-term work (Clause 6), there is a special duty for employers to inform fixed-term workers about vacancies which become available in the undertaking ‘to ensure that they have the same opportunity to secure permanent positions as other workers’. Additionally, in Clause 6 there is a duty⁴⁷ – more or less ‘voluntary’, it would seem – for employers to facilitate, as far as possible, access to fixed-term workers to appropriate training opportunities and the like to enhance career development and occupational mobility.

In Finland Clause 6 is implemented through Chapter 2, Section 6 of the new Employment Contracts Act, which obliges employers ‘according to general practices at the relevant enterprise or work-place, [to] generally inform about job-openings to guarantee that part-time workers and fixed-term workers have equal opportunities to apply as have ordinary and full-time workers’. As for Sweden, there are no rules about any general duty for the employer to inform his employees, whether permanent or in fixed-term work about vacancies. Many collective agreements, however, contain rules on a duty to make positions public. To my knowledge the situation is about the same in Norway and Denmark. Since Nordic collective agreements are generally not sufficient to comply with the requirements to guarantee at all times the basic requirements of a Directive, Clause 6 seems to require the introduction of an explicit rule concerning the duty to inform. This is also the position of the Swedish Government, although they did find that the introduction of such a rule calls for further investigation.⁴⁸

4.3. The Role of the Social Partners

Given that the Directive has as its purpose putting into effect a framework agreement concluded by the social partners at European level (Article 1),

47 Compare Weiss, *op. cit.*, p. 102, characterizing the clause as one of ‘moral persuasion’.

48 Government Bill 2001/02:97, p. 54.

it is only natural for the social partners to have been given a special role. This is true both for the implementation of the Directive/Framework Agreement in the Member States, and for the implementation and interpretation of the Directive itself at Community level.

According to Article 2 the Member States shall bring the Directive into force within two years of its adoption, 'or shall ensure that, by that date at the latest, management and labour have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive'. So far, there seems to be no difference between this Directive and what is generally required while implementing directives. As regards the Framework Agreement itself, though, it seems that the social partners are given a more crucial function with respect to its implementation than is usually the case. Here Clause 5 and 8(4) should be specially mentioned, but also Clauses 2, 3, 4 and 7.

Clause 2(b) thus leaves it to the Member States after consultation with the social partners and/or to the social partners themselves to exclude contracts for vocational training or apprenticeship from the scope of the Directive. Clause 3(2) on 'comparable permanent workers' refers broadly to the standard-setting of collective agreements, and the arrangements of Clause 4 on the principle on non-discrimination gives a special role to the social partners (*see* Section 4.4 below). According to Clause 7, with regard to workers' representative bodies, fixed-term workers shall be taken into consideration, and the arrangements for the application of this Clause shall be defined after consultation with the social partners. Clause 7(3) provides a special right for existing workers' representative bodies to – as far as possible – be informed about fixed-term work in the relevant undertaking.

With regard to the measures geared to preventing abuse arising from the use of (successive) fixed-term employment, these are to be introduced only after 'consultation with the social partners in accordance with national law, collective agreements or practice', and/or by the social partners themselves and 'in a manner which takes account of the needs of specific sectors and/or categories of workers' (Clause 5(1)). The role of the social partners with regard to the definition of successive fixed-term contracts etc. according to Clause 5(2) has already been mentioned above.

Here, the first thing to spring to mind is the very significant scope for collective bargaining and collectively agreed terms, also within the legislated framework, in all the Nordic countries. Norway is a country which imposes rather precise restrictions on the social partners where the use of fixed-term contracts is concerned, allowing agreements deviating from the statutory framework in specified branches only. Sweden and

Denmark, however, offer in principle unlimited possibilities for the social partners to come to terms to the use of different modes of employment. In Denmark, in fact, collectively agreed terms are so far the only explicit rules on the permitted use of fixed-term contracts. Does such freedom comply with the restrictions laid down in Clause 5 of the Framework Agreement? There is nothing to guarantee that collective agreements actually stipulate at least one of the listed measures, even in cases of successive renewal. One could argue that it is in the very nature of this type of collective agreement to call for (objective) reasons for admitting fixed-term work in a certain situation, at least in the sense that the special conditions of the branch warrant it. The fact that the Framework Agreement requires the alternative measures suggested in Clause 5 to be introduced 'in a manner which takes account of the needs of specific sectors and/or categories of workers' must here be taken into account. I myself would thus answer the question in the affirmative.

However, especially the wording of Article 2 of the Directive makes it seem desirable to me to arrange for the Directive to be implemented in the usual way, restricting the competence of the parties to introduce deviations in conformity with the Directive as such. I also feel that there is a need for some legislated 'background' rule on restrictions operating outside the scope of collective agreements. In the summer of 2001, Denmark chose to implement the Part-time Work Directive by means of legislation. The Part-time Work Act uses a combination of legislation and collective-agreement regulation, giving the dominant collective agreements a kind of *erga omnes* effect. Thus, in case the parties concerned are not themselves bound by any collective agreement, they are to apply the terms of the private-sector (between DA and LO) agreement on the implementation of the Part-time Directive or the public-sector agreement which corresponds to their area of activities. It remains to be seen whether the Danish legislator will choose a similar solution as regards the implementation of the Fixed-term Work Directive. With regard to Finland, it is worth noticing the legal possibility of generally applicable collective agreements. In contrast to the old act, such general applicability now calls for a special declaration according to the rules in Chapter 2, Sections 7 and 8 of the 2001 Employment Contracts Act.

4.4. Equal Treatment of Fixed-term Workers and Permanent Workers

The principle of non-discrimination (Clause 4) says that in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation, unless this is justified on objective grounds.

The application of the principle of non-discrimination to fixed-term work poses special problems. It may be said that the Directive merely draws on a model of equal treatment that is also used in the Part-time Directive and even in the Council's Directive 91/383 on the health and safety of, amongst others, fixed-term workers. However, as compared to other, more traditional fields of application for the equal-treatment principle – such as sex and nationality – this would 'give a new scope to the principle'.⁴⁹

One problem consists of the fact that what is forbidden by the non-discrimination provision – differential treatment as regards employment conditions – is at the same time part of what constitutes the groups that are to be compared. Different employment conditions pertaining to the mode of employment, and thus fundamentally to the termination of the employment contract, are a *sine qua non* for even distinguishing the protected group.⁵⁰ Moreover, Clause 4 prohibits differential treatment of fixed-term workers *solely* because they have a fixed-term contract – that is it forbids *direct discrimination* and thus not, as it might seem,⁵¹ indirect

49 Vigneau *et al.*, 1999, p. 7. For a multi-faceted presentation of non-discrimination rules in general, see, for instance, A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague, 2001.

50 In this context, however, it should be noted that the ECJ in the case C-109/00 *Tele Danmark A/S v. Handels- og Kontorfunktionærernes Forbund in Denmark* (Judgment 4.10.2001) stated that the dismissal of a fixed-term-employed woman on grounds of pregnancy is in conflict with the Council's Directive 76/207/EEC (Article 5.1, direct discrimination on grounds of sex) as well as with Directive 92/85/EC (Article 10). According to the ECJ there is, according to those Directives, no reason for not treating different modes of employment equally (par. 33). See also case C-173/99 *The Queen v. Secretary of State for Trade and Industry ex parte: BECTU* (Judgment 26.6.2001) on the right to vacation according to the Council's Directive 93/104/EC on Working Time.

51 In practice, fixed-term workers are less likely to accumulate the necessary length of service to 'trigger' various statutory or collectively agreed employment rights, because of the nature of their contract. Not only the wording of Clause 4(1) but also the existence of 4(2) and 4(4) seem to imply that the Directive does not aim to prohibit the indirectly discriminatory effect of such requirements. Discrimination will exist only if the differentiation is directly related to the unlawful criterion, and not justified on other grounds. The verb 'solely' in the phrase 'solely because they have a fixed-term contract' determines the crucial and unique element which leads to an unlawful discrimination. Differential treatment based on another criterion, such as length of service etc., seems perfectly acceptable according to the Directive, even if it indirectly affects fixed-term workers more than regular workers. Compare, for instance, Vigneau *et al.*, 1999, p. 164, Murray, 1999, p. 275 and the argumentation of the European Parliament in its' report to the Commission over the proposed Directive. Nielsen, too, takes the non-discrimination concept of the Directive to be more narrow than is usually the case; see Nielsen 2001, p. 225. A different view is taken by the Swedish Ministry of Industry in Ds 2001:6, p. 72. See also the discussion in the Government Bill 2001/02:97, pp. 30-33.

discrimination. Furthermore, unlike what has – at least traditionally – been understood as the view of the ECJ in cases of sex discrimination, direct discrimination solely on the grounds of the fixed-term contract may be accepted *if justified on objective grounds*. These conditions reflect the restricted scope of the Directive/Framework Agreement; or, to put it another way, the ambiguity concerning the use of fixed-term work. The existence of accepted different modes of employment where the most vital employment conditions are concerned – length of and rules on expiry of the employment contract – is a prerequisite for further regulation and differential treatment is as regards other employment conditions, typically supposed to be on occasion objectively justified. This reveals a somewhat limited ambition with respect to the equal treatment principle as well. Additionally, the principle of equal treatment is subject to the principle of *pro-rata-temporis*, which means that fixed-term employees are entitled to the same rights as permanent workers in proportion to the time for which they work (Clause 4(2)).

Denmark has not yet implemented the Fixed-term Work Directive. It has, however, recently implemented the Part-time Directive through special legislation. The Part-time Work Act, as was already indicated, uses a combination of legislation and collective-agreement regulation, giving the dominant collective agreements a kind of *erga omnes* effect. Section 4 of the private-sector agreement between DA and LO contains a ban on differential treatment of the part-time employed solely (*udelukkende*) because of their part-time employment, which comes close to the wording of Clause 4 in the Framework Agreement itself.⁵²

Finland has implemented the equal-treatment clause in the 2001 Employment Contracts Act Chapter 2, Section 2. This is a rule on the prohibition of discrimination and on equal treatment. According to paragraph 2, more unfavourable working conditions must not be applied in fixed-term or part-time work only because of this character than in other employment, unless this is objectively justified. Moreover, any unfavourable differential treatment requires justifiable reasons according to paragraph 3 of the same rule. The rule as such says little more than the generally formulated clause in the Framework Agreement itself.

Looking at the legal situation in Sweden it may, roughly speaking, be said that apart from adhering to totally different categories of employment with completely different employment-protection regimes, there is no tradition of differentiating other employment conditions between

52 See further Nielsen, 2001, pp. 223ff.

fixed-term workers and permanent workers.⁵³ However, some important issues such as pay are not regulated by law, and legal rules, as we have seen, often permit deviations through collective agreements. Since there is a demand on the Member States to be able to guarantee the basic requirements of the Framework Agreement at any time, a new Act on Prohibition of Discrimination of Employees Working Part-time and Employees with a Fixed-term Relationship was recently implemented in the Directive.⁵⁴ The Act, which will enter into force 1 July 2002, is 'copied' on the former Swedish non-discrimination laws as well as the Burden-of-Proof Directive 97/80/EC, prohibiting not only direct but also indirect discrimination and calling for a reversed burden of proof once a *prima facie* case of discrimination has been established by the employee 'side'.⁵⁵ The suggested implementation seems to go beyond the requirements of the Fixed-term Work Directive.

5. CONCLUDING REMARKS

The question is, then, whether there is a Nordic model regarding the regulation and scope of fixed-term work, and if this is the case, how that model relates to the Fixed-term Work Directive?

Initially I indicated that the Nordic countries have been seen to represent what Streeck has called a quasi-corporatist model of flexibility. If we – along with Streeck – define the quasi-corporatist model so as to involve patterns of high internal flexibility as a compensation for continuing external rigidities, such a description does not, from what we have seen, seem to picture the legal situation in Denmark very well. As a consequence of the weak statutory employment protection in Danish labour law, that law does not really pit permanent open-ended employment and fixed-term work against each other in such a way that the legitimate scope of the latter category becomes crucial. In this context, it is interesting to notice that in Denmark fixed-term workers make up a relative-

53 See, for instance, Ds 2001:6, p. 40f. Some differentiating rules do exist, though, in collective agreements as regards pension schemes, additional employment-security schemes and parental-benefits schemes. As for legislation, the requirement for three months of employment for the right to holiday leave can be mentioned, as well as the six-months-of-employment requirement for parental leave (but not benefits) on some occasions.

54 Government Bill 2001/02:97.

55 According to the proposal, the ban on direct discrimination does not apply if the application of the conditions is 'objectively justified', while the concept of indirect discrimination requires not only objective reasons – they have to be appropriate and necessary to their aim. However, the justification of the objective reasons may imply just that, namely passing the proportionality test.

ly smaller part of the employed total in Danish labour market than is the case in other Nordic countries (except Norway). As regards Danish employers' use of the external flexibility strategy, these statistics do not necessarily leave us with an answer, though. The mode of employment is just not crucial enough to external flexibilization for the strategy to show in such statistics. However, the relative strength of the social partners is also relevant to the prevalence of external versus internal flexibility strategies, and in this respect Denmark is not significantly different from the other Nordic countries, at least not in an international setting.

Norway is the Nordic country with the lowest incidence of fixed-term work (and thus external flexibility) according to the statistics available, followed by (neglecting Denmark) Sweden and then Finland. This constitutes a fairly good reflection of the relative differences regarding the legal scope for fixed-term work in these countries.

Especially the share of fixed-term work in the Finnish labour market may seem more or less incompatible with the quasi-corporatist interpretation, though. I would rather relate these developments to ongoing normative changes concerning the importance of and the attitude towards fixed-term employment. Hitherto, labour law discourse has usually focused on labour market segmentation in terms of a core group of permanently employed workers and more peripheral groups of workers in atypical employment. However, recent Swedish labour market statistics show that employability in terms of qualification appears to be the crucial quality, regardless of mode of employment, when it comes to the risk for the individual of being subjected to unfavourable labour conditions, transfers and unemployment.⁵⁶ Recent developments in respect of the legal scope for fixed-term work may be said to illustrate a shift from ideological opposition against flexible work to an acceptance – provided that equal treatment (in principle) prevails and that misuse is punished.⁵⁷ This is also the position reflected by the Fixed-term Work Directive.

As we have seen from Section 4 in this chapter, the approach to fixed-term work varies a great deal among the Nordic countries, also when contemplated in relation to the Directive. I would say that the Danish solution is – because of lower barriers in between the different modes of employment – closer to the equal treatment approach than at least Norwegian and Swedish law (as it stands), and that the Danish line is in this sense closer to the Fixed-term Work Directive.⁵⁸

56 A. Numhauser-Henning, 'Flexible Qualification – A Key to labour Law?', n. 1, 2001, pp. 101-115.

57 Compare Vigenau in Vigneau *et al.*, 1999, p. 215.

58 Compare Nielsen, 2000, p. 150.