Special agencies:
Recruitment and flexibility in Germany and the UK

Recruitment agencies support companies in the search for qualified personnel. Such personnel usually need specific skills and experience to help companies which are often interested in meeting their workforce requirements in a flexible manner.

The rise of agencies: a common trend
Recruitment agencies can help to flexibly meet the demand for personnel. If workforce bottlenecks occur over the short or longer term, an agency can quickly provide qualified workers without engaging in a long-term individual relationship. Take, for example, a major new order at a time when commensurate labour capacities are unavailable. In such a case, an agency can fill vacancies with specialists at short notice, while costs are transparent and plannable. The skilled personnel deployed will remain with the customer only for as long as required. Importantly, the lead time is short because the customer need not advertise jobs or conduct time-consuming recruitment procedures; what is more, the customer does not run the increasing risks connected with such procedures, such as compliance in Germany with the provisions of the German General Equal Treatment Act (AGG).

The ‘aggregating’ function helps reduce transaction costs of sourcing workers and work – much as the new online platforms can now do. Agencies increasingly hold themselves out as experienced, professional and ethical alternatives to the practices of some disrupters. But they are under political pressure arising from concerns over exploitation.

In practice, three ways of legally implementing the flexible deployment of professional staff at companies through recruitment agencies have been established.

1. Agencies may hire out their own specialised employees to third parties.
2. It is possible to deploy professional staff on the customer’s premises as freelancers.
3. (and sometimes in combination): recruitment agencies search for highly qualified permanent personnel for their customer against the payment of a placement fee.

The option of permanent placement is not covered in the following, as we focus on flexible deployment of specialist workers by recruitment agencies.

“The ‘aggregating’ function helps reduce transaction costs of sourcing workers and work – much as the new online platforms can now do. Agencies increasingly hold themselves out as experienced, professional and ethical alternatives to the practices of some disrupters. But they are under political pressure arising from concerns over exploitation.”
The first option is realised by concluding a labour leasing contract between the recruitment agency and the customer. The agency undertakes, upon request, to lend to the customer’s establishment personnel for the purpose of temporary employment. The agency guarantees to the customer that only workers employed by the agency will be posted. The customer pays a labour leasing fee or under a ‘contractor’ model, the recruitment agency concludes with the customer a contract for the provision of services and undertakes to deploy for this purpose a qualified freelancer/subcontractor. Based on another contract, the agency will then commission a freelancer as its subcontractor for providing the services agreed between the agency and the customer.

The second option – deployment of freelancers on the customer’s premises – typically requires an advance examination as to whether the individual qualifies for such activities. Compliance checks must be performed prior to deployment. The deployment of a freelancer should be clearly structured upfront, together with the customer, in order to minimise any risks. This is of special importance where the freelancer will be involved in a project together with customer employees, using company equipment (such as computers, etc.) and working under instructions. Experience has shown that, where regulatory pre-approval is not possible, (see of Border control) the best approach is to determine status from the outset, using comprehensive checklists and up to date case law analysis.

This requires an overall analysis of all material circumstances. The more the worker is subject to instructions about the content, place and time of service provision, and the more the worker is involved in the customer’s work processes and operations, the more one has to assume – taking into account all circumstances of the individual case – that disguised employment exists.

Working for the clampdown: pressure on service companies

The contractor model bears the risk that it may turn out, even after years of contract performance, that an employment rather than a freelance relationship is involved. In such a case the employer is obliged to pay to the relevant authorities the full social security contribution (both the employer’s and the employee’s share) from the outset and also runs a risk of criminal prosecution. “Whosoever, as an employer, withholds contributions of an employee to the social security system shall be liable to imprisonment not exceeding five years or a fine.” (Sec. 266a (1) German Criminal Code [StGB].)

The risks are considerable. And on 1 April 2017, the reformed German Personnel Leasing Act (AÜG) took effect. Under the new AÜG, temporary work has become more complex and less flexible. The revised AÜG provisions stipulate that in such situations an employment relationship with the customer’s company is established by law.

The contractor model has the advantage that it offers good margins and is financially more attractive than the temporary employment model. The new German AÜG contains ‘anti-avoidance’ terms so that, for example, the worker’s name must be specified by referring to the labour leasing contract, requiring written form. Notional positions are no longer permitted. Any violation of this provision is punishable by a fine of up to EUR 30,000. If a labour leasing contract is falsely declared as a contract for
work or services (rather than an employment relationship), obtaining a labour leasing permit will not prevent the imposition of sanctions under the AÜG for illegal labour leasing. The protective effect of a permit will in future materialise only where the parties expressly designate their contractual relationship as temporary employment. This is new and increases the risk faced when using the contractor model.

In Germany as in the UK, to reduce the risk of disguised employment for the customer, the formation of a personal service company may be advisable. In that case the customer would conclude the freelance contract not with the freelancer, but with the freelancer’s company, which would then post its shareholder/managing director for performing its contractual duties on the customer’s premises. But the Federal Court of Justice has said that this may in certain circumstances constitute circumvention of the law and stated that any assessment as to an employment relationship needs to be based solely on the factual circumstances rather than on a legal form obviously chosen for the purpose of concealment. A different legal view is certainly conceivable, but as in both the UK and Germany, the use of personal service companies is under pressure.

Recent UK changes require state clients of such companies to determine their status and make tax and social security withholdings on payments to them as if the owner of the personal service company were their direct employee. Contractors lose a tax-offset but do not gain extra legal rights.

Regulating the role of agencies: hard law versus nudge theory

Regarding option one, classic temporary work by way of a labour leasing contract between a recruitment agency and its customer, workers in Germany can now only be deployed for a duration up to the statutory maximum labour leasing period (18 months) or up to the limit provided for by any deviating provisions in the relevant industry collective labour agreement or works agreement at the customer’s establishment. During engagement, the agency as the lessor must grant the same material terms and conditions applicable to a comparable employee of the customer at the customer’s establishment, including equal pay. A collective labour agreement can include deviating provisions, but only for the first nine months of temporary work: a longer period is possible only through qualified collective agreements such as sector-specific pay supplement agreements. Again, this makes temporary work more inflexible than before.

Germany’s worker representation culture permits negotiations to deal with ‘non-core’ workers, and dynamic unions like IG Metall seek to extend the protections of core worker collective agreements to the peripheral agency labour force in sectors like logistics. As we comment on in † Border control, German law and practice can work to normalise and contain the impact of agencies.

By contrast, the UK currently has no real culture of ‘umbrella’ representation covering sites with multiple employees. We wait to see if the Taylor Review promotes some form of works council for fragmented workforces. It could advocate that agency staff have a voice in multi-employer sites, e.g. at fulfilment centres or contact centres. If it does, will UK core workforces be ‘altruistic’ or self-interested in supporting common treatment for agency workers?"
Another possible reform to UK practice which has been under discussion would be a requirement for client businesses to publish information on their use of agency staff. This would be consistent with UK policy under Prime Minister Theresa May, whose laws on modern slavery and gender pay gaps require transparency. But it is not easy to see how, on its own, a requirement to declare use of agency workers would influence the customers of a business, or the business in its own conduct. Stronger outcomes could come from a law making the end-user liable for any breach of obligations to agency staff.

Agencies and Brexit

Britain’s exit from the European Union has many potential effects on the cross-border aspects of agency law and the international deployment of workers. Fundamentally, unless a special deal is reached, Brexit does away with the free movement of workers, as Britons will lose their status as EU citizens when the UK leaves the European Union. Britons will no longer be covered by the scope of Germany’s Act on the General Freedom of Movement for EU Citizens (FreizügG/EU) adopted to implement Directive 2004/38/EC. So recruitment agencies face delays and increased qualification requirements when wanting to post workers into the EU and vice versa. In the future, for any employment in the relevant other country, German and British workers will need work visas, the timing or achievability of which would be problematic or even impossible for many candidates.

Among other consequences, Brexit will impact tax regulations for recruitment agencies not having their own subsidiaries or independent establishments in Germany. A customs union between the UK and the EU is rather unlikely and customs barriers are expected to be re-established.

More fundamentally, the EU rules on agency work have for a long time been criticised by some politicians for restricting choice and flexibility. As EU rules harden, will the UK be tempted to move the opposite way to differentiate itself and increase competition through a different approach to agency work – and can it afford the implications for tax revenue?

Dr. Sebastian Buder, Berlin