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Labour market regulation and the 'competition state': An analysis of the implementation of the Agency Working Regulations in the UK

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Abstract

This paper examines the changing role of the state, through an analysis of the development and implementation of the EU Temporary Agency Work Directive in the UK. The paper outlines and utilises the concept of the 'competition state' to help frame and comprehend the UK government's approach to negotiating and shaping the Directive. Using archival, secondary and primary research, the paper shows how the state continues to exercise important choices nationally and internationally which, in turn, have profound implications for the operation of labour markets. The paper shows how, despite a veneer of fairness, the state has developed a regulatory instrument which provides uneven protection for workers, favours the actions of employers, promotes further flexibility in the use of temporary labour contracts and, by taking advantage of compromises at the European level, creates further market-making opportunities for well-established large agencies in the sector.

Introduction

There is widespread recognition that the state as an actor is changing. In response to political shifts, external and internal economic forces, and the rise of dominant ideologies, the state has altered how it intervenes at supranational, national and sub-national levels (Gamble and Kahn, 1998; Howell, 2006). The precise contours of these changes in individual economies, and the broader implications of these changes for capital, labour and the state remain the subject of much debate. Some have argued that the role of the state is diminishing (Reich, 1991), however there is increasing recognition that, far from retreating, the state continues

to play a key role in imposing 'market-orientated' agendas and is better characterised as a transformative actor rather than a helpless victim of exogenous change (Cerny and Evans, 2001).

This can be seen clearly in the realm of work and employment, where the state has extended or modified its role yet continued to shape the regulation and operation of labour markets (Gamble, 2010; Martinez Lucio and Stuart, 2011; MacKenzie and Martinez Lucio, 2014). Some have pointed to the emergence of the 'depoliticised' state (Elger and Burnham, 2001), where governments distance themselves from direct efforts to regulate, retaining elements of control and direction by using the rhetoric of market discipline to shield themselves from the consequences of unpopular policies, whilst simultaneously shifting expectations about the state's capacities. Cerny (1997; 2010), by contrast, has argued that states remain key political actors, as both authors and subjects of increasingly globalised market pressures. State activities are said to be undergoing a transformation leading to the emergence of the 'competition state', in which the state pursues '*increased* marketization in order to make economic activities located within the national territory... more competitive in international and transnational terms' (Cerny, 1997, p.259, original emphasis). The 'competition state' still has important choices to make, intervening to contain, coerce or support regulatory actors, to expose regulatory actors to external market pressures, and to facilitate the operation of new actors in the labour market (MacKenzie and Martinez Lucio, 2014; Gamble and Kahn, 1988).

The aim of this paper is to illuminate the role of the 'competition state' in the labour market. The specific focus of the research is on the choices made in relation to the development and implementation of the EU Agency Workers Directive (AWD), transposed into UK law through the Agency Working Regulations (AWR) in 2011. The paper addresses two research questions: first, how can we understand the specific actions and choices of the 'competition state' in the regulation of the temporary agency labour market? Secondly, what are the effects of these choices for actors in this labour market? The paper uses archival, secondary and primary research, to trace the evolution of the AWD from its inception in 2002 to its adoption in 2008 and UK implementation in 2011, and then to explore the responses of agencies in the UK to the AWR. The paper analyses the actions of the UK state in shaping the AWD at European-level. It then reveals the choices made by the UK state in transposing these regulations into UK law, highlighting a clear strategy to shape the market for agency labour, to offer new 'market-making' opportunities for capital and to protect the competitiveness of UK industry by utilising exemptions in the Directive. Analysis of the responses of agencies to the regulations shows how the actions of the state in the UK have privileged the aims of flexibility and economic growth contained within the Directive over that of equal treatment for temporary agency workers.

The remainder of the paper is structured as follows. First, an overview of the concept of the 'competition state' is provided and the recent evolution of labour regulation within the UK and EU reviewed from this perspective. This is followed by discussion of the methodology. The results are split into three sections: the first section examines the UK approach to the negotiations on the Directive, and how it sought to defend competitiveness through light

regulation; the second looks at how it transposed the Directive in the UK, creating new opportunities for market making in the agency sector; and the third section looks at agencies' responses to the UK Regulations. Finally, conclusions are drawn.

The state as a 'competition state'

Contrary to economic accounts which see the state as separate from – and typically a source of interference in – markets, the state is inseparable from commercial activity. Long-recognised within institutional and radical traditions, the state has an essential role in regulating, protecting and prescribing the boundaries to and terms of trade (Hodgson, 1988; Polanyi, 1944). The labour market is no exception. Here the state shapes labour markets and employment outcomes as an employer, by prescribing the range of individual employment rights, in recognising and legitimising industrial relations actors and in establishing the 'rules of the game', amongst other activities (Hyman, 2008, pp.264-71). There is widespread recognition that the character of state activities in the realm of work and employment has recently been changing, through increasingly 'market-orientated' approaches to the regulation of labour markets, underpinned by neoliberal ideology (Gamble and Kahn, 1998; Howell, 2006). Yet these developments may involve an extension or evolution of the role of the state in labour markets rather than a retreat, through, for example, encouragement of more 'individualised' employment contracts over collective agreements, or the amelioration of some negative consequences of flexibility through new rights and regulations (Gamble, 2010; Martinez Lucio and Stuart 2011; MacKenzie and Martinez Lucio, 2014).

Debates about the role of the state in the labour market mirror broader conceptual debates about the nature of the state in contemporary capitalism. A useful means of capturing these labour market developments is Cerny's (1997; 2010) concept of the 'competition state'. Cerny's argument is that the rationale for nation-states is being supplanted by the increasingly dominant goal of 'maintaining and promoting *competitiveness* in a world marketplace and multi-level political system' (2010, p.6, original emphasis). States are retreating from dominant post-war strategies of decommodification, in which the reach of the state and welfare protection was extended to support social goals, to one of 'pro-competitive, pro-market *regulation*' (ibid. p.7; see also Cerny 1997, pp.258-259). The impetus for the shift is traced to the economic crises of the 1970s, which created fertile ground in which neoliberal analyses and solutions could take root (see Backhouse, 2009). Since then, nation-states have encouraged and extended global competition by pursuing the increasing liberalisation of trade, of financial transactions within and across borders and of cultural forces. For Cerny, state actors are the 'primary source' of the transformation, nation-states crucially playing the role of 'stabilisers and enforcers of the rules and practices of *global society*' (Cerny, 1997, pp257-8, original emphasis).

That said, the state is not unfettered in its action, although it acts relatively autonomously, allowing the possibility of contradictory logics emerging between the state and the economy: the state may act in a way that supports the interest of capital in general whilst damaging those of specific capitals, for example (Jessop, 2002. p.41). Shaping state actions and activities are the balance of forces between capital and labour, the political goals of various social forces and prevailing ideologies (ibid.; Martinez Lucio and Stuart, 2011). Relatedly, the

competition state literature identifies the emergence of a growing 'transnational elite' from increasingly powerful multinational corporations, global finance, transnational policy networks and media interests as a contemporary additional pressure on states; these are the product and lever of globalisation (Cerny, 2010, pp.15-6). A further consideration is the influence of international political and regulatory institutions (e.g. the EU). These organisations often have a transnational impact in setting the rules, regulations or policy imperatives for participating states and they can begin to operate relatively autonomously (Cerny, 1997, pp256-8; 2010, pp.8-9). Hence, through participation in these international institutions, the nation-state contributes to and, in turn, becomes further subject to globalising forces: it is 'both the engine room and the steering mechanism of political globalisation itself' (Cerny, 1997, p.274). These forces then increase the pressure to refashion domestic institutions, policies and practices in the name of competitiveness including, crucially, those relating to the labour market.

The competition state concept is not without its critics. Elger and Burnham (2001, pp248-250) have pointed to the limited treatment of class relations in the model whereby the post-war industrial welfare state is treated as unproblematic until disrupted by globalising forces (2001, pp.248-50). Hay (2004) is critical of Cerny's account for a perceived tendency towards a functionalist argument: the competition state emerges as a resolution to economic imperatives of a globalised world of freely mobile capital. Both these criticisms appear unfair. Cerny does recognise that shifts towards 'competition state' structures are uneven in timing, nature and extent across countries. Further, this reflects the importance of political agency, differential institutional structures and variations in the distribution of power between social

and political actors across countries and over time (see Cerny, 1997, pp.263-8; 2010, pp.17-8). As Cerny (1997: 266) notes, the competition state 'comes in myriad forms'. Thus, the notion of the competition state highlights the importance of differing institutional and state structures to the understanding of domestic reactions to global economic and political pressures. After all, there is more than one (simple neoliberal) way to underpin competitiveness, as examination of the evolution of the AWD reveals.

Labour market regulation and the competition state: the UK and the EU

The UK provides a particularly clear example of transformation to a competition state (Cerny and Evans, 2000; 2004; Evans, 2010). Re-regulation of the labour market has been one of the key ways in which the state has sought to re-articulate its relationship with employers and employees, beginning with the actions of Conservative governments of the 1980s and 1990s. Although the election of New Labour in 1997 appeared to herald a change of approach, it will be argued that this, in fact, strengthened the UK competition state. Politically New Labour embraced the regulatory and distributive functions of competitive markets, championing increased globalisation by setting out a positive agenda in which state action could deliver a competitive advantage for UK businesses (Watson and Hay, 2003 : 296-300): '[w]ith new Labour, Britain can seize the opportunities of globalisation, creating jobs and prosperity for people up and down the country' (Labour Party, 2005, p.29).

Within the labour market this meant, somewhat paradoxically, a new minimum set of entitlements including a shortened qualifying period for individual employment rights, a new collective recognition procedure and a statutory national minimum wage, as set out in the

1998 White Paper *Fairness at Work* (DTI, 1998). However, the new language of rights and fairness can be seen more as a means of underpinning and seeking consent for existing and additional flexibilities, with new rights permitted insofar as they imposed few costs but brought benefits to business in general, such as increases in labour force participation (e.g. minimum wages; family-friendly policies) or improvements in workplace efficiency and productivity (e.g. union recognition). Tellingly, Prime Minister Tony Blair's foreword to the 1998 White Paper (DTI, 1998, para 1.31) sought to reassure business: '[e]ven after the changes we propose, Britain will have the most lightly regulated labour market of any leading economy in the world...' (ibid.).

Rather than signalling a retreat from the competition state, developments under New Labour can therefore be seen as a change of emphasis. In the wake of the economic liberalisation of the 1980s and early 1990s, growing inequalities and resistance to globalisation required New Labour to seek ways to integrate groups left behind (e.g. the long-term unemployed) and to compensate losers (e.g. the low paid and economically insecure) in order to justify its own commitment to open and flexible markets. It is in this sense that any 'return to the state' should be seen, legislative changes reflecting a move to 'social neoliberalism' (Cerny, 2008; 2010, p. 9) not abandonment of moves to the competition state.

Developments in the UK labour market cannot be seen in isolation. A central theme of the competition state is that globalisation extends to the political sphere, with outcomes shaped through complex multi-level interactions involving a range of state, market and cultural actors. For the UK, a key relationship is with the European Union. In place of Conservative

opt-outs and distancing strategies, New Labour sought engagement and influence with many new labour market entitlements reflecting its adoption of the Social Chapter of the Maastricht Treaty which, along with the Working Time Directive, had been vehemently opposed by earlier Conservative governments.

The Social Chapter itself reflected a shift within the EU. Prior to Maastricht, labour market regulation developed slowly, largely based on health and safety provisions (see Jeffrey, 1995). With the move to greater intra-EU trade and economic liberalization in the 1980s, pressure from trade unions and some member states (see Mosely, 1990) led the European Commission to recognize the need to address the social dimension. As Barnard (1995, p.188) puts it, 'the Community needed a human face to persuade its citizens that the social consequences of growth were being effectively tackled'.

The Maastricht Treaty created a new impetus for EU regulation of non-standard workers, a process which had begun in the early 1980s. In addition to extending the range of EU competences in employment and industrial relations, the Treaty introduced qualified majority voting to some and formally incorporated consultation with the social partners as part of the legislative procedure. Without the need for unanimity progress in many areas of employment and industrial relations regulation progressed more rapidly. By the late 1990s directives had been agreed on the equal treatment of part-time and of fixed-term workers. Yet, agreement over similar regulations for agency workers continued to prove elusive, with initial social partner discussions between the European TUC and the European-level

employers' association breaking down in 2001, although at a sectoral level agency employers and union representatives demonstrated more common ground (see Ahlberg *et al.*, 2008). The European Commission took this as sufficient evidence that an agreement could be reached, issuing a draft directive in 2002 (EC, 2002) for negotiation in the European Council.

Although New Labour adopted the Social Chapter and began to shape the 'social neoliberal' agenda at the EU level from the late 1990s, on the particular issue of agency worker regulation it mounted strong resistance. Ultimately, as discussed below, the nature of EU decision-making and the peculiarities of the agency sector allowed the UK the scope to shape and take advantage of the developing directive on agency workers in a way that protected and extended its competitiveness against other member states. Finally agreed at the EU-level in 2008, the AWR transposed the Directive into UK law in 2011. The formulation of the regulations were initially viewed negatively by UK agencies and employers. Successive UK governments had come to embrace agencies both as providers of flexible staffing solutions and as partners able to deliver active labour market programmes (Forde, 2008). Moreover, the state as employer had also come to rely on agencies across activities including health, education, social services and local government. In some cases, it sought to manage the use of agency staff tightly (Kirkpatrick *et al.*, 2011), however, the long-term over-reliance on agency staff was highlighted in key audits of staffing, such as the Audit Commission's (2001) influential report on agency nurses in the NHS. The new regulations meant that from day one agency workers became entitled to equal access to on-site facilities and information about job vacancies in the user firm; the entitlement to the same basic conditions of employment

as a comparable directly employed worker including pay and working time rights, crucially, were introduced in the UK alone as subject to a 12-week qualifying period.

In what follows, the detail of the negotiations that led to the agency work directive are examined, focusing in particular the UK government's opposition. Even if the aims of European social regulation had shifted away from welfare towards underpinning flexibility within the single market, UK governments retained a rather different view of regulatory how to deliver competitive advantage and of the impact of regulation. In part this follows from the different institutional contexts of member states. However, in the case of agency regulation, this difference led to an accommodative new regulatory structure that, paradoxically, provided scope for the UK to gain competitive advantage, as the findings below illustrate.

Methodology

In tracing the evolution and impact of the AWD and AWR, a variety of archival, secondary and primary research has been undertaken. Key archival research included analysis of European Council Social Questions Working Party minutes and UK government consultations on the AWD and AWR. Where aspects of the debate over the AWD are in the public domain, we utilise these secondary commentaries alongside the archival data. The goal with the secondary and archival analysis was twofold: to understand the debates (and tensions) between social actors over the EU AWD, including the state, transnational and national social actors; and secondly to explore the justifications adopted by the UK government in shaping the Directive and in making choices about how it was transposed into UK law. This was supplemented with primary research conducted in 2013, as part of an externally-funded

study into the responses of agencies to the UK AWR. Having explored the way the UK shaped the AWD, this aspect of the research explores the impact of the state on the activities and behaviour of agencies.

The primary research comprised sixteen qualitative interviews with agencies and representatives of two peak industry bodies: the main employer organisation representing temporary agencies, and the trade association representing agencies supplying seasonal and casual workers in sectors regulated by the Gangmasters Licensing Authority. The eleven agencies included two multinationals, two national, five regional and two local agencies and covered firms supplying both the public and private sectors. In each of the agency cases, interviews were conducted at branch level, with managing directors, branch managers, temporary recruitment consultants or contract managers. Together, this sample of interviews provided insights across a range of agency sizes covering a broad range of sectors. Interviews were conducted face-to-face or by telephone. Interviews were recorded and transcribed or notes made during and immediately after the interview, dependent on the respondent.

The findings below are presented in three main sections: the first reports the archival analysis of the UK approach to negotiations on the AWD. The second section considers the transposition of the AWD into UK law. The third examines the actual impact of the UK AWR on agencies and their responses.

Findings

The evolution of the Directive

The European Commission's initial draft of the AWD (EC 2002a) followed the principle of equal treatment already included in directives on part-time and fixed-term contract work and sought to ensure agency workers would enjoy the same pay and working conditions as a comparable worker in the user enterprise. However, it also stressed the importance of balancing the needs of workers and businesses. Reflecting varying labour market institutions and agency work practices across EU states, the draft provided a range of qualifications: workers paid between agency assignments would be exempted; collective agreements could derogate from strict equality subject to provision of 'adequate' protection; and importantly, equality would not apply to assignments of less than six weeks (EC, 2002a; Vosko, 2009: 402-3; Wynn, 2013: 55-6). Despite this, the UK government opposed the draft strongly on the basis that it threatened the existing 'balance between flexibility and protection' in one of the UK's fastest growing industries (EC 2003a). Indeed, the UK government went further, submitting a memorandum to the Commission citing excessive 'administrative burdens' on business from the requirement to identify pay comparators in a labour market without collective sectoral wage agreements. At the same time the UK mounted a fundamental challenge to the inclusion of pay within the Directive (DTI, 2002; EC, 2002b), arguing it was contrary to the EU Treaty.

Despite amendments by the European Parliament in 2003 weakening the definition of a 'comparable worker', the UK remained resistant to EU regulation arguing that it risked 'decreasing the attractiveness of agency workers to user companies, which might reduce the number of jobs available' (DTI, 2003: para. 13). Although the Commission accepted many of Parliament's amendments, further progress remained subject to qualified majority voting in the European Council and here the UK built coalitions with Ireland, Denmark and Germany

blocking final approval (EC 2003a). The UK's objections were based on two main concerns: that it could not take advantage of the exemptions available to states in which collective labour agreements were commonplace and that a much longer qualifying period – up to 12 months – was needed to protect labour market flexibility (EC, 2003a). Whilst other member states raised objections in Council seeking to protect their own institutional practices, the UK stands out for opposing the principles so fundamentally and consistently throughout the lengthy negotiations (see Ahlberg *et al.* 2008).

From 2003, the UK government began to face increasing pressure to improve agency work regulation from trade unions and its own MPs. By 2007, against a backdrop of rises in the numbers in agency work (see Forde and Slater, 2005) a private members' bill had gained momentum and was progressing through the House of Commons without government support (see Keter, 2008). Facing mounting pressure internally and externally, the UK government softened its public negotiating stance, expressing greater support for the principle of equal treatment, whilst still objecting strongly to the detail of the draft directive in the Council. In the end, the deadlock was broken under the 2008 Portuguese Council Presidency which employed a strategy of pairing negotiations on the AWD with the review of the Working Time Directive and its provision for the UK to opt-out of the 48-hour working week. The inability to maintain a blocking minority on two fronts then left the UK government exposed and facing an unpalatable trade-off: it could maintain the working time opt-out but would have to accept an Agency Work Directive which contained a qualifying period for equal treatment of only six weeks (Wynn, 2013, pp.59).

Faced with this dilemma, the UK government sought to build domestic support for its position on agency regulation in the spring of 2008. To do so, it assembled an *ad hoc* corporatist structure bringing together the government, TUC and CBI which reached domestic agreement on a 12 week qualifying period for equal treatment, exclusion of occupational social security schemes from equality provision and a definition of comparable terms as 'those that would apply to a worker recruited to the same job directly by the user firm' (see Vosko, 2009, 403-4; Wynn, 2013, 59-60). However, this corporatist dialogue was a one-off, and no provisions were put in place for continued dialogue at the UK-level between the social partners. Far from signalling the beginning of a social dialogue this was, at best, a snatched conversation – and one with a single aim: to deliver a domestic agreement on agency work regulation that could then be used to save the UK opt-out over working time (Keter, 2008). Indeed, the absence of national-level negotiating machinery has been highlighted recently by the need for the TUC to raise its concerns over the UK's implementation of the AWD directly with the European Commission (see TUC, 2013).

Having secured a domestic consensus, the trick for the UK government was then to secure acceptance for this method of social partner consultation and the exemptions it had agreed upon within the European Council. In this it was successful, the Council and European Parliament agreeing the inclusion of an additional clause (EU 2008, Article 5(4)) allowing for the UK compromise and for the AWD finally to be passed. The UK government had secured the ability to apply its own 'diluted' version (Wynn, 2013, p.59).

In reaching this compromise, many UK employers' associations and peak-bodies remained hostile to the Directive, particularly those representing smaller enterprises. The Institute of Directors, Federation of Small Businesses and Chambers of Commerce all launched media

campaigns against the Directive arguing that the regulatory burden on small firms (including smaller agencies) would be excessive. Whilst not perceived to be acting in the interests of some parts of the agency sector, it could be said that the state had acted in the interest of capital in general, albeit within the constraints of European governance, by delivering 'the least worst outcome available for British business' in the words of Deputy-Director of the CBI (cited in Open Europe, 2008: p.4).

From the Directive to the UK regulations

While the actions of the UK government certainly prolonged the process of reaching agreement and shaped its ultimate form, the AWD (EU, 2008) also represented many accommodations for and compromises with the governments and social partners of other member states (Ahlberg *et al.*, 2008; Vosko, 2009). Accordingly, the final Directive contained a number of important derogations from the principle of equal treatment and these provided scope for the UK government to weaken the impact of the regulations on its labour market. The last of these had, of course, been secured by the UK: in states without national or sectoral collective bargaining machinery, an *ad hoc* national agreement could be used to set a different level of basic working and employment conditions, including a qualifying period, subject to retention of an 'adequate' level of protection. Referred to in the literature as the 'British derogation', this was added to what have been termed the 'German derogation' and 'Nordic derogation' (see Vaes and Vandenbrande, 2009, pp.8-9; Schömann and Guedes, 2013, pp. 17; Wynn, 2013, pp.61).

Article 5(2) - the 'German derogation' - allows for deviations from the principle of pay equality in cases where the agency worker has a *permanent* contract with the temporary employment agency (EU 2008). The 'Nordic derogation' (*ibid.*, Article 5(3)) makes provision for social partners to reach collective agreements over pay and conditions that deviate from strict equality. This safeguards the ability of national social partners to regulate pay and conditions of agency working without legal restraints, a flexibility that Sweden fought hard for in negotiations (EC 2003a). Yet it is the first of these arrangements that has subsequently, and confusingly, come to be referred to as the 'Swedish derogation' despite being included from the first AWD draft. Although Swedish agency workers do tend to be employed by agencies, Germany rather than Sweden became most exercised about the drafting of Article 5(2), arguing – unsuccessfully - for pay exemptions to be extended to workers employed by agencies on a *fixed-term* contract to better reflect German practices (see for example EC 2002b; EC 2003b; EC 2007). Hence, what is now commonly referred to as the 'Swedish derogation' should more properly be called the 'German derogation'. Despite this, in what follows the common interpretation is used.

Critically, in addition to securing the ability to impose a qualifying period, the UK government was also able to explore implementation of these other derogations when transposing the directive into national law. Through a two-stage process, the government consulted on both its general policy approach (BERR, 2009) and then on the details of implementation of the AWR (BIS, 2009). Under the first, the government sought views on utilising the 'flexibility' to conclude alternative arrangements under Articles 5(2) and (3) - the exemptions available for permanently employed agency workers and through collective agreement respectively (BERR, 2009, para. 2.4). On the former, noting the rarity of permanent agency contracts with pay

between assignments in the UK, the government noted '[i]t is clear that such arrangements have the potential to benefit workers, hirers and agencies alike, and we would not wish our implementation of the Directive to discourage them...In principle, it is therefore our intention to make use of the option provided for by Article 5.2 [the 'Swedish derogation'], disapplying the equal treatment provisions as far as pay is concerned in the case of such workers' (BERR, 2009, paras. 4.28-4.29). The government was less positive about incorporating the flexibility to establish collective agreements derogating from equal treatment (Article 5(3)), noting the 'practical difficulty in making use of such provisions...given the tripartite nature of agency work' (BERR, 2009, para. 4.33-4.36).

Unsurprisingly, on these issues business respondents were favourably inclined to incorporate maximum flexibility.. Whilst unions welcomed the prospect of collective agreements in order to deliver *better* outcomes for agency workers (TUC, 2009, p.38) employers began to balk at the cost and limited scope to use the provision to deviate negatively from equal treatment (BIS, 2010, para. 4.51) and ultimately the government chose not to include it. On the 'Swedish derogation' – already looked upon favourably by government - firms using agencies welcomed it, both to allow current arrangements to continue 'and to have access to the flexibility allowed for under the Directive *in future*' (BIS, 2009, paras. 2.34-2.39; emphasis added). Despite union opposition due to the potential for abuse (TUC, 2009, p.35) provision for the 'Swedish derogation' was included in UK regulations the government's justification being '[t]hroughout, our policy approach to this issue has been to balance business needs with appropriate worker protection' (BIS, 2010, para. 4.43). Tellingly, the regulatory guidance notes issued to accompany the final UK regulations were extensive, with much information

seeking to close-off potential 'workarounds' to the regulations (BIS, 2011). The extent of these 'anti-avoidance' measures then suggest that the UK AWR do indeed contain plenty of scope for evasion and, through the 'Swedish derogation', avoidance.

Agency responses to the regulations

Interviews with agency respondents and peak-level organisations revealed that collective industry-wide lobbying had played a significant role in shaping the regulations prior to their implementation in 2011. Accompanied by a 'business friendly' state agenda, which had sought to minimise the effects on agencies, the final regulations were seen by peak-level respondents and agencies as a positive outcome, compared to the possibilities of much tighter regulation in 2002. Accordingly, across the majority of the agencies interviewed, there was broad consensus that the effects of the AWR on their practice had not been as great as originally feared. The perception of many agencies interviewed was that the regulations might actually legitimise the sector further by raising the perceived quality of agency work.

In contrast to initial uncertainty, agencies had come to actively look at how they could 'use' the regulations to further develop their business and all the agencies interviewed had availed themselves of legal advice. Events run by the main employer organisation, the REC provided a key source of this advice. The 'Roadshows', run by the main employer organisation, were used by agencies as a means of gathering advice and sharing information. For the main employer organisation representing agencies this was not simply about sharing knowledge. They saw themselves as playing a key role in seeking to embed an 'industry-wide' take on the

regulations that could be shared, disseminated and promoted by members. There was recognition by this employer organisation that the implications of the AWR would vary from one agency to another, and that agencies needed to be aware of the risks associated with moving towards a particular model of supplying labour in light of the regulations. Nonetheless, the employer organisation sought to stress also the common elements of the regulations that would apply across all agencies, highlighting issues such as the increased administrative burden on agencies, the need for agencies to implement robust monitoring systems, and the importance of communicating effectively with client firms.

These Roadshow events emphasised that established models of supplying agency labour would and should continue and, indeed, new business models utilising the 'Swedish Derogation' (sometimes called 'pay between assignment' models) might open-up. The main peak organisation representing agencies argued strongly that agencies 'needed to go into these with their eyes open', highlighting how media attention on the costs of Swedish Derogation arrangements for workers had neglected the challenges of such models of labour supply for agencies. This peak organisation also highlighted how client firms were particularly keen to explore this possibility in the UK context, given the Derogations available. One agency also noted that discussions over the Swedish Derogation were 'definitely client led....they have the power and have been pushing it, often on a take it or leave it basis' (Regional agency, industrial specialist). Another agency argued that Swedish Derogation arrangements were being jointly pushed by agencies and clients. Whilst some agencies were already supplying temps using 'pay between assignment' models, the attention these arrangements received during the AWR consultation process had raised awareness. For workers, however, there was less knowledge of the AWR, particularly some of the nuances of the regulations (such as the

‘Swedish derogation’). Indeed, some agencies were critical of their competitors, arguing they were abdicating their responsibility to inform temps of their new rights. Whilst agency respondents noted that new contracting forms, particularly using the ‘Swedish derogation’ were becoming more commonplace, industry representatives sought to downplay their significance, whilst noting that such contracts were a legitimate, legal response to the AWR.

From the agency perspective, respondents noted that some agencies had been able to adapt to the possibility of new contracting forms better than others, due to their size, or the nature of their relationships with clients. This was a point emphasised by one of the peak-level organisations, the specialist trade association for organisations who provided temporary, contract and seasonal workers within the food and agricultural sectors. Some smaller and regional agencies, felt ‘squeezed’ as a result of the regulations, with larger national and international agencies perceived to be able to work more effectively with clients to ensure the financial viability of the ‘Swedish derogation’ model, which involved a redistribution of risk and changes to margins. This was something accepted by the main employer organisation representing temporary agencies, although the respondent here emphasised that even for these larger agencies, the risks of Swedish Derogation models were borne to a greater degree by agencies rather than client firms.

Interviewees revealed that ‘pay between assignment’ approaches to labour supply had become more common in some sectors, notably care work, industrial and manufacturing areas since the AWR. One regional agency, with a small number of branches operating in

London and supplying between 150-300 industrial temps per week, did not offer pay between assignment contracts. The view of its manager was that this provision, whilst allowed for, was clearly being used as a way to circumvent the equal pay element of the AWR and in the industrial sector had 'changed things overnight – it's not a level playing field anymore'. This agency was clearly under pressure as many of its competitors had begun to offer 'Swedish derogation' contracts, often at the behest of client firms, leading to an estimated loss of between 25 and 30 per cent of its business: 'clients are getting together and insisting on the Derogations...it's a zero cost strategy for them. They can push it onto agencies. But agencies are working with them on it too' (Manager, Regional Agency).

Variability in use of pay between assignment models is not surprising since the costs associated with such contracts can be minimised by agencies in only those sectors with high-volume temporary supply. Industrial sectors tend to fit this model, involving headcounts often of hundreds of workers utilised on core tasks on an ongoing basis. In this case, not only is the risk of pay between assignments minimised, the cost savings in the pay bill for agencies are large given the volumes and scope to reduce hourly rates. The client firm gains through lower cost labour supply and the agency in terms of a higher margin (to cover the increased risks associated with these arrangements) alongside the continued regular supply of temps in large numbers.

For workers in such arrangements, there appeared to be few benefits, with the arrangements appearing to favour the other two actors in this 'triangular' relationship, the client firm and the agency (see Forde, 2001). Agency temp workers 'gained' from a direct employment relationship with the agency (with limited mutuality of obligation), but this was far outweighed by the loss of pay comparability with client firm workers where they were placed

long-term. Indeed, the manager at one agency noted that temps were often unaware of what these derogation contracts meant for them in practice:

‘are they aware about what ‘finding suitable work’ for them means, and what sort of work they’ll need to accept to get pay between assignments....I don’t think so...many are signing up to these contracts with agencies without realising what they are signing away.’ (Manager, local agency)

Similarly at one regional-based agency, providing industrial and low-skilled labour supply, the derogation was seen as a ‘loophole’, with employers and client firms both complicit in driving these arrangements forward. The agency manager perceived that temps faced considerable risks from such contracts and were being made unreasonable offers of work (often long distances from their home), in order that some work was maintained for the temp to avoid pay between assignment provisions. Despite the potential for abuse, many agency managers felt that the regulations had effectively helped to legitimise and embed the ‘pay between assignment’ approach in the UK, providing new business opportunities for agencies, even though this was not a derogation that was lobbied for by the UK government at European level in the original versions of the Directive.

Conclusions

This paper has provided new theoretical and empirical insights into the role of the competition state in the labour market, through a focus on the regulation of temporary agency work. Two specific research questions were addressed: first, how can we understand the specific actions and choices of the competition state in the regulation of the temporary

agency labour market? Secondly, what are the effects of these choices for actors in this labour market? At one level, the tactics and choices of the UK state in responding to regulatory pressures on the temporary agency sector are unsurprising, and in line with established notions of the actions associated with a competition state (Cerny, 2007; Gamble, 2010). Through its actions, the UK state deepened and consolidated flexibility relative to EU peers. In shaping the form of the Directive, it created regulatory space to specifically avoid many of the originally intended protections, pushing instead those aspects of the regulations which were more liberalising and building-in exemptions, not least a 12-week exemption period.

In incorporating the AWD into law, the UK government exercised further choices, taking advantage of regulatory provisions designed to accommodate other (quite different) national labour institutions. Indeed, by incorporating the 'Swedish derogation' in the UK AWR, an incentive to pursue new contractual forms was created, allowing UK business to continue to access agency workers at differential cost, benefiting UK competitiveness. While these arrangements may be attractive to client firms, in the UK workers employed by agencies do not have the backstop protection of sectoral collective agreements unlike Swedish or German counterparts.

Overall, the choices made by the state appear to be having two effects. First, the actions of the state here, as in other areas, appear to be resulting in an unevenness of protection, with some workers clearly not benefitting from pay equality. Secondly, the choices made around the implementation of the agency working regulations are likely to alter the structure of the

industry over time, favouring larger, typically multi-national agencies with large, recurrent labour supply contracts, who are best placed to bear some of the risks of new contracting models. The regulations thus provide further 'market-making' opportunities for large, multinational agencies, in a sector where such agencies have, through aggressive lobbying activities and discursive tactics, have become the dominant actors.

Under the veneer of fairness, then, the UK state has ushered-in regulations that legitimise a sector and embed capital-labour relations favouring the actions of employers, and which allow for and promote further flexibility in the use of temporary labour contracts. The language of fairness and protection has been mobilised by the state to garner sufficient internal support to push through a particular form of regulation, but this language detracts from the actual effects of the regulations, which are just beginning to be observed. The choices and actions of the state have been to facilitate the continued growth of the agency work sector, to open-up new methods of labour supply to the benefit of employers and agencies and ultimately to ensure that national competitiveness is maintained.

As has become evident this situation was the result of choices made by the state. These choices included defining the scope of protection, the level of protection and the extent to which social regulation could be allowed to enter-into standards-setting. Far from presenting a challenge to UK business, these EU-inspired regulations have presented new opportunities. Even in an already market-dominated, flexible labour market such as the UK, the state remains a powerful, transformative actor.

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References

Ahlberg K, Bercusson B, Bruun N, Kountouros H, Vigneau C and Zappalá L (2008) *Transnational Labour Regulation: A Case Study of Temporary Agency Work*. Brussels: P.I.E. Peter Lang.

Audit Commission (2001) *Brief Encounters: Getting the Best from Temporary Nursing Staff*. London: HMSO..

Backhouse R (2009) Economists and the rise of neo-liberalism. *Renewal* 17(4): 17-25.

Barnard C (1995) Workers' rights of participation. In: Neuwahl, N and Rosas, A (eds.) *The European Union and Human Rights*. The Hague: Kluwer Law International.

Business Enterprise and Regulatory Reform (2009) *Implementation of the Agency Workers Directive: A Consultation Paper*. London: Department for Business, Enterprise and Regulatory Reform.

Business Innovation and Skills (2009) *Implementation of the Agency Workers Directive: Consultation on Draft Regulations*. London: Department for Business, Innovation and Skills.

Business Innovation and Skills (2010) *Implementation of the Agency Workers Directive: Response to Consultation on Draft Regulations*. London: Department for Business, Innovation and Skills.

Business Innovation and Skills (2011) *Agency Workers Regulations: Guidance*. London: Department for Business, Innovation and Skills.

Cerny P (1997) Paradoxes of the competition state: the dynamics of political globalisation. *Government and Opposition* 32(2): 251-274.

Cerny P (2008) Embedding neoliberalism: the evolution of a hegemonic paradigm. *Journal of International Trade and Diplomacy* 2(1): 1-46.

Cerny P (2010) The competition state today: from raison d'État to raison du Monde. *Policy Studies* 31(1): 5-21.

Cerny P, Evans M (2001) *New Labour, Globalisation and the Competition State*. Working Paper Series 70. Harvard University: Center For European Studies.

Department of Trade and Industry (1998) *Fairness at Work*. Cm 3968. London: The Stationery Office.

Department of Trade and Industry (2002) *Explanatory Memorandum on European Community Legislation submitted by the Department of Trade and Industry on 29 April 2002*. London: Department of Trade and Industry (available at: <http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/er/agency/em.pdf>; accessed 24/08/15).

Department of Trade and Industry (2003) *Explanatory Memorandum on European Community Legislation: Amended Proposal for a Directive of the European Parliament and Council on Temporary Work*. London: Department of Trade and Industry (available at: <http://webarchive.nationalarchives.gov.uk/20050302053421/http://www.dti.gov.uk/er/agency/em.htm>; accessed 24/08/15).

European Commission (2002a) *Proposal for a Directive of the European Parliament and Council on Working Conditions for Temporary Workers*. COM(2002) 149 final. Brussels: European Commission.

European Commission (2002b) *Outcome of Proceedings of Social Questions Working Party* 24th July. SOC 339 CODEC 857. Brussels: Council of the European Union.

European Commission (2003a) *Outcome of Proceedings of Social Questions Working Party* 11th February. SOC 65 CODEC 152. Brussels: Council of the European Union.

European Commission (2003b) *Addendum to Report to Council (Employment, Social Policy, Health and Consumer Affairs) from Permanent Representatives Committee (Part 1)* 27th May. SOC 220 CODEC 714. Brussels: Council of the European Union.

European Commission (2007) *Outcome of Proceedings of Social Questions Working Party* 23rd October. SOC 393 CODEC 1119. Brussels: Council of the European Union.

Elger T, Burnham P (2001) Labour, globalisation and the competition state. *Competition and Change* 5(3): 245-267.

European Union (2008) *Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work*. Brussels: European Union.

Evans M (2010) Cameron's competition state. *Policy Studies* 31(1): 95-215.

Forde C (2001) Temporary arrangements: the activities of employment agencies in the UK. *Work, Employment and Society*, 15(3): 631-644.

Forde C (2008) 'You know we are not an employment agency': Manpower, government and the development of the temporary employment agency industry in Britain. *Enterprise and Society*.

Forde C, Slater G (2005) Agency working in Britain: character, consequences and regulation. *British Journal of Industrial Relations* 43(2): 249-271.

Gamble A (2010) New Labour and political change. *Parliamentary Affairs* 63(4): 639-652.

Gamble A, Kahn K (1998) *The Free Economy and the Strong State: The Politics of Thatcherism*. Basingstoke: MacMillan Education.

Hay C (2004) Re-stating politics, re-politicising the state: neo-liberalism, economic imperatives and the rise of the competition state. *The Political Quarterly* 75(1): 38-50.

Hodgson G (1988) *Economics and Institutions*. Cambridge: Polity Press.

Howell C (2006) *Trade Unions and the State*. Princeton: Princeton University Press.

Jeffery M (1995) The Commission proposals on 'atypical work': back to the drawing-board...again. *Industrial Law Journal* 24(3): 296-299.

Jessop B (2002) *The Future of the Capitalist State*. Cambridge: Polity

Keter V (2008) *Temporary and Agency Workers (Equal Treatment) Bill 2007-08*. Research Paper 08/17. London: House of Commons Library.

Kirkpatrick I, De Ruyter A, Hoque K and Lonsdale C (2011) Practising what they preach? The disconnect between the state as regulator and user of employment agencies. *The International Journal of Human Resource Management*. 22(18): 3711-3726.

Labour Party (1997) *New Labour: Because Britain Deserves Better*. London: The Labour Party.

Labour Party (2005) *Britain forward not back: the Labour Party Manifesto 2005*. London: The Labour Party.

MacKenzie R, Martinez Lucio M (2014) The colonisation of employment regulation and industrial relations? Dynamics and developments over five decades of change. *Labor History*. 55(2): 189-207.

Martinez Lucio M, Stuart, M (2011) The state, public policy and the renewal of HRM. *International Journal of Human Resource Management* 22(18): 3661-3671.

Mosely H (1990) The social dimension of European integration. *International Labour Review* 129(2): 147-64.

Open Europe (2008) *The Agency Workers Directive and the CBI-TUC Agreement: Background Briefing*, 29th May, London: Open Europe.

Polanyi M (1944) *The Great Transformation*. Boston: Beacon Press.

Reich R (1991) *The Work of Nations: Preparing Ourselves for 21st-Century Capitalism*. New York: A.A. Knopf.

Schömann I, Guedes C (2012) *Temporary agency work in the European Union: Implementation of Directive 2008/104/EC in the Member States*. Report 125. Brussels: European Trade Union Institute.

Trades Union Congress (2009) *Delivering Equal Treatment for Agency Workers - BIS Consultation on the Implementation of the Temporary Agency Worker Directive Draft Agency Worker Regulations: TUC Response*. London: Trades Union Congress.

Trades Union Congress (2013) TUC lodges complaint against government for failing to give equal pay to agency workers. Press Release, 2nd September 2013. London: Trades Union Congress. (available at: <https://www.tuc.org.uk/workplace-issues/employment-rights/proposed-changes-law/basic-rights-work/tuc-lodges-complaint>; accessed 24/08/15).

Vaes T and Vandenbrande T (2009) *Implementing the New Temporary Agency Work Directive*. Leuven: Hoger Instituut voor de Arbeid.

Vosko L (2009) Less than adequate: regulating temporary agency work in the EU in the face of an internal market in services. *Cambridge Journal of Regions, Economy and Society* 2(3): 395-411.

Watson M, Hay C (2003) The discourse of globalisation and the logic of no alternative: rendering the contingent necessary in the political economy of New Labour. *Policy and Politics* 31(3): 289-305.

Wynn M (2013) Power, politics and precariousness: the regulation of temporary agency work in the European Union. In: Fudge J, Strauss K (eds.) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work*. London: Routledge.