

Stein Evju (ed.)

**Cross-Border Services, Posting of Workers, and  
Multilevel Governance**

FORMULA is an international, interdisciplinary project devoted to studying EU/EEA labor market regulation in the context of cross-border provision of services involving in particular posting of workers, as indicated by its full title 'Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective'. This volume presents up-dated contributions from the project's second phase focusing on national responses to EU regulation and ECJ case law concerning posting of workers, spearheaded by an in-depth, comprehensive study of case law developments at the EU level pertaining to cross-border movement and posting of workers. This penetrating study is followed by country studies on national responses in seven countries, Denmark, Germany, the Netherlands, Norway, Poland, Sweden, and the UK. An in-depth study of the exceptional political process resulting in the EU Services Directive added to by a legal analysis of that Directive in a labour law context round off a set of novel studies adding new perspectives to the European and international debate on the issues concerned.

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**UNIVERSITY OF OSLO**  
FACULTY OF LAW

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POSTING OF WORKERS,  
AND MULTILEVEL GOVERNANCE**

Stein Evju (ed.)

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## PREFACE

The idea that turned into reality with the FORMULA project was spawned in the fall of 2006. In what was in many ways a transitional stage for the EU, and consequently for the EEA, in regard to its internal market policies and realities two sets of factors converged to generate a research interest in a field dominated at the time by debate on specific, concrete issues. One set of factors was the EU Eastward Enlargement that had taken effect as of 1 May 2004 with a further step due to enter into force in 2007. The other was the then pending ECJ cases of *Viking Line* and *Laval*, which were seen from different perspectives to propound a litmus test of the relation between EU/EEA internal market and free movement regulation and national industrial relations and labour law regimes. Add to this as a ‘rider’ the long lasting controversy over a Services Directive, about to be brought to a conclusion just at that time, it was an irresistible challenge from a scientific perspective to study the many issues involved on a broader and more comprehensive basis.

We successfully obtained financing for the project from the Research Council of Norway on the basis of an application submitted in February, 2007. The RCN financing was granted for a first phase of the Council’s ten years programme ‘Europe in Transition’ (RCN Award no. 182747/V10), which at the same time accommodated another two projects among a total number of 33 applicants, one being ‘Legal Cultures in Transition – The Impact of European Integration’ and the other being ‘The Transformation and Sustainability of European Political Order – EuroTrans’.

The formal appellation of the FORMULA project is ‘Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective’. This rather extensive designation indicates, explicitly and implicitly, two aspects that are essential to the project. First, it was intended from the very outset as an interdisciplinary project including not just legal but also industrial relations and political science perspectives. Second, although the designation points specifically to a Nordic perspective the addition of a ‘comparative perspective’ is equally important. Whereas both the *Viking Line* and the *Laval* case arose out of a Nordic context a solely Nordic perspective on the issues concerned would be too narrow to really be fruitful. Attending to this concern we were fortunate to be able to obtain the participation of distinguished colleagues from continental European countries, east and west, and from the UK.

Moreover, and highly important to the operation of the project we were fortunate to be able to involve and benefit from the participation of a number of colleagues from inside and outside of the Nordic countries in research group workshops as well as at the three FORMULA Conferences that were organized in 2009, 2010 and 2012 as parts of the overall project. They were many, and we owe our sincere thanks to all for their valuable contributions— none mentioned, none forgotten. Grand thanks are due also to Ms Bodil Silset at the Department of Private Law, University of Oslo, without whose extensive

and excellent assistance in all matters of administration of the project and its various events we would not have been able to cope, and also to Mr James Patterson for his invaluable assistance in language checking the many contributions of collaborators venturing to write in a language different from one's own mother tongue. This being said I need to add that whatever gaffes that may appear are none of his responsibility but, rather, result from subsequent updating and amendments to the manuscripts concerned. Not least, we are grateful to the Research Council of Norway for granting the funding that made the FORMULA project a reality in the first place.

The contributions in the present volume emanate from what we have dubbed the 'second phase' of the FORMULA project. The project's first phase was devoted to investigating which many different issues that could be considered as relevant to the project from a national as well as an EU/EEA perspective, drafting 'position papers' on which to proceed. The second phase was concentrated on establishing a sound and broad-ranging basis for a final, summarizing and synthesizing third phase devoted to compound analysis of overarching and comparative perspectives. The second phase of the FORMULA project was technically concluded with the second FORMULA Conference in Oslo in September, 2010. The contributions as they appear in the present book are based on the papers presented at that conference but are updated as per the end of 2012 or by April 2013, as the case may be. A brief overview of the contributions is set out in Chapter 1, section 5, this volume. A further volume, comprising the papers originating from the project's third phase and the third and final FORMULA Conference in March, 2012, synthesizing the results of the project in a cross-cutting and truly comparative perspective is intended to follow the publication of the present volume.

Oslo, June 2013

Stein Evju

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## CHAPTER 1

# The FORMULA Project: Introduction and Backdrop

*Stein Evju*

### 1. Introduction

The object of this opening chapter is in part to introduce the FORMULA project and its status at an intermediate stage of the project, at the second of the three phases of the project as a whole. It is also intended to introduce the contributions in the following chapters and briefly to point ahead to the results of the project's third and final phase, which are due to be published in a next book.

The FORMULA project has been devoted to studying the development and interplay at the European and national levels of the regulation of labour relations in the context of cross-border provision of services. Part of the background for and platform of the FORMULA project was the increasing focus on cross-border service mobility in the wake of the EU enlargements in 2004 and 2007, epitomised by the strife over the 'Bolkestein proposal' and a Services Directive,<sup>1</sup> and the highly controversial cases – then pending – before the European Court of Justice (ECJ)<sup>2</sup> in *Viking Line*<sup>3</sup> and *Laval*<sup>4</sup>. In this regard the elaboration of the project anticipated imminent events. The ECJ's decisions in those two cases were handed down right at the start of the FORMULA project period, whereas the Services Directive was adopted in 2006 to be implemented by late 2009. The Directive, the ECJ decisions, and the subsequent developments have obviously influenced FORMULA project issues and research efforts. And not just that. It is no exaggeration to say that the research based literature on topics such as those at the centre of the FORMULA project virtually exploded after the ECJ's decisions in *Viking Line* and *Laval* and the corollaries to the latter, the Court's 2008 decisions in *Rüffert*<sup>5</sup>

<sup>1</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>2</sup> Now the Court of Justice of the European Union (CJEU). As the case law and the time period involved here precede the changes following the entry into force of the Lisbon Treaty ([2007] OJ C 306, in force 1 December 2009), here I mainly remain with the previous appellations and abbreviations, also for the Treaties concerned.

<sup>3</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>4</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>5</sup> Case C-346/06 *Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

and *Luxembourg*,<sup>6</sup> jointly referred to as the ‘Laval Quartet’. Thus the FORMULA project is set squarely at the centre of an ongoing and still vivid debate at European level and among EU/EEA Member States, in academic research as well as among social partners and EU institutions.

## **2. The project, aims and methods**

FORMULA – short for ‘Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective’ – is an international and interdisciplinary project. In general terms, FORMULA is focused on legal regulation, legislative developments and industrial relations structures and actors, and the interplay between them in a national, supra-national and multilevel governance context, in the field of cross-border provision of services involving cross-border movement of workers. This implies that the aims and methods are not just those of legal science. They encompass also social science perspectives and research, and the interplay between perspectives and methodological approaches is a key element in the project, generally and with regard to the comparative analyses that are also a central part of the project.

In more specific terms, as set out in the project application and description, the aim of the comparative analyses is to develop new, applicable knowledge about:

- 1) How the interplay between extension of the EU/EEA market, growth in cross-border services, supra-national regulations and national responses influence the evolving multilayered regime of labour market regulation, industrial relations and interest intermediation in the EU/EEA; this includes national reactions to and influence on EU legislative initiatives and different forms of adaptation in transposition.
- 2) The impact of these processes and of the application of the Posted Workers Directive and the Services Directive in particular, on the national regimes of labour market regulation in the Nordic countries, Germany, Poland, and the United Kingdom; and
- 3) the aims, strategies, and institutional channels through which the political authorities and the social actors in these countries try to influence EU policies and regulations in this field.

Through (1)–(3) the overriding ambition is to:

- 4) deepen the understanding of how interacting political, legal, socio-institutional and economic logics influence the interplay between the different institutions and organized actors shaping supra-national decision-making and national adjustments in the emerging multilayered European polity, with particular regard

<sup>6</sup> Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323.

to the formation, adaptation and application of legal regimes in the labour market.

Also, FORMULA is a problem-driven project; it rests on a ‘grounded’ approach to the research issues. Thus the project did not set out to employ or test a certain theory but is rather concerned with facts and their impact. Theory-driven approaches are not fruitful to the issues and objectives with which the FORMULA project is concerned. Whereas one may conceive of various actor or interest perspectives that might be employed in analysing the different issues and conflicts with which FORMULA is concerned, the foundational perspective of the project is that of labour law and industrial relations. Regulating transnational labour is a process and the project is concerned with how this emerges in a multifaceted environment. The protection of labour rights in international human rights is another foundational element. The FORMULA project is not aimed at revising or rewriting human rights conventions or case law pertaining to them. Part of the project’s object is rather to confront and assess EU legal developments within the project’s remit with international human rights norms. A brief sample is given later in this chapter.

For the project as a whole, the chapters in this book stem from a stage which was a step on the way and thus were not aimed at drawing firm conclusions. They are, rather, part of the ‘groundwork’ forming the platform for the third and final stage of the FORMULA project. Its first phase, concluded in 2009, was devoted to developments at EU level. The second phase, concluded in September 2010, was devoted to developments at national level in the states covered by the project – Denmark, Finland, Norway and Sweden, and Germany, the Netherlands, Poland and the United Kingdom,<sup>7</sup> and in addition to undertake foundational studies of the elaboration and process of adoption of the Services Directive. In this introductory chapter I shall not venture to summarize the developments in these areas; that is a too far-reaching task to be undertaken here.<sup>8</sup> The chapters that follow speak better for themselves.

In this introduction I limit the presentation to some key issues that form the backdrop against which the topics that are dealt with in the following chapters are set and then briefly add some observations pointing ahead to the third and final phase of the FORMULA project.

### **3. Points of departure – private international law and national autonomy**

<sup>7</sup> All countries are represented in the FORMULA group of researchers; its members, who are more than the contributors to this volume, are presented at the project website, at [www.jus.uio.no/ifp/english/research/projects/freemov/members/](http://www.jus.uio.no/ifp/english/research/projects/freemov/members/).

<sup>8</sup> Working Papers from phase 1 and phase 2 of the project are available at the FORMULA website, [www.jus.uio.no/ifp/english/research/projects/freemov/index.html](http://www.jus.uio.no/ifp/english/research/projects/freemov/index.html), under ‘Publications’.

In the field of cross-border provision of services and conjunct movement of workers a fundamental part of the background is that of private international law, or conflict of laws. Despite its appellation, private international law at the outset is *national law*, regulating conflicts of laws and matters of jurisdiction in transnational contexts. Within the EU a certain harmonization was achieved with the 1980 Rome Convention (now superseded by the Rome I Regulation 593/2008/EC).<sup>9</sup> Simplified, parties to employment contracts are free to choose the applicable law, in other words, which law shall govern the contract. If no law is chosen, the contract is governed by the law of the country where work is ‘*habitually*’ carried out. For workers moving from one country to another, individually or, more importantly, as employees of a service provider to temporarily perform work in another country, this implies that it is the law of the home state and not that of the host state that would apply. The host state can, however, apply mandatory rules of law, that is, rules that cannot be derogated from by contract – now termed ‘overriding mandatory provisions’ meaning ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests’; Article 9(1) Rome I.

Within this general setting, national regimes differed quite significantly. Simplifying once more, in one category we can place states with a ‘globalist’ approach, whereby all labour and employment law rules apply also to workers from abroad on a temporary assignment in the host country, the United Kingdom and Poland<sup>10</sup> being primary examples:

It has long been a rule of British law that provided the individual falls within the personal scope of the relevant provision and has worked the relevant period of service, UK employment rights will apply, irrespective of the individual’s nationality and the duration of his or her employment in the UK.<sup>11</sup>

In another category we have states drawing a distinction between mandatory rules, often considered as rules of public law, and private law rules pertaining to the employment contract. Within this category considerable differences exist, however. The notion of ‘*ordre public*’ and the role accorded to norms of that kind in labour market regulation differ widely. This is aptly illustrated by Belgium and France, on one hand, where the larger part of public and private labour law is considered *ordre public*,<sup>12</sup> and on the other hand, Denmark, where contract regulation and contractual freedom predominate.

<sup>9</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>10</sup> For Poland this is amply demonstrated by Andrzej Świątkowski’s presentation in Chapter 7 of this book.

<sup>11</sup> See C Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law: Case C-319/06 *Commission v Luxembourg*, Judgment 19 June 2008’ (2009) 37 *Industrial Law Journal* 122.

<sup>12</sup> On French law see, in particular, N Meyer, *L’ordre public en droit du travail: Contribution à l’étude de l’ordre public en droit privé* (LGDJ, 2006); for Belgium e.g. Joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade, Arblade & Fils SARL, as the party civilly liable, and Bernard Leloup, Serge Leloup, Sofrage SARL, as the party civilly liable* [1999]

This was furthered by the fact that the Rome Convention did not define the term ‘mandatory rule’ clearly. The margin for a national appreciation of what should be deemed a mandatory rule was used by the states to continue their different traditions in this field, in particular with regard to the extent to which and the reason why the applicable employment law is set aside by overriding mandatory rules and rules of public policy.<sup>13</sup>

Also, immigration law was employed to curtail labour immigration, including cross-border provision of services, and to protect the domestic labour market by imposing an obligation to pay wages in line with those prevailing, pursuant to collective agreements or otherwise, upon domestic and foreign employers alike. Here, Norway presents a very straightforward example, as illustrated in Chapter 6.

It is easily appreciated that in such varied legal settings uncertainty would be a factor, for service providers as well as for their employees. In the project, we have been able to demonstrate how legislative efforts to harmonise Member States’ law on this ground were initiated by the EC long before the emergence of plans for a single (internal) market. Those specific initiatives did not result, however; they dwindled into nothing and were shelved after the adoption of the Rome Convention in 1980. But we have also shown how those initiatives were brought back into the legislative process and how major features were retained in the drafting of the Posting of Workers Directive (PWD), 1996.<sup>14</sup> The latter legislative process was set in the framework of the single market, implemented in 1992, and was triggered in particular by a key ECJ decision, the seminal *Rush* judgment of March 1990.<sup>15</sup> The Court’s broad *dictum* in that case, seemingly granting Member States virtually unlimited discretion to decide to apply domestic labour law rules to foreign workers employed by a foreign service provider was obviously problematic to reconcile with the tenets of a single market and the Treaty-based freedom to provide services<sup>16</sup> in that context.<sup>17</sup>

In this context the private international law dimension is essential to the issues with which the FORMULA project is concerned. In short, key issues in the project are (i) what wages and working conditions are to be applied to workers who are moving to work

ECR I-8453. The situation in Luxembourg is similar, as illustrated by the *Luxembourg* case (above n 4). – Now Norway also offers an illustration, albeit more narrow and specific, with the Supreme Court decision of 5 March 2013 in the so-called ‘shipyards case’, see chapter 6, section 7.3, this volume.

<sup>13</sup> Cf. M Houwerzijl, *The Dutch understanding of posting of workers in the context of free services provision and enlargement: A neutral approach?* FORMULA Working Paper No. 23 (2010), at 5.

<sup>14</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>15</sup> Case C-113/89 *Rush Portuguesa Lda v Office national d’immigration* [1990] ECR I-1417.

<sup>16</sup> Then Articles 59 and 60 EEC, subsequently Articles 49 and 50 EC, now Articles 56 and 57 TFEU (Treaty on the Functioning of the European Union [2010] OJ C 83/47).

<sup>17</sup> The issues referred to in this paragraph are discussed in considerably more depth in a contribution in a subsequent book collecting the final papers from the FORMULA project.

(temporarily) in the territory of another Member State, (ii) should the employment relationship of these workers be governed by the law of the host state or the home state, or (iii) should terms and conditions of employment partly be regulated by both of the national laws?

#### **4. Restricting national autonomy – ‘positive’ and ‘negative’ integration**

Here is where the Posting of Workers Directive and ECJ case law pertaining to it have fundamentally altered the terrain, retreating territoriality in favour of supra-national EU law. Put differently, the economic has taken precedence over the social – the intended ‘social dimension’ of the single market has had to yield to market freedoms as construed on the basis of Treaty law. This is common ground by now; here I shall briefly recall only the essential features, which are quintessential to the overall perspective of the FORMULA project.

The Posting of Workers Directive does not regulate private international law issues comprehensively but lays down a ‘catalogue’ (or ‘list’) of types of provisions in a host state’s national law that are to apply, coupled with requirements as to their adoption, ‘whatever the law applicable to the employment relationship’ (Article 3(1)). The very essence of this is that the rules thus designated are *mandatory* rules, taking precedence over the worker’s home state law or a choice of applicable law made in the employment contract – save for *more favourable* terms and conditions applying by way of *home* state (or the chosen) law, pursuant to Article 3(7). For example, a Polish service provider posting workers to Norway cannot remunerate work performed in Norway according to Polish provisions on pay if minimum wages are properly set in Norway. In that case, the service provider is obligated to pay its workers at the Norwegian rates.

The Directive was perceived by many at the outset as a *minimum* directive that allowed a host state to impose other types of terms and conditions than those specified in the Directive and also to fix higher standards than such as otherwise obtain in the labour market (subject to not being discriminatory on grounds of nationality). However, the ECJ, considering the PWD in light of Treaty provisions, has emphatically construed EU (Community) law to the effect that Article 3(1) (and article 3(10)) PWD lays down a *maximum* regulation. By the *Laval*, *Rüffert* and *Luxembourg* sequence of decisions the Court has laid down that a foreign service provider *cannot* be compelled to abide by host state provisions beyond the scope of Article 3(1), and within this scope higher standards than those applying as mandatory minima in the national labour market, or the relevant part of it, cannot be imposed. Consequently, for the rest home state law or the employment contract parties’ choice of law will prevail.

Moreover, and more important in the present context, the Court in *Laval* and the joint *Viking Line* decision (on free establishment, Article 43 EC) proceeded to lay down supra-national norms on a point where the EU does not have competence to adopt

secondary legislation, that is, on issues concerning industrial action (strike, lockout and so on – cf Article 137(5) EC, now Article 153(5) TFEU). It is a common denominator of the two decisions that the possible recourse by a trade union to industrial action for the purpose of pressing for the acceptance of a demand relating to employment and terms and conditions is considered a ‘restriction’ under Articles 43, 49 EC. Just the *prospect* of being met with industrial action in the host state as a means for a trade union to impose demands on an employer amounts to a restriction on freedom of movement, at any rate if demands go beyond the scope permitted under Article 3(1) PWD or if industrial action is a means linked to demands for collective bargaining if the outcome is not clearly prescribed in advance or if bargaining may be long-lasting.<sup>18</sup> The Court effectively held that it is sufficient to constitute a ‘restriction’ that a transnational service provider *may* be met by collective action as a means to be forced to sign a collective agreement or to be forced to enter into collective bargaining of ‘unspecified duration’ with a host country trade union. It can hardly be stated more emphatically that the *state of domestic law* as such is a restriction in Community law; a threat to undertake industrial action or the actual implementation of such action is not a prerequisite.

Also in both decisions, the Court paid homage to the right to strike as ‘a fundamental right which forms an integral part of the general principles of Community law’. But this was immediately subjected to the reservation that such a right still must be within the bounds of general principles of Community law, namely those pertaining to the safeguarding of freedom of movement. The exercise of a fundamental right such as the right to take collective action, said the Court, ‘must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality ...’, and from that follows, in the Court’s view, ‘that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action’.<sup>19</sup> Thus, having been placed squarely within the reach of Community law the right to take industrial action is immediately subjected to the general principles of ‘justification’ for restrictions on free movement to be permissible. This, in short, is a two-pronged issue. First, the question is for what purposes may collective action be used, or, in the standard language of free movement law, which objectives may constitute ‘an overriding reason of public interest’. The second question is how the *proportionality* test is to be conducted.

Again, I shall not go into any detail on this.<sup>20</sup> It must be noted, however, that the Court’s approach in these cases in principle is nothing new and thus the outcome

<sup>18</sup> See, in particular, *Laval* (above n 2) paras 91–111.

<sup>19</sup> Cf *Laval* paras 94–95.

<sup>20</sup> For a further discussion see S Evju, ‘Norway’ in R Blanpain and AM Świątkowski (eds), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. Bulletin of Comparative Labour Relations 69 (Kluwer Law International, 2009) 123, 131–133.

arguably should not be surprising. That said, there is a strong line of argument that demonstrates how the Court, had it so considered, could have reached different conclusions.<sup>21</sup> As regards fundamental rights, however, the same approach as in *Viking Line* and *Laval* is manifested in the *Schmidberger* and *Omega* decisions.<sup>22</sup> Concerning areas in which the EC/EU does not have power to legislate directly, case law demonstrates the same kind of approach to limiting the freedom to regulate by Member States, for example, in the fields of tax law, social security law and pay within the meaning of Article 136(5) EC.<sup>23</sup> And, it may be added, the overall pattern of recent directives prior to the decisions was to subordinate fundamental rights to economic concerns.<sup>24</sup> Nonetheless, as regards industrial action, with its conjunct collective bargaining, the ‘negative integration’ imposed by the ECJ decisions in the ‘Laval Quartet’ is of a far-reaching nature. What matters here is the principled approach of subjecting the lawful recourse to industrial action to market economic considerations, restricting the scope of interests to be pursued and to impose a proportionality standard.

## 5. Topics of the present volume, and pointing ahead

The comments may serve as a backdrop to the following chapters. The cursory observations above touch on developments that are discussed in more detail in the papers that are the body of this book. Concurrently these developments are central to many of the issues being discussed in the third and final phase of the FORMULA project.

In Chapter 2 Erik Sjødin provides a comprehensive, in-depth analysis of ECJ case law involving posting of workers, tracing developments from the very beginning up to and beyond the ‘Laval Quartet’ decisions. This serves as a platform and frame of reference for the studies in chapters 3 to 9 devoted to the various national situations in the countries covered by the FORMULA project.<sup>25</sup> The common, overarching focus of these contributions is on the individual national regimes being confronted with the Posting of Workers Directive and the implementation of the PWD into domestic law, and

<sup>21</sup> See for an in-depth discussion B Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 279.

<sup>22</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Case C-265/95 *Commission of the European Communities, supported by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, v the French Republic* [1997] ECR I-6959.

<sup>23</sup> See on the latter Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] ECR I-7109.

<sup>24</sup> See S Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social Space’ (2006) 12 *European Law Journal* 41, 48.

<sup>25</sup> With the exception, for pragmatic reasons, of Finland.

subsequent reactions and responses to the developments at the EU level with regard primarily to the ‘Laval Quartet’ case law of the ECJ. Issues pertaining to the Services Directive are also included, however more cursorily.

The two final chapters 10 and 11 turn specifically to the Services Directive, discussing the highly controversial ‘Bolkestein proposal’ and the equally controversial further genesis of this particular piece of EU secondary legislation. The two chapters however rest on different approaches. In chapter 10, Jon Erik Dølvik and Anne Mette Ødegård present a ground-breaking political science and sociology study of the legislative process and the role and influence of the different actors involved, and discusses the possible lasting effects of such factors on legislative decision-making in the EU context. In the final chapter, Monika Schlachter provides a penetrating analysis of the initial ‘Bolkestein proposal’ and the eventual Directive as adopted from a legal perspective, concluding her presentation by discussing its relation to the legal issues otherwise pertaining to the posting of workers.

The contrasts emerging from the national presentations, also with regard to the Services Directive, are striking and amply illustrate differences between legal and industrial relations regimes across EU/EEA member states and how the impact of EU level developments also differ significantly. While essentially applying a legal perspective to the issues in question these national level analyses thus also may, along with Dølvik and Ødegård’s study, feed into the broader field of social science research and, more particularly, research in the field of industrial relations generally and the line of research denominated by the collective term ‘varieties of capitalism’.<sup>26</sup>

They serve, also, as a bridge to forthcoming papers of the third phase of the FORMULA project, which is dedicated to ‘horizontal’ analyses of the many issues with which the project is concerned. A broad-ranging study of the genesis and salient features of the Posting of Workers Directive is a prelude to an in-depth study of the private international law aspects that are at the core of the legislative efforts in the field. This is added to by a social sciences based analysis of the role of the social partners in Europe’s multilevel governance with regard to the establishment of an effective floor of wages and working conditions in view of the challenges posed by the growth in cross-border labour mobility and posting of workers. The project’s third phase moreover include studies of cross-cutting issues of monitoring compliance with the legislation involved and sanctions for collective action in breach of EU law. The latter is a highly topical issue in view of the Swedish sequel to the *Laval* judgment and ensuing developments as regards manifest or prospective conflicts with international labour standards, in particular at the level of the ILO and the Council of Europe. The former is currently in debate, once again a highly controversial debate, on a possible ‘enforcement directive to

<sup>26</sup> See, eg, PA Hall and D Soskice, ‘An Introduction to Varieties of Capitalism’ in PA Hall and D Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (OUP, 2001); G Menz, *Varieties of Capitalism and Europeanization. National Response Strategies to the Single Market* (OUP, 2005).

supplement and underpin the Posting of Workers Directive. The perspectives are further broadened by studies of public procurement law and the role of labour clauses and of EU legislative efforts on third country nationals with regard to cross-border movement of labour. In closing, the issues addressed by the various contributions concerned and the overall perspectives of the FORMULA project are discussed with a view in particular to the reform efforts epitomized by the so-called ‘Monti II’ package of legislative measures, however already manifestly unsuccessful in part,<sup>27</sup> and an outlook on the possibilities of ‘squaring the circle’ in this highly complex field of multilevel governance and conflicting interests, horizontally between national actors and nation states and vertically between international, EU/EEA, and national levels. Altogether, the many contributions of the FORMULA project feed into and are fit to enrich the wide-ranging and continually topical debate on the numerous and many-faceted issues at stake.

<sup>27</sup> For some preliminary observations on this and related issues, see S Evju, ‘Implementing EU Law on Services: National Diversity and the Human Rights Dilemma’, 5 *Arbeidsrett og arbeidsliv* (2011), 287.

## CHAPTER 2

### Labour Market Regulation as Restrictions

#### A Developmental Study of ECJ Case Law at the Interface between Free Movement and Posting of Workers

*Erik Sjödin*

##### 1. Introduction

The first court proceedings in the now famous *Laval* case<sup>1</sup> took place on 20 December 2004, before the Swedish Labour Court. The proceedings involved an undertaking established in Latvia, a country which joined the European Union on 1 May 2004. The Swedish Labour Court, in a decision delivered on 29 May 2005, stayed the proceedings and asked the European Court of Justice (ECJ) for a preliminary ruling on questions concerning the legality in EC law of collective action initiated in Sweden. The ECJ gave its judgment on 18 December 2007. In addition to the issue of legality of collective action the case and the ECJ's decision also concern the scope of alternatives available to Member States when implementing the Posting of Workers Directive (PWD)<sup>2</sup> and otherwise regulating the situation for workers posted to their territory in the context of provision of services.

The *Laval* decision was delivered three years after the European Union's eastward enlargement in 2004, when eight new Member States, primarily situated in central Europe, joined the Union.<sup>3</sup> The EC Treaty<sup>4</sup> that was interpreted by the ECJ in the *Laval* case had been adopted by the six founding Members of the European Economic Community quite some time before, on 25 March 1957. The decision also, and ventrally, concerned the PWD.

It is no exaggeration to say that, once delivered, the *Laval* decision, in conjunction with other ECJ decisions related to it, caused widespread discussion throughout Europe. In Sweden, both trade unions and employers' organisations proclaimed the decision a

<sup>1</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767 (*Laval*).

<sup>2</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ 1997 L 18/1.

<sup>3</sup> The first eight, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, were followed by Bulgaria and Romania, which joined the EU in 2007.

<sup>4</sup> Treaty establishing the European Community (consolidated version) [1992] OJ C 224.

victory immediately after it was made public. After some consideration it became apparent, however, that the effects were not altogether positive for trade unions. The executive of the European Trade Union Confederation (ETUC) held the ECJ to resemble the Oracle of Delphi in Greek mythology.<sup>5</sup> In legal journals, the judgment has also resulted in numerous contributions from commentators across Europe.<sup>6</sup>

The object of this chapter is to analyse the ECJ's case law involving posting of workers in order to present the development in case law leading up to the decision in *Laval*. In doing so the chapter employs an evolutionary approach. To begin with, the PWD was still in the making when the first significant decisions were made by the ECJ. Once the Directive was adopted in 1996, at first it was not taken account of by the Court, inasmuch as the factual situations at issue preceded the 1999 implementation deadline for the PWD.<sup>7</sup> Although mentioned in several judgments, the ECJ gave its first actual interpretation of the Directive on 12 October 2004, in the *Wolff & Müller* case.<sup>8</sup> Subsequently, the interpretation of the PWD has been the subject of a number of decisions.

In the following presentation, the general questions in focus include: Who should regulate the actions of an undertaking posting workers? Should their actions be the concern of the home state or the host state? In which labour market should the price of labour of posted workers – that is, essentially their wages – be fixed? First, some general remarks on the freedom to provide services will be made with a view to placing the topic in context.

<sup>5</sup> W Lundby-Wedin and J Monks, 'Europe loses when it legitimises low wages', *Financial Times*, 2 March 2008.

<sup>6</sup> Among others, N Reich, 'Free movement v. Social Rights in an Enlarged Union – the Laval and Viking cases before the ECJ', *German Law Journal* 2008, 125; R Nielsen, 'EU-domstolens afgørelser om konfliktet i Viking- og Laval-sagerne', *Arbejdsretlig Tidsskrift* 2008, 265; E Kocher, 'Kollektivverhandlungen und Tarifautonomie – welche Rolle spielt das europäische Recht?', *Arbeit und Recht* 2008, 13; PA Köhler, 'Vaxholm – Gustafsson – Evaldsson. Das kollektive Arbeitsrecht Schwedens auf dem europarechtlichen Prüfstand', *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 2008, 65; J Kristiansen, 'Laval, Viking og den danske model', *Juristen* 2008, 79; J Malmberg and T Sigeman, 'Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice', (2008) 45 *Common Market Law Review* 1115; P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and judicial approaches to their reconciliation' (2008) 33 *European Law Review* 411.

<sup>7</sup> For example, Case 164/99 *Infringement proceedings against Portugaia Construções L<sup>da</sup>* [2002] ECR I-787 (*Portugaia*) paras 14–15.

<sup>8</sup> Case C-60/03 *Wolff & Müller GmbH & Co. KG v José Felipe Pereira Félix* [2004] ECR I-9553 (*Wolff & Müller*).

The Chapter has considered material up until May 2009. Consequently, Treaty references are to the EC Treaty, not to the current Treaty on the Functioning of the European Union (TFEU);<sup>9</sup> likewise, the Court of Justice is referred to as the ECJ.

## **2. Free Movement of Labour**

### *2.1 Introduction*

Posting of workers is not the only way in which manpower may move across the borders of nation states. Depending on the different contractual and practical arrangements under which labour is supplied, different legal regimes will apply. The term ‘manpower’ is chosen here in order to avoid the assumption that such a situation is governed by *one* of the four freedoms. This sections aim to provide an overview of the legal regimes under which ‘free movement of manpower’ may be exercised. Another aim is to illustrate how the regulatory competence of Member States is affected by the different legal regimes under which the movement of manpower may be classified.

The free movement of manpower of concern here refers to labour being performed by an individual at a certain location, and where it is not possible to separate the individual from his work and the location of where it is performed. This excludes, for example, services provided through computer communication.

The European Union now consists of twenty-seven Member States. Despite the aim of establishing an internal market without obstacles to the free movement of goods, persons, services and capital, there are still substantial differences between the labour markets of the different Member States and it is not possible to talk about *one* European labour market.

Manpower drifts within a national labour market and across borders that divide the EU into separate labour markets. Free movement of labour is part of the Treaty’s vision of free movement. Depending on the labour market in which manpower is utilized and under which legal regime the entrepreneur has chosen to organise his manpower, the government will have different options with regard to how to regulate the activities of entrepreneurs and employees.

A brief look at the Treaty reveals that several of the fundamental freedoms involve free-moving manpower. Free movement of workers, establishment and services concern labour, which may be of different types. A company established in one Member State that enters into a contract of employment with a citizen with the same or another nationality will be providing that person’s manpower to a potential customer. If of another nationality, that worker may be considered as availing himself of the freedom of

<sup>9</sup> Treaty on the Functioning of the European Union (Consolidated version 2012) [2012] OJ C 326.

movement of persons guaranteed under Article 39. If another person who is self-employed chooses to expand the number of possible customers by offering his services in another Member State, this may be considered to be making use of the free movement of services guaranteed under Article 49. If the move is of a more permanent kind, the self-employed person may be considered to be established in this second state. A company established in one Member State may perform a service in another Member State and for this reason temporarily locate an employee to this second state. This employee may be considered as operating under the free movement of services.

This introductory presentation illustrates the different legal regimes under which manpower may be classified. This is conducive to regime shopping, inasmuch as the consequences of the classifications may be considered as more or less favourable for the different actors in the labour market. The entrepreneur may have an interest in reducing costs to a minimum – something that may be facilitated by his choice of legal regimes. The workers, on the other hand, may have an interest in a high level of remuneration. The effect of Community law on the method through which this may be achieved varies, depending on the legal regime to which labour is subject.

In the following discussion, a division between moving legal persons (undertakings) and moving natural persons is made in order to illustrate which one falls under each legal regime.

It is also necessary here to remark briefly on the heavily debated Services Directive (SD).<sup>10</sup> The SD does not, according to its provisions, affect labour law and does not encompass the services of temporary agency work. If in conflict with the PWD the latter will prevail.<sup>11</sup> As will be discussed below, a company has several options with regard to how to meet its demand for manpower. The fact that labour law is excluded from the scope of application of the SD does not mean that the Directive will be redundant in all situations that involve free-moving manpower. The SD must, however, be taken account of with regard to other matters than those concerning the relationship with employees. For example, the fact that an entrepreneur posts workers across borders does not entail that he may not benefit from the right to information set out in Article 7 SD. The service provider may also have to abide by regulations not affecting the employment relationship.

## 2.2 *Cross-Border Undertakings*

### 2.21 Introduction

An entrepreneur is free to organise activities in whatever form the owners find most suitable. Company law provides several different forms, which may vary throughout the

<sup>10</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>11</sup> See Articles 1(6), 2(2)(c), and 3(1) of the Directive. For an extensive presentation of the Services Directive see Schlachter and Fischinger, Chapter 11, this volume.

Community. Groups of companies may be established in different Member States at the same time.

## 2.22 Establishment

The freedom of establishment includes, among other things, the right to set up and manage undertakings under the conditions laid down in law by the country where the undertaking is set up. By establishing itself, either through a primary or secondary establishment, the company will assert itself on the (labour) market of the Member State of establishment. At the outset, the company's need for manpower will be satisfied on that labour market. Treaty rules on the freedom of establishment, according to the ECJ, mainly ensure that the foreign entrepreneur is treated the same way as national undertakings.<sup>12</sup> The rules also prohibit Member States from impeding entrepreneurs wishing to establish themselves in another Member State.<sup>13</sup> Once established, the company is subject to the rules on management prevailing in the state of establishment and is an actor on that state's (labour) market on the same footing as strictly domestic undertakings.

The ECJ has defined components of establishment as involving 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'.<sup>14</sup> A key element when determining whether the activities constitute a service or an establishment is whether or not the company is registered in the second Member State.<sup>15</sup> In legal writing, the duration of the period under which a service is provided is the most important factor when separating services from establishment.<sup>16</sup> The fact that a project lasts for a long time, even years, does not necessarily mean that the entrepreneur must be considered to be established.<sup>17</sup> When determining whether an undertaking is established or provides services, it is not only the duration of the stay that should be considered; account should also be taken of regularity, periodicity and continuity.<sup>18</sup>

Utilising the freedom of establishment is a privilege for the entrepreneur. In the individual case, the issue of separating establishment from free movement of services is dependent on his actions. To what extent and with what regularity does the entrepreneur

<sup>12</sup> See Article 43(2) EC; Case C-161/07 *Commission v. Austria* [2008] ECR I-10671, para 28.

<sup>13</sup> Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 (*Viking Line*), paras 68-69.

<sup>14</sup> Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905 (*Factortame*), para 20.

<sup>15</sup> Case C-514/03 *Commission v. Spain* [2006] ECR I-963, para 22.

<sup>16</sup> C Barnard, *The Substantive Law of the EU*, 2<sup>nd</sup> ed. (Oxford University Press, 2007), 367.

<sup>17</sup> Case C-215/01 *Bruno Schnitzer* [2003] ECR I-14847 (*Schnitzer*).

<sup>18</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-41659 (*Gebhard*), para 27.

make his services available on another market? Is he registered in the host country and does he have some infrastructure there? These are factors to be taken into consideration when drawing the line.

An example of when there is a cross-border establishment is when a company sets up an office which is manned by the company's own staff.<sup>19</sup> This office does not have to be an agency or a branch. It also does not seem necessary to become registered in the state of establishment for the company of a home state to be considered as being established in a second Member State.

The freedom of establishment may collide with labour law norms impinging upon the freedom to move. *Viking Line* is an example. Under Finnish law, collective action to counteract a company's utilisation of the freedom of cross-border establishment was lawful. However, the envisaged collective action of the Finnish Seamen's Union was deemed by the ECJ to constitute a restriction on the freedom of establishment, which conceivably could be justified but was left a very narrow scope in that regard, and in any case was considered a restriction on a fundamental freedom.

When established in the second state the firm will not, as an employer, enter into a contractual relationship with a posted worker. Such a situation is not covered by the scope of a posting situation found in Article 2 of the PWD. The posting of workers presupposes that the situation concerns the free movement of services. The established entrepreneur may utilise posted workers, but when doing so he will not enter into the role of employer in the relationship with the posted workers he uses.

### 2.23 Services

Labour may also drift from one Member State to another as part of a service. The ECJ has classified the provision of manpower as a service.<sup>20</sup> The provision of manpower through a temporary work agency may be the purest form of free movement of labour.

The Treaty prohibits restrictions on the free movement of services and an entrepreneur may, in order to be able to provide his services, *temporarily* pursue his activities in the host state under the *same conditions* as imposed on the national service providers.<sup>21</sup> The free movement of services, according to the Treaty, is residual to the other fundamental freedoms. Only when a situation cannot be classified in terms of goods, persons or capital will the freedom of movement of services regime apply.<sup>22</sup> This is to be decided in each case by considering the factual circumstances beforehand, however.<sup>23</sup>

<sup>19</sup> Case 205/84 *Commission v. Germany* [1986] ECR I-3755, para 21.

<sup>20</sup> Case 279/80 *Criminal proceedings against Alfred John Webb* [1981] ECR 3305 (*Webb*).

<sup>21</sup> Article 50(2) EC.

<sup>22</sup> See Article 50 EC.

<sup>23</sup> See Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521 (*Fidium Finanz*).

The Treaty does not contain any final definition of what may be considered a service. Services are, according to the Treaty, normally provided for remuneration.

The occurrence of a service, according to Community law, does not presuppose that the activities of those actually performing this service – those, so to speak, ‘holding the hammer’ – are to be considered as falling under Article 49 and the free movement of services. The entrepreneur who provides the service is the contractual counterpart to the service receiver. An example of a service may be the renovation of a building. This service may be provided by an entrepreneur established in a Member State other than that of the location of the building. The entrepreneur has several options about how to satisfy his demand for manpower: he may post workers, hire them at the location or use a temporary work agency, which may be located in either the home or the host state. Article 49 prohibits restrictions on the provision of services. The potential restrictive effect of a labour market regulation on the entrepreneur’s (service provider) activities in the host state will be dependent on what legal regime his labour can be subsumed under.

The situation in which an undertaking posts workers to another Member State to fulfil a contract have, in several judgments, been assessed under the free movement of services.<sup>24</sup> Would the same conclusion be drawn when an undertaking repeatedly posts workers from one Member State to another? The ECJ provided some guidance in *Schitzer*. In that judgment the Court held that construction projects involving large buildings that last for a period of several years might be considered services. The fact that an entrepreneur often provides the same service to the same Member States, without the necessary infrastructure, is not sufficient to identify him as being established there. The ECJ provided an example of such services, the giving of advice for remuneration.<sup>25</sup> One interpretation of the judgment is that a service may last over several years on the presumption that it is one single project. There is no provision of the Treaty that determines the duration or frequency with which services may be provided in order to be still considered a service.<sup>26</sup> The ECJ, in the subsequent judgment *Trojani*, in which *Schitzer* was cited, held that an activity carried out on a permanent basis or without any foreseeable limit would not be considered a service within the meaning of the Treaty.<sup>27</sup> A conclusion from the judgments ought to be that a construction company exclusively focused on a different country than that of establishment would not be considered a service provider by the ECJ. The Grand

<sup>24</sup> For example, Case C-341/05 *Laval*; Joined cases C-49/98 a.o. *Finalarte Sociedade de Construção Civil Lda and Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, a.o. [2001] ECR I-7831 (*Finalarte*); Case C-164/99 *Portugaia*.

<sup>25</sup> C-215/01 *Schnitzer*, para 30 and 32. The case has later been cited, see Case C-514/03 *Commission v. Spain* [2006] ECR I-963; Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573 (*Trojani*).

<sup>26</sup> *Schnitzer*, paras 31–32.

<sup>27</sup> *Trojani*, para 28.

Chamber's judgment in *Trojani* did not overturn the *Schnitzer* judgment and the general principle remains that services are something of a temporary nature.<sup>28</sup>

The trade union parties in *Laval* submitted that the dispute did not concern the free movement of services since Laval, through its subsidiary L&P Baltic Bygg AB, was established in Sweden. It was undisputed that Laval was the single owner of L&P Baltic Bygg AB.<sup>29</sup> The conclusion of the trade unions was that the ECJ should reject the questions asked by the Swedish Labour Court since the factual circumstances concerned establishment. This argument was not accepted by the ECJ. The ECJ motivated its conclusion with reference to the separate functions of the ECJ and the national courts. The national court had decided to ask questions regarding the free movement of services.<sup>30</sup> The trade unions had not provided the argument of Laval's establishment in Sweden before the Swedish Labour Court.<sup>31</sup>

*Laval* is an illustrative example of how the organisation of labour will have an effect on the Community law classifications of this labour under different legal regimes.

The Court has held that an obligation imposed on an entrepreneur to comply with all requirements for establishment would deprive the free movement of services of all practical effectiveness.<sup>32</sup> Thus, if the situation is classified as a service, the entrepreneur is able to present a Community law argument against such a requirement restricting his possibilities to provide services.

### 2.3 *Border Crossing Natural Persons*

#### 2.31 Introduction

The Treaty ensures natural persons free movement in the internal market. Natural persons may provide labour and this provision may be delivered under different legal regimes. A worker as well as a self-employed person may be a provider of manpower. The factual and contractual circumstances will decide under which legal regime the provision of manpower will be classified. An important factor here is the individual's relationship with his principal. The division between the Community concepts of self-employed and worker bears similarities to the division in national labour law between

<sup>28</sup> See also V Hatzopoulos and TU Do, 'The case law of the ECJ concerning the free provision of services: 2000–2005' (2006) 43 *Common Market Law Review* 923, 929 f.

<sup>29</sup> See the trade unions' written petition, at page 24 f, in *Laval*.

<sup>30</sup> *Laval*, paras 42–50; see also Nielsen (above n 6) for another discussion of the division of functions between the ECJ and the national courts. Nielsen argues that by adjudicating the question of proportionality the ECJ is deciding a question which the national court has jurisdiction over.

<sup>31</sup> See Arbetsdomstolens domar (AD; Labour Court Law Reports) 2005 nr 49.

<sup>32</sup> Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* ECR [1991] I-4221 (*Säger*), para 13, see also C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others* [2001] ECR I-2189 (*Mazzoleni*), para 23.

workers and independent contractors.<sup>33</sup> The self-employed person's relationship with the principal does not presuppose subordination in the same way that the employment relationship does.

The posting of workers is another way in which a natural person may be used to provide labour across national borders. The posting of workers takes place within the framework of transnational provision of services and does not *prima facie* make use of the freedom of movement of persons.

### 2.32 Self-employed

A self-employed (person) may choose to move to another Member State in order to offer his services to potential clients in a new market. If wanting to establish him- or herself for an indefinite period of time, the self-employed person may be classified as utilising the free movement of establishment. The conditions and questions are similar to those considered above (in 2.22) concerning establishment.

A self-employed may not be willing to turn his indefinite attention to another market and establish himself there. He, like other undertakings, is assured the right to provide services. As mentioned, the Treaty prohibits restrictions on the free movement of services. A self-employed may to the same extent as other entrepreneurs utilise the free movement of services. An example of services performed by a self-employed may be a dental clinic-on-wheels. Also, construction work may be performed by someone classified as a self-employed person.

As is the case with legal persons (companies), the amount of activity in the host state will determine whether this individual is providing services or may in fact, be considered to be established there. The fact that he or she has some infrastructure enabling his provision of services does not automatically mean that he will be considered as established (see *Gebhard*).

The question of separating the situation when the self-employed is established from that when he is providing services is similar to those considered above in Section 2.22.

### 2.33 Migrant Workers

Article 39 and the free movement of workers established there award the worker a right to accept offers of employment, move freely to accept such offers and also the right to remain in another Member State for the purpose of employment.

The Treaty does not contain any definition of the concept of "worker". The ECJ has given the concept a broad definition and the Community concept covers everyone who is actually and genuinely performing work in another Member State.<sup>34</sup> This wide and

<sup>33</sup> R Eklund, T Sigeman and L Carlson, *Swedish labour and employment law: cases and materials* (Iustus Förlag, 2008), 250 f.

<sup>34</sup> See Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration*, [1990] ECR I-1417 (*Rush*), Attorney General's opinion para 14 with references to previous case law.

almost all-embracing definition was later demarcated by the ECJ's recognition of traditional parts of an employment relationship.<sup>35</sup> That is, that the worker performs a service for, and under the direction of, another who in return rewards this person for his efforts.<sup>36</sup>

Above, it was mentioned that a company may be considered as established in another Member State when it opens an office in another Member State and this office is manned by the company's own staff. The worker employed at such an office is not a posted worker, within the meaning of the PWD. The PWD presupposes that the situation concerns the trans-national provision of services. The employee is also not utilising the free movement of establishment, a privilege reserved for the entrepreneurs. He is instead a free-moving worker, using the right awarded to him through Article 39.3 c to stay in a Member State for the purpose of employment.

It may be illustrative to provide some examples of factual circumstances that would be classified as falling under Article 39 and the free movement of workers.

*a) Directly employed*

An individual employed directly by an "establishment". This is a person moving from one state in order to enter into an employment contract with a company established in a second state. Regardless of the duration of the employment relationship the action of the private person is a utilisation of the free movement of workers.

*b) Local employee*

A local employee is an individual accompanying the firm when it establishes itself in another Member State. A firm established in one Member State that pursues its activities through an office manned by its staff is considered as established in the second State. The worker employed, however, utilises the free movement of workers. As such he is to be treated equally with other national workers.

*c) Day labourer*

A day labourer is an individual who repeatedly shifts employer but remains within one Member State other than that of his nationality. The period of employment may exceed one day and his employer may shift and be of different nationalities. Both those entrepreneurs established and those providing services will engage in employment relationships with the day labourer. He is an Article 39 worker and since he is not posted he also claims access to the labour market of the host state and remains there for the purpose of employment.

The free movement of workers governs each of these different situations. As shown, the activities of the employer may be governed by other freedoms and the separation of the

<sup>35</sup> R Eklund, R Sigeman and L Carlson (above n 33), 250.

<sup>36</sup> Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121 (*Lawrie-Blum*), para 17.

different freedoms may be determined by different factors not connected to activities of the employees.

### 2.34 Posted Worker

Posting of workers is another legal regime under which labour may be provided across national borders. The concept of a posted worker is now established in Community law and defined in the Posting of Workers Directive, as a worker who for a limited period carries out work in the territory of a Member State other than the one where he normally works.<sup>37</sup> The Member State in which the service is provided is to ensure posted workers a ‘hard core’ of terms and conditions of employment.<sup>38</sup>

Although not the first judgment concerning posting of workers, *Rush* may be considered a point of departure.<sup>39</sup> The factual circumstances in the case occurred shortly after Portugal’s accession to the Community in 1986, which is why the ECJ also had to consider Portugal’s act of accession. The judgment was preceded by an opinion given by Advocate General van Gerven, which will here be restated, in part, in order to present what at that time was considered a plausible solution. But first the facts. A dispute arose between the Portuguese company Rush Portuguesa and the French Office National d’Immigration. Rush Portuguesa had concluded a contract with a French undertaking. It had agreed to take part in the construction of a railway in France. In order to deliver their part of the contract, they brought with them their employees from Portugal. After inspections had been carried out, in the later part of 1986, Rush Portuguesa was fined for a breach of the French Labour Code which concerned employing foreigners in France, something that was reserved for the Office.

In the opinion of Advocate General van Gerven the ECJ was, according to the request from the national court, to assume that the Portuguese workers would immediately return to Portugal after the assignment had been completed. Also, the Portuguese act of accession imposed a restriction on the free movement of workers from Portugal to the, at that time, “10 old Member States”.

The Advocate General identified the question of law as: to determine to what extent the act of accession’s limitations on the free movement of workers could be applied to entrepreneurs providing services. Rush Portuguesa argued that the fact that Portuguese employees were present in France had nothing to do with the free movement of workers: they did not look for work and did not enter the French labour market since their contracts of employment remained Portuguese, and they also did not try to

<sup>37</sup> See Article 2 PWD.

<sup>38</sup> Article 3 PWD.

<sup>39</sup> Case C 113/89 *Rush*. The first judgments are, in my opinion, *Webb* (above n 15) and Joined cases 62 and 63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d’assurance contre la vieillesse et l’invalidité* [1982] ECR I-223 (*Seco*).

establish themselves in France.<sup>40</sup> The Advocate General held that such reasoning could not be accepted. The Community law concept of a worker is broad and covers any person who actually and genuinely performs work in another Member State. The Portuguese act of accession was based on that concept. Furthermore, he stated that the company's activities could not be separated from the persons actually performing the service. His conclusion was that the Portuguese company could bring with it, for the purpose of providing services, workers who belonged to the managerial personnel or personnel in certain trustworthy positions.

The ECJ also identified as a question of law the relationship between the act of accession's derogation from the free movement of workers and the free movement of services. The ECJ's conclusion was, however, different from that of the Advocate General. The ECJ recited the passage in the Treaty stipulating that a foreign entrepreneur may provide services on the same conditions as the nationals of that Member State. Therefore, Member States may not prohibit a person providing services from moving freely in its territory. The Treaty also precludes the Member States from imposing conditions such as work permits on staff. The act of accession was intended to prevent disturbances on labour markets resulting from *large movements of workers* and therefore a derogation on the free movement of workers was introduced. However, the situation was different in this case, which concerned temporary movement of workers from one Member State to another as part of the provision of services on behalf of their employer. Such a worker returned after the completion of the service and *did not at any time gain access to the labour market of the host state*.<sup>41</sup>

It has been argued that this latter argument was used to disqualify the application of Article 39 EC.<sup>42</sup> The ECJ's reasoning did indeed exclude the application of the act of accession and, at the same time, Article 39 and the free movement of workers. The ECJ has repeated this statement and drawn the conclusion from it that Article 39 EC is not applicable to the situation when workers are posted.<sup>43</sup> It has also been repeated in several subsequent judgments concerning the posting of workers and is one of the fundamental assumptions as far as posting of workers is concerned.<sup>44</sup> The ECJ had previously stated, when it recognised that the provision of manpower was a service, that

<sup>40</sup> *Rush*, Advocate General's opinion para 13.

<sup>41</sup> *Rush* para 15; Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803 (*Vander Elst*) para 23.

<sup>42</sup> W Däubler, 'Posted Workers and Freedom to Supply Services: Directive 96/71/EC and the German Courts' (1998) 27 *Industrial Law Journal* 264; J Hellsten, *From Internal Market Regulation to European Labour Law* (Helsinki University Print, 2007), second article at 8.

<sup>43</sup> *Finalarte*, paras 22–23.

<sup>44</sup> See C-445/03 *Commission v. Luxembourg* [2004] ECR I-10191, para 38; C-168/04 *Commission v. Austria* [2006] ECR I-9041, para 55; C-244/04 *Commission v. Germany* [2006] ECR I-885; *Vander Elst*, para 2.

such activities were particularly sensitive and directly affected the labour market and the work force concerned.<sup>45</sup> Posting of workers was thus assessed under the free movement of services.

Another way of ruling out the application of Article 39 EC is to – as *Rush* did before the ECJ – focus on the fact that the posted worker remains employed by his home state employer. Thus he does not utilise any of the, in Article 39, proscribed situations in terms of which posted workers are not governed by the free movement of workers.<sup>46</sup>

In the previous section the question was raised of whether an undertaking that repeatedly provides services in another country may be seen as established in that country. The corresponding question in relation to free movement of workers is whether the posted worker may be considered a worker within the meaning of Article 39 EC. A worker may stay in the host country for a longer period than it takes to complete the first contract. It is also possible that the worker returns to the home state only to be shipped off to another country, after which he returns again to the first state. The situation is not unlikely if the worker's employer focuses on providing services in other Member States while remaining established in another.

A difference exists between labour provided by migrant workers and labour provided through the posting of workers. The migrant workers are present on the labour market in a way that the posted workers are not. The migrant workers are to be treated equally with the national workers, in accordance with the free movement of workers. In such a situation it is unproblematic to give full effect to the legal system where the work is done.<sup>47</sup> The posted worker operates under the free movement of services where one of the assumptions is that a Member State may impose all the requirements that are imposed on established companies, something that applies also to the relationship to the posted workers.

### 2.35 Summarising Conclusion

Labour, as is well known, is not a commodity. As shown, Community law provides several points of contact with free-moving manpower. Both parties to an employment contract are engaged, on opposite sides, with the provision of labour. The legal regime under which this provision of manpower falls is, as already mentioned, dependent on the contractual and factual circumstances of the specific case. When put in a Community law context, the labour of concern to the employment contract may be

<sup>45</sup> *Webb*, para 18.

<sup>46</sup> Situations in which persons are employed for the performance of one contract in another Member State touches on the free movement of workers. For a concurring opinion see D Martin, 'Comments on Gottardo (Case C-55/00 of 15 January 2002), Finalarte (Case C-49/98 of 25 October 2001) and Portugaia Construções (Case C-164/99 of 24 January 2002)' *European Journal of Migration and Law* 2002, 369.

<sup>47</sup> See Article 39 EC.

classified under different legal regimes. The entrepreneur may be established or provide a service. The individual may be a worker, self-employed person or posted worker. The separating factor making the posting of workers irregular in this Community law context seems to be the assessment of an individual “worker” under the free movement of services. The assessment is, however, dependent on the individual worker’s relationship with his employer. The employer’s choices will exclude him from being assessed under the free movement of workers. Both the free movement of workers and the free movement of establishment stipulate equal treatment of foreign and domestic workers/undertakings once they are, respectively, employed and established. The situation is more complicated when it concerns the provision of services, since both the entrepreneur and the workers involved may be affected by two legal systems simultaneously.

The free movement of services appears to be residual to the other freedoms. It is applicable only when no other freedom governs the situation. Which freedom governs a situation must be determined in the individual case with regard to the circumstances of that case. As shown, no other freedom than services seems to govern the posting of workers and the situation is regulated primarily by the free movement of services. There are, as has been noted, always borderline situations in which the application of free movement of services to a posting situation is far from evident. A general observation regarding such situations is that the outcome of the final assessment depends on which actor the main focus of the argumentation lies upon. If the focus is on the entrepreneur – for example, the service has been provided for six months and he has acquired some infrastructure in the host state – this may result in the situation being classified as governed by the right of establishment. If the focus instead is on the worker actually performing the service – for how long has he been posted, will he move from one project to another – this may result in the situation being governed by the free movement of workers.

The assumption made here is that the internal market is divided into separate labour markets. The posting of workers is but one legal regime under which free-moving labour may be classified. As already mentioned, the point of departure concerning free movement of establishment and free movement of workers is that companies and workers from other Member States are to be treated equally with the nationals of that state. The free movement of services has another point of departure in that entrepreneurs may provide services without restrictions. The free movement of services in the context of posting of workers strikes a balance between the regulatory aspirations of two different Member States for a single worker travelling from one Member State to another. This is why the free movement of services will be the primary concern of this chapter.

The question of whether the entrepreneur is established, or if the workers posted actually are migrant workers, ought primarily to be one concerning facts and thus to be

decided by the national court and not the ECJ. There might, of course, be situations in which the guidance of a preliminary ruling from the ECJ is needed.

If a situation is governed by the free movement of workers or establishment, instead of services, it will result in both the entrepreneur and the worker, having accessed the labour market of the host state, being required, at least to some extent, to follow the rules and regulations of that Member State's labour market.

### **3. Free Movement of Services**

#### *3.1 Introduction*

The previous section identified posting of workers as one form of free movement of labour. Posting of workers falls within the scope of free movement of services. The following sections will therefore focus on this freedom. In this section some general remarks on the development of the restriction concept found in Article 49 will be delivered. The following section will focus on factual restrictions identified in the case law on posting of workers. It may already be pointed out here that not all restrictions are contrary to Community law: that applies only to restrictions that are not justifiable. The process of justification will be presented and examined in Sections 3.5 and 3.6.

The free movement of services is regulated in Articles 49–55 EC. The Community also, after a heavy debate, adopted a special directive on services on the internal market. This directive will be disregarded in this chapter and is covered by other contributors.<sup>48</sup>

The free movement of services is one of the four freedoms that characterise the internal market<sup>49</sup> and when described it is often divided into the following situations:<sup>50</sup>

1. the interstate movement of the service provider;
2. the interstate movement of the service receiver;
3. the interstate movement of both the provider and the recipient;
4. the interstate movement of the service itself.

These categories display the range of possible situations that may be classified as falling in under the free movement of services: cross-border construction companies,<sup>51</sup>

<sup>48</sup> For a detailed presentation of the Services Directive see Chapters 10 and 11, this volume.

<sup>49</sup> See Article 3 EC.

<sup>50</sup> See J Snell, *Goods and services in EC law: a study of the relationship between the freedoms* (Oxford University Press, 2002), 17; S St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF* (Iustus förlag, 2007), 35; Barnard (above n 16), 355; L Woods, *Free movement of goods and services within the European community* (Ashgate, 2004), 164.

<sup>51</sup> Case 62 and 63/81 *Seco*.

broadcasting of television programmes through cable networks<sup>52</sup> and tourism<sup>53</sup> are all actions that may constitute services within the meaning of the Treaty. The Treaty offers no comprehensive definition of what may be considered a service.<sup>54</sup> Some guidance is offered by Article 50(2) EC where it is held that a service is normally provided for remuneration, meaning that there is a need for an economic link between the provider and the recipient of the service.<sup>55</sup>

Article 49's prohibition of restrictions on the freedom to provide services has been invoked in many different situations. Cases with reference to free movement of services have concerned, for example, financial compensation from the state after being assaulted on the Metro<sup>56</sup> and the expulsion of a Philippine national married to a British citizen.<sup>57</sup> An analysis of the case law involving the free movement of services should bear in mind the Court's own insight regarding the subject:

It should be stated that, since the concept of the provision of services as defined by Article [50] of the Treaty covers very different activities, the same conclusions are not necessarily appropriate in all cases.<sup>58</sup>

Free movement of services is one of the four fundamental freedoms and as such it has been covered by several prominent authors. Many textbooks on EC law contain a chapter concerning the free movement of services.<sup>59</sup> There are several other contributions to the discussion on the free movement of services in books<sup>60</sup> and

<sup>52</sup> Case 352/85 *Bond van Adverteerders and others v The Netherlands State* [1988] ECR 2085 (*Bond*).

<sup>53</sup> C-189/89 *Commission v. Italy* [1990] ECR I-727.

<sup>54</sup> See on this subject St Clair Renard, (above n 40), 29 ff; Barnard (above n 14), 358; Woods (above n 48), 159 ff; R White, *Workers; Establishment and Services in the European Union* (Oxford University Press, 2004), 37.

<sup>55</sup> Barnard (above n 13), 360.

<sup>56</sup> Case 186/87 *Ian William Cowan v Trésor public* [1989] ECR 195 (*Cowan*).

<sup>57</sup> C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279 (*Carpenter*).

<sup>58</sup> C-113/89 *Rush*, para 16.

<sup>59</sup> See, for example, P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 2008) chapter 17; Barnard (above n 16), chapter 14; K Engsig Sørensen and P Runge Nielsen, *EU-retten* (Jurist- og Økonomforbundets Forlag, 2008), chapter 10; U Bernitz and J Kjellgren, *Europarättens grunder* (Norstedts juridik, 2007), chapter 13; J Steiner, L Woods and C Twigg-Flesner, *EU law* (Oxford University Press, 2006), chapter 22.

<sup>60</sup> See, for example, Woods, (above n 50), Snell (above n 50) M Andenaes and W-H Roth (eds) *Services and Free Movement in EU Law* (Oxford University Press, 2002), St Clair Renard, (above n 50), and Hellsten (above n 40). See also White (above n 54).

articles.<sup>61</sup> The material published does not present *one* single model of how the case law on free movement of services should be structured. There are differences, but also similarities, in the presentations published. An example of the differences is Barnard's use of the term "market access" in the Substantive Law of the EU,<sup>62</sup> a term that does not seem to be mentioned by Bernitz and Kjellgren in *Europarättens grunder*,<sup>63</sup> nor by Steiner, Woods and Twigg-Flesner in their *EU law*.<sup>64</sup> There are other examples but this one serves to illustrate that so far no single model is provided in the legal literature on how to structure the case law on free movement of services.

This chapter concerns the part of free movement of labour that involves posting of workers, which may be categorised under the first situation mentioned above: the interstate movement of the service provider. The free movement of services concerns all four described situations and in order to understand the first situation one must bear in mind that the development of the jurisprudence on services has occurred not only in judgments concerning the posting of workers but also in the other three situations. Due to this consideration, this study will not just be restricted to judgments concerning posting situations. When judgments on other areas are examined this will be done in relation to how they have been received in the field of posting of workers.

### 3.2 *In Search of the Prohibition of Restrictions*

In this section some general remarks concerning the free movement of services will be presented in order to illustrate the framework within which the case law on posting of workers operates. The following is a brief description of the development of the concept of restriction on the free movement of services. It does not claim to be exhaustive but introduces the general development of the concept of restriction on the free movement of services within which judgments on posting of workers are delivered.

Article 49 prohibits restrictions on the freedom to provide services on the grounds of nationality and place of establishment. The first paragraph of Article 49 EC states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

<sup>61</sup> See, for example, V Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 *Common Market Law Review* 43; Hatzopoulos and Do (above n 28); C Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw' (2001) 26 *European Law Review* 35; P Oliver and W-H Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407.

<sup>62</sup> See Barnard (above n 16), at 276 f.

<sup>63</sup> Bernitz and Kjellgren (above n 59), at least not mentioned in chapter 13 covering services.

<sup>64</sup> Steiner, Woods and Twigg-Flesner (above n 59), at least not in chapter 22 covering services.

For full understanding of the “concept” of restriction of the free movement of services and its justification one must bear in mind the wording of the third paragraph of Article 50 (*italics added*):

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under *the same conditions* as are imposed by that State on its own nationals.

The content of the articles has remained unchanged. An interpretation of the articles is that the Treaty prohibits measures that treat foreign entrepreneurs providing services differently to host state entrepreneurs, since such treatment will constitute a restriction on the free movement of services. The Treaty appears to intend that the foreign service providers have to comply with all measures imposed on the national service provider. The prohibition of restrictions on the free movement of services has undergone a development, propelled first and foremost by the judgments of the ECJ, but also through legislative acts by the other institutions.

In 1961, only four years after the Treaty of Rome was adopted, the Council of the European Economic Community adopted a General Programme for the abolition of restrictions on freedom to provide services.<sup>65</sup> The General Programme embroiders the Treaty’s provisions but the point of departure is the same. The foreign entrepreneurs have to comply with all the measures applicable to national service providers. Only when those measures exclusively or principally have as their effect to hinder the foreign service providers are they to be regarded as restrictions.

One of the ECJ’s first judgments on the free movement of services, *van Binsbergen*, was delivered in 1974. It concerned a legal requirement that a court counsel had to be established in the same country as the court where he or she appeared as representative. A requirement of that kind would, according to the ECJ, deprive Article 49 of all its useful effect. With regard to the particular nature of services a specific requirement imposed on a person could not be considered incompatible with the Treaty where it had as its purpose the application of professional rules justified by the general good. The ECJ concluded that Articles 49 and 50.3 are to be interpreted as meaning that a Member State cannot, through an imposed requirement of residence, deny a person the right to provide services.<sup>66</sup> The ECJ, in the same judgment, also added that the provisions of Article 49 abolish all discrimination on the grounds of nationality or place of establishment. The obligation provided by the Article was well defined and had vertical

<sup>65</sup> General Programme for the abolition of restrictions on freedom to provide services [1962] OJ C 2/32, English special edition: Series II, Volume IX, 3–6.

<sup>66</sup> Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 (*van Binsbergen*), para 17.

direct effect.<sup>67</sup> The Court in this judgment took a first step away from the “*same conditions*” provided in Article 50.3.

In 1978, the ECJ returned to a more literal interpretation of the article when in *Koestler*, after reference to the mentioned General Programme, it stated:

[T]he treaty, whilst it prohibits discrimination, does not impose any obligation to treat a foreigner providing services more favourably, with reference to his domestic law, than a person providing services established in the Member State where the services have been provided.<sup>68</sup>

The judgment concerned bank transactions performed on the order of a German national who resided some of the time in France. The ECJ implies that regulatory relief for the foreign service providers is more favourable treatment than the application of the entire regulations. In 1978, the opinion of the ECJ was that the Member States were given a margin of interpretation to impose regulations on service providers as long as they were not discriminatory.

In *Webb*, delivered in 1981, the Court returned to the track set out in *van Binsbergen*. The judgment concerned criminal proceedings against a manager of a British company which supplied manpower in the Netherlands. The company did so without the licence required by and issued by the Ministry of Social Affairs in the Netherlands. The ECJ held that Article 49’s essential requirements abolish all discrimination against a person providing services on the basis of his nationality or the fact that he is established in another Member State.<sup>69</sup> No reference was made to the general prohibition against discrimination, in Article 12 EC. The conclusion is that Article 49 EC constitutes its own independent prohibition of discrimination.

The ECJ in *Webb*, as a reply to the German and Danish governments’ argument that all legislation of the host state should be applied to a service provider, produced an explanatory remark regarding the aim and meaning of Article 50(3). It first held that the principal aim of the articles was to ensure that the service provider did not suffer from discrimination in favour of the nationals in that state. Then it stated:

[i]t does not mean that all national legislation applicable to nationals of that state and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States.<sup>70</sup>

<sup>67</sup> Case 33/74 *van Binsbergen*, para 27. See also Craig and de Burca (above n 59), 764.

<sup>68</sup> Case 15/78 *Société générale alsacienne de banque SA v Walter Koestler* [1978] ECR 1971, para 5.

<sup>69</sup> Case 279/80 *Webb* paras 13 and 14; the wording is clearer in the German and Swedish versions.

<sup>70</sup> Case 279/80 *Webb*, para 16.

The ECJ seem to take the stance that not all requirements could be imposed on the foreign entrepreneur. The development of how the concept of restriction was to be understood continued in *Seco*.<sup>71</sup> This case, which was adjudicated in 1982, concerned two French companies who posted workers – non-nationals of a Member State – in Luxembourg where they carried out construction work.<sup>72</sup> The workers remained registered under the French social security scheme. According to the law of the host state the workers were in principle insured under the old age and invalidity insurance scheme, to which contributions were paid by the employer (half) and the employee (the other half). Foreign employees could be exempted from the obligation to pay such contributions, but not employers.

The ECJ in *Seco* repeated what was held in *Webb*, that Articles 49 and 50 EC prohibited all discrimination on the ground of nationality or place of establishment and then held that this includes not only overt discrimination based on nationality, but also all forms of covert discrimination, in other words, when the defining criterion is neutral, but the effect is discriminatory. Such is the case when an obligation to pay the employer's share of social security contributions is extended to foreign employers who already have to pay such contributions in the home state. The foreign employers have to bear a heavier burden than those established within the home state. The Court classified such a dual burden imposed by the obligation as discriminatory and therefore covered by the prohibition against restrictions on the free movement of services.<sup>73</sup> The ECJ at the beginning of the 1980s apparently interpreted Articles 49 and 50 as a prohibition of discrimination. The Member States were not allowed to discriminate against foreign service providers. It was unclear how this discrimination was identified. The ECJ used a distinction between overt and covert discrimination. The focus was, regardless of what terminology was used, on the establishment of discrimination.

The factual circumstances in *Rush* have been described above. The ECJ in the judgment added substance to Article 50(3) by stating that the provision precluded a Member State from prohibiting a service provider from moving freely in its territory with its staff. It also prevented making such a movement subject to restrictions such as work permits. Imposing such requirements on service providers established in another state would be discriminatory.<sup>74</sup> Pointers in the direction of this judgment could be seen already in the

<sup>71</sup> Case 62 and 63/81 *Seco*.

<sup>72</sup> At the time of the adjudication of the case the ECJ did not use the term “posting of workers”; the English version uses “seconded workers”.

<sup>73</sup> Case 62 and 63/81 *Seco*, paras 8 and 9. The definition of covert discrimination given by the Court seems similar to the indirect discrimination defined in some directives. See, for example, Article 2.2 b in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>74</sup> C-113/89 *Rush*, see particular para 12.

General Programme. As already mentioned, the Programme held that provisions that limited or excluded rights normally attached to the provisions of services should be eliminated.<sup>75</sup>

### 3.3 *The Säger formula*

In 1991 the ECJ united behind a formula that came to be guiding in the subsequent case law on the free movement of services. *Säger* concerned patent renewal services provided by an English company in Germany. The German lawyer Manfred Säger complained that the English company Dennemeyer provided these services without the necessary licenses. The ECJ in its judgment pronounced the following formula:

Article [49] of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>76</sup>

Through the judgment the ECJ abandoned the “same conditions” found in Article 50.3 EC and held that all restrictions had to be abolished. Through the use of such a formula the ECJ removed the need to classify the measures as discriminatory in order to establish that the measure was non-compatible with the Treaty. The “*not only*” of the formulation indicates that the expansion of the concept of restriction did not include an abandonment of the prohibition of discrimination.<sup>77</sup>

The Court in the same judgment stated that Member States could not make the provision of services dependent on the service provider complying with all conditions required for establishment. This was, as mentioned above, already stated in *Webb*.<sup>78</sup> Although an affirmation of something already established, it is mentioned here since the judgment meant a shift away from what had previously been the state of the law. The *Säger* formula has been repeated in many of the subsequent cases concerning restrictions on the free movement of services.<sup>79</sup> The formula has been applied repeatedly in judgments where the factual circumstances have concerned the posting of workers.<sup>80</sup>

<sup>75</sup> See under Title III of the General Programme.

<sup>76</sup> C-76/90 *Säger*, para 12.

<sup>77</sup> See, for example, MP Maduro, ‘Harmony and Dissonance in Free Movement’, in Andenaes and Roth (above n 60), 41, 60.

<sup>78</sup> See Case 279/80 *Webb* and C-164/99 *Portugaia*, para 17.

<sup>79</sup> Barnard regards the *Säger* judgment as building on a two-stage analysis based on market access (restriction and justification), see Barnard (above n 16), 273 ff. In a later paper she refers to the formula introduced in *Säger* as the “Säger market access approach”, see Barnard, ‘Employment Rights, Free Movement under the EC Treaty and the Services Directive’, in M Rönmar (ed), *EU Industrial Relations v. National Industrial Relations* (Kluwer Law International 2008).

<sup>80</sup> See, for example, C-43/93 *Vander Elst*, para 15.

This development has continued after the Court's judgment in *Säger*. The ECJ widened the scope of the concept even further. Without reasoning, it added another element to the meaning of a restriction. Not only are restrictions that are liable to prohibit or otherwise impede the activities of a provider of services covered by Article 49, but so too are those measures that render them less attractive.<sup>81</sup> It is sufficient that the measure make the activities of the service provider less attractive for the measure to constitute a restriction within the meaning of Article 49.

Through this addition and the *Säger* judgment the ECJ brought the reasoning on free movement of services in closer proximity to that regarding goods in the *Dassonville* formula, which was delivered in 1974. This had already been done in relation to the free movement of workers.<sup>82</sup> The famous *Gebhard* formula<sup>83</sup> addressed all four freedoms.<sup>84</sup> This later development shows that it is not necessary to determine that there has been any "real" restriction.<sup>85</sup> It is enough that a purchaser of a service considers the "foreign service" to be less attractive because of the measure in order for it to be regarded as a restriction. The opposite should also apply: if a service provider, because of the measure, finds it less attractive to cross the border into another Member State to pursue his activities there, that measure should be regarded as a restriction. The Court in *Mazzoleni* offered clarification about how to identify such a restriction. Application of national rules that involve expenses or additional administrative burdens makes service provision less attractive.<sup>86</sup>

### 3.4 Summarising Conclusion

The contemporary scope of the concept of restriction on freedom to provide services has evolved over time. Prohibition of restrictions is the foundation in the regulation of the free movement of services. The contemporary concept covers a wide variety of measures, both discriminating and non-discriminating but restricting measures. What

<sup>81</sup> C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* [1996] ECR I-1905 (*Guiot*) para 10, the exact wording is not used in *Guiot* but that is where the change took place.

<sup>82</sup> C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663 (*Kraus*), para 32.

<sup>83</sup> C-55/94 *Gebhard* para, 37. It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain.

<sup>84</sup> Woods notices the difference between the *Säger* formula and the *Dassonville* formula, '[the] test in *Säger* seems to require a slightly more concrete impediment of the provisions of services.' See Woods (above n 50), 197 and 212.

<sup>85</sup> For a similar opinion at least concerning the *Dassonville* formula, see P Syrpis, *EU Intervention in Domestic Labour Law* (Oxford University Press, 2007), 24.

<sup>86</sup> C-165/98 *Mazzoleni*.

originally only prohibited discrimination now also covers measures that make services less attractive. No further addition – as far as I know – has been made to the concept of a restriction. Development here has been continuous since the foundation of the Community in the 1950s. The ECJ has reduced the size of the holes in the net used for catching restrictive measures. The potential catch of measures covered by the contemporary prohibition of restrictions is almost unimaginable.

This paper does not contain any extensive discussion on direct effects, but an observation on this subject in relation to the development described here is appropriate. *Walrave and Koch* concerned pace-makers in international cycling races. The ECJ stated that Article 49 contains a prohibition of any discrimination on nationality. This prohibition extends to rules issued by others than public authorities aimed at “regulating in a collective manner gainful employment and the provision of services”.<sup>87</sup> The judgment was delivered in 1974 and, as shown above, restrictions at that time were interpreted as “only” prohibiting discrimination and not the contemporary obligation not to make the provisions of services less attractive.<sup>88</sup> What was conferred upon the private parties through the judgment was an obligation not to discriminate, in other words to treat nationals from other Member States the same way as they treated their familiar domestic actors. The case was cited more than twenty years later in the judgments *Laval* and *Viking*, in which Articles 43 and 49 were given horizontal direct effect in relation to trade unions.<sup>89</sup> The obligation imposed today, with the contemporary meaning of prohibition, is more burdensome for the private parties than when first introduced in 1974. The private actors may have to provide, in the form of a Community law, acceptable justification for their responsibility for making it less attractive to provide services.

The case law on free movement of goods includes some of the classic cases establishing profound principles of free movement within the Community. The Treaty prohibits quantitative import and export restrictions and measures having equivalent effect

<sup>87</sup> Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405 (*Walrave and Koch*), paras 16–17.

<sup>88</sup> The Swedish Labour Court in the decision requesting the preliminary ruling in *Laval* held that Article 49 and 50 EC had both horizontal and vertical effect, see AD 2005 nr 49, at 21. This can be questioned and one opinion is that the judgment did not settle the question of horizontal direct effect, see Barnard (above n 16) 283 f. One can argue that the ECJ’s *Bosman* judgment conferred horizontal direct effect on Article 39. See C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I- 4921, paras 82–87. N Reich made that argument in ‘Horizontal liability in EC law’ (2007) 44 *Common Market Law Review* 705.

<sup>89</sup> C-341/05 *Laval*, para 98; C-438/05 *Viking Line*, paras 33–34.

through Articles 28–30 EC. In 1974, the ECJ created what is now known as the *Dassonville formula*. According to this formula all trading rules enacted by Member States, which are capable of hindering *directly or indirectly, actually or potentially* intra-community trade, are to be considered as measures having an effect equivalent to quantitative restrictions and are thus prohibited.<sup>90</sup> In the early 1990s the ECJ restricted the reach of the *Dassonville* formula with its judgment in *Keck*.<sup>91</sup> The Court stated that the application of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States, as long as those provisions apply to all actors operating within the Member State and affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. By excluding some types of regulations the Court limited the reach of the *Dassonville* formula.

The ECJ's development of the concept of restriction on the free movement of services has brought it more in line with the Treaty's provisions on free movement of goods. It can be argued that such a tight net imposes too heavy a burden on the Member States.<sup>92</sup> The tightened net may also be said to ensure that entrepreneurs wishing to provide customers in other countries with services may do so without suffering from, for them, costly and burdensome requirements that may act discouragingly. A difference between the reach of the *Dassonville* and the *Säger* formulas remains. The reach of the *Dassonville* formula, concerning the free movement of goods, was limited in *Keck*. Such a limitation has not been introduced in the field of services.

## **4. Restricting the Posting of Workers**

### *4.1 Introduction*

The previous section described the general development over time of the “restriction” concept. This section will provide an overview of factual restrictions identified in the case law on posting of workers. The inventory will examine what has actually been considered to be a restriction on the free movement of services in order to produce an overview of measures that have been considered to restrict entrepreneurs providing services using posted workers.

### *4.2 Inventory of Restrictions*

The ECJ has delivered several judgments in which the factual circumstances have concerned the posting of workers. The inventory will provide a rough division of the

<sup>90</sup> Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, (*Dassonville*), para 5.

<sup>91</sup> C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 (*Keck*).

<sup>92</sup> See Syrpis (above n 85), 114.

judgments into different categories. The categorisation is based on the restriction that has been identified in the judgment. The inventory will also provide some examples of the ECJ's reasoning under each category.

The inventory will examine the impact of the *Säger* judgment and the development of the concept of restriction on the free movement of services, in the part of the case law on free movement of services that concerns posting of workers. Examples of identified discrimination that has appeared in the judgments after the ECJ judgment in *Säger* will be presented.

#### 4.21 Funds

The first category identified in the judgments deals with something here named “funds”. An obligation was imposed upon the entrepreneur (employer) to pay contributions to a system created by both laws and collective agreements and made generally applicable through government action.

The first judgment, which concerned an employer’s obligation to contribute to a fund, is *Seco*. Two French companies posted workers in Luxembourg where they carried out construction work.<sup>93</sup> The workers remained in the French social security scheme. According to the law of the host state the workers were in principle insured under the old age and invalidity insurance scheme, to which contributions were paid half by the employer and half by the employee. Non-Luxembourgian employees could be excluded from the obligation to pay such contributions, but not the employers. The ECJ held that such an obligation should be regarded as covert discrimination, since no regard was shown to what the employer paid in the home state.<sup>94</sup>

In 1996, the ECJ delivered a judgment reviewing a similar situation. *Guiot* concerned criminal proceedings against the manager of a Luxembourgian company. The company had failed, as required by Belgian law, to pay the contributions to “*timbres-fidélité*” and “*timbres-intempéres*” for four workers who had worked on a construction site in Belgium. The requirement was imposed through a generally applicable collective agreement. The ECJ concluded, after citing *Säger*, that such an obligation imposed an additional burden on the foreign entrepreneur. Regardless of whether it applied equally to national and foreign entrepreneurs, it constituted a restriction on the free movement

<sup>93</sup> The English and the German versions do not use the terms “posting” or “*Entsendung*”, which are the terms used today. The Swedish translation produced in the beginning of the 1990s, however, uses the term “*utstationering*”, which is the same as the contemporary term.

<sup>94</sup> Case 62 and 63/81 *Seco*, paras 8–9.

of services.<sup>95</sup> The reasoning in *Guiot* was repeated in the subsequent judgments *Arblade* and *Finalarte*.<sup>96</sup>

There is a shift in the reasoning between the first mentioned *Seco* and the subsequent adjudicated cases *Guiot*, *Arblade* and *Finalarte*. In the three later judgments the ECJ did not find it necessary to classify the imposed obligation as discriminating. The obligations' restricting effect was sufficient to classify them as restricting the free movement of services.

#### 4.22 Permits

A permit may be an effective way of limiting the number of actors engaging in a particular activity. The motives behind a permit may vary but one common dominator is that a certain procedure has to be followed and particular conditions have to be met. Here, some judgments on the permits affecting entrepreneurs posting workers will be examined.

In *Webb*, the ECJ first concluded that the provision of manpower is a service within the meaning of Articles 49 and 50. The second question asked by the national court was whether a Member State, without breaching the mentioned articles, could impose a requirement to possess a licence for providing such services, when the company already possessed such a licence in the home state. The ECJ, after holding that Articles 49 and 50 abolish all discrimination, established that, due to the particular nature of the services in question, the requirement of a licence was a legitimate policy choice. The ECJ then exemplified under what conditions such a licence would be excessive. The procedure had to heed the requirements of the state of establishment.<sup>97</sup> In 1981, the conclusion was that the specific licence was a legitimate policy choice pursued in the public interest. The ECJ did not explicitly conclude that the requirement was a restriction on the free movement of services.<sup>98</sup>

In *Rush* the ECJ was asked whether a Member State could impose conditions such as the need to obtain work permits for its staff. The ECJ, who had already proclaimed that the Member States could not prevent service providers from bringing their own staff, held that Articles 49 and 50 also prohibited making the movement subject to an obligation to obtain a work permit for the staff. Such conditions discriminate against the foreign service provider in comparison to his competitors in the host state, since they are allowed to move freely.<sup>99</sup>

<sup>95</sup> C-272/94 *Guiot*, in particular paras 14 and 15.

<sup>96</sup> C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-8453 (*Arblade*), paras 50 and 51; C-49/98 *Finalarte*.

<sup>97</sup> Case 279/80 *Webb*.

<sup>98</sup> Case 279/80 *Webb* paras 18–19.

<sup>99</sup> C-113/89 *Rush*, see in particular para 12.

*Vander Elst* was delivered in 1994 and concerned the manager of a Belgian company who posted eight workers to France for a demolition project. Four of them were Moroccan citizens lawfully residing and working in Belgium. He was fined, in France, for having foreigners employed on French territory without notifying the immigration office and also for not having the appropriate work permits. Vander Elst, who had ensured that the four Moroccans had the necessary visa for staying in France for one month, appealed against the decision. The work permit condition was imposed regardless of the nationality of the employer and found to be contrary to Articles 49 and 50. The ECJ emphasised that the Moroccans were lawfully residing in Belgium. Thus an imposed requirement to possess a work permit conferred an additional burden upon the foreign entrepreneur.<sup>100</sup> The additional burden to be carried by the foreign service provider was deciding when non-compatibility with the Treaty was established. The ECJ's reasoning was not dressed in terms of discrimination.

The ECJ confirmed the reasoning from *Vander Elst* in *C-445/03 Commission v. Luxembourg*. The Commission there explicitly argued that to require posted workers who were not EU nationals to possess work permits was discrimination. The ECJ concluded that such permits constituted a restriction on the free movement of services. The ECJ thus did not confirm the Commission's argument.<sup>101</sup> In *C-168/04 Commission v. Austria* the factual circumstances did not concern an actual permit but rather the EU posting confirmation stipulated by Austrian law. Confirmation was needed when providing services that were carried out by employees who were not EU nationals. In order to obtain confirmation the employee had to have been employed for a year or possess an employment contract of indefinite duration. The confirmation also required that the Austrian wage and employment conditions had to be met during the period of the posting. According to the ECJ it was indisputable that the EU posting confirmation constituted a restriction on the free movement of services. It was an authorisation procedure that had to be issued before the posting could be carried out. It could not be seen as a merely declaratory procedure.<sup>102</sup> Similar reasoning was provided in *C-244/04 Commission v. Germany*.<sup>103</sup>

Again, the Court's reasoning has shifted from establishing discrimination to establishing a restricting effect. A permit's restricting effect is evident, a provider of services will be discouraged from providing services in another Member State if he knows that he needs a permit in order to pursue his activities there.

<sup>100</sup> C-43/93 *Vander Elst*.

<sup>101</sup> C-445/03 *Commission v Luxembourg* [2004] ECR I-10191.

<sup>102</sup> C-168/04 *Commission v Austria* [2006] ECR I-9041.

<sup>103</sup> C-244/04 *Commission v Germany* [2006] ECR I-885.

#### 4.23 Documents

An employer may have several obligations towards his employees. Such obligations may appear in different documents possessed by the employer.

The last question handled in *Arblade* concerned an obligation imposed on the employer to keep certain social and labour documents. According to the regulations of the host state an employer who employed workers in the Member State had to keep social documents at the workplace or at a certain address in the host state. The ECJ concluded that such an obligation constituted a restriction on the free movement of services.<sup>104</sup> In the later judgment *Finalarte* it was held that an obligation to provide certain authorities with information could be considered as a restriction on the free movement of services and in this case it was not motivated to provide the authorities with documents.<sup>105</sup> It has also been recognised as a restriction to impose an obligation to have certain documents translated into the language of the host state and to keep them at the building site.<sup>106</sup>

#### 4.24 Wage

Workers, whether posted or not, are entitled to remuneration for their labour in accordance with their contract of employment. The worker's claim to receive wages has its foundation in the individual employment contract. There are different ways of regulating the level at which the wage should be set, however. In a posting situation the question of who should have the primary responsibility for regulating the posted worker's wage level arises. Should it be that of the home state or the host state? How are such wage-regulating efforts to be considered from the perspective of restricting on the free movement of services?

The ECJ made a contribution to this discussion in 1982 with its judgment in *Seco*. The judgment, as mentioned, concerned the employer's obligations to pay contributions to a fund. The Court held:

It is well-established that Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.<sup>107</sup>

The Court's remark is peculiar since it did not have an effect on the outcome of the actual case. The factual circumstance did not concern wages. The Luxembourg government had argued that the fees imposed upon the foreign service providers would compensate for the advantage achieved by not complying with the minimum wage

<sup>104</sup> C-369/96 and C-376/96 *Arblade*, paras 56–62.

<sup>105</sup> C-49/98 *Finalarte*.

<sup>106</sup> C-490/04 *Commission v Germany* [2007] ECR I-6095.

<sup>107</sup> Case 62 and 63/81 *Seco*, para 14.

regulation. The remark can also be seen as a reply to the following statement made by the Advocate General:<sup>108</sup>

It is one of the fundamental features of the Common Market, which is to be attained *inter alia* by the freedom to provide services, that when providing services in another Member State any employer may in principle make use of the cost advantages existing in his country, including lower wage costs, under the competition which constitutes another objective of the Treaty.<sup>109</sup>

In the *Seco* judgment, the ECJ referred to the abovementioned principle as *well-established* Community law. This was made without any reference to previous judgments or any other legislative instrument issued by the Community. One interpretation of the statement is that the basis for the application of the minimum wage of the host state is taken from the “same conditions” of Article 50.3 EC.<sup>110</sup> The ECJ clarified that application of the host state minimum wage to a foreign entrepreneur could be compatible with Community law. The ECJ thus awarded the Member States some margin of interpretation concerning the application of “*their*” minimum wage to foreign entrepreneurs.

Eight years later, the ECJ repeated the formulation from *Seco* in *Rush*,<sup>111</sup> where it established that the Treaty precluded legislation hindering services to be carried out by staff brought from the state of establishment. There the statement from *Seco* was explicitly repeated as a reaction to the concerns expressed by the French government.<sup>112</sup> The ECJ's statement on this subject was of no importance for the actual outcome of the case.<sup>113</sup> Although regarded by Paul Davis as a ‘[b]asic error of the craft of judicial decision-making, [which] answered a question which was not necessary for its decision’<sup>114</sup> it was repeated in *Vander Elst* and also in *Guiot*.<sup>115</sup>

In *Arblade*, the factual circumstances concerned criminal proceedings against the managers of two companies who posted French workers in Belgium for construction work on silos storing white sugar. The managers were prosecuted for not complying

<sup>108</sup> See also Hellsten, (above n 42), 9 ff.

<sup>109</sup> Case 62 and 63/81 *Seco*, opinion of Advocate General Verloren van Themaat.

<sup>110</sup> For a similar reasoning see Däubler (above n 42).

<sup>111</sup> The statement has been described as a green light for a kind of restriction on the free movement of services. The restrictions are found in rules in law and universally (*allmängiltig förklarade*) collective agreements, see T Sigeman, ‘Fri rörlighet för tjänster och nationell arbetsrätt’, *Europarättslig tidsskrift* 2005, 465–495. Sigeman also recognizes the statement as an *obiter dictum*.

<sup>112</sup> C-113/89 *Rush* para 18; C-43/93 *Vander Elst*, para 21.

<sup>113</sup> Syrpis (above n 85), 109, has argued that the ECJ did not regard labour law legislation as a barrier to free movement, although he disregards this on the following page.

<sup>114</sup> P Davis, ‘The Posted Workers Directive and the EC Treaty’ (2002) 31 *Industrial Law Journal* 298.

<sup>115</sup> C-43/93 *Vander Elst*, para 23; C-272/94 *Guiot*, para 12.

with certain parts of Belgian social and labour legislation. One of the breaches consisted of not paying the minimum wage stipulated in a generally applicable collective agreement. The ECJ started by citing *Seco* and *Rush* and then added that legislation or collective agreements on minimum wage, in principle, could be applied to service providers operating within the territory. The *Arblade* judgment imposed conditions that had to be fulfilled by the minimum wage regulation in order for a breach thereof to be prosecutable. The provisions ‘[m]ust be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply’.<sup>116</sup> The ECJ in this part did not reason in terms of a restriction on the free movement of services. The statement was made after the repetition of the statement from *Seco* and *Rush*. It rather seems to focus on the legal authority requirement in criminal proceedings.<sup>117</sup>

In *Mazzoleni*, delivered in 2001, the ECJ was again asked to provide some clarification on this issue. The security company that posted personnel explicitly put forward the argument that it only had to comply with the minimum wage regulation of the home state, France.<sup>118</sup> The Court, in concurrence with the mentioned case law, held that Community law did not preclude imposing an obligation to pay the workers the minimum wage of the host state. The Court drew up some guidelines on when the application of minimum wage regulation is not motivated. Such an application may neither be necessary nor proportionate to the objective of protecting the workers under certain conditions. It was for the national authorities to determine whether application of the rules on minimum wages was necessary and proportionate, with evaluation of all factors. The ECJ did not explicitly consider the application of the minimum wage as a restriction on the free movement of services. The Advocate General in his opinion had concluded that the application of the minimum wage could constitute a restriction on the free movement of services.<sup>119</sup> The ECJ’s reasoning held that the application of minimum wage regulations could give rise to additional administrative burdens for the companies posting workers, something used as a criterion for identifying a restriction.<sup>120</sup>

*Portugaia*, delivered in 2002, is another judgment that concerned wages. Portugaia had paid its posted workers wages that were lower than those stipulated by the generally applicable collective agreement. Hence they were ordered to pay the difference between the wages paid and the wage stipulated in the collective agreement. The ECJ, after citing *Seco* and *Rush*, stated that the Member States’ *application of minimum wage*

<sup>116</sup> C-369/96 and C-376/96 *Arblade*, para 43.

<sup>117</sup> Nulla poena sine lege.

<sup>118</sup> C-165/98 *Mazzoleni*, para 12.

<sup>119</sup> C-165/98 *Mazzoleni*, Advocate General’s opinion para 19.

<sup>120</sup> C-165/98 *Mazzoleni*, in particular paras 24 and 36.

legislation to foreign service providers *pursues a public interest*, namely the protection of workers. The application of rules on minimum wages may under certain circumstances not be compatible with Articles 49 and 50 EC. It is to be determined whether the host state's regulation of minimum wages promotes the protection of *posted workers*. In order to do so the rules need to confer a genuine benefit on the posted workers that significantly increases their social protection. The community law principle – invented in *Seco* – was then referred to as something that was clear from the case law.<sup>121</sup>

The PWD now regulates which country's minimum wage should be applied. It is clear that the minimum wage of the host state should be applied to posted workers.<sup>122</sup> In the preamble of the PWD the principle first introduced by the ECJ in *Seco* is repeated.<sup>123</sup> According to the Directive, Member States shall ensure that posted workers are guaranteed, among other things, the minimum wage. The minimum wage is part of the PWD's 'hard core'.

The adoption of the posting directive did not settle the issue in question. In *Rüffert*, the ECJ held explicitly that the application of the minimum wage to foreign entrepreneurs imposed an additional burden and was therefore liable to make the provision of services less attractive, thus constituting a restriction on the free movement of services.<sup>124</sup>

#### 4.25 Collective Action

The ECJ's seminal decision in *Laval* and the closely connected *Viking* were the first judgments in which the ECJ balanced collective action against the rules on free movement. The question of whether collective action could be regarded as a restriction on an economic freedom started a heated debate. Many arguments were put forward concerning why the ECJ was not equipped to judge on this issue.<sup>125</sup> The arguments put forward were, however, disregarded by the ECJ.

The collective actions were taken by private subjects (trade unions). Therefore there was a question of horizontal direct effect. The ECJ settled that the provisions of the Treaty had horizontal applicability in this case. The ECJ moved on to assess whether the present collective actions in *Laval* constituted a restriction on the free movement of services. The ECJ concluded that *the right to take collective action* might force foreign entrepreneurs to sign the collective agreement for the building sector. That collective

<sup>121</sup> C-164/99 *Portugaia*, in particular para 21.

<sup>122</sup> See Article 3(1)(c) PWD.

<sup>123</sup> Recital 12 PWD.

<sup>124</sup> C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 (*Rüffert*) para 37.

<sup>125</sup> For an overview of the submission made to the ECJ on these questions see B Bercusson, 'The Trade Union Movement and the European Union: Judgement Day' (2007) 13 *European Law Journal* 279. He also identifies the differences in the arguments made between the "new" and the "old" Member States of the Community.

agreement contained terms that were more favourable than those in the ‘hard core’ of the PWD and also conditions that were not covered by it. The right to resort to collective action was recognised as a *fundamental right*. However, this trade union right is liable to make it less attractive or more difficult for a foreign entrepreneur to provide services. Thus it constitutes a restriction on the free movement of services. With regard to minimum wages, the restrictive effect was strengthened by the fact that the foreign entrepreneur may be forced through collective action to enter into negotiations with the trade unions. The negotiations will determine what minimum wage to pay the posted workers.<sup>126</sup> The ECJ in this part made no explicit reference to previous case law. The conclusion is in line with the post-*Säger* judgments on posting of workers, however.<sup>127</sup> In order to constitute a restriction, the measure has to make the provision of services less attractive. The risk of being subject to collective action makes it less attractive for entrepreneurs to provide services and so is a restriction on the free movement of services. The Court’s reasoning seems to make the collective action’s restrictive effect dependent on the requirements of the collective agreement. This collective agreement imposed both terms more favourable than those found in the ‘hard core’ and also terms concerning other matters than those found in the ‘hard core’. The provisions regarding wages, forced upon the foreign entrepreneur by means of collective action, enforce this restrictive effect. Is a possible conclusion that the collective actions would not have been considered a restriction on the free movement of services had it not been for these requirements?

In *Viking Line*, the same formal objections were raised regarding balancing collective action against free movement. The judgment concerned collective actions by the Finnish Seamen’s Union (FSU) and the International Transport Workers’ Federation (ITF) against Viking Line. The FSU demanded that the crew be increased by eight people and that Viking Line abandon plans to reflag the vessel “Rosella” to Estonia. The FSU had sent an e-mail to the ITF in which it held that “Rosella” was owned in Finland and that they had the right to negotiate with Viking Line. The ITF, in response to the request from the FSU, sent a circular asking their members to refrain from negotiating with Viking Line.<sup>128</sup> The judgment thus concerns the actions of both the FSU and the ITF. The FSU had given notice that they would take strike action against the “Rosella”. The action was never carried out, however. According to the ECJ it was undisputable that strike action, such as envisaged by the FSU, would make it less attractive or even pointless to exercise the right to free establishment. The action envisaged by the FSU was thus a restriction on the free movement of establishment.<sup>129</sup> The same conclusion

<sup>126</sup> C-341/05 *Laval*, paras 99 and 100.

<sup>127</sup> See Section 4.2.

<sup>128</sup> C-438/05 *Viking Line*, in particular paras 11–12 (ITF) and 16 (FSU).

<sup>129</sup> C-438/05 *Viking Line*, para 72.

was drawn regarding the actions of the ITF: they were liable to restrict Viking Line's exercise of free movement of establishment.<sup>130</sup> The conclusion is in line with the case law on establishment developed in the wake of the *Säger* judgment.<sup>131</sup> If collective action makes the exercise of free movement of establishment less attractive, then it is to be considered a restriction on free movement.

#### 4.26 Public procurement requirements

Public procurement is a procedure that is to some extent harmonised through community legislation.<sup>132</sup> The procedure has given rise to an extensive case law, which will not be examined here. Of interest here are requirements connected to the regulations imposed on those awarded a public contract. These requirements also have to be regarded by entrepreneurs posting workers.

The issue of whether these requirements are compatible with the free movement of services was one of the questions of law in *Rüffert*. In Lower Saxony, public contracts were awarded only to companies that undertook both to apply a regional collective agreement and to ensure that the sub-contractors they hired did the same. The judgment did not concern the rules on public procurement but instead primarily concerned an interpretation of the PWD. The ECJ held that imposing a requirement on foreign service providers to pay a minimum wage that was higher than that in the home state could impede or make the provision of services less attractive; in other words, Lower Saxony's measure was a restriction on the free movement of services.<sup>133</sup> The minimum wage found in the regional collective agreement was higher than that found in a universally applicable collective agreement applied all over Germany. The requirement imposed in the public procurement procedure was seen as a restriction on the free movement of services.

#### 4.27 Absolute restrictions

This type of restriction affecting entrepreneurs posting workers has been imposed by the ECJ in some judgments and goes beyond a "regular" restriction on the free movement of services.

[T]he requirement of a permanent establishment is the very negation of the fundamental freedom to provide services in that it results in depriving Article [49] of the Treaty of all effectiveness.<sup>134</sup>

<sup>130</sup> C-438/05 *Viking Line*, para 72.

<sup>131</sup> See C-55/94 *Gebhard*, para 37.

<sup>132</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114. See also Nielsen (above n 6), where she attributes the principle of transparency found in the Directive's Article 2 as being of importance for the ECJ judgment in *Laval*.

<sup>133</sup> C-346/06 *Rüffert*.

<sup>134</sup> C-493/99 *Commission v Germany* [2001] ECR I-8163, para 19.

The same conclusion has also been drawn in other judgments where a requirement to be established in the host state has been imposed.<sup>135</sup> The statement quoted was made in Case C-493/99 *Commission v. Germany* where the Commission sought a declaration that Germany had failed to fulfil its obligations. Legislation providing that construction companies established in other Member States may not provide trans-frontier services on the German market as part of a consortium unless they are located in, or at least have an establishment, on German territory, employ their own staff and have concluded a company-wide collective agreement for those staff, constitutes a restriction on the free movement of services.

The wording of the ECJ suggests that such requirements may be separated from the “ordinary” restrictions. The Court held that such a requirement not only restricted the free movement of services but in fact made the provision of services from other Member States impossible.<sup>136</sup> The measure constituted a total negation of the free movement of services. The ECJ did not classify the measure as discriminatory.

#### 4.28 Established Discrimination after *Säger*

The ECJ in *Säger* stated that Article 49 required *not only* the elimination of all discrimination *but also* the abolition of any restriction liable to make the provision of services less attractive. As shown in this chapter, the ECJ has applied the prohibition of restriction in many judgments concerning the posting of workers. The ECJ have also, in some of the judgments adjudicated after *Säger*, explicitly identified measures as discriminatory. The reasoning of these judgments will be presented here.

The third question in *Finalarte* concerned a provision in the German law on the posting of workers. According to the provision, all workers posted in Germany by a company established in another Member State – but only those workers – were regarded as a business. Another concept of business was applied to employers established in Germany. This could result in differences regarding the collective agreements’ scope of application. The Court regarded the provision as discriminatory. The result was that companies established abroad were always obliged to contribute to a fund. This was not the case for companies established in Germany. The provision was seen as discriminatory and thus had to be justified by the Treaty.<sup>137</sup>

*Portugaia*, as has been presented above, primarily concerned the application of minimum wages. The ECJ’s answer to the German Court’s second question, however, contained a discussion about discrimination. In Germany it was possible for companies established there to conclude collective agreements enabling a wage lower than that laid down in the general collective agreement. This possibility was not open to the

<sup>135</sup> See C-279/00 *Commission v Italy* [2002] ECR I-1425; C-493/99 *Commission v. Germany* [2001] ECR I-8163; and also C-355/98 *Commission v. Belgium* [2000] ECR I-1221.

<sup>136</sup> See Reich (above n 6), at 134.

<sup>137</sup> C-49/98 *Finalarte*, paras 77–83.

companies established in other Member States. The ECJ concluded that this constituted discrimination. The procedure created unequal treatment contrary to Articles 49 and 50 EC.<sup>138</sup> The situation in *Portugaia* was similar to that in *Finalarte*. The Court had, regarding the first question, applied the reasoning from *Säger*. This *unequal* treatment could, however, not meet one of the conditions set up in *Säger* which was that it should be applied without distinction.

C-490/04 *Commission v. Germany* concerned, among other things, a requirement in the German law on the posting of workers. According to the requirement, temporary employment agencies supplying labour in Germany had to make a declaration in German to an authority containing certain information. This had to occur before every new project began. Employment agencies established in Germany were not obliged to submit this required information every time the worker started on a new project. The ECJ emphasised that it was clear from the case law on free movement of services that the freedom to provide services in particular abolishes all discrimination on account of nationality or place of establishment. The mentioned provision meant that employment agencies established outside Germany were discriminated against. The provision was, according to the ECJ, not universally applicable to service providers.<sup>139</sup>

In *Laval*, the ECJ also established discrimination. It did so when answering the Swedish Labour Court's second question regarding the provision in the Swedish Codetermination act known as Lex Britannia. The ECJ repeated the mentioned reasoning from *C-490/04 Commission v. Germany* and pointed out: "it is clear from settled case law that the freedom to provide services implies, in particular, the abolition of any discrimination".<sup>140</sup> The Lex Britannia failed to take into account whether the foreign entrepreneur was bound by a collective agreement in the home state, regardless of the content of this collective agreement. The provision thus gave rise to discrimination since it treated the service provider in the same way as it treated a national company not bound by a collective agreement.<sup>141</sup>

In hindsight it is obvious that the ECJ answer to this second question was sufficient for the Swedish Labour Court to adjudicate the case. It had already, in its decision, concluded that had it not been for the Lex Britannia the collective action would have been unlawful according to the Swedish Codetermination act.<sup>142</sup>

The presentation shows that in the field of the case law on free movement of services that concerns posting of workers, the introduction of the formula from *Säger* did not

<sup>138</sup> C-164/99 *Potugaia*, paras 31–35.

<sup>139</sup> C-490/04 *Commission v Germany* [2007] ECR I-6095 paras 81–89.

<sup>140</sup> C-341/05 *Laval*, para 114.

<sup>141</sup> C-341/05 *Laval*, para 115–116.

<sup>142</sup> See AD 2005 nr 49; the conclusion is at p 27.

mean that ECJ abandoned the prohibition of discrimination. It has with some regularity occurred in case law in this field.

### 4.3 Concluding Remarks

Measures affecting entrepreneurs posting workers have to a large extent been assessed in line with the general case law on free movement of services. As mentioned, the free movement of services prohibits *not only* discrimination *but also* any restriction on the free movement of services. The examined case law illustrates the impact of the fact that the ECJ does not need to establish an occurrence of discrimination in order to classify a measure as contrary to Community law. Initially, Article 49's prohibition was interpreted as a prohibition of discrimination. This prohibition evolved to encompass any measure likely to make the provision of services *less attractive*. As shown, the ECJ did not abandon the prohibition of discrimination in the field of services, that is, posting of workers. The method of determining what constitutes a restriction is in line with the general case law on free movement of services. When the measure makes the provision of services less attractive it may be considered a restriction on the free movement of services.

A systematic conclusion from the judgments is that there is still a need to first determine whether the measure is discriminatory in the way described in Section 4.2.8. If this first test is passed, the second question will be to determine whether the measure is liable to make the provision of services less attractive. Both are types of measures are covered by Article 49 EC.

The *perspective* from which it is decided what makes the provision of services less attractive *is that of the entrepreneur*. Their interests are the guide when deciding whether a measure makes their activities less attractive. The same applies regarding discrimination; it is the entrepreneur who is discriminated against. From the entrepreneur's perspective the provision of services becomes less attractive if he has to contribute to a fund or if he is the subject of trade union collective action. The effects of and perceptions about the measure on/by those actually performing the service are irrelevant when determining whether a measure constitutes a restriction. Workers employed by the entrepreneur may to a large extent carry out the services; importance may be attributed to effects on them when assessing the justification of restrictions.<sup>143</sup>

The development to the expanded concept of a restriction had an immediate impact on the case law concerning the posting of workers. The covert discrimination introduced in *Seco* has, since the introduction of the *Säger* formula, been abandoned in the explicit reasoning of the ECJ in judgments concerning posting of workers. At least in this area the concept of covert or indirect discrimination seems to have become superfluous, at all events in the explicit reasoning of the ECJ.

<sup>143</sup> See Sections 5 and 6.

As mentioned, the ECJ has never limited the reach of the *Säger* formula with a *Keck*-like decision.<sup>144</sup> It has been argued that a *Keck*-like test should replace the *Säger* test when handling labour law restrictions. Such a test would catch only measures actually preventing access to the market, plus those that are discriminatory.<sup>145</sup> Could the introduction of such reasoning have produced another outcome in, for example, *Laval*? Lex Britannia would still have been considered discriminatory and thus *Keck*-like reasoning would not exclude it from the Treaty's reach: it would still have been declared unlawful. The Court's answer to the first question in *Laval* mainly concerned the interpretation of the PWD. The Directive's 'hard core' contains a list of labour law requirements that have to be applied by the service provider. The Directive also prescribes certain ways this has to be done. The Directive coordinates the procedures imposing requirements throughout the Member States. The final interpreter of this legislation is the ECJ and it would be inconsistent to adopt secondary law and then exclude it from interpretation. Before the adoption of the PWD a solution excluding labour law restrictions from the general restriction test in posting situations was possible. The adoption of the PWD has ruled out *Keck*-like reasoning, at least in the field of services that involve posting of workers. The free movement of establishment is not affected by the PWD which is why such a line of argument could not be ruled out concerning the freedom of establishment.

## **5. Justification**

### *5.1 Introduction*

The sections above have focused both on the general development of the concept of restriction in Article 49 and the restrictions identified in the field of case law on free movement of services that concerns the posting of workers.<sup>146</sup> In the following sections, the next step of compatibility assessment will be presented. A restriction on the free movement of services must be justified in order to be compatible with the Treaty. Only a non-justifiable restriction is incompatible with the Treaty. A division is made between the grounds found in the Treaty and the overriding requirements with regard to the public interest created by the ECJ. The latter will be examined in Section 6.

Again, one must bear in mind that Article 50.3 stipulates that a service provider entering another state for the purpose of providing services there may do so under the *same conditions* as those imposed on the national service provider. The presentation illustrated that the ECJ has expanded the concept of restrictions beyond the *same conditions* of Article 50.3 and a mere prohibition of discrimination.

<sup>144</sup> See Section 4.3.

<sup>145</sup> See Syrpis (above n 85), 113.

<sup>146</sup> See Sections 3 and 4.

The understanding of the Court's case law on the justification of restrictions on the free movement of services may be more complete if a distinction is made between Treaty justification and Court-created justification. The Court's expansion of the concept of restriction has created situations not entirely foreseen by the Treaty, since the Treaty stipulates only that service providers may enter another Member State and provide their services there under the same conditions as imposed on national service providers.<sup>147</sup> The Court's interpretation of restrictions also prohibits measures that treat them equally if they are liable to make the provision of services less attractive. The broad range of Article 49's reach catches not only measures that treat foreign service providers differently but also those who treat them the same. Therefore a wider basis for justification is needed in order to justify the larger number of restrictions caught by the Treaty.

The inventory above identified different types of restrictions on the free movement of services. The different types of restrictions identified above are all in need of justification. What grounds may justify the different types of restrictions? Who may utilise the different grounds for justification? When is it necessary to use which grounds for justification?

### 5.2 *Treaty provisions on justification*

Title III of the EC Treaty regulates not only the free movement of services but also that of workers, establishment and capital. Each part has its own provisions on justification, except for that on services.<sup>148</sup> Articles 49–55 EC do not contain any explicit provisions on justification but there is instead a reference to Article 46 which is found under the part that governs the right of establishment. The Article provides grounds on which an unequal treatment may be justified. It states:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

The wording suggests that Member States are allowed to treat foreign service providers differently on the grounds of public policy, public security or public health. We shall consider the following questions: *When* in posting situations is it necessary to make reference to the Treaty and the grounds for justification mentioned there? *How* are the concepts of public policy, public security and public health to be understood? *Who* is able to justify their action with reference to those grounds?

<sup>147</sup> Another possible reading of Article 49 is that the Court with its case law has created the same conditions proscribed in the Article: the elimination of the restricting burdens for the foreign companies entails a climate of “same conditions” between foreign and national companies. Such reading is however contradicted by the included prerequisite “[a]s are imposed by the State on its own nationals”.

<sup>148</sup> See Articles 39(3) EC workers, 46 EC establishment and 58 EC capital.

In *Bond* from 1988, which concerned a prohibition against advertising and the subtitling of television programs,<sup>149</sup> the ECJ held that one of the scrutinised measures was discriminatory. It then stated that national rules that are *not applicable to services without distinction* as regards their origin and therefore discriminatory, are compatible with Community law *only* if they can be brought within the scope of an express ground for derogation. In that case the public policy mentioned by Article 46 was the only ground possible.<sup>150</sup>

*Bond* did not concern a situation of a cross-border service provider, but rather a moving service.<sup>151</sup> In the later C-490/04 *Commission v. Germany* concerning an action for failure to fulfil an obligation under Article 49, the ECJ reviewed a German obligation imposed on foreign employment agencies to make a declaration relating to the place of the posted worker. The provision was classified as discriminatory. The Court then, with a slight adjustment, repeated what was held in *Bond*, that *national rules not universally applicable* to service providers are compatible with Community law *only* if they fall within the express derogation of the Treaty.<sup>152</sup>

In Section 4.28 the discriminatory measures identified in *Finalarte* and *Portugaia* were presented. The ECJ held that the provisions in *Finalarte* constituted discrimination against service providers on the ground of their place of establishment. The provision had to be justified by the Treaty in order to be compatible with Community law.<sup>153</sup> The reference to a ground of justification recognised by the Treaty ought to imply Article 46 and thus public policy, public security and public health. The ECJ, regarding the provision assessed in *Portugaia*, held that it created unequal treatment contrary to Article 49 and, since no ground of justification provided by the Treaty was invoked, it constituted an unjustified restriction on the free movement of services.<sup>154</sup> There seems to be a reference, though not explicit, to Article 46.

The second question in *Laval* concerned a provision in the Swedish Codetermination Act, known as Lex Britannia.<sup>155</sup> The rule was introduced after the Swedish Labour Court's judgment in the Britannia case. There it was held that collective action aimed at having a collective agreement amended or set aside was prohibited. The conclusion was

<sup>149</sup> Case 352/85 *Bond*.

<sup>150</sup> Case 352/85 *Bond*, paras 32–33.

<sup>151</sup> For a graphic illustration of the rather complicated circumstances, see Barnard (above n 16) 359.

<sup>152</sup> C-490/04 *Commission v. Germany* [2007] ECR I-6095, para 83–86.

<sup>153</sup> C-49/98 *Finalarte*, paras 76–82.

<sup>154</sup> C-164/99 *Portugaia*, paras 31–34.

<sup>155</sup> The ECJ's answer to the first question in *Laval* did not to any extent contain considerations concerning discrimination and the grounds found in Article 46 for justification were not mentioned.

reached by interpreting the existing prohibition of collective actions found in the Codetermination Act.<sup>156</sup> The judgment led to the introduction of a new paragraph,<sup>157</sup> according to which the mentioned prohibition on collective action was limited to actions taken because of working conditions that the Codetermination Act is directly applicable to. The mentioned provision was classified as discriminatory and here the ECJ made an explicit statement that there was a need for the grounds mentioned in Article 46.<sup>158</sup>

In the part of free movement of services that involves posting of workers discriminatory measures may be justified only on the grounds mentioned in Article 46. *Laval* also contained an extensive interpretation of the PWD, which does not seem to be altered when justification through the Treaty is necessary.

The ECJ, as noted above in *Laval* considered Lex Britannia as discriminatory and thus it could be justified only on the grounds provided by the Treaty in Article 46. The ECJ also produced a formula in the judgment about how to identify a provision as discriminatory:

It is also settled case law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.<sup>159</sup>

The Court referred to this as settled case law. The cases cited by the Court where the formulation occur all concern forms of taxation, in relation to both Articles 39 and 43 EC.<sup>160</sup> This way of identifying discrimination had not previously been used in judgments where the factual circumstances have concerned the posting of workers.<sup>161</sup> This way of identifying discrimination has in this context been noted by White. The application of different rules to the same situations has been held to be formal discrimination and the application of the same rules to different situations has been regarded as material discrimination.<sup>162</sup> In *Laval*, the Latvian undertaking was regarded, under the Swedish Lex Britannia, to be in the same situation as a Swedish undertaking, not bound by a collective agreement. To apply different rules to them was

<sup>156</sup> See AD 1989 nr 120. The ECJ's description of the judgment is found in para 14 of C-341/05 *Laval*.

<sup>157</sup> See F Schmidt, *Facklig arbetsrätt* (Norstedts juridik, 1997), 264 f.

<sup>158</sup> C-341/05 *Laval*, para 117.

<sup>159</sup> C-341/05 *Laval*, para 115.

<sup>160</sup> See C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225, para 30; C-383/05 *Raffaele Talotta v Belgian State* [2007] ECR I-2555, para 18; C-182/06 *État du Grand Duchy of Luxembourg v Hans Ulrich Lakebrink and Katrin Peters-Lakebrink* [2007] ECR I-6705, para 27.

<sup>161</sup> C-490/04 *Commission v Germany* [2007] ECR I-6095, paras 83-86; C-49/98 *Finalarte*, paras 76-82; C-164/99 *Portugaia*, paras 31-34.

<sup>162</sup> C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* [2000] ECR I-8081, para 51. See White (above n 54), 51.

discriminatory and, since not justified by Article 46, the provision was assessed as non-compatible with the Treaty.<sup>163</sup> To give it a name, Laval suffered from formal discrimination.

It has become clear through the judgments in *Portugaia* and *Finalarte* that with regard to the posting of workers discriminatory measures have to be justified on the grounds found in the Treaty. What is not clear is how a discriminatory provision is identified.<sup>164</sup> There are still some doubts about how the ECJ reasons when identifying provisions as discriminatory and thus necessary to justify on grounds of public policy, public security or public health. An illustration of this is the opinion given by Advocate General Mengozzi in *Laval*. He did not classify Lex Britannia as needing to be justified on the grounds mentioned in Article 46.<sup>165</sup>

It has been held that reference to the express derogations of the Treaty is necessary only when justifying direct discrimination.<sup>166</sup> This can be questioned, at least if one attributes the same meaning to direct discrimination as is provided in several directives referring to discrimination.<sup>167</sup> The ECJ, in the cases mentioned here, does not state that the scrutinised measures were directly discriminatory. In order to substantiate the need for Treaty justification, it is sufficient that the measure is discriminatory. In *Bond* the ECJ classified the provisions as not applicable to the service without distinction to their

<sup>163</sup> It was suggested to the Swedish government that they should abolish the provision in order to preserve the Swedish model, see N Bruun and J Malmberg, *Dagens Nyheter*, 25 January 2006.

<sup>164</sup> St Clair Renard (above n 50) in her thesis suggests using the term “open discrimination”.

<sup>165</sup> See C-341/05 *Laval*, opinion of Advocate General Mengozzi, for example para 241 and also the conclusion in para 309. Advocate General Kokott has suggested that the views of the Advocate Generals on the judgment were not altogether positive. See J Kokott, ‘Die Auslegung der Entsenderichtlinien in den Entscheidungen Laval und Rüffert’, in *Die Auswirkungen der Rechtsprechung des Europäischen Gerichtshofes auf das Arbeitsrecht der Mitgliedstaaten: Tagungsband vom Symposium am 26. Juni 2008 in Berlin*. Online at: [www.bmas.de/coremedia/generator/26986/property=pdf/2008\\_\\_07\\_\\_16\\_\\_symposium\\_\\_eu\\_gh\\_\\_kokott.pdf](http://www.bmas.de/coremedia/generator/26986/property=pdf/2008__07__16__symposium__eu_gh__kokott.pdf) (visited 30 April 2009).

<sup>166</sup> See White (above n 52), 51 f; T Blanke, ‘Streikende Wikinger vor dem Europäischen Gerichtshof’, *Arbeit und Recht* 2006, 1; Barnard (above n 16) 255; Andenaes and Roth (above n 60), 11.

<sup>167</sup> E.g., Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. Article 2.2 defines direct discrimination as follows: ‘direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’.

origin and therefore discriminatory.<sup>168</sup> In *Finalarte* as well as in *Portugaia* the provisions gave rise to inequality of treatment.<sup>169</sup>

*Laval*, however, provides us with a tool that may be used in those situations concerning the posting of workers in order to determine whether there is a need to justify the measure on the grounds found in the Treaty. The formal discrimination established in *Laval* needed to be justified by the grounds in the Treaty. Would the same conclusion be drawn regarding the situation when the same rules are applied to different situations (material discrimination)? The judgment seems to imply that it would, since it holds that discriminatory measures may be justified *only* on the grounds found in the Treaty.

In order to establish predictability one may wish that the formula from *Laval* would reoccur in the judgments concerning posting of workers. A linguistic understanding suggests that this will be the case, since “*only*” when treating similar situations differently or different situations differently can discrimination occur. The formula established a rule under which the Member States may adopt their action. The consistent use of this formula would remove an uncertainty from the system.

### 5.3 *Public Policy, Public Security, Public Health*

#### 5.31 Introduction

As shown, discriminatory measures may be justified only by public policy, public security and public health. The Treaty offers little guidance about the actual meaning of the concepts. The concepts of public security and public health are more easily understood. Public policy, on the other hand, is harder to comprehend without interpretative guidance. Public policy and public health are terms that occur also when allowing Member States to derogate from the free movement of goods,<sup>170</sup> workers<sup>171</sup> and capital.<sup>172</sup>

The concepts also occur in Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health. It has now been replaced by Directive 2004/38 on the right of citizens of the union to move and reside freely within the territory of the Member States.<sup>173</sup>

<sup>168</sup> Case 352/85 *Bond*, para 32.

<sup>169</sup> See C-49/98 *Finalarte*, para 82; C-164/99 *Portugaia*, para 34.

<sup>170</sup> Article 30 EC.

<sup>171</sup> Article 39 EC.

<sup>172</sup> Article 58 EC.

<sup>173</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

The case law on *public security* is sparse. It has been held that the Member States may make reference to public security when enacting protection against terrorism, crime and espionage.<sup>174</sup> Directive 2004/38 contains provisions regarding state actions against individuals on grounds of public security. A possible situation in connection to this report is the criminal activities of a posted worker resulting in his expulsion because he is regarded as a threat to public security.

According to Directive 2004/38, the only diseases that justify restrictions on free movement with reference to *public health* are those that are classified as epidemic by the World Health Organisation.<sup>175</sup> Governments have tried to argue that imposed requirements restricting free movement were motivated by public health, an argument that has been rejected by the ECJ.<sup>176</sup> The Commission has argued that public health as a ground for derogation is a little out of date, given the state of European integration.<sup>177</sup>

### 5.32 Public policy

Here “public policy”, referred to in Article 46 EC as a ground to justify discriminatory measures, will be examined. In German the wording is “*aus Gründen der öffentlichen Ordnung*”, in French “*par des raisons d’ordre public*” and finally in Swedish “*allmän ordning*”. The Treaty contains no definition of public policy. The concept of public policy interpretation is left to the Court and the Member States. The concept of public policy also occurs in Directive 2004/38. The PWD and the Service Directive also contain the concept.

Several judgments have concerned the interpretation of the first two mentioned directives. They will not primarily affect service providers that pursue their activities in the form of legal persons. The directives’ provisions, however, regulate posted workers and set up standards which have to be met before, for example, denying entry to a worker employed by a service provider.

Yvonne van Duyn was denied entry to England to take up work as a secretary with the Church of Scientology. The UK government considered the activities of the Church socially harmful. The ECJ, in the judgment delivered in 1974, held that the concept of public policy must be interpreted strictly when it is used in a Community context as justification for derogation from a fundamental freedom. Scope cannot be decided by one Member State alone without Community control. The circumstances that motivate the use of public policy may vary from time to time and from one Member State to

<sup>174</sup> White (above n 54), 92.

<sup>175</sup> See Article 29 of Directive 2004/38.

<sup>176</sup> Snell (above n 50), 177 f.

<sup>177</sup> White (above n 54), 92 f.

another, which is why the Member States are given a measure of discretion.<sup>178</sup> The Court's judgment interpreted the above-mentioned Directive 64/221.

The Court, in another judgment which concerned the expulsion of French citizen *Bouchereau* convicted in England for the possession of drugs, interpreted the meaning of Article 39(3). After citing *Van Duyn*, the Court held that the national authority's reference to public policy presupposes, in addition to the disturbance that any breach of law is, a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.<sup>179</sup> The ECJ in another case found the argument that private security firms pose such a threat unfounded, and thus not possible to use to justify an imposed requirement on place of business.<sup>180</sup>

The Commission, in a Communication regarding Directive 64/221, stated that the scope of the concepts of public policy, public security and public health should not be limited by an attempt to give them an exact and exhausting definition. This does not mean that the Member States are totally free to interpret the concepts, however.<sup>181</sup>

The observant reader will have noted that none of the mentioned judgments have concerned the interpretation of Article 46. The ECJ in *Omega* established a connection between the mentioned judgments and the "public policy" of Article 46. The factual circumstances concerned a decision by German police to ban a laser game with reference to public policy. In reply to the specific circumstances of the case, the ECJ held that Community law did not preclude that a laser game, involving fictitious acts of homicide, was subject to national prohibition adopted on the grounds of public policy by reason of the fact that it was contrary to human dignity.<sup>182</sup> The ECJ cited some of the here mentioned judgments and established that public policy in the context of justifying a derogation from the free movement of services has to be interpreted strictly and cannot be decided by a single Member State.<sup>183</sup> Also, in the context of Article 46, public policy may be relied upon only when there is a genuine and serious threat to a

<sup>178</sup> Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337 (*van Duyn*), para 18.

<sup>179</sup> Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 1999 (*Bouchereau*), para 35, see also Case 36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219 (*Rutili*), paras 27 and 28.

<sup>180</sup> C-355/98 *Commission v Belgium* [2000] ECR I-1221, paras 27–30.

<sup>181</sup> COM(1999) 372 Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, at 10.

<sup>182</sup> C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (*Omega*).

<sup>183</sup> C-36/02 *Omega Spielhallen*, paras 29 and 30.

fundamental interest of society. There must also be a link between the threat, which has to be current, and the measure adopted in order for a justification to be accepted.<sup>184</sup>

In order to be justified on the grounds found in the Treaty the measure has to be proportionate. If the aim can be achieved by a less restrictive measure then the ECJ will reject any attempt of justification.<sup>185</sup>

There are examples where the ECJ has answered attempts by a Member State to justify their imposed measures on grounds of public policy. In *Centros* it was argued, by the Danish government, that a requirement imposed on private limited companies to pay minimum capital shares served a double purpose: first to reinforce the financial soundness of the companies in order to protect the public, and second to protect all creditors against fraudulent insolvency due to the inadequate initial capitalisation. The Court did not accept the argument as falling within the ambit of Article 46's public policy.<sup>186</sup>

The ECJ in *C-168/04 Commission v. Austria* scrutinized a provision of Austrian law regarding automatic refusal of entry and residence permit if the application was made after entry. It was considered a disproportionate sanction. By not making it possible to adapt the situation to the situation of a legally posted worker, the provision constituted a restriction to the free movement of services. The Austrian government argued that they should be able to control whether the person posed a threat to public policy or public security. The Court rejected the Austrian argument. It held that the entry without a visa constituted an offence, but that the imposed measure was disproportionate to the gravity of the offence and the fact that the posted worker was in a lawful position in his home state and also fulfilled the requirements of the Austrian rules on posting. Such a worker could not automatically be considered a threat to public policy and public security.<sup>187</sup> In *C-490/04 Commission v. Germany* it was concluded that an obligation imposed in Germany on foreign employment agencies to declare not only the placement of the worker, but also any change in that respect, was discriminatory to foreign service providers. It held that the argument put forward by the German government that the obligation was needed in order to carry out effective monitoring was not something that could be covered by public policy, public security or public health.<sup>188</sup>

<sup>184</sup> *C-466/98 Commission v the UK* [2002] ECR I-9427, para 57.

<sup>185</sup> *C-54/99 Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-1335, para 18.

<sup>186</sup> *C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 (*Centros*), in particular, paras 32–34.

<sup>187</sup> *C-168/04 Commission v Austria* [2006] ECR I-0941.

<sup>188</sup> *C-490/04 Commission v Germany* [2007] ECR I-6095.

*Omega* remains the only exception within the field of services where public policy has been successfully argued before the ECJ. It is interesting that the state action reviewed in the judgment does not seem to include any discrimination.

### 5.33 Public policy in the posting directive

The PWD also contains the concept of public policy. According to Article 3.10, the directive does not prevent, in compliance with the Treaty, the application of terms and conditions of employment on matters other than those regulated in the ‘hard core’ in the case of *public policy provisions*.

In 2003, the Commission issued a communication on the implementation of the PWD in which it expressed its views on how Article 3.10 should be interpreted. The Article should be interpreted in light of the objective of the Directive to facilitate the provision of services, and bearing in mind that there is a connection between the provision found in the Directive and public policy in Article 46. The Commission mentioned judgments concerning public policy in the Treaty and concluded that there is a concurrence between the two provisions. The Commission also provided an example. Some rules on dismissal are to be considered as domestic public policy legislation. They cannot, within an internal relationship, be disregarded and a contract in breach of the rules would be null and void. These rules are not classified as public policy provisions or mandatory rules within the meaning of Article 7 of the Rome Convention, however. The concept within Article 3.10 covers provisions concerning fundamental rights and freedoms, such as the freedom of association. The Commission also mentioned in the Communication Declaration No. 10 made by the Council and the Commission in connection with the adoption of the PWD.<sup>189</sup>

The ECJ was confronted with the provision in *Laval* and, as mentioned, the ECJ concluded that the level of protection to be assured to the posted workers is limited to the hard core of the PWD.<sup>190</sup> The ECJ in *Laval* held that since the parties of the labour market – that is, trade unions and others – are not governed by public law they cannot base their actions on public policy as understood in the Directive in order to justify collective actions. According to Article 3.10, the Member States are able to impose terms and conditions on foreign service providers other than those in the ‘hard core’ in the case of public policy provision. These measures have to be imposed by the Member States.<sup>191</sup> It is thus clear that the use of public policy in the PWD is reserved for the authorities in the Member States.

<sup>189</sup> COM(2003) 458 final, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The implementation of Directive 96/71/EC in the Member States, at 12 ff.

<sup>190</sup> C-341/05 *Laval*, para 81.

<sup>191</sup> C-341/05 *Laval*, para 84.

The ECJ, in the subsequent C-319/06 *Commission v. Luxembourg*, made some introductory remarks concerning how Article 3(10) PWD should be understood. The factual circumstances concerned the Commission's application to the ECJ that it should declare that Luxembourg had failed to fulfil its obligation under the PWD and Article 49 by, among other things, classifying some legislation as mandatory provisions falling under public policy. The ECJ started by citing *Arblade* and the statement made there on how the Member States determine public-order legislation.<sup>192</sup> It continued by holding that the public policy exception is a derogation from the free movement of services and as such its meaning cannot be determined by one Member State alone. The Court concluded that the subjects listed in the 'hard core' are exhaustive. The Member States, as an exception, in compliance with the Treaty may apply terms and conditions of employment on other matters than the 'hard core' in the case of public policy provisions. The ECJ held that public policy in the context of the PWD – that is, derogation from the exhaustive 'hard core' – should be interpreted strictly and also that the scope cannot be determined by one Member State alone. However, the mentioned consideration does not free the Member States from the obligations in the Treaty. In the following tests of provisions it is clear that even though the Member State in this case had regarded the provisions as public policy provisions, they had to pass the usual "restriction on the free movement of services" test in order to be seen as compatible with the Treaty. The ECJ also held in the judgment that Declaration No. 10 of the Commission and Council was Community law and that it could be used when interpreting the PWD.<sup>193</sup> The European Parliament's legal affairs committee has held that the ECJ should not rely on the statement which was not adopted by the Parliament as co-legislator.<sup>194</sup> Supposedly, the Declaration was not published until 2003.<sup>195</sup>

The Court's reasoning is similar to that used in earlier judgments concerning Directive 64/221, a reasoning also used regarding Article 46 through the abovementioned judgment in *Omega*. There is in C-319/06 *Commission v. Luxembourg* no reference to Article 7 in the Rome Convention, 1980. It seems clear from the judgment that there is at least no evident relationship between that provision and Article 3(10). The public

<sup>192</sup> See C-369/96 *Arblade*, paras 30–31.

<sup>193</sup> The ECJ in the judgment uses and classifies Declaration No 10 as Community Law, see para 3. This document is not accessible at the Law Library in Uppsala, which since 1991 is part of the European Documentation Centre. It was also not accessible through any Internet resources.

<sup>194</sup> See the European Parliament Committee on Employment and Social Affairs, Report 30 September 2008 on Challenges to collective agreements in the EU (2008/2085(INI)), at 18; and European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).

<sup>195</sup> See J Cremers, 'Conflicting interpretations of the Posting of Workers Directive', in *CLR News* No 3/2000, 10.

policy of Article 3(10) should be seen as the Community law concept of public policy with resemblances to be found both in the Treaty and also in secondary law.

The private organs of the labour market have to comply with the 'hard core' and there are limits on how to impose requirements outside the 'hard core' that cannot be imposed through collective action. The private parties of the labour market are thus not given the same opportunity as the Member States to justify their actions.

#### 5.34 Private actions justified by the Treaty

The internal market consists of different labour markets divided by national borders. With regard to labour law issues, the regulatory competence and aspirations of private actors varies from one Member State to another. The greater the competence given to a private actor the greater their need for justification, in relation to Community law, may be. Most of the Treaty's provisions are aimed at the Member States. This has not stopped the ECJ from establishing that the Treaty binds not only the Member States but also their inhabitants, however. Likewise, the provisions on justification are directed towards the Member States. The question thus occurs of whether private actors, such as trade unions, are able to justify their actions with reference to the Treaty. Article 46's wording refers to provisions laid down in law, regulations or administrative actions. Such measures can be applied only by the state. Articles 39, 43 and 49 EC have all been awarded horizontal direct effect. Article 49 has to be regarded when private actors collectively regulate the provision of services.<sup>196</sup>

The ECJ in *Laval* cited *Bosman*,<sup>197</sup> in which the Court remarked that nothing precludes private persons from relying on the grounds found in the Treaty.

It has been argued that it would be surprising if private persons were not allowed to justify their actions on the grounds mentioned in Article 46, especially since *Bosman*, in which they were allowed to do so concerning free movement of workers.<sup>198</sup> Several authors seem to be of the opinion that private persons are able to justify their actions only when regulating conditions of employment in a collective manner. The private actors are then fulfilling a "semi-public" regulatory function.<sup>199</sup>

It has been argued, as already mentioned, that private actors are able to justify their actions with reference to the Treaty. Can the same conclusion be drawn after the ECJ's clarification regarding public policy found in Article 3(10) PWD? We have concluded

<sup>196</sup> C-341/05 *Laval*, para 98; see also C-438/05 *Viking Line*, paras 56-66; C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139 (*Angonese*). The effect of this horizontal direct effect is debated, however.

<sup>197</sup> C-415/93 *Bosman*, para 86.

<sup>198</sup> Snell (above n 50), 173.

<sup>199</sup> First put forward by JM Fernandez in 'Re-Defining Obstacles to the Free Movement of Workers' (1996) 21 *European Law Review* 313. See also White (above n 54); Snell in Andenaes and Roth (above n 60) at 231.

that there are several similarities between “Treaty” public policy and “PWD” public policy. The statement regarding public policy is delivered in the part of the *Laval* judgment that concerns the PWD. The conclusion in *Bosman* is clear and was delivered by eleven judges. Therefore the interpretation of the PWD should not have overturned the conclusion regarding the grounds found in the Treaty.

There is thus a difference between private actors’ possibilities of referring to the concept of public policy, dependent on whether it concerns the PWD or the Treaty. The PWD coordinates Member States’ law with regard to the posting of workers. The ‘hard core’ is an exhaustive list and the exception found in Article 3(10) PWD is not accessible to private actors. Even if private persons may justify their actions, those situations should be rare, especially since the situation has to be other than those covered by the PWD.

#### 5.4 Concluding remarks on Treaty justification

The grounds for justification prescribed in the Treaty are, as noted, to be interpreted strictly. The most well-known example of the ECJ accepting a restriction with reference to public policy is *Omega*. In the case law concerning posting of workers the ECJ has identified several restrictions that have needed to be justified on the grounds of public policy, public security or public health. None of the arguments put forward in those judgments were considered to fall under public security, public health or public policy.

The ECJ seems to attribute the same meaning to the public policy provision found in the PWD as to the one found in the Treaty. One difference is that private persons cannot justify their actions by reference to this provision. Article 3.10 contributes to limiting the properties of the PWD from the perspective of the trade unions. The ‘hard core’ is an exhaustive list, a ceiling and not a roof. In principle, no other terms and conditions may be imposed on the posting of workers. When wanting to impose conditions outside the ‘hard core’ the only possible way is through reference to public policy provisions. The Member States and also the private actors had a wider base for justifying their action before the PWD. Before the PWD entered into force, such requirements could have been justified by the protection of workers and also the prevention of unfair competition. It is notable that a different assessment is made regarding measures imposed in order, in accordance with Article 5 PWD, to ensure posted workers the conditions within the ‘hard core’.<sup>200</sup>

Restrictions are defined from the perspective of the service provider or consumer of services.<sup>201</sup> The grounds found in the Treaty are concerned with the interests of neither the employer nor the worker. The grounds examined here justify the most Community-hostile measures: discrimination on the grounds on nationality. The grounds have to be interpreted strictly, which serves a Community interest of keeping these measures as

<sup>200</sup> See C-60/03 *Wolff & Müller*

<sup>201</sup> See above Section 4.3.

few as possible. The grounds also serve the interest of the Member States. The Member States have an interest in protecting the values of particular importance to them. The Member States are, through utilisation of the concepts found in Article 46, given a limited possibility to protect some of their special interests.

## **6. Public Interest Justification**

### *6.1 Introduction*

The previous section examined justification on the grounds found in Article 46. A reading of the Treaty may leave the examiner with the impression that the Treaty's grounds are the only ones able to justify restriction on the free movement of services. The ECJ has, in its given role as the final interpreter of Community law, created an independent (from the Treaty) way of justifying restrictions on the free movement of services.

The ECJ in *van Binsbergen*, delivered in 1974, held that due to the particular nature of services, specific requirements imposed on persons providing services could not be considered incompatible with the Treaty where they had as their purpose the application of professional rules justified by the public interest.<sup>202</sup> No reference was made to the explicit grounds of Article 46 in that judgment and this process of justifying restrictions on the free movement of services has developed over time.

The introductory questions are similar to those put forward in the previous section: When is it necessary to make reference to a public interest; how should the concept of public interest be understood; and, finally, who may make reference to a public interest in order to justify their actions?

### *6.2 Procedure*

Not all restrictive measures are incompatible with the Treaty. This section will establish how such measures may be justified and thus made compatible with the Treaty.

The development of justification has run parallel to that of the development of restrictions. The ECJ in *Webb* (1981) held:

The freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all

<sup>202</sup> Case 33/74 *van Binsbergen*, para 12. In the English version the term “general good” is used; the German and the Swedish versions, on the other hand, use “public interest”: “die sich aus der Anwendung durch das Allgemeininteresse gerechtfertigter Berufsregelungen”, “om dessa krav är grundade på tillämpningen av sådana yrkesregler motvieras av allmän intresset”.

persons or undertakings operating in the said state in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in that member state.<sup>203</sup>

The – for the Community – fundamental principle of free movement of services may *only* be restricted by provisions justified by a public interest.<sup>204</sup> In the sections above on restriction it was shown that a restriction at the time of *Webb* (1981) meant a need to establish some form of discrimination. If not discriminatory, so that it had to be justified by the Treaty, it could be found to be compatible if justified by a public interest.

In *Säger*, delivered in 1992, the ECJ broadened the concept to include all sorts of measures with restricting effect. The judgment also delivered a formula on how to justify such a restriction on the free movement of services:

As a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.<sup>205</sup>

The criteria that a measure has to satisfy in order to be justified may be listed as follows:

- Justified by a public interest.
- Applied to all persons operating within the territory.
- The interest is not safeguarded by the home state.
- The requirement is appropriate for attaining the objective and does not go beyond what is necessary.

There are obvious similarities with the later so-called *Gerhard* formula, which is considered to apply to all four freedoms.<sup>206</sup> The *Gerhard* judgment concerned a lawyer who had established himself in Milan where he started to use the title “*avvocato*”. His use of the title prompted a reaction from the Milan bar association and the ECJ later delivered a preliminary ruling concerning the right of establishment. The basic discrepancy between the *Säger* and *Gebhard* formulas lies in the adaptation of the first to the special nature of cross-border services.<sup>207</sup> The service is temporary and the provider will return once it has been performed. His activities remain under the influence of his home state. The Member State where the service is performed also aspires to regulate the activities of the provider of services. Recognising that a service

<sup>203</sup> Case 279/80 *Webb*, para 17.

<sup>204</sup> As noted in fn 201, above, the English quote uses the term “general good”, while the German and the Swedish versions use terms which may be translated as “public interest”.

<sup>205</sup> C-76/90 *Säger*, para 15.

<sup>206</sup> C-55/94 *Gebhard*, para 37.

<sup>207</sup> See above Section 2 on the free movement of labour.

provider might have to fulfil the requirements of his home state, as well as those of the host state, is the difference between the two formulas. The public interest doctrine has been upheld in an almost endless number of judgments regarding entrepreneurs providing labour through posting of workers and the ECJ in those judgments always regarded the requirements in the home state.<sup>208</sup>

Inherent in the formula is a limitation of the field of application. Only measures that are applied to all persons within the territory are covered. Such discriminatory measures as were identified in Section 4.28 above may not be justified with reference to a public interest.

The use of a public interest justification is as frequent in the judgments as that of identifying a restriction. Restrictions making the provision of services less attractive, as well as measures that constitute a total negation of freedom to provide services, may be justified by a requirement of overriding public interest.<sup>209</sup>

#### 6.21 Public interest

The judgment preceding *Säger* in the European Court Reports is *Gouda*.<sup>210</sup> The judgment's factual circumstances concerned the broadcasting of television programmes. In the judgment the ECJ made a list of the different requirements of overriding public interest, which it had previously recognised. The recently adopted Service Directive also contains the concept of overriding public interest and its recital lists the Court's previously recognised interests; in Article 4.8 there is a definition of the concept.<sup>211</sup>

Reasons of overriding public interest are special interests that have been regarded as so important that they may infringe the fundamental freedoms. The list contains various items, ranging from consumer protection to environmental concerns. Determining the compatibility of a measure with reference to a public interest always requires a balancing act in order to decide whether the measure is proportionate. Not all public

<sup>208</sup> C-43/93 *Vander Elst*, para 15; C-272/94 *Guiot*, para 11; C-369/96 *Arblade*, para 34; C-165/98 *Mazzoleni*, para 25; C-131/01 *Commission v Italy* [2003] ECR I-01659, para 28; C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, para 21.

<sup>209</sup> See eg C-493/99 *Commission v Germany* [2001] ECR I-8163.

<sup>210</sup> C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007 (*Gouda*), para 14.

<sup>211</sup> See Directive 2006/123/EC Article 4(8) and the Recital para 40. The definition is as follows: "Overriding reasons relating to the public interest" means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives'.

interests have a clear labour market connection but some do, and in what follows a detailed examination of the lines of reasoning surrounding the reasons of overriding public interest that most affect the labour market will be presented.

#### 6.22 Protection of workers

The protection of workers was first recognized as a reason of overriding public interest in *Webb*.<sup>212</sup> An introductory question is: *which workers* are affected by the overriding interest: the posted workers or the workers of the host state? Are their interests concurring or deviating? Even if the posted workers, according to the ECJ, do not gain access to the labour market, the individuals populating the two groups may be considered as competitors. They may even work on the same building site or at the same company. High standards of worker protection for the posted workers could serve the interest of the workers of the host state since it would not put a downward pressure on their levels of protection.

In this section some lines of reasoning from the judgments will be presented and examined in order to outline a picture of how to understand the use of protection of workers as a ground for justifying restrictions on the free movement of services. The balancing act of the, at times, opposing interests of free movement and worker protection will be highlighted in order to help clarify proportionality.

Both judgments, *Webb* and *Seco*, represent balancing acts. In *Webb*, it was held that licensing the provision of manpower was a legitimate policy choice in order to be able to refuse licences when the activities could harm good relations on the labour market or when the interests of the affected workforce were not adequately safeguarded. The licence requirement would only be proportionate to the aim of protecting the workers when consideration was shown to the demands imposed in the home state.<sup>213</sup> The last-mentioned step suggests that it was the protection of the posted workers that was in focus, since the conditions of the home state would not be of interest to workers in the host state. The recognition of potential harm to good relations on the labour market, however, seems connected to the interest of national workers. In *Seco*, delivered in 1982, the ECJ concluded that a general requirement imposed to pay social security contributions was not an appropriate method since it was unlikely to make the employer comply with minimum wage legislation and did not confer any benefit on the posted workers. The Luxembourg government had argued that the requirement to pay contributions was justified since it compensated the economic advantages achieved by not complying with minimum wage legislation. This argument was rejected by the ECJ.<sup>214</sup> Here, too, the interests of posted workers seem to have been at the forefront for the ECJ.

<sup>212</sup> Case 279/80 *Webb*, para 19.

<sup>213</sup> Case 279/80 *Webb*, in particular paras 19–20.

<sup>214</sup> Case 62 and 63/81 *Seco*, paras 10 and 13.

The balancing act continued in the cases adjudicated after *Säger*. The restrictive work permits reviewed in *Vander Elst* (1994) went further than necessary and thus were not justified by the protection of workers. The work permits went too far since the four Moroccan workers were lawfully residing in the host state. The posted workers never sought access to the French labour market. The permits had as their aim regulation of access of third country nationals to the French labour market.<sup>215</sup> The ECJ's primary concern was the posted workers' protection and their ability to perform the services intended.

*Guiot* concerned the requirement to pay “*timbres-intempéries*” and “*timbres-fidélité*”. The ECJ specified the public interest as being the *social protection of the workers* in the construction industry. The obligation to contribute to the funds was not justified when the workers in question – being the posted workers – received protection through fees paid in the home state.<sup>216</sup>

*Arblade*, delivered in 1999, contained several questions and various balancing acts.<sup>217</sup> The ECJ repeated its findings from *Guiot* concerning the reviewed obligation to contribute to a fund. The judgment is equally clear that it was the protection of the posted workers that was the concern of the Court. The final question concerned the obligation to keep social and labour documents, something that was considered a restriction on the free movement of services. However, this was justifiable by reason of overriding public interest, namely, the social protection of workers. In the absence of a system of the kind provided for in Article 4 of the PWD, the possession of certain documents may be the only appropriate method of enabling control of certain terms and conditions of employment.<sup>218</sup> According to the Article, the Member States are to establish a liaison office and information on employment conditions should be provided free of charge. The question of documents returned in C-490/04 *Commission v. Germany*, in which the Commission argued that Germany had failed to fulfil its obligation under Article 49 EC and the PWD by requiring that certain documents were to be translated into German. The Commission argued that the obligation to translate documents was made superfluous by the system for cooperation imposed by Article 4 of the PWD. The claim was rejected by the ECJ. Monitoring would be almost impossible if no documents in the language of the host state existed.<sup>219</sup> Provisions of this kind

<sup>215</sup> C-43/93 *Vander Elst*, paras 19–22.

<sup>216</sup> C-272/94 *Guiot*, in particular paras 16–17.

<sup>217</sup> Regarding the minimum wage, nothing is said concerning justification of the actual application of the host state minimum wage. This is because it was not considered a restriction and thus did not have to be justified.

<sup>218</sup> C-369/96 and C-376/96 *Arblade*.

<sup>219</sup> C-490/04 *Commission v Germany* [2007] ECR I-6095.

enable control, and thus also effective enforcement, of the national rules imposed on foreign service providers.

*Finalarte*, from 2001, was the preliminary ruling for no less than nine cumulated cases and contains detailed reasoning concerning justification on the ground of worker protection. The first question was whether or not Article 49 EC prevented the application of provisions in universally applicable collective agreements that obliged posting companies to contribute to a common fund for vacation. Such an obligation was established as a restriction, which could be justified by a reason of overriding public interest. However the provisions needed *to confer a genuine benefit for the posted workers* that significantly added to their social protection. The Court itself exemplified such advantages as the right to more holiday and higher daily allowances. When determining whether the provision conferred an actual additional benefit the national court had to consider whether the posted workers, after they had returned to the home state, could claim their due from the fund. If, after these considerations had been regarded, the national court considered that the provisions conferred a genuine benefit, it also had to be proportionate. The Court also held that Articles 49 and 50 EC did not prevent a Member State from extending legislation on holidays to posted workers. The ECJ in the judgment clearly stated that it was the protection of the posted workers that could justify the restriction.<sup>220</sup>

The Commission later sought a declaration from the ECJ that the legislation scrutinised in *Finalarte* breached Article 49. The ECJ in C-490/04 *Commission v. Germany* upheld the judgment in *Finalarte*. The Commission had only argued along the lines of a literal interpretation and thus had not considered whether the provisions conferred an actual benefit for the posted workers and whether it was proportionate. The ECJ rejected the claim made by the Commission.<sup>221</sup>

In *Mazzoleni*, the application of the minimum wage was considered a restriction on the free movement of services. In certain situations the applications of such rules would not be proportionate to the goal of worker protection. National authorities, before applying such legislation, had to ensure that it was necessary and proportionate.<sup>222</sup> The ECJ here concluded that the application of the minimum wage was a restriction that could be justified.

In *Portugaia* the first question asked by the German court was formulated so as to provide clarification about which workers were affected by the reason of overriding public interest, namely, the protection of workers. The court asked whether workers' social protection also included the protection of national industries and the reduction of internal employment for the purpose of preventing tensions on the labour market. After

<sup>220</sup> C-49/98 *Finalarte*.

<sup>221</sup> C-490/04 *Commission v Germany* [2007] ECR I-6095, para 50.

<sup>222</sup> C-165/98 *Mazzoleni*.

citing its previous case law in which the protection of workers had been recognised, the ECJ repeated the above-examined statement that Community law in principle does not prevent the application of minimum wage regulations on service providers.<sup>223</sup> The ECJ then drew the conclusion that the application of minimum wage legislation to foreign service providers pursues the public interest of protection of workers. The application may, however, not always be motivated. Even if pursuing a public interest, the application of the minimum wage needs to confer a genuine benefit for the protection of the posted worker. That question was left by the ECJ to be determined by the national court.<sup>224</sup>

C-445/03 *Commission v. Luxembourg* concerned a requirement of work permits for posted workers, who were non EU-citizens. The ECJ held that the protection of workers could justify such a restriction, but in this case it was not adequate. The ECJ then provided an example of a less intrusive measure, such as an obligation to notify local authorities in advance of the presence of the workers and the assumed duration of their stay, a less restrictive and equally effective measure. The judgment also concerned the condition imposed for issuing a collective work permit – the worker had to possess an indefinite contract of employment concluded six months before the posting – and held that this also went beyond what was necessary. The ECJ confirmed the Commission’s argument that a condition of this kind could considerably complicate the posting of third country nationals, especially for newly started undertakings.<sup>225</sup>

The Court in C-168/04 *Commission v. Austria* held that the EU posting confirmation imposed on posting workers who were non EU-citizens was not an appropriate means for attaining the protection of the posted worker. This, by making the issuance of the posting confirmation dependant on a general observance of Austrian wage and conditions of employment, showed no consideration for the conditions of the home state. The confirmation also presupposed an employment contract of at least one year, which went beyond what was required.<sup>226</sup> The same arguments can also be found in C-244/04 *Commission v. Germany*.<sup>227</sup>

### 6.23 Prevention of unfair competition

The legislation at issue in *Wolff & Müller* regarding joint and several liability as a guarantor for the employees of an undertaking’s subcontractor was, according to the referring court, motivated by the will to protect the national labour market. Such a legislative intention does not automatically amount to non-compatibility with Community law. The national court, according to the ECJ, had to examine whether the

<sup>223</sup> See Section 4.24.

<sup>224</sup> C-164/99 *Portugaia*.

<sup>225</sup> C-445/03 *Commission v Luxembourg* [2004] ECR I-10191.

<sup>226</sup> C-168/04 *Commission v Austria* [2006] ECR I-9041.

<sup>227</sup> C-244/04 *Commission v Germany* [2006] ECR I-885.

provision conferred an actual benefit upon the posted workers.<sup>228</sup> Some intervening parties, including the Commission, argued that this was the case since the employee, due to the legislation, had another, probably more solvent, party towards which the wage claim could be directed. Thus the legislation conferred an actual benefit upon the posted workers.<sup>229</sup>

The national legislation aimed to prevent unfair competition, meaning the payment of wages lower than the minimum wage stipulated in the host state. This could serve as a reason of overriding public interest capable of justifying a restriction on the free movement of services.<sup>230</sup> The protection of unfair competition seems to be recognised as an independent reason of overriding public interest. The ECJ in this judgment also held that the right to a minimum wage is part of worker protection. The prevention of unfair competition through respect of the minimum wage regulation seems to be closely connected to the protection of workers.

In the PWD's preamble, recital 5, it is stated that the promotion of transnational services requires a climate of fair competition. The ECJ clarified this in *Laval* through its interpretation of the PWD. The ECJ held that the 'hard core' of the PWD aims at creating a climate of fair competition. The 'hard core' also rules out unfair competition by a service provider through the application of the lower level terms and conditions of employment of the home state.<sup>231</sup>

The ECJ in both abovementioned judgments interpreted the PWD, and in the first it introduced the prevention of unfair competition as a public interest. It seems, however, that this is something that will rarely be needed since unfair competition, according to the ECJ, is ruled out by the 'hard core' of the PWD.<sup>232</sup>

### 6.3 *Absolute restrictions*

Some national measures have the effect of rendering it impossible to provide services in another Member State. A requirement of such a kind is that the service provider must be located in or have a place of establishment within the host Member State. Such measures apply equally to all wishing to provide services, and thus are not seen as

<sup>228</sup> C-60/03 *Wolff & Müller*, para 38.

<sup>229</sup> *Ibid.*, paras 34 and 40.

<sup>230</sup> *Ibid.*, para 41.

<sup>231</sup> C-341/05 *Laval*, paras 74–75.

<sup>232</sup> The prevention of unfair competition is mentioned as a public interest in the Recitals of the Services Directive but not in the actual article where the Directive defines its own concepts. Cf. Recital 40 and Article 4(8) of the Services Directive; and also C-60/03 *Wolff & Müller*, para 41.

discriminatory.<sup>233</sup> Thus they may be justified with reference to the public interest. The ECJ seems to have raised the bar on certain criteria that the measure has to fulfil in order to be justified by a public interest. The measure, in order to be accepted, has to be indispensable for attaining the objective pursued. This differs from what has been stated concerning “ordinary” restrictive requirements. The measure there has to be necessary for attaining the objective.<sup>234</sup>

#### 6.4 *Effects of coordination*

In December 1996 the Council and the Parliament adopted the Posting of Workers Directive and the Member States were given until the end of 1999 to implement it. Most of the judgments mentioned in this chapter concern factual situations prior to that date. The ECJ therefore did not apply the Directive in the judgment.<sup>235</sup> Some of the recent cases have also concerned the posting of non-EU nationals, a situation in which the PWD was not applied.<sup>236</sup> Although adopted in 1996, even today only a few judgments actually interpret the PWD.<sup>237</sup>

The ECJ recently delivered three judgments clarifying how to interpret the PWD: *Laval*, *Rüffert* and *C-319/06 Commission v. Luxembourg*.<sup>238</sup> In this section the effect of the PWD in the process of justifying a restriction on the free movement of services, with reference to the public interest of protection of workers, will be examined. As already mentioned, the PWD does not harmonise, but rather coordinates the posting of workers between the Member States.<sup>239</sup>

In *Laval* the ECJ concluded that the *right to take collective action* by which foreign entrepreneurs are forced to sign the collective agreement for the building sector may make the provision of such services less attractive. In other words, it was considered a restriction on the free movement of services. The ECJ had previously recognised the

<sup>233</sup> One can argue about whether applying the test from *Laval* on how to determine whether a measure is discriminatory is adequate.

<sup>234</sup> On this subject see *C-279/00 Commission v Italy* [2002] ECR I-1425; and *C-493/99 Commission v Germany* [2001] ECR 8163.

<sup>235</sup> See, for example, *C-165/98 Mazzoleni*, para 17.

<sup>236</sup> See, for example, *C-445/03 Commission v Luxembourg* [2004] ECR I-10191, and also Recital 20 of the PWD where it is held that the Directive does not affect the national rules relating to entry, residence and access to employment for third-country workers.

<sup>237</sup> These are *C-60/03 Wolff & Müller*; *C-341/02 Commission v. Germany*; *C-341/05 Laval*, *C-346/06 Rüffert*; *C-319/06 Commission v. Luxembourg* [2008] ECR I-4323.

<sup>238</sup> Together with *C-438/05 Viking Line* these are referred to as the “*Laval Quartet*”.

<sup>239</sup> An example of a harmonizing directive is Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L 61/26.

right to resort to collective action as a fundamental right, which forms an integral part of the general principles of Community law.<sup>240</sup>

The Swedish government and the trade unions argued that restrictions were justified since they were necessary to ensure a fundamental right. The aim of the restriction – collective action – was also to protect the workers. The ECJ replied that a collective action aimed at ensuring *posted workers* certain levels of protection, in principle, falls within the reason of overriding public interest, that is, the protection of workers. The ECJ then faulted the specific collective action taken by the trade union on two counts. *First*, due to the specific obligations of the collective agreement for the building sector that were not justified by the objective of protection of workers. The collective agreement for the building sector contained more favourable provisions than the legislation within the ‘hard core’ and also provisions on other matters.<sup>241</sup> The restricting effect of the collective actions was enforced by the obligation to negotiate in order to determine the wages of the posted workers.<sup>242</sup> *Second*, the public interest of the protection of workers could not justify collective action, which required that the foreign entrepreneur enter into negotiations that formed part of a national context and which lacks provisions making them foreseeable.<sup>243</sup> The conclusion was an effect of the PWD. The Court had earlier on in the judgment held that the level of protection guaranteed to posted workers, in principle, is limited to the ‘hard core’ provided by the PWD, unless they enjoy more favourable conditions in their home state. The service provider can also by *his own accord* conclude a, for his workers, more favourable collective agreement.<sup>244</sup> The ECJ made no assessment as to whether or not the conditions found in the collective agreement conferred an actual additional benefit on the posted workers.

*Rüffert* is another judgment delivered in 2008 that contains an interpretation of the PWD. The factual circumstances, as mentioned, concerned Lower Saxony’s law on public procurement. According to the law, the undertaking awarded the contract was obliged to ensure that the workers received wages at the levels of the local collective

<sup>240</sup> C-341/05 *Laval*, para 92.

<sup>241</sup> As has been pointed out by Reinhold Fahlbeck there are other effects in Swedish law of a collective agreement that may be in conflict with the rules on free movement of services; see the opinion of the Faculty of Law at Lund University in the public consultation on the ‘white paper’ SOU 2008:123 Förslag med åtgärder med anledning av Lavaldomen. It remains unclear, however, whether all such effects are to be seen as unjustified restrictions on the free movement of services.

<sup>242</sup> C-341/05 *Laval*, paras 99 and 100.

<sup>243</sup> *Ibid.*, paras 108–110.

<sup>244</sup> *Ibid.*, para 81. The question arises concerning whether a collective agreement is ever concluded of the employer’s own accord. The other party to the agreement is a trade union and the effect of a refusal to enter into a collective agreement may be that the trade union resorts to collective action. The threat of collective action is inherent in the collective bargaining system.

agreement, an agreement not made universally applicable.<sup>245</sup> The company also undertook to see that the same applied to the sub-contractors used. The ECJ in the preliminary ruling interpreted both the PWD and Article 49. First, the focus was on whether or not the minimum wage was imposed in a way proscribed by the directive. The answer was negative and therefore it could not be considered a minimum wage within the meaning of the PWD. Such rates of pay could therefore not be imposed on the foreign service providers. In addition, the application of the regional collective agreement was found to be a restriction on the free movement of services. If the service provider has to apply a higher level of wages than applied in the host state he might find it less attractive to provide services there.<sup>246</sup> Workers performing public contracts would not be the only ones needing the higher rate of pay. The ECJ did not consider whether an application of the local agreement conferred an actual benefit on posted workers.

C-319/06 *Commission v. Luxembourg*, as mentioned above, contains several general remarks on Article 3(10) PWD and the concept of “public policy provisions”.<sup>247</sup> The judgment also contains a material scrutiny of some Luxembourgian provisions that were held by the national legislator to be public policy provisions. The first question concerned the obligations found in another directive to provide the worker with a written contract of employment. The Court held that to impose such a requirement was not in accordance with Article 3(10), since it was not applied in accordance with the Treaty. The obligation was already imposed in the home state.<sup>248</sup> The same was also applied to the regulations on part-time and fixed-term work, which were also found in a directive.<sup>249</sup> Luxembourg had also held that the some regulations on collective agreements were part of the public policy provisions. The ECJ drew the conclusion that the rules on how collective agreements are concluded are not to be considered as public policy provisions.<sup>250</sup>

One difference compared to the previous case law lies in the fact that no assessment whatsoever is made of whether the provisions confer any actual benefit for the posted workers. The justification process in the judgments preceding the PWD has almost always included the question of whether the assessed measure confers an actual benefit on the posted workers. If so, and proportionate, then it could be found to be compatible with the Treaty. The question of additional protection was often the decisive factor when determining compatibility with the Treaty.

<sup>245</sup> There is a connection here to ILO Convention No 94, which prescribes that workers be awarded the protection of local agreements. The Convention, which has not been ratified by Germany, was not mentioned by the ECJ and seems to have been disregarded.

<sup>246</sup> C-346/06 *Rüffert*, paras 31–40.

<sup>247</sup> See above Section 5.33.

<sup>248</sup> C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, paras 43–44, in particular.

<sup>249</sup> *Ibid.* para 60.

<sup>250</sup> *Ibid.* paras 67–68.

A comparison with the *Viking Line* judgment is obvious. This judgment also concerned the balancing of a trade union's collective action against a fundamental freedom. The judgment concerned the right to establishment, a freedom not affected by the PWD. We have mentioned that the ECJ concluded that the actions by the FSU and the ITF constituted restrictions on the right of establishment. The ECJ then moved on to the question of whether the collective actions were justified. A distinction was made between the actions taken by the FSU and those taken by the ITF. After presenting a slightly rephrased *Gebhard* formula, the ECJ concluded that the protection of workers is one such public interest that may justify such a restriction. The Community has both an economic and a social purpose. The final assessment of the action's compatibility with Community law was passed on to the national court; it was to decide whether the actions pursued the objective of protecting the workers. The national court was given some guidelines on how this assessment should be done. The collective actions of the FSU aimed at protecting the jobs and conditions of employment for the *members* of the FSU, which could be regarded as falling within the objective of protecting workers. A limitation was then introduced: if the jobs and conditions of employment were not jeopardised or seriously threatened the collective action could not be aimed at protecting the workers and thus not be justified. Jobs and conditions would not be threatened if the company, in a binding agreement, undertook to guarantee them. If it was established that the jobs and conditions were actually threatened, then the action also had to be proportionate and it would not be proportionate if other means at the trade union's disposal had not been used.<sup>251</sup>

The effect of the Directive is that, since the reason of overriding public interest – protection of workers – has been provided for through the PWD, all further protection is unnecessary and thus a restriction cannot be justified, at least not with reference to the protection of workers. This conclusion leaves the question of how Article 3(7), which states that the 'hard core' shall not prevent application of terms and conditions that are more favourable for the workers, should be understood. The ECJ in *Laval* held that the Member States may not make the provision of services conditional upon the observance of terms and conditions of employment that go beyond the *mandatory rules of minimum protection*. Within the 'hard core' the Directive expressly lays down the level of protection.<sup>252</sup> As mentioned, the ECJ then concluded that the protection of the posted workers, in principle, is limited to the 'hard core'.<sup>253</sup> This was repeated in *Rüffert* and the ECJ is even clearer in the later C-319/06 *Commission v. Luxembourg* judgment, where it stated the 'hard core' "sets out an exhaustive list".<sup>254</sup> The conclusion seems to be that Article 3(7) does not increase the possibilities for the Member States to impose

<sup>251</sup> C-438/05 *Viking Line*.

<sup>252</sup> C-341/05 *Laval*, paras 79 and 80; repeated in C-346/06 *Rüffert*, paras 32–34.

<sup>253</sup> C-341/05 *Laval*, para 81.

<sup>254</sup> C-319/06 *Commission v. Luxembourg* [2008] ECR I-4323, para 26.

requirements on service providers outside the ‘hard core’. It applies when more favourable conditions exist in the host state and also gives the employer the option to apply, of his own accord, more favourable conditions than those found in the ‘hard core’.<sup>255</sup> Article 3(7) is, for host Member States, degraded to an appendix without function but is a reminder of something no longer needed.

In *Wolff & Müller* the Court also interpreted the PWD. Here, a condition for justification was that the measure conferred an actual benefit on the posted workers.<sup>256</sup> A difference between *Wolff & Müller* and *Laval* and *Rüffert* was that the first did not concern regulation within the ‘hard core’ but rather how the ‘hard core’ could be enforced. The PWD in Article 5 merely states that the Member States shall take appropriate measures in the event of failure to comply with the Directive. The Member States are given considerable freedom on how to ensure this.

The PWD affects justification of restrictions on the free movement of services, since the Directive provides for the level of protection needed by the posted workers and also how to impose it. *Laval* holds that the protection of workers may justify a restriction in the form of trade union action. But due to the Posting Directive it is unclear what demands may be put forward in any ensuing collective agreement.

#### 6.5 *Private subjects and public interest justification*

Private subjects, such as trade unions, have to take Article 49 into consideration since they, through horizontal direct effect, are covered by its prohibition of restrictions. The section concerning the grounds for justification found in the Treaty concluded that private persons will likely be able to refer to the grounds of public policy, public security and public health in order to justify their action.<sup>257</sup>

Few of the judgments concerning the labour market have assessed actions taken by private persons. *Laval*, however, concerned the actions of a trade union. The trade unions argued that their actions were aimed at protecting workers. The ECJ held that trade union action, which was intended to guarantee that *posted workers* had terms and conditions fixed at certain levels, fell within the objective of worker protection.<sup>258</sup>

Similar conclusions were drawn in *Viking Line* concerning the right of establishment. The ECJ there held that the collective actions taken by the FSU, aimed at protecting the jobs and conditions of the members of their own trade unions, would be considered to

<sup>255</sup> See also C Barnard, ‘The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law’, (2009) 38 *Industrial Law Journal* 122.

<sup>256</sup> C-60/03 *Wolff & Müller*, para 38; cf. at fn 227, above.

<sup>257</sup> See Section 5.4 above.

<sup>258</sup> C-341/05 *Laval*, paras 106–107.

be within the public interest of protection of workers. This would not be the case if it was established that the jobs and conditions were not threatened.<sup>259</sup>

The public interest as grounds for justifying restricting actions seems, with regard to the mentioned judgments, to be a procedure accessible to private subjects. The opposite conclusion would introduce an inconsistency since actors having to comply with the articles would then have no possibility of justifying actions that made the provision of services less attractive.

#### 6.6 *Concluding Remarks*

Restrictions on the free movement of services may be justified with reference to reason of overriding public interest. The protection of workers is one such interest with a clear connection to the labour market. The protection of workers, both posted and national, has been decisive when determining the restrictions' compatibility with Community law. In the section handling restrictions, the conclusion drawn was that the perspective of the service provider or the service buyer is applied when identifying restrictions.<sup>260</sup> There, it was hinted that the workers' perspective would be taken into account in the process of justification. In the justification process the measure's effects are reviewed not only from the perspective of the service provider but also from that of the worker. If a measure provides additional protection to the worker then it may be seen as compatible with Community law, even when restricting the aspirations of the entrepreneur. Does the employer's obligation to contribute to a vacation fund benefit the worker? Is the obligation to pay the worker the minimum wage of the host state of benefit to the worker?

The PWD has been proven to have a decisive effect on the question of justification. The ECJ has interpreted the Directive as, in principle, prohibiting additional protection outside the 'hard core'. Thus there is no need to determine whether or not the measure confers any additional protection to the workers in question. The Community has showed some concern for the posted workers. Their interests have been provided for by the PWD. The Directive has removed the individual element of assessing the protection of workers from the justification process. The workers' perspective was decisive when the content of the 'hard core' was established in secondary law. Through the PWD's 'hard core' posted workers throughout the Community have been provided with protection. There is no need for a final assessment to be left to national courts. *Viking* illustrates this effect, where the national court had to decide whether collective actions were aimed at protecting workers. The judgment contains an individual assessment of the restriction on collective action. The national court's assessment would have been individual, had the case not been settled.

<sup>259</sup> C-438/05 *Viking Line*, para 81.

<sup>260</sup> See Section 4.3 above.

## 7. Closing observations

### 7.1 *Justification and the Posting of Workers Directive*

When introducing this subject, the term “free movement of labour” was used. It was concluded that the posting of workers is one form by which labour may cross a border into another Member State. Both the free movement of services and the PWD govern the posting of workers. The concept of restrictions on the free movement of services has, over time, been expanded by the ECJ. The contemporary restriction concept comprises every measure that makes the provision of services less attractive. The Treaty’s provisions on free movement of services also have to be considered by private subjects, since these provisions have horizontal direct effect. The requirements that may be imposed on an entrepreneur posting workers are limited to the exhaustive list of the ‘hard core’ of the PWD. If outside the ‘hard core’, the measure will be next to impossible to justify. The fixed ‘hard core’ has limited the Member States’ ability to regulate the posting of workers in their territory and also limits what liberties they may grant their labour market actors.

### 7.2 *The price of labour and free movement*

We have also extracted from the case law some of the basic assumptions regarding the posting of workers. The ECJ has drawn the conclusion (assumption) that the posted workers do not at any time gain access to the labour market of the host state.<sup>261</sup> In our inventory we also concluded that the ECJ has awarded the Member States some margin of interpretation when it comes to imposing minimum wage regulations upon employers posting workers.<sup>262</sup> The minimum wage is also now part of the ‘hard core’ of the PWD, in other words, the Member States are obliged to ensure the posted workers the national minimum wage. Nonetheless, such wage-regulating efforts may, as already mentioned, be considered restrictions on the free movement of services.

Examining these two fundamental – for the posting of workers – points of departure together exemplifies the effects of a shift in perspective.

The labour *market* sets the price of labour. The price set by this labour market will be reflected in the wage received by the worker. Throughout the Community there are different ways of setting wages. The labour market’s wage-regulating mechanisms may be of both a private and a public law nature. The Swedish approach is extremely private.

<sup>261</sup> See C-113/89 *Rush*, para 15; C-43/93 *Vander Elst*, para 21; C-49/98 *Finalarte*, paras 22–23; C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, para 38; C-168/04 *Commission v Austria* [2006] ECR I-9041, para 55; C-244/04 *Commission v Germany* [2006] ECR I-885, para 59.

<sup>262</sup> Case 62 and 63/81 *Seco*, para 14; case C-113/89 *Rush*, para 18; C-43/93 *Vander Elst*, para 23; C-272/94 *Guiot*, para 12.

Posted workers, as has been held repeatedly by the ECJ, do not access the labour market of the host state, a statement that overthrows the assumption that the internal market is also *one* labour market. If it is only one labour market, the posted worker would not be able to leave one in order to enter into another labour market.

The other assumption is the host state's labour market minimum wage should also be applied to posted workers. It thus seems that the labour market of which the posted worker is not a part should set the price of the posted worker's labour. If an essential function of the labour market – the price-setting mechanism – is applied to the posted worker, is it then possible to regard him as not having accessed this labour market? It seems hard to hold both assumptions at the same time, at least when the situation is examined from this perspective. The rejection of the assumption that the posted worker does not access the labour market may result in a need to re-evaluate motivations about why the posting of workers is classified as falling under the free movement of services.



## CHAPTER 3

### Danish Law on the Posting of Workers

*Martin Gräs Lind*

#### 1. The background to the Law on the posting of workers.

On 13 October 1999, about two months before the deadline for implementing the Posting of Workers Directive (PWD),<sup>1</sup> the Danish Minister for Employment, Ove Hygum, tabled a bill for a Law on the posting of workers.<sup>2</sup> The aim of the bill was to ensure that Denmark met its obligations under Article 7 of the Posting of workers Directive by 16 December 1999, by adopting the necessary legislation and administrative provisions under the Directive.

At the time the bill was put forward the Directive had been subject to consultation and discussion in a number of meetings with the main actors in the labour market in Denmark, including the Confederation of Danish Employers (DA) and the Danish Confederation of Trade Unions (LO), as well as other major organisations, public sector employers and the Ministry of Employment.<sup>3</sup> At these meetings among other things there had been discussions about whether Denmark should use the possibility of applying its collective agreements in relation to posted workers. However, it was agreed that Denmark should, for the time being, refrain from using this possibility, also in relation to the question of setting minimum rates of pay.<sup>4</sup> The background to this was a balancing of, on one hand, the major problems associated with this and, on the other hand, the actual need to exploit this possibility.

One of the principal problems identified as being associated with the application of collective agreements to workers posted to Denmark from other Member States was to ensure that there would not be different treatment of foreign and Danish undertakings through the use of the collective agreements. Thus agreements should apply to ‘all similar undertakings’ and, if not, problems would arise. In Denmark, collective

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>2</sup> Legislative proposal No L 47 for a Law on the posting of workers, L 1999 933: FT 1999-2000, A 1216; B 87. [FT = Folketingets Tidende (Parliamentary Records)]

<sup>3</sup> FT 1999-2000, A 1218.

<sup>4</sup> In Denmark there is no legislation on minimum rates of pay. The question of rates of pay is regulated, with varying content, solely in collective agreements and contracts of employment.

agreements are applied only if the employer is bound by the agreement. As a rule this will be via membership of an employers' organisation or by a direct agreement with a trade union. If a collective agreement were to apply to foreign workers posted to Denmark from another Member State, but not to a similar Danish undertaking which had not entered into a collective agreement, this could constitute different treatment of foreign undertakings in relation to Danish undertakings. To make Danish collective agreements applicable as *erga omnes* agreements would have been quite foreign to the Danish tradition, so that other solutions had to be sought.

Another problem associated with using the possibility of the general application of Danish collective agreements to posted workers in Denmark concerns the setting of a general minimum rate of pay. This would involve considerable complications, for example in identifying the relevant collective agreement for each case. There is no central registry of all Danish collective agreements. Moreover, it can be difficult, more generally, to determine what in fact the minimum rate of pay is. Different pay calculation systems are used. There are a number of variations within the two basic systems used for determining payment in Denmark, payment by time and payment by performance, sometimes determined by local circumstances. For example, in addition to the minimum rate of pay in the applicable collective agreement, a Danish undertaking often gives higher individually determined rates of pay to employees because of various supplements determined on the basis of factors such as seniority, qualifications and age.<sup>5</sup> If a foreign undertaking were only bound to pay the minimum rate of pay according to the relevant collective agreement, it would be put in a more advantageous position than a similar Danish undertaking in practice. Such a problem would have to be cleared up if Denmark were to use the possibility in the Posting of workers Directive to set a minimum rate of pay. Because of the timing of such a process, it had already become difficult to find a solution for the problems identified before 16 December 1999. Finally, a solution on the use of collective agreements would mean that it would be necessary to clarify whether Denmark would be content with the position of the Directive, that only collective agreements in the building sector should be applied, or whether Denmark would use the opportunity to include collective agreements for other sectors, and if so how the boundaries should be drawn unless all collective agreements were to be included.

The implications referred to above associated with applying Danish collective agreements to posted workers in Denmark should be set against the actual need to make collective agreements applicable to posted workers. In 1999, no particular problems had been identified with 'social dumping' in Denmark, although this topic had been in focus at the European level for a number of years in other Member States and was in fact the reason for adopting the Directive. The Danish trade unions thus thought that the problems of social dumping, particularly in relation to rates of pay, could be solved by

<sup>5</sup> FT 1999-2000, A 1218.

the unions' possibilities for entering into agreements with individual undertakings in the usual way, including via the use of collective action in support of obtaining a collective agreement. However, there was agreement that the situation should be closely monitored and that the possibility could be made use of if the need should arise.<sup>6</sup>

The result of the discussion prior to the publication of the bill was that there was broad agreement between the labour market parties not to propose the implementation of that part of the Directive that concerned collective agreements, and not to include rules in the bill on minimum rates of pay.

The first reading of the bill in Parliament was on 4 November 1999, after which all parliamentary parties took part in oral negotiations (including the Social Democrats, the Liberal Party, the Conservative People's Party, the Social Liberal Party, the Socialist People's Party, the Red-Green Alliance, the Danish People's Party and Freedom 2000) and supported the proposed model for implementing the Directive in Danish law. Apart from the agreement between the labour market parties during the preceding consultations, this should be seen in light of the fact that there was general agreement between the parliamentary parties to give support to the Danish model for a solution, whereby the legislators' and the EU's influence on the Danish labour market should be kept to a minimum. The labour market parties thus wished, by means of the Danish model including collective agreements, to solve as many problems as possible themselves, through negotiation, entering into agreements and by using the normal means for resolving conflicts recognised in Denmark, including collective action in accordance with the democratic choice of the relevant organisations. In addition to the fact that the bill would not encroach upon the 'sacred territory' of the setting of rates of pay in Denmark, the Law on the posting of workers would finally ensure that foreign workers would obtain the protection relating to working time, holidays, working environment and equal treatment that already existed in Denmark. Thus, the structure of the Law on the posting of workers did not constitute a major risk to the Danish model, while the implementation of the Directive was one of Denmark's EU obligations.

The second reading took place without any discussion, question or debate on 9 December 1999 and on the third reading on 10 December 1999 the Law was unanimously adopted by Parliament with 107 votes, and the Law entered into force on 17 December 1999.

## **2. The content of the Law on the Posting of Workers and selected topics**

### *2.1 Foreign employers who post employees to Denmark*

The Law on the posting of workers primarily contains regulation of certain rights of posted employees under Danish labour law in relation to their employers in their home

<sup>6</sup> FT 1999-2000, A 1220-21.

State. However, a single provision addresses the application of host State rules in Denmark for posted workers from Denmark, as their home State, in another host State within the EU or the European Economic Area (EEA). Finally, the Law on the posting of workers contains regulation of collective action towards international service providers in Denmark (§ 6a) and of the registration of workers posted in Denmark (§ 7a-e). According to Chapter 1 (§1), Chapter 2 (§§ 2 to 6a, § 7a(1) and (3)–(6) and §§ 7b–7e) applies in situations where, in connection with the provision of services, an undertaking posts workers in Denmark. The provisions in §§2 to 5, which constitute the main substantive protective rules, are dealt with below in Section 2.2, as well as the adoption of the original Law on the Posting of Workers, there were amendments of the deadline for revising the law in 2003.

In Law No. 47 of 10 December 1999 on the posting of workers, § 11 included a provision on revision of the Law, according to which a proposal was to be put forward for revision of the Law by 1 January 2003, at the latest. As stated above, §§ 5 and 6 contain a reference to the laws and executive orders giving rights in the areas of the working environment, equal treatment and holidays. At that time, working time was not regulated by law. However, subsequently Law No. 248 of 8 May 2002 implemented the Working Time Directive, introducing regulations on the length of working time. By Law No. 27 of 5 December 2002 on the extension of the deadline for revision and an addition to the Law on working time, for entry into force on 1 January 2003, Parliament unanimously agreed, with 109 votes, to add in § 5 that the Law should apply to posted workers in Denmark. It was also decided not to introduce the application of collective agreements to posted workers with regard to minimum rates of pay, as the labour market parties had stated that, since the introduction of the Law on the Posting of Workers, there had been very few cases on minimum rates of pay. These cases had been resolved, and there was agreement that there was no need to amend the law in 2003.

In 2006 substantive amendments were made to the Law in four stages.

As stated above, in its § 11, Law No. 27 of 5 December 2002, on the extension of the deadline for revision and an addition to the Law on Working Time, introduced a deadline of 1 January 2006 for revision of the Law. On 21 March 2006, Parliament unanimously adopted Law No. 132, having established that the labour market parties were still in agreement that there was no reason to amend the Law on the posting of workers with regard to minimum rates of pay, and that Denmark should continue to make use of the provisions in the Posting of workers Directive which allowed Member States such as Denmark, which did not use generally applicable collective agreements, to refrain from implementing the provisions of the Directive on minimum rates of pay. This Law contained a new revision deadline of 1 January 2009 to re-evaluate whether the Law on the posting of workers should contain a provision on minimum rates of pay. See Executive Order No. 849 of 21 July 2009 on the posting of workers.

Section 2.3 below describes the 2008 amendments introducing stricter monitoring of posted workers,<sup>7</sup> which have recently been made even stricter by Law No. 509 of 19 May 2010, which will come into force successively.<sup>8</sup> In Section 2.4 there is a description of the changes made as a consequence of the Laval decision.<sup>9</sup> In Section 2.5

<sup>7</sup> Law No 263 of 23 April 2008 on the obligation to give notification in connection with posting. The Law provided for the establishment of a central Register of Foreign Service Providers (RUT).

<sup>8</sup> See Section 2.5 for further details.

<sup>9</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-

there is a more general description of which rules, under Danish law, can be said to apply to trade union monitoring. In connection with the introduction of §6a of the Law on the Posting of Workers, it is stated in the preparatory documentation to the provisions that the Law does not change the existing rules for trade unions' scope for monitoring employers' compliance with the terms of collective agreements. However, it is not stated what these rules consist of or what are the main principles lying behind them. The question of trade unions' rights in connection with monitoring is not dealt with in detail in Danish legal literature, but there are some judicial decisions on labour law that have an influence on this. In particular, the question of trade union monitoring of the conditions of posted workers in Denmark is an area that concerns the labour market parties in connection with the posting of workers. Thus, for example, Denmark has decided to refer to the Commission to obtain clarification of whether EU law sets restrictions on, for example, giving information from RUT to the labour market parties in specific situations (see Section 2.6 below). There thus seems to be a need to identify more precisely and to describe the legal rights of trade unions to monitor in Denmark, not least in connection with undertakings that post workers to Denmark. In Section 2.6 there is also a description of the latest political agreement of 3 December 2009 on stricter rules for RUT and the consequential statutory provisions adopted by Law No. 509 of 19 May 2010.

Chapter 3 of the Law on the posting of workers (§ 7) regulates the choice of law in situations where workers are or have been posted from Denmark to other EU or EEA Member States. These provisions are dealt with below in Section 2.7.

Other provisions, including Chapter 4 (§ 8), concerning information and the establishment of a liaison office in accordance with Article 4 of the Directive, and Chapters 5 to 7 (§§ 9 to 11), are dealt with in Section 2.8.

## *2.2 Foreign employers who post employees to Denmark*

The main part of the regulations in the Law on the posting of workers is concerned with foreign employers who post workers temporarily to Denmark, with a view to their carrying out their work in Denmark.

A 'posted worker' is defined in § 3 as an employee who 'carries out their work temporarily' in Denmark. The provision is in line with Article 2(1) of the Directive which, however, uses the term 'for a limited period' rather than 'temporarily'.<sup>10</sup> This is in order to avoid any misunderstanding that the period should be thought to mean 'for a predetermined limited period', and since the Directive means a 'temporary' period this is the term used in the Danish Law. If an employee works more than temporarily in Denmark, Denmark will be the State in which the employee normally works so that

11767. – Law No. 36 of 18 December 2008 on the implementation of the recommendation of the working group report on the consequences of the Laval decision and on extension of the deadline for revision.

<sup>10</sup> FT 1999-2000, A 1223.

Danish law will apply in general.<sup>11</sup> It is not decisive whether the person concerned might be considered to be independently self-employed in the State where they normally work (their home State).<sup>12</sup> In accordance with Article 2(2) of the Directive, it is the definition of a ‘worker’ in Denmark, as the host State, that applies in §3, and it is this concept of a worker that is decisive for whether the person concerned is covered by the Directive. According to §4 of the Law, an undertaking is regarded as posting a worker to Denmark if: (1) on their account and under their direction an undertaking posts an employee in connection with the provision of a service for a recipient of that service in Denmark; or (2) an undertaking posts workers to an establishment or to an undertaking owned by the same group of companies or to an undertaking which has a similar association with the undertaking that makes the posting.

In addition, there will be a posting if, in its capacity as a temporary employment undertaking or placement agency, an undertaking posts a worker to a client undertaking in Denmark.

It is a basic condition for such posting that, during the period of posting, there should be an employment relationship between the temporary employment undertaking or placement agency in the home State and the worker.

When it is determined, under §§ 3 and 4 of the Law on the Posting of Workers, that there is a posting in Denmark, then under § 5 of the Law, regardless of which State’s law otherwise governs the employment relationship, the Danish law on the working environment,<sup>13</sup> the law on equal treatment with regard to employment, and the law on parental leave and so on<sup>14</sup> (with certain exceptions<sup>15</sup>), the law on equal pay between

<sup>11</sup> See the Rome Convention, Convention on the law applicable to contractual obligations, 1980; consolidated version [1998] OJ C 27/34. Denmark has not signed up to the Rome I Regulation, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>12</sup> FT 1999-2000, A 1223.

<sup>13</sup> Law No 268 of 18 March 2005 on the working environment.

<sup>14</sup> Law No 734 of 28 June 2006 on equal treatment of men and women with regard to employment etc.

<sup>15</sup> The Law on equal treatment of men and women also contains rules on the right to be absent in certain situations that are not considered to be protective measures for pregnant women and women who have recently given birth, for example rules on parental leave and leave for adopting parents. These rules are therefore excluded in relation to posted workers. An exception is also made from the rules on Danish social security legislation whereby during absence from work under the Law on equal treatment, there is a right to maternity pay. However, the Posting of Workers Directive does not cover Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community if the posting is not intended to exceed one year. Thus, a worker posted to Denmark can have a right to be absent according

men and women,<sup>16</sup> §7 of the Law on salaried employees on parental leave,<sup>17</sup> the Law on discrimination in employment and so on<sup>18</sup> all apply to the posted worker.

The abovementioned laws apply regardless of which State's law otherwise governs the employment relationship, so that the Danish rules are made internationally mandatory. This means that a law – for example, §7 of the Law on Salaried Employees – can apply to a contractual relationship even if the contract is otherwise governed by the law of another country, for example Romanian labour law.

When a worker is temporarily posted from, for example, Romania (the home State<sup>19</sup>) to Denmark (the host State<sup>20</sup>), the principle is that, despite the posting, the law of the home State (Romania) continues to apply to the employment relationship. This is in accordance with Article 6 of the Rome Convention, according to which a contract of employment continues to be governed by the law of the State in which the employee habitually carries out their work, even if temporarily employed in another country, unless the parties have agreed that some other law, for example Danish law, is to apply.<sup>21</sup> However, the employer making the posting is required to ensure that the posted worker has employment terms and conditions that at least correspond to the terms that apply in Denmark on the points referred to in the Law on the posting of workers. This means that Danish law cannot be derogated from by means of a choice of law clause in a contract.<sup>22</sup>

Special and slightly complex rules on holidays apply to posted workers. Thus, in §6 of the Law it is provided that if the rules that otherwise apply to the employment relationship are less favourable for the worker with regard to the length of holiday and holiday pay than the rules of the Danish Law on holidays (§§ 6, 12 and 14), the employer must ensure that the worker receives supplementary holiday and holiday pay so that the worker is put in the same position as they would be under the Danish

to the rules of the Law on equal treatment, but payment during such absence will be according to the rules of the home State.

<sup>16</sup> Law No 899 of 5 September 2008 on equal pay for men and women.

<sup>17</sup> Law No 81 of 3 February 2009 on legal relations between employers and salaried employees.

<sup>18</sup> Law No 1349 of 16 December 2008 on the prohibition of discrimination in employment etc.

<sup>19</sup> The home State is the State where the worker normally works in fulfilment of their work contract or, if the worker does not normally work in a specific State, the State where the place of business which employs the worker is situated.

<sup>20</sup> The host State is the State in which the worker, in performance of their agreement with their employer from the home State, carries out their work as a posted worker.

<sup>21</sup> Even if the parties have agreed a specific choice of law, under the Rome Convention they cannot derogate from certain rules of the Home State (national mandatory rules).

<sup>22</sup> A case can be brought in a court in the area in which the worker carries out the work in question.

provisions referred to. If posted workers were covered by the Danish holiday rules in their entirety, this would give rise to a number of practical problems. For example, the Law on holidays refers to the year for earning holiday entitlement, which follows the calendar year, and the holiday year (for taking entitled holiday) that differs from the year for earning, and runs from 1 May to 30 April. The Danish Law on holidays<sup>23</sup> is thus based on the assumption of a longer connection with Denmark. Sec. 6 of the Law on the posting of workers seeks to solve these practical problems. There is no requirement in the Directive that the rules of the Law on holidays on giving notice of holidays and so on should apply. There are only requirements that rules on the length of holiday and holiday pay should apply. Thus, under the Danish provisions, the posted worker is still covered by the holiday rules of the home State, but the employer must ensure that the worker is at least given holiday and holiday pay corresponding to the provisions in the Law on holidays on the minimum number of days' holiday. If the home State's holiday provisions are less favourable than the Danish Law on holidays, the posted worker can earn supplementary holiday and /or holiday pay while posted in Denmark. Under Danish law there is a right to 5 weeks' holiday with payment of 12.5 per cent of the annual salary as holiday pay, or with full pay during holidays with a holiday supplement of 1 per cent of the annual pay.<sup>24</sup>

### *2.3 Stricter monitoring – since 2008 – of posting to Denmark by foreign service providers*

Under Law No. 70 of 17 April 2008 on the obligation to give notification in connection with posting, Parliament amended the Law on the posting of workers with the aim of stricter monitoring of workers posted to Denmark in connection with the provision of services.

Under the Law, the stricter monitoring of the posting of workers to Denmark by foreign service providers is to be achieved by introducing in Denmark a new register of foreign service providers (the Register of Foreign Service Providers (RUT)). The purpose of RUT is to provide a better database for the authorities so they can have more effective and targeted supervision of foreign undertakings and their employees. RUT should also give the labour market parties a better overview of foreign undertakings and their posted workers in Denmark.

The background to the introduction of RUT was the 'Østafstale III' (Eastern Agreement) of 29 June 2007 concerning the expansion of the EU and the Danish labour market.

Generally referred to as *Østafstalen* – the 'Eastern Agreement'. The Eastern Agreement, which was implemented by making changes to the Law on immigration, the Law on sick pay and allowances, the Law on maternity leave etc., constituted an interim limited restriction of the basic EU principles and it was authorised by the Accession Treaty with the new Member States. During a transitional period of 7 years it was permitted, subject to a number of conditions, to take national measures with a view to

<sup>23</sup> Law No 407 of 28 May 2004.

<sup>24</sup> According to § 6 of the Law on the posting of workers, it is a condition of the right to supplementary holiday that the posting is for more than 8 days.

regulating the free movement of workers in the form of introducing limits on access to the labour markets of the 'old' Member States. In the first instance the Eastern Agreement (on access to the Danish labour market after the expansion of the EU on 1 May 2004) was entered into on 2 December 2003 between the Liberal Party, the Conservative People's Party, the Social Democrats, the Socialist People's Party, the Social Liberal Party, and the Christian Democrats. The Eastern Agreement was then revised by an agreement of 5 April 2006 between the Liberal Party, the Conservative People's Party, the Social Democrats, the Socialist People's Party and the Social Liberal Party. On 29 June 2007 an agreement for further adjustments was made between the Government, the Liberal Party, the Conservative People's Party, the Social Democrats, the Socialist People's Party and the Social Liberal Party. The agreements are political agreements to introduce the amendments referred to in the agreements in Parliament. Since the Eastern Agreement was revised twice, the agreements can be referred to more specifically as Eastern Agreement I, II and III. Under the Agreement, monitoring by the authorities was to be intensified with regard to whether foreign undertakings and posted workers complied with the Danish rules on the posting of workers. According to the Agreement it was to be ensured that the relevant authorities had the necessary tools and resources available to them to ensure compliance with the applicable laws and regulations. Under Eastern Agreement II, several ministries<sup>25</sup> were to work together to establish a common register of foreign undertakings and posted workers in Denmark. It was this agreement that the amendment to the Law on the posting of workers, entering into force on 1 April 2008, was to implement.<sup>26</sup>

According to the *travaux preparatoire* to Law No. 70 of 17 April 2008, the number of foreign undertakings that provided services in Denmark and which posted workers to Denmark in this connection, had increased sharply following the expansion of the EU in 2004, and on this basis there was seen to be a need for rules to better enable monitoring of compliance with the Danish rules, including the provisions in the Law on the posting of workers. The public authorities did not possess sufficient information about the foreign undertakings and the posted workers to ensure effective monitoring of compliance with, for example, the Law on the working environment, and tax and VAT legislation. According to Law No. 849 of 21 July 2006 on the posting of workers, in the view of the ministries responsible and of the labour market parties, there was an insufficient legal basis for being able to require more specific information about foreign undertakings that provided services in Denmark, including information on posted workers in Denmark. The possibilities for monitoring foreign undertakings' compliance with the core protection of the Law on the posting of workers were thus regarded as ineffective. Moreover, as grounds for introducing RUT, it was argued that under Article 3 PWD Denmark has an obligation to ensure that posted workers are given the working terms and conditions that apply in Denmark as set out in Article 3(1) of the Directive, and there is also an obligation to take appropriate measures to ensure that adequate procedures are available to workers and/or their representatives for enforcing the obligations under the Directive (see Article 5).

<sup>25</sup> The Ministry of Taxation, the Ministry of Economic and Business Affairs and the Ministry of Employment.

<sup>26</sup> Act No 70 on duty of registration in connection with posting was adopted by the Danish Parliament on 17 April 2008 after the third reading of the Bill and came into force on 1 May 2008. Of the 113 votes cast, all votes were in favour of the Bill.

It was also argued that the Commission's Communication, Guidance on the posting of workers in the framework of the provision of services COM(2006) 159 final, was a basis for introducing more intensive monitoring of compliance with the provisions of the Posting of workers Directive on working conditions during a posting. For example, in the Communication it is stated that the host Member State 'should be able to demand, in accordance with the principle of proportionality, that the service provider submit a declaration, by the time the work starts, at the latest, which contains information on the workers who have been posted, the type of service they will provide, where, and how long the work will take.'

The abovementioned elements were the background to the proposal to introduce a law on more detailed registration in a central Register of Foreign Service Providers (RUT) in Denmark.

The Register, which is set up under the Commerce and Companies Agency, is operated on the basis that foreign undertakings themselves register information with RUT via a website.<sup>27</sup> The public authorities, such as the Tax and Customs Administration, the National Labour Market Authority, the Working Environment Authority, the Immigration Service, local government authorities, the police and the regional employment boards, will have access to all information in RUT. The information is to be used as part of the monitoring of the labour market and for monitoring that the applicable rules are complied with. The labour market parties can also have access to information about which undertakings are providing services in Denmark, categorised by industry sector, as well as information about contact persons in the undertakings that post workers, the place of delivery of the service and so on. The Law introduced a subscription service enabling authorities and private parties access to RUT on a daily basis.

For the Tax and Customs Administration, the idea is to use RUT as a tool for monitoring whether foreign undertakings that provide services in Denmark pay VAT on their sales turnover in Denmark, as well as whether the undertaking withholds payroll taxes for posted workers subject to tax in Denmark. In the case of foreign temporary employment undertakings or placement agencies, the Tax and Customs Administration controls whether the Danish host undertaking withholds payroll taxes in relation to individual temporary workers, and whether VAT is paid. Also, foreign one-man undertakings that must be registered in RUT must be assessed for whether they really are self-employed workers on the Danish labour market, or whether there is an employment relation where the foreign worker is effectively employed by an employer in Denmark, for example a construction company. Finally, the Tax and Customs Administration controls whether, for tax purposes, there really is a posting, or whether there is an evasion through the use of an employment relationship through direct

<sup>27</sup> The legislative amendments concerning parts of the stricter regulation in Law No 509 of 19 May 2010 and the obligation of Internet registration came into force on 1 January 2011.

employment in Danish undertakings so that the taxation of earned income should be paid to Denmark. In a more detailed note<sup>28</sup> on future controls and the use of RUT, it appears that the Tax and Customs Administration's control will be carried out as:

- a) ongoing control on the basis of information from RUT,
- b) a trial arrangement in the building and construction sector in cooperation with the Working Environment Authority, and

coordinated 'fair play' activities, in cooperation with other authorities, including the Immigration Service and government ministries. Based on an actual assessment, the Tax and Customs Administration may also take action on the basis of referrals from trade union organisations or other non-public bodies.

The supervision of foreign undertakings by the Working Environment Authority includes screening and physical inspection of the working environment of foreign building and construction companies. The aim is to identify those undertakings that have serious working environment problems and to select them for more detailed inspection. As part of its increased efforts, the Working Environment Authority will also inspect particular areas of dangerous work, such as roofing and scaffolding. Inspections will also be made on the basis of complaints and referrals. Information from RUT will be included in the Working Environment Authority's planning and implementation of inspections. The Working Environment Authority will use RUT to gather information on the sites where there are foreign undertakings. This means that the Working Environment Authority's possibilities for supervising the working environment of these undertakings will be improved. The Working Environment Authority will obtain extracts from RUT at weekly intervals.<sup>29</sup>

The police also have access to RUT, and it is intended that the police should use such information when investigating specific cases and in preparing for meetings of the regional networks. The 12 police districts in Denmark have established regional networks consisting of the top management representatives for trade unions, employers, police and other relevant public authorities. Among other things, the regional networks have the task of clarifying the situation with regard to illegal workers and putting forward new initiatives in the area. In connection with specific reports of the use of illegal workers, the aim is to establish close informal contact between the police and the organisations through meetings of the regional networks with the participation of the relevant organisations and authorities. The organisations can also make reports to the police about infringements of the rules of the Law on immigration on illegal workers. The police will involve the relevant authorities to the extent necessary in each case, for example, the Immigration Service.

According to the travaux préparatoire to Law No. 70 on the obligation to give notification in connection with posting, the National Labour Market Authority will

<sup>28</sup> FT 2007-08 (2nd series), L 70, answer to Question 2 from the Labour Market Committee.

<sup>29</sup> *Ibid.*

obtain information monthly, with selected information on foreign undertakings and the foreign workers which such undertakings employ in Denmark.<sup>30</sup> Information from RUT will also be available to the secretariats of the regional employment boards to enable them to monitor and analyse the extent and nature of foreign service providers on the regional labour markets, and with a view reviewing this at the regional employment board. The new Law will also involve local government authorities, the labour market parties and private persons as potential participants in monitoring, though private persons, including the labour market parties, will only be able to receive partial data from RUT.

The following specific provisions have been included in the Law on the posting of workers:

‘§ 5a. A foreign undertaking that posts workers to Denmark in connection with the provision of services shall report the following information to the Commerce and Companies Agency:

- 1) the name, business address etc. of the undertaking required to make the report,
- 2) the dates of commencement and conclusion of the provision of services,
- 3) the place where the services are provided,
- 4) the name of the contact person for the undertaking required to make the report,
- 5) the industrial classification code of the undertaking, and
- 6) the identity of employees whom the undertaking posts and the duration of the posting.’

According to the supplementary provisions to the above regulation (§ 5a(2) to (5), and § 5b), notification must be made on the date of commencement of the provision of the service in Denmark, at the latest<sup>31</sup> in accordance with the Law on procedures for the reporting etc. of certain information to the Commerce and Companies Agency.<sup>32</sup>

The registered information may only be used for the Danish authorities’ monitoring of whether the undertakings comply with the Law on the posting of workers and for statistics on foreign undertakings and posted workers.

However, under § 5c of the Law on the posting of workers it is possible to obtain, by payment, access to information about the name of an undertaking required to make a report, the name of the contact person for that undertaking and information about the

<sup>30</sup> *Ibid.*

<sup>31</sup> Certain forms of posting are exempted from the reporting obligation if the posting does not last more than eight calendar days.

<sup>32</sup> Law No 571 of 6 June 2007 on procedures for reporting etc. of certain information to the Commerce and Companies Agency. The law regulates the Commerce and Companies Agency’s general registration functions and contains common rules for reporting, registering, combining and storing information. The Commerce and Companies Agency thus has data responsibility for RUT.

industrial classification code. With the introduction of Law No. 509 of 19 May 2010, the access rules were widened to include the place of delivery of the service.<sup>33</sup>

Generally, with the introduction of Law No. 509 of 19 May 2010 on the posting of workers a number of stricter rules were implemented concerning the registration requirements in order to improve the possibilities of monitoring posted employees but also foreign one-man undertakings, which do not post employees. In this connection, §§5 a–c were repealed and replaced by §§ 7 a–e, of which some parts came into force on 1 June 2010 and other parts – for example, §1 (3), § 7 a (2), § 7 d, § 10 a (1)(ii–iv) and § 10 a (2) – came into force on 1 January 2011.<sup>34</sup> A breach by a foreign undertaking of the obligation to make a report can be punished by a fine. A foreign undertaking that commences the provision of a service, when the posted workers have begun their work, can be fined if the undertaking has wholly failed to give information for registration or if it has not given information correctly or in due time.

Law No. 70 on the obligation to give notification in connection with posting was passed by Parliament on the third reading on 17 April 2008, and entered into force on 1 May 2008. Of the 113 votes cast, all were in support of the Law.

#### *2.4 Changes in Denmark as a consequence of the Laval case*

After the ECJ decision in *Laval* the Danish Government appointed a working group to report on the situation, whose remit was as follows:

‘With the handing down of judgment by the Court of Justice in the Swedish *Laval* case on 18 December 2007, it is necessary to assess in more detail the significance and consequences of the judgment for the law in Denmark. At the same time, it is necessary to assess the need for any amendment to the applicable legislation and the practice in the labour market with regard to foreign service providers and their posting of workers to Denmark.

The aim is to maintain the fundamental principle of the Danish labour market, whereby the prime responsibility for the regulation of payment and employment terms is left to the labour market parties. An important element of the regulation of the labour market in Denmark – the so-called ‘Danish model’ – is that employees’ organisations can take collective action in order to obtain a collective agreement.

The role of the parties in regulating the labour market is the cornerstone of the Danish ‘flexicurity’ model, which for a number of years has been a model that many seek to make known as an inspiration to the other EU Member States.

On this basis the Government has decided to appoint a working group which is to present a report containing recommendations to the Government concerning the judgment. The report should contain an assessment of the need for any amendment of the existing legislation and practice on the labour market in connection with the posting of workers to Denmark. Finally, the report should contain concrete proposals for initiatives that may be necessary in order best to ensure the compatibility of the Danish model with EU law.’

The working group that was appointed consisted of the chairman, theatre director Michael Christiansen, two representatives each from DA and LO, one representative each from SALA (the Confederation of Employers’ Associations in Agriculture), the Employers’ Association for the Financial Sector, Local Government Denmark, Danish

<sup>33</sup> Cf §7 c (1).

<sup>34</sup> See Section 5.2 for further details on these amendments.

Regions, the Confederation of Salaried Employees and Civil Servants, the Confederation of Professional Associations, the Association of Managers and Executives and the State Employers' Authority. Representatives from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Economic and Business Affairs and the Ministry of Employment also took part.

The working group delivered its report on the consequences of the Laval case on 19 June 2008. The report made clear that the working group found that the decision necessitated changes to the law in Denmark.

When, as in Denmark, there is no tradition for making collective agreements generally applicable, nor legislation for laying down minimum rates of pay, if a foreign service provider that operates in Denmark is to be subject to a requirement on minimum rates of pay, it is instead possible to rely on collective agreements entered into by the most representative labour market parties at national level and which apply throughout national territory; see Article 8(2), second paragraph PWD. In paragraph 66 of the Laval judgment this possibility is interpreted in such a way that the application of the model of using collective agreements requires the Member State to make a decision to do so, and that the application of collective agreements to undertakings that post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) PWD between the foreign undertakings and domestic undertakings in the same profession or industry that are in a similar position.<sup>35</sup> Domestic undertakings must thus be subject to the same obligations as foreign undertakings that post workers, and both types of undertaking must fulfil these obligations with the same effect before there can be equality of treatment within the meaning of Article 3(8) of the Directive.

The report also stated that the provisions on minimum rates of pay must be sufficiently precise and understandable so as not to make it, in practice, impossible or unreasonably complicated for a foreign undertaking to obtain clarity about its obligations.

Finally, according to the assessment of the working group, the Directive requires that when there is legislation in the areas referred to in Article 3(1), first subparagraph, (a) to (g) of the Posting of workers Directive, there cannot be further requirements for foreign service providers than those stated, and there cannot be requirements that fall outside the listed points.

Against this background, and having regard to the opposing consideration of preventing social dumping and that the protection of workers on the Danish labour market should not be undermined, it was the conclusion of the working group that the inclusion of a provision in the Law on the posting of workers to the effect that the collective agreements that are entered into by the most representative labour market parties in Denmark should form the basis for the setting of minimum rates of pay would enable

<sup>35</sup> Report of the working group on the *Laval* decision, 19 June 2008, p. 11.

Denmark to comply with the rules in the Directive, while retaining the possibility of using collective action in support of claims for minimum rates of pay.

According to the working group's proposed model for supplementary regulation of the Law on the posting of workers it would be possible to amend the Law by inserting a provision to the effect that the collective agreements entered into by the most representative labour market parties in Denmark, and which apply to the whole territory of Denmark, should be the basis for establishing minimum rates of pay. To the extent that foreign service providers are not covered by any such agreement, a Danish trade union would be able to initiate collective action in accordance with the rules for this in Denmark, just as it would be able to take such action against a Danish employer. Equality of treatment would thereby be ensured, so that foreign service providers would be neither in a better nor a worse position than Danish undertakings in connection with negotiating collective agreements on minimum rates of pay.

In its report on the consequences of the Laval case on 19 June 2008, the working group gave a concrete legislative proposal that was later enacted as Law No. L 36 of 18 December 2008 on implementing the recommendations of the working group on the consequences of the Laval decision and on the extension of the deadline for revision of the Law. This amendment Law inserted a single provision in the Law on the posting of foreign workers, which was inserted as §6a. The provision states:

‘§ 6 a. With a view to ensuring for posted workers rates of pay corresponding to those which Danish employers are obliged to pay for the performance of equivalent work, collective action may be used in relation to foreign service providers, in the same way as in relation to Danish employers, in support of claims for entering into collective agreements; paragraph 2 also applies. 2. It is a condition for initiating the collective action referred to in paragraph 1 that the foreign service provider should previously have been referred to the provisions in the collective agreements between the most representative parties on the labour market in Denmark applying to the whole of the territory of Denmark. These collective agreements shall state, with sufficient clarity, what rates of pay must be used under the collective agreements.’

As required by Article 3(8), second subparagraph PWD, by the inclusion of the above provision the Law lays down the minimum conditions for the obligations of a foreign undertaking on the payment of its posted workers. This thus defines the minimum rates of pay in accordance with the practice in Denmark. If a foreign undertaking has not entered into a collective agreement, a Danish trade union will thereafter be able to initiate collective action against the undertaking. §6a(1) seeks to ensure both regard for equality of treatment, whereby foreign undertakings may not be subject to costs, additional to what an equivalent Danish undertaking in a corresponding situation would be required to pay under the collective agreement, and the avoidance of social dumping, whereby the right to take collective action is secured.

Sec. 6 a (2) lays down the more detailed conditions that must be fulfilled before a foreign service provider can be presented with claims for rates of pay. First, there is a requirement for referral to existing terms. According to the preparatory documentation, the requirement for referral means that, as a minimum, it should be clear which

provisions are referred to, which collective agreement is referred to, who the parties to the collective agreement are and how long the collective agreement in question has been in force. The question is whether there is a requirement to provide a copy of the collective agreement which it is demanded should be entered into, as otherwise it can hardly be said to be accessible to the foreign service provider.<sup>36</sup>

Next, there is a requirement as to the nature of the collective agreement. The collective agreements whose terms are referred to must only be those between the most representative labour market parties in Denmark, and they must also be applicable to the whole of the territory of Denmark. This means that a number of collective agreements will not be relevant for foreign service providers to refer to. For example, a collective agreement for an individual undertaking would not meet the requirement as it would not necessarily constitute a correct basis for determining the rates of pay that it would be permissible to take collective action to obtain. It is also assumed that a referral may only be made to a collective agreement for the employment sector in question.

Third, there is a requirement for sufficient clarity about what rate of pay should be paid under the relevant collective agreement. The foreign service provider must be able to determine with certainty what claims to pay could be supported by the use of collective action when, for example, making estimates for a project. One could imagine that, in connection with putting forward claims for minimum rates of pay supported by a threat of collective action, a trade union might refer to terms in collective agreements relating to payment by piecework, payment by performance or suchlike, unless the terms are clearly set out. According to the preparatory documentation to § 6 a (2), the same applies to terms in collective agreements that do not directly state a rate of pay, but where there are references to statistical material and trade practice as the basis for determining rates of pay. What is important is that it should be possible for the foreign service provider to see without unreasonable difficulty what is required as minimum rates of pay.<sup>37</sup>

If disagreements arise about the interpretation and application of §6a of the Law on the posting of foreign workers in relation to foreign service providers who post their workers to Denmark, the Danish Labour Court has jurisdiction to decide on the application of § 6 a. Thus, under § 9(1), Nos. 3 and 5 of the Law on the Labour Court, cases concerning the use of or warnings of collective action can be brought before the Labour Court. In practice, the Labour Court is the judicial body that decides on the legality of warnings of conflicts and collective action, also in relation to foreign service

<sup>36</sup> It can be difficult enough for a Danish employer or employee to obtain a copy of the relevant nationwide collective agreement for the industry sector concerned. There is no obligation to publish, nor even an obligation to supply a collective agreement to employees under the Law on employment documentation; see Executive Order No 1011 of 15 August 2007 on employers' obligations to inform employees on the terms of their employment, with subsequent amendments.

<sup>37</sup> FT 2008-09 – L36 jf. [www.ft.dk](http://www.ft.dk).

providers who are the subject of a conflict about the use of collective action. Thus, if a foreign service provider claims that they are put in a worse position than a Danish employer in relation to a nationwide collective agreement within the same industry sector, the Labour Court can set aside evaluations based on other collective agreement elements that do not directly constitute payment terms. This can be a matter of interpretation. The Labour Court can also decide whether the conditions of § 6 a (2) are fulfilled.

According to its *travaux préparatoire*, the insertion of § 6 a (2) in the Law on the posting of foreign workers is intended to expand the scope of trade unions' possibilities for monitoring of foreign undertakings that exercise the right of free movement to provide services in Denmark by posting workers. The preparatory documentation clearly states that:

‘the possibilities for monitoring compliance by foreign service providers with collective agreements which they have entered into or enter into are not affected by the Law.’

On the other hand, it is stated that collective agreements between the most representative parties contain employment rules, monitoring provisions and rules on delayed payment under certain arrangements that are recognised by the State, as well as rules for the use of replacement workers or subcontractors, other normative rules and rules that are intended to prevent avoidance of the collective agreement. Such collective agreement terms will still be applicable to foreign service providers.<sup>38</sup>

## 2.5 *Trade union monitoring of foreign undertakings and of compliance with Danish collective agreements*

### 2.51 Introduction and the formation of collective agreements

The possibilities for trade unions to monitor the avoidance or exploitation of the rules that prevent social dumping are both practically and theoretically relevant in connection with the use of foreign workers in Denmark. As stated above, including the description in Section 2.2, it is intended that the more intense control measures for public authorities in the Eastern Agreements and in the rules on the introduction of RUT

<sup>38</sup> In contrast to all other amendments to the Law on the posting of workers described above, §6a was not passed unanimously by Parliament. Of the votes cast for the third reading of the Law on 18 December 2008, 89 were in favour of the proposal with 21 against, of which 19 were from the Danish People's Party, and 2 from the Red-Green Alliance. The background to the opposition by the Danish People's Party and the Red-Green Alliance to the insertion of §6a was, in the case of the Red-Green Alliance, a view that there should be completely equal terms for being able to conduct conflicts with Danish and foreign employers, and in the case of the Danish People's Party, a fundamental aversion to complying with the EU rules restricting the Danish rules on conflicts as expressed in the *Laval* case, Case C-438/05 *Viking Line*, Case C-346/06 *Rüffert* and other decisions that intervene in the Danish law on conflicts. The Law was adopted on 18 December 2009 and entered into force on 1 January 2009, with a new revision deadline of 1 January 2011.

should ensure prevention of avoidance of the rules under the Law on the posting of workers. Just as with all other private bodies, the trade unions can, for payment, obtain the names of undertakings that post their employees to Denmark, as well as their contact persons and industrial classification codes. Moreover, the labour market parties, including trade unions, are involved to a certain extent in the coordinated work in the regional networks established by the police areas. However, there is no legislative authority to exercise control or legally authorised right to delegate control functions to the labour market parties in Denmark. If the trade unions want to monitor the pay and conditions of posted workers in situations where there is not a contractual right to do so via a collective agreement, or where the problem concerns compliance with, for example, the Law on the working environment, tax and VAT regulations, or the Law on immigration, they must submit reports to, for example, the police, the Working Environment Authority or the Tax and Customs Administration, on the basis of information the trade unions have been able to gather lawfully, for example via their members. The trade unions have no special powers in this respect.

Where a trade union has an agreement with a foreign undertaking it is interesting to analyse more closely whether and to what extent the trade union has a possibility for monitoring through its status as a party to the agreement. In this situation it is also relevant to consider whether EU law sets limits to the right of trade unions to exercise control.

If, in connection with making an agreement, a trade union requires a special agreement on monitoring an undertaking from another Member State which wishes to provide services in Denmark, and to post its employees in connection with this, the trade union must be careful not to go beyond what is considered a necessary restriction, so as not to constitute a restriction on free movement. In such a situation agreed rights do not apply. If the trade unions enter a collective agreement, there will be agreed terms between two parties, and the issue will not be in the nature of a restriction that will be a problem under the rules on freedom of movement. If, on the other hand, a demand for a collective agreement is backed up by threats of the use of collective action, the whole problem arises of trade unions' right to use collective action in support of demands other than those set out in Article 3(1), first subparagraph, (a) to (g) PWD. In this connection a trade union must be very clear in communicating the motive for introducing a demand for more intensive monitoring. Can the motive be characterised as a public interest purpose, for example to prevent social dumping, or safety in the workplace, or is it merely a natural obligation that is a consequence of the agreement on minimum rates of pay? In this connection it must be emphasised that the labour market parties cannot negotiate on the basis of Article 3(10) PWD; see paragraph 84 of the *Laval* judgment. Paragraph 111 of the judgment should also be emphasised, where the ECJ stated that Article 49 of the EC Treaty and Article 3 of the Posting of workers Directive preclude a trade union from attempting, by means of collective action, to force a provider of services to enter into negotiations with it on a collective agreement which

contains more extensive terms than those listed in Article 3(1), first subparagraph, (a) to (g) of the Directive where there is minimum legislation, or other matters not referred to in Article 3 of the Directive.

#### 2.52 Collective agreement terms on trade union monitoring

The question of the right of trade union monitoring depends on whether an undertaking is covered by a collective agreement to which the employers' organisation and/or the individual undertaking is a party, on one hand, and the employees' organisation is a party, on the other hand. At the level of the main agreement, there is no special regulation of the monitoring rights of trade unions over undertakings, other than the overall principles and conditions that can be derived from the September Agreement and its following main agreement. It is only at the level of agreements, in some places and within some sectors where there have been disputes on payment and employment terms concerning foreign workers, that there has been agreement about the principles for trade union monitoring of compliance. For example, it is seen in accession agreements that the employer is bound to give trade union representatives unhindered access to the workplaces of the undertaking with a view to monitoring the pay and conditions of foreign workers. An agreement can also be made to send pay slips and work slips, on demand, documentation in the form of bank accounts showing wage transfers and the obligation to provide information about the engagement and dismissal of foreign workers and so on. Finally, there are examples of agreements on showing the leasing contracts for the residences of foreign workers, where the employer also acts as landlord and there have also been collective agreements with obligatory or procedural terms on how disputes about the pay and conditions of foreign workers should be dealt with. The aim of such separate monitoring agreements is to secure for the trade unions the possibility of exercising effective monitoring of pay and conditions in an area where there is a clear risk of the breach of the collective agreement. However, it is not only in connection with collective agreements that regulate groups of workers where there has traditionally been use of foreign workers that there can be a special need to monitor compliance with agreements. In a number of other situations where there can be a risk of getting round collective agreements, for example where there is non-unionised labour, or an employer trades with self-employed undertakings or where the basis for the calculation of payment is particularly complex, the monitoring of the basis for an agreement can be very important for ensuring reasonable and effective monitoring of compliance with collective agreements. Breach of the terms of a collective agreement can be sanctioned by the imposition of a fine under the rules of labour law. Specific performance by order of the sheriff court with a view to obtaining documents does not appear to have been tried, according to the published cases. Collective agreement terms on trade unions' rights to monitor do not obviously appear to have major legal implications. Their validity depends on the terms of the agreement, as with any other contractual terms, and the usual rules of contract law apply to their formation, compliance and termination.

If a trade union has obtained an agreement with a service provider from another Member State that posts its employees to Denmark, and if such an agreement contains principles for monitoring, these must naturally be applied in accordance with their content, and the foreign undertaking and its employees must accept and comply with the agreement, otherwise there would be a breach of the agreement. Moreover, the fundamental principles of labour law for trade union monitoring of Danish undertakings, which are identified below but which may not be expressly stated in the agreement, must be complied with by the undertaking that posts workers, subject to such adjustments as the nature of the situation requires, in the same way as for Danish undertakings in a similar situation.

### 2.53 Trade union monitoring without a specific agreement

In the many situations where nothing is stipulated<sup>39</sup> in a collective agreement about a trade union's monitoring of compliance with the agreement, the question arises as to how a trade union can monitor compliance with the agreement, including compliance by undertakings that post workers to Denmark.

First, in this section it is necessary to clarify whether it can be assumed that there is any right to monitor by the trade union as part of the agreement. Next, the content and limits of any such monitoring must be considered. Do trade union representatives have a right to make a physical inspection (2.54.1–2)? And to what extent is there a right to monitor information (2.54.3)? Does a trade union have a right to documentation on work permits and residence permits for all foreigners employed by an employer (2.44.4)?

The first question must be answered in the affirmative. A trade union which is a party to an agreement must, as such, have a right to monitor compliance with the agreement. This applies, even if in the circumstances of the agreement the counterparty is not directly involved in fulfilling the terms of the agreement.

The right of one of the parties to a contract to verify and monitor the other party's fulfilment of an ongoing obligation is well known in a number of other areas of the law apart from labour law, which supports the assumption that corresponding rules apply in relation to collective agreements.

In construction law the question of the property developer's presence and right of control of ongoing service provision by contractors is regulated in AB 92 (general terms for building and construction work). According to § 11(3), contractors must allow the developer and their inspectors access to workplaces and production units where the work is carried out. This also applies to ongoing service provision, even if the end product is first verified in a delivery transaction. The developer can also demand such information as is necessary to assess the service. This rule may also be presumed to apply in construction contracts where the right of control is not specified in detail, as it must be assumed to be a natural condition for such a contract that, as part of the construction contract, the developer must be able to have corresponding access as there is a requirement for faithful performance and a proper need for being able to exercise control, even if there is no ground to suspect the contractor, and even if the performance of the contract is incomplete; see, for example, Torsten Iversen i T:BB 2003, 482(*Tidsskrift for bolig- og byggeret*). Of

<sup>39</sup> In particular, in some sectors there can be a binding rule on monitoring, which gives the same right as an express term in an agreement.

course, there are also contrary contractual considerations. For example, the exercise of control may not amount to the harassment of a contractor. In connection with sales agents, there are also express rules for situations where performance-based services are calculated on a basis that is known to only one of the parties; see M. Bryde Andersen, *Praktisk aftaleret*, 2. udgave (Forlaget Gjellerup 2003), 347 ff. According to § 15 of the Law on sales agents, a sales agent is entitled to demand all information, including extracts of sales ledgers, which the principal possesses and which are necessary for the agent to be able to see whether their commission statement is a correct statement of the commission due to the agent (see J Lykkegaard, *Handelsagentloven* (DJØF 2007), 96–99). Also, in company law there are express rules on examination, where shareholders have a right to demand an examination of the company's formation or other specific circumstances of the company's administration. In [the Law Reports and Journal] U 1967.738 Ø, the Court of Appeals ruled that a partner had a right to monitor and verify the accounts of a freight company, for which the other partner was responsible for the day to day management and bookkeeping. This was so even though this was not laid down in either the partnership agreement, legislation or any other agreement was. A further example is to be found in §57 of the Law on copyright.

A trade union's right to monitor an undertaking's compliance with an agreement on pay and conditions also stems from an early decision of the Permanent Arbitration Court (now: the Labour Court). In a ruling of 29 May 1914 in Case No. 124, it was stated that, just as employers have a right to monitor, 'so, on the other hand, there must be a right for workers' organisations to carry out the necessary monitoring of whether the somewhat complicated provisions on pricing in the collective agreement are complied with'.<sup>40</sup> The decision was followed by later decisions to the same effect.

In FVK of 18/1-1985<sup>41</sup> it was to be decided whether an employers' association should recognise that the workers' association's representatives, including their assistants, should have access to a number of joinery undertakings that did not want such monitoring. The *Snedker- og Tømrerforbundet* (Carpenters' and Joiners' Union) wanted access for its representatives to a construction joinery undertaking with the aim of helping the union's members calculate their piecework, and setting up piecework accounts. A quantity surveyor who was engaged in helping the union's members on behalf of the local union, in connection with measuring specific piecework according to the building price list, had been physically refused entry on the ground that the collective agreement did not contain authorisation for the use of quantity surveyors and that there was no other basis for such a right. The court allowed that the union had a right to obtain access to undertakings covered by the collective agreement, provided it had a prior agreement with the undertaking to this effect, and only to the extent

<sup>40</sup> The decision is in line with an earlier decision of 18 February 1914 in Case No 114 (AR 114), where it was stated that a journeyman could not be prevented from seeking advice from a trade union's representatives. 'AR' refers to decisions of the Labour Court (previously the Permanent Arbitration Court), which are numbered chronologically.

<sup>41</sup> FVK is short for *Faglig Voldgifts kjennelse*, a decision by a trade arbitration panel. The decision is published in *Arbejdsretligt tidsskrift* (AT) 1985, 197.

necessary for helping the union's members' measure piecework according to the building price list.<sup>42</sup>

On the basis of the above decisions and the general principles on the monitoring of an ongoing provision of a service, both within and outside the area of labour law, it must thus be said that a right exists for trade unions to monitor compliance with a collective agreement and that it corresponds to the equally natural ongoing right for employers and employers' associations to ensure that employees and union members comply with the obligatory and normative provisions of a collective agreement. This is further supported by legal theory: for example, Hasselbalch states that '[t]he agreement must be presumed to give the parties mutual monitoring powers to ensure that it is complied with', and that 'the employee party has a right to carry out such monitoring as is necessary to ensure compliance with the collective agreement'.<sup>43</sup>

The question is, how far does this monitoring extend?

#### 2.54 What are the limits to trade union monitoring of undertakings covered by a collective agreement?

Just as the employer's right to monitor is limited to the norms that the monitoring must not cause loss or significant inconvenience to the workers, that it must be based on the operation of the business, have a reasonable purpose and may not be offensive, it is natural to analyse what limits apply to trade unions' monitoring of undertakings' compliance with collective agreements in various circumstances.

##### 2.54.1 *Physical non-notified inspections*

One of the most intrusive forms of monitoring is inspection visits by representatives of a trade union who arrive at the address or building site of an undertaking covered by a collective agreement, suddenly and without warning. In the case of foreign undertakings with posted workers, the monitors will not have the possibility of visiting the headquarters of the undertaking in its home State, so monitoring will typically be at the place where the service is provided, for example at a building site. This situation, naturally, can have a number of variations. In some cases, one can imagine a more covert form of monitoring, where the trade union's inspectors enter the undertaking and speak to the employees, take observations and so on without the undertaking's management being informed of this or accepting it. Here the question is whether this form of monitoring is covered by the trade union's right to monitor. In other cases, the trade union's representatives announce themselves immediately to the management, for example the person who is registered in RUT as the contact person. Here the question is whether the inspection can be refused without this amounting to a breach of the agreement.

<sup>42</sup> Subsequent decisions have confirmed this opinion of the law, see AR 1210, AR 2220 and AR 2221.

<sup>43</sup> O Hasselbalch, *Arbejdsret Online*, third book: Kollektivarbejdsretten, section XXII; [www.djoef-forlag.dk/services/ARonline/html/lit/kolret/kolret\\_22.htm](http://www.djoef-forlag.dk/services/ARonline/html/lit/kolret/kolret_22.htm).

Covert monitoring can be a disturbing intervention in the circumstances of the undertaking and it can also cause loss and significant inconvenience to the employer. Even though the undertaking may be covered by an agreement, it can cause a disturbance if an undertaking has to accept that, without agreement, people other than the employees who have a natural right to have access to the workplace or parts thereof suddenly turn up and carry out an inspection without any warning. In such situations, the undertaking has an interest both to protect privacy and to prevent unauthorised entry to private property. The same applies to a building site.

Where those making an inspection visit immediately notify their arrival to the management of the undertaking, the undertaking and service provider have an interest in conducting their operations without disturbance, including planning the working day so as to hold meetings with trading partners, for example, without risking having trade union representatives disturbing matters by conducting unannounced inspections. This is an argument for allowing the undertaking to refuse an inspection without this amounting to a breach of the agreement, despite contrary considerations, such as that the trade union is distanced from the fulfilment of the agreement and thus generally has an increased need to make a physical inspection. However, against this it can be argued that there will often be a union representative at the workplace in the shape of a shop steward who can entirely lawfully report observations of the actual circumstances, including information that may be relevant to the terms and conditions of employment and information about the workers who are present, without monitoring by a physical inspection by persons who do not normally have access to the undertaking.

In 1989, in an arbitration case on employment law matters, it was disputed whether a trade union had a right to make an unannounced inspection visit to the employer's workplace. A number of employers were dissatisfied that the painters' union had made unannounced visits to private workplaces. According to the facts of the case, over a period of six months representatives of the painters' union had visited more than 65 workplaces, some of them between two and four times. The aim of the visits was partly to 'get hold of' the painting employers who were outside the collective agreement and partly to help colleagues in the individual workplaces with all kinds of problems.

The arbitrator found that there was a binding custom that visits could be made only to the workplaces of painting employers who were parties to the collective agreement after obtaining prior agreement from the responsible management of the workplaces or building sites, and there was in fact an agreement on compliance with this practice. Thereafter it was stated that visits to workplaces without the prior acceptance of the responsible management of the workplaces could not be made.<sup>44</sup> However, the decision cannot be taken as meaning unequivocally that an inspection of an undertaking requires prior agreement with the employer or the employer's organisation.

<sup>44</sup> FVK of 27 October 1989. The decision is available at <http://arbejdsretsportalen.lovportaler.dk>.

In another case, from 2001, union representatives had sought, through an unannounced visit to a workplace, to establish who was the employer at a given building site, and one of the employees who was present at the building site had been asked whom he worked for. The union representatives were then referred to the manager who said that it was a unionised workplace, and the representatives immediately left the site. The court did not find that, on this basis, there was a workplace inspection in breach of the arbitration finding of 1989 referred to above, such as to incur a fine. On the other hand, the decision should not be understood as meaning that there is a general right for union representatives to be present on building sites until it is confirmed whether or not the employing undertaking has union organisation.

Unannounced and unprovoked inspection visits, at least with regard to covert inspections and inspections without permission from the undertaking, appear in general to be so intrusive that there is an overwhelming presumption that consideration for the interests of the organised undertaking weighs heaviest (see the elements mentioned). Again, as an overwhelming presumption, it will not be contrary to the collective agreement for the employer to refuse to accept monitoring where the representative directly addresses the undertaking's management and warns of or requests a physical inspection of the undertaking. In other words, there is no obligation to hold 'open house' for the union representative for this purpose. This must in any case be the more general conclusion as to whether there is a right to make an unannounced physical inspection of an undertaking by a union, without there being special grounds for such an inspection.<sup>45</sup> It is also possible that an unannounced physical inspection visit could, under special circumstances, constitute a breach of the agreement by the trade union. In this context the proportionality principle of labour law will work in the employer's interest, as in the first instance the assumption must be that monitoring could be undertaken in some other less intrusive way. Thus, in all cases it must be assumed that an on-site inspection must follow prior notification or must be in accordance with rules agreed in advance.

In the absence of such permission, in the worst case a visit must be regarded as a breach of the agreement. Union representatives must therefore take great care over

<sup>45</sup> However, it is still possible that there may be entirely special situations where the refusal by an employer that is covered by a collective agreement to allow union representatives to make a physical inspection could be considered a breach of the agreement, and there could thus be special circumstances in which the employer will have an obligation to allow an unannounced inspection to be made. The existing decisions about quantity surveyors must be seen in light of the special need in payment by piecework for control by special experts. On this see Hasselbalch (above n 43) section XXII: 'Furthermore, the employee organisation that is a party to a collective agreement is entitled to carry out such control measures as are in fact necessary to ensure that payment is made in accordance with the agreement, for example the measuring of work at the workplace by the union's representatives. Thus, these have a right to enter the workplace for this purpose (with due consideration for the interests of the employer in connection with such visits).'

unannounced and intrusive visits to workplaces with a view to making a physical inspection of whether a collective agreement is being complied with and to gather information about employment conditions, including information about union organisation. This applies in particular if there has been no complaint about the conditions, for example via a shop steward, and if the monitoring is thus based on a more general desire to carry out sample monitoring or suchlike.

Also in situations where there has previously been disagreement about the employer's compliance with the terms of a collective agreement, the union representatives must be careful not to exceed the norms by trespassing on property and must respect privacy rights in general, as well as following custom and agreements on prior assent to visits. It must also be assumed that the general rule is that unannounced inspection visits of undertakings that are covered by a collective agreement may not take place without a special legal basis, for example in the form of a collective agreement or some other form of agreement with the undertaking.

#### *2.54.2 Unannounced physical inspections of undertakings not covered by a collective agreement*

What rules apply to physical visits to undertakings that are not covered by a collective agreement? Here there is a different starting point and the two situations can be difficult to compare. In connection with a demand for entering into an agreement with an undertaking there is a conflict of interests, and in such a situation the inviolability of property rights means that there is a prohibition on any form of unauthorised entry to private property and a physical blockade of an undertaking is not a lawful weapon under labour law. In Sweden in this context there are people referred to as 'syndicalists', who go to extremes to put pressure on an undertaking.<sup>46</sup> In Denmark, people who commit criminal trespass are punishable under §264 of the Criminal Code. This also applies if union representatives enter a private area with a view to putting pressure on an employer to obtain an agreement. As for undertakings that provide services in Denmark and post workers to Denmark, there are also the principle of freedom of establishment, among others in Article 56 of the Treaty on the Functioning of the European Union (TFEU), and the decisions of the ECJ that have been developed in support of freedom of movement. (See more on this in the section below.)

#### *2.54.3 Information monitoring – what kind of monitoring may be undertaken?*

The next question is, what form of monitoring by trade unions of undertakings that are covered by a collective agreement may be assumed to be permissible without prior agreement?

In a number of situations there can be entirely legitimate and reasonable needs for monitoring in the form of verifying factual information about an undertaking in relation

<sup>46</sup> See, for example, the judgment of 19 November 2008, Mål No B 1283-08 of Malmö District Court, first department, concerning criminal entry and physical blockade by a number of syndicalists.

to the terms of an agreement. This is not notably different from the examples given above of other legal situations where an ongoing service provision requires some form of ongoing verification of information. Also, because of the special nature of collective agreements, where a trade union does not participate directly in the performance of the agreement, there is a special need for monitoring.

For example, a trade union may have been given information by a number of its members that wages have not been paid correctly, perhaps certain supplementary payments or holidays and days off may not have been arranged as set out in the collective agreement. In such a situation the trade union has a proper and justified interest in reviewing the administration of the working times of all the employees in order to verify whether there are individual or general breaches of the agreement.

Hasselbalch also states that there is a 'generally recognised obligation on the part of the employer to inform the trade union about circumstances that are relevant to the administration of the agreement'.<sup>47</sup>

This statement can presumably be extended to an obligation for an employer who is subject to an agreement to give information to the trade union which is relevant to the union's possibility for ensuring that the agreement is complied with in general, as long as such a requirement is reasonable and only the employer is in possession of the information concerned.

By comparison, in individual employment relationships the employer's right to monitor employees is intensified so that the less opportunity an employer has to monitor the work of an employee, the more the employee is obliged to disclose to the employer information about the ongoing performance of the work, on demand, including by written documentation. In other words, the more difficult it is for an employer to have ongoing monitoring of the performance of work, the more an employee must accept that they must give information about their performance of the work to the employer.

In the first instance the union's right to monitor must be carried out via its members and shop stewards. This means that, in the first instance, the union must itself gather the information necessary for it to see whether the terms of the agreement for pay and conditions are complied with. The proportionality principle of labour law must be assumed to apply, so that an employer who is covered by an agreement must not be troubled unnecessarily with requests for information about employment matters which could just as easily be obtained elsewhere by the union.<sup>48</sup>

<sup>47</sup> Hasselbalch (above n 43) Section XXII, on the mutual right to information.

<sup>48</sup> *Ibid.*, 'The trade unions' right to monitor is bound by the general proportionality principle of labour law which, in relation to a trade union's monitoring of the employer, is not presumed to involve demands or measures that go further than necessary in order to achieve the aim of ensuring compliance with the agreement.'

This is also in accordance with an arbitration decision from 1994, where it was found that the union did not have a right to obtain pay slips from an employer who was covered by an agreement with a view to monitoring compliance with the agreement, as the pay slips could have been obtained from the union's own members, and documents which the union ought easily to have been able to obtain from its members could not be demanded. According to this decision, it was relevant that there was no term in the agreement requiring the employer in question to deliver the pay slips, and reference was made to the principles in §§298 and 299 of the Law on the administration of justice on discovery. Finally, it was noted in the decision that the union had to accept responsibility for its members not being willing to provide information in the case.<sup>49</sup>

It is interesting that the decision also made the union responsible if the union's own members had the information but did not wish to give it to the union, so that in such a situation it was not a breach of the agreement for the employer to refuse to provide quite general information for monitoring the agreement, which both parties agreed should be complied with.<sup>50</sup> There can thus be situations where a union has a reasonable assumption that an agreement is being breached, but where the member who has passed on information to the union does not wish to be identified. If this is compared with the rules on disclosure, it can be debated whether, in all situations, a union can easily obtain documentation on information showing that the employer has breached the agreement. This applies in particular if an employer posts workers who are fearful of losing their jobs with the employer in their home State.

The general rules on an employer's obligation to provide documentation – such as pay slips – can thus be described as being that, in the absence of a specific agreement and in all events unless there are special circumstances, the employer cannot be required to provide information, for example in the form of copies of pay slips, work slips or time cards in relation to persons covered by an agreement.<sup>51</sup>

However, there can be a number of situations in which information cannot easily be obtained through the union and its members, and where it would be unreasonable for the union to be made responsible for the failure to obtain the information.

<sup>49</sup> FVK of 28 June 1994 in the case of *Dansk Metalarbejderforbund v Dansk VVS Installatør Forening* on behalf of Finn Jensen ApS. The decision is available at <http://arbejdsretsportalen.lovportaler.dk> and in summary form at <http://www.djoef-forlag.dk/services/ARonline/index.htm>

<sup>50</sup> In the decision of the Permanent Arbitration Court (Labour Court) of 11 November 1926 in Case AR 1020 it was argued that it was the employer's obligation to make it clear in the accounts that the rates of pay had been in accordance with the tariff. The decision should be seen in light of the fact that the accounts can be assumed to have been more simple than, but the principle that a union should have the possibility of verifying information about wages and salaries in one way or another can still be said to apply.

<sup>51</sup> The situation may be different if, on the basis of individual employment law, employees have a right to receive information from the employer about their pay.

One could imagine, for example, that if a union has a suspicion, or that there is a particular risk, that an employer has deliberately chosen not to employ members of the union which is party to an agreement because non-members of the union do not normally demand the rates of pay set out in the agreement, the union can have an interest in obtaining information about the pay of all employees who work under the agreement for that employer. This can also relate to persons who, to all appearances, act as independent third parties or subcontractors. Such monitoring of information can be carried out only through the employer and not through the union's members, unless the union receives information on pay from non-members, which can be difficult in practice.

As stated, there can also be situations in which, on the basis of information from its members, a union suspects that the pay or conditions are contrary to the collective agreement, but in the circumstances does not want to or cannot expose a particular member who has passed on the information.

Finally, there are situations in which there is a clear risk of avoidance of the agreement and where the undertaking posting workers to Denmark does not have an address in Denmark and the need for monitoring is naturally greater than usual.

In these cases, a concrete evaluation must be made of the circumstances that are the basis for the suspicion and whether the principle of proportionality and the weighing of the importance of the demand for delivery of documentation between the employer's and the union's interests can justify requiring the delivery of documents, despite the general rule.

It must also be assumed that under the proportionality principle and the principle of negotiation in labour law, in the first instance the union must in any case present a well reasoned demand for the delivery of the information in question.

Thus, Hasselbalch also states that, in the first instance, the employer's obligation to provide information to the union will be expressed in the demand.<sup>52</sup> This is correct, and it can be added that without the union making a demand for the employer's delivery of documentation it will not be possible to impose a sanction for a breach of the agreement, because the employer does not deliver, for example, pay slips to the union, unless this is explicitly agreed. The same requirement for the parties putting forward demands as practical and legal preconditions for bringing legal proceedings applies generally to a large proportion of all legal proceedings. Meanwhile, it is interesting that the failure to comply with a demand will constitute a breach of the agreement.

<sup>52</sup> Hasselbalch (above n 43), Section XXII.

Here, too, ideas for assessing this can naturally be drawn from the rules for employers' monitoring and in particular from the exceptions to their right to monitor their employees.<sup>53</sup>

Furthermore, the labour law practice referred to above can be included and it is possible that other arguments and considerations can be taken into account.

A number of factors may be relevant for assessing whether there are special circumstances that mean that the general rule should be departed from and that, even without a specific agreement to this effect,<sup>54</sup> the employer must be legally obliged under the agreement and its assumptions to provide the documentation that the union seeks. In accordance with this, it can be relevant whether the union has sent a demand for the delivery of documentation and whether the union is already in possession of the information, or whether the union could easily and should itself have obtained the information.

It can also be relevant whether the information that the union seeks concerns members or non-members. On one hand, the union can argue that, in relation to rates of pay, the agreement does not distinguish between members and non-members, just as the union is entitled, under the agreement, to negotiate on behalf of all the employees regardless of whether an employee is a member of a union or not. Thus, the union can argue that, in carrying out monitoring, union membership should make no difference.<sup>55</sup>

Conversely, the employer can argue that the provision of information about the payment of persons who are not union members constitutes an infringement of privacy rights, is contrary to the Law on personal data and that the provision of information about the pay of named persons is not necessary (see § 5(3) of the Law on personal data). The provision of information about the payment of persons who are not union members has been tried several times under Swedish law. In AD (Arbetsdomstolens domar) 1995 No. 73, the Swedish Labour Court decided that the employer did not have any obligation, on the basis of a collective agreement and its presumptions, to disclose information about the pay of employees who were not union members.<sup>56</sup> In a more recent Swedish decision of 14 January 2009 it was also examined whether, under the agreement, the employer was obliged, in connection with pay negotiations, to give pay information

<sup>53</sup> See below for examples of criteria for assessment.

<sup>54</sup> There can of course be a number of situations in which the terms of an agreement are interpreted to mean that there is a special assumption of the existence of the employer's obligation to provide documentation. See, for example, the decision of the Permanent Arbitration Court (Labour Court) No. AR 1137 of 11 January 1923.

<sup>55</sup> A union can also argue that there can hardly be a question of commercially confidential information in relation to the rates of pay of persons who are covered by a collective agreement.

<sup>56</sup> The same result was reached by the Swedish Labour Court in AD 1989 No. 94, where the union argued on the basis of the *medbestämmandelagen* (Law on co-decisionmaking).

about named persons who were not union members. The Labour Court did not find that the terms of the agreement obliged the employer to disclose information about third party employees in pay negotiations and there was therefore no breach of the agreement.<sup>57</sup> It is highly likely that the same would apply in Danish law.

If a matter concerns a union member about whom the union wants information, it can be relevant whether there are special circumstances that suggest that it is more reasonable for the employer to give the information rather than the union member. Thus the general rules must be that the employer is not obliged to give the information.<sup>58</sup>

Also, the question of whether there have been previous breaches of the agreement concerning the type of information on which documentation is demanded from the employer can play a role, just as the union's demand for documentation from the employer must always be supported by specifically assessed proper considerations. A reasonable consideration is whether an employer who is covered by an agreement can meet the requirements of the union without significant inconvenience and financial loss for the employer, and whether the risk of the employer breaching or avoiding the agreement in connection with the matters for which documentation is requested is a significant risk. Finally, it can be relevant whether the matter concerns new circumstances that have arisen since the agreement was entered into, so that when entering into the agreement the union could not have been aware of the need for a special agreement for the delivery of documentation demanded. The basic requirement must naturally be fulfilled, that the provision of the documentation must be necessary to ensure compliance with the agreement, so that the demand is not disproportionate to the measure used. It can thus be stated with regard to the employer's obligation to disclose information on pay and conditions to the union that such an obligation can apply in special situations where the union has an actual and particular justified reason for receiving the information directly from the employer, but there cannot be said to be a general obligation to do so. An overall assessment of the situation must be made in specific cases.

#### *2.54.4 Information about the pay and conditions of foreign workers – including posted workers*

Next, it is necessary to ask whether a union that is covered by an agreement can, without a specific agreement, demand more detailed documentation on the pay and conditions of specific groups of foreign workers, including, for example, the work permits and residence permits of foreign workers, where such are required.

<sup>57</sup> AD 2009 No. 3.

<sup>58</sup> However, if the union has been given power of attorney by the individual members covered by the pay information to obtain information under the Law on personal data, the employer will be bound by this.

This question has been and can still be relevant, among other things because, until the latest easing of the Law on immigration,<sup>59</sup> there have been special requirements that all workers from the 10 new EU Member States could not start work with an employer in Denmark before being able to show work permits and residence permits. Moreover there was, and could still be, a special risk of avoidance of such rules through the use of foreign one-man undertakings exploiting the rules on the freedom to provide services and the freedom of establishment under Articles 49 and 56 TFEU.<sup>60</sup> Not least, there is a risk that such parties may avoid the rules on the protection of workers in the Law on the posting of workers, so further initiatives on this are planned by Denmark, for example that such one-man undertakings should be registered in RUT.<sup>61</sup> Since 1 May 2009 Denmark has no longer distinguished between workers from the ‘old’ Member States and workers from the ‘new’ Member States, all of whom are covered by Article 45 TFEU on free movement, but the rules in the Law on immigration still mean that workers from countries outside the EU can obtain work and residence permits in Denmark, subject to certain conditions.<sup>62</sup>

It is an interesting and practical question whether a trade union can demand information about the rules in the Law on immigration under which a worker carries out work for an employer covered by a collective agreement, including being shown documentation about work and residence permits, or the information that is registered by RUT, including the names of the individual posted workers, the dates of starting their employment and so on.

The unions’ interest in ensuring compliance with collective agreements will not in itself be sufficient to demand documentation on work and residence permits for all workers of foreign origin working for an employer, or the information registered in RUT which is not publicly accessible.

<sup>59</sup> Law No 264 of 23 April 2008. See also Executive Order No 1044 of 6 August 2007, with subsequent amendments.

<sup>60</sup> The accession of the eight new Member States on 1 May 2004 and later of Bulgaria and Romania on 1 January 2007 put the focus on a number of questions prompted by the principle of free movement within the EU. See, for example, B Egelund Olsen *et al.*, *Europæiseringen af dansk ret* (Jurist- og Økonomforbundets Forlag 2008), Chapter 25 ‘Enkeltmandsvirksomheder fra de nye østeuropæiske medlemsstater’.

<sup>61</sup> By Law No 509 of 19 May 2010 on posting of employees, the title of the Law has thus been amended to read ‘employees’ ‘etc.’. Furthermore, rules have been implemented concerning registration in RUT of self-employed undertakings and on public access to some of this information. See Section 25 below.

<sup>62</sup> In the examples given by way of introduction, where contractually certain normative or obligatory terms must be agreed, particularly concerning the legal status of foreign workers, the parties are bound by the content of the agreement.

As a general rule, only public authorities and the police have a right to initiate proceedings and have control powers for ensuring that the rules of immigration law, tax law, the law on the work environment and so on are complied with.

Thus, unlike in Iceland,<sup>63</sup> for example, in Denmark there are no general rules on the trade unions' right of insight into the pay and conditions of foreign workers.

Seen in isolation, unless specifically agreed otherwise, as a general rule it lies outside the rights of trade unions to monitor whether employers employ workers without the necessary work and residence permits, notification to RUT and so on, as long as the workers receive pay according to the rates in a collective agreement and are treated in accordance with a collective agreement. As stated previously, the authority to exercise control has not been formally delegated to the unions. Questions of work and residence permits, compliance with the rules of the Law on the posting of workers and suchlike are not, in principle, either normative or obligatorily relevant questions for collective agreements.

Viewed from a wider perspective, and taking into account the elements referred to above, it is relevant to ask whether there may not nevertheless be special circumstances in individual cases where a foreign employer may not be required to provide documentation to a union entitled under a collective agreement showing that the employer's employees are not illegally employed or, for example, are not employed contrary to the rules in the Law on the posting of workers on registration with RUT.

One could imagine that, on the basis of information from its own members or others, a trade union would ask a foreign employer for information on whether named persons of foreign origin are engaged as employees of the employer, as service providers under the EU rules, or as posted workers under the Law on the posting of workers, and requesting that the answer be supported by documentation. In justification of such a request the union could, perhaps, depending on the situation, rely on a number of the arguments given above, including the risk of avoidance, that the provision of the documentation would not cause significant loss or inconvenience for the employer, and that the request is properly based on information from union members or others, previous similar episodes and so on.

However, a trade union would be unlikely to be successful in claiming that an employer's failure to comply with such a request constituted a breach of agreement. The public interest relating to requirements based on public law is too narrow in relation to a collective agreement, and a union could, in any case, have included such an obligation to provide documentation as a term of a collective agreement during the negotiations.

If the request for documentation concerns other matters, such as documentation of working time and payment, which are regulated in the collective agreement, the

<sup>63</sup> Agreement on Foreigners in the Icelandic Labour Market of 7 March 2004 between ASI and SA.

example of employment of foreign workers, for example under the rules on the posting of workers, could be one of the scenarios in which there can be a special justification for demanding further information in the form of documentation from the employer. The specific evaluation could be made using the factors referred to above.

#### *2.54.5 Restrictions on monitoring under EU law*

If a control measure is specially directed at workers from EU Member States, there can be grounds for considering whether the control is of such a kind as to be capable of being considered a hindrance to or restriction on the free movement of workers under Article 45, 49 or 56 TFEU. This has been particularly relevant since 1 May 2009, since when there is no longer authority under the Accession Treaty for interim measures against social dumping.

It is well known from the practice of the ECJ that the control measures of the Member States concerning foreign undertakings often have to balance between the strict demands of free movement, on one hand, and regard for exercising control, public interest and so on, on the other. The principle that the Member States must ensure the freedom to provide services within the Union, as expressed in Article 56 TFEU, is an inflexible fundamental principle of the EU.

According to Article 56, a service provider established in a Member State has a right to provide services in another Member State and to post their workers for this purpose in accordance with the Posting of workers Directive. According to the practice of the ECJ, the principles of freedom to provide services and freedom of establishment can be restricted only by provisions based on Article 52 TFEU, on the grounds of the overriding public interest, while respecting the principles of non-discrimination and proportionality. It can be questioned whether it is the view of the ECJ that only national authorities, and not the labour market parties – such as trade unions – can act with a view to imposing on the undertakings of other Member States conditions or lawful restrictions on the grounds of public policy or on the grounds of the overriding public interest. The background to this assessment is illustrated by paragraph 84 of the judgment in the *Laval* case, which touched on the question of trade unions' use of collective action.

It follows from the decision in the *Vander Elst*<sup>64</sup> case that the rules on the freedom to provide services should be interpreted as precluding one Member State from requiring undertakings that are established in another Member State and enter the first Member State in order to provide services, to obtain work permits and the associated administrative burdens. In this case such administrative burdens were identified with the responsibility for answering questions about employment, and the obligation to pay the costs associated with this. There was then the problem that an administrative fine was imposed in the event the questions were not answered. The case concerned the right of

<sup>64</sup> Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803.

France to require work permits in connection with the use by a Belgian undertaking of Moroccan workers for demolition work in France, in a situation in which the Moroccan workers were lawfully resident and had work permits and permanent jobs in Belgium.

According to the *Rush* case,<sup>65</sup> the Member State in which the performance of a service is received must have the possibility of controlling that a service provider which is established in another Member State does not use the freedom to provide services for other purposes, so as to misuse the rules on free movement. However, any control measures must be taken within the framework established by Union law, so that the measures must not result in the freedom to provide services being rendered illusory or undermined, nor may the exercise of the freedom be made subject to the discretion of the authorities.<sup>66</sup>

According to the general principles developed in the decisions of the ECJ, Member States are entitled to take measures to prevent abuse of the rules on freedom of movement and likewise a Member State may lawfully seek to protect itself from the avoidance of rules, such as those in the Posting of workers Directive or similar, by introducing special control measures.

However, the right to protect against abuse of the rules is not so extensive as to permit the introduction of restrictions that can hinder or involve disadvantages for the posting undertaking.<sup>67</sup> As stated by Karsten Engsig Sørensen, it must be a condition that the abuse is found to exist in fact and that the restriction is not merely based on general rules or assumptions.<sup>68</sup>

In Case C-244/04 *Commission v Germany* [2006] ECR I-855 the ECJ held that Germany had committed a breach of the Treaty by setting aside its obligations under Article 49 EC (now Article 56 TFEU) in connection with the posting of workers by requiring a prior period of employment of at least one year with the undertaking that

<sup>65</sup> Case C-113/89 *Rush Portuguesa v Office national d'immigration* [1990] ECR I-1417.

<sup>66</sup> See also Case C-168/04 *Commission v Austria* [2006] ECR I-9041, according to which it was unlawful for Austria to make it a condition for the posting of employees from a third country of an undertaking domiciled in another Member State that authorisation of posting within the EU should have been obtained and that the employees in question should have been employed for at least one year in the posting undertaking or that, in association with this, there was an employment contract for an indefinite duration and for Austria to require evidence of fulfilment of the Austrian pay and conditions requirements. Moreover, it was contrary to Article 49 of the EC Treaty (now Article 56 TFEU) for the Austrian immigration law to provide for automatic rejection, without exception, of entry and residence permits that made it impossible to regularise the situation for third country citizens who are lawfully posted by an undertaking domiciled in another Member State once the workers had entered the national territory without a visa.

<sup>67</sup> This applies even if the restrictions apply without discrimination between domestic service providers and service providers from other Member States.

<sup>68</sup> K Engsig Sørensen, 'EU's udvidelse og den fri bevægelighed', *U* 2004 B 283.

posted workers to Germany. In the case the German Government argued, among other things, that the requirement that an employment contract had been entered into at least one year prior to the posting was an appropriate and effective means of preventing undertakings domiciled in other Member States from taking on employees solely for the purpose of posting them abroad. In its judgment the ECJ ruled that such a requirement must be regarded as disproportionate for fulfilling the purpose claimed by Germany.

The ECJ's judgment in Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR I-2107 concerned the tax treatment of interest paid by companies domiciled in the United Kingdom on loans from companies domiciled in other Member States. The judgment lays down the principle that it would be contrary to the freedom of establishment and to the free movement of capital and of services for Member States to impose unnecessary administrative burdens in their national measures against abuse.

Since the decisions of the ECJ lay down strict requirements for Member States concerning which burdens can be imposed on an undertaking that provides services to another Member State in order for there to be found that there is not a restriction on freedom of movement contrary to Article 56 of the Treaty, trade unions must also take care to ensure that their monitoring of compliance with collective agreements, or their requirements made in connection with a collective agreement, cannot be regarded as a restriction or hindrance to freedom of movement. This applies not least when the ECJ has indicated that the labour market parties cannot justify any hindrance to freedom of movement on the grounds of public policy or overriding public interest.

#### 2.56 Personal data and monitoring by trade unions

A different perspective on the right of trade unions to monitor foreign workers concerns what possibilities or restrictions there are for the disclosure of information under the data protection rules. The Law on personal data provides that disclosure to third parties of even ordinary personal information, such as information about the pay of individual workers, may be made subject to compliance only with a number of guarantees of security.

Sec. 5(2) of the Law on personal data requires the collection of data to be for clearly stated and legitimate purposes, and the subsequent processing of the data may not be incompatible with these purposes. The question is whether the disclosure of personal information by an employer, including a posting employer, to a trade union for the purpose of the trade union's monitoring of pay and conditions, without the agreement of the workers concerned, would be compatible with the originally stated and legitimate purposes for processing the data, namely to ensure the administration of and compliance with the individual worker's employment agreement and the public law rules associated with it.

Moreover, § 6(1) No. 7 of the Law on personal data provides that the disclosure of information to third parties, for example, a trade union, must be necessary for that third

party to be able to pursue a legitimate interest that outweighs consideration for the registered person.

If there is sensitive information, such as information about union membership or ethnic background, then as a rule even more restrictive rules in the Law on personal data apply to the disclosure of the information.

In the case of public employees, information about the employment conditions of an individual – such as their name, job position, education, tasks, salary and business travel – is, as a rule, subject to public inspection under the rules of the Law on access to public information, in particular § 2(3) first and second sentences. However, the rules on access to public information are not unconditional and in certain situations the right of access may be excluded. In connection with these rules, under the Law on personal data, the Data Protection Agency has decided that the content of a collective agreement and of any local agreements and so on can be relevant in assessing the opposing interests under § 6(1) No. 7 of the Law on personal data with regard to the disclosure of personal data. Examples of interests that can be relevant to such an assessment include the need for shop stewards who are authorised to negotiate to be able to fulfil their responsibilities. According to the Data Protection Agency, the form in which disclosure is made and whether the employee is covered by the rights of third parties to have access to the information can also be relevant. Opposed to this is the interest of employees to protect their privacy and to keep information about their pay and conditions, including their income, to themselves. The Data Protection Agency has not ruled directly on whether consideration for a trade union's monitoring of compliance with a collective agreement can be given weight when balancing the interests related to disclosure under § 6(1) No. 7 of the Law on personal data, so the question cannot be said to have been finally determined.<sup>69</sup>

In the case of private sector employees, the Data Protection Agency has not made a general ruling, as private workplaces often have different agreements and traditions for the treatment of information on pay.<sup>70</sup>

However, according to the practice of the previous Registers Agency there cannot be systematic disclosure of personal information to a trade union with a view to its monitoring activities. See, for example, RÅ 1996/93, according to which an undertaking's systematic disclosure of information on accumulated rights to hours off work and bonus hours, shift-working hours, days of holiday on grounds of seniority and

<sup>69</sup> On the right of public sector employers to disclose information about pay, see the Data Protection Agency's statement of 12 October 2007, Case No 2007-321-0047, available at [www.datatilsynet.dk](http://www.datatilsynet.dk).

<sup>70</sup> The Data Protection Agency has said that its statement of 12 October 2007 on the right of public sector employers to disclose information about pay is aimed primarily at the public sector, since it is the Data Protection Agency's impression that private workplaces often have different agreements and traditions for the treatment of information on pay.

so on to a group of employers, without the agreement of those concerned, was contrary to the Law on registers, so the group of employers was not entitled to register such information.

According to the Registers Agency's annual report for 1995/96, it appears that a group of manufacturers could lawfully register lists with information about the individual employees' accumulated rights to hours off work, so that the shop steward could follow up and monitor whether the applicable rules were being complied with. But the acceptability of these arrangements required that the registration must not be made by public display of the lists, since such publication would constitute an unlawful disclosure of personal data.

To the extent that an employer is directly obliged to disclose information on pay and conditions to the shop steward or trade union on the basis of a collective agreement (see the description of the labour law above) it must be assumed that the general rule is that consideration for the trade union outweighs consideration for the persons registered according to § 6(1) No. 7 of the Law on personal data, so there may be disclosure without the consent of registered members of the union. It must also be assumed that the principles of proper purpose and finality in § 5(2) of the Law on personal data must be observed in such situations. Thus the assessment, under data protection law, of disclosure of information from an employer to a trade union or shop steward plays a central role in the question of whether disclosure of information can be said to be necessary so the employer responsible for the data can comply with the obligations under employment law, or whether a trade union can take care of the employment law rights of its members in accordance with the agreement. These considerations have been so important, at least on the Danish labour market, that, as an exception to the prohibition on disclosure of information about trade union membership, a special provision has been included in §7(3) of the Law on personal data, which also applies to situations where the registered person has not given express permission for the disclosure of sensitive information.

The personal data law problems in the area of collective agreements must thus today be interpreted in light of the rules of the law on collective agreements. This is also in line with the following statement of the Article 29 Data Protection Working Party<sup>71</sup> (see the working party report WP48):<sup>72</sup>

The Working Party would like to point out that data protection law does not operate in isolation from labour law and practice, and labour law and practice does not operate in isolation from data

<sup>71</sup> The popular name is due to the fact that the working party was set up under Article 29 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The working party is an independent EU advisory body on data protection and the protection of privacy in the EU. Its tasks are laid down under the authority of Article 29 of the Directive.

<sup>72</sup> WP 48, 5062/01/EN/Final, Opinion 8/2001 on the processing of personal data in the employment context, of 13 September 2001, p. 4.

protection law. This interaction is necessary and valuable and should assist the development of solutions that properly protect workers' interests.

However, in assessing the justification for disclosure, it is important to ensure that only the information that is necessary for the purpose of the trade union's monitoring is disclosed, so that personal data which, for the purpose of the monitoring, could just as well be given in anonymised form should not be disclosed (see § 5(3) and § 6(1) No. 7 of the Law on personal data).<sup>73</sup> In the case of non-union workers, which will often be the case with posted workers, the situation is more doubtful and the monitoring interests of a trade union will probably not outweigh the privacy interest of non-union workers.

To the extent that an employer is not directly obliged, under employment law, to disclose information to a trade union, there is always a right for the employees whose personal data are processed by the employer to have a right to inspect the data under §31 of the Law on personal data. This means that the trade union can receive information from the registered persons with a view to monitoring compliance with an agreement, and the union can obtain powers of attorney to apply to inspect and receive the data of the employer on behalf of an employee. This applies both to union members and non-members.

In Swedish law, which is based on the same principles as Danish personal data law, it has been clarified that there is not a right for a trade union to receive information about the pay of non-members. On the contrary, considerations of privacy dictate that the employer is not obliged to disclose such information for the purposes of monitoring. Also, in Sweden, even though a collective agreement might provide that the employer must disclose information about non-union members to the union, such disclosure would be contrary to Swedish personal data law. In other words, in Sweden the rules of the personal data law will overrule the terms of a collective agreement which are contrary to the personal data law.<sup>74</sup> The same view can be expressed of Danish law.<sup>75</sup>

## 2.57 Conclusion

As parties to an agreement, trade unions have a justified interest in being able to conduct ongoing monitoring to ensure that employers bound by an agreement comply with it and they have a real right to conduct monitoring. However, the right to monitor, which can be derived from the general principles of contract law and labour law, has its limits, just as employers' monitoring of the work of their employees is subject to a number of principles.

<sup>73</sup> See generally on the registration of organisational relations, including for non-members: P. Blume and J. Kristiansen, *Databeskyttelse på arbejdsmarkedet* (Jurist- og Økonomforbundets Forlag 2002), 42.

<sup>74</sup> Dnr 498-2007 of 17 December 2007 of Datainspektionen. The decision was upheld by the Administrative Court at the end of 2008; see the report of 30 December 2008 of Datainspektionen published at [www.datainspektionen.se](http://www.datainspektionen.se)

<sup>75</sup> Blume and Kristiansen (above n 73) 42.

The limits to trade union monitoring have developed over time through decisions of the courts on labour law, and sometimes a special need for monitoring arises which means that it is necessary to require the employer to give information to the trade union for the purposes of the union's monitoring.

A trade union will be unlikely to have the right to make a physical inspection via an unannounced visit to an undertaking, unless such an inspection is agreed to by the employer or is an express obligation under a collective agreement. Also, an employer will not generally be obliged to give documentation of information that is in the possession of the union's own members. There must be special circumstances justifying why it would be more reasonable for the employer to give the information rather than the members direct to their union. This is expressed in the decisions on labour law where it has been decided that information that the union ought easily to be able to obtain for itself through its members cannot be required to be provided by the employer as part of a monitoring measure.

However, in certain situations the employer may have an obligation, under a collective agreement, to contribute information that the union cannot obtain itself through its shop steward or through its members. Thus, if an employer who is bound by a collective agreement is in possession of information that is not directly available to the trade union, and which concerns pay and conditions that are governed by the agreement, the employer could be obliged to provide such information to the trade union on request, for the purposes of monitoring. It is not impossible that in special circumstances this could include information about posted employees that is not publicly available via RUT. However, there can be other legal implications, namely the limits to hindrances and restrictions on freedom of movement in EU law, and the strict norms of personal data law on the disclosure of information, including confidential and sensitive personal data without the consent of the registered person. Altogether, it can be said that there are many potential legal problems associated with a trade union's monitoring of an undertaking that posts employees to Denmark, as long as there is no direct authority to monitor either in legislation or in an agreement. This applies both in situations where the foreign undertaking has signed a collective agreement that is silent on the question of monitoring and in situations where there is no agreement.

It must be assumed that a trade union's right to monitor is in any case not so extensive that, without an explicit agreement, there will be an obligation for an employer to give documentation of work and residence permits, for example, or of the information in RUT that is not publicly accessible in relation to posted workers.<sup>76 77</sup>

<sup>76</sup> On the regulation of the monitoring rights of trade unions in other countries, see K Alsos, 'Tillitsvalgte og fagforbundenes rett til innsyn i lønns- og arbeidsvilkår – En komparativ studie av regelverket i utvalgte europeiske land', *Arbeidsrett* 2007, 140 [a comparative study of the regulatory framework in selected European countries].

*2.6 Agreement of 3 December 2009 on stricter rules for reporting to and compliance with the obligations to report to RUT and implementation of Law No. 509 of 19 May 2010 on amendment of the Law on posting of employees*

By a political agreement of 3 December 2009,<sup>78</sup> in line with the methodology of previous agreements for amending the Law on the posting of workers, a political agreement was adopted by a number of parliamentary parties that as soon as possible a bill should be put forward amending the rules in the Law on the posting of workers in RUT. It appears from the agreement that the aim of the amendments is to create a better overview of undertakings posting workers to Denmark and of posted workers in Denmark so as to be able to control compliance with the legislation on the work environment and on taxation more effectively. The aim is also to give the labour market parties better scope for protecting their interests. Thus, it was agreed to amend the Law on the posting of workers in order to create a more detailed and effective information and registration obligation, as well as more effective enforcement.

The reasons stated in the agreement for these measures is that there is a growing number of posted workers in Denmark, necessitating a better overview of undertakings posting workers and of posted workers in order to better control compliance with Danish law, and that there have been difficulties associated with the posting of workers in Denmark, despite the introduction of RUT in 2008.

By implementing a revision of the rules first adopted on RUT, the aim is to achieve better enforcement of the obligation to send reports to RUT, and to ensure that the applicable practice on the Danish labour market should be respected.<sup>79</sup>

According to the agreement, the existing rules will be made more effective by shifting some of the responsibility for reporting to the undertaking providing the work, for example the building contractor who enters into an agreement with a service provider in another Member State, so that the undertaking providing the work has shared responsibility, subject to criminal sanctions, for ensuring that the foreign service provider has sent the necessary information to RUT. Moreover, the level of detail is to be increased so that there will be stricter requirements for information on the contact person for the undertaking that posts workers. The level of fines is to be doubled and the

<sup>77</sup> M. Gräs Lind, 'Fagforeningers kontrol af virksomheders løn- og arbejdsvilkår?', *U* 2010 B 1, reviews the rules on trade union monitoring of pay and conditions from a general standpoint. Significant parts of the Danish version are thus the same.

<sup>78</sup> See the agreement of 3 December 2009 between the Liberal Party, the Conservative People's Party, the Social Democrats, the Socialist People's Party and the Social Liberal Party on strengthening the provisions on the central Register of Foreign Service Providers (RUT).

<sup>79</sup> Agreement of 3 December 2009 on strengthening the central Register of Foreign Service Providers (RUT).

administrative responsibility is to be moved to the Working Environment Authority, which will in future be responsible for enforcing the obligations with regard to RUT. Finally, it was agreed that one-man undertakings from other Member States will have to report to RUT, even though such undertakings are in principle not covered by the Law on the posting of workers.

On the obligations for undertakings providing work to ensure that foreign service providers have sent information to RUT, it is stated in more detail in the commentary that backs up the agreement that the duty – which applies to both private and commercial providers of work – must cover ensuring that documentation showing that the foreign service provider has reported to RUT and has given the correct work address and correctly stated the duration of the work. However, the duty of the undertaking providing the work will be limited to the building and construction sector, agriculture and forestry, and so on, as it is in these areas that it has been shown that there are problems with the posting of workers. However, this area can later be expanded. The duty of the undertaking providing the work will first come into force when there is on-line access to RUT.<sup>80</sup>

On the stricter requirements for information about the contact person, it is stated in the agreement that the labour market parties need to have more information available than under the present arrangement in order to contact foreign service providers. The foreign undertakings do not normally have an establishment with personnel in Denmark, so it has often not been possible to contact them. It is intended to make it clear in the Law that the contact person must be associated with the undertaking, and that the contact person must be appointed from among those persons who work in Denmark in connection with the provision of the service. More detailed contact details must thus be given, including information on how the person can be contacted, for example via a mobile telephone number. According to the agreement, the Danish Government intends to ask the European Commission whether, under EU law, it will be possible to give the information in RUT about workplaces to the labour market parties/private persons, for example if it is not possible for the labour market parties to get in touch with the undertaking concerned via the contact person whose information is given.<sup>81</sup> The European Commission replied that it is possible to give public access to information concerning the place of delivery of services, including to labour market parties.<sup>82</sup>

As for the stricter penalties, it is proposed that the level of fines for normal cases should be increased from DKK 5,000 to DKK 10,000, and the fine should be graded, among other things, according to the seriousness of the breach, exculpatory circumstances, the number of workers and the duration of the posting. Examples given of aggravating

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> Cf. the Official Report of Danish Parliamentary Proceedings A, reprint, the Danish Parliament 2009-10, Bill No L 157, 3, 1<sup>st</sup> column.

circumstances justifying a higher fine include repeat offences and clearly evasive arrangements, such as camouflaging workers in the form of one-man undertakings.

The fact that in future the Working Environment Authority will have responsibility for enforcing the obligations relating to RUT will strengthen the possibilities for exerting control; the Working Environment Authority will also be able to undertake investigations of breaches of the law, including coordinating contact with the Tax and Customs Administration concerning foreign undertakings that have not complied with their obligations to report to RUT.<sup>83</sup>

With Law No. 509 of 19 May 2009 on the amendment of the Law on posting of employees, which partially came into force on 1 June 2010 and partially comes in to force at a later time to be determined by the Minister of Employment as regards the obligations of one-man undertakings, the above-mentioned political agreement was implemented in the Law on posting of workers, which has subsequently been amended to the Law on posting of employees etc.

The Law implements the political agreement on the amendments of the Law on posting of workers, whereby stricter registration rules are implemented in connection with the supply of services in Denmark. The purpose of the legislative amendment is thus to ensure improved compliance and enforcement of the existing material rules that already apply in connection with posting, but also to extend the registration obligation to include one-man undertakings' supply of services to a recipient in Denmark in order to improve the possibilities of controlling these companies. Thus, the implementation of the Law is based on the fact that the existing rules in RUT are not sufficiently effective. Among other things, it appears from the explanatory remarks that, as of 1 January 2010, only 714 registrations had been made in RUT, and some of the registrations consisted of repeated registrations from the same company, despite the fact that the actual number of foreign companies that were liable to make registrations in RUT is presumed to be significantly higher. The RUT register existing when the stricter regulation was implemented is thus not presumed to be correct and the database is furthermore presumed to be insufficient. It appears from the preparatory work to the Law that both the authorities' compliance control with, for example, the work environment legislation and the tax legislation, and also the role of the labour market parties in ensuring fair salary and work terms in the Danish labour market, are considerations that have motivated the implementation of stricter registration obligations.

The Law implements the following new initiatives:

- one-man undertakings become subject to a registration obligation with RUT;

<sup>83</sup> See generally the agreement of 3 December 2009 between the Liberal Party, the Conservative People's Party, the Social Democrats, the Socialist People's Party and the Social Liberal Party on strengthening the provisions on the central Register of Foreign Service Providers (RUT).

- the issuer of an assignment is subject to an obligation to ensure that the foreign service provider has submitted information to RUT;
- stricter requirements for providing information about a contact person;
- doubling of the fine; and
- the Danish Working Environment Authority assigns liability for enforcement of the registration obligation for foreign service providers to RUT.

The rules on one-man undertakings' registration obligations and the obligations of the issuer of an assignment to ensure documentation of the service providers' registration with RUT do not come into force until an online version of RUT has been perfected for the Danish Commerce and Companies Agency.

§§5 a-c have thus been repealed and inserted in a new Chapter 3 a, whereby the above-mentioned amendments are implemented by §§7a-e. The separate obligations of one-man undertakings and the issuers of an assignment, which have not yet come into force, but which make up new provisions to the Law on posting of employees, read as follows:

‘§7 a (2). An international undertaking carrying out work in Denmark by supplying services without posting employees in Denmark, shall provide the following information for registration with the Danish Commerce and Companies Agency:

Name, business address and contact information of the undertaking.

2) The start and end date of the supply of services.

3) The place where the service is delivered.

4) The company's trade code.

(3) Registration pursuant to (1) and (2) must be made pursuant to the Law on Procedure for Registration etc. of Certain Information with the Danish Commerce and Companies Agency.

(4) Information which has been registered pursuant to (1) and (2) may only be used for

1) control by Danish authorities as to whether companies comply with the legislation in connection with provision of work in Denmark, and

2) statistics concerning foreign companies and posted employees.’

‘§7 d. The service provider shall, at the latest when the supply of the service is commenced, provide information to the issuer of the assignment that registration has been made, cf. §7 a (1) and (2), if the service relates to building and civil engineering or agriculture, forestry and horticulture.

(2) An issuer of an assignment receiving a service from an undertaking under an obligation to register and being part of one of the industries specified in (1) shall, at the latest 3 days after supply of the service has been commenced, contact the Danish Working Environment Authority if the issuer of the assignment has not received documentation that the company has made a registration with the Danish Commerce and Companies Agency, or if the information concerning the place of delivery of the service or the date of commencement and termination of the supply of the service is insufficient or wrong.

(3) The Minister of Employment may lay down rules to increase the obligation for service providers and issuers of an assignment, cf. (1) and (2), to include other industries than the ones specified above in (1).’

It is noteworthy that it is specified in § 7 a(4) that the information registered pursuant to (1) and (2) may be used only for authority control and statistics, and public access may be given pursuant to § 7 c to all information except the date of commencement and termination of the supply of services and the identity of the employees posted by the company and the duration of the posting period for companies that are posting employees. For one-man undertakings supplying services in Denmark, any registered information may be disclosed to the public, cf. § 7 c(1), cf. § 7 a(2), apart from the dates

of commencement and termination of the supply of services. The reason should consequently be seen in light of the fact that it has generally been requested to increase the trade unions' request to carry out monitoring. It is generally noted that the role of the trade unions concerning participation in authority-like control of compliance with the rules applying to the posting of foreign employees in Denmark now becomes even clearer than earlier in the preparatory work to the Law. However, as opposed to what was previously the case, trade unions and employer organisations do not obtain explicit rights, although the actual motivation for public access to the registration according to the explanatory remarks may be ascribed thereto. This fact may relate to the concern that it will be contrary to EU law that only national authorities – and not labour market parties, such as trade unions – may trade with a view to imposing legal restrictions on undertakings in other states based on public order or compelling public considerations. As regards the relationship to EU law, it thus appears from the preparatory work to the Law that pursuant to Article 16(3) of the Service Directive<sup>84</sup> it is possible to impose requirements on a foreign service provider if such a requirement is based on a consideration of public order, public safety, public health or environmental protection. Enforcement of work environment rules is thus stated to be part of the consideration of public health. In this connection it is specified that the proposed registration obligation for one-man undertakings is within the framework of EU law, as it will lead to real equality with Danish undertakings as regards the possibilities of the Danish Working Environment Authority to control the work environment rules for one-man undertakings.

In addition, the legislative amendments include the increased level of fines, which have been doubled, and some more technical amendments as a result of the five above-mentioned objects with the legislative amendments regarding registration obligations.<sup>85</sup>

### *2.7 Posting from Denmark to other EU or EEA Member States*

Chapter 3 of the Law on the posting of workers (§ 7) regulates situations in which persons are or have been posted from Denmark to other EU or EEA Member States.

As stated above, the main aim of the Law on the posting of workers is to implement the Posting of workers Directive as part of Denmark's obligations as host State in relation to foreign undertakings that wish to provide services in Denmark involving the posting of employees to Denmark. The main aim of the Law is thus to require foreign employers to follow the rules of Danish employment law in those areas referred to in the Directive.

With the temporary posting of workers from Denmark as home State to another host State in the EU or EEA the principle is that the law in the home State (Denmark)

<sup>84</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>85</sup> See L 2010 509: FT 2009-10 (Bill No 157).

continues to apply to the resolution of employment disputes between the employee and employer. It is also provided in Article 6 of the Rome Convention that in an employment relationship, in the absence of an agreement on choice of law, the relationship is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country.

In accordance with this, §7 of the Law on the posting of workers states that:

‘A person who is or has been posted to an EU Member State or some other country in the European Economic Area (EEA), and who, in carrying out work in that country has been covered by rules that implement Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in bringing a suit in Denmark concerning a dispute that has arisen in connection with such posting, can choose that the case shall be decided according to those rules, regardless of whether Danish law is otherwise applicable.’

This provision means that if a person who is an employee in Denmark and who is posted, for example to Poland, within the framework of providing services to Poland, brings a case in Denmark against a Danish employer relating to the posting, that person may choose to have the dispute decided according to Polish law.

If Denmark had only implemented the Directive in its capacity as a host State, then in relation to Danish workers posted abroad, the Danish courts should only apply the Rome Convention, so that as a general rule Danish law should apply.<sup>86</sup>

On the basis of § 7 of the Law on the posting of workers, Danish courts must apply the rules of the host State, in this example Poland, if the employee claims this, and this goes further than Article 7 of the Rome Convention which provides that, in applying the law of a specific country, the mandatory rules of the law of another country with which the circumstances have a close connection can be given effect if and to the extent that this country’s rules are to apply, without regard to which country’s law otherwise applies to the agreement.

Under this provision a posted Danish worker thus obtains a right, which may perhaps only be a possibility depending on the court’s discretion, as long as only Article 7 of the Rome Convention applies. The alternative would thus have been that Danish employees would have had to rely on bringing a case in the host State, for example Poland, if they were to be sure that the rules of Poland, as the host State, should apply.

### *2.8 Other regulations in the Law on the posting of workers*

Sec. 8 of the Law on the posting of workers provides that the National Labour Market Authority is the Danish liaison office with reference to Article 4 of the Posting of workers Directive. Since the passing of the Law, the Authority has coordinated the work of informing foreign employers and workers about the rules that apply to the posting of

<sup>86</sup> R Nielsen, online commentary in *Karnov*, [www.thomsen.dk](http://www.thomsen.dk), on Lovbekendtgørelse 2006-07-21 No. 849 on the posting of workers.

workers in Denmark. Experience has shown that it is very difficult to reach foreign service providers through Danish information campaigns.

The National Labour Market Authority has had the task of cooperating with the liaison offices of the other Member States in connection with various problems that can arise in connection with the posting of workers to and from Denmark. As stated above, the political agreement of 3 December 2009 decided to amend § 7 of the Law on the posting of workers so that in future the Working Environment Authority will be the liaison office. It is thought that this will provide better coordination of tasks, as the Working Environment Authority is thought to have better possibilities for cooperating with the authorities of other Member States and to exchange information with them in connection with the results of controls under the Law on the working environment and RUT. The Working Environment Authority is to be given increased authority in connection with enforcing the rules on posting and of attempts to evade the rules.

According to § 9 of the Law on the posting of workers, the Danish courts are the forum for cases concerning workers who are or who have been posted to Denmark. Such workers can always bring a case in the host State against their employer in their home State concerning the substantive protection rules in Denmark that are made internationally mandatory for those elements that are listed in the Law on the posting of workers.<sup>87</sup>

### **3. Reflections in conclusion**

When the gestation of and ongoing amendments to the Law on the posting of workers up to the ECJ's decisions in the *Viking* and the *Laval* cases are viewed from an overall perspective, it becomes clear that in Denmark, unlike in a number of other Member States, the Posting of Workers Directive, its origins and the earlier decisions of the ECJ, such as the *Rush* case, were not initially paid sufficient attention.

The attitude was that, as hitherto, in Denmark one could solve any problem and one retained the right to solve any problem related to the legal status of posted workers in Denmark. This was to be done via the Danish model's dynamic solutions, directly through the labour market parties. The preferred stance was that the influence of Danish politicians and the right of the EU to decide through regulations and directives should be kept to a minimum. Preferably, the Law on the posting of workers should not have

<sup>87</sup> LL Hansen, 'Udstationerede lønmodtagere – er det hjemlandets eller værtslandets regler, der gælder?', U 2005 B 189. For more on posting and foreign workers in Denmark, see N Offendal and A Bugsgang, *Internationale ansættelsesforhold* (Thomson Reuters 2009). See also, for example, R Nielsen, 'Denmark', in R Blanpain and AM Świątkowski (eds), *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*. Bulletin of Comparative Labour Relations 69 (Wolters Kluwer 2009).

been introduced at all, as Denmark regarded the minimum requirements of the Directive as having been complied with already, but ‘for the sake of good order’ the Directive was implemented by a Law entering into force on the day after the implementation deadline. This, at least, was the attitude evident in the preparatory documentation that formed the basis for the Law on the posting of workers, for example in the responses to the consultation, the responses of working groups, speeches in Parliament and the commentaries of the draft law.

Moreover, social dumping was not regarded as a significant problem in Denmark. In the few concrete cases where it had been necessary to intervene, the problems had been solved through the usual negotiating processes with the undertakings involved. Such situations did not give rise to major litigation on principles or suchlike in Denmark. The consensual attitude that Denmark could look after itself was characteristic, and to a large extent it still is.

After the introduction of the Law on the posting of workers in 1999/2000, the Law had a very quiet existence in Denmark, without attracting great political or judicial attention. Because of the provisions in the Law concerning its revision, it was reviewed three times in 2000–2010. Each time the revisions of the Law were passed unanimously or by a large Parliamentary majority, without much debate.

The expansion of the EU in 2004 and again in 2007 did not put a direct focus on the Law on the posting of workers. On the other hand, there was political awareness about the rules for Danish undertakings entering into employment contracts directly with workers from the new Member States. There was great interest among Danish employers to recruit workers, particularly in the construction sector and in agriculture and market gardening. The labour market parties, and particularly the trade unions, did not want Danish undertakings employing cheap Polish labour without a collective agreement at, for example, DKK 60 per hour in price competition with the Danish collective agreements. With the expansion of the EU, property developers who did not normally employ construction workers became interested in the possibility of making savings in construction costs by themselves employing cheap foreign labour. Thus, with the expansion of the EU there was great political focus on the introduction of rules to shore up defences against social dumping. Shortly thereafter the Eastern Agreements were entered into on the basis of the Accession Treaties, where the principles were agreed for the introduction of national restrictions on free movement of workers for an interim period. Thus, Denmark made use of the possibilities in the Accession Treaties and made new regulations by amendments to the Law on immigration. The most significant measures for achieving the newly realised aim of preventing social dumping was that such employment required registration, prior approval of the employee and the employing undertaking, as well as regulation of pay and conditions in accordance with or corresponding to the terms of Danish collective agreements. The terms of the Eastern Agreements were gradually eased through several amendments to the Law on immigration, towards more liberal possibilities for employing foreign workers, and on 1

May 2009 the interim regulations in the Law on immigration came to an end, and the same rules applied to workers from all Member States. This easing of the rules further increased the number of foreign workers in Denmark, which matched the growth and the employment needs in the construction industry and in agriculture and market gardening up until the start of the financial crisis. However, as stated above, the trade unions did not achieve special monitoring rights over and above the usual scope for monitoring under collective agreements.

Along with the gradual opening up of the Danish labour market to the direct employment of foreign workers in Danish undertakings, an increasing number of Danish and foreign undertakings were becoming aware of the possibilities of providing and receiving services in accordance with the general EU principles of free movement. However, this applied not only to one-man undertakings, which found themselves in a no-man's land in relation to the rules on the posting of workers, but also to larger undertakings, especially subcontractors using posted workers. The rules of the Law on the posting of workers applied to the posted workers, but it became apparent that there was a need for better registration with a view to ensuring compliance with the rules on VAT and income tax, as well as compliance with the Law on the posting of workers, especially with regard to compliance with the rules on the work environment.

In such situations, the trade union movement wanted to exert pressure through the traditional Danish use of collective action against the incursion of foreign undertakings. However, in practice it was often difficult to identify the management of the foreign undertakings in Denmark, even after the introduction of the RUT registration in 2008. Most recently, the rules have been further restricted as from 1 June 2010 by implementation of Law No. 509 of 19 May 2010, among other things with the purpose of increasing trade unions' access to information.

The trade unions' understanding of the possibilities for using collective action was also subject to serious revision following the decisions of the ECJ in the Viking case and the Laval case. These judgments led to efforts to clarify the situation, which resulted in the introduction of a new provision in §6a on the Law on the posting of workers whereby, under certain conditions, collective action can be taken against foreign undertakings. However, the introduction of the provision, which directly provides for the right to use collective action against foreign undertakings who post workers to Denmark in the same way as against Danish undertakings, still leaves a number of questions unanswered.

Even though the immediate understanding of the provision by the labour market parties is that a reasonable solution has been achieved which gives equivalent conditions for the use of collective action against foreign and Danish undertakings, it must be noted that 'rates of pay' determine the legal parameter in §6a for justifying the use of collective action. Thus, neither in the wording of the provision nor in its preparatory documentation does the Law give a right to use collective action against foreign undertakings that post workers to Denmark where the collective action is taken to obtain

an entirely Danish collective agreement. If collective action is to be initiated against a foreign undertaking in support of minimum rates of pay, this raises a number of questions of interpretation in relation to the requirement of precision in identifying the minimum rate of pay. Thus, it is not certain that the foreign undertaking will be able to find out what the minimum rate of pay claimed is, and whether any lack of clarity in connection with the use of collective action will be considered to be a restriction within the meaning of EU law so as to be incompatible with the principles in the Laval case. Finally, in future in cases dealing with Danish labour law, it is possible that the courts will have to consider various shades of meaning, such as whether it makes a difference that a Danish trade union has members among the posted workers, or whether the foreign undertaking is a party to a collective agreement in its home State, and the provision in the Law does not appear to have clarified whether it is possible to conduct a conflict in support of claims for rates of pay that are higher than the minimum rates of pay in a collective agreement.<sup>88</sup> Until the decisions in Viking and Laval, the Posting of workers Directive and the common EU rules had unanimous Parliamentary support in Denmark, without attracting much political attention. This came to an end with the Laval and Viking decisions. The working group that had to consider the consequences of the decisions for Danish law now had a clear mandate to 'Introduce the necessary amendments, without undermining the Danish model'. Whether the Danish solution, with the introduction of §6a, is sufficient to comply with the principles in the Laval and Viking decisions may depend on the future decisions of the ECJ.

The employer may be obligated in different situations, where subject to a collective agreement, to contribute information that the union cannot obtain itself through its shop steward or members. Under some circumstances this could include information about posted employees that is not publicly available via RUT. Denmark has decided to ask the Commission for clarification of whether EU law sets restrictions on, for example, giving information from RUT to the labour market parties in specific situations. It will be interesting to find out the Commission's point of view in this matter and to see which arguments count the most: freedom of movement under EU law or the strict norms of personal data law on the disclosure of information and the need for the unions to be able to monitor the posted workers' working conditions, among other things. It can be concluded that there are many potential legal problems associated with a trade union's monitoring of an undertaking that posts employees to Denmark, as long as there is no direct authority to monitor either in legislation or in an agreement. This applies both in situations where the foreign undertaking has signed a collective agreement that is silent on the question of monitoring and in situations where there is no agreement.

It must be assumed under the present regulation in Denmark, that a trade union's right to monitor is not so extensive that, without an explicit agreement, there will be an

<sup>88</sup> J Kristiansen, 'Laval, Viking og den danske model', *Juristen*, 2008, 79.

obligation for an employer to give documentation of the information in RUT which is not publicly accessible in relation to posted workers.

## CHAPTER 4

# The Posting of Workers Directive – German Reactions and Perceptions

*Monika Schlachter*

### **1. Introduction – aims and approach**

The aim of this chapter is to depict the development of the rules and regulations on the posting of workers at European and national level. Its focus will be a detailed explanation of developments in Germany, in law and in fact.

In Section 1 the problems originating from the posting of workers between different Member States are set forth. The reasons and consequences of transnational provision of services for the German economy are highlighted. We also discuss the discord between Member States concerning the posting of workers and the consequent obstacle to regulation at European level; the influence of the judgments handed down by the European Court of Justice is also illustrated.

Section 2 pinpoints the difficult development of German domestic regulation. The focus lies on the process of legislation and the diverging opinions among politicians and economists about the existence and necessary content of a possible law on the posting of workers. The long and winding road from a national draft bill to its effective enforcement will thus be disclosed, also regarding the implementation of Directive 96/71 EC on the posting of workers (PWD).<sup>1</sup>

Section 3 focuses on the recent developments at national level following the ECJ's judgments in the 'Laval Quartet'. Even though intensely debated among legal scholars, these decisions had fairly limited implications for legislative developments. As the existing act was nevertheless completely overhauled, the highly controversial purpose of reformulating national law on the posting of workers in 2009 is discussed briefly.

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

## **Part 1: The factual basis for regulation of the cross-border provision of services**

### **2. Developments at the European level**

#### *2.1 Enlargement of the Single Market*

The formation of the European Single Market initially was supposed to lead to a harmonised economy in Europe as a whole, but it did not give rise to the equalised market conditions in all Member States that had been hoped for. Tensions increased in the 1980s with the southern enlargement of the Union through the accession of Greece, Portugal and Spain. By this process the former Member States of the European Union (EU), mostly with strong economies, faced less potent economies in the process of industrialisation and with much lower costs of living and working. Because of the great wage discrepancies within the different Member States, the ‘old Member States’ dreaded harsh consequences from the free movement of workers in the enlarged Union. By relying on the free movement of workers, mature labour markets could be flooded by cheap labour, resulting in high unemployment rates in high-wage countries, where workers would be unable to compete on costs. In particular, the building sector was in focus because labour costs amount to a particularly high proportion of overall costs, usually up to 50 per cent. Hence in this sector employers with cheap workers could easily win contracts in high wage countries.

#### *2.2 Transition provisions for the new Member States*

Such a prospect alarmed the ‘old Member States’ and the urge to protect their national employment markets led to a restriction of the EU’s fundamental freedoms in the Acts of Accession. The Act of Accession for Greece, Spain and Portugal allowed the postponing of the free movement of workers from their home countries to ‘old Member States’ for up to seven years.<sup>2</sup>

The intended effects implemented through postponing application of the fundamental freedoms were destroyed by the ruling of the European Court of Justice (ECJ) in the *Rush Portuguesa* case.<sup>3</sup> According to this decision the protective transition provisions on restricting free movement of workers were not applicable in case of the posting of workers because those workers by providing their services cross-border do not immediately make use of their own fundamental freedoms: The derogation provided for in Article 216 of the Act of Accession relates to Title I of Regulation No 1612/68 on eligibility for employment. The national provisions or those provisions in agreements which remain in force during the period of application of that derogation are those relating to the authorization of immigration and eligibility to take up employment. It must accordingly be inferred that the derogation contained in Article 216 applies when access by Portuguese workers to the employment market of other Member States and the entry and residence arrangements for Portuguese workers seeking such access and for members of their families are at issue. The application of that derogation is in fact justified since in such circumstances there is a risk that the employment market of the host Member State may be disrupted. ... The situation is different, however, in a case such as that in the main proceedings where there is a temporary movement of

<sup>2</sup> For Greece until 1988, Act of Accession 24.5.1979 [1979 OJ L 291/26, 27; for Portugal and Spain until 1993, Act of Accession 12.6.1985 [1985] OJ L 302/35 (Spain), 88 (Portugal); A Hänlein, ‘EU-Beitritt der MOE-Staaten im Bereich der Arbeitnehmerfreizügigkeit und der sozialen Sicherheit’, *Europäische Zeitschrift zum Wirtschaftsrecht* 2001, 165, 168.

<sup>3</sup> Case C-113/89 *Rush Portuguesa L<sup>da</sup> v Office national d’immigration* [1990] ECR I-1417, paras 15, 19.

workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer. In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State. (paras 14, 15)

Due to this interpretation the situation of posting is an aspect of an employer's freedom to provide services, Article 56 TFEU (ex. Article 49 EC) instead of a worker's right to free movement, Article 45 TFEU (ex. Article 39 EC). To fulfil service contracts in foreign Member States employers need to bring their regular workers to the country in which the service is to be provided, so that the very fact that such workers are posted cross-border remains an element of their employer's the freedom to provide services. Contrary to the situation in which the free movement of workers would be at stake, in the contractual relationship between employer and worker in the event of posting of workers work would not habitually be carried out in the country to which the worker was actually posted: despite the actual cross-border situation the habitual place of work would be in the country of origin. Therefore the employer as a supplier of services would be able to offer such services in all Member States freely and would be subject to neither restrictions to employ domestic workers from the country of the production site nor the duty to apply for work permits for employees. In such cases the application of Article 56 TFEU (ex. Article 49 EC) protects not only the freedom of service providers but indirectly also the free movement of employees.<sup>4</sup>

Since the situation of posting did not, in the reasoning of the ECJ, touch on the scope of the politically restricted right of free movement of workers, the transition provisions for free access to labour markets are inapplicable, so that the construction sector became open to competition from low wage countries. Conflict of law rules did not solve the difficulties arising from such situation: the German conflict of law rule applicable to such cases, Article 30 Para 2 no 1 EGBGB,<sup>5</sup> determines that a labour contract is principally governed by the law of the country where the worker habitually carries out his work, even if he is temporarily posted to a different country. Because of this regulation, German labour law provisions did not apply to posted foreign workers, who could lawfully be employed under their domestic (home state) regulations on wages and working conditions. The result was distortion of market competition in Germany, a high wage country.

<sup>4</sup> Case C-113/89 *Rush Portuguesa*, para 22; Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803, para 21.

<sup>5</sup> Article 30 EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) corresponds to Article 6 of the Rome Convention of the law applicable to contractual obligations from 1980. Articles 1–21 of the Rome Convention were transposed into German private international law through the EGBGB. The EGBGB regulates German private international law; since 17 December 2009 Article 30 EGBGB is superseded by Article 8 Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6).

### 2.3 Drafts for a directive on the posting of workers

Since the ruling of the ECJ annulled the intended effects of restricting the applicability of some fundamental freedoms of the EC Treaty for workers from the new Member States, the 'old Member States' tried to regain control by implementing a directive on the posting of workers. In 1991, the Council of the European Union tabled a first proposal.<sup>6</sup>

The political compromise it relied on aimed at creating a safeguard for individual workers operating transnationally, but thereby hindering distortion of competition due to the assignment of cheap labour from low wage countries to high wage ones. The same working conditions should govern the same work in the same workplace. The scope of the directive was supposed to cover all cases in which undertakings in one Member State posted their workers temporarily, within the framework of transnational supply of services, to a different Member State. In these cases a 'hard core' of minimum working conditions, including regulations in collective agreements effective in the Member State in which the services were to be accomplished, should be applicable also to foreign posted workers. The applicability of the law of the location where the work is carried out should be superimposed on the otherwise applicable labour law of the worker's home country. This approach met with fierce criticism. Especially the new Member States disagreed with the draft, because the chance of boosting their economy through the competitive advantage of posting of workers at their domestic wages would thus be lost.

Great Britain (for fundamental reasons) and Portugal totally rejected a posting of workers directive. Greece, Italy and Ireland opted for a threshold deadline: such a directive should govern only situations in which the duration of the posting exceeds three months. But such a generous threshold would annul both intentions of the directive, since continuously replacing workers at a construction site within three months was affordable without huge costs or losing much efficiency, which would make it a breeze to undermine the regulation.<sup>7</sup>

In addition to such differences in principle, the content of the extendable core working conditions was controversial, as was effective implementation of the directive under the conditions of the different national labour law systems.<sup>8</sup>

Responding to these frictions among the Member States, the European Commission came up with a modified draft in 1993.<sup>9</sup> But this proposal again could not achieve

<sup>6</sup> COM(91) 230 final – SYN 346.

<sup>7</sup> W Koberski/G Asshoff/D Hold, *Kommentar zum Arbeitnehmerentsendegesetz*, 2. Aufl (Beck 2002), 17.

<sup>8</sup> W Däubler, 'Ein Anti-Dumpinggesetz für die Bauwirtschaft', *Der Betrieb* 1995, 726, 727; W Däubler, 'Der Richtlinienvorschlag zur Entsendung von Arbeitnehmern', *Europäische Zeitschrift für Wirtschaftsrecht* 1993, 370, 373.

<sup>9</sup> COM(93) 225 final – SYN 346.

unanimous consent. Primarily, the new Member States and the United Kingdom remained unconvinced and prevented a compromise.

#### 2.4 Rejections of the proposal (Germany perspective)

Even though the German presidency to the European Council in 1994 tried to advance the draft, this proposal did not meet with overall acceptance in the country itself. Even though there was consent on the urgent need for action, the measures proposed and the plans on how to implement them were received mainly negatively in Germany.<sup>10</sup>

From the very beginning, the proposed threshold deadline (according to the revised draft: one month<sup>11</sup>) was called into question. It was contested that the intended positive effects for the German construction sector could be achieved under such threshold: as controlling the actual period of posting could be complicated, allowing for some period of time not governed by the law pertaining to the construction site would make it easy to circumvent restrictions applicable only at a later phase. Apart from this, a large part of work on a construction site only takes a couple of days or weeks, for example, laying tiles or erecting scaffolding. All such operations would then legitimately fall outside the scope of the directive so that the goal to render national regulations generally applicable to posted workers would often not be met. Under these restrictions the directive would not be able to change distorted competition in the construction sector.

An additional problem for Germany was the non-existence of a statutory minimum wage there, as this raised the problem of how to implement a nationwide mandatory wage standard. Therefore, the only remaining way of setting mandatory wages by declaring the relevant collective agreements generally applicable did not lie within the exclusive authority of the state, but could be achieved only with the consent of both sides of industry.<sup>12</sup> As such consent, especially on the part of the national federation of employers, could never be taken for granted the suitability of such an instrument to meet the intended goal was considered questionable.

In constitutional terms, possible discrimination against state nationals (*'Inländerdiskriminierung'*) was a matter of concern. The draft directive proposed an obligation for foreign employers to apply national minimum standards, but German employees still could be treated worse if they were deployed from one part of the country (for example, the eastern part, also providing lower wages) to another part of the country within the scope of the same collective agreement. To avoid such outcomes it was demanded that the regulation also be extended to domestic postings.

<sup>10</sup> The mentioned criticism was expressed in the written statements of German experts in labour law and from employer and employee representatives, handed to the Commission for Labour and Social Policy according to the drafts for a European directive and national law concerning the posting of workers, *Bundestagsdrucksachen* (hereafter cited as BT-Drs) 13/768.

<sup>11</sup> Article 3 II COM(93) 225.

<sup>12</sup> § 5 TVG; TVG = *Tarifvertragsgesetz*, the German law on collective agreements.

Also the proposed scope of application of the Directive, restricted only to the building sector, was criticised by some because other sectors were encountering comparable difficulties and therefore also deserving of comparable protection from undercutting wages. However, the majority agreed that regulating the building sector had high priority.

Other highly controversial points were the control and penalty mechanisms of the draft, which assigned the Member States to exchange information about posted workers and to cooperate in fulfilling the aims of the directive. To this end, Member States should also provide information to the posted workers themselves about their legal rights and guaranteed working conditions. To realise this goal, a strict assignment of competences to public authorities would have been necessary, previously unknown to the labour inspectorate.

Another major problem was the enforcement of workers' individual rights. It could be difficult for posted workers due to an inability to speak the national language to understand their rights completely. The supporting measures of collective labour law regularly applicable to German workers would also be of little help to posted workers: Unions are competent in supporting their members, but posted workers might refrain from joining a German union because their employers might see this as disloyalty. The works council of the German company in charge of the construction site would not be representative of them, either.

Finally, the legal basis for the directive seemed disputable: whereas the European Commission invoked ex Article 66 EC combined with Article 57 EC (version of Maastricht treaty) (now Article 62 and Article 53 TFEU, respectively), this was heavily criticised as not representing the proper basis for such a directive, especially among German legal scholars.

Another central point of concern was a possible conflict of the proposed directive with the fundamental right of free collective bargaining, which in Germany is guaranteed by the Constitution. A regulation at the supra-national level might endanger the exercise of such a fundamental right without the involvement of the state, which is constitutionally obliged to protect it.

Facing such disagreement at the European level and much scepticism at the domestic level, the draft could not be passed.

### **3. Development at the domestic level**

#### *3.1 Problems of the German construction sector*

The negative consequences of EU enlargement described above were strongly felt in Germany. In 1995, already about 150,000 workers from other EU Member States were working on German construction sites. As a consequence, 140,000 German workers,

constituting about 10 per cent of all workers employed in this sector, were unemployed, even under the favourable economic condition of a building boom following Germany's unification. In 1995, 100,000 additional German construction workers lost their jobs.<sup>13</sup>

This was the result of disparate wage levels in the Member States. Foreign undertakings paid their workers only half the amount that German employees earned or even less while deploying them on German construction sites. Since labour costs make up nearly half the total costs of a building, and as the German wage standard was one of the highest in Europe, the competition with low wage Member States was unbalanced as foreign undertakings could undercut German competitors' prices easily by 25 per cent. The foreign undertakings deploying their employees to Germany were not bound to comply with German collective agreements and the minimum wages established by them, not even if the agreements were declared generally applicable. The number of insolvencies of domestic construction companies rose dramatically. In the area of Berlin, for example, the number had tripled from 1991 to 1994. A lot of German employers had only the choice of either keeping up with the competition by engaging foreign subcontractors and firing their own employees or becoming insolvent and losing their business. The development of the employment situation thereby led to social dumping. German workers could not compete with the low wages of their foreign colleagues; as living costs in Germany are much higher than in the low wage countries, they simply could not afford to work for less.

On the contrary, the low wage level in certain countries could be based on the existence there of a less developed infrastructure or labour productivity. Importing low wages to Germany amounts to exploiting the benefits of doing business in two different economies: the companies could combine the advantage of their low labour costs and social standards at home and the convenience of a good technical infrastructure in Germany. German undertakings, on the other hand, could not legally reap such benefits through employing cheap foreign workers: Regulation 1612/68 EC<sup>14</sup> and 2004/38 EC<sup>15</sup> on freedom of movement for workers within the Community obliges undertakings to treat foreign workers the same as domestic workers, whereas foreign employers were not obliged to obey German standards while posting their workers only temporarily. All in all, competition in the construction sector became so fierce that domestic undertakings and their employees experienced all the burdens but none of the achievements of a European Single Market.

<sup>13</sup> D Hold, 'Arbeitnehmer-Entsendegesetz gegen Lohndumping und illegale Beschäftigung im Baugewerbe', *Arbeit und Arbeitsrecht* 1996, 113.

<sup>14</sup> Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257/ 2.

<sup>15</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC [2004] OJ L 158/77.

### 3.2 *Pressure on the social policy*

The aggravation of the influx of foreign workers in the construction sector put the German government under pressure to act. Not only was anti-EU sentiment in the population an acute danger for the approval rates of a government accused of behaving like a helpless bystander, but the consequences of the economic losses in the powerful construction sector were threatening the stability of social security systems.

Unemployment represents a huge cost to the national economy and the state: unemployment benefits and tax revenue losses included, the costs amounted to 40,000 DM per jobless person per year.<sup>16</sup>

Beyond that, the stability of the special social security system of the building sector was affected. This system is a collective institution of the collective bargaining parties<sup>17</sup> under which all domestic construction undertakings pay a monthly fee. Any time a worker employed by such an undertaking exercises a right conferred on them by the collective agreement – for example, the right to take paid leave – the employers' costs are refunded from the social system.<sup>18</sup> The advantages of such a system, such as avoidance of competitive distortion through a guaranteed equal sharing of costs by all domestic employers, as well as granting rights to all employees, can only be maintained if all undertakings participate in its financing. Such a 100 per cent participation rate had hitherto been guaranteed through the instrument of generally applicable collective agreements. Once a collective agreement has been declared universally applicable, any undertaking doing business in the relevant sector becomes bound by its norms, whether or not they participate in collective bargaining.

The involvement of foreign undertakings in the German labour market, relying on the free movement of services, endangered the stability of this social contribution system. Only non-national employers, not covered by the underlying collective agreements, were allowed to pay lower wages and undercut the benefits for employees secured through the social contribution system. Enterprises participating in the social contribution system were obliged to pay their contributions and could not achieve a competitive advantage by undercutting wages set in the collective agreement. But over and above the well-being of individual undertakings driven out of the market due to the competitive advantages of cheap labour and low social security contributions, for the German social contribution system in the construction sector the situation became a threat to its very survival.<sup>19</sup>

### 3.3 *The German legislator's constitutional obligation to act*

Under such conditions the academic debate focused on the question of whether or not the government would have to protect existing domestic systems under a Constitutional

<sup>16</sup> BT-Drs 13/2414, 7.

<sup>17</sup> § 4 II TVG.

<sup>18</sup> Bundesratsdrucksachen (hereafter BR-Drs) 546/95, p. 15.

<sup>19</sup> BT-Drs 12/2418, p. 8.

obligation to guarantee fundamental rights to citizens. This line of reasoning referred to a decision of the Federal Constitutional Court arguing such an obligation: once legal relationships operate not only in purely domestic situations, the court holds that the tolerable margin of infringement of fundamental rights would be wider than in national cases, but that nevertheless the implementation of fundamental rights had to be guaranteed as far as possible.<sup>20</sup> This duty to protect national fundamental rights obliged the German state to obviate a circumvention of German working conditions.<sup>21</sup> As a consequence of such a duty to protect, the government decided to table a draft bill without relying on the possible of the Directive at EU level.

Such a national regulation for the posting of workers was intended to achieve that foreign building contractors would not be able to deploy their workers to Germany under their national conditions for employment contracts. The goal was to impose the ‘same wage for the same work at the same working site’.

This goal could be achieved by extending domestic regulations to posted workers. Technically, this is realised through the application of mandatory rules with an overriding effect (Article 34 EGBGB). Such norms considered to contain fundamentally important regulations of the domestic legal system should always prevail, no matter which law would otherwise be applicable to the labour contract. This way, certain minimum working standards laid down in generally applicable collective agreements should be applicable to posted workers, too, even if the labour relationship with their respective employer is otherwise governed by the rules and regulations of their home country.

Even though the German government had tried during its EU Council Presidency in the second half of 1994 to further a European solution in this direction, it decided to provide for a national solution as this goal seemed out of reach.<sup>22</sup> Following the example of France, Belgium and Austria, Germany finally presented its own national solution.

#### 3.4 *Conformity of national regulations with the fundamental freedoms*

Whether such domestic law on the posting of workers would be in conformity with European law depends on whether it respects the fundamental freedoms of the EC Treaty, particularly the freedom to provide services. Even if such law intentionally limited competition from foreign service providers this solution is not necessarily unlawful, as affirmed by the ECJ in *Rush Portuguesa*:

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily. Within their territory, no matter in which country the employer is established; nor

<sup>20</sup> ‘Schiffsregisterurteil’, Bundesverfassungsgericht (BVerfG), 10.01.1995 – 1 BvF 1/90, 1 BvR 342, 348/90, in *Neue Zeitschrift für Arbeitsrecht* 1995, 272.

<sup>21</sup> BT-Drs 13/2418, p. 8.

<sup>22</sup> BT-Drs 546/95, p. 6.

does Community law prohibit Member States from enforcing those rules by appropriate means. (para 18)<sup>23</sup>

But any restriction of the right of freedom to provide services can be lawful only on condition that an overriding public interest demands this intervention and provided that the home country of the posted worker is unable to provide adequate protection.

Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive means. (para 15)<sup>24</sup>

The German legislator relied on this line of argumentation when drafting the domestic posting of workers bill. Due to all the difficulties for the economy, the social security system and the labour market described above, an overriding public interest in regulating trans-border posting of workers was clearly established. That there could be alternative, less restrictive rules that achieved the same results was not the case from the German government's view point: in Germany this situation jeopardized the constitutionally guaranteed freedom of collective bargaining and led to social tensions. In particular the construction sector was negatively affected due to the special relevance of labour costs in determining prices in that sector. The hopeless situation with regard to regulation at the European level made unilateral action at national level all the more important as there seemed to be no alternative.

#### **4. Summary Part 1**

Due to the accession to the European Union of new Member States with significantly lower wage levels than the old Member States, social and economic tensions among Member States grew. Whereas the EC Treaty provides fundamental economic freedoms, protection of social rights was rather weak. The transitional provisions in the accession treaties aiming at temporarily restricting free movement of workers for the purpose of protecting labour markets in the old Member States were interpreted by the ECJ in such a way as to render them meaningless. By this line of reasoning, posting of workers from low wage countries to high wage countries became the single most important source for insolvencies and growing joblessness in the German construction sector. As the situation got out of control for the government, EU regulation deemed absolutely necessary. As conflicts between Member States could not be settled and a solution at EU level seemed out of reach, the German government decided to enact a national posting of workers act that aimed at keeping the envisaged solution in line with the ECJ's rulings.

<sup>23</sup> The same opinion was already expressed in Joined cases 62 and 63/81 *Société anonyme de droit français Seco et Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223 (Seco).

<sup>24</sup> Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007.

## **Part 2: Development of a domestic regulation**

### **5. German drafts for the Posting of Workers Act**

The proposed legislation aimed at establishing minimum wage levels in the German construction sector by introducing ‘uniform minimum working conditions’. Such minimum standards should be imposed on foreign undertakings in order to limit the advantage they obtained from paying their workers posted to Germany much lower wages than their German competitors.

This way, competitive distortions between domestic and foreign undertakings could be counterbalanced by extending some national regulations to posted workers through the law on mandatory working conditions for providing transnational services (AEntG – *Arbeitnehmer-Entsendegesetz*). Notably, this draft bill was not meant to directly limit the influx of foreign service providers into the German construction sector, respecting the ECJ’s decision that such undertakings may rely on the fundamental freedom to provide services in all Member States (ex Article 49 EC, Article 56 TFEU).<sup>25</sup> The government nevertheless sought to diminish the comparative cost advantage of such undertakings, especially in the construction sector.

#### *5.1 Governmental draft*

In September 1995 the Federal government<sup>26</sup> introduced a draft Bill<sup>27</sup> to the Lower House of Parliament.<sup>28</sup>

##### 5.11 Content of the draft Bill

As there was no statutory minimum wage in Germany, the draft Bill provided for an additional possibility of establishing minimum conditions in all fields relevant for price setting in the construction sector. Such minimum conditions should become binding for all German employers first and then be extended to undertakings situated in other European Union Member States and their employees deployed to Germany. These minimum standards were considered to be so important for preserving the public interest that they function as mandatory norms within the meaning of Article 34 EGBGB, overriding the norms of the sending country, which otherwise govern the contract of employment.<sup>29</sup> The material scope of the draft bill should be limited to the construction sector,<sup>30</sup> as this was the economic area where immediate action was most needed.

<sup>25</sup> BT-Drs 13/2414, 6.

<sup>26</sup> In the election period concerned the German government was based on the parliamentary group of the Christian Democratic Union (CDU) and the Christian Social Union (CSU).

<sup>27</sup> Referred to as gov. draft.

<sup>28</sup> BT-Drs 13/2414.

<sup>29</sup> § 1 AEntG gov. draft: ‘... zwingend Anwendung, wenn ...’.

<sup>30</sup> § 1 I AEntG gov. draft.

In order to fit into the existing system of wage determination and other relevant working conditions by means of collective bargaining, it should not be left to the state to determine the content of the minimum standards that are meant to be extended to posted workers.<sup>31</sup> The state should merely provide for the technical means for such extension and the final decision on which (existing) regulation would be extended. Such means are provided for under the German law on collective agreements that allows for a declaration of universal applicability of such agreements by the state. Only such regulations in collective agreements should be qualified for extension that contain rules on wages<sup>32</sup> and paid holiday leave<sup>33</sup> because of their huge competitive and social policy importance. In the course of declaring such rules generally applicable, collective agreements were extended to all employers and employees, including those not hitherto bound by it. By this means, not only foreign undertakings but also domestic undertakings would be obliged to obey the standards of the collective agreement for such workers carrying out their work anywhere on German territory. This would also include German undertakings deploying employees from one German *Land* to another.<sup>34</sup> Only through such broad scope of application was the law deemed to guarantee that discrimination of foreign employers would be avoided.

In addition to provide substantive minimum working conditions, foreign undertakings must participate in the German social contribution system for the construction sector, if they did not already participate to a comparable system in their home country, in which case the German system allowed consideration of the already granted benefits.<sup>35</sup>

Such provisions should be applicable from the first day of posting onwards, but exceptions could be granted if the work provided was marginal or in comparable appropriate and justified cases.<sup>36</sup> Public authorities should be responsible for monitoring employers' compliance with the regulations<sup>37</sup> and the law should oblige employers to provide the necessary data.<sup>38</sup> An infringement was to constitute an administrative offence and punished with a monetary fine of between 20,000 and 50,000 DM, depending on the abuse.<sup>39</sup> The law was planned to be limited to two years.<sup>40</sup>

<sup>31</sup> BT-Drs 13/2414, p. 8.

<sup>32</sup> § 1 s.1 AEntG gov. draft.

<sup>33</sup> § 1 s. 2 AEntG gov. draft.

<sup>34</sup> § 1 I AEntG gov. draft.

<sup>35</sup> § 1 II AEntG gov. draft.

<sup>36</sup> § 1 III AEntG gov. draft.

<sup>37</sup> § 2 AEntG gov. draft.

<sup>38</sup> § 3 AEntG gov. draft.

<sup>39</sup> § 4 AEntG gov. draft.

<sup>40</sup> § 5 AEntG gov. draft

### 5.12 Critical reactions

In Parliament the vast majority of MPs agreed with the necessity for a national solution, since a regulation at European level was not to be expected in the near future. However, the way the draft bill was intended to realise its goals remained highly contested.

The disagreement included different opinions among political parties in the German Lower House of Parliament, between the Lower and the Upper House of Parliament and among the relevant employer and employee representatives in the construction industry. It was doubted that the government draft could effectively fight social dumping in the building sector.

Critical arguments were raised simultaneously against all the main points of the government's draft. The different standpoints could only agree on restricting the material scope of application to the construction sector because the differences in working conditions among Member States were especially great in this sector.<sup>41</sup> But even the type of jobs to be counted as belonging to the construction sector was disputed. Some MPs demanded extension not only to principal construction occupations but also to sub-branches and all jobs close to the building sector,<sup>42</sup> because drawing distinctions in that area would be difficult. At least all jobs performed on construction sites should be included.<sup>43</sup>

Limiting the regulations to only minimum wage and paid leave was also considered insufficient, because other regulations important for employee protection – such as on health and safety or prevention of accidents – would still remain at a low level<sup>44</sup> for posted workers.

That the law should be of limited duration for a period of only two years<sup>45</sup> was also a major point in the discussion. It was strongly doubted that within two years wage levels in Europe would have adapted to a more equal standard, which would render such regulation unnecessary.<sup>46</sup>

The intended measures of control were criticised as insufficient and the planned assignment of such control functions to the general administrative authorities as inexpedient<sup>47</sup>. Instead, it deemed it preferable to delegate compliance monitoring to the Federal Employment Agency and the Customs Office, since both bodies already monitored illicit employment.

<sup>41</sup> BR-Drs. 546/95 p. 5.

<sup>42</sup> Plenary protocol of the Upper House of Parliament 689, p. 458.

<sup>43</sup> BT-Drs 13/58, p. 4925 B, 4939 C.

<sup>44</sup> Plenary protocol of the Upper House of Parliament 689, p. 458.

<sup>45</sup> *Ibid.*

<sup>46</sup> BT-Drs 13/58, p. 4928.

<sup>47</sup> Plenary protocol of the Upper House of Parliament 689, p. 458.

In addition to all these differences, the major point of concern was related to the declaration of the general applicability of collective agreements.

Under the law on collective agreements, in principle only such labour relations are governed by a collective agreement in which both contracting partners are members of the employer's organization or the union concluding the relevant agreement. Employers can also be governed by collective agreements that they conclude as an individual contracting party. Declaring a collective agreement generally applicable<sup>48</sup> provides for coverage of all employment relationships lying in the material scope of application of the relevant collective agreement,<sup>49</sup> even if the parties are not members of the relevant organizations. The general applicability of collective agreements provides protection for employees not organized in unions or whose employers are not covered by a collective agreement.<sup>50</sup> On the other hand, such an extension of collective agreements to employment relationships hitherto not covered represent government interference with fundamental collective bargaining rights, on one hand, and the contractual freedoms of labour contract parties, on the other. For this reason, the administration is not free to declare a collective agreement generally applicable. Instead, a precondition for such intervention is that employers already bound by such a collective agreement must employ 50 per cent of the workers covered within the regional, professional and personal scope of the collective agreement.<sup>51</sup> Furthermore the declaration of general applicability must be required by the public interest. The administration must balance the possibility of disadvantages for a major portion of the employees hitherto not covered against the possible disadvantages of contracting parties not wanting to be covered by the collective agreement.<sup>52</sup>

To represent the relevant interests at stake in such interest balancing, a statutory committee on collective agreements had been created, whose consent is necessary for any declaration of general applicability. This committee consists of three representatives of each of the parent organizations<sup>53</sup> of the employers and employees,<sup>54</sup> representing the regional scope of application of the collective agreement.<sup>55</sup>

<sup>48</sup> The declaration of general applicability of tariff agreements is regulated by the *Tarifvertragsgesetz* and the *Durchführungsverordnung des Tarifvertragsgesetzes* – DVO TVG (Implementing order of the law of collective agreements).

<sup>49</sup> § 5 IV TVG.

<sup>50</sup> R Giesen, *Arbeitsrechtskommentar*, 1. Aufl (CH Beck 2008), § 5 TVG, para 6, 9.

<sup>51</sup> M Franzen in *Erfurter Kommentar zum Arbeitsrecht*, 10. Aufl (CH Beck 2010), § 5 TVG, para 11.

<sup>52</sup> *Ibid.*

<sup>53</sup> Parent organizations are confederations of trade unions and employers' organizations, § 2 II TVG.

<sup>54</sup> § 1 DVO TVG.

<sup>55</sup> W Koberski/L Clasen/H Menzel, *Kommentar zum Tarifvertragsgesetz* (Loseblatt) Stand 1999 (Luchterhand), § 5 TVG para 81.

The declaration of general applicability depends on a previous petition by at least one of the relevant parties to the collective agreement and on the consent of the majority of members of the said committee.<sup>56</sup> The final decision about enforcement and conditions lies with the administration.

To achieve the necessary majority in a committee composed of three representatives of each side of industry, the consent of only one side is not enough. Since the representatives of the employers had already declared in the course of the development of the draft bill that they would never approve such an application for general applicability in the construction sector, this method of extending national regulation to foreign service providers through the declaration of general application was disapproved.<sup>57</sup> Thus many regarded the law as a failure before it was even passed.

Another point of criticism concerned the fact that by the intended draft the German legislator interfered with the autonomy of collective bargaining. Through the mere fact of enacting this law the legislator would have insisted on the existence of a public interest in the general applicability of minimum wages. Under such preconditions the members of the committee on collective bargaining would have difficulties in voting against such general applicability

The Upper House of Parliament also argued that the narrow scope of application, as well as the mechanisms of implementation would not be appropriate to establish equal working and competitive conditions and that the control and penalty measures would not suffice. The Upper House of Parliament decided by a majority to decline the proposal and to introduce its own proposal<sup>58</sup> to the Parliament,<sup>59</sup> shortly before the opposition party in the Lower House of Parliament<sup>60</sup> came up with another alternative.<sup>61</sup> All such drafts followed the same intentions, but the implementation measures were extremely controversial.

## 5.2 *Draft of the opposition party*

In response to the government draft bill, which they fiercely criticized, the minority party in Parliament<sup>62</sup> came up with an alternative draft.<sup>63</sup> The alternative concept proposed as a benchmark for foreign undertakings the applicability of standard local working conditions. All posted workers originating from the European Union and thus not needing to apply for a work permit should be within the scope of the law. Working conditions such as wages, health and safety and sick pay were to be counted among

<sup>56</sup> § 3 I DVO TVG.

<sup>57</sup> Plenary protocol of the Upper House of Parliament 689, p. 459.

<sup>58</sup> BR-Drs. 546/95; BT-Drs 13/2834.

<sup>59</sup> 13/689, p. 458.

<sup>60</sup> Bundestag is referred to as the Lower House of Parliament.

<sup>61</sup> BT-Drs 13/2418.

<sup>62</sup> The opposition party in that period was the SPD.

<sup>63</sup> BT-Drs 13/2418; referred to as opp. draft.

standard local working conditions when laid down in basic collective agreements, or alternatively, when habitually granted to workers in that area for a comparable job.<sup>64</sup> Even if such working conditions did not cover all domestic companies this would not discriminate against foreign posting undertakings, according to the European Commission,<sup>65</sup> as long as the vast majority of undertakings representative of the sector are covered. Under these preconditions, the terms of the relevant collective agreement had to be respected by almost all undertakings operating in the sector.<sup>66</sup>

Foreign employers should be obliged to contribute to the German social security system, but double claiming was supposed to be avoided here as well.<sup>67</sup> Before posting their workers to Germany, undertakings should be obliged to inform the authorities<sup>68</sup> responsible for compliance monitoring. The responsibility for supervising compliance with the law was planned to lie with the Federal Employment Agency.<sup>69</sup> The draft also intended to pierce the corporate veil for an undertaking subcontracting to employers who do not comply with the law.<sup>70</sup> Employers providing working conditions in gross disparity with those required should be threatened by criminal persecution, as well as liable to compensation for damages.<sup>71</sup> Administrative offences should be punished by a fine of between 1,000 and 100,000 DM, depending on the seriousness of the infringement.<sup>72</sup>

### 5.3 *Draft bill of the Upper House of Parliament*

A third draft bill for a national law on the posting of workers originated from the Upper House of Parliament.<sup>73</sup> It was supposed to cover all undertakings and their employees in the European Union and the European Free Trade Association. The draft also focused on the applicability of standard local working conditions,<sup>74</sup> which should be extended to the whole building sector.<sup>75</sup> The relevant conditions should include wages and paid leave, health and safety standards, terminating employment relationships as well as continued sick pay.<sup>76</sup> The law was supposed to create mandatory rules under Article 34

<sup>64</sup> § 1 II AEntG opp. draft

<sup>65</sup> BT-Drs 13/2418; refers to COM (93) 225 final. – SYN 346.

<sup>66</sup> Motives according to Article 3 COM (93) 225 final. – SYN 346.

<sup>67</sup> § 3 AEntG opp. draft.

<sup>68</sup> § 6 AEntG opp. draft.

<sup>69</sup> § 7 AEntG opp. draft.

<sup>70</sup> § 9 AEntG opp. draft.

<sup>71</sup> §§ 12, 13 AEntG opp. draft.

<sup>72</sup> § 14 AEntG opp. draft.

<sup>73</sup> The German Bundesrat is referred to as the Upper House of Parliament; BT-Drs 13/2834; BR-Drs. 546/95; cited as parl. draft.

<sup>74</sup> § 1 I AEntG parl. draft.

<sup>75</sup> The scope of application: building sector according to § 75 *Arbeitsförderungsgesetz*.

<sup>76</sup> § 1 I AEntG parl. draft.

EGBGB.<sup>77</sup> Obliging the undertaking to announce the planned posting of workers to Germany to the responsible authorities should provide for sufficient control.<sup>78</sup> As monitoring body for supervising compliance with the law the Federal Employment Agency<sup>79</sup> and the Customs Offices<sup>80</sup> were designated because of their familiarity with this subject. Sanctions for non-compliance included compensation for damages,<sup>81</sup> fines for administrative offences<sup>82</sup> and penal provisions.<sup>83</sup> The draft was not intended to be valid for only a limited period of time.

#### 5.4 *Critical reactions*

In reply to the two alternative proposals the Government refused to accept their respective main points, especially the proposal for implementing local working conditions as mandatory. The Government evaluated this as not only inconsistent with EC law but also infringing on the collective bargaining autonomy of both sides of industry, protected under Article 9 Para. 3 GG.<sup>84</sup> Since such wages could be mandatory only for foreign undertakings and not for domestic ones,<sup>85</sup> neither the national constitution nor the fundamental freedoms of the EC Treaty were respected. To the contrary, extending standard local working conditions to foreign undertakings might amount to unjustifiable discrimination (ex. Article 49 EC, Article 56 TFEU) against other EU citizens.<sup>86</sup>

## 6. **Legislation process**

As all proposed draft bills in principle agreed on a common goal, all of them were simultaneously tabled with the Lower House of Parliament and referred to the Parliamentary Commission for Labour and Social Order.<sup>87</sup>

The Commission argued for implementing the government draft with added changes.<sup>88</sup> The restriction to the building sector was retained, but should be extended to the whole construction sector.<sup>89</sup>

<sup>77</sup> BT-Drs 13/2834, p. 12.

<sup>78</sup> § 6 AEntG parl. draft.

<sup>79</sup> § 7 AEntG parl. draft.

<sup>80</sup> § 10 AEntG parl. draft.

<sup>81</sup> §§ 9, 11 AEntG parl. draft.

<sup>82</sup> § 14 AEntG parl. draft.

<sup>83</sup> §§ 12, 13 AEntG parl. draft.

<sup>84</sup> Grundgesetz – the Constitution.

<sup>85</sup> BT-Drs 13/58, p. 4917 A – SPD draft; BT-Drs 13/2834 appendix 2, statement of the Federal Government- Council draft.

<sup>86</sup> BT-Drs 13/2834 appendix 2, statement of the Federal Government.

<sup>87</sup> In case the Upper House of Parliament does not approve the government draft it has the option to call in the Commission for Labour and Social Order to advise on the draft.

In the session of Parliament on 30 November 1995 the draft was finally adopted with the changes suggested by the Commission, with the votes of the coalition parties against the votes of the opposition.<sup>90</sup> In the same session the draft of the opposition was rejected after a second reading, whereas the draft of the Upper House of Parliament was declared to be settled.

As the Commission for Labour and Social Order had voted for an amendment to the draft bill, improving the available implementation and control mechanisms and constituting unrestricted duration of its application, some open questions remained. Taking into consideration the still negative opinion of the employers' representatives in the statutory commission on collective agreements, the draft bill was no guarantee that effective solutions would be provided in cases of conflict. Also, it was questioned whether generally applicable collective agreements were the appropriate means to solve the construction sector's problems since only few of the existing ones also covered minimum wages.

The Upper House followed this assessment of the Commission for Labour and Social Order and rejected the draft bill in the version approved by Parliament by calling on the Arbitration Commission.<sup>91</sup> The Arbitration Commission reworked the draft and proposed a final version: monitoring of compliance with the law should be carried out by the Federal Employment Agency and the Main Customs Offices,<sup>92</sup> posted workers need to be notified to the German authorities and undertakings would be liable for administrative offences by their sub-contractors with an increase in the monetary fine.<sup>93</sup> Furthermore, in case of an infringement of the law the offenders should be excluded from participation in public procurement.<sup>94</sup>

This final draft was forwarded to the Lower House of Parliament,<sup>95</sup> which enacted the law on 8 February 1996. The Upper House approved (according to ex Article 87 III s 2 GG) one day later.

The Act on mandatory working conditions for trans-national services<sup>96</sup> finally came into force on 1 March 1996.<sup>97</sup>

<sup>88</sup> BT-Drs 13/3155.

<sup>89</sup> BT-Drs 13/3155, p. 6; extended scope of application: §§ 1 and 2 of the *Baubetriebe-Verordnung* of the 28th October (version of 1984), § 75 para 1 no 3 *Arbeitsförderungsgesetz*.

<sup>90</sup> BT-Drs 13/74, p. 6487.

<sup>91</sup> BR-Drs. 823/1/95.

<sup>92</sup> § 2 AEntG gov. final draft.

<sup>93</sup> § 3 AEntG gov. final draft.

<sup>94</sup> § 5 AEntG gov. final draft.

<sup>95</sup> BT-Drs 13/3663.

<sup>96</sup> AEntG 19967

<sup>97</sup> BGBl (Bundesgesetzblatt) I 1996, 227.

## **7. General applicability of collective agreements in the construction sector**

The mechanism for achieving the general applicability of collective agreements and extending them to foreign service providers did not rely on enactment of the new law alone: the collective agreement's mandatory regulations were not automatically binding for posted workers. One precondition for declaring the respective collective agreements generally applicable is the consent of a majority in the Committee on collective agreements. If the public authorities wish to establish mandatory minimum rules through collective bargaining mechanisms they need to achieve such a majority in the Committee first.

### *7.1 First round of negotiations in the Committee on collective agreements*

When the declaration of general applicability was requested for the first time the representatives of the Federal Employers Association stuck to the line already expressed during the formation of the law<sup>98</sup> and refused to consent, whereas the Federal Trade Union Organisation was in favour of the declaration of its general application.

This outcome was highly contested even among the employers' organisations. The representatives on the employers' side in the Committee were representatives of Gesamtmetall,<sup>99</sup> Gesamttextil<sup>100</sup> and the BDA.<sup>101</sup> In particular the Federal Employers Association BDA had fundamental objections to declaring the construction sector's collective agreements generally applicable. Since the construction sector paid comparably high wages, the BDA feared that trade unions in other sectors of the economy would demand at least the 'minimum standards' in the construction sector also for their members. On the other hand, the employers' organisation of the construction sector itself agreed with the respective union that they needed generally applicable mandatory rules. General applicability of the collective agreement on minimum wages in the sector was important to enable undertakings to remain competitive compared to foreign employers' law labour costs. In case of failure of the negotiations in the Committee the German Central Association in the building trade and the Principal Association in the construction industry threatened to leave the parent organisation, the BDA, responsible for that outcome.

Nevertheless, the BDA did not compromise its position but refused to agree. The BDA's representatives declared the minimum wages as being too high in comparison with other branches, considering that such high wage levels would lead to rising wages in other sectors, especially those close to the construction sector. This would involve the risk that construction work would become even more expensive with the possible

<sup>98</sup> BT-Drs 13/3155 p. 14.

<sup>99</sup> Association for the metal industry.

<sup>100</sup> Association for the textile industry.

<sup>101</sup> German Federal Association of Employers' Associations.

consequence of negative impacts on investment in construction, or putting the level of employment in jeopardy.<sup>102</sup>

For this reason, the BDA gave no consent to the application of declaring the collective agreement in the construction sector generally applicable<sup>103</sup> in the first round of the negotiations initiated in April 1996, so that subsequently no declaration of general application could be achieved.

### 7.2 *Second round of negotiations*

The Committee on collective agreements met for a second round of discussions in September 1996, referring their dispute to mediation. In this discussion the need to finally reach an agreement led to important concessions on the part of the building sector, compromising on central points of their existing agreement in order to win the necessary vote of the BDA: the BDA managed to set a fixed time frame for the eventual declaration of general applicability, which would be valid only for one year. Afterwards the procedure in that committee would have been started anew to secure more influence on the part of the BDA.<sup>104</sup> Additionally, the minimum wage level had to be reduced, so that the collective bargaining procedure for the construction sector had to be re-opened.<sup>105</sup>

As a consequence of these decisions the German Central Association of the building trade and the Principal Association of the construction industry left the BDA.<sup>106</sup> Other observers were also fiercely critical of such behaviour on the part of the BDA. Their taking advantage of their involvement in the process of declaring a collective agreement generally applicable for the purpose of levelling down the minimum wage was seen as an infringement of the right of free collective bargaining. The denial of their consent as such was considered by some as counteracting the legislative decision in the statute according to which employee protection in posting of workers was necessary.

## **8. Conformity of AEntG 1996 with the EU fundamental freedoms**

Legal scholars in particular were critical of AEntG 1996 as being an infringement of the EU fundamental freedom to provide services.

<sup>102</sup> KH Sahl/B Stang, 'Das Arbeitnehmer-Entsendegesetz und die Europäische Entsenderichtlinie', *Arbeitsrecht im Betrieb* 1996, 652, 657.

<sup>103</sup> Bundesanzeiger No 104, 8 June 1996, 6290.

<sup>104</sup> The collective agreement was limited until 31 May 1997.

<sup>105</sup> T Blanke, 'Die Neufassung des Arbeitnehmer-Entsendegesetzes', *Arbeit und Recht* 1999, 417, 420. The minimum wages were reduced to 15.64 DM for the new German states and 17.00 DM per hour for the old ones; the succeeding collective agreement even set the wages only at 15.14 DM and 16.00 DM.

<sup>106</sup> J Ulber, *Kommentar zum Arbeitnehmerüberlassungsgesetz* (Bund-Verlag 1998), §1 AEntG para 31.

The aim of the law to influence competition between Member States and to implement equal wage levels and social standards was seen as an unjustified infringement of the fundamental freedom to provide services and the basic policy of the European Union to implement a free market economy and free competition.<sup>107</sup> The law was criticized for taking away from foreign service providers their competitive advantage of more favourable wages in their home countries. This argument was nothing new, as the ECJ had already consented to such a restriction and succeeding interference with free competition, if justified through the remaining competences of the Member States<sup>108</sup> in the field of social policy. Sticking to this line of reasoning, the ECJ in *Finalarte*<sup>109</sup> confirmed in principle the approach of the German AEntG, in other words, that imposing national terms and conditions of employment to foreign service providers was justifiable:

Article 59 of the Treaty (now, after amendment, Article 49 EC) and Article 60 of the Treaty (now Article 50 EC) do not preclude a Member State from imposing national rules guaranteeing entitlement to paid leave for posted workers on a business in the construction industry established in another Member State which provides services in the first Member State by posting workers for that purpose, on the twofold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued.

A national regulation to establish minimum working standards and thereby regulating fair competition through the extension of national regulations to posted workers constitutes a justified infringement of the freedom to provide services once the conditions set up by the Court were met. The Court especially emphasizes the necessary protection for individual posted workers, who should gain a genuine benefit through the minimum wage levels. In addition, AEntG 1996 states expressly that no foreign employer must pay double social security contributions: if undertakings were obliged to contribute to a social security scheme in their country of residence, they would be exempted from contributing to the German system.

But the court also declared one regulation an unjustified infringement of the freedom to provide services:

... Paragraph 1(4) of the AEntG, which essentially provides that all workers posted to Germany by an employer established outside Germany, and only those workers, are to be treated as a business, whereas a different definition of a business applies to employers established in Germany, which may, in certain cases, result in different businesses falling within the scope of the collective agreements. ... It follows that Paragraph 1(4) of the

<sup>107</sup> M Löwisch/L Gerken/V Rieble, 'Der Entwurf eines Arbeitnehmer-Entsendegesetzes in ökonomischer und rechtlicher Sicht', *Betriebs-Berater* 1995, 2370, 2373.

<sup>108</sup> C-113/89 *Rush*; C-43/93 *Vander Elst*.

<sup>109</sup> Joined cases C-49/98 *ao Finalarte Sociedade de Construção Civil Lda and Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, *ao* [2001] ECR I-7831.

AEntG gives rise to inequality of treatment which, in the absence of any justification recognised by the Treaty, is contrary to Article 59 of the Treaty. (para 76, 82)

The regulation concerned was consequently repealed in 2003.<sup>110</sup>

## **9. Directive 96/71 EC concerning the posting of workers**

After several governments in old Member States enacted statutes on posting of workers (for example, Belgium, France, Austria and Germany) the European Commission could no longer afford to be without a relevant Directive. The conflict between Member States would otherwise be going on at national level, rendering Community institutions irrelevant for solving the problem. Therefore the Commission was under pressure to enact a formal solution. After a new round of debate the draft directive, even though still under huge criticism, was finally approved by the European Parliament and the European Council on 16 December 1996. Enacting such a directive was measured against the subsidiarity principle (ex Article 5 II EC) and understood as being objectively justified. Sufficient protection of posted workers could be achieved only by coordinating the laws of Member States, which in turn was to be achieved through regulation at Community level.<sup>111</sup> Using the instrument of a directive not aiming at harmonization of national regulations, but only at restricting the choice of law rules interferes as little as possible with Member States' legal systems. The Directive determined the areas in which minimum working conditions had to be secured, but still left room for the Member States to decide how intensely the regulations were implemented nationally. Free movement of labour was not at all infringed by the directive, since its scope of application aimed only at workers operating in the host country for a specific duration, as in the case of posting, not regulating employment of unspecified duration in a foreign country.

The directive allows for the setting of a minimum standard for certain core working conditions that may not be undercut in the case of deploying any worker to a foreign construction site. The exploitation of wage and social cost discrepancies cannot be totally avoided by this approach in order also to protect the interests of undertakings situated in sending States. But such undertakings lost at least parts of their competitive advantages due to having to obey 'mandatory rules' of the receiving State which prevail over the usually applicable law governing the contract of employment.<sup>112</sup> A divergence from these regulations to the disadvantage of workers is consequently not admitted. Posting within the meaning of the Directive can come in three different forms: under a contract concluded between the undertaking that posts workers and the recipient of

<sup>110</sup> BGBl I 2003, 2848.

<sup>111</sup> Recital 13 in the second draft, COM(93) 225 final, at 9.

<sup>112</sup> M Schlachter, in *Erfurter Kommentar zum Arbeitsrecht*, 10. Aufl (CH Beck 2010), § 1 AEntG para 4.

services; as posting to an undertaking owned by the group of undertakings that provides the services; or as posting by a temporary employment agency to another ‘user’ undertaking.<sup>113</sup>

Such restriction of the freedom of the posting undertaking is only allowed concerning hard core provisions enumerated in the directive<sup>114</sup> and dependent on the purpose of workers’ protection.<sup>115</sup> Quite different from the German act, the Directive is not at all concerned with collective bargaining and only to a limited extent concerned with Member States’ competency to develop their domestic social policy. Instead, it relates to rules on ‘fair completion’ and intends to protect the individual posted worker. As stated by the ECJ in *Finalarte*,

... it is necessary to check whether those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted. (para 42)

The respective regulations must be mandatory for all undertakings in the relevant geographical area, including foreign and domestic undertakings. If domestic law allowed only domestic undertakings to undercut such minimum standards by means of collective bargaining on a company level, this would amount to unjustifiable discrimination against foreign service providers and therefore constitute an infringement to the freedom to provide services.

... the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services. (para 35)<sup>116</sup>

Also, the correctness of the directive’s legal basis (ex Article 66 EC combined with Article 57 EC (version of Maastricht treaty) (= Article 62 TFEU in combination with Article 53 TFEU) of the EC treaty) was called into question by German legal scholars. Such objections were ill founded. The directive in the interpretation of the ECJ acknowledges the posting of workers as a form of using the freedom to provide services. In this context, workers responsible for carrying out such services across borders will necessarily be deployed to the host county. Consequently, a directive on the

<sup>113</sup> Article 1(3)(c) PWD.

<sup>114</sup> Article 3(1) PWD.

<sup>115</sup> See, for example, Case C-165/98, *André Mazzoleni, and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Éric Guillaume and Others* [2001] ECR I-2189; and *Finalarte* (above n 109).

<sup>116</sup> Article 3(7) PWD; Case 164/99 *Infringement proceedings against Portugaia Construções L<sup>da</sup>* [2002] ECR I-787.

posting of workers would regulate the free provision of services and the legal basis chosen is suitable. The ECJ has not opposed this, either.<sup>117</sup>

## **10. Transposing the Directive into national law**

After the directive was finally enacted and several decisions had been handed down by the ECJ, German law needed to be adapted accordingly.

### *10.1 Legislative changes to the AEntG 1996*

The first changes in substance became effective at the beginning of 1998.<sup>118</sup> These amendments were deemed necessary after the entry into force of the first declaration of general application of the collective agreement in the construction sector according to AEntG 1996. The amendments were not so much a consequence of having the Posted Workers Directive in place but a means of avoiding loopholes to the domestic legislation arising over the period of its application. The personal scope of the law was therefore extended to posted, subcontracted workers to prevent circumvention. Additionally, the regulations about how to prove the relevant working time, duty of application and administrative offences were tightened and an additional jurisdiction for claims of posted workers and the social fund offices for the construction sector were introduced.

The general duty of an employer to register his employees with the employment agencies responsible for the relevant construction site, which required the name of the posted worker, the estimated duration of assignment and the identification of the construction site of operation, was expanded. Under the new version, the undertaking had to provide details of the first and last name, the date of birth and the address of the person responsible for the posting within Germany, as well as an authorized recipient for documents in Germany. A nomination of a specific location, where the authorities could inspect the necessary documents about the posted worker, was also required.<sup>119</sup>

The scope of the law was extended to temporary agencies providing transnational employment.<sup>120</sup> This was an important change, as the previous act disallowed any form of temporary work in the central construction sector. The new regulation allowed the deployment of temporary workers to several branches of the building sector – for example, the electrical trade – and opened up a new field of employment for foreign

<sup>117</sup> W Däubler/T Lakies, *Kommentar zum Tarifvertragsgesetz*, 2. Aufl. (Baden-Baden 2006), appendix 2 § 5 TVG, para 35.

<sup>118</sup> *Erstes Gesetz zur Änderung des Dritten Buches Sozialgesetzbuch*, BGBl I 1997, 2970; the previous amendment BGBl I 1997, 594 was restricted to formal changes.

<sup>119</sup> § 3 I AEntG.

<sup>120</sup> § 1 IIa AEntG.

workers. The employer/lender was obliged to provide identical information as the employer of a posted worker to guarantee monitoring of the deployed workers.<sup>121</sup>

### *10.2 Amendment in 1998*

Developments in practice showed that such amendments were still not sufficient to implement the intended effects and to prevent effectively all circumvention strategies on the part of foreign employers.

Consequently, the newly elected Government introduced a Law of correction concerning social insurance and employee protection<sup>122</sup> in order to improve the law to combat social dumping more effectively.<sup>123</sup> At the same time, this reform served the purpose of transposing Directive 96/71 EC into German law.

### *10.3 Authorization of statutory order*

One of the main points of making the law more effective was changing the procedure for establishing the general application of collective agreements in order to prevent the National Employers' Organization from interfering with the results of collective bargaining in the construction sector when the representatives of that sector applied for a declaration of general applicability. The reform bill achieved that goal by introducing an alternative way for state authorities to extend a collective agreement to posted workers by authorisation of a statutory order, § 1 III a AEntG.<sup>124</sup> This enabled the Ministry of Labour to extend collective agreements without needing to follow the hitherto established procedure for declaration of general applicability. This method also promised a faster procedure and therefore a more flexible way to adapt to economically problematic situations.

#### *aa. Mechanism of § 1 III a AEntG*

The introduction of this new method of extending collective agreements to labour contracts formerly not bound by it was the statutory answer to the behaviour of the representatives of the Federal Employers' Organisation during the previous negotiations on the general applicability of a collective agreement in the construction sector.<sup>125</sup>

Under the previous law an extension of collective agreements was dependent on the consent of the committee on collective agreements and later implementation through the State authorities. The authorization of a statutory order in §1 III a AEntG implemented the possibility for state authorities to establish working conditions by means of a legal ordinance without obtaining consent in the Committee first. The decision is not even dependent on the requirement of an existing public interest.<sup>126</sup> Nevertheless, the

<sup>121</sup> § 3 II AEntG.

<sup>122</sup> BGBl I 1998, p. 3843.

<sup>123</sup> BT-Drs 14/45 3, 17; BT-Drs 14/151, 3, 26 ff.

<sup>124</sup> BGBl I 1998, 3843.

<sup>125</sup> Blanke (above n 5) 420.

<sup>126</sup> H Wiedemann/R Wank, *Kommentar zum Tarifvertragsgesetz*, 7. Aufl (CH Beck 2007), appendix 1 zu § 5 TVG, para. 12.

possibility of achieving general application after the consent of the committee on collective agreements is still an effective alternative. It is thus up to the collective bargaining parties concerned when applying to extend their minimum standards on foreign service providers to make the kind of application to the Ministry they think appropriate: if they believe that consensus in the Committee can be achieved, they can still apply for a declaration of general applicability. If they expect their application to be blocked by the BDA, they can apply for a statutory order instead. Such an application would not even require a previous failure to declare a general application, but could be implemented immediately. By this means, the power of the committee on collective agreements to prevent general application completely or to achieve a simple reduction of working conditions in the collective agreements<sup>127</sup> was severely diminished. The authorization of statutory order intended the elimination of this possibility.

In order to respect the freedom of collective bargaining, state authorities cannot issue a statutory order independently when they think this is necessary. They are instead only allowed to act on the application of one of the parties to the relevant collective agreement, as the latter are supposed to know best the situation in their branch of industry.

*bb. Effective implementation of § 1 III a AEntG*

In 1999, the collective bargaining parties in the building sector introduced a new collective agreement on minimum wages fixing a new minimum wage of 18.50 DM for the western part of the country and 16.28 DM for the eastern part, entering into force on 1 September 1999. The application for a declaration of general applicability was at first petitioned, but the BDA again refused to agree, opposing the set wage level. Hence a renewed declaration of general applicability was impossible, with the consequence that a loophole was created concerning the minimum wage in the construction sector: the earlier declaration of general applicability of the previous collective agreement was time-limited to the end of August 1999.

Therefore, the state authorities used – for the first time ever – the instrument of statutory order on application of the collective bargaining partners representing the construction sector. This measure was then heavily criticized by the BDA, with the arguments already described: the wage level would be prejudicial to other branches as well, leading to a potentially negative impact on construction undertakings in eastern Germany. But the state authorities considered that the public interest in maintaining conditions for fair competition and social standards in the German construction sector outweighed such possible negative consequences and enacted the statutory order, which became valid on 1 September 1999.<sup>128</sup> The statutory order was time-limited until the end of August 2000.<sup>129</sup> Later on, this means of extending minimum standards in collective agreements

<sup>127</sup> Koberski/ Asshoff/ Hold (above n 7), §1 AEntG.

<sup>128</sup> BGBl I 1999, 1894.

<sup>129</sup> Statutory regulations in chronological order: BGBl I 2000, 1290; BGBl I 2002, 3372; *Bundesanzeiger* 2003, 26093; *Bundesanzeiger* No 164 2005, 13199 (changed through

to foreign service providers was habitually employed for all subsequent collective agreements to be extended under AEntG.

*cc. Compatibility with the German Constitution*

Critics of the law accused it of being incompatible with the German Constitution, especially Article 80 GG and the fundamental right to collective bargaining enshrined in Article 9 Para 3 GG.

Article 80 Para 1 GG requires certain preconditions for transferring the right to set norms from the legislative to the administrative branch of the State. Regulations transferring such power to the administration need to declare precisely the content, purpose and dimension of the cases in which the Ministry should be empowered to take action. According to the critics, AEntG did not meet such preconditions. These allegations are not convincing, however. The scope of the statutory order is defined by existing collective agreements, the relevant working conditions are enumerated<sup>130</sup> and the employers concerned are laid down.<sup>131</sup> This way, at the time of the enactment of §1 III a AEntG the legislator determined sufficiently clear what content a succeeding statutory order would have.<sup>132</sup>

The greater challenge to AEntG concerned whether it infringed the fundamental right to collective bargaining as protected by Article 9 GG. The German Constitution guarantees a number of aspects of the freedom to bargain collectively. The first, the right of an individual to establish or join a union, is obviously not touched, since § 1 III a AEntG does not hinder the establishment or joining of a labour organisation and does not make such an act impossible. Solely the fact that a reduced influence of collective bargaining due to the introduction of the authorization of statutory order could diminish the appeal of trade union membership does not suffice to infringe Article 9 III GG.<sup>133</sup>

The second aspect guaranteed in the Constitution is the right to freely decide against joining a union. This right is not infringed, either. The extension of collective agreements to employers and employees not hitherto bound by such agreements represents no obligation to join a union. Even if employers and employees as an effect of the declaration to extend collective agreements are governed by its rules, this does not force them to become members of the relevant association.<sup>134</sup>

BGBI I 2006, 926 and *Bundesanzeiger* Nr. 38 2008, 891), *Bundeanzeiger* No 131 2008 of 21 August 2008; *Bundesanzeiger* No 128 2009, 2996.

<sup>130</sup> §§ 1, 7 AEntG.

<sup>131</sup> The business must perform predominantly construction work in the sense of § 211 I SGB III.

<sup>132</sup> BVerfG 18.7.2000, AP Nr. 4, § 1 AEntG.

<sup>133</sup> The principles laid down in BVerfGE (*Entscheidungssammlung des Bundesverfassungsgerichts*) 44, 322, 343 – AP No 15 § 5 TVG, for § 5 para. 1 TVG can be transferred BVerfG 18.7.2000, in *Neue Zeitschrift für Arbeitsrecht* 2000, 948.

<sup>134</sup> BVerfG 18.7.2000 (above n 133).

The third constitutionally protected aspect of the freedom of association is the protection of the relevant organizations themselves.<sup>135</sup> They enjoy the right to bargain in the best interests of their members in a way more focused on the relevant needs in their specific field of competence than a general law, applicable through all branches, could achieve. Here a conflict could arise in case an undertaking that is party to another collective agreement loses the terms and conditions of this agreement due to the State authorities' extension of a rival collective agreement. In such a situation, the declaration to extend could infringe the right of an employer's organization to regulate labour relationships for their members. The organization would not be hindered in bargaining and concluding collective agreements but these would no longer have any relevance for their members once the content of a rival collective agreement has been extended. This possibility met with huge criticism when a conflict in the postal services sector emerged.<sup>136</sup> Whereas the Federal Labour Court accepted such an outcome,<sup>137</sup> the administrative courts have not done so up to now. The dispute is still ongoing.

#### *10.4 Further legislative changes in 1998*

The personal scope of application of AEntG was marginally enlarged in 1998 to include shipping assistants.

The enumeration of minimum working conditions was enlarged in order to cover all hard core conditions described by the Directive.<sup>138</sup>

A new strict liability of the service provider for claims by deployed workers of their sub-contractors was introduced.<sup>139</sup> The service providers should be held liable for wage claims by the workers of all their sub-contractors, as well as for unpaid contributions to the social funds of the construction sector. This special type of liability is restricted to legal persons acting as service providers, whereas natural persons commissioning construction work are not covered.

Furthermore, the notification requirements were tightened<sup>140</sup> and the amount of monetary fines was increased to up to 1,000,000 DM for any violation of mandatory working conditions and up to 50,000 DM for irregularities concerning the notification requirements.<sup>141</sup>

<sup>135</sup> BVerfG 26.06.1991, in *Neue Zeitschrift zum Arbeitsrecht* 1991, 809.

<sup>136</sup> VG (Verwaltungsgericht) Berlin 7.3.2008 – VG 4 A 439.07 ; OVG Berlin-Brandenburg 18.12.2008 – OVG 1 B 13.08.

<sup>137</sup> BAG 25.6.2002 – 9 AZR 439/01, AP AEntG § 1 No 15; BAG 18.10.2006 – 10 AZR 576/05, in *Neue Zeitschrift für Arbeitsrecht* 2007, 1111.

<sup>138</sup> § 7 AEntG 1996.

<sup>139</sup> § 1 a AEntG 1996.

<sup>140</sup> § 3 AEntG.

<sup>141</sup> § 5 III AEntG 1996.

### *10.5 Compatibility with the Posting of Workers Directive*

The Posting of Workers Directive obliges Member States to guarantee certain domestic minimum standards, set through statutory or administrative regulations or generally applicable collective agreements for both domestic workers and posted workers from other Member States of the EU. The minimum standards represented as ‘hard core’ minimum conditions are conclusive. Member States are not competent to extent additional requirements not enshrined in that list, even though the Directive solely concerns providing for minimum standards. If, however, a Member State wishes to provide for better protection at a higher level, this would not be acceptable to the ECJ in that it is overly burdensome for the service provider and therefore an infringement of his fundamental freedom to provide services.<sup>142</sup> Regulations set by the home country more favourable to the posted workers than the regulations set by the host country must remain applicable.<sup>143</sup>

The main change to national law caused by the duty to implement the Posting of Workers Directive into German law by 16 December 1999 was the exceeding of the time limit. This was necessary to satisfy the aim of the Directive to create a regulation which provides permanent protection of minimum working standards.

The applicability of the law to transnational temporary employment services, as required in the Directive<sup>144</sup> was already incorporated in the amendments of 1997.<sup>145</sup>

The Directive also demanded the implementation of adequate measures for the workers concerned for enforcing their rights under the Directive<sup>146</sup> and special jurisdiction for such judicial proceedings.<sup>147</sup> The statutory amendments provided for workers seeking enforcement by judicial proceedings to bring their claim before a German labour court. This is a privileged situation compared to the general principle that employers may be sued by their employees either in the employer’s State of domicile or in the State where the employee habitually carries out his work. As such a general rule would exclude the courts of the State to which the worker was temporarily posted, a special rule had to be enacted for allowing jurisdiction in Germany. A special form of action for obtaining minimum working conditions does not exist in Germany. Proceedings before a German labour court are relatively inexpensive as every party to the proceedings only has to pay their own costs, no matter who wins.<sup>148</sup> This way the workers are not deterred by the high cost of proceedings.

<sup>142</sup> Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323.

<sup>143</sup> Article 3(7) PWD, implemented in § 1 III a AEntG 1996: ‘... mindestens ....’.

<sup>144</sup> Article 1(3)(c) PWD.

<sup>145</sup> BGBl I 1997, 2970.

<sup>146</sup> Article 5(2) PWD.

<sup>147</sup> Article 6 PWD.

<sup>148</sup> § 12 a ArbGG – Law on procedure in the labour court matters.

### 10.6 Compatibility with EU fundamental freedoms

Critics of the law also insisted that it was incompatible with the fundamental freedoms of the Treaty. Especially the extension of collective agreements through the authorization of statutory order was challenged in this respect. The ECJ had to decide one aspect of the matter in 2001:

Articles 59 and 60 of the Treaty preclude the application of a Member State's scheme for paid leave to all businesses established in other Member States providing services to the construction industry in the first Member State where businesses established in the first Member State, only part of whose activities are carried out in that industry, are not all subject to that scheme in respect of their workers engaged in that industry.<sup>149</sup>

The decision made it very clear that national law must provide for a regulation obliging all national employers to grant the same minimum working conditions extended through a statutory order to foreign employers. If domestic law allows for deviating from such minimum standards through collective bargaining measures available for practical reasons only or primarily to domestic undertakings, the obligation to guarantee these working conditions could not be extended to foreign employers, either. Technically, such an overriding effect of a collective bargaining agreement other than the one extended also to foreign undertakings by statutory order could be achieved by means of specificity: under the law on collective agreements, priority is given generally to the more specific agreement, which is therefore able to take precedence over conflicting more general collective agreements. This general principle is not applied to collective agreements extended through a statutory order,<sup>150</sup> however, at least according to the up to now predominant interpretation. Another line of reasoning argues that it is not possible to deviate at least from minimum working conditions, neither for domestic nor for foreign undertakings.<sup>151</sup> German legislation has tried to accommodate such preconditions by clarifying that the scope of the law includes domestic as well as foreign undertakings. For this reason, it is considered to be in conformity with the EU Treaty.<sup>152</sup>

### 10.7 Later development of the AEntG 1996

Until the expiry of the law due to the enactment of the revised AEntG 2009, AEntG 1996 was subject to several amendments.<sup>153</sup> The most important changes in the course

<sup>149</sup> *Finalarte* (above n 109) para 83; see also Case C-164/99 *Portugaia* (above n 116).

<sup>150</sup> R Wank/U Börgmann, 'Die Einbeziehung ausländischer Arbeitnehmer in das deutsche Urlaubskassenverfahren', *Neue Zeitschrift für Arbeitsrecht* 2001, 177, 182.

<sup>151</sup> M Schlachter, in *Erfurter Kommentar zum Arbeitsrecht*, 6. Aufl (CH Beck 2006), § 1 AEntG para 15.

<sup>152</sup> BAG 20.7.2004 – 9 AZR 369/03 – AP AEntG § 1 No 18 decided that § 1 AEntG 1996 is at least lawful since its amendment in 1998, with the new wording that clarified that the area of application also includes German Employers.

<sup>153</sup> BGBl I 2000, 1983; BGBl I 2001, 2267; BGBl I 2001, 3584; BGBl I 2002, 2787, 3760; BGBl I 2002, 4607; BGBl I 2003, 2304; BGBl I 2003, 2848; BGBl I 2004, 1842; BGBl I 2005, 2354; BGBl I 2006, 926; BGBl I 2007, 2246.

of time were the extension of the law to additional branches, such as industrial cleaning<sup>154</sup> and mail services<sup>155</sup> in 2007. With such extensions the German legislator used AEntG as a tool for solving the problem of the non-existence of a statutory minimum wage in Germany. On one hand, political pressure for safeguarding employees rights in low-wage branches increased as many workers were employed under contracts providing for poor working conditions. On the other hand, the enactment of a statutory minimum wage was politically impossible. Thus, the legislator made use of the legal situation just described, that minimum working conditions extended to foreign undertakings must not – for reasons of compliance with the fundamental Treaty freedoms – be undercut by domestic employers, either. Extending AEntG to additional branches therefore allowed for de facto minimum wages in specific sectors, binding primarily domestic undertakings, whether or not their branch in fact faces fierce competition from foreign service providers.

## **11. Summary Part 2**

After several Member States had implemented their own national laws on posted workers the Commission finally came under pressure to enact a Directive that was hitherto not acceptable for several Member States. When the Directive eventually entered into force, its primary – if internally conflicting – objectives were providing for fair competition and protecting individual workers due to implementing at least minimum standards of social protection.

The margin of discretion left to each Member State is necessary to individually adapt the arrangement of the provisions to the national legal and social systems – for example, in Germany to the system of collective agreements. Under such conditions, the Directive could neither implement one single level of core working conditions throughout Europe nor substantially narrow the gap between such standards.

## **Part 3: Recent tensions**

### **12. Interpretation of the ECJ in the ‘Laval Quartet’**

The implications of the Posting of Workers Directive on domestic legislation aiming at the prevention of ‘social dumping’ at first seemed to be manageable for most countries. The Directive was understood to represent a compromise between conflicting goals,

<sup>154</sup> BGBl I 2007, 576.

<sup>155</sup> BGBl I 2007, 3140.

allowing Member States to protect their labour and social policy provisions up to a point defined through the necessity of allowing foreign undertakings to compete on domestic markets also by undercutting wages. But this compromise was reformulated in a dramatic way by the ECJ's interpretation of the Directive limiting the Member States' discretion.<sup>156</sup> The decisions meant that Member States regulating minimum labour standards through the process of collective bargaining had to accept limitations to their system. Even though the Directive emphasizes setting minimum standards, the ECJ declared that set the maximum level of protection for workers.

Additionally, the possibility to take industrial action to achieve application of the relevant collective agreements also to foreign undertakings must be balanced against their freedom<sup>157</sup> to provide services, which disallows measures not aiming at topics enshrined in the Directive. Even though the ECJ acknowledged for the first time that a right to collective action was a 'fundamental right that forms an integral part of the general principles of Community' law, the decision declared at the same time that 'fundamental' does not mean 'prevailing'. Only an overriding public interest can justify an infringement of the freedom of services/establishment through collective action. Justified cases of infringement of the fundamental Treaty freedoms are laid down in Article 3(1) PWD. As the enumeration in the Directive is exhaustive and its contents are only legitimate to the level acknowledged as a mandatory minimum standard, collective action is limited in what it is allowed to ask for. Increasing the minimum standard through collective action therefore is next to impossible; only voluntary agreements are left for this purpose. Since the transnational service providers are not obliged to guarantee more than the minimum working conditions, voluntary agreements cannot be expected.

In its decision in *Viking* the ECJ in principle let the freedom of services prevail over the right to collective action and in *Laval* ruled out superior collective wage standards than the minimum corresponding to the prescriptions of the Posting Workers Directive<sup>158</sup> and also working requirements elaborated in local collective agreements.<sup>159</sup> These judgements made clear that the 'fundamental right to collective action' is still far away from being on an equal footing with the fundamental treaty freedoms. Member States cannot rely on Public Policy to allow for better working standards, as the ECJ allows for

<sup>156</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 (hereafter *Viking*); Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767 (hereafter *Laval*); Case C-346/06 *Rechtsanwalt Dr. Dirk Ruffert v Land Niedersachsen* [2008] ECR I-1989 (hereafter *Ruffert*); Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323 (hereafter *Luxembourg*).

<sup>157</sup> *Viking* para 44; *Laval* para 91.

<sup>158</sup> Per *Laval* and also *Ruffert*, wage standards of collective agreements that are not generally binding would infringe the freedom of services.

<sup>159</sup> In *Luxembourg*.

such solutions only under circumstances in which the intended measure is absolutely necessary for the system of the country concerned. These preconditions will only rarely ever be met. Therefore the balance between the conflicting goals has changed: Member States must not use the setting of minimum standards for protecting other social policy objectives but for individual workers' minimal protection.

### **13. EU enlargement**

In 2004, ten more Member States joined the European Union. As for the earlier Accession States, differences in levels of wages and other cost-inducing labour conditions in many of those countries allowed for harsh competition on the labour and service markets in old Member States. Due to that fact, in negotiations about accession to the EU old Member States tried to protect their interests in advance by restricting at least temporarily the fundamental freedoms of undertakings established in Accession States. Such a political solution, however, is viable only for a certain period of time.<sup>160</sup> Thus in the German construction sector and additionally in industrial cleaning and for interior decorators, the free movement of services in case of posting of workers could be restricted to a maximum of seven years.<sup>161</sup>

### **14. AEntG 2009**

#### *14.1 Content of the revised Act*

The German legislator soon decided to revise AEntG.<sup>162</sup> The objective of this reform was only to a very limited extent a reaction to developments at EU level; it was primarily domestic in intent. As described above, the non-existence of a statutory minimum wage causes severe turbulence on the domestic labour market. Therefore the legislation extended the scope of application of AEntG to six new branches: nursing care, private security, coal mining, laundry services for property client services, waste management, apprenticeship and retraining.<sup>163</sup> Through the instrument of declaration of general applicability, either decided in the committee on collective agreements<sup>164</sup> or by

<sup>160</sup> Cf Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union [2003] OJ L 236.

<sup>161</sup> *Ibid.* V–XIV no 13.

<sup>162</sup> BGBl I 2009, 799.

<sup>163</sup> §§ 4, 10 AEntG 2009.

<sup>164</sup> § 5 TVG.

a statutory regulation,<sup>165</sup> minimum working standards regulated by collective agreements can be extended to all workers carrying out their work in Germany in any given branch included in AEntG. The authorisation for issuing statutory orders extending collective agreements for the new branches was restricted. If a newly listed branch is concerned, the committee on collective agreements has to be involved. But the new law widens the provisions for a solution in case of conflicting interests: in case a majority of four approving votes cannot be reached in the committee on collective bargaining or if the committee does not deliver an opinion, the statutory regulation can still be adopted by the Ministry.

The *personal scope* of minimum working conditions for posted workers is not restricted by law. So the AEntG minimum standards apply to all workers working on German territory, whether they are German, from other EU Member States or third country nationals, whether they had been working for their current employer earlier on or were employed for the purpose of being posted to Germany only. There is also no mention that the posting has to be ‘temporary’ in nature. Quite the contrary to the situation under the Social Security Regulation, labour law minimum standards are applicable to posted workers as long as they are posted. In the academic literature, however, the prevailing opinion is that for an employee staying indefinitely in Germany, the AEntG regulations are not the appropriate way of setting standards. How the line of demarcation should be drawn is nevertheless highly contested. What may count as common ground is the precondition that parties to a labour contract agreeing to work abroad ‘temporarily’ must agree on some indicators concerning when the posting should come to an end. This might include agreeing on fixed term posting, on the fulfilment of a special task or other features that allow for the conclusion that there will be no definite assignment of the worker concerned to work abroad.

Control and *enforcement mechanisms* rely primarily on public law measures, which include the duty to report posted workers to public authorities before they start working, report any changes in working site or working conditions occurring during posting, preparing documents on the actual working time of posted workers and present upon request all necessary documents that allow the authorities to verify that minimum standards in fact have been complied with. Any information of significance to the calculation of wage and holiday entitlements has to be noted. Furthermore, employers have to keep documents available for the controlling authority to check compliance with working conditions. Such documents have to be in German and presented in the course of inspections. They include the contract of employment and any document drawn up in the sending State for complying with the obligation resulting from implementing the Posting of Workers Directive. Also, work performance records, wage slips and wage payments have to be presented on request.

<sup>165</sup> Now a public interest is required in § 7 I AEntG 2009, but not coverage of 50 per cent of the workers bound by the collective agreement.

Against acts of non-compliance sanctions including fines can be imposed. Undertakings that have been penalized with at least 2,500 euros in fines could, as a consequence, be temporarily suspended from participating in the procedure of awarding public procurement contracts. Responsible for controlling the relevant obligations is a public authority under the supervision of the Ministry of Finance, the customs authority in Cologne.

Additionally, private enforcement mechanisms apply. Individual posted workers are entitled to bring an action for wages they are owed for the period of being posted to Germany also before a German labour court. The special institutions of the construction industry dedicated to social benefits for construction workers can also sue foreign undertakings for financial contributions for posted workers. As these institutions are regular claimants before national courts they are used to the judicial system and not easily deterred from taking action. Many of the court cases arising under AEntG in fact are initiated by that claimant.

Finally, AEntG provides for the liability of a principal for any act of non-compliance by its subcontractors. The principal will therefore act as a guarantor jointly and severally liable whenever the posted worker or the social benefits institution has not received the wages or the social contribution owed for the period of posting. This allows both types of creditors to immediately turn to the principal to recover the sums they are owed once the immediate employer does not pay. Therefore, it would be in the principal's economic self-interest to make sure that subcontractors are reliable and financially sufficiently well-off to comply with AEntG's minimum standards.

#### *14.2 Critical reactions*

The extension of AEntG 2009 represents more of an internal political compromise than an instrument to transpose the relevant directive and calls into question the original objectives of a law on the posting of workers. The initial reason for enacting AEntG 1996 was to counteract the pressure of competition from service providers situated in low wage countries that endangered in particular undertakings in the German construction sector. Through the instrument of declaring collective agreements generally applicable and extending them to foreign undertakings AEntG 1996 was supposed to impose minimum wage standards benefitting national and posted workers deployed within Germany.

The intentions of AEntG 2009 diverge from this objective. The possibility to set a minimum wage through generally applicable collective agreements also in the newly listed branches follows the purpose of ameliorating increasing differences in domestic wage levels. In the recent past a large low wage sector has evolved and the duty of the legislator to protect a minimum working standard is scarcely deniable. These facts might have demanded a new statutory regulation.

Extending the new AEntG 2009 to additional branches avoids the introduction of statutory minimum wages in the fields covered and thus gives the legislator new options

to influence minimum working conditions. Whereas a statutory minimum wage would create State support for the bargaining power of unions at the expense of employers, implementation of minimum working conditions through a declaration of general applicability has for a precondition the existence of such an agreement.<sup>166</sup> This process is therefore neutral with regard to the bargaining mechanism itself but relies on whatever outcome it produces.

Nevertheless, in the course of the renewal of AEntG the power of the legislator to influence working conditions has increased, while the formation of collective agreements now has a much wider scope, since they can be extended farther than the regulating power of the negotiating parties. Thus from this point of view the revision of the Act may be counted a success. On the other hand, the question of the constitutionality of fixing wages through the enactment of a quasi-statutory minimum wage still remains open. The law now holds expressly that working conditions set in generally applicable collective agreements displace all lower levels of working conditions set in other collective agreements.<sup>167</sup> AEntG 2009 refers, in case several collective agreements compete for extension, to the representativeness of the respective agreements. This solution has also encountered challenges to its constitutionality as it prefers established unions over smaller ones.

### **15. Summary Part 3**

Recent developments at European level have shown that the internal contradictions between the Directive's two conflicting objectives have not been overcome but have become more and more severe. The restrictions enshrined in the fundamental freedoms of the EC Treaty, combined with the Directive, disallowed Member States the margin of discretion in regulating their labour policies they earlier took for granted. How a balance between the conflicting interests finally can be found is not foreseeable for the near future. In Germany, the introduction of a revised version of the Act on the posting of workers nevertheless did not aim at coping directly with such problems. Even though the usual adjustments to current developments of the law through ECJ decisions are present there, too, the prime intention of this legislation focuses on solving domestic problems. Even as the Posting of workers act will be judicially reviewed time and again, the issues at stake are specific to the German legal system and may not provide insights transferable to other Member States.

### **Conclusion and prospects**

#### **16. Development and changes in domestic legislation**

The German Act on the posting of workers (AEntG) was enacted prior to the adoption of the Posting of workers directive, as a directive did not seem to arrive in time to meet

<sup>166</sup> Däubler/Lakies (above n 117), § 5 TVG, appendix 1 para 21 et seq.

<sup>167</sup> § 8 II AEntG 2009.

the ever more pressing need. The aggravation of the employment situation especially in the construction sector furthered the opinion in Germany that some measures had to be taken immediately.

In anticipation of the Directive that was eventually adopted the German legislator implemented main principles of the Directive and amended the statute according to the Directive after it finally entered into force. Both the domestic legislation and the Directive strove to balance the objective of achieving fair competition with the need for minimum standards for all workers in a given sector.

As described above, preventing social dumping and unfair competition was the main aim of developing domestic legislation prior to the adoption of the PWD and this goal remained the focus of the national debate for a long time. Changes in the labour market, especially in the construction sector, had such devastating effects on unemployment that legislators felt obliged to react. To this extent the EU was seen rather as creating additional problems than providing solutions.

After the Posting of workers directive finally entered into force, it was originally understood as developing alternative (Community) means to the identical (domestic) end, in other words, allowing Member States to prevent social dumping and unfair competition through additional protection for individual posted workers. These two aims, although sometimes conflicting in details, would allow for one common approach, thereby stabilising a social model. Therefore, opponents of such approach would invoke the prevailing nature of the EU's fundamental freedom to provide services as having a limiting effect on what the PWD should – and indeed legally could – allow Member States to legislate in the area of worker protection. Thus domestic legislation was seen primarily as protective in nature, whereas Community secondary law, in particular, was considered to allow such standards under a different, more individualistic heading, and the Treaties' fundamental freedoms were regarded as having a limiting effect.

Whereas the domestic statute was intended to protect not only individual posted workers but also their system of collective bargaining and national social policy, the Directive established little with regard to such topics. Only through the interpretation of the ECJ was it turned into an instrument for setting maximum standards of protection, and only through such interpretation did it become obvious that collective action for reaching an agreement would be justifiable only to a limited extent.

The measures for setting minimum standards in domestic legislation reflect the responsibilities for worker participation shared among the legislator and collective bargaining partners: several core conditions as laid down in the Posting of workers directive's list have traditionally been statutorily regulated in Germany. For such topics, transforming the Posting of workers directive into national law proved easy: the legislator simply stated that national statutes on such topics become applicable to posted workers and their foreign employers, too. The problems are not quite solved through that approach, however, as many of the statutes concerned have administrative bodies

involved in implementing employer's legal duties. Such public law entities' authority is restricted to the national territory. They could not provide protection against dismissing a pregnant woman, as they would be able to under the relevant national law, if the employer undertaking is situated in a foreign country. There is no known practical experience with such involvement of public administration, but obviously legislation on posted workers has not gone into details when extending statutory worker protection to posted workers, simply broadening the personal scope of application of statutes.

Wages and (additional) holiday with pay, on the other hand, have traditionally been left to regulation by collective agreement. In those fields, the simple solution of extending the personal scope of a statute for transposing the Posting of workers directive is not available. Collective bargaining partners have to be involved in order to respect their constitutional freedoms and prerogatives. Thus, using existing mechanisms to declare collective agreements generally applicable or modifying such mechanisms in order to better fit into the trans-border situation was the method of choice. On the other hand, collective bargaining and collective action measures in Germany were already not in a very healthy condition at the time of implementing AEntG, and such problems only worsened over time. Trade union density and collective agreement coverage are declining and in some branches and regions are now almost non-existent. Employers organisations had to deal with newly founded worker organisations with very distinct features. On the one hand, specialist unions emerged, representing, inter alia, pilots, air traffic controllers, train drivers or medical doctors who are next to irreplaceable on a short-term basis and therefore make for tough bargaining partners. On the other hand – and much more relevant for posted workers – new organisations developed that were willing to undercut the existing wage level in collective agreements considerably in order to preserve jobs for their members. Thus the solution of extending the 'relevant' collective agreement to foreign undertakings and their posted workers would demand an additional involvement of the State in the process of choosing which one of the possibly several co-existing agreements is the relevant one.

Facing such difficulties, not much effort was dedicated to clarifying the relationship between domestic industrial relation practices and the relevant EU law. Only after the ECJ handed down its decisions in the Laval quartet, some debate arose on the consequences for domestic collective action measures. Existing differences between the relevant collective bargaining partners have intensified, but the legislator has not yet seen a reason for intervention. This part will thus be left to academic debate and for the courts to decide upon, which is unusual in regulating industrial conflicts in Germany. The main points for discussion would be the following: even though the ECJ acknowledges the right to collective bargaining and it is a fundamental right, the fundamental freedoms of the EC Treaty prevail. The specific focus of legal systems relying on collective bargaining for setting working conditions would justify a much wider margin of discretion in collective action than the rather limited approach of the Directive.

Later, during the process of developing the *Services Directive* and due to the decisions handed down by the ECJ, which clearly limited domestic means to practically enforce social standards for the sake of the freedom to provide cross-border services, the domestic debate shifted its focus. Minor amendments to AEntG have obviously been guided by loyalty to the ECJ's interpretations. But they have been accompanied by feelings on the part of workers' representatives that from now on they would have to defend the existing social model against interference from the EU which is seen as aiming at 'liberalising' labour markets by driving down standards. Whether in the process of such defence of the social model examples of cross-learning from the experiences of other Member States actually exist is not clear. The main field of influence seems to be the organisation of political resistance against the Services Directive's 'Bolkestein draft'. In this field, information spread across borders on how to achieve media coverage, to influence political debate and to mobilise workers' and political representatives in a common cause. After that draft Directive was changed, the prevailing view was that the defence was a success and labour relations had been saved from the EU's influence. Thus in the process of transposing the Services Directive's final version into national law the debate was among public law specialists on how to best review administrative procedures that might place burdens on service providers. Labour law experts were more or less sidelined in the debate as the common understanding was that the Directive does not aim at regulating terms and conditions of work.<sup>168</sup>

## **17. Influence on national industrial relations**

The discussion on posting of workers and their presence in the domestic labour market has had some consequences for industrial relations, too.

First, as the ECJ would not accept any one standard for the protection for posted workers as a minimum and therefore consistent with the prevailing interpretation of the Directive, once it could be undercut anywhere in the country collective bargaining partners would have to come up with nationwide collective agreements. This was not previously the custom of collective bargaining agreements. Industrial relations were organised in a way that collective agreements were concluded for different areas at different levels in order to respect the different levels of economic development and/or degree of unionisation. Now the aspect of a special minimum wage has to be taken out of this context and regulated separately at a uniform level throughout the country.

The difference in wage levels between branches, which was already present but obviously not so much in the focus of public awareness, became a matter of strategic concern for the Employers' Association. Allowing for minimum standards in the construction sector at a level that could barely be achieved by regular workers in other sectors was seen as a threat to low paying branches. Thus the common standards agreed

<sup>168</sup> See further on this Chapters 10 and 11, this volume.

upon in one sector met heavy resistance from lead organisations defending their strategic influence in the labour market as such. For unions, too, specific problems arose. Concession bargaining at company level would not be acceptable any more once rescue measures started to undercut minimum standards. Branch agreements in sectors with very low union density would face the same problem: accepting basic wages lower than the minimum standard elsewhere would not be seen by members as representing a bargaining success, whereas the unions concerned would barely be in a position to force through better standards.

Thus both sides of industry in a way were unhappy with the legislator's solution in AEntG, setting minimum wages through generally applicable collective agreements. The conclusions drawn from such a lack of satisfaction were nevertheless opposite to each other. Unions came to embrace the necessity of a statutory minimum wage that could provide a safety net for all branches and situations in which unions themselves were not powerful enough to fight for such standards. Employers' organisations, on the other hand, would strongly oppose statutory minimum wages and other government interference in the wage setting process. They would therefore rely on EU market freedoms and on the national constitution to prevent governments from choosing one collective agreement to represent the 'adequate' wage level and therefore to declare it generally applicable. Instead, they would opt for allowing all undertakings, national and foreign ones alike, to conclude collective agreements as they think appropriate for their respective field of business. As such a solution can easily lead to fairly low standards, the AEntG reform presented a statutory solution allowing the Government to have its say as to the appropriate wage level, on one hand, but leaving the main decisions to collective bargaining, on the other. At the international level, reactions to the problems of setting minimum levels can differ. When searching for a political solution, the clash of interests between old and new Member States will count as a hindrance. Possibilities to rectify the situation on national level, however, may be almost non-existent. Therefore the revision of the German statute in 2009 did not even aim in this direction; it is merely the answer to a domestic problem.

## CHAPTER 5

# The Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: A Neutral Approach?<sup>1</sup>

*Mijke Houwerzijl*<sup>2</sup>

### 1. Introduction

This chapter presents an overview and analysis of the Dutch legal and practical approach to the posting of workers within the framework of the free provision of services within the European Union. As a point of departure, the ‘state of the art’ before the adoption of the Posting of Workers Directive (hereinafter PWD)<sup>3</sup> is sketched (Section 2). This is indispensable for putting the Dutch approach to the implementation, application and enforcement of the PWD in the right perspective. Next, an account of the Dutch implementation of the PWD is given, including measures aimed at practical effectiveness (compliance, provision and cooperation with regard to information) (Section 3). The main legal and practical changes in (the context of) the implementation Act, resulting from the political debates on the consequences of EU enlargement and on the draft services directive, are the subject of Section 4. Finally, the Dutch reception of four judgments of the Court of Justice of the European Union (hereafter CJEU<sup>4</sup>), often referred to as the ‘*Laval quartet*’, is described (Section 5). Inasmuch as this chapter is intended primarily for comparative purposes it is of less interest to describe in full detail the Dutch legal rules on the posting of workers than to examine the choices and changes

<sup>1</sup> This contribution builds and draws on earlier publications, see: MS Houwerzijl, ‘Implementation of the Posting Directive in the Netherlands’, in R Blanpain (ed), ‘Freedom of Services in European Union Law: Labour and Social Security Law: the Bolkestein Initiative’, *Bulletin of Comparative Labour Relations* 58 (Kluwer 2006), Part II, Applicable law, no 18, 225; MS Houwerzijl, *De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van richtlijn 96/71/EG* (PhD-thesis University of Tilburg 2005); MS Houwerzijl, country report on the Dutch implementation of the PWD, in J Cremers and P Donders (eds), *The free movement of workers in the European Union*, CLR Studies 4 (Reed Business Information 2004), 105–114.

<sup>2</sup> I am grateful to Stein Evju for comments on the working paper version of this chapter, and to the discussions with those participating in the Second Formula Conference held in Oslo on 2–3 September 2010.

<sup>3</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>4</sup> More precisely, its predecessor the European Court of Justice (ECJ). In the remainder of this chapter I refer to CJEU only.

in the application of Dutch law. Nevertheless, a certain amount of detail is unavoidable in the exercise to provide an accurate picture of the Dutch system. Section 6 contains some concluding remarks.

## **2. Posting of workers in the Netherlands prior to the adoption and implementation of the PWD**

### *2.1 Awareness of the posting 'phenomenon'*

As we may gather from early CJEU judgments in the cases *Van der Vecht*<sup>5</sup> and *Manpower*,<sup>6</sup> in the Netherlands posting was already a phenomenon in the 1960s and 1970s. Practices involving the hiring of a (temporary agency) worker from a country with a 'cheaper' social security scheme with the sole purpose of posting him to a Member State with a more expensive social security regime were at that time considered to be abusive and labelled 'social dumping'. The Dutch authorities responsible for the application and enforcement of social security developed policy rules against these kinds of practices and were very keen on acquiring political support for strict rules on monitoring and compliance in the context of Regulation 1408/71 (now Regulation 883/2004)<sup>7</sup> and especially the so-called E-101 declarations. Until the beginning of the 1990s, the sparse Dutch academic literature on the posting of workers was focused solely on the social security aspects.

Around 1990, Antoine Jacobs was the first author in the Netherlands to call attention to the labour law aspects of the 'completion of the single market' in 1992. Among other things, he pointed to the upcoming phenomenon of posting of workers in the European construction sector as a result of the gradual liberalisation of the EU public procurement market from the mid-1980s onwards.<sup>8</sup> In the slipstream of this development, islands of foreign labour law were observed at big construction sites as a consequence of chains of cross-border subcontracting.<sup>9</sup> The proposal for a Posting of workers Directive and the underlying question, as a consequence of the 1980 Rome Convention,<sup>10</sup> together with

<sup>5</sup> Case 19/67 *Bestuur der Sociale Verzekeringsbank v JH van der Vecht* [1967] ECR 445 (English special edition: p 345).

<sup>6</sup> Case 35/70 *SARL Manpower v Caisse primaire d'assurance maladie de Strasbourg* [1970] ECR 1251.

<sup>7</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1, superseding Regulation (EEC) 1408/71 on the same topic.

<sup>8</sup> See ATJM Jacobs and AMEA van Rooij, 'De Europese Gemeenschap en de bouw. Sociaalrechtelijke aspecten', *Bouwrecht* 1992, 123; ATJM Jacobs, 'De arbeidsrechtelijke aspecten van de voltooiing van de Europese binnenmarkt', *Nederlands Juristenblad* 1989, 835–837.

<sup>9</sup> Until 1992, less than 5 per cent of building activities in the EU were carried out across borders.

<sup>10</sup> Convention on the law applicable to contractual obligations, 1980, Consolidated version [1998] OJ C 27/34; as per 17 December 2009 superseded by Regulation (EC) No 593/2008

the *Rush Portuguesa*<sup>11</sup> and *Vander Elst*<sup>12</sup> judgments of the CJEU, was to what extent Member States might be allowed or were required to apply their mandatory wages and other working conditions to workers posted on their territory, did not lead to fierce debates in the Netherlands at the time, neither in the academic literature nor among policymakers.

This was only slightly different in the construction sector, where the Dutch trade union *FNV Bouw & Hout bond* tried to raise awareness of the social dumping problems surrounding big building projects in a cross-border context. At that time, the general secretary of the European Federation of Building and Woodworkers (EFBWW) originated from this Dutch trade union. On behalf of the EFBWW he pleaded for a solution in Community law analogous to ILO Convention No. 94 on social clauses in public procurement contracts. In this respect, the American Davis-Bacon Act was also a source of inspiration.<sup>13</sup> During the adoption process of the PWD, the EFBWW pleaded for application of host state labour standards without a threshold (thus from day one of the posting).<sup>14</sup> Although the *FNV Bouw & Hout* supported this stance, it did not put it on the domestic agenda as a very pressing issue because in practice social dumping was not much of a problem, even in the Dutch construction industry. This may be attributed to the closed structure of this branch until 2001, thanks to the predominant cooperation of Dutch building companies in cartels.<sup>15</sup> Trade unions indirectly profited from this cartel mentality as well, because it (almost) eliminated labour cost competition and

of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/16.

<sup>11</sup> Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

<sup>12</sup> Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [2004] ECR I-3803.

<sup>13</sup> Indeed, in the action programme linked to the Community Charter of Fundamental Social Rights for Workers of 9 December 1989, next to the proposal which led to the PWD another proposal was launched to combat social dumping, in particular in the construction industry. This was a 'Proposal for a Community instrument on the introduction of a labour clause into public contracts, with a reference to Communication COM 89/400'.

<sup>14</sup> See J Cremers, 'Denkend aan Europa. AVV in Europees perspectief', *Zeggenschap* 1993, 7; B Köbele and J Cremers (eds), *European Union: posting of workers in the construction industry*, (Verlag Marg. Wehle, 1994); Cremers' own short account of this period in J Cremers, JE Dølvik, G Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) 38 *Industrial Relations Journal* 524; J Hellsten, 'On the social dimension in posting of workers' (separate paging), in J Hellsten, *From internal market regulation to European labour law* (Helsinki University Print 2005).

<sup>15</sup> Still in 1995 more than 80 per cent of public procurement was awarded in closed tender procedures, whereas in Belgium this was approximately 50 per cent. Nevertheless, Belgian building companies quintupled their turnover on the Dutch construction market between 1983 and 1996. See also B Bercusson, *European Labour Law* (Cambridge University Press 1996), 500 on the increasing turnover of big British construction firms 'on the Continent', while their share in the home market diminished. See Houwerzijl (above n 1), *Detacheringsrichtlijn*, 280–284 for more details on the Dutch construction sector.

benefited the level of compliance with the CLA (collective labour agreement) for the construction industry.

## 2.2 *The private international law approach to cross-border mobility of workers*

Right from the beginning of the fairly modest debate in the Netherlands the quest for the right mix of labour standards applicable to posted workers was understood as a problem regarding the interface between private international law (PIL or conflict of laws) and national labour law.

Prior to the adoption and implementation of the PWD the law applicable to the *individual employment contracts* of posted workers (to and from the Netherlands) was governed exclusively by national PIL and later on by the Rome Convention of 1980 (which entered into force in the Netherlands in 1991).<sup>16</sup> The law applicable to the individual employment contract of a (posted) worker must be determined with the help of these conflict of laws rules. Since in the Netherlands provisions of collective labour agreements (hereinafter CLAs) are a source of law for most individual employment contracts, they thereby also fall under the scope of conflict of laws rules.

Most provisions of the Rome Convention embody the principle of individual party autonomy and the principle of legal certainty. The rules applicable to contractual obligations are in principle neutral to the sort of social-economic interests furthered by (labour) law, since they are based on the assumption that national legal systems are interchangeable. However, for obligations deriving from employment (and consumer) relationships the rules of conflict of laws have partly broken with the presumptions of free choice of law and neutrality in order to protect the – from a social-economic point of view – weaker party in the contractual relationship. The rule is that parties are free to choose the law applicable to their employment contract only insofar as it is more favourable to the employee than the mandatory standards of the law which would objectively apply to the contract in absence of a choice by the parties. In this respect, Article 6(2)(a)<sup>17</sup> of the Rome Convention (now Article 8(2) Rome I) refers to the law of the country where<sup>18</sup> the contract is habitually performed, even if the employee is temporarily employed in another country.

<sup>16</sup> In 1980, the Member States signed the Convention on the Law Applicable to Contractual Obligations (the ‘Rome I Convention’). The Convention came into effect in most Member States as of 1991. Articles 6 and 7 contain rules for international employment contracts. Examined in A van Hoek, *Internationale mobiliteit van werknemers* (SDU 2000); CMEP van Lent, *Internationale intra-concern mobiliteit* (Kluwer 2000); MV Polak, *Arbeidsverhoudingen in het Nederlands internationaal privaatrecht* (Kluwer 1988); J Dumortier, *Arbeidsverhoudingen in het IPR* (Kluwer Rechtswetenschappen 1981). See also Houwerzijl (above n 1, *Detacheringsrichtlijn*), 6–7.

<sup>17</sup> We refrain here from mentioning the other connecting factors stated in Article 6(2), namely ‘the law of the country in which the company that employed the worker has its place of business’ or ‘the law of the country with which the employment contract is most closely associated’.

<sup>18</sup> In Article 8(2) Rome I the words ‘or failing that, from which the employee habitually carries out his work in performance of the contract’ are added; See Regulation (EC)

According to the *Giuliano and Lagarde Report*<sup>19</sup> this means that:

The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law.

It follows from this text that if the law of the country designated by Article 6(2) makes the collective employment agreements binding for the employer, the employee will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.

This explanation suits the traditional Dutch PIL approach in cases concerning employment contracts, since in Dutch labour law the individual autonomy of the parties is limited by the mandatory character of much labour law, including extended CLA provisions. Dutch labour law has often been characterized as being of a corporatist nature, due to the fact that social partners in interplay with the state play an important role in regulating Dutch industrial relations. In domestic labour law the party autonomy can be restricted not only in order to protect employees but may also be set aside in order to steer the labour market for social policy purposes.<sup>20</sup>

The application of Article 6(2)(a) Rome Convention leads to the territorial application of labour law in the archetypal case of worker mobility, namely when a worker moves to another country and concludes and performs an employment contract there. It may lead to a gap in protection, however, in more complex forms of worker mobility, for instance in the case of posting. In that situation a worker has concluded his employment contract in the country where he, supposedly, works habitually, but temporarily performs his duties in another country. Then the law of the habitual place of work prevails, irrespective of mandatory labour standards in the law of the host country that would protect the worker better.

However, Article 7 (now Article 9 Rome I) defines rules of a special mandatory character; these rules may apply even if a worker is only temporarily working in a country. The text of this provision was inspired in particular by the 1966 judgment of

593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. (Employment) contracts signed after 17 December 2009 must be interpreted according to the rules laid down in Rome I. In Rome I, Article 8 and 9 contain the rules for international employment contracts.

<sup>19</sup> Containing the ‘explanatory memorandum’ of the Rome Convention [1980 OJ C 282/1]. Citation from commentary on Article 6 (2).

<sup>20</sup> See for instance JP Windmuller, C de Galan, AF van Zweeden, *Arbeidsverhoudingen in Nederland* (Spectrum 1987); AC Hemerijck and Jelle Visser and Anton Hemerijck, *A Dutch miracle. Job growth, welfare reform and corporatism in the Netherlands* (Amsterdam University Press 2000); AG Nagelkerke and T Wilthagen, ‘Een nieuwe mozaiek van arbeidsverhoudingen?’, in AG Nagelkerke and T Wilthagen (eds), *Arbeidsverhoudingen in Ontwikkeling: Eenheid en Verscheidenheid van Sectoren* (Kluwer 2002), 152. For a very brief sketch of the Dutch ‘poldermodel’ of industrial relations see B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe* (Hart Publishing 2009), Appendix 1, 320–322.

the Netherlands Supreme Court (*Hoge Raad*) in the so-called Alnati case, in which the Court held that

although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, it may be that, for a foreign State, the observance of certain of its rules, ... is of such importance that the courts must take account of them and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.<sup>21</sup>

In the Netherlands a clear distinction exists between public law rules on labour protection (representing supra-individual interests, such as the regulation of the domestic labour market, and/or the protection of workers, for example, in the area of safety and health) and the private law rules (representing the legitimate expectations of the contractual parties) on the employment contract. Thus, if an employment contract is governed by foreign law Dutch mandatory provisions will apply to the contract only if these provisions can be classified as overriding mandatory provisions within the meaning of Article 7 Rome Convention/ Article 9 Rome I. Most labour protective rules of a public nature will have this character, most contractual rules will not. In the private law category, only specific rules will be overriding mandatory provisions because they are deemed to protect a public or supra-individual interest. CLA provisions come within the scope of the conflict of laws rules. Extended provisions of CLAs may do the same but according to the academic literature<sup>22</sup> referring to a report of the Social Economic Council in 1992 on the implications of the coming into effect of the Rome I Convention this must be assessed for each provision, depending on its nature and objectives. Thus, in contrast to traditions in France, Belgium, and Luxembourg, not all but only some provisions of extended CLAs may be classified as rules of an overriding mandatory nature.

Although the Rome Convention provided for fairly uniform law of conflict rules in the Member States,<sup>23</sup> until 2004 the Convention could be interpreted exclusively by national courts. The CJEU did not have jurisdiction with respect to the Convention.<sup>24</sup> Therefore, in the Netherlands and in other Member States national PIL traditions still flavour the application of the Convention in the Member States. This was furthered by the fact that the Convention did not define the term ‘mandatory rule’ clearly. The

<sup>21</sup> Quoted from the *Giuliano and Lagarde Report* (above n 19), citation from commentary on Article 3(1) and Article 7(1).

<sup>22</sup> See, for example, van Hoek (above n 17) 391.

<sup>23</sup> However not fully, since some Member States made a reservation to Article 7(1), which meant that the Member State might give different effect to internationally mandatory rules not belonging to the law of the country of the court vested with a case (*lex fori*).

<sup>24</sup> The competence to interpret the Rome Convention was established in a separate protocol which entered into force on 1 August 2004 (see Case C-29/10, *Heiko Koelzsch v. État du Grand-Duché de Luxembourg*, not yet reported in ECR, paragraph 30). The first judgment of the CJEU in a Rome Convention case (non-labour law) was in Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV* [2009] ECR I-9687.

margin for national appreciation of what should be treated as a mandatory rule and what not was taken advantage of by Member States to continue their different traditions, in particular with regard to the extent to which otherwise applicable employment law was set aside by overriding mandatory rules and rules of public policy.<sup>25</sup>

### 2.3 *The overall picture prior to the PWD*

As explained above, the traditional Dutch PIL approach to what constitutes a rule of overriding mandatory character steers a middle-course. For a posted worker on the territory of the Netherlands before implementation of the PWD, this meant that not all but only some provisions of extended CLAs could be applied to him, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character. However, this was only a possibility and not a duty and therefore it was left to the social partners to decide on this matter for themselves. Many extended Dutch CLAs still exclude posted workers from their personal scope. This, in my opinion, runs contrary to the Dutch implementation of Article 3(1) PWD, which states that the Member States should *ensure* the core protection of the posted workers. Although the PWD limited this for extended CLA provisions to the construction industry, since 2005 the Dutch implementation Act has broadened this to extended CLA provisions in all branches.

Until 1995 the Dutch CLA for the construction sector also excluded posted workers from its personal scope. Although already on the bargaining agenda of the union side from 1990 on, as a consequence of the *Rush Portuguesa* judgment, this was not altered until five years later, following the example of Belgium.<sup>26</sup> In fact, this is all that can be said about the reception of *Rush Portuguesa* in Dutch labour law with regard to the application of host state labour law. The Dutch academic literature did not pay any attention to it, apart from an interesting annotation of the Belgian author Verschueren in a Dutch migration law journal.<sup>27</sup> Verschueren noticed the broad interpretation the CJEU gave, albeit implicitly, of Article 7 Rome Convention in para 18 of the *Rush Portuguesa* judgment. However, in sharp contrast to other ‘high wage’ countries, such as Belgium, Germany, Austria, Finland and Denmark, in the Netherlands no need was felt to require that all or a part of its employment law regulations and extended collective agreements would be applicable to posted workers on its territory.

<sup>25</sup> See extensively van Hoek (above n 16).

<sup>26</sup> See Jacobs, van Rooij (above n 9), 133; Houwerzijl (above n 1, *Detacheringsrichtlijn*) 281.

<sup>27</sup> H Verschueren, ‘Het arrest *Rush Portuguesa*, een nieuwe wending aan het vrije verkeer van werknemers in het Europese gemeenschapsrecht’, *Migrantenrecht* 1990, 10.

### 3. Implementation of the PWD

#### 3.1 Parliamentary history

The Posting of Workers Directive was officially implemented by means of the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (*WAGA*: Terms of Employment (Cross-Border Work) Act). The Act entered into force on 24 December 1999. The parliamentary history of the Act perfectly illustrates the ‘neutral’ attitude of the Dutch government vis-à-vis the Posting of Workers Directive. In brief, the Bill was sent to the House of Representatives in the spring of 1999. In the parliamentary debate the central motto of the government became clear: ‘We do not want to transpose more or less than necessary.’ In hindsight, it seems that the Dutch government advocated the implementation of the PWD as a ‘maximum’ directive. After the judgments in the ‘*Laval quartet*’ we may appreciate this as an anticipatory plan.

The main consequence of this plan was that none of the optional provisions in Article 3 PWD (that is, items 3 to 5 and Article 3(10)) were considered in the Bill. This neutral attitude corresponds to the general Dutch approach to the implementation of EU Directives. Nevertheless, the majority of the House of Representatives did not agree with this strategy. These politicians objected in particular to the limitation of the collective agreement part of the Directive, Article 3(1) cf (8), to the construction sector. They opined that companies in other sectors would also want equal treatment in this regard. The system of universally applicable (generally binding) collective agreements is widespread in the Netherlands. Thus, not broadening the scope of the Bill through Article 3(10), second indent, of the PWD would mean that Dutch companies and workers outside the construction sector would not be able to compete with their foreign colleagues on an equal footing. This discussion dominated the parliamentary debate on the Bill but did not lead to any amendment. Finally, the Second Chamber of the Dutch Parliament accepted the Bill on condition that the Government would seek advice from the national board for socio-economic affairs (*SER*)<sup>28</sup> in which the social partners are predominantly represented but also, making up one-third, a delegation of ‘independent experts’.<sup>29</sup> Thus, the Bill was passed on. Meanwhile, the *SER* delegated the request to another board of advice, named *STAR*,<sup>30</sup> which is composed solely of representatives

<sup>28</sup> Abbreviation of ‘Sociaal-Economische Raad’; The Social and Economic Council of the Netherlands (*SER*), which is an advisory and consultative body of employers’ representatives, union representatives and independent experts, organized under public law. The Social and Economic Council of the Netherlands (*SER*) aims to help create social consensus on national and international socio-economic issues.

<sup>29</sup> See *Handelingen II*, 1998–1999, no. 104, 5985; and *Kamerstukken II*, 1998–1999, 26 524, no. 10–11.

<sup>30</sup> *STAR* is the abbreviation of ‘Stichting van de Arbeid’ (also known as *StvdA*); the Labour Foundation is a national consultative body organised under private law. Its members are the three peak trade union federations and three peak employers’ associations in the Netherlands. The Foundation provides a forum in which its members discuss relevant issues in the field of labour and industrial relations. Some of these discussions result in memorandums, statements or other documents in which the Foundation recommends

from employers' associations and unions. This board came down with a divided opinion about the desirability of broadening the scope of the proposed legislation to other sectors. Trade union representatives were in favour, whereas representatives of the employers' side spoke against it.<sup>31</sup> In January 2001 the Government concluded that the advisory opinion did not give cause to adjust its policy. This conclusion was accepted by Parliament and the discussion seemed to be closed.

Obviously, other issues were raised during the parliamentary debate on the Act. Questions were posed about the definition of 'posting'; about the mode of compliance and enforcement of the applicable employment conditions for posted workers (Article 4, 5, 6 PWD); about the non-use of the derogation option for postings not exceeding one month (Article 3(3) and Article 3(4) PWD), or 'non-significant' postings (Article 3(5)); and about the application of the 'more favourable principle' (Article 3(7) PWD).<sup>32</sup> However, none of these questions led to broad discussions or to any adjustment of the Bill. As far as the answers to these questions are still of relevance, they are dealt with in the following sections of this Chapter.

### 3.2 *Definitions of posting, worker and period of work*

In the Terms of Employment (Cross-Border Worker) Act (Article 1) a 'posted worker' is defined as someone who works temporarily in the Netherlands and to whose employment contract foreign law is applicable. No further wording is used to implement Articles 1 and 2 of the PWD.

#### 3.21 Definition of posting

Hence, the three types of posting that are distinguished in Article 1(3) PWD are not mirrored in the Terms of Employment (Cross-Border Worker) Act (*WAGA*). Still, as the responsible Minister assured members of Parliament the Act is meant to apply to all three types of posting set out in Article 1 PWD. Explicit implementation in the Act was not deemed necessary. One problem in practice with this 'implicit' method of implementation is that the posting definition of Article 1(3) does not correspond to the Dutch internal definition of posting.<sup>33</sup> In Dutch (legal) usage only posting type b, intra-corporate posting in multinational companies, and type c, posting through temporary work agencies, are understood as posting, while type a under Article 1 PWD – that is, temporary cross-border work within the framework of the employer's sub-contracting services – is normally seen as something different.<sup>34</sup> Moreover, the definition in the

courses of action for the employers and trade unions that negotiate collective bargaining agreements in industry or within individual companies.

<sup>31</sup> See STAR, *Advies inzake de uitvoering van richtlijn 96/71/EG*, 4 October 2000, no. 11/00.

<sup>32</sup> See *Kamerstukken II*, 1998–1999, 26 524, no. 5-6; *Handelingen II*, 1998–1999, no. 104, 5985.

<sup>33</sup> *Kamerstukken II*, 1998–1999, 26 524, no. 5, 3 and no. 6, 3.

<sup>34</sup> A judgment of first instance court Kantonrechter Heerlen 24 September 2003 (*JAR: jurisprudentie Arbeidsrecht* 2003 decision no. 268) illustrates that this confusion has occurred in practice. See M Houwerzijl, 'Het verband tussen detachering van werknemers en grensoverschrijdende aanneming', *ArbeidIntegraal* 2004, 39–41.

*WAGA* may be confusing because it includes, probably unintentionally,<sup>35</sup> more workers than posted service workers who usually work in another Member State. Notably, it also includes workers who continuously move for work to other Member States because of the nature of their occupation; examples include international truck drivers and tour guides. Because Article 1(1) PWD is not explicitly transposed, the *WAGA* is not limited to companies that post workers within the framework of a provision of services.<sup>36</sup> This means, at least in theory, that it would be possible to bring under the scope of the *WAGA* someone who has a temporary job in the Netherlands under an employment contract in which the parties have explicitly chosen to apply foreign law (Article 8 Rome I).

In contrast, it can be deduced from a jointly-published leaflet of 2003 in the construction industry that the social partners, while also not mentioning the three types, at least limited the scope of the applicable provisions of their collective agreements to workers who ‘normally work for their employer in another country of the EU’.<sup>37</sup> Since 2003, a provision in the extended collective agreement for the construction sector repeats the definition of the *WAGA* but in addition stresses that a ‘posted worker’ in this respect means every worker who *usually* works in another Member State not being the Netherlands. Thus, the provision of the social partners is more accurate than the definition in the *WAGA*, although here the necessity of posting within the framework of a cross-border provision of services (as mentioned in Article 1 of the Posting Directive) is absent as well. This seems to imply that the linkage between posting of workers and cross-border service provision was overlooked by the implementing actors.

### 3.22 Status of a worker

Article 1 of the *WAGA* makes no explicit distinction between a posted worker and a (posted) self-employed worker. But Parliamentary documents and the applicable legislation for posted workers under Dutch law show that only the Dutch definition of an employee is to be taken into account in case a question should arise about the status of the worker.<sup>38</sup> In this respect no problems have arisen like the ones that led to CJEU judgments in cases such as *Barry Banks* and *FTS* within the framework of Regulation 1408/71.<sup>39</sup> Still, the practical problem underneath is not easy to tackle: Although certain

<sup>35</sup> Inasmuch as there is no trace of consciousness of the difference with the PWD definition in the parliamentary documents.

<sup>36</sup> See JCMG Bloemarts, ‘De werking van de CAO ten aanzien van grensoverschrijdende arbeid in Nederland’, *Tijdschrift voor Sociaal Recht* 2004, 185–195.

<sup>37</sup> See the Brochure *Posting to the Dutch construction sector. Collective labour agreement for the Construction Sector, Collective labour agreement for Site Management, Technical and Administrative personnel in construction companies*, September 2003, published on behalf of the parties to these collective agreements, especially at 2–3. In an update of 2008, however, this text was deleted and instead the different types of posting are described.

<sup>38</sup> See *Kamerstukken II*, 1998–99, 26 524, no. 3, 3.

<sup>39</sup> See the judgments in cases C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883 and C-178/97 *Barry Banks and Others v Theatre royal de la Monnaie* [2000] ECR I-2005. A problem for host countries is

branches prefer to work with self-employed workers who would surely turn out to be employees if all the facts were known, in practice it is very difficult to prove this. How does one recognise a posted worker and thus apply the *WAGA*? First of all, these workers are difficult to find because they often work quite insulated from Dutch workers.<sup>40</sup> And when they are found, language problems and a lack of interest intervene because (most of the) posted workers have nothing to gain from judicial proceedings about their status.

### 3.23 Posted workers from third countries

The scope of the *WAGA* is not limited to workers originating from one of the EU/EEA Member States. This means that posted workers from a ‘third country’ are entitled to at least the same protection and their employers are obliged to at least comply with the same conditions as workers and employers from within the EU/EEA. Migrant law, however, shows that posting by an undertaking established in a third country is regulated differently. The Foreign Nationals Employment Act (*WAV*) requires not only a residence permit for workers from a third country but also requires employers to obtain a work permit.<sup>41</sup> Furthermore, the employer is obliged to treat and pay the foreign worker in conformity with all current working and employment conditions in the Netherlands.<sup>42</sup>

At the level of the extended provisions of the CLA for the Dutch construction industry, this full equal treatment of posted workers from third countries used to be stipulated as well. Until 2007 it was stated in Article 1a(b) of the CLA that all its extended provisions were applicable to posted workers from third countries.

that Regulation (EEC) 1408/71 and the superseding Regulation (EC) 883/2004 refer to the law of the country of origin (sending country) to define the status of the worker.

<sup>40</sup> Especially in the construction sector. A practical reason for this ‘insulation’ is that working together in a team with different nationalities would lead to more communication problems for the managers of teams on a building site.

<sup>41</sup> Initially, no difference in treatment was made between third country nationals legally resident and employed in one of the Member States and posted by an ‘EU employer’, on one hand, and TCN workers living outside the EU who are posted by an employer established in a third country, on the other. In December 2005, as a consequence of the judgment of the CJEU in Case C-445/03 *Commission v Luxembourg (non-member nationals)* [2004] ECR I-10191 the Dutch government abolished the requirement of a work permit for part of the former group, namely posted workers defined in Art. 1(3)(a) PWD. The work permit requirement for posted workers defined in Art. 1(3)(b) and Art. 1(3)(c) PWD was maintained.

<sup>42</sup> ‘In conformity with current Dutch working conditions’ (*marktconform*) means that not only statutory provisions but also working conditions in current collective agreements (extended and not extended) shall be applied or, as the case may be, even more favourable company-related term and conditions. Only in situations in which the foreign, third country national worker is hired for a very short period (a couple of days or in any case less than a month), it might in some cases be allowed that the worker is paid according to the statutory minimum wage level (Article 8(d) *WAV*).

### 3.24 What is temporary?

Finally, in the WAGA the ‘permitted’ length of posting is not determined. This vagueness about the period of posting is logical: it is not specified in the PWD either. It would have been a breach of the ‘neutral implementation attitude’ to develop a Dutch policy on this point, even if we disregard the question of whether the PWD would permit a national determination of the period of posting at all. Nevertheless, in the CLA for the Dutch construction industry the traditional approach can still be traced in provisions on the posting of workers *from* the Netherlands to other Member States, usually the neighbouring countries Germany and Belgium. There it is stated that the performance of the contract in the other Member State is regarded as posting for as long as Dutch social security legislation applies to the employment contract, now up to two years pursuant to Article 12 Regulation (EC) 883/2004.

### 3.2 Statutory terms and conditions for posted workers

Interestingly, applicable national rules corresponding to the subject matter covered by Article 3(1) PWD are only partly identified by the *WAGA*. Article 1 of the Act makes a couple of provisions in Book 7 (on employment contracts) of the Civil Code (*BW*) applicable to posted workers in the Netherlands. Herewith, all mandatory civil law provisions on minimum paid annual holidays, equal treatment of men and women and other provisions on non-discrimination, health and safety at work including employers’ liability in case of work-related accidents or diseases, and one of the protective measures for pregnant women (prohibition of dismissal because of pregnancy) are implemented. Although not clear when one only reads the text of the *WAGA*, several provisions of Dutch public (administrative) law are applicable to posted workers as well. All special mandatory law with a ‘public order’ character is deemed applicable under Article 7 of the Rome Convention/Article 9 Rome I. This concerns provisions of the Minimum Wages Act (*WML*), the Working Time Act (*ATW*), the Health and Safety Act (*Arbowet 1998*), the Temporary Employment Agencies Act (*WAADI*) and the Equal Treatment Act (*AWGB*).

The Dutch implementation of Article 3 PWD may be interpreted as a continuation of the traditional Dutch PIL tradition, as explained in Section 2 above. In parliamentary documents it was stated that the Acts and statutory provisions that were already undisputedly deemed applicable under Article 7 Rome Convention, such as the Health and Safety Act (*Arbowet 1998*) and the Working Time Act (*ATW*), need not be mentioned in the Dutch implementation Act. Indeed, Recitals 7 to 11 to the PWD makes the otherwise optional Article 7 Rome Convention obligatory and defines what subjects of employment law must be seen as ‘special mandatory’.

Thus, in the set of applicable mandatory national rules corresponding, as a minimum, with the subject matters in Article 3(1) PWD, a mixture of public law and private law with an overriding mandatory character is visible:

- a. With regard to maximum work periods and minimum rest periods, only the public Working Time Act (*ATW*) applies.

- b. Minimum paid annual holidays are laid down in Articles 634 to 642, and 645 of Book 7 of the Civil Code (*BW*). The minimum amount of holiday allowance, a right existing alongside the right to continued payment of wages during holidays, is laid down in Article 15 of the public Minimum Wages Act (*WML*).
- c. Likewise, minimum rates of pay, including overtime rates, are also covered by the *WML*, which stipulates a flat minimum wage rate based on a fulltime working week. Lower rates of minimum wage are laid down for young workers (aged 15 to 22 years, in the *Besluit Minimumjeugdloonregeling*). According to the second sentence of Article 3(7) PWD it is possible to consider allowances specific to the posting to be part of the minimum wage unless they are paid as reimbursement of expenditure actually incurred on account of the posting, such as on travel, board and lodging expenses. The same rule is laid down in Article 6 lid 1 (sub f) *WML*.
- d. Conditions of hiring-out workers, in particular the supply of workers by temporary work agencies, are laid down in the Temporary Work Agencies Act (*WAADI*). Article 7:690 *BW* (Dutch Civil Code) is also applicable, however.<sup>43</sup> This provision states that a contract for temporary work is an employment contract. The most important provision of the *WAADI* is Article 8, which stipulates that unless a universally applicable collective agreement provides other rules, temporary agency workers are entitled to the same wage and other allowances as comparable workers in the industry where the worker is temporarily carrying out his work (*loonverhoudingsnorm*). Furthermore, Article 11 *WAADI* obliges the employer to give temporary workers all information about necessary vocational qualifications and working conditions, before the temporary work takes off.
- e. Rules on health, safety and hygiene at work can be found in the Working Conditions Act (*Arbowet* 1998) and, specifically for employment related diseases and accidents, in Article 7:658 *BW*.
- f. Protective measures with regard to terms and conditions of employment of pregnant women, women who have recently given birth, children and young people are found in the *ATW*, *Arbowet* 1998 and the *WML*. For pregnant posted workers also Article 7:670(2) *BW* applies. But the usual sanction that accompanies this provision for workers under Dutch law is not applicable. Therefore it is not clear how a posted pregnant worker can actually enforce her right to protection against unlawful dismissal.
- g. Equal treatment of men and women and other provisions on non-discrimination are laid down in the Equal Treatment Act (*AWGB*) and in Articles 646, 647, 648 of Book 7 *BW*. It is significant that posted workers are not discriminated against on grounds of nationality. Unequal treatment is only permissible when related to the specific employment situation that goes along with cross-border posting.

<sup>43</sup> Although only mentioned in the Explanatory Memorandum (see above no. 29).

### 3.4. *Terms and conditions of employment in (extended) collective agreements*

#### 3.41 System of extension of CLAs

Which Dutch CLA provisions may be applied to posted workers? As explained in Section 2 above, Dutch legal doctrine classifies CLA provisions as a source of law for individual employment relationships. This is (1) the case when the employer is a party to the CLA or is a member of an employers' association which is party to the CLA. Furthermore, (2) the CLA may be incorporated into the individual employment contract either implicitly or explicitly by way of a contractual clause. Finally (3), the CLA provisions must be applied by individual parties when they are declared generally binding. However, if a CLA provision proves to be inconsistent with mandatory statutory law the collectively agreed provision is to be considered null and void.

By virtue of the Collective Labour Agreements (Declaration of Generally Binding and Non-binding Status) Act of 1936 (*AVV Act*<sup>44</sup>), the Government can decide that a collective agreement is generally applicable for a whole economic sector, which means that employers who are not members of the employers' organization that negotiated the collective agreement are also bound by it. The Dutch method of extension of collective agreements enshrined in the *AVV Act* came into force in 1937 and results in an '*erga omnes*' scope during the period of extension. Therefore the system fits into the definition in the first subparagraph of Article 3(8) PWD of 'Collective agreements which have been declared universally applicable' meaning collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

Indeed, during the period a CLA is 'universally applicable' in the Netherlands it must be observed by all undertakings in the industry concerned. However, it is not the CLA as a whole that is declared generally binding but only specific provisions of the agreement. The *AVV Act* excludes certain provisions from the possible scope of extension, for example, provisions aimed at compelling employers or workers to join an organisation. Derogations from generally binding CLA provisions by clauses in individual employment contracts are automatically null and void.

The authority to declare provisions of CLAs generally binding is vested in the Minister of Social Affairs and Employment. The Minister must publicise a proposed extension so that employers and workers and their organisations have the opportunity to submit observations and objections before a decision is taken. Preceding this, before CLA provisions may be extended two conditions must be fulfilled. In the first place there must be a request from at least one of the parties to the collective agreement. Second, the collective agreement must already be applicable to a majority of those working in the branch of industry concerned. According to the *AVV Act* it must be 'an important majority in the opinion of the Minister'. For a long time it was unclear what should be

<sup>44</sup> *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, Act of 25 May 1937 (*Staatsblad*) Government Gazette 801.

regarded as an ‘important majority’, but this was never considered to be a problem until neoliberal economists started to challenge the system of extension in the early 1990s. They reasoned that extension of CLAs constitute an unreasonable restriction on free competition.<sup>45</sup> Although their plea to abolish the system was not heeded, the ‘extension’ system came under scrutiny.

Since 1998 the Minister has applied his competence to extend CLA provisions according to published policy rules. In these rules it is stated that a majority of 60 per cent is always ‘important’ and a majority of 55 per cent, or even less, may be considered important enough under certain conditions. A majority does not consist of the number of unionised employees – union density in the Netherlands is only around 25 per cent – but of the number of workers in the service of organised employers. An employer who bound by a collective agreement must apply its employment conditions (normative provisions) to all of his employees within the subject matter scope of the agreement,<sup>46</sup> irrespective of union or non-union membership. Consequently, a majority is easily reached when enough (large) employers are bound by the collective agreement. This system, which depends on the density of organised employers instead of employees’ union density rates, results in nearly 85 per cent of employees in the Netherlands being covered by CLAs. According to research in the 1990s the coverage would still be more than 75 per cent without extension, due to the fact that so many large enterprises are organised.<sup>47</sup>

### 3.42 Extended CLA-provisions and posted workers

Article 2(6) of the *AVV* Act transposes the hard core of labour standards, specified in Article 3(1) PWD. Originally, Article 2(7) *AVV* Act limited the scope of Article 2(6) *AVV* Act to the branches of industry mentioned in the Appendix of the PWD.<sup>48</sup>

Although in the PWD the construction industry is defined more broadly than what usual in the Netherlands,<sup>49</sup> the Dutch Government did not try to identify all the corresponding Dutch collective agreements. Some members of Parliament insisted that the Government should do so because it would enhance the accessibility of the Dutch

<sup>45</sup> See E Franssen and ATJM Jacobs, ‘Collective Agreements and Competition Law in the Netherlands’, in N Bruun and J Hellsten (eds), *Collective Agreements and Competition Law in the EU* (DJØF Publishing 2001), 165.

<sup>46</sup> Article 14 *AVV* Act. The parties to the collective agreement may deviate from this statutory provision.

<sup>47</sup> See Houwerzijl (above n 1 *Detacheringsrichtlijn*) 288. However, many authors have argued that the coverage of CLAs would probably fall considerably if the extension mechanism were abolished because this would expose the organized employers to wage competition from their unorganized competitors. See E Franssen and ATJM Jacobs, (above n 46), and Taco van Peijpe, ‘If Vaxholm were in Holland’, in M Rönmar (ed), *EU industrial relations v. national industrial relations. Comparative and interdisciplinary perspectives* (Kluwer Law International 2008), 193–215.

<sup>48</sup> Until Article 2(7) *AVV* Act was abolished in 2005.

<sup>49</sup> The exact scope can be found in the so-called NACE codes 45.10 up to and including 45.45. See appendix to Regulation (EEC) no 3037/90 of 9 October 1990 [1990] OJ L 293/1, most recent change by Regulation (EC) no 29/2002 of 19 December 2001 [2002] OJ L 6/3.

collective agreements for foreign employers and employees and prevent misunderstandings as well. The responsible Minister objected, saying that such an exercise would lead to more bureaucracy and moreover, that it belonged to the competence of the social partners to decide on this issue.<sup>50</sup> The same answer was given about the related issue of who has the competence to decide which provisions of the collective agreement correspond to the subject matter covered by the PWD.

As part of the collective bargaining process Dutch social partners in the construction sector began with classifying the applicable provisions in subsequent CLAs for the construction industry from 1998 on. Between 1998 and 2002 they had explored the possibilities and limitations of the four main CLAs in the construction sector. These collective agreements cover most but not all occupations and companies in the Dutch construction sector. Still not all sub-industries and professions were included that are part of the prescribed activities in the Appendix to the PWD. Professions such as painter, plasterer, installation engineer and electrician are subject to other CLAs. Only in 2003, the scope of the CLA for painters firms (and related companies) was for the first time expanded to posted workers. An appendix to the CLA stipulates exactly which provisions of the CLA belong to the hard core of the PWD and therefore applicable to posted workers. From the slow progress that has been made in this field, it may be deduced that it has been quite difficult to motivate the bargaining social partners engaged in the other related construction CLAs<sup>51</sup> to make the inclusion of posted workers a part of the personal scope of their CLA. The consequence of this situation is that posted workers who should be covered by CLAs where no reference is made to them in the personal scope, are left to take action themselves. Also possibilities to undercut wages of domestic employees are taken for granted. Admittedly, the chance that posted workers are aware of the fact that for instance the CLA for plasterers is not applied to them although this CLA comes under the scope of the Appendix of the PWD is very small.

Then, which applicable provisions are identified in the Dutch CLAs of the construction industry? From the seven categories mentioned in Article 3(1) PWD the CLAs contain rules in six of them: work and rest time (a), holiday (b), rates of pay (c), workers for a temporary employment agency (d), health and safety (e), protective measures (only with regard to the terms and conditions of employment for young people) (f). In the remaining field (equal treatment of men and women etc.) (g) only the statutory rules

<sup>50</sup> See *Handelingen II*, 1998–1999, no. 104, 5989-90, *Handelingen II*, 1999–2000, no. 5, 231 and *Kamerstukken II*, 1998–99, 26 524, no. 9.

<sup>51</sup> Like (in 2010) the CLA for plasterers and related companies (*stukadoors, -afbouw, -vloerenleggersbedrijf: afbouw-cao*), the CLA for roofers (*cao voor bitumineuze en kunststofdakdekkers (dakdekkers-cao)*), and even (partly) the CLA for mortar (*cao voor mortel- en morteltransportondernemingen (mortel-cao)*), the CLA for carpenters-firms (*cao timmerfabrieken (timmer-cao)*), the CLA for furnishing companies/industry (*cao voor de meubelindustrie en meubileringsbedrijven*) and the CLA for residence services (*cao woondiensten*).

apply to posted workers. A special appendix to the CLAs for the construction industry stipulates which parts of the applicable provisions are meant for posted workers. Sometimes the text of the applicable provisions is rewritten to adjust it to the situation of posted workers, i.e. references to Dutch provisions and situations have been deleted. In addition, special explanations are given about the job-related pay system and guaranteed gross wages. This is deemed necessary in order to make the highly detailed wage systems in the Dutch CLAs understandable to foreign service providers and their posted workers. Altogether, in the construction sector, only about half of the total extended agreement provisions that apply to domestic employees are applied to posted workers. Still, these provisions include practically all basic working and employment conditions. According to a spokesman from the construction union, the exclusion of fringe benefits and other provisions meant for workers with an infinite employment contract (such as vocational training and stipulations about the end of an employment contract), makes posted workers around 25 % cheaper in labour costs than domestic workers.<sup>52</sup>

As soon as Article 2(6) *AVV* Act was made applicable in all sectors by the end of 2005,<sup>53</sup> social partners in the Temporary Work Agency (TWA) sector also started labelling and making accessible which CLA provisions correspond to the hard core of labour law in the PWD.<sup>54</sup> To my knowledge, in most other sectors this work has not been done yet, probably because social partners do not think the result is worth the effort. National topics are much more important in the bargaining process. Moreover, in some sectors, like in transport, the CLAs contain provisions which exclude posted workers from the scope of the CLA. This is in breach with Article 2(6) *AVV* Act. Since 2005 the hard core conditions of extended CLAs in all industries *must* be applied to posted workers. In this respect, it is interesting to note that the implementation of the PWD has limited the policy space for self-regulation of the social partners. They used to be free in the demarcation of the personal scope of their CLA, but in case they want to request extension, Article 2(6) *AVV* Act now limits this policy freedom with regard to posted workers.<sup>55</sup>

### 3.43 Exemption from or expiry of extended CLA provisions

In practice, the application of the mandatory hard core of host state CLA-provisions depends on their extension. Just like non-organised domestic employers, foreign service

<sup>52</sup> This estimation was made by one of the interviewed union representatives for the CLR Study. See Cremers and Donders (above n 1).

<sup>53</sup> For the reasons behind this decision, see section IV.

<sup>54</sup> The rules laid down in the Dutch Collective Labour Agreement for Temporary Agency Workers 2009–2014 are fully accessible in the English and Polish language. See for the applicable rules on posted workers Article 46 and Appendix IV, <http://www.abu.nl/publicaties/cao>, last accessed 13 August 2012.

<sup>55</sup> So far, stakeholders did not perceive of this restriction of their own competence as a problem and the Minister doesn't seem to examine the personal scope during the extension procedure.

providers have the possibility to submit a request for an exemption from the extended CLA, either to the Minister of Social Affairs (see section 5.1 below), or to the CLA-parties. To my knowledge, the latter situation has once occurred in practice:

In the extended CLA for construction it is stated that an employer may send a request for exemption to a committee of social partner representatives. Although not mentioned in the text of the provision, the usual policy of this committee is to grant an exemption only when there is a CLA on company level that has on average the same level of wage and other conditions as the agreement on industry level. Sometimes however, exemption rests on other considerations: In case of the extended CLA Construction Industry 2001 the social partners decided to grant an exemption to the Irish construction company ICDS. This was not based on a comparison of labour standards but on practical arguments, because ICDS delayed the extension of the CLA with objections that had to be dealt with by the Minister of Social Affairs. Since the subsequent CLA 2003–2004 this exemption has not been granted again. The objections that ICDS brought against extension were then overruled.<sup>56</sup> Moreover, the CLA 2003–2004 and its successors were improved with regard to their accessibility and clarity for foreign service providers and their employees.

Apart from the exemption possibility, the hard core of Dutch CLA provisions does not have to be applied either if the period of extension is expired until a renewal of the CLA. In practice, such periods without extension occur quite often. After the renewal of an expired CLA it usually takes several months before the new provisions are extended. In the meantime no extension is applicable. The employers who are not bound themselves by the CLA are free to apply other terms and conditions of employment to their workers until a new extension applies.

### *3.5. Optional derogations from host labour law terms and conditions*

In the Netherlands no use is made of the optional derogations contained in Articles 3(3) and 3(5) PWD. Up till now this does not seem to raise any particular problems in practice. The compulsory derogation for initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, if the period of posting does not exceed eight days (Article 3(2) PWD), is not implemented either. For the construction sector this is not important because it is exempted from this obligation.

It can be gathered from the documents of Parliament about the Implementation Bill that the Dutch government intended to let social partners be free to make use of Article 3(4) PWD.<sup>57</sup> But no transposition of this provision can be found in the Implementation Act

<sup>56</sup> See Houwerzijl (above n 1 *Detacheringsrichtlijn*) 281.

<sup>57</sup> See *Kamerstukken II*, 1998–99, 26 524, no. 3, 4 and no. 6, 5: The government deemed deviation from the legislative minimum wage and the minimum paid holiday level undesirable and inconsistent with the Dutch system. For additional entitlements in collective agreements a more flexible attitude was argued.

*WAGA*, so one can question whether Article 3(4) PWD is sufficiently and recognizably implemented. Probably not, since the evaluation of the European Commission in 2003 showed that no Member States had implemented this provision.<sup>58</sup> However, the attitude of the Dutch government is explicable in the light of the CLA for the Construction Industry which was in force at the time the Implementation Bill was drafted and enacted. From 1995 till 2001 this CLA stipulated that the rules for posted workers only applied for postings longer than a month (analogous to Directive 91/533<sup>59</sup>). Perhaps the Dutch government did not want to force the social partners in construction to alter this into an application from the first day of posting. Nevertheless, as a result of collective bargaining the social partners altered this stipulation (Article 1a) in 2001. From that time on, extended CLA-provisions for posted workers apply from the first day that a posted worker starts working in the Dutch construction sector.

### 3.6. *The favour principle and the method of comparison*

Article 3(7) PWD is not implemented explicitly in the Terms of Employment (Cross-Border Work) Act (*WAGA*). Since the interpretation of this provision was at stake in the cases *Laval*<sup>60</sup> and *Rüffert*,<sup>61</sup> it is important to emphasise that in the Netherlands Article 3(7) PWD was read right from the beginning in the way the CJEU did in its rulings on these cases.

During the adoption process of the Implementation Act *WAGA* some members of Parliament asked in vain for codification of the favour principle, especially because in Dutch law no legal base exists for it. Moreover, members of Parliament asked the Minister what method would have to be followed in the Netherlands to compare the applicable labour conditions of the host country and the country of origin. Article 3(7) PWD gives posted workers a right to the most favourable terms and conditions of employment, but no method of comparison to determine this is prescribed. Is a comparison preferable on the level of each provision, or between units of provisions covering the same subject, or is a comparison of the whole package of working and employment conditions the right point of departure? According to the Minister, the Dutch legal system prescribes a comparison on the level of each provision because in

<sup>58</sup> See COM(2003) 458 of 25 July 2003 *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – The implementation of Directive 96/71/EC in the Member States*; The opinion of the STAR (above text at n 30) demonstrates that social partners at national level also concluded that the optional derogation in Article 3(4) PWD was not implemented in the Netherlands. See also Van Hoek (above n 17) 516. She observes that implementation of Article 3(4) PWD is in contradiction with the terms in Article 2(6) *AVV* Act, that provides no room for own policy to social partners.

<sup>59</sup> Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32.

<sup>60</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>61</sup> Case C-346/06 *Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

the case of posted workers only a minimum level of mandatory law is at stake. The mandatory character of provisions does not allow the exchange of one provision for another, depending on the arbitrary preference of an individual worker.<sup>62</sup>

In this regard, the Minister also mentioned the existing 1997 agreement between the Dutch and Belgian social partners in construction to acknowledge each other's collective agreements as equivalent. The social partners took this bilateral initiative as a way of 'repairing' the, in their eyes, unsatisfactory consequences of the CJEU judgment in the case *Guiot* of 1996.<sup>63</sup> In this case, a service provider protested against double charges in both the host state (Belgium) and the state of origin (Luxembourg) for contributions to so-called social funds in the construction sector. Construction workers often work under short-term contracts. In these circumstances, statutory labour law and social security law do not necessarily provide these workers with adequate social protection. Holiday rights, for example, are hard to realise for a worker who works for many different employers in the same calendar year. To solve this problem, social partners have often concluded collective agreements to create special funds for additional workers' rights, such as holiday pay and bad weather payments. If these collective agreements are declared universally applicable, all employers in a particular country or region have to contribute to this fund, including foreign service providers with workers posted in the construction sector. In *Guiot*, however, the CJEU ruled that the service provider only had to pay contributions in his own country of origin. Social partners in the construction sector criticised this judgment because the CJEU had only considered the type of social funds, not the level of payment which workers could derive from the funds and thus not the equivalence of the schemes. Therefore, the Belgian and Dutch social partners made a comparison of their CLAs which led them to the conclusion that workers in both countries were provided with protection at an equivalent level. This led to an agreement on the suspension of the application of the CLA of the host state. As a result, Belgian and Dutch service providers only had to apply their own CLA and to contribute to the holiday funds in their own countries and were no longer confronted with unjustified double charges. The German holiday and leave fund in the construction sector *ULAK*<sup>64</sup> copied this initiative but limited it to the holiday funds, and has concluded multiple bilateral agreements with, for example, French, Dutch, Belgian and Austrian holiday funds.<sup>65</sup>

<sup>62</sup> See *Handelingen II*, 1998–99, no. 104, p. 5980, 5987'. This statement is confirmed in a judgment of the Hoge Raad (Supreme Court), 14 January 2000, *JAR: jurisprudentie arbeidsrecht* 2000 decision no. 43.

<sup>63</sup> Case C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* [1996] ECR I-1905.

<sup>64</sup> *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, currently applied by *SOKA-Bau*. See <http://www.soka-bau.de>, last accessed 7 September 2013.

<sup>65</sup> See for more details M Houwerzijl and FJL Pennings, 'Double Charges in Case of Posting of Employees: The Guiot Judgment and its Effects in the Construction Sector' (1999) 1 *The European Journal of Social Security* 91.

As a result of the Belgian-Dutch agreement, the Belgian CLA applies to a posted worker who habitually works in Belgium during his period of posting in the Netherlands and vice versa. According to the Minister this agreement could be prolonged. But he added that if a posted worker from Belgium appeals to more favourable extended Dutch CLA provisions, the Belgium provisions have to yield as far as minimum entitlements are concerned. As long as posted workers are satisfied with the agreement, no objections against a prolongation exist.<sup>66</sup> This pragmatic attitude leaves enough room for collective bargaining to make the favour principle more workable in practice. The only reverse side of the coin is that it does not guarantee 100 per cent legal certainty for employers. But when only very few or even no individual appeals for deviance have to be expected, this may not be considered a problem.

### 3.7 Cooperation on information

To ensure the practical effectiveness of the PWD, Article 4 of the PWD provides for cooperation on information between the Member States. Liaison offices and authorities are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States, for undertakings posting workers and for the posted workers themselves. Article 4 obliges the Member States to appoint one or more liaison offices or one or more competent national bodies. In the Netherlands, the Labour Inspectorate is mentioned as the chief responsible organisation in this respect.<sup>67</sup> Until 2005, the Labour Inspectorate did not report any difficulties when applying the provisions of the PWD. But, as we shall see further on when the Dutch enforcement system is explained, this is not per se a good sign because the Labour Inspectorate was hardly engaged in this task.

One of the tasks stipulated in Article 4(2) PWD is to reply to reasoned requests from equivalent authorities in the other Member States for information on the transnational posting of workers, including manifest abuses or possible cases of unlawful transnational activities. Until 2005, from France there had been two requests (in 2001) for information about Dutch companies that posted their workers to France. The request consisted of a check of the correctness of the given information to the French authorities by the companies. Between 2001 and 2005 a German agency of the social partners in

<sup>66</sup> See *Handelingen II*, 1998–99, no. 104, p. 5980, 5987’ and *Kamerstukken II*, 1998–99, 26 524, no. 6, 4–5.’ See also KM Sengers and PTH Donders, ‘De Nederlandse Bouw-CAO in Europees perspectief’, *Tijdschrift voor Sociaal Recht* 2001, 143. They speak of ‘gentlemen’s agreements’.

<sup>67</sup> Neither the Labour Inspectorate nor any other organisation is mentioned in the WAGA. Only the Parliamentary documents make clear that the Labour Inspectorate is to function as liaison office. Also the ‘Rijksverkeer inspectie’ is mentioned in the Documents but this organisation has only minor tasks in the enforcement of Dutch labour law. See *Kamerstukken II*, 1998–99, 26 524, no. 6, p. 5. From 1 January 2012 on, the Labour Inspectorate and several other Inspectorates merged in one overarching Inspectorate under the name *Inspectie SZW*. In this chapter we nevertheless refer to the Labour Inspectorate.

construction approached the Dutch Ministry of Social Affairs with a question.<sup>68</sup> This request was delegated to the Dutch social partners. Apart from the established practise that CLA-related questions would be referred to the social partners, no regular contacts about the Implementation Act *WAGA* and/or the application of the CLA provisions were reported between the Ministry and the social partners. The Dutch Labour Inspectorate did not make any requests to liaison offices in other Member States. In the Group of Experts appointed by the Commission as proposed in its Evaluation,<sup>69</sup> the improvement of the mutual administrative cooperation was taken up. Data of the persons to contact at the Ministries and liaison offices were exchanged and the intention was expressed to keep this information up-to-date in the future.

In what way is the information on the terms and conditions of employment referred to in Article 3(1) PWD made generally available for workers and employers from other Member States, as required in Article 4(3) PWD? It took quite a while to find the text on the website of the Ministry of Social Affairs. At first instance, there were no plans to improve the accessibility of the information to the general public despite the strong recommendation to do so in the Evaluation of the European Commission.<sup>70</sup> However, this attitude changed after enlargement. The current site of the Ministry provides, for example, the possibility of submitting questions by e-mail.<sup>71</sup> In September 2003 social partners in the construction sector published a special leaflet in English, aimed at posted workers and their employers. This leaflet gives fairly detailed and comprehensive information about the provisions applicable to posted workers. It was updated in 2009. At social partner level, until recently no website information was available. On plans to translate the brochure into at least the German language no agreement could be reached between the social partners. According to union representatives, insufficient financial resources played a role.<sup>72</sup> In 2005, the TWA-sector was the first to publish leaflets and make information available through its website, even in Polish.<sup>73</sup>

### 3.8 *Measures aimed at compliance*

Article 5 PWD states that Member States shall take appropriate measures in the event of failure to comply with the Directive. This implies that the government is held responsible for the supervision of compliance with the transposed PWD in the

<sup>68</sup> See Cremers and Donders (above n 1). From 2005 onwards, reasoned requests from and to the Dutch Labour Inspectorate have gradually increased. For figures dating from 2010 on twelve EU Member States including the Netherlands see A van Hoek and M Houwerzijl, *Comparative study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*. Radboud University Nijmegen (March 2011), 161–168. See: <http://ec.europa.eu/social/BlobServlet?docId=6677&langId=en> (last accessed 7 September 2012).

<sup>69</sup> COM(2003) 458, 19–20.

<sup>70</sup> *Ibid.*

<sup>71</sup> Available at: <http://www.government.nl/ministries/szw>, last accessed 7 September 2012.

<sup>72</sup> See Houwerzijl (above n 1 *CLR-Country report*), 110.

<sup>73</sup> See above n 55.

Implementation Act *WAGA* and the other applicable statutory and extended collective agreement provisions. Therefore, the government has to ensure in particular that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the PWD. But because the Dutch enforcement system is mainly based on private law, the Dutch government did not have any special control mechanisms to prevent fraud and to assure the correct application of the Directive. Thus, at first instance it was fully left to the posted workers and the social partners involved to ensure the Directive's correct application and, if possible, to prevent fraud.

In this respect, Article 4 *WAGA* transposes Article 6 PWD on jurisdiction into the Code of Civil Procedure (*Rv*). Thus, it is safeguarded that the Dutch judge has jurisdiction to decide in judicial proceedings started by a posted worker. Moreover, unions are entitled to start judicial proceedings on behalf of posted workers or on the basis of their own interest in enforcement of the Directive. This is laid down in Articles 3:305a and 305b *BW*. As far as extended CLA provisions are concerned, Article 3 of the *WAGA* entitles unions and employers' organisations to institute proceedings in their capacity as parties to the collective labour agreement.

In Parliamentary debate the Minister was asked in what way the government interprets its task of ensuring the effective enforcement of the PWD in the Netherlands. According to the Minister, the Labour Inspectorate and to some extent the '*Rijksverkeer inspectie*' have the supervision of the enforcement of, for example, working conditions and working times. This occurs when a provision in the Acts concerned is sanctioned with a penalty or fine (according to criminal or administrative law). In this respect no difference is made between Dutch and foreign companies. But most of the applicable legal provisions on posted workers are of a private law character. Not only provisions in the Civil Code (*BW*) but also provisions with a public law character, such as the Act on Minimum Wages (*WML*) were at that time mainly sanctioned by private law mechanisms. And the enforcement of CLA-provisions belongs substantially to the competence of the social partners themselves.<sup>74</sup> Some help is provided for in public Acts, where it is laid down that social partners or individual workers can ask the Labour Inspectorate, for example, to check working conditions in specific companies.<sup>75</sup> However, insiders and experts generally agree that these possibilities do not mean very much in practise because the Labour Inspectorate has a huge workload and is not able or prepared very often to give priority to these requests.

The Minister defended this system of enforcement, which is quite atypical compared to other Member States, such as direct neighbours Belgium and Germany. The main advantage for the state is that the costs are limited.<sup>76</sup> But also in purely domestic

<sup>74</sup> See *Kamerstukken II*, 1998–99, 26 524, no. 6, p. 4 and *Handelingen II*, 1998–99, p. 5987.

<sup>75</sup> See in particular Article 18a *WML* (on minimum wages), Article 10 *AVV* Act (on extension of CLAs). Often this help from the Labour Inspectorate can only be asked for in case of a lawsuit or when legal proceedings are at least prepared.

<sup>76</sup> *Handelingen II*, 1998–99, 5986–87.

situations critics have warned that the trust in this system might be too high where the ability of workers to lay present claims in court is concerned.<sup>77</sup>

In the Parliamentary debate a member proposed to oblige employers to announce in their specifications of public work contracts whether they work with posted workers. But the Dutch government had complained to the German authorities about such a duty for the sake of Dutch employers who post workers to German construction sites. Imposing such a duty on Dutch sites would not be very effective in that respect. Another suggestion of this Member of Parliament was to make use of the E-101 documents as a control mechanism because employers need to obtain these forms anyway to let their posted workers stay insured under the social security system of their Home State (see Regulation 1408/71).<sup>78</sup> Nothing was done with this idea.

### 3.9 Observations

In this section the Dutch legislative (and partly practical) process of implementing the PWD was examined. In all matters that were examined above, the ‘neutral’ motto of the government in its implementation Bill, namely ‘to transpose not more or less than necessary’, was consistently and successfully upheld. According to the Minister this neutral stance was guided by the general government guidelines on the implementation of EU Directives, which is based on avoiding unnecessary ‘national supplements’ to European legislation.<sup>79</sup> Therefore, all options in the PWD to do less or more than strictly necessary were left out of the Bill. Politically, this attitude was fully in line with the deregulation and free-market philosophy which was in its heyday<sup>80</sup> during the second government of secular liberal and social democrat political parties (the so-called purple governments). To apply a neutral attitude (disregarding domestic interests as much as possible) to such a politically sensitive subject matter as posting of workers led, however, to a (too)<sup>81</sup> minimalistic and sometimes fairly indifferent implementation of the PWD. This is true in particular with regard to the (1) practical effectiveness of the PWD, (2) the personal scope of the PWD and (3) the limiting of the substantive scope to

<sup>77</sup> See, for instance, S Klosse *et al.* (eds.), *Op zoek naar kwaliteit. Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen* (SDU 2003), 272.

<sup>78</sup> See *Handelingen II*, 1998–99, no. 104, p. 5983.

<sup>79</sup> See extensively Houwerzijl (above n 1, *Detacheringsrichtlijn*), 291.

<sup>80</sup> Its rise and fall in popularity may be situated between 1996 and 2009, marked by the embracing of the so-called ‘Third Way’ by leader of the Social Democrat Party Wim Kok, in a keynote lecture on 11 December 1995 (Den Uyl lezing) and the departure from it by his successor Wouter Bos in a keynote lecture of 25 January 2010 (Den Uyl lezing). W Kok, ‘We laten niemand los’, Dr JM Den Uyl-lezing, 11 December 1995 (Den Haag 1995): <http://www.trouw.nl/tr/nl/5009/Archief/archief/article/detail/2554884/1995/12/23/Een-reeks-van-vaagheden-in-Koks-Den-Uyl-lezing.dhtml> (last accessed 7 September 2012); W Bos, ‘De Derde Weg voorbij’, Dr. JM Den Uyl-lezing, 25 January 2010 (Den Haag 2010): <http://www.pvda.nl/berichten/2010/01/Den+Uyl+lezing+Wouter+Bos> (last accessed 7 September 2012).

<sup>81</sup> The Netherlands forgot to implement Article 3(2) of the PWD which consists of an obligatory exemption from the hard core for very short postings for first installation of a newly purchased machine, for example).

only extended CLAs in areas of activity mentioned in the Appendix of the PWD (largely, the construction industry).

With regard to the latter issue, it seems as if the government deliberately disregarded its own system of extension of CLA provisions which aims at furthering collective bargaining on a sectoral level by temporarily eliminating the possibility of labour cost competition among firms during the duration of the extension. Since 1937 this system has been widely used and supported but it became controversial in the 1990s. Nevertheless, the system survived the attacks from neo-liberal academics and policymakers but this came at a price: from 1997 till 2007 a very liberal exemption policy was implemented (see Section 4).<sup>82</sup> During the implementation process of the PWD the possibility that foreign service providers would undercut Dutch labour standards was consistently ignored. In contrast, the Minister underlined the problems experienced by Dutch companies posting workers to Germany in its defence to apply as little host state labour law as possible to posted workers and he advised the Parliament to first wait and see how other countries implemented the PWD on this point. Although the Parliament remained very critical and a majority favoured a broadening of the substantive scope to all industries in order to create a level playing field of fair competition between domestic and foreign companies, it didn't make it a breaking point when the government persisted in its refusal to use the option laid down in Article 3(10), second indent of the PWD and it adopted the Bill in full.

With regard to the 'neutral' but insufficient implementation of the PWD regarding its practical effectiveness and its personal scope, it seems that the government was more concerned with preserving national autonomy than with loyalty to the EU integration process. This factor is explicitly visible in the defence of the Minister of 'our private law based enforcement system of labour law'. Not sticking to the traditional passive enforcement tradition of the state in labour law would simply cost too much money. Reluctance to re-examine the adequacy of the national system may also have guided the inaccurate implementation of personal scope, because the definition and the three situations of posting in the PWD did not fit into the domestic definition of this phenomenon. As a result nowhere in the Dutch Implementation Act is it made clear that posting of workers takes place within the framework of service provision and that these workers are supposed to habitually work in another Member State. Lacking knowledge or awareness of the role of EU free movement law on this subject matter may have played a role in overlooking or ignoring this aspect of the PWD. Moreover, the dominant PIL perspective (see Section 2) on the legal position of posted workers may have strengthened the misunderstanding of the personal scope of the PWD by the Dutch legislators. In this context it is remarkable that the CLA for the construction industry has implemented a more accurate definition of a posted worker.

<sup>82</sup> See also, extensively, M Houwerzijl 'De golfbeweging in het dispensatiebeleid op grond van de Wet avv (1992–2007)', in ATJM Jacobs and FJL Pennings (eds), *Een prettige Fase in het sociaal recht, Liber Amicorum voor Prof WJPM Fase* (Zutphen 2007), 135.

Thus, the initial implementation of the PWD was guided by a ‘neutral’ approach with blind spots for the ‘prevention of unfair competition’ and the ‘furthering of effective employment protection of posted workers’ aims of the Directive. However, as far as the Dutch ‘neutral’ implementation was meant to further the third goal behind the PWD, of ‘enhancing the free movement of services within the EU’, this must be understood purely in the legal, PIL interpretation of this aim (see the Recitals of the PWD) to further transparency and legal certainty: during the parliamentary adoption process the undesirability of the applicability of more than one legal system to the employment contract of posted workers was emphasised several times. At first instance the Minister even sent a Bill to the Parliament in which also the application of the hard core labour standards in statutory law was limited to the construction industry. This omission was quickly repaired after discovery. Hence, furthering legal certainty and simplicity (fitting into the deregulation hype) may have been the main driver behind the Dutch implementation of the PWD.

#### **4. Enlargement and the debate on the Services Directive – influence on the (enforcement of) rules concerning posting of workers in the Netherlands**

##### *4.1 The Dutch transitional regime for the free movement of workers*

From 1 May 2004, nationals from eight of the 10 new Member States (EU8 nationals) were not accorded the Community law right to freely move to and reside in the Netherlands for the purposes of work (Article 39 EC, now Article 45 TFEU). Instead, national migration law governed their labour market access, which meant they were still *treated as third country nationals* for whom a work permit was required to gain access to the Dutch labour market. The possibility to impose these temporary restrictions on the right to free movement was enshrined in the Accession Treaty between the new and the old (EU15) Member States. The Accession Treaty allowed the EU15 Member States to derogate from elements of the free movement of workers *acquis* until no later than 1 May 2011.

Until November 2003, when the Ministers of Finance (against) and of Economic Affairs (in favour) came into conflict about this subject, the government had favoured the immediate opening up of the Dutch labour market on the accession of the EU8 countries. In the following months running up to enlargement, all the arguments pro and con were raised in heated debates in parliament and in the public press. The combination of concern about rising unemployment<sup>83</sup> and, more importantly, the perceived increasing chance of unmanageable influxes of EU8 workers on the labour market now that more and more EU15 states had already made policy U-turns and announced that transitional measures would be implemented, were the official reasons to adopt a transitional regime in spring 2004. However, the concerns about a negative

<sup>83</sup> Which in hindsight proved only to be a small interruption in a booming economy until mid-2008.

public reaction to the immediate extension of mobility rights to EU8 nationals seems to have been an important hidden factor motivating transitional restrictions rather than any convincing evidence of probable labour market disruption.<sup>84</sup> In this context, the rising popularity of populist political parties from 2001 onwards seems to be of crucial importance.<sup>85</sup>

Whatever the general public might have expected, in reality the transitional arrangements were not meant as a measure to stop immigration. On the contrary, immediately from 1 May 2004 thousands of EU8 migrants got work permits every month to help alleviate labour shortages in specific sectors of the labour market, such as transport and agriculture. The flexible design of the transitional measures made it possible to adapt the rules every three months to changing labour market needs. Only three years after the enlargement, in May 2007, the Netherlands lifted the last restrictions on the free movement of workers from the EU8. For the EU2 countries Bulgaria and Rumania a transitional regime was enacted from 1 January 2007, which still exists, and will probably be prolonged until 1 January 2014.

#### 4.2 Policy change no. 1 and the factors behind it

##### 4.21 Expanding the substantive scope of the Implementation Act

In the slipstream of the dispute on the transitional arrangement in the autumn of 2003, the debate on broadening the scope of the Dutch Implementation Act *WAGA* in order to create a level playing field for domestic and foreign companies and workers was opened again. Left-wing politicians and also the trades union were in favour of opening the borders to the EU8 workers from day one but linked this to the need to prevent social dumping. At first, the government kept defending its 'neutral' position and the majority in Parliament still accepted this, despite continuing attempts by supporters of 'expanding the scope' to put the item on the legislative agenda again. It was only after enlargement, in summer 2004, that the government made a U-turn, officially because Dutch employers had complained about unfair competition related to the influx of cheap posted workers. Thus, in autumn 2004 a Bill was sent to the House of Representatives with the proposal to broaden the scope of the *WAGA* to all universally applicable collective agreements. This Bill was adopted and entered into force 14 December 2005.<sup>86</sup> Apart from the official reason behind the U-turn, two important other developments in the context of cross-border mobility of workers and the opening up of

<sup>84</sup> See for a general overview of the decision-making process on transitional regimes, K Tamas and R Münz (with a contribution by E Hönekopp), *Labour Migrants Unbound? EU Enlargement, Transitional Measures and Labour Market* (Institute for Futures Studies Stockholm, 2006); European Commission, *Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty* (period 1 May 2004–30 April 2006), COM(2006) 48 final.

<sup>85</sup> In May 2002, the charismatic leader Pim Fortuyn was killed shortly before a landslide victory in the general elections (lower house of Parliament), which marked the end of 8 years of coalition government between the Social Democrats and liberals.

<sup>86</sup> See *Kamerstukken II*, 2004/05, 29 983, no. 1. *Staatsblad* (Government Gazette) 2005, 626, 13 December 2005.

the services market in autumn 2004 seem to have informed this decision. First of all, the discussion on the draft Services Directive (see below 4.2.2) and secondly the acknowledgment that posting of workers in the framework of service provision could not be restricted by the transitional regime (4.2.3).

#### 4.22 The evolving debate about the ‘Bolkestein Directive’

The slowly evolving Dutch debate about the proposal for a Services Directive, launched by the Dutch Internal Market Commissioner Bolkestein in January 2004, became serious in the autumn of 2004. The press reported that the government was divided on this proposal. The Minister of Economic Affairs was in favour, but the Minister of Justice hesitated because the legal implications of this draft were far from clear.<sup>87</sup> The part of the draft legislation that caused most discussion was the ‘country of origin’ principle. Former opponents of expanding the scope of the *WAGA* to all universally applicable collective agreements suddenly saw it as an argument to counteract the public fear that companies setting up services in the Netherlands could do so according to the labour standards in their own country.<sup>88</sup> In December 2004, the government, also at the request of the Parliament, asked the Social and Economic Council (*SER*) to issue advice regarding the draft Services Directive. In its advice of May 2005 the influential *SER* stated that it assumed that the Parliament would adopt the expansion of the *AVV* Act since ‘This legislative proposal guarantees that it will be possible to properly manage the increase in cross-border service transactions and therefore the increase in posted workers’.<sup>89</sup>

Next, the *SER* advice stated that the exclusion of only those aspects of the country of origin principle that are regulated by the PWD would not be sufficient to guarantee the desired neutrality of the Services Directive in respect of existing European employment law in cross-border situations, as there are cross-border situations in which the PWD does not apply *or no longer* applies. In these situations the Rome Convention (now the Rome I Regulation) is relevant. Those aspects of employment contracts that are regulated by the Rome Convention were not excluded from the country of origin principle. The *SER* therefore advised the amendment of the draft Services Directive in order to ensure that the Rome Convention will continue to apply in respect of employment contracts, ‘of course with due observance of the specific stipulations regarding posting in the PWD’.<sup>90</sup>

Furthermore, while supportive of the aim of establishing a better balance between enforcement of employment law, on one hand, and market opening, on the other, the *SER* rejected the proposed provisions (in Article 24 and 25 draft Services Directive) to

<sup>87</sup> Houwerzijl (above n 1, *Detacheringsrichtlijn*) 299 fn 106.

<sup>88</sup> Houwerzijl (above n 1, *Detacheringsrichtlijn*) 299; *SER* Press Release 20 May 2005, *Unaniem over dienstenrichtlijn*.

<sup>89</sup> *SER*, *Advies Dienstenrichtlijn* (Advisory report: The Directive on services in the internal market) (Den Haag, July 2005), 147. See on the *SER* in general above n 29.

<sup>90</sup> *Ibid.*, 125.

limit the competence of the host state concerning the abolition of certain disproportionate national authorisation schemes and the improvement of controls in respect of the compatibility between the employment terms and conditions and the PWD. In its final assessment the *SER* emphasised that ‘Confidence in efficient collaboration between the Member States and in *strict enforcement* is a basic condition for the proper functioning of the country of origin principle: after all, the Member States must be able to rely on the fact that public interests are sufficiently guaranteed in the Member State of establishment’.<sup>91</sup>

The final version of the Services Directive turned out less ‘expansive’ than the ‘Bolkestein draft’ which the *SER* had discussed in its report of 2005,<sup>92</sup> and did not stir any noticeable commotion among Dutch social partners and the major political parties. Nevertheless, it is worth noting that the majority of the Dutch Parliament, including the centre-left politicians were more supportive of the draft Services Directive than centre-right parties in neighbouring countries, such as Belgium. In my view, this perfectly illustrates the predominantly EU-loyal free market mindset of the Dutch political and industrial establishment, although these views are most of the time mingled with concerns for preservation of the ‘social model’.<sup>93</sup>

Illustrative of the blind eye this establishment often seems to turn to the resentment of ‘ordinary people’ is the remark by the chairman of the largest employers’ association *VNO-NCW* on the day of the release of the *SER* advice on the draft Services Directive. He was proud of the civilised and sensible tone of the Dutch debate on the Services Directive, compared to France where, according to the chairman, ‘cheap and populist’ characterisations were in use, such as the Frankenstein Directive.<sup>94</sup> However, only eleven days after the release of the *SER* advice, almost 62 per cent of the Dutch electorate rejected the Constitutional Treaty. Similar ‘gut feelings’ as in France seem to have played a role in this regard. Actually, in both countries, the public debate about the draft Services Directive was by some closely linked to the debate and referendum on the Constitutional Treaty. The ‘No Constitution Rap’ of the Dutch Socialist Party is telling in this regard: ‘If you want a social Europe, and a Europe for the people, not for business and money, then say “No” to the constitution.’<sup>95</sup>

<sup>91</sup> *Ibid.*, 142.

<sup>92</sup> For example, the *SER* had advised to stick to the ‘country of origin principle’ and to keep the temporary work agency branch within the scope of the proposed Directive.

<sup>93</sup> The enthusiasm for ‘flexicurity’ and the Lisbon Strategy also fits into this picture. One of the assumed reasons behind the rise of populist parties seems to be the absence of disagreement about these socio-economic issues between the traditionally major political parties on the left and right and in the centre.

<sup>94</sup> See press release 20 May 2005: ‘SER unaniem over Dienstenrichtlijn’.  
<http://www.ser.nl/nl/actueel/persberichten/2000-2008/2005/20050520.aspx> (last accessed 7 September 2012).

<sup>95</sup> Two days earlier, on 29 May 2005, in France, ‘only’ 55 per cent voted no. Although some voted no because they wanted a more social Europe there seems to have been a lot of

#### 4.23 Partial lifting of the transitional regime for the posting of EU8 workers

The second factor that facilitated the expansion of the Terms of Employment (Cross-Border Worker) Act, was the acknowledgement of the Dutch Government, as a consequence of the judgment of the CJEU in *Commission v Luxembourg*, 2004,<sup>96</sup> of 21 October 2004, that the transitional regime for the free movement of workers does not include workers posted by EU8 companies to exercise their (unrestricted) freedom to provide services in the Netherlands.<sup>97</sup> Therefore, the Dutch Government announced that ‘in the near future’ no work permit would be required anymore for this group. In December 2005, the transitional regime for the free movement of EU8 workers was changed as follows:

‘Foreign service providers for whom the free movement of services applies, who want to offer a service in the Netherlands using their own employees (i.e. posting of workers as mentioned in article 1, sub 3 (a) of the Directive) for whom the free movement of workers within the Netherlands does not pertain, are exempted from applying for work permits for their employees under the following conditions:

- The service provider is established outside the Netherlands in a country where the rules for the free movement of services apply and is not only a post office box business;
- The services provided do not involve the posting of workers or an undertaking engaged in making labour available;
- The services are reported to the Centre for Work and Income (CWI) before their commencement.

Posted employees as mentioned in article 1, sub 3 (b) (i.e. posting of workers to an establishment or to an undertaking owned by the group in the territory of a member state) and sub 3 (c) of the Directive (i.e. hiring out of workers to a user by a temporary undertaking or placement agency) are exempted from the notification system and need to apply for work permits.<sup>98</sup>

The recognition that posting of workers by EU8 companies could not be restricted by the transitional regime thus was limited to what the Dutch Government understood as ‘genuine’ posting situations. For these archetypical ‘*Rush Portuguesa*’ situations of posting situations as codified in Article 1(3)(c) PWD, employees of service providers from the EU8 no longer needed a work permit, but the employer remained obliged to notify postings to the authorities. According to the new rules from December 2005 on,

different reasons for the no-votes. From the interviews with no-voters, however, the picture emerged that their vote was often not based on informed political arguments, but first and foremost on a dislike of the ‘arrogance’ of the elite: ‘People are unhappy with the fact that Europe is a project of the elite, not the ordinary people’. See ‘Varied reasons behind Dutch No’, BBC 1 June 2005, <http://news.bbc.co.uk/2/hi/europe/4601731.stm> (last accessed 10 September 2012).

<sup>96</sup> Case C-445/03 (above n 42).

<sup>97</sup> See also under Section 3.23 for the implementation of the PWD on posting from third countries.

<sup>98</sup> See ‘The Netherlands’, under XVI. Procedural and administrative requirements at < docs.minszw.nl/pdf/135/2006/135\_2006\_1\_14765.pdf > (last accessed 10 September 2012). The information is based on Article 2(1) of Foreign Nationals Employment Act (*WAV*) in conjunction with Article 1(e)(1) of the Decree on the implementation of the Wav (*Besluit uitvoering Wav*), as amended by the Decree of 10 November 2005 (Government Gazette (*Staatsblad*) 2005, No. 577).

some of the posting situations defined in Article 1(3)(b) and all situations defined in Article 1(3)(c) PWD are now situations of ‘non-genuine’ posting.<sup>99</sup> The rationale behind this is that these workers from the new Member States are deemed to have access to the Dutch labour market.

According to the Polish companies Vicoplus, BAM Vermeer Contracting and Olbek Industrial Services this new policy was in violation of the free movement of services. Hence, they instituted proceedings against the Dutch Minister of Employment and Social Affairs concerning the fines imposed on them because they employed Polish agency workers in the Netherlands without work permits. Subsequently, the litigation section of the Council of State (*Raad van State*) submitted preliminary questions to the CJEU in these joined cases.

In *Vicoplus* the CJEU confirms the line of reasoning of the Dutch government. Inter alia, the Court refers back to para 16 of its judgment in *Rush Portuguesa*, where it stated that an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the TFEU, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State. Indeed, while being hired out to the user undertaking the worker is ‘typically’ assigned to a post that would otherwise have been occupied by a person employed in that undertaking. Hence, during the transitional period, which aims at regulating access to the labour market, the requirement of a work permit for, in this case, Polish temporary agency workers can be justified as a measure allowed on the basis of the Act of Accession and is therefore compatible with the free movement of services. This is deemed in line with the purpose of the transitional provisions, which aim to avoid entirely opening up the labour market immediately.<sup>100</sup>

#### 4.3 Policy change no. 2: More stringent monitoring and enforcement of Dutch labour law

##### 4.31 Background

Apart from expanding the scope of the Terms of Conditions (Cross-border worker) Act (*WAGA*) the partial renunciation of the transitional regime in 2005 stirred the Dutch government also to intensified action with regard to the enforcement of labour law, now that they could no longer use migrant law tools to monitor the entrance and labour standards of posted EU8 workers. The emphasis in the *SER* advice<sup>101</sup> on the need for proper enforcement as a basis for opening up national services markets also marked a shift in thinking about enforcement issues.

<sup>99</sup> See above n 43.

<sup>100</sup> Case C-307/09-309/09 *Vicoplus* [2011] ECR I-453, paras 38-40.

<sup>101</sup> See above n 91.

Since the beginning of the new century the increasing presence of Eastern European workers on the Dutch labour market<sup>102</sup> who appeared to be less inclined to exercise their rights, had led to an increase of exploitative or abusive employment relationships. Moreover, ‘locking the front door’ to the Dutch labour market after the 2004 enlargement stimulated an increasing use of ‘the back door’, most notably through reliance on temporary employment agencies and employer-organised schemes. These methods may be legal or illegal and consequently offer less or no labour law protection compared to more regular forms of employment. As numerous research studies have confirmed, the EU8 migrants were mostly hired as cheap labour, unaware of their rights or not even interested in them (because they were still in a better position than in their own country). As a result of the increased demand for and supply of cheap labour, in Dutch sectors such as road transport, the construction industry, agriculture, the fish and meat processing industries, the hospitality business and the temporary employment agencies sector, competition was distorted by the legal, grey and black supply of EU8 posted employees and bogus self-employed workers.<sup>103</sup> Apart from the legal and illegal possibilities to circumvent the transitional restrictions on the free movement of workers, for some 100,000 EU8 nationals work permits were issued during the three years that the transitional regime lasted. Next to abusive labour relationships, unsafe and illegal housing situations, widely exposed in the press, became a growing problem for municipalities with a lot of workers, the majority being Polish.

The attitude of the Dutch press has varied since the EU8 workers made their entrance on the Dutch labour market. Initially, the Dutch government was heavily criticised by the generally EU-loyal left-wing and liberal<sup>104</sup> opinion after its decision to impose a transitional regime on the entry of EU8 workers. The right-wing (populist) media, however, applauded this step. After enlargement gradually more stories were released on both wings of the press, although differing in tone, on abusive situations and/or perceived social dumping. Often this led to questions in the Lower House of Parliament. In August 2005, for instance, the Minister of Social Affairs and Employment was asked in Parliament whether rumours were true that thousands of construction workers had lost their jobs because of the lower labour costs of Polish workers. The Minister responded that there were no signs of a substantial loss of employment by Dutch

<sup>102</sup> For example: In an inquiry called ‘Ethnic minorities and foreigners in construction’, the research institute *EIB (Economisch Instituut Bouwnijverheid)* concluded in 2004 that approximately 1,450 Germans were employed by Dutch building companies, posted, working on temporary contracts or as self-employed. Among these Germans, there were a number of Polish citizens with German passports. There were also 834 other foreign workers and 300 Polish painters working on temporary employment contracts.

<sup>103</sup> MC Versantvoort and others, *Evaluatie werknemersverkeer MOE-landen* (Ecorys 2006).

<sup>104</sup> In the Netherlands, a liberal politician is someone who predominantly supports ‘enlightened’ (secular) tolerant points of view on immaterial issues such as abortion, euthanasia, freedom of opinion, open migration policies and so on, traditionally associated with left-wing parties, but on socio-economic issues favours a free market philosophy.

construction workers. Although the number of job seekers increased slightly between July 2004 and July 2005, the number of construction workers looking for employment decreased by 3.8 per cent. Nevertheless, the Minister did not rule out increasing competition in construction and a subsequent loss of employment.<sup>105</sup>

Although less frequent than negative stories there has also been recognition in the press of an apparent good work ethic demonstrated by Polish migrant workers, and they were even celebrated as a role model for unwilling Dutch unemployed since they were working in occupations not easily filled by domestic workers.

#### 4.32 Supportive measures to enhance enforcement as a precondition for lifting the transitional regime

In May 2007, the government was able to lift the last restrictions on the free movement of workers from the EU8 only in cooperation with the representatives from both sides of industry in the Foundation of Labour.<sup>106</sup> In a framework agreement between those parties and the Minister of Social Affairs special supporting measures were proposed to enhance the enforcement of applicable employment conditions in order to prevent social dumping. The Labour Inspectorate was to play a more active role in supervision and in addition, a penal provision has been added to the Minimum Wages Act (*WMM*). An employer in breach of this Act may incur a fine of up to 6,700 euros per worker.

The introduction of an administrative fine was a remarkable step since it added public enforcement to (underused) private enforcement of the Law on minimum wages (*WMM*). The measure was adopted by Parliament and enacted in 2007.

However, this agreement with the social partners did not come overnight. Several times before, the government had tried in vain to find a majority in Parliament for lifting the restrictions. By the end of March 2006 the government had already announced that, from 1 January 2007 onwards, the Netherlands would allow free movement for EU8 workers.<sup>107</sup> According to the government, freedom of movement for workers was inevitable and further postponement would lead to an increase in the number of (bogus) self-employed from the new EU countries and an increase in the number of illegal practices. To show its concern for proper enforcement of labour law with regard to this new group of workers on the Dutch labour market, the government announced the implementation of a number of measures *first* in order to prevent unfair competition. Most of these were practical measures on information and cooperation.

<sup>105</sup> *Kamerstukken II*, 2004–2005 Vraagnummer 2040519340, 5 August 2005 (Nawijn); *Kamerstukken II*, 2004–2005, 29 407, no. 23 Vrij verkeer werknemers uit de nieuwe EU lidstaten, verslag van algemeen overleg, 1 September 2005; *Kamerstukken II*, 2005–2006 Vraagnummer 205060060, 30 September 2005 (De Wit).

<sup>106</sup> The Foundation of Labour (*Stichting van de Arbeid*) is a joint body of the national employers' and trade union federations. See above n 32.

<sup>107</sup> Government information service, 31 March 2006. See Press Release SZW 06/005.

For instance, the Tax Department and the Labour Inspectorate would cooperate more closely to counter illegal labour, undeclared employment and migrant workers posing as self-employed (1). The Labour Inspectorate would also start notifying workers and trade unions of cases of infringement of the Minimum Wages Act, with the aim of facilitating court action to demand back payment. By passing on information trade unions could better enforce observance of CLAs (2). Next, cross-border cooperation agreements would be made with competent authorities on tax on wages and social security contributions (3) and the government would support information campaigns initiated by employers' organisations and trade unions to raise awareness among EU8 workers of the Dutch core of labour standards they are entitled to (4).

Parliamentary debates on the issue in April 2006, however, revealed broad opposition to the plan. The Christian Democrat Party and the Labour Party demanded further guarantees that an expected influx – primarily of Polish workers – would not lead to unfair competition for Dutch workers. This was in line with the opinion of the largest trade union in the country, *FNV*. The government had to postpone a final decision on the opening of the labour market until the end of 2006. First, another report had to be submitted to the Parliament on planned measures to prevent abuse of labour market rules. In the meantime, the government reported to the European Commission that it would stick to its current restrictions.<sup>108</sup>

#### 4.33 The better enforcement approach

It must be noted that the supportive measures to lift the transitional regime for EU8 migrants have been introduced in a general political environment focused on reducing illegal migration. Thus, the focus on compliance issues seems to have shifted from regulation to suppression through increased controls and fines. This is accompanied by stricter policies and policy proposals towards people remaining illegally and towards asylum seekers. In March 2005, for example, the Christian Democratic Party (*CDA*) insisted on sterner sanctions to combat the illegal employment of foreign workers. They requested that the fine for illegal employment be raised from 8,000 to 10,000 euros per person. Since then, the issue has figured prominently on the political agenda. One MP stressed that illegal employment is a widespread phenomenon and that sanctions are apparently not severe enough to have a real impact.<sup>109</sup>

In the past decade, the trend therefore is towards better enforcement of existing laws and regulations and the improvement of controls and sanctions. Not only the authorities, but also the social partners have made efforts towards better compliance in their branches of industry. The majority of Polish workers in the Netherlands are engaged through temporary employment agencies or intermediaries based in Poland, Germany or the Netherlands. Often constructions are only semi-legal: a migrant worker is on the payroll for the statutory minimum wage per month, which is based on a 40-hour

<sup>108</sup> See M Beunderman, 'Dutch postpone labour market opening decision', 13 April 2006 at <http://euobserver.com/9/21383> (last accessed 10 September 2012).

<sup>109</sup> Parliamentary Newsletter, 16 March 2005.

working week. In practice, the migrant worker logs more than 60 hours per week, which decreases his hourly wage substantially. Another frequent practice is to pay a regular wage, but to deduct costs for tools, working clothes and so on from the wage, because everything that is needed to get the work done has to be hired via the intermediary.<sup>110</sup> Therefore, many measures aimed at better enforcement are targeted at the temporary work agencies branch, as an exploratory – and thus incomplete – overview of initiatives below will show.<sup>111</sup> Although there have been successes in the short run, nevertheless there is no convincing evidence that the problems with non-compliance are diminishing in the longer run, probably due to the fact that the demand for ever cheaper labour is simply too high. At best, the authorities may keep pace with the increase of the phenomenon or they may be helped by a long economic downturn.

*a) Cooperation of authorities in intervention teams*

In sectors where much abuse occurs, such as agriculture and horticulture, the temporary agency sector, construction, transport, cleaning and retail, the competent authorities work together in so-called intervention teams. The activities of such *Intervention Teams* (IT) are announced in the press some weeks or months before the operation starts, but individual employers are not informed beforehand when and where inspections will take place. The press releases by the Ministry of Social Affairs and Employment are presumed to have a precautionary effect.

The IT monitor all possible forms of undeclared labour: illegal foreign employment, which is a task of the Labour Inspectorate, evasion of taxes and social security contributions which is the task of the tax authorities, bogus self-employment and benefit fraud (a task of the Employment Insurance Agency *UWV*). The IT inspectors also check illegal housing, which is one of the side-effects of the illegal employment of foreign workers, and the observance of safety regulations. Dangerous situations are reported to the Labour Inspectorate, to be sanctioned later. Other institutions are also involved, such as the Foreign Nationals Registration Office and local government. Sometimes more than 70 inspectors operate together.

During the operations, workers who are not able to identify themselves are booked. Their employer receives an administrative fine of 8,000 euros a head per day. Foreign workers who are not allowed to stay will be expelled by the Foreign Nationals Registration Office. The sanctions of the tax authorities are severe: payment of income tax and contribution arrears, together with a fine.

<sup>110</sup> HM ter Beek *et al.*, *Poolshoogte. Onderzoek naar juridische constructies en kostenvoordelen bij het inzetten van Poolse arbeidskrachten in drie sectoren* (Regioplan Beleidsonderzoek, 2005), 39–40.

<sup>111</sup> Based on a slightly updated survey in C Bosse and M Houwerzijl (2006), *Undeclared Labour in the Construction Industry Country Report – The Netherlands – June 2006*, see: <http://www.clr-news.org/CLR-Studies/Dutch%2003-OK.pdf>, last accessed 10 September 2012. Summary published in: J Cremers and J Janssen (eds), *Shifting employment: undeclared labour in construction*, CLR Studies 5 (CLR/International Books, 2006) 114–125.

*b) More manpower for more labour inspections*

The number of inspections was gradually increased from 3,900 in 2003 to 10,500 in 2006. The number of labour inspectors was doubled from 80 to more than 160.

*c) Notification of new employees from the first day of work*

In an effort to tackle unreliable temporary work agencies, but also undeclared work in general, from 1 July 2006 employers became obliged to notify a new employee on the first day of work to the relevant tax and social security organisations. However, on 1 January 2009 this measure was abolished again because it was deemed disproportionate and not very effective.<sup>112</sup> Now the Tax Inspector may only oblige certain risk groups of employers to notify each employee on the first day of work.

*d) Complaint desks*

Several trade unions installed permanent or temporary complaints desks for their members to report unfair competition by foreign workers not respecting the CLA. The results have once been used for a naming and shaming report, which caused a lot of trouble with the employer side of the branch (road transport).<sup>113</sup>

*e) Self-regulation through quality labels and compliance offices*

The temporary work agency sector has witnessed a sharp increase in the number of unreliable agencies since the abolition of the permit system in 1998. To combat fraud and other abuses the employers' association *ABU* has developed a quality label, also with an eye to preventing the reintroduction of a permit system. This is meant to distinguish reliable agencies from their unreliable colleagues. It enables user companies to choose a qualified agency that adheres to the rules. Since 1 January 2007 temporary work agencies established in the Netherlands can acquire this quality label – known as *NEN-norm 4400 Part 1* – from the National Standardisation Institute (*Nederlands centrum van normalisatie, NEN*) when they are seen to fulfil requirements concerning the payment of statutory minimum wages, taxes and social insurance and the legitimacy of employment in the Netherlands. The assessment is made by private certifying companies. After certification, the temporary work agency will be registered by the Foundation for Employment Standards (*Stichting Normering Arbeid, SNA*). Regular monitoring of the registered agencies on compliance with the applicable law and regulations and on their payment record must ensure that the agencies stay on the right

<sup>112</sup> See announcement at [www.antwoordvoorbedrijven.nl/regel/eerstedagsmelding?gclid=CJf\\_mbvqqrICFSTHtAods2oArA](http://www.antwoordvoorbedrijven.nl/regel/eerstedagsmelding?gclid=CJf_mbvqqrICFSTHtAods2oArA) (last accessed 10 September 2012). According to the government the first-day notice obligation caused annoyance among employers.

<sup>113</sup> See Press Release ‘Jij, Jerzy’ vertelt over uitbuiting van Polen’, 5 April 2006, at [http://www.fnvbondgenoten.nl/nieuws/acties\\_en\\_campagnes/grenzeloos\\_solidair\\_en\\_social/nieuws/33760\\_27834](http://www.fnvbondgenoten.nl/nieuws/acties_en_campagnes/grenzeloos_solidair_en_social/nieuws/33760_27834), last accessed 7 September 2012. The ‘naming and shaming’ report with the title ‘Jij, Jerzy’ lists the grievances of truck drivers collected through a temporary complaints desk for a couple of months in the road transport sector.

track. Otherwise, a non-compliant agency will be removed from the register.<sup>114</sup> Besides this, social partners in the temporary work agency sector have established an independent Compliance Office, incorporated in the extended CLAs from 2004 on, which has been given the task of monitoring compliance with the CLA provisions. Recently, more and more extended CLAs of other industries have introduced a clause obliging the employer to contract a qualified temporary work agency in order to promote certification of agencies.

With regard to the enforcement of CLA provisions most social partners do not yet have a very active tradition. In general, there was no urgency for a very active approach until some ten years ago. However, following the example of active engagement of the social partners in the temporary work agency branch to combat illegal practices, in 2006 the social partners in the construction industry agreed on a so-called Compliance Office that would combat illegal employment and unfair competition by migrant workers. The aim was to actively monitor compliance of the rules by foreign companies and (their) workers. The Compliance Office was to become a central point of contact and registration for firms and employees. Moreover, the Office would actively seek cooperation with the Labour Inspectorate and other enforcement authorities and with the social partners in the temporary agency sector to join forces against concrete illegal practices.<sup>115</sup> However, in 2009 the Compliance Office was closed down because it had not been able to achieve its goals. Parts of its duties were shifted to another joint office.

*f) Information on applicable labour law for posted workers*

In recent years considerable progress has been made in making available the required information on host labour standards for posted workers and their employers. For instance, the Minister of Social Affairs has launched a whole website in the Polish language, and social partners in the temporary work agency sector and construction have updated their information leaflets on the applicable core of CLA provisions, digitalised them and translated them into four to six languages.

*g) Media campaigns and informational events*

Since 2006, the Labour Inspectorate has informed the general public at regular intervals of the risk and impact of undeclared labour by means of radio slots and newspaper articles in media campaigns. Regular press releases concerning planned actions are meant to inform the public about the topic and the tasks of the Labour Inspectorate.

<sup>114</sup> See E Sol, G Mundlak and E Schram, ‘Governing Temp Agency Work by New Modes of Regulation: Lessons for Europe?’ Paper presented at the annual meeting of the Law and Society Association, TBA, Berlin, Germany, 25 July 2007, Abstract available at [www.allacademic.com/meta/p178018\\_index.html](http://www.allacademic.com/meta/p178018_index.html) (last accessed 7 September 2012); M Houwerzijl and S Peters, ‘Liability in subcontracting processes in the European construction sector: Netherlands’ (European Foundation, 2008), available at: [www.eurofound.europa.eu/publications/htmlfiles/ef08877.htm](http://www.eurofound.europa.eu/publications/htmlfiles/ef08877.htm) (last accessed 7 September 2012).

<sup>115</sup> See Press release Bouwend Nederland, 16 May 2006, ‘Bureau Naleving tegen illegale arbeid in de bouw’.

Also in 2006, the *FNV* unions initiated a promotion campaign and demonstration for ‘equal work, equal wages’, which is still running. In the construction industry the employers’ association organised several informational events in the region to inform employers of their obligations and to explain the benefits of declared work.

#### *h) Liability in subcontracting and temporary agency work*

From 1 January 2010, liability for the wages of temporary agency workers applies to user companies that make use of non-certified temporary work agencies. The liability is limited to the statutory minimum wage. This new legislative measure is laid down in Article 7:692 *BW* and is intended to encourage the use of so-called NEN-certified temporary work agencies.<sup>116</sup> It is also applicable to users of foreign temporary work agencies and is thus also meant to serve as a tool to enhance compliance with host country labour standards by foreign service providers. The German example played a role in the parliamentary process, in which a reference to the 2004 *Wolff & Müller* judgment<sup>117</sup> was made in an analysis of the compatibility of this measure with obligations under EU law. Liability for wages is a new tool of enforcement of labour law in the Netherlands. It fits in with the trend to further compliance without too much administrative ado. Nevertheless, liability as such is not new.

With regard to labour law, Article 7:658 (4) *BW* provides for liability of the user undertaking in the event of industrial accidents or work-related diseases. And already since 1982 the Wages and Salaries Tax and Social Security Contributions Act (Liability of Subcontractors – *Wet Ketenaansprakelijkheid*) provides that the main contractor or user company is liable for social security contributions and income tax. The first goal of this Act is to fight unreliable subcontractors and temporary work agencies. The main contractor/user company is not only liable for the first subcontractor but for the whole chain of subcontractors who follow in line and work on the same project. The second goal is to combat unfair competition. However, in cross-border situations the Act is not always applicable: when foreign subcontractors work with posted workers, no social security contributions and income taxes are due for, respectively, the first two years and the first 183 days of work. Foreign temporary work agencies, however, are covered by the Dutch law on wage tax from day one.<sup>118</sup>

#### *4.4 Observations*

Since 2005, the initial reluctance of the government to implement measures aimed at the practical effectiveness of the PWD has vanished. The most important policy change was the expansion of the substantive scope of the *WAGA*. Two important reasons behind this policy shift were the debate on the draft services directive in autumn 2004 and, coincidentally, the necessity to lift the transitional regime for genuine posting of

<sup>116</sup> See M Houwerzijl and S Peters, ‘Inlenersaansprakelijkheid minimumloon: paardenmiddel, papieren tijger of ei van Columbus?’, *Tijdschrift Recht en Arbeid (TRA)* 2010, no. 66.

<sup>117</sup> C-60/03 *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix* [2004] ECR I-9553.

<sup>118</sup> See M Houwerzijl and S Peters (above n 117).

workers due to CJEU case law. With regard to the latter, the replacement of a migrant law tool of enforcement by a labour law enforcement tool is noteworthy.

However, if the *AVV* Act had been effective most other measures to boost the practical effectiveness of the PWD would probably not have been taken. Therefore, the favourable climate for more stringent enforcement tools (policy change no. 2) was sketched in Section 4.3 and a survey was given of implemented measures in 2005–2010. The main focus of all these tools and measures is on:

- better enforcement of existing laws and conventions and improvement of control and sanctions;
- more staff and resources for the Labour Inspectorate and other authorities or institutions involved;
- higher efficiency in the penal or administrative procedures, sanctioning of all actors involved;
- blacklisting of contractors and/or customers;
- methods linked to liability in the chain (main contractor and/or client oriented);
- improvement of cooperation between the actors concerned;
- transparent and accessible information on the applicable rules;
- promotional measures demonstrating the benefits of abiding by the rules for employers and employees.

Most of these measures are targeted on diminishing *all* kinds of bogus or illegal labour relationships and abusive or exploitative working conditions and indeed have to be, if only because of equal treatment obligations. Since there is no registration system for posted workers, apart from the duty to notify ‘genuine’ postings in relation to the transitional regime, the size of the phenomenon in the Netherlands is unknown. However, many empirical research reports point to the sharp rise of bogus self-employment as a much larger trend. Often there is also a domestic interest next to the cross-border interest. Interests are also intertwined with regard to their content: protecting the labour market may come first but the measures are also genuinely intended to protect the posted workers concerned. The combination of both aims is logical since one of the more effective measures to protect the labour standards of workers is to eliminate or diminish space for labour cost competition.

Summarising, the Netherlands has witnessed a policy shift from targeted control of the entrance of posted workers through migration law tools to control measures with a general personal scope in labour law. Notably, these were not only of a private law but also of a public law character, such as the introduction of administrative fines in the Minimum Wages Act (*WMM*). The introduction of a user company liability for the statutory minimum wage in January 2010 was another remarkable step in the perspective of the formerly passive tradition with regard to enforcement in Dutch labour law. This policy shift was facilitated by a political climate favouring better enforcement of rules and combating illegal practices in general.

## 5. Reactions to the ‘Laval-quartet’

In comparison with the impact of the draft Services Directive and EU enlargement, the CJEU judgments in the so-called ‘*Laval-quartet*’ did not cause much stir. Of course they were critically scrutinized in the academic literature and in public policy, but with regard to the impact of this case law the shared conclusion was that Dutch strike law, public procurement law, private international law and the implementation of the PWD were more or less in line with the four judgments. Nevertheless, some – in comparison with other countries rather minor – comments can be made with regard to the impact of the four judgments in the Dutch context. The elements of impact, not the judgments themselves, will be dealt with below, in chronological order.

### 5.1 Impact of the *Viking* and *Laval* judgments

#### 5.1.1 Impact on Dutch strike law or practice?

With regard to the kind of strikes that were at stake in the *Viking*<sup>119</sup> and *Laval*<sup>120</sup> cases, it must be noted that the judgments will not have any consequences, since it is highly unusual for Dutch unions to resort to collective action in order to compel outsiders to adhere to a collective agreement. Nevertheless, there may occur a more indirect effect of the two judgments, namely on the willingness of Dutch trade unions to strike in certain cross-border situations. In one case, this may have played a role. The case was as follows.

In 2008, a posting of workers case attracted attention in the press. A German cleaning company was subcontracted by a Dutch company to carry out cleaning activities in its holiday parks located in the Netherlands and in Germany. This caught the interest of the media when the Dutch trade union *FNV* initiated actions against the subcontractor because of complaints about bad working conditions. Especially the difference in pay between German workers and their Dutch colleagues was felt to be unfair. Questions about this case were posed in the Dutch Parliament. In media stories the difference in pay was related to the fact that German workers were covered by a less favourable German CLA, whereas the Dutch CLA applied to Dutch workers.<sup>121</sup> The company insisted that it adhered to the law and if one takes the PWD into consideration this may have been the case if a non-extended Dutch CLA applied in that period. The *FNV* chose in this case to try to *persuade* the company to pay the Dutch and German workers equally for their identical work, even if on pure legal grounds they may not have been obliged to do so. According to a representative of the union, if it were not for the

<sup>119</sup> Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>120</sup> Case C-341/05 (above n 61).

<sup>121</sup> See the recent study commissioned by the European Commission of van Hoek and Houwerzijl (above n 68), Annex I media case no 30. The press dealt with this case as if it concerned migrant workers instead of posted workers.

judgments in the *Viking* and *Laval* cases, *FNV* might have considered a call for a solidarity strike, but now its strategy is to avoid litigation as much as possible in intra-EU cross-border cases.<sup>122</sup>

#### 5.12 Impact on Dutch exemption policy rules?

Also with regard to the application of the Dutch system of extension of CLAs to foreign service providers, there may have been an indirect influence of the then pending *Laval* case.<sup>123</sup> In an article in 2008 Van Peijpe described the hypothetical situation of a *Laval* case in the Netherlands. He examined four possible *Laval*-like scenarios. The most realistic one was the scenario that ‘Laval’ would have tried to evade the applicability of Dutch extended CLA provisions by submitting a request for exemption to the Minister of Social Affairs. In a scenario in which the Minister would refuse this request for exemption *Laval* could go to Court and, according to Van Peijpe:

‘Lavals’ action in Court could be successful if he could prove that a Dutch employer under similar circumstances would have received an exemption. Perhaps ‘Laval’ could use as an argument for exemption that the special conditions of his enterprise, being established in a distant location (travel- and housing costs for the workers) require an exemption. Such an argument may be successful if ‘Laval’ can find a precedent in which similar conditions have been accepted as a ground for exemption for Dutch employers. Furthermore, ‘Laval’ could put forward that he is discriminated against since it is difficult for a foreign service provider to meet the procedural requirements for exemption in the Netherlands.<sup>124</sup>

That a refusal of an exemption from extension to a foreign service provider must be deemed discriminatory in a situation in which a domestic employer would have received it, follows already from the judgment of the CJEU in 2002 in the case *Portugaia Construções*.<sup>125</sup> There the CJEU ruled that the fact that German employers could be exempted from the obligation to pay minimum wages by concluding their own CLA, whereas foreign service providers did not have this opportunity, constituted discrimination and a violation of Article 49 EC (now Article 56 TFEU). Apparently, at that time, the Dutch Minister of Social Affairs did not realise that its own exemption policy provided an equivalent loophole to the German one.<sup>126</sup>

In the Netherlands, exemption from extended CLA provisions by the Minister of Social Affairs is possible under certain conditions. According to the published policy rules in force from December 1998 until 1 January 2007,<sup>127</sup> first of all, the employer had to

<sup>122</sup> Information based on an interview with a spokeswoman representing the trade union confederation *FNV*, July 2010, who also referred to the British *BALPA* case in this respect.

<sup>123</sup> Van Peijpe (above n 48).

<sup>124</sup> Van Peijpe (above n 48), for this last argument referring to A van Hoek and M Houwerzijl, ‘De Europese werknemer en het Nederlandse arbeidsrecht’, 61 *Sociaal Maandblad Arbeid* 2006, 432.

<sup>125</sup> Case C-164/99 *Infringement proceedings against Portugaia Construções L<sup>da</sup>* [2002] ECR I-787.

<sup>126</sup> See M Houwerzijl. ‘Case-law of the European Court of Justice (ECJ) about the posting of workers’, *CLR News* 2002/3, 3.

<sup>127</sup> See ‘Toetsingskader algemeen verbindend verklaring CAO-bepalingen. Besluit van 2 december 1998’, Government Gazette (*Staatscourant*) 1998, 240.

conclude a legally valid CLA according to Dutch norms at the enterprise/company level. Secondly, a request for exemption had to be directed to the Minister of Social Affairs, who would then assess it by virtue of the policy rules. According to these rules, a request for an exemption used to be granted ‘in principle’ if the employer was already bound by another CLA. In practice, this turned out to be a loophole for competition on labour costs because the rules made it possible for an employer to pay lower wages if he concluded a CLA at the enterprise/company level.<sup>128</sup>

The Ministry of Social Affairs did not investigate how many of the granted exemptions were given on the basis of CLAs concluded at company level with a lower level of working conditions than the (extended) CLA concluded at sectoral level. However, from 2002 onwards attempts by employers to evade extension were reported ever more frequently in the literature. These employers asked for an exemption after the conclusion of a very meagre CLA at company level with an employer-friendly, not really independent (‘yellow’) union. Not surprisingly, the experience with lower level ‘company CLAs’ grew in particular in several branches with fierce labour-cost competition.<sup>129</sup> Hence, criticism increased together with the frequency of use of this loophole, especially in the branches that employ the most vulnerable (often migrant) employees. Moreover, in the literature it was pointed out that foreign service providers had to be given equal access to this loophole once they discovered it.<sup>130</sup> In this respect a reference was made to the then pending *Laval* case and also to the *Portugaia Construções* judgment.<sup>131</sup>

Apparently the time was ripe for a change, because some additional policy rules for exemptions entered into force on 1 January 2007. From then on an employer (or employers’ organization) must prove that there are ‘serious reasons’ which would make it unreasonable to apply the extended CLA provisions in his enterprise, for example, the particular character of his enterprise as distinguished from other enterprises in the same industry. Moreover, it must be made clear that the union party to the CLA is truly independent. In June 2007, immediately three exemptions were refused under the application of the new policy rules because the employers (temporary work agencies)

<sup>128</sup> From documents before 1998 it can be traced that at the beginning of the 1990s the Minister of Social Affairs deemed exemption for a CLA concluded at company level with lower wages than the extended CLA at industry level inconsistent with the intention of the Collective Labour Agreements (Declaration of Generally Binding and Non-binding Status) Act of 1937 (*AVV* Act). Since 1998, the policy has apparently changed in a more liberal direction. See also above n 83.

<sup>129</sup> See Franssen and Jacobs (above n 46).

<sup>130</sup> In order to obtain an exemption certain procedural requirements must be fulfilled, which may create an obstacle for employers from other Member States. A request for exemption must be made within a short period (usually three weeks) after the publication of a proposed extension. The existence of a separate collective agreement can be a ground for exemption only if this separate collective agreement has been registered with the Minister of Social Affairs. See the Wage Determination Act (*Wet op de loonvorming*) Article 4.

<sup>131</sup> See van Hoek and Houwerzijl (above n 125).

could not provide sufficient proof of serious reasons for an exemption.<sup>132</sup> Hence, the new rules seem to be rather effective, some would say too effective.

### 5.2 *Impact of the Rüffert judgment regarding social clauses*

In theory, the *Rüffert*<sup>133</sup> judgment should have had the most serious implications for Dutch legal practice, since the Netherlands did, in 1952, ratify Convention 94 of the ILO on social clauses in public procurement contracts. Article 2 of this Convention provides that contracts for construction and so on awarded by a public authority shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried out. Thus, when tendering, the Dutch authorities have committed themselves to contracting only on condition that the prevailing Dutch labour standards are respected by (sub-) contractors. Nevertheless, it is not customary for the authorities to include a social clause in public procurement contracts.<sup>134</sup> This became clear after a request from the ILO on the practical application of the Convention in the Netherlands.<sup>135</sup> Thus, the *Rüffert* judgment did not have any repercussions for public procurement practices. Ironically, the Dutch trade union confederation *FNV* seized the opportunity to plead for a more stringent application of Convention 94 as a follow-up to *Rüffert*. In its observations, sent to the ILO, the *FNV* emphasized that, contrary to Germany which has not ratified Convention 94, the Netherlands is bound by the Convention and therefore the CJEU's narrow interpretation of the PWD cannot affect its obligations arising out of the Convention. The ILO has invited the Dutch Government to transmit any comments it may wish to make in response to the observations of the *FNV*. So far, it seems that the Government has not responded to this request.<sup>136</sup>

<sup>132</sup> WGM Plessen, 'Cao-perikelen, een vervolg', 62 *Sociaal Maandblad Arbeid* 2007, 352.

<sup>133</sup> Above n 62.

<sup>134</sup> See CEACR 2001/72nd Session, 'Comments made by the Committee of Experts on the Application of Conventions and Recommendations, Labour Clauses (Public Contracts) Convention, 1949 (No. 94), Netherlands (ratification 1952)'. At [www.ilo.org](http://www.ilo.org) (last accessed 7 September 2012).

<sup>135</sup> See CEACR 2007/78th Session, CEACR 2001/72nd Session, 'Comments made by the Committee of Experts on the Application of Conventions and Recommendations, Labour Clauses (Public Contracts) Convention, 1949 (No. 94), Netherlands (ratification 1952)'. The Committee observes that the Dutch law is purely permissive, 'inasmuch as it authorizes the contracting authority to require the contractor to observe certain conditions, particularly in the social field. Such a provision does not ensure the observance of Article 2 of the Convention, under which public contracts to which the Convention applies must include clauses ensuring to the workers concerned wages, hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the same area by collective agreement, arbitration award or national laws or regulations'. See [www.ilo.org](http://www.ilo.org) (last accessed 7 September 2012).

<sup>136</sup> *Ibid.* and CEACR 2010/81st Session, where the Committee notes that 'the FNV reiterates its view that the national legislation has never specifically implemented the Convention but rather the EU Public Procurement Directive of 2004 which is purely permissive. The FNV adds that the Government has initiated a process of privatization and liberalization of public

### 5.3 *Impact of the Commission v Luxembourg judgment*<sup>137</sup>

Last but not least, the *Commission v Luxembourg (ordre public)* judgment did not have any impact on the Dutch posting of workers law either, since the Netherlands has not made use of the possibility laid down in Article 3(10)(first indent) PWD to impose more mandatory rules than the ‘hard core’. Therefore, this judgment did not stir much political interest.

Nevertheless, despite the fact that the government chose to implement the PWD in 1999 as if it were the ‘maximum’ directive that it seems to be from 2008 on, it cannot be ruled out that other mandatory rules than the hard core would be applicable according to Dutch legal doctrine. As observed by the Social Economic Council (*SER*) in its advice on the draft Services Directive,

The Rome Convention also remains relevant in situations that do come under the posting situations. The Posting of Workers Directive only stipulates that the mandatory law of the host country applies to the hard core of employment terms and working conditions. With regard to employment terms that fall outside or go beyond this hard core the country of origin principle could, potentially, interfere with the Rome Convention.<sup>138</sup>

Thus, it remains to be seen whether in a future case on appeal to Article 7 Rome Convention/Article 9 Rome I would be honoured, although the margin of appreciation is certainly diminished by the *Commission v Luxembourg (ordre public)* judgment.

### 5.4 *Conclusion*

With regard to the impact of the ‘*Laval quartet*’ in the Netherlands we can be very brief: the *Viking* and *Laval* judgments may have had a discouraging effect on the readiness of trade unions to call (solidarity) strikes in cross-border situations, but so far this is only based on an observation, not on any real evidence – which may be hard to obtain. Likewise, it may be speculated that in 2006 the then pending *Laval* case had some influence on the decision of the government to close a loophole in its exemption policy for extended CLAs which heavily undermined the aim of the Act on Extension of Collective Agreements in certain labour-intensive sectors (often with a lot of migrant labour). Nevertheless, the policy shift predominantly aims to shield organised labour from domestic ‘social dumping’, since no service provider from another Member State had ever used the loophole in practice. Ironically, the *Rüffert* judgment did not have any impact in the Netherlands because in practice the ratified ILO Convention 94 on social clauses in public procurement contracts is not applied.<sup>139</sup> As for the *Commission v*

services and public procurement has become an instrument in the Government’s privatization policy. The FNV also expresses its concern over a new legislative proposal for a Public Procurement Act (TK 2009–2010, 32 440), which was transmitted to the Parliament on 25 June 2010’. See [www.ilo.org](http://www.ilo.org) (last accessed 7 September 2012). The proposal for a Public Procurement Act is still pending.

<sup>137</sup> Case C-319/06 *Commission v Luxembourg (ordre public)* [2008] ECR I-4323.

<sup>138</sup> Cited from SER-report (above n 90), 124.

<sup>139</sup> Labour Clauses (Public Contracts) Convention, 1949 (No. 94), Netherlands (ratification 1952), via [www.ilo.org](http://www.ilo.org) (last accessed 7 September 2012).

*Luxembourg (ordre public)* judgment, it has not had any impact because the PWD was implemented as a ‘maximum’ directive right from the beginning.

## **6. Concluding remarks**

In a comparative perspective the implementation, application, and enforcement of the PWD in the Netherlands has not involved major difficulties or political turmoil. Nevertheless, we may conclude from what has been discussed in this paper that the Dutch ‘neutral’ transposal of the PWD into Dutch law and legal practice was too minimalistic with regard to (1) ensuring its practical effectiveness, (2) its personal scope, and (3) substantive scope, by excluding extended CLA provisions from all sectors but the construction industry. With regard to issue 2 nothing has been done yet and there seems to be no need for it in legal practice, but with regard to issues 1 and 3 two major changes in policy were established (see Sections 4.1 and 4.3 above). The most important legislative change was the expansion of the substantive scope of the Terms of Employment (Cross-Border Worker) Act (*WAGA*) in 2005 to extended hard core CLA provisions in all industries. From then on the government and social partners also began to work more actively than before towards improving the practical effectiveness of the PWD, in particular with regard to monitoring and enforcing compliance with the rules.

Two important reasons behind these policy shifts were the debate on the draft Services Directive in the autumn of 2004 and, coincidentally, the necessity for the Dutch government to lift the transitional free movement of EU8 workers regime for ‘genuine posting’ of workers. With regard to the latter reason, the fact that a migrant law tool of enforcement was replaced by labour law enforcement tools, including some of a public law nature, is noteworthy. Another interesting aspect of the need to adapt the transitional rules on posted workers to the case law of the CJEU is that it revealed the long-standing misunderstanding of the *Rush Portuguesa* judgment with respect to the non-entrance of posted workers on the labour market of the host state. As described above, the work permit requirement for posted workers in subcontracting processes (as defined in Article 1(3)(a) PWD) was abolished under pressure of the European Commission in 2006. However, the Dutch government did maintain this requirement for the other types of posting (as defined in Article 1(3)(a) and (b) PWD), relying on the leeway the *Rush Portuguesa* judgment gave for the interpretation that workers posted by foreign intermediaries do enter the Dutch labour market. In the words of the Dutch government, these types of secondment do not constitute ‘genuine’ postings. This aspect of the Dutch transitional regime for the free movement of workers was the central issue in the case *Vicoplus*, which was decided in favour of the Dutch government.

At the beginning of the 1990s, when the *Rush Portuguesa* judgment<sup>140</sup> was issued, the Dutch approach had been remarkably passive with regard to the possibility for host Member States to impose their mandatory labour standards in legislation and extended CLAs on foreign service providers. One of the reasons behind this passive attitude must have been that social dumping was in general not deemed to be much of a problem. An exception was the construction industry. Here, the extended CLA was made applicable to posted workers from 1995 on, following the example of Belgium. Another, more legally informed reason for the ‘non-use’ of the *Rush Portuguesa* judgment in this respect may be found in the Dutch private international law tradition. The traditional Dutch PIL approach to what constitutes a rule of an overriding mandatory character steers a middle course. For posted workers on the territory of the Netherlands before the implementation of the PWD, this meant that not all but only some provisions of extended CLAs could be applied to them, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character. Coming from this tradition, it was only logical to implement the PWD in a ‘neutral’ way, furthering legal certainty as much as possible. This led to an implementation Act that suited the goal of ‘enhancing the free movement of services within the EU’ above the other goals of the PWD. So, in this Dutch context the word ‘neutral’ may be used as a synonym for ‘internal market–friendly’. Together with the balanced Dutch PIL tradition regarding employment contracts, which in fact served as a model for Article 7 Rome Convention, this seems to explain why the Netherlands experienced no aftermath from the so-called ‘*Laval quartet*’ but instead proved to be a trendsetter with its limited interpretation of the substantive scope of the PWD.

<sup>140</sup> Above n 12.

## CHAPTER 6

### **Safeguarding National Interests**

#### Norwegian Responses to Free Movement of Services, Posting of Workers and the Services Directive

*Stein Evju*

#### **1. Introduction**

##### *1.1 Getting off to an early start*

Norway was one of a small number of countries that ‘jumped the gun’ in the wake of *Rush*<sup>1</sup> and in anticipation of an EC directive on the posting of workers. The Posting of Workers Directive (PWD)<sup>2</sup> was barely on the drawing board when the key legislation that was subsequently to form part of the measures implementing the Directive was initiated and adopted. As Norway was not a member of the EC, having rejected that option by referendum in 1972, the general background to the efforts that were set in motion in 1990 and 1991 is found in the then emerging negotiations on an Agreement on an European Economic Area (EEA). From the outset, considerable attention was devoted to the potential effects of EC legislation on freedom of movement, in particular the possible repercussions for the labour market of the free movement of workers and services and among trade union organisations. Those concerns were amply reinforced with the ECJ’s decision in *Rush*,<sup>1</sup> which was handed down in March, 1990. The judgment was pronounced at what was a crucial point in time from a Norwegian perspective. Following the Delors–Brundtland informal talks in 1989 the EFTA states, including all the Nordic countries except Denmark,<sup>3</sup> an EC member since 1973, were looking at the possibility of a ‘more structured partnership’ with the EC. Therefore, developments within the EC and in EC law were of immediate importance and were followed with keen interest.

##### *1.2 The backdrop: Rush and the looming EEA*

When the ECJ’s decision in *Rush* was announced it quickly drew attention across the Nordic countries. It brought about a new awareness of the potentialities of free movement rights in the EC legal order, while seemingly allowing broad scope for national labour and employment relations.

<sup>1</sup> Case C-113/89 *Rush Portuguesa L<sup>da</sup> v Office national d’immigration* [1990] ECR I-1417.

<sup>2</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>3</sup> Finland, Iceland, Norway and Sweden.

This was certainly the case in Norway, whose Prime Minister at the time, Gro Harlem Brundtland, had conducted the talks in 1989 with Jaques Delors that initiated the 'Delors/Oslo Process', leading to the formal opening of negotiations between the EC and the EFTA states in June 1990. One of the basic foundations agreed upon at an early stage was that an EEA agreement should include all the EC Treaty and secondary law on the internal market, including the law on the four freedoms of movement and the competition law rules. The EEA Agreement was signed on 2 May 1992, and was intended to enter into force on 1 January 1993. Complications in certain EFTA and EC member states<sup>4</sup> led to a postponement of the entry into force of the Agreement until 1 January 1994.<sup>5</sup>

The potential impact of a possible EEA agreement on the national labour market and labour market regulation was realised from the very start, amplified by the *Rush* decision and the EC Commission's first draft for a directive on the posting of workers, formally tabled in late June 1991.<sup>6</sup> The Norwegian Trade Union Confederation (LO) put forward a demand prior to the opening of the EEA negotiations that an agreement should contain safeguards to ensure that domestic terms and conditions of employment would apply to work performed by EC-based businesses with their employees in Norway.

This fell on fertile ground. A precursor of sorts existed in the immigration law regulations requiring wages to conform to collectively agreed or otherwise prevailing standards as a condition for a work permit. More importantly, Ms Brundtland's minority Labour government depended heavily on its sister organisation, the LO, for political support in order to attain popular and political acceptance of an EEA agreement. Part of the collaboration that sprang from this was the adoption in 1993 of a new Act, dubbed the Act on extension of collective agreements, etc., which was intended as a form of preventive measure. This Act serves as a basis and core component of the later implementation of the Posting of Workers Directive (PWD).<sup>7</sup>

The following presentation proceeds from here. First, we look briefly at the immigration law rules concerned and their development. Second, we map the adoption process of the 1993 Act and highlight some of its key features. Third, the implementation of the

<sup>4</sup> Switzerland rejected the EEA Agreement by referendum in December 1992, and in some EC member states the ratification procedures were protracted.

<sup>5</sup> At that time the EFTA block was disintegrating. Most of the states were negotiating for full membership of the EC. Austria, Finland, and Sweden joined the EC as per 1 January, 1995, leaving Norway along with Iceland and Lichtenstein alone as the EFTA wing of the EEA Agreement.

<sup>6</sup> COM(91) 230 final. Proposal for a Council Directive concerning the posting of workers in the framework of provision of services, 28 June 1991 [1991] OJ C 225/6.

<sup>7</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

Posting of workers Directive and subsequent measures adopted to fortify domestic legislation and its enforcement are considered. Together, this provides a background for the discussion of more specific questions concerning the form and effects of Norwegian implementation measures pertaining to the PWD. The relation to the Services Directive<sup>8</sup> is discussed in conclusion.

## **2. Work permits and the requirement of ‘Norwegian’ wages**

When the prospect of European affiliation appeared on the horizon the Nordic countries had since long operated a regime of free movement of workers between them. Under the 1954 treaty on a common labour market, citizens of Nordic countries were exempt from requirements of passports or residence and work permits.<sup>9</sup> Labour mobility under this regime never assumed great proportions, however. In 1992, it was estimated that immigrants from the other Nordic countries amounted to no more than 1 per cent of the total population of Norway at the time.<sup>10</sup>

Apart from this, labour mobility into Norway fell within the scope of application of immigration law. That was true also for the temporary posting of workers within the framework of cross-border provision of services. Dating further back in time notable developments got under way from 1970. In light of a considerable increase in immigration primarily from Asian countries a review of immigration policies was initiated.

As a first step, on the recommendation of the Committee appointed to carry out the review, stricter requirements for work permits were introduced in 1971. They included inter alia a requirement that an employment relationship should have a probable duration of a minimum of six months, and that wages and other working conditions should not be below what was otherwise ‘normal’ in the domestic labour market. This set the tone for the measures to be adopted subsequently. The Committee, presenting its report in 1973,<sup>11</sup> proposed an extension of the minimum period of employment in Norway to one year, which was subsequently adopted.

<sup>8</sup> Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>9</sup> The Treaty of 22 May 1954 on a Common Nordic Labour Market and an accompanying Protocol, NT II 1622 (in force from 1 July 1954) applied to citizens of Denmark, Finland, Norway and Sweden. It was superseded by a new Treaty of 3 June 1982, NT V 705 (in force from 1 August 1983), to which Iceland also acceded.

<sup>10</sup> See Innst. S. nr. 248 (1991–92), 78 [Recommendation by the relevant Standing Committee of the Stortinget to the Plenary].

<sup>11</sup> See NOU 1973: 17 *Innvandringspolitikken* [White Paper on Immigration Policy].

The Committee did not devote much attention to immigration in the context of cross-border provision of services, at the time dubbed ‘foreign contractors in Norway’. This was a growing concern, however. The incipient offshore oil industry brought with it significantly more extensive labour mobility in this form than had been expected. In view of this the Ministry for Labour, in a separate follow-up to a report already pending in the Stortinget (Parliament), proposed that a ‘relatively restrictive regime’ should be adopted. This had a dual motivation, in part to safeguard employment for Norwegian workers and in part to try to secure acceptable terms and conditions of employment for foreign workers in Norway. To achieve this the Ministry proposed that if both Norwegian and foreign workers were employed at a place of work, the builder or its contractors should be obligated to see to it that the same wage provisions and other terms and conditions be applied ‘regardless of nationality’. If only foreign workers were employed the Ministry proposed that there should be a requirement that wages and other terms and conditions should not be inferior to the standards ‘applying pursuant to collective agreement or scale or otherwise normal for the place and profession in question’.<sup>12</sup>

These proposals were approved by the Stortinget and were subsequently included in the regulations issued in pursuance of the Immigration Act of 1956 and its successor of 1988.<sup>13</sup> With the superseding act of 2008<sup>14</sup> the pertinent provision is included in the Act itself, where it reads:

Pay and working conditions shall not be inferior to the collective agreement or pay scale for the branch or industry. If no such collective agreement or pay scale exists, pay and working conditions shall not be inferior to that which is normal for the place and profession concerned. (Sec. 23 para. 1 item b.)

An exception is applied to ‘installation work’ by technical experts, installation engineers, assemblers and so on, who did not need a work permit for a period of up to three months. This is still the case pursuant to the more comprehensive sec. 1-1 of the Regulations to the 2008 Act.<sup>15</sup>

<sup>12</sup> See Innst. S. nr. 85 (1974–75), 8

<sup>13</sup> Act of 25 June 1954 No 14 (fremmedloven) and Regulations of 10 January 1975 No 4, and Act of 24 June 1988 No 64 (utlendingsloven; Foreigners Act) and Regulations of 21 December 1990 No 1028, respectively.

<sup>14</sup> Act of 15 May 2008 No 35 on the Right of Foreigners to Entry and Residence (utlendingsloven), in force from 1 January 2010.

<sup>15</sup> Regulations of 15 October 2009 No 1286 on the Right of Foreigners to Entry and Residence (utlendingsforskriften).

### 3. Fear of ‘social dumping’ – legislation in process

#### 3.1 *Prelude*

It was this legal situation that prevailed with regard to non-Nordic workers when the idea of an EEA was set in motion and negotiations got under way in 1989 and 1990. The prospect of a wider reaching right to free movement for workers and, particularly, labour mobility in the context of provision of services gave rise to some concerns, especially on the part of trade unions. This was recognised politically and was accommodated along two different lines in the process leading up to the ratification and subsequent entry into force of the EEA Agreement.

First, in its White Paper on ratification the Government presented a fairly moderate prognosis of the possible labour market effects of freedom of movement legislation. Referring to the experience with the internal Nordic labour market it considered it unlikely that inward mobility from EC/EEA states would be significant.<sup>16</sup> This was emphasised by the Stortinget’s Standing Committee, which could ‘see no reason to presume that the EEA agreement would result in much labour market mobility’.<sup>17</sup> Further, the Government White Paper invoked the ECJ judgment in *Rush*, citing the Court’s notorious dictum.

Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means ... (para. 18).

It was argued, understandably, that thereby it was settled that a Member State could apply its legislation as well as collective agreements on wages and working conditions to all forms of paid work being carried out on its territory, regardless of a worker’s or employer’s nationality.<sup>18</sup> The White Paper, however, pointed to the then recently tabled proposal for a directive on the posting of workers as an element of uncertainty.<sup>19</sup> This was echoed in the Standing Committee’s Recommendation, which commented somewhat sceptically on the draft legislative proposal the Ministry of Labour had put out for consultation in June 1992. The Committee emphasised the importance of putting adequate legislative measures in place to counter problems of ‘social dumping’ before adopting the EEA Agreement and in any case before its entry into force.

That points to the second line of accommodation, the process leading to the adoption in 1993 of the Act on Extension of Collective Agreements, etc.

<sup>16</sup> St.prp. nr. 100 (1991–92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS) [to the Stortinget in plenary, December 1991] , 253–54.

<sup>17</sup> Innst. S. nr. 248 (1991–92) [September 1992], 78.

<sup>18</sup> St.prp. nr. 100 (1991–92), 252, 253, 254.

<sup>19</sup> *Ibid.* 255.

### 3.2 *Elaboration of the Extension Act – the first phase*

In mid-1990 the LO made it emphatically clear that the Confederation would insist on adequate measures to be included in an EEA agreement to ensure the application of domestic terms and conditions of employment for work being performed in Norway by EC-based businesses. That aim was accepted politically without much ado. The Ministry of Labour started looking into the matter towards the end of the year. In the absence of substantive input from the LO, or from social partners otherwise, Ministry officials were left to grapple with the issue on their own. From the start, their focus was on the problem of wages, not on other terms and conditions of employment. This was reflected in the Ministry's first formal communication to the LO and the Confederation of Norwegian Enterprise (NHO), the major employers' confederation.<sup>20</sup>

Pointing to the mandatory nature of statute law rules on worker protection and to private international law norms as regards dismissal protection law and so on, the Ministry indicated three alternative ways of dealing with the wage problem. First, the introduction of *minimum wage* regulation; second, rules requiring compliance with domestic wage levels; and third, permitting national trade unions to take collective action against foreign employers, even if they and their workers were bound by collective agreement. The latter alternative was modelled explicitly on the Swedish '*Lex Britannia*' legislative amendment introduced in 1991.<sup>21</sup> As for other terms and conditions set out in collective agreements the Ministry stated that it would depend, *inter alia*, on the duration of work whether such provisions should be made applicable to foreign undertakings.

In response, the LO expressed satisfaction with the Minister's assurance that the Government would take the appropriate action to prevent 'social dumping' in due time before the entry into force of an EEA agreement, but did not go into detail on the alternatives sketched by the Ministry or any other measures. The NHO took a more sceptical approach, emphasising the different forms of regulation of terms and conditions of employment and the variation in content between different instruments and branches. Both organisations also pointed to the ongoing efforts in the EC to elaborate a directive on the posting of workers.<sup>22</sup>

<sup>20</sup> Kommunaldepartementet (Ministry of Labour), letter of 18 June 1991 (91/3282 M2 HGG), to LO and NHO.

<sup>21</sup> Amendment to sec. 42, etc., in the Act (1976:580) on Joint Regulation in Working Life, in force from 1 July 1991. The *Lex Britannia* came to the fore in the ECJ decision in *Laval* (Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] EFD I-11767), which held the Swedish Act on this point to be in violation of Articles 49 and 50 EC (Articles 56, 57 TFEU), see paras 112–121.

<sup>22</sup> Letters of 28 June 1991 from the LO and 26 September 1991 from the NHO (Ministry ref. 91/3282-7 and -9, respectively).

The Ministry subsequently, in the last quarter of the year, drafted a text that in substance was copied into the White Paper on ratification of the EEA Agreement, tabled in May 1992. There, ‘social dumping’ was defined as occurring if foreign workers perform work on terms and conditions of employment that are significantly inferior (*‘vesentlig dårligere’*) to those prevailing in the host country, and the Government stated unequivocally that it would ‘prevent’ the EEA Agreement from leading to a situation in which foreign workers might come to Norway and perform work on terms and conditions that are ‘significantly less favourable’ than terms and conditions otherwise applicable.<sup>23</sup>

Also in May, a draft consultation document was put to *Arbeidsrettsrådet*, the Standing Advisory Committee on Collective Labour Law, in which both the Ministry of Labour and the LO and the NHO were represented by senior officials.<sup>24</sup> That document, virtually without modifications, was subsequently sent out for public consultation on 25 June 1992.<sup>25</sup> This was done even if it was clear that the LO had expressed its preference for another form of measure than that proposed by the Ministry in the consultation document, in other words, general applicability of collective agreements. Two reasons seem to underlie this. At the time the LO had not yet discussed the issues in its Executive Committee; and inside the Ministry the LO’s preferred alternative was considered probably to have a domestic aim going further than what was required to resolve problems arising from the EEA Agreement.

This sets the scene for the next phase of the process.

### 3.3 *The second phase – legislation in draft*

The Ministry’s draft proposal envisaged an Act on the fixing of *minimum wages* that should apply to all work performed in Norway, whatever the law applicable to the employment relationship. Minimum wages could be fixed for all or a part of a branch or industry. The proposal was to empower the National Wages Board (*Rikslønnsnemnda*), an existing body with social partner representation and essentially an interest dispute arbitration board, to fix minimum wages at the request of a representative trade union or employers’ association.<sup>26</sup> A prerequisite should be that the fixing of minimum wages was in the public interest. The Board thus would not have autonomous competence, nor

<sup>23</sup> St.prp. nr. 100 (1991–92), 31–32.

<sup>24</sup> ‘Sosial dumping – Orienteringssak’. Document to Arbeidsrettsrådet’s meeting on 14 May 1992.

<sup>25</sup> Kommunaldepartementet, *Høringsnotat – sosial dumping* (91/3282 M2 HGG), 25 June 1992.

<sup>26</sup> The term ‘representative’ here is a simplification of the Norwegian technical concept of *‘innstillingsrett’* pursuant to the Labour Disputes Act, 5 May 1927, sec. 11, now the superseding Labour Disputes Act, 27 January 2012, No 9, sec. 39, denoting national trade unions with an active membership of at least 10,000 and employers’ associations with a minimum of 100 members and total employment of at least 10,000.

would trade unions or employers' association have an independent right to have minimum wages fixed on request.

The draft proposal contained nothing specific on the objective of the envisaged legislation. It also said nothing about a requirement that there existed substandard wage levels for any workers as a prerequisite of making a minimum wage resolution. The sole indication was linked to the notion of 'public interest' and accentuated the consideration to protect domestic business and employees from competition.

The consultation document discussed but rejected forms of 'extension' or imposing general applicability of collective agreements, for several reasons. To confer general applicability on collective agreements was seen as a very extensive encroachment on free collective bargaining. It could also be perceived as a form of devolution of legislative power to social partners. It was doubtful whether decisions by a public body on granting general applicability could provide satisfactory protection against 'social dumping'. Moreover, collective agreements in many cases do not contain specific provisions on wages or set minimum standards that are considerably lower than the wage levels actually prevailing within the agreement's domain.

The consultation document met with split reactions. On the one hand, nearly all of the social partners and so on that submitted opinions agreed that there was a need for measures to ensure parity of terms and conditions of employment. On the other hand, opinions differed on which kinds of measures should be resorted to.

At its session on 22 June the LO's General Council had adopted a statement of principle insisting, first, that social partners should have as much control as possible over whether and when the scope of collective agreements should be extended; second, that the responsibility for wage fixing should remain with the social partners; and third, that it should be for the social partners to decide on the minimum levels to be given extended scope of application. An LO memo citing, inter alia, these basic views and arguing strongly in favour of a system of 'extension' of national collective agreements subject to requests by representative trade unions was passed on to the Ministry of Labour through the Prime Minister's Office in mid-August. Presenting the matter to the Minister, the Ministry department in charge expressed strong scepticism with regard to the LO's 'extension' proposal, essentially maintaining the assessments expressed in the consultation document.

In the consultation proper, opinions being submitted in early September, the NHO and other employers' associations supported the proposal for a minimum wage fixing regime. The LO, on the other hand, insisted strongly on an 'extension' of collective agreements alternative. So did the Confederation of Vocational Unions (YS) and a number of other national trade union organisations – possibly to the surprise of Ministry of Labour officials who had assumed that smaller and competing unions would resist general applicability alternatives as they might put the LO in a stronger position. Further, objections were raised towards either alternative. The Ministry of Trade and

Industry was critical of what it saw as a lack of effort to assess the scope and extent of a potential social dumping problem and counselled against establishing a machinery empowered to fix wages and other terms of employment, for fear of upward pressure on wages and negative economic effects. Similar objections were submitted, more comprehensively, by the Directorate of Prices and Competition; objections that would reappear at a later stage in the legislative process.

After the conclusion of the consultation procedure the Department drafted a memo at the end of September to the Minister of Labour seeking the political go-ahead to prepare a draft Bill, maintaining its arguments against the ‘extension’ alternative proposed by the LO but accepting that a Board should have the power to fix some terms and conditions of employment beyond wages. It insisted that a ‘public interest’ requirement should apply, and concluded that for several reasons it was inadvisable to make use of the National Wages Board as a terms fixing body. The Department proposed to establish a new independent body, composed in the same way as the National Wages Board, for this purpose. While strong on some points, the memo gave no clear conclusion on the issue of the two basic alternatives, independent fixing of wages and other terms or the ‘extension’ alternative. This in essence foreboded the subsequent developments.

Following a first round of political consultations the Department a short two weeks later drafted a new memo to the Minister proposing to accept, with some modifications, the LO’s ‘extension’ proposal. This notwithstanding, work was in progress on a draft Bill that was finalised on 23 October 1992, and which was based on the independent fixing of terms alternative. That draft Bill was not politically approved and was never brought to public light, however. Some two weeks later a new draft based on the ‘extension’ alternative was largely ready. Intensive consultations, with Ministries and others, on salient substantive and technical points followed until a mere ten days before a Bill was officially tabled, on 26 November 1992.<sup>27</sup>

#### *3.4 The third phase – bill, controversy, and adoption*

The proposed Act was fairly short and simple, but lacking in clarity nonetheless. Its main features can be summarised as follows.

- The Act should apply to fixing of wages and other terms and conditions of employment for work performed in the service on another, including a mandatory choice of law rule prescribing the application of Norwegian law.
- The draft proposal contained no object clause and had no provision stipulating differences from or comparison with prevailing standards domestically as prerequisites to extension decisions.

<sup>27</sup> Ot.prp. nr. 26 (1992–93) *Om lov om allmenngjøring av tariffavtaler m.v.* (Bill to the Odelstinget, the chamber of Stortinget seised with the first step of debates and voting on legislative proposals. Since October 2009 all matters including legislative proposals are handled in plenary, the former two chamber system for legislative matters being abolished.)

- Only representative trade unions and employers' associations, parties to a given collective agreement should be entitled to require the competent body to take a stand in substance on a demand for extension.
- An independent administrative law body, *Tariffnemnda* (the Tariff Board),<sup>28</sup> was to be established, with permanent representation from the major social partners, LO and NHO, and vested with the power to decide in 'extension' cases.

Furthermore, the draft proposal included some simple procedural provisions, a provision on the period of validity of a decision by the Board, and a special provision on enforcement boycotts.

The Bill triggered strong objections. Even if the Government to a great extent had taken the LO's views into account, the trade union confederation disagreed sharply with the Bill on some points. Objections were, however, raised, in particular by employers' associations. The criticism was not levelled at technical aspects of the proposed Act. The main bone of contention was the fact that the Bill proposed a fundamentally different form of machinery from that which was up for consideration in the consultation round and, moreover, a solution the Ministry had discussed but rejected in the consultation document. The turnaround in the Bill came as a surprise to the employer side.

The controversy led to a rather drawn-out procedure in the Standing Committee<sup>29</sup> of the Stortinget. From mid-January 1993, the Committee staged a series of consultation meetings with a number of trade union and employers' organisations, and several of those actors submitted written opinions to the Committee.<sup>30</sup> Proposals on some key points were put forward by the NHO and countered by the LO. Two issues in particular were subjects of dissension. Several social partners on either side argued in favour of including an object clause in the Act. How to frame it, however, was a different matter. The LO strongly opposed the NHO's proposal to use the expression 'significantly inferior', copied from the Government's definition of 'social dumping' in the 1992 White Paper. Drawing on a formulation in the Bill's introductory summary the LO instead proposed a standard, which can be seen to be adapted from immigration law provisions, of terms being 'on par with' those fixed in a relevant collective agreement or with that which is normal for the place and profession concerned. The Ministry and its political leadership still maintained, in communication with the Standing Committee and its Labour Party wing, that it was unnecessary to include an object clause, arguing

<sup>28</sup> The first part of the appellation, *tariff*, corresponds to the term denoting a collective agreement in Norwegian, *tariffavtale*.

<sup>29</sup> In Norwegian: Kommunal- og miljøvernkomiteen.

<sup>30</sup> All written submissions are included in the Appendix to the Standing Committee's Recommendation, Innst. O. nr. 98 (1992–93).

that the objectives of the Act were clearly explained in the preparatory work, the Bill.<sup>31</sup> A solution on this point was arrived at only after the insistence on an object clause by the Christian Democratic (*KrF*) wing of the Standing Committee and a compromise inside of the Committee in early May.

The second main point of dissension was the requirement of a factual basis as a prerequisite for *Tariffnemnda* to make decisions in substance. The Bill did not stipulate any provision on this. This issue was also the subject of considerable communication back and forth between the Standing Committee and the Ministry but was not clarified to any great extent. In the end, however, the Standing Committee employed a wording from the NHO's proposal for an object clause. Framing one of its own stating that the objective of the Act was to secure terms and conditions for foreign workers 'on a par with' those enjoyed by Norwegian workers, the Committee added wording to the effect that this was meant to prevent foreign workers from working on terms and conditions that 'as a whole' are 'demonstrably inferior' to collectively agreed or otherwise normal standards for similar work. While the Ministry was opposed to construing a formulation of this kind as an evidentiary rule, the Chair of the Standing Committee during the Stortinget's debate emphasised that the term 'demonstrably' was intended to express a basic requirement of evidence, aimed at preventing 'inappropriate' requests for decisions by the Tariff Board.<sup>32</sup>

The Standing Committee tabled its Recommendations on 13 May; debates in the Stortinget took place on the 18th and 25th of May, and the Act was formally adopted on 4 June 1993 – Act No. 58 relating to Extension of Collective Agreements, etc.-

### 3.5 *The legislative process in retrospect*

The Extension Act was born under the looming prospect of a European internal market. The open Nordic labour market that had been in existence for almost 40 years had not resulted in downward pressures or notable disturbances on the domestic labour market. Considerably different in technical regards, terms and conditions of employment in substance did not differ a lot across the Nordic countries. Part of the reason for this could be found in long-standing cooperation at the administrative and legislative level, as well as between social partners. EC/EEA-wide freedom of movement law, and the reminder provided by the *Rush* case, presented quite different perspectives.

The LO immediately realised that union density and collective agreement coverage rates were not such as to make it possible to rely on collective bargaining and collective action measures to curb possible low-wage competition from foreign workers or employers. Trade union density stood at about 55 per cent and collective agreement

<sup>31</sup> See, for example, Ministry of Labour (*Kommunal- og arbeidsdepartementet*), letter of 17 March 1993 (91/3282-93 M2 IP) to the Standing Committee, the Committee's letter to the Ministry of 22 April and telefax from the *KrF* wing of 23 April, and the Ministry's letter to the Committee of 28 April 1993 (91/3282-101 M2 HGG).

<sup>32</sup> Blankenborg (A), *Ot.forh.* 1992–93, 675.

coverage in the private sector was at about the same level, although differing significantly between branches. This was in marked contrast to the Nordic neighbours where density and coverage rates were between 75 and 90 per cent, according to commonly cited figures. Hence the Norwegian LO from the very beginning opted for the legislative route.

The LO's call for legislation met with little opposition. Employers' associations also saw a need for legislative measures enabling protection against 'social dumping'. In the first phase these views were not made specific, however. That left Ministry of Labour officials in a bit of a vacuum to consider possible forms of regulation. The minimum wage alternative first tabled rested on a critical assessment of extension of, or declaring generally applicable, collective agreements, in part based on freedom of association considerations in view of the pluralistic trade union situation in Norway, and in part on difficulties involved in extracting suitable standards, in form and scope, from collective agreements often differing widely with regard to their provisions and levels of precision. The LO on the contrary emphasised the role of social partners, in particular the major ones, in the determination of wages and other terms and conditions of employment on the national labour market and in the national economy and argued strongly for a solution that not only would give it a role in this regard but also would not restrict a decision-making body to solely deal with wages. Once a better and more specific communication was established with the political level of the Ministry of Labour during the final phase of the consultation procedure in 1992, it was this approach that prevailed, even if at the outset it still met with some reservations on the part of Ministry officials.

It attests to the political impact of LO that the Bill was drafted based on LO's preferred alternative without bringing other major social partners into the process, even though the proposal to be tabled was quite a turnaround from the consultation round. The outcome of the Standing Committee's deliberations illustrates the same. There was strong opposition on many points to key demands from the LO by other actors, employers' associations in particular. On some points also the Ministry of Labour at the political level disagreed. On most issues of consequence the LO's views still prevailed. The Act as adopted was not quite tailored to order but the paternity nonetheless was unmistakable.

#### **4. The Extension Act as adopted**

##### *4.1 Overview*

A notion of 'social dumping' figures in the background but does not appear in the Act itself. On the contrary, the notion of 'social dumping' as employed at the time, and still, presupposes pay and other terms and conditions that are *inferior* to those otherwise prevailing in Norway. That is a less demanding standard than the parity requirement in

the Act's object clause, sec. 1-1, in which the words 'demonstrably inferior' are not a reference to a degree of difference in substantive terms. The wording of the object clause was far from clear in this respect,<sup>33</sup> but the point was made clear in the preparatory work to the Act, in particular during the parliamentary debate.

The Tariff Board was established as an independent public administrative body composed of five permanent members, two representing the major social partners, and supplemented for decisions by one representative of the party to the collective agreement concerned making a demand for extension and one representative of the other party to the agreement (sec. 2). Representative trade unions and employers' associations (see above n. 23) were given the right to request that the Board decide in substance on demands for extension. Other social partners were accorded no such right, but the Board was empowered to make decisions on its own initiative in exceptional cases.

In the wording of sec. 3 a decision on extension would involve 'that a nation-wide collective agreement shall apply wholly or partly to all employees performing work of the kind covered by the collective agreement'. This wording, however, is an overstatement. Collective agreements in the Norwegian context are typically comprehensive instruments regulating a wide range of issues at the collective as well as the individual employment contract levels. Sec. 3, second paragraph, expressly stipulated that extension decisions can 'be made only in respect of those parts of the collective agreement which stipulate terms of wages and employment of individual employees', in other words, the *normative* provisions of the collective agreement.<sup>34</sup> Furthermore, the Tariff Board could, 'in special cases', set 'terms of wages and employment other than those ensuing from the collective agreement'. This alternative was intended for situations where the actual terms and conditions in a branch or sector do not reflect the formal provisions of an agreement, typically where a minimum standards collective agreement is added to by workplace bargaining. An extension decision at the outset is valid for the duration of the period of validity of the collective agreement, which typically is two years. A decision, however, retains effect beyond

<sup>33</sup> Sec. 1-1 'Objectives of the Act' as adopted in 1993 read 'The objective of the Act is to ensure foreign employees of terms of wages and employment on a par with those of Norwegian employees, in order to prevent that employees perform work on terms which, based on a total assessment, are demonstrably inferior to the terms stipulated in existing nationwide collective agreements for the trade or industry in question or are otherwise normal for the place or occupation concerned'.

<sup>34</sup> Here is a notable difference in comparison to the German *Tarifvertragsgesetz* (Collective Agreement Act). Under sec. 5(4) a declaration of general applicability (*Allgemeinverbindlicherklärung*) encompasses all forms of legal norms (*Rechtsnormen*) of the collective agreement concerned, not just those pertaining to individual employment relations.

this, lapsing only if either party to the collective agreement has not made a new demand for extension within one month of the renewal of the agreement (sec. 4).

As a public law administrative body the Tariff Board, its procedure and decisions are within the ambit of administrative law. A provision permitting a simplified procedure in securing the requisite information, through oral hearings, was included on this ground and a duty of information was imposed on public authorities, as well as on employers, their managers and employees (sec. 6, 7). Furthermore, for employers and persons managing a business on the employers' behalf wilful or negligent violation of a decision by the Tariff Board is liable to criminal sanctions, in the form of a fine. A new twist on enforcement mechanisms was introduced with a provision enabling workers concerned or their trade union to institute private criminal proceedings (sec. 8).

The Extension Act as adopted in 1993 entered into force coincidentally with the EEA Agreement, on 1 January 1994. From then on, it essentially remained passive for ten years.

#### 4.2 Observations

A first observation concerns Tariff Board decisions. A decision to 'extend' a collective agreement does not create rights and obligations in contract law between the workers and employers concerned. In legal terms, a decision by the Tariff Board lays down statutory regulations. It is characteristic of the Tariff Board that it exercises delegated legislative power. It is quite unique in the Norwegian context that such empowerment is devolved on a public administrative body that is independent of politically responsible levels of government and parliamentary control. The strong representation by social partners on the Board adds to this distinctive feature.

A further point to be noted is the objectives of the Act and thereby of regulations issued by the Tariff Board. The parity requirement in the object clause, sec. 1-1 of the Act, and the wording 'demonstrably inferior' reflect the duality of the Act's objectives. The aim is *in part* to ensure that foreign workers enjoy terms and conditions on a par with Norwegian workers while working in Norway, and in part to preclude distortion of competition as regards undertakings employing Norwegian workers. This corresponds to a basic principle of immigration policy. It was, and still is, a fundamental tenet of immigration policy that labour immigrants should have the same terms and conditions of employment as are otherwise applicable on the national labour market, which is deemed to be important not only to safeguard immigrant labour against being employed on unacceptable terms but also in order to protect workers and earnest domestic undertakings from unfair competition.<sup>35</sup>

These two facets intertwine. The parity objective first and foremost is aimed at protecting domestic undertakings and employees from competition; the perspective is

<sup>35</sup> See, more recently, the White Paper on Labour Immigration, St.meld. nr. 18 (2007–2008) *Arbeidsinnvandring*, at 16.

not primarily to protect foreign workers from exploitation or inappropriate treatment. Arguably, not just any difference can be deemed to amount to exploitation or unacceptable standards. The paradox is that the more equal to a domestic worker the foreign worker is treated, the more their competitive advantage on the labour market is weakened. That is not necessarily to the benefit of the foreign worker. This goes to indicate that drawing the line between the reasonable use of competitive advantage and unacceptable standards is far from a simple task. Thus from the outset, it can fairly be held that protection against foreign competition is the dominant facet of the Extension Act and its specific provisions. It is protection against ‘social dumping’ in the sense of undercutting domestic standards that was at the core of the concerns and efforts resulting in the Act.

Another feature is that the wording of the Act does not differentiate between what was later to be termed ‘posted workers’ and workers entering the country in an individual capacity under the free movement of persons rules (Article 28 EEA). The distinction is not addressed at all in the preparatory work. This may seem surprising in light of the ECJ’s decision in *Rush* and the first proposal for a Directive (COM(91) 230 final). Both were triggers and a key backdrop of the legislative process. The explanation evidently is that both categories of workers should come within the scope of the Act, a conclusion which is consistent with the underlying presumption that decisions made under the act would apply also to domestic undertakings and workers. The implicit premise was to avoid discrimination by nationality.

It is a point to be noted, however, that otherwise the relation to EU/EEA law and the possible limitations it might entail on the Extension Act itself and the exercise of power to regulate in pursuance of the Act in reality were not discussed in the legislative process. This may be due to a too simplistic reliance on the dictum in *Rush*, or it may mirror an as yet insufficient familiarity with EC law, or both.

Finally, another facet is the enforcement measures. In the Act as adopted these were scanty at best. Criminal liability as pointed to above was one, a right to resort to enforcement boycott by parties to an ‘extended’ collective agreement was the other measure included in the Act. In fact, very little attention was paid to matters of control and enforcement in the preparation of the Extension Act.

The two latter topics figure more prominently at later stages of the development of the legislation.

## **5. Implementing the Posting of Workers Directive**

### *5.1 Transposition 1999–2000*

As a non-member of the EU Norway was not a party to the adoption process of the Posting of workers Directive and had limited access to information about the

deliberations. This was accentuated after the referendum in November 1994 rejecting a proposal to join the EU. The essential elements were, however, known at the time the Directive was included in the EEA Agreement<sup>36</sup> and accepted for implementation in Norway,<sup>37</sup> the deadline for implementation to be 16 December 1999, as set out in the Directive.

The Ministry of Labour issued a public consultation document on 5 February 1999, proposing a renewal of the Act on Posted Workers. The draft law adhered closely to the Directive's main provisions. Sec. 2 essentially replicated Articles 1 and 2 PWD; sec. 3 enumerated relevant national provisions in pursuance of Article 3(1) and included a choice of law clause and a provision similar to Article 3(7), first paragraph; and provisions on information, jurisdiction and enforcement of judicial decisions followed in sec. 4, 5, and 6. In the absence of any minimum wage legislation in Norway the draft pointed to the Extension Act, proposing that provisions on 'minimum wages' in an 'extended' collective agreement should apply also to posted workers.

Comments and objections to the draft were few but some were significant.<sup>38</sup> Some minor comments, mainly of a technical nature, were made on points concerning annual holidays, and the choice of law and jurisdiction provisions. The Norwegian Shipowners' Association and the Ministry of Foreign Affairs discussed the geographical scope of an act with regard to petroleum activity on the Norwegian part of the continental shelf, the former in particular arguing in favour of having an act apply there as well. That was eventually accepted, even if it was not strictly required under the EEA Agreement.<sup>39</sup> Furthermore, some objections were urged against the draft's construction of Article 3(1) of the Directive and the proposal to limit the applicability of regulations issued by the Tariff Board to 'minimum wages'. Those objections were also accepted in the subsequent Bill and the Act adopted thereafter.

The case of implementation apparently was considered as an essentially technical issue. Not only were comments on the draft legislation few; there was also no notable controversy or disagreement between social partners on either side. The major substantive point being brought up was raised by the LO but not commented upon in any other submissions. The LO suggested that an alternative based on Article 3(8)

<sup>36</sup> EEA Committee Decision No 37, 30 April 1998, amending Appendix XVIII to the EEA Agreement.

<sup>37</sup> Stortinget decision 23 November 1998, St.forh. 1998–99, 478–79 and 481, cf St.prp. nr. 81 (1997–98), Innst. S. nr. 29 (1998–99). The decision was notified pursuant to Article 103 EEA on 23 December 1998.

<sup>38</sup> The synthesis here is based on a complete set of copies of the written observations to the consultation document, obtained from the Ministry of Labour; on file with the author.

<sup>39</sup> On standard construction, the Norwegian part of the continental shelf is not part of the national 'territory' within the meaning of Article 126 EEA.

PWD, first alternative,<sup>40</sup> should be included into an act, in order to complement the ‘extension of collective agreements’ alternative which the LO considered too restricted. This proposal was rejected by the Ministry of Labour, which considered it as inexpedient, pointing, *inter alia*, to the difficulties involved in appreciating the consequences to existing arrangements if it is laid down by law that collectively agreed terms and conditions of employment that are not concretised were to be applied to posted workers. Moreover, the Ministry regarded this alternative as potentially untenable in respect of nationality discrimination. It also noted that very few collective agreements in Norway would qualify in terms of scope and raised doubts as to whether the Article 3(8) alternative could be used alongside the extension of collective agreements machinery.<sup>41</sup>

On a smaller point the LO prevailed. It argued that the existing provisions on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, transposing Directive 91/533/EEC,<sup>42</sup> should be included among the provisions of domestic law to apply mandatorily to posted workers’ employment relationships, in order to facilitate control. The Ministry of Labour went along with this proposal noting that a ‘written agreement of employment’ would serve as an important measure as regards the extent to which a worker would have the opportunity to invoke terms and conditions pursuant to the act in question. The provisions concerned were thus included in the list otherwise based on Article 3(1) PWD.<sup>43</sup>

A major change occurred in respect of the form of implementation instrument to be used. The Ministry of Justice objected to a separate act, arguing strongly against ‘little laws’ on ‘particular topics’ for reasons of legislative structure and technique, suggesting instead that the provisions on posted workers should be incorporated into the Working

<sup>40</sup> That is, ‘collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’.

<sup>41</sup> See Ot.prp. nr. 13 (1999–2000) *Om lov om endringer i lov 4. februar 1977 nr. 4 om arbeidervern og arbeidsmiljø m.v. (arbeidsmiljøloven) og lov 4. juni 1993 nr. 58 om allmenngjøring av tariffavtaler m.v. (allmenngjøringsloven)*, 22–23.

<sup>42</sup> Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, [1991]OJ L 288/32. This Directive is implemented in the form of provisions on a ‘written agreement of employment’, to be drawn up as a rule within one month after the actual beginning of the employment relation and, hence, subsequent to the conclusion of the contract of employment proper. At the time of the implementation of the PWD the rules on a ‘written agreement’ were part of the 1977 Working Environment Act (4 February 1977 No 4). They are now included in sec. 14-5 *et seq.* of the superseding Working Environment Act of 17 June 2005, No 62.

<sup>43</sup> By reference to § 55 B, § 55 C’ in the new sec. 73 M, first paragraph, *litra a*, of the 1977 Working Environment Act.

Environment Act. The Ministry of Labour abided by this,<sup>44</sup> and as the Bill was approved by the Stortinget the new rules on posting of workers were inserted as a new chapter XII B into the 1977 Working Environment Act by Amendment Act of 7 January 2000, No. 3 (in force from 7 January 2000).

### 5.2 *New act, new arrangement, 2005*

The 1977 Act was superseded by a new Working Environment Act in 2005.<sup>45</sup> This renewal of the legislation essentially did not bring about any changes in substantive terms from the provisions laid down in chapter XII B of the 1977 Act. There was, however, a change of a legal technical nature. The provisions concerned were moved from the Act itself to Regulations issued in pursuance of sec. 1-7 of the 2005 Act. This followed up on an observation made by the Ministry of Labour in the Bill to the amendment Act of 2000, when, however, the implementation deadline precluded a wholly different solution from the statute provisions originally proposed.<sup>46</sup> This was supported by technical legal arguments, in particular that the use of regulations would simplify extending the applicability of the provisions to other relevant Acts than just the Working Environment Act.

The legal basis for the Regulations, sec. 1-7 WEA 2005, contains no stipulations on terms and conditions of employment or machinery to determine mandatory rules for posting situations. Instead, sec. 1-7 lays down definitions on who is a posted worker and what is posting, again essentially replicating Articles 1 and 2 PWD, adhering to and replacing sec. 73 K and 73 L of the 1977 Act.

### 5.3 *Observations*

By retaining the content of the provisions implemented originally with the amendment Act of 2000, the Regulations of 2005 maintain the same extensive list of mandatory domestic provisions to apply to posted workers. Article 3(10) PWD was briefly touched upon in the preparatory work to the 2000 Act, but not in this respect. The enactment also did not rely on Article 3(7) PWD. It was clearly recognised that the ‘more favourable’ clause in its first paragraph pertained to better terms and conditions pursuant to employment contracts or the law otherwise applicable to the employment relation, in other words, as a rule, the worker’s *home* country. This was reflected in sec. 73 M, third paragraph, of the 1977 Act, replicated in sec. 2, third paragraph, of the 2005 Regulations.<sup>47</sup> In the preparatory work to the 2000 amendment Act the Ministry of

<sup>44</sup> Ot.prp. nr. 13 (1999–2000), sub-chapter 5.2.

<sup>45</sup> Cf above n 9.

<sup>46</sup> Ot.prp. nr. 13 (1999–2000), sub-chapter 5.2; Ot.prp. nr. 49 (2004–2005) *Om lov om arbeidsmiljø, arbeidstid og stillingsvern mv. (arbeidsmiljøloven)* (the Bill for the 2005 Act), 82.

<sup>47</sup> These provisions stipulate(d) that the rules enumerated to apply to posted workers regardless of the otherwise applicable law shall apply only insofar as ‘a posted worker is not subject to

Labour expressed the view that a large number of protective provisions in the WEA (1977) would apply also to posting situations, those being provisions that are enforced by public administrative agencies. The special provisions of chapter XII B were not meant to alter this and on this ground the Ministry did not see a need for including still more provisions on terms and conditions in chapter XII B.<sup>48</sup>

Still, the enumeration of applicable domestic law in sec. 73 M, now sec. 2 of the Regulations is more extensive than what is compatible with Article 3(1) and (10) PWD. This is the case in particular with the provisions on ‘written agreement’ (information in writing on terms and conditions), sec. 14-5, 14-6, and 14-8 of the WEA 2005, and furthermore the large majority of stipulations on different forms of leave, in chapter 12 of the Act. These discrepancies have been pointed to in legal writing<sup>49</sup> but have not been addressed by the legislator, not even after the ECJ’s decision in *Commission v Luxembourg*, 2008, made clear that a requirement to abide by host state rules laid down in pursuance of Directive 91/533/EC is not in compliance with the PWD and Article 49 EC (now Article 56 TFEU).<sup>50</sup>

On another note, the legislative provisions implementing the Posting of workers Directive contain no sound definition of posting as far as its duration in time is concerned. Sec. 1-7, first paragraph, of the 2005 WEA, replicating sec. 73 L, second paragraph, of the 1977 Act, merely stipulates that the concept ‘posted worker’ means a worker who for ‘a limited period of time’ is performing work in a country other than that with which the employment relationship is habitually connected. The notion of ‘a limited period of time’ has not been specified or commented on in the preparatory work to the Acts, nor has it yet been put to a test in practice. The openness of the notion is a pending paradox at the national level, just like in EU law, pertaining to private international law as well as immigration law. At the national level, immigration law regulations provide only an indirect and limited indication when stipulating that a foreigner, EU/EEA citizen, may enter the country and work for up to three months (or reside up to six months if seeking work). This is not a maximum time limit, however, only the initial period for which a residence permit is not required. Beyond this a residence permit can be applied for while in Norway and shall be granted as of right upon documenting certain simple requirements. If an employment relation is limited in duration from three months to a year the validity of the residence permit as a rule shall be limited correspondingly; otherwise, a first time residence permit is granted for five

more favourable terms and conditions of employment by virtue of contract or the law of the country otherwise governing the employment relation’.

<sup>48</sup> Ot.prp. nr. 13 (1999–2000), sub-chapter 5.4.

<sup>49</sup> In particular, S Evju, *Evaluering av almengjøringsordningen – høring*. [Opinion to the Ministry of Labour and Social Inclusion, 13 January 2006.], reprinted in S Evju, *Arbeidsrett: Utvalgte artikler 2001–2010* (Universitetsforlaget 2010), 325–371; S Evju, ‘Utstasjonering og sosial dumping – et skandinavisk perspektiv’, *Arbeidsrett* 2008, 1–20.

<sup>50</sup> Case C-319/06 *Commission of the EC v Luxembourg*, [2008] ECR I-4323, para 35–44.

years and is renewable.<sup>51</sup> Third country nationals, employees of an EFTA Member State service provider and integrated into the labour market of an EFTA State are subject to a different regime. They may enter the country to work for up to 90 calendar days per year; beyond that a work permit and a residence permit are required.<sup>52</sup>

## **6. The relationship between the Enumeration and the Extension Act**

The enumeration of domestic law rules that shall apply to workers who are posted to Norway within the framework of the provision of services, in sec. 2, first paragraph, of the 2005 Regulations encompass:

- chapter 10 WEA, on working time, maximum work periods and minimum rest periods; and also the majority of provisions in chapter 12 WEA on forms of leave;
- the Holidays with Pay Act, 1988, and relevant provisions of the Holidays with Pay for Fishermen Act, 1972;
- sec. 14-12 – sec. 14-14 WEA, and sec. 27 of the Labour Market Services Act, 2004, pertaining to the hiring-out of workers and the supply of workers by temporary employment undertakings (labour-only contracting);<sup>53</sup>
- chapter 4 WEA, on health, safety and hygiene at work;
- chapter 11 WEA concerning work of children and of young people, and sec. 15-9 on dismissal protection for women during pregnancy, after birth, and in the case of adoption;
- chapter 13 WEA on protection against discrimination, and the employment related provisions of the Gender Equality Act, 1978; and
- sec. 14-5, 14-6, and 14-8 on ‘written agreement’ (written information) on terms and conditions of employment.

The Regulations, formerly sec. 73 M WEA 1977, do *not* contain any provision referring to rules on pay. As noted previously, there is no minimum wage legislation, mandatory general rules on minimum pay or the like in Norway. Wage setting is a matter for

<sup>51</sup> See the Foreigners Act of 24 June 1988 No 64 sec. 50–54 and Regulations of 21 December 1990 No 1028 sec. 175–177, 190–192.

<sup>52</sup> Foreigners Act 1988 sec. 50, second and third para, and the Regulations of 1990 sec. 172 second paragraph.

<sup>53</sup> On this regime see S Evju, ‘Labour-only contracting – the Norwegian way’ in R Blanpain and M Weiss (eds), *Changing Industrial Relations and Modernisation of Labour Law. Liber Amicorum in Honour of Professor Marco Biagi* (Kluwer Law International 2003), 113–126. In particular, sec. 14–12 restricting the right to hire in became a centre-piece of contention in the process of implementing the Temporary Agency Work directive, Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L 327/9.

agreements, be they individual or collective. The latter dominate in many ways in a socio-economic and socio-political perspective but their impact in practice differs considerably across sectors of working life.

The pay aspect is covered by the Extension Act. Pursuant to sec. 2 second paragraph<sup>54</sup> of the Regulations under sec. 1 – 7 WEA, if the employment relationship of a posted worker falls within the scope of application of a decision by the Tariff Board, the rules on pay and other terms and conditions of employment shall apply and take precedence over terms ensuing from the provisions of the enumeration in sec. 2.

The importance of this is two-sided. First, provisions on pay are consistently a key element of collective agreements that are put up for ‘extension’ and thus serve as a basis and model for a decision by the Tariff Board. Second, on several counts terms and conditions stipulated in collective agreements are more favourable to workers than the standards laid down in legislation. One example is working time. While the ordinary working week is maximized at 40 hours in the WEA, it is generally 37.5 hours per week in collective agreements. Similarly, annual holiday time is four weeks plus one day pursuant to the 1988 Holidays Act but five weeks under collective agreements.

Differences such as these play a part, as the Tariff Board consistently has not restricted its ‘extension’ decisions to matters of pay. In the regulations the Board has adopted it has also fixed other terms and conditions, including working time, at collective agreement levels. In contrast, the Board has consistently refrained from including the relevant collective agreements provisions on annual holidays with pay.

When the Posting of Workers Directive was implemented with the WEA Amendment Act of 2000 an exception clause was included in the new sec. 73 M, fourth paragraph, which now appears in identical terms in sec. 2, fourth paragraph, of the 2005 Regulations. The exception clause answers to the ‘assembly clause’ in Article 3(2) PWD. It applies to cases of ‘initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking’, if the period of posting does not exceed eight days. In such cases an exception is made from the enumerated provision that shall apply in respect of the provisions of the Holidays with Pay Act and sec. 10-6 WEA, eleventh paragraph, on the percentage rate for overtime increments. Correspondingly, provisions on holidays, holiday pay, wages and overtime pay in an otherwise applicable decision by the Tariff Board shall not apply during such a short-term period of up to eight days.

This exception clause is the key to understanding a formulation in the Extension Act’s provision on the Tariff Board’s competencies. It has been noted above (in 4.2) that in the preparatory work to the Extension Act in 1992–93 the relation to and the possible boundaries ensuing from EC/EEA law were not discussed. As part of the Amendment

<sup>54</sup> Identical to sec. 73 M, second paragraph, WEA 1977.

Act of 2000 implementing the Posting of Workers Directive a new part sentence was inserted into sec. 3, first paragraph, of the Extension Act. The original wording to the effect that the Tariff Board is empowered to resolve that provisions of a 'nationwide collective agreement shall wholly or partly apply to all employees performing work of the kind covered by the collective agreement' was added to by words stating that this applies only within the restrictions ensuing from chapter XII B WEA (1977). In its present wording sec. 3 similarly refers to sec. 1-7 WEA 2005 and regulations issued in pursuance of that provision.

The wording might suggest a consideration of EC/EEA law and, possibly, an idea of limiting the scope of regulations issued by the Tariff Board merely to posted workers. This is, however, not the case. The specific wording is solely intended to set out that Tariff Board decisions cannot apply to posted workers under the 'assembly clause' exception, to the extent it provides for exemption. The added wording to sec. 3 cannot be taken to imply that regulations laid down by the Tariff Board do not apply to domestic workers or individual labour immigrants. Moreover, it does not reflect any discussion or assessment of the role and powers of the Tariff Board within the framework of EC/EEA law in more general terms. This is a topic the legislator has abstained from addressing head on in the legislative process. It has, however, surfaced in some other contexts, as we shall see.

## **7. The Extension Act in operation**

### *7.1 Bringing the Act into use*

The Extension Act remained an unused piece of legislation for a good 10 years. The rules on posted workers also were not brought into play for some time. It was not until the EU enlargement of 1 May 2004 was approaching that the first application to the Tariff Board was submitted by the LO in mid-December 2003. The LO applied to have provisions laid down on the basis of three different national collective agreements to apply to seven specific on-shore petroleum industry works.

This first case gave rise to a series of issues concerning evidence requirements, the scope of the Tariff Boards competencies and more, and it was also quite contentious. The procedure consequently ended up being rather protracted. A decision laying down the first set of regulations in pursuance of the Extension Act was made only on 11 October 2004, with the member from the employer side dissenting. The second application was made in February 2005, also by the LO, to obtain an 'extension' applicable to the greater Oslo region of the national collective agreements for the building and electric installation industries. In this case, there was more of a consensus; the employer member agreed that there was grounds for issuing regulations but took a different view from the majority on certain specific points of the provisions to be laid down. The Board's decision was issued in June 2005.

The split and divided attitudes evidenced in these two first cases have persisted in subsequent cases. While there has been consensus in general terms on issuing ‘extension’ regulations for the building industry, and later for horticulture and agriculture, and for cleaning services, there has been sharp disagreement in other cases. In one, concerning shipyards, the undertakings concerned assisted by the NHO filed suit for annulment of the Tariff Board’s decision, which is further discussed in 7.3, *infra*.

## 7.2 *The EEA compatibility issue – stage 1*

This legal dispute is related to general traits of the Extension Act and Tariff Board practices, which again are linked to issues of EC/EEA law on both Treaty/Agreement and directive levels.

In its first decision, 2004, the Tariff Board took a rather fuzzy stance on its competence relative to the EEA Agreement and its implementation into Norwegian law. The Board stated that it considered its decision to be in compliance with the Extension Act but held that the compatibility of the Act with EEA law was a matter for the legislator to assess. Thereby the Board bypassed its obligation, in domestic law generally as well as pursuant to the applicable EEA law, to independently consider and ensure that its decision is not in violation of international law obligations undertaken by Norway. This stance drew considerable criticism in subsequent evaluations.

Based on the experience gathered from the Board’s first case of the considerable difficulties involved in applying the Act the Ministry of Labour launched a first evaluation of the Extension Act in May 2005, followed by a second round in October of that year, in the form of public consultations based on reports drawn up by the Ministry. The consultation rounds revealed strongly diverging opinions on the Act and its compatibility with EEA law and on elements of the Acts as construed by the Tariff Board, in particular the requirement pertaining to the factual basis for a possible decision, dubbed the ‘documentation requirement’. An expert opinion written for and submitted by the major employers’ confederation, the NHO, argued that the Extension Act *as such* was in contravention of EC/EEA law, *inter alia* on grounds of the discretionary power of the Tariff Board and the lack of transparency inherent in the arrangement of the ‘extension’ scheme as a whole.<sup>55</sup> This view was, not surprisingly, contested by several other submissions. There was disagreement also on the maximum level of minimum wages that can be fixed in ‘extension’ regulations so as not to transgress limits ensuing from EC/EEA law. Opinions differed from minimum levels drawn from the lowest collectively agreed salaries, as a measure of ‘subsistence minima’ that should be considered a ceiling, to considerably more liberal approaches, some pointing to practices in a number of EU Member States.<sup>56</sup>

<sup>55</sup> E Hjelmeng and O Kolstad, ‘Allmenngjøringsloven og innsynsrett – EØS-rettslige problemstillinger’, *Arbeidsrett* 2006, 1–39.

<sup>56</sup> For example, Evju (above n 48, 2006 and 2008); Hjelmeng and Kolstad (above n 54).

In subsequent cases the Tariff Board took a guarded position on the EC/EEA law issue, either bypassing it or referring to the Ministry's opinion in the consultation documents that the Act in and of itself is not incompatible with the EEA Agreement. The issue was then brought to a point with the shipyards case, which was initiated with an application from the LO in September 2007. At the outset, it was the documentation requirement that was brought to the fore. The employer side, and the member representing the NHO on the Board, argued strongly that there was no factual basis for an 'extension' decision. This was added to by a new expert opinion submitted by the NHO challenging the compatibility of the Act with EEA law and also several aspects of the Board's competencies within the framework of the Act.<sup>57</sup> In the course of this initial phase of the procedure the European Court of Justice came down with the decisions in *Laval* and *Rüffert*,<sup>58</sup> and then *Commission v Luxembourg*. The ensuing debate, coupled with the fact that Norsk Industri, a member association of the NHO, had filed a complaint with the ESA concerning the legality of the Act, led the Tariff Board to solicit the opinion of the Legal Department of the Ministry of Justice in late June 2008. Offering a rather protracted exposé of generalities the Legal Department opined, in early September, that it considered the Act as such not to contravene the EEA Agreement, even if it vests the Tariff Board with far-reaching competencies which, on their wording, empower the Board to make decisions going beyond the limits ensuing from the Posting of workers Directive. The Legal Department then noted, cursorily, that the Board's powers must be applied within the limits of the EEA Agreement and the relevant secondary legislation and that the Tariff Board has an independent responsibility to exercise its powers accordingly. From this the Board proceeded to lay down regulations by a decision of 6 October 2008, the member representing the NHO vigorously dissenting, in particular on the issue of a factual basis but also on points relating to the standards imposed by the regulations. To be precise, weekly working time was set at 37.5 hours, as in the relevant collective agreement and thereby shorter than the statutory maximum of 40 hours. These points of controversy reappeared in a court case on the Tariff Board's decision of October 2008 laying down minimum standards regulations for the shipyards industry<sup>59</sup> (cf above sub-section 7.1).

<sup>57</sup> O Kolstad, *EØS-rettslig vurdering av Tariffnemndas forslag til forskrift om allmenngjøring av tariffavtale for skips- og verftsindustrien*. Opinion to NHO (The Norwegian Confederation of Business and Industry), 27 May 2008. 18 p (mimeo). Appendix to letter from NHO to Tariffnemnda (the Tariff Board) 29 May 2008 (TN-200800345).

<sup>58</sup> *Laval* (above n 20) and Case C-346/06 *Rechtsanwalt Dr. Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, respectively.

<sup>59</sup> Tariffnemndas vedtak 6. oktober 2008 om fastsettelse av forskrift om delvis allmenngjøring av Verkstedoverenskomsten i skips- og verftsindustrien [Decision of 6 October 2008 on 'extending' certain provisions of the Engineering Industry Agreement to apply to the shipyard industry], forskrift [Regulations] 6. oktober 2008 nr. 1137; removed by Tariff Board Decision 20 December 2010, forskrift 20. desember 2010 nr. 1764.

Importantly, in the meantime the EFTA Surveillance Agency (ESA) reached its decision in the complaints case relating to the Extension Act. In that decision the ESA explicitly rejected the notion of ‘subsistence minima’ or the like as a cap on permitted minimum wages and similarly accepted collectively agreed working hours as acceptable even if the statutory standard is higher, stating, *inter alia*, that

Whereas Directive 96/71, in particular its Article 3, does not in any way regulate the *level* of minimum rates of pay. In *Laval*, the Court of Justice stated that: “[quote from para. 60 of the *Laval* decision]. Therefore, it is up to each EEA State to decide, within the means foreseen under the Directive and in compliance with the EEA Agreement, what is to be the minimum level of pay in that State, Whereas, in making that determination, the State is not under any obligation to confine itself to the minimum level which is considered necessary for subsistence in that State or have as a benchmark minimum rates provided for with regard to social benefits such as unemployment or invalidity benefits. Similarly, the State is not under any obligation under EEA law to have the minimum wage levels in other EEA States as a benchmark when determining a minimum wage level on the basis of its national law,

...

Whereas the same legal considerations apply to the Tariff Board’s decisions with regard to provisions on working time, as are applied to minimum rates of pay,

Whereas, the Authority must, therefore, conclude that decisions by the Tariff Board with regard to the definition of the working week, whether they refer to the definition provided for in the Working Environment Act or the definition in the relevant collective agreement, comply with Article 3(1)(a) of Directive 96/71.<sup>60</sup>

It is pretty much inconceivable that the ESA should state to such effect without having consulted and reached a common understanding with the European Commission. The points of departure in principle on these issues one might consider as having been settled. The EFTA Court’s 2012 advisory opinion, discussed in the following subsection, stands as an affirmation.

### 7.3 *The EEA compatibility issue – stage 2*

On domestic ground, the EEA decision at first was grudgingly accepted by the harshest opponents of the Extension Act, changing the focus more specifically to the issue of proportionality with regard to when and to what extent it can be considered permissible to lay down higher standards than otherwise applicable statutory or other minima. The two approaches, seeing terms better than statutory standards as unacceptable as such or on a proportionality test, combines in the plaintiffs’ argumentation ‘shipyards case’. As noted above (7.1), in March 2009 the companies concerned assisted by the NHO filed suit for annulment of the Tariff Board’s decision of 8 October 2008 laying down Regulations for the shipyard industry (cf above n 58). The first instance City Court found in favour of the defendant, the State, on all counts. On appeal, Borgarting Court of Appeals at the preparatory stage resolved to submit questions to the EFTA Court for

<sup>60</sup> EFTA Surveillance Authority Decision of 15 July 2009 to close a case against Norway commenced following receipt of a complaint against that State in the field of free movement of services (Case No: 63734; Event No: 521127; Dec. No: 320/09/COL), at 3.

an advisory opinion.<sup>61</sup> Condensing the somewhat complex framing of the questions the issues can be reduced to three. The first concerned the fixing of shorter weekly working hours than the statutory minimum. The Court, like the ESA previously, held this to be acceptable, stating, *inter alia*:<sup>62</sup>

54 Provided that the conditions laid down in Article 3(8) of the Directive referred to above are met and the general principles of EEA law are complied with, it follows from points (a) and (c) of the first subparagraph of Article 3(1) of the Directive that EEA States are free to set limits both for maximum and for normal working hours, as well as to adapt such limits in relation to specific professions or industries.

55 With regard to the latter aspect, the Court considers it evident that the protection of workers may call for more stringent rules with regard to some professions or industries than others, and that EEA States must be at liberty, within the limits of the general principles of EEA law, to adopt legislation or declare collective agreements or arbitration awards universally applicable in order to achieve the level of protection they consider necessary.

It is a point to note here that the reference to Article 3(8) PWD in paragraph 54 demonstrates a misconception. Inasmuch as Tariff Board decisions are regulations in public law they are statutory instruments falling within the scope of the first indent of Article 3(1) PWD.<sup>63</sup>

The two other issues had to do with (1) additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home and (2) compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home. The EFTA Court, holding that these items are not ‘pay’ within the meaning of Article 3(1) PWD, however in principle did not disallow such prestations but referred the issues back to the national court to decide whether they could be held to ‘in fact pursue the public interest objective of protecting workers employed by providers of services established outside Norway’ and are proportionate ‘on the basis of all the facts before it’ (para 86–87, 100).

It is noteworthy that although it is rich on generalities the EFTA Court’s opinion is cursory to the point of barely stating conclusions as far as the specific issues are concerned. Moreover, in its discussion of the concept of ‘minimum pay’ it did not address the reference in Article 3(1) second subparagraph to national law or practice.

In the subsequent domestic proceedings Borgarting Court of Appeals, on a significantly more comprehensive factual basis, upheld the first instance decision on all points.<sup>64</sup> The case is presently (August 2012) on appeal to the Supreme Court. By its judgment of 5 March 2013 the Supreme Court upheld the Court of Appeals’ decision but on a

<sup>61</sup> Borgarting lagmannsrett, letter to the EFTA Court 1 February 2011, ref. 10-060 176ASD-BORG/03.

<sup>62</sup> EFTA Court, Judgment 23 January 2012 in Case E 2/11.

<sup>63</sup> Which covers ‘law, regulation or administrative provision’. Cf above in sub-section 4.2.

<sup>64</sup> Borgarting lagmannsrett, dom 8. mai 2012, saksnr. 10-060176ASD-BORG/03.

considerably more comprehensive discussion of the issues involved.<sup>65</sup> As a general point of departure the Supreme Court pointed out that an opinion by the EFTA Court is advisory and, in keeping with its previous case law, emphasized that consequently, the Supreme Court is empowered to and obligated to take an independent stance on whether and to what extent the EFTA Court's opinion shall be taken as a basis for a Supreme Court's decision. It is safe to say that the Supreme Court took a quite critical view of the advisory opinion, on the relation between the PWD and Article 36 EEA (emulating Article 49 EC) as well as on the construction of the concept of 'minimum pay'. However, the Supreme Court refrained from taking a firm stand on those contested issues, upholding the provisions of the Regulations at issue on the basis of a rather extensive construction of the 'public policy clause' in Article 3(10) PWD.

## **8. Control and enforcement – a growing field**

At the time the Extension Act was adopted, in 1993, the Posting of workers Directive was still in the early making and so, then, was its Article 5 on measures to ensure compliance and enforcement. Limited attention was paid to these issues but the LO strongly advocated a means of trade union enforcement. The outcome was a typically 'Nordic Model' solution. 'Representative' organisations<sup>66</sup> within the meaning of the Act – trade unions or, as the case might be, employers' associations – were granted an extended right to boycott, beyond the ordinary rules of the 1947 Boycott Act, in order to seek to compel an employer to comply with a Tariff Board decision on terms and conditions of employment (sec. 6). This private enforcement mechanism was freely considered the primary and essential means to ensure compliance. A provision on criminal liability in the event of wilful or negligent non-compliance by an employer took a secondary position, as do criminal sanctions generally in the field of terms and conditions of employment. A role for public inspection bodies – for example, the Labour Inspectorate – was not foreseen at the time.

The implementation in 2000 of the Posting of Workers Directive (above, sub-section 5.1) brought about a first change. Setting out specific statute law provisions to be observed brought about a different situation with regard to foreign service providers and their employees. The various provisions enumerated in sec. 73 M of the 1977 WEA in substance were within the remit of four different public bodies: the Labour Inspectorate and the Petroleum Directorate, the Equal Opportunities Ombud, and the Labour Directorate (the labour market authority, concerning the hiring in/out of labour). These

<sup>65</sup> Supreme Court Decision of 5 March 2013, Rt. 2013, 258 (Rt. = The Supreme Court Law Reports). For a comment (in Norwegian) see S Evju, 'Almengjøring, verftssak og «offentlig orden» – Rt. 2013 s. 258', *Nytt i privatretten* 2013, No. 2, 1.

<sup>66</sup> Cf above n 25.

bodies were to have similar control and enforcement powers relative to the provisions laid down in sec. 73 M *et seq.* WEA to their statutory powers otherwise. Furthermore, a separate provision, sec. 73 Q, was inserted to forestall that employers subject to these specific rules could incur criminal liability to a larger extent than those subject to the general rules of the relevant legislation. A point to note, however, is that the Labour Inspectorate is held to have power to control and enforce rules of a ‘public law’ nature only. Hence it does not have powers pertaining to matters of private law, for example, to agreements on pay, on working time within the bounds of the WEA, on holidays and holiday pay, or dismissal protection. Also, no step was taken, or suggested, to subject Tariff Board decisions pursuant to the 1993 Extension Act to control and enforcement by the Labour Inspectorate.<sup>67</sup>

Faced with the reality of the EU enlargement of 1 May 2004, further measures have gradually been adopted and put into effect. After the EU/EEA enlargement in 2004, Norway saw a sharp increase in inward labour migration of workers individually as well as in the framework of provision of services. This brought about new initiatives with regard to supervisory and control measures.

First, a series of different measures was adopted in mid-2004. Concurrently with the first case pending before the Tariff Board a Bill was tabled by the then center-liberal government in late May 2004. During a Parliamentary debate in June the Stortinget voted a request to include legal rules to enable requiring employers to see to it that employees have identity cards, among other things. The proposals were enacted by an amendment act of 2 July 2004 No 66 (in force from 1 October 2004). One element was a *reporting obligation on contracting employers* to report detailed information on contractors and employees involved to the Tax Authority. This measure clearly has a dual objective. One is fiscal, the other is serving as a basis for controlling employment relations, as registered information in the tax registers is prerequisite to having ID cards issued. The second element was the inclusion in the WEA 1977 of legal authority to issue regulations requiring workers to *carry ID cards* and employers to maintain lists of workers at the workplace on grounds of health and safety.<sup>68</sup> This was implemented from 1 January 2008 for the building industry.<sup>69</sup> This has later been extended to apply also to cleaning services.<sup>70</sup> Third, public control and enforcement authority was introduced into the otherwise ‘private law’ field, as the Labour Inspectorate<sup>71</sup> was vested with

<sup>67</sup> See Ot.prp. nr. 13 (1999–2000), sub-chapters 3.5, 4.3.2, 5.11.

<sup>68</sup> Sec. 15a, superseded by sec. 4–1 WEA 2005.

<sup>69</sup> Regulations of 30 March 2007, No 366 on identity cards (ID cards) on building and construction sites, in force from 1 January 2008; cf Regulations of 3 August 2009 on safety, health and working environment on building and construction sites.

<sup>70</sup> Regulations of 8 May 2012, No 408 on public authorisation of cleaning businesses and purchase of cleaning services.

<sup>71</sup> And similarly the Petroleum Directorate, which within its remit – the offshore oil industry – is vested with the same responsibilities and powers as the Labour Inspectorate onshore.

supervision and control of compliance with requirements on terms and conditions of employment, including pay, pursuant to the Immigration Act and regulations issued under the Extension Act. The essentially private enforcement regime originally stipulated in that Act thus was significantly altered.

Later in 2004, with the *Laval* conflict having made its appearance on the eastern horizon,<sup>72</sup> the LO launched an initiative to reinforce protection against ‘social dumping’ and elaborate simpler and more easily applicable measures than the machinery provided by the Extension Act. This caught on with the Labour-led three-party center-left coalition that took power after the general election in September 2005. Pointing to the importance of ensuring that ‘Norwegian terms and conditions of employment’ are abided by for work performed in Norway, and to the need for measures to prevent ‘social dumping’, in their joint political platform of October 2005<sup>73</sup> the new government launched a first ‘Action Plan against Social Dumping’ consisting of a wide range of measures.<sup>74</sup> A first follow-up appeared in June of that year with a Bill proposing to reinforce the supervision and control powers of the Labour Inspectorate, subsequently adopted in November 2006.<sup>75</sup> That amendment also included the introduction into the Extension Act of legal authority to issue regulations laying down an *obligation of information* requiring a contracting employer to inform contractors of obligations ensuing from ‘extension’ regulations. A further step on that path, as well as a qualitative innovation, followed with an amendment act of June 2007.<sup>76</sup> Again, the powers of the Labour Inspectorate were strengthened. In addition, *elected union representatives* in a contracting employer’s undertaking, members of a trade union party to an ‘extended collective agreement’, were granted a *right to obtain information*, in other words, a right to require any contractor to produce information on the terms and conditions of employment of workers performing work within the scope of application of regulations in pursuance of the Extension Act. Complementing this, the provision authorising regulations on a duty of information was expanded to also include the stipulation of a duty for a contracting employer to ensure that a contractor complies with its obligations

<sup>72</sup> The first phase of the *Laval* case took place from May to December 2004. The conflict, the parties’ arguments and the process leading up to the initial decisions in the Swedish Labour Court, AD 2004:111 (22 December 2004) and AD 2005:49 (29 April 2005), were followed closely in Norway, as were the subsequent developments in the case.

<sup>73</sup> Plattform for regjeringssamarbeidet mellom Arbeiderpartiet, Sosialistisk Venstreparti og Senterpartiet 2005–09 (aka the Soria Moria Declaration), at 35–36.

<sup>74</sup> St.meld. nr. 2 (2005–2006) and further St.meld. nr. 9 (2005–2006) on transitional measures pertaining to workers from the new EEA Member States.

<sup>75</sup> Act of 24 November 2006 No 63 amending the Extension Act and the Foreigners Act.

<sup>76</sup> Act of 29 June 2007 No 42 amending the Working Environment Act and the Extension Act.

(sec. 9). Regulations on the information obligation and on elected unions representatives' right of access to information were issued in February 2008.<sup>77</sup>

A second 'Action Plan against Social Dumping' was launched in October 2008, in conjunction with the Bill on the 2009 Budget. It spanned a series of legal and extra-legal measures that have been put in effect gradually. On the latter limb, increased resources for the Labour Inspectorate and strengthening of its information and guidance activities was the primary priority, added to by a stronger focus on the 'green sector' – in other words, horticulture and agriculture – and improving information to employers and workers on rights and obligations under the Occupational Injuries Insurance Act, 1989.<sup>78</sup> The legal measure indicated was the introduction of *regional* 'safety representatives',<sup>79</sup> in the hotels and restaurants sector, implemented by regulations in force from 1 January 2011,<sup>80</sup> to examine whether to introduce ID card requirements for the cleaning business, implemented 2012 (cf above), and possibly other sectors (not yet effected), and to introduce a joint and several liability scheme within the ambit of the 1993 Extension Act.

This last measure was adopted with an Act of 29 June 2009 No. 42 amending the Extension Act. Aside from a minor restructuring of the Extension Act and some primarily technical amendments, the essential feature of this revision was the introduction of a provision on joint and several liability for wages, including overtime supplements and holiday pay (sec. 13; in force from 1 January 2010). This applies top-down through the whole chain of contractors and subcontractors ('kjedeansvar', 'chain liability') but in the way that a worker's claim can only be directed 'upwards', not to a subcontractor of its own employer or further down the chain. A claim must be filed in writing within three months of its due date; the targeted debtor then must meet its obligation within three weeks. A contractor or subcontractor against whom a claim is filed has a right of recourse against the other undertaking in the chain, and should notify all contractors and subcontractors that share in the liability as swiftly as possible and in any case within two weeks of a claim that has been received. These provisions are inspired by arrangements existing in Germany under the *Arbeitnehmer-Entsendegesetz* sec. 5.<sup>81</sup> The objective of the reform is to make the enforcement of 'extension' regulations more effective and to improve the protections for workers, in particular posted workers. The reform was heavily controversial and forecasts of its consequences

<sup>77</sup> Regulations of 22 February 2008 of 166 on duties of information, insuring, and right of access to information.

<sup>78</sup> Lov 16. juni 1989 nr. 65 om yrkesskadeforsikring.

<sup>79</sup> 'Safety representatives' being elected workers' representatives in undertakings for the purpose of safety and health ('working environment') matters; see further chapter 6 of the 2005 Working Environment Act.

<sup>80</sup> Regulations of 16 November 2010 No 1452 on regional safety representatives in certain branches.

<sup>81</sup> Ot.prp. nr. 88 (2008–2009), 57.

in practice have differed widely. As of yet, however, the new rules on this point have not been put to a test other than being applied at enterprise level, with good results reported by local trade union officials.

## 9. Interjecting the Services Directive

When the ‘Bolkestein Draft’ for a ‘Framework Directive on Services in the Internal Market’ was tabled in 2004,<sup>82</sup> it quickly created havoc in Norway, like elsewhere, among trade union organisations in particular.<sup>83</sup> Domestically, largely on account of rank-and-file opposition and pressure the LO adopted a half militant, half attentive stance, its Governing Body adopting a resolution requiring guarantees from the Government that national labour market institutions and terms and conditions would not be affected. This stance was maintained following the Commission’s revised proposal in 2006,<sup>84</sup> and considerable debate ensued. The Ministry of Trade and Industry (*Næringsdepartementet*) commissioned a series of independent studies to assess conceivable consequences in different regards of implementation of the Services Directive as adopted, including one relating to the first ‘Action Plan on Social Dumping’. That study concluded that essentially, considering the various exception clauses relating to labour and employment law,<sup>85</sup> the Services Directive would not entail any impediments to carrying out the measures foreseen in the Action Plan. The sole exception referred to the use of ‘anti-contractor clauses’, allowing public contracting actors to require contractors to use its own employees, or subcontractors with its own employees, to perform the contract, with a view to precluding the use of (bogus) self-employed workers. Such clauses were seen as contravening Article 16(2)(d) of the Services Directive.<sup>86</sup>

Whereas controversy persisted and the LO commissioned a separate expert opinion in 2009,<sup>87</sup> in the end the political issues were settled and an Act on the implementation of

<sup>82</sup> COM(2004) 2 final (with Corrigendum COM(2004) 2 final/3). Proposal for a Directive of the European Parliament and of the Council on services in the internal market.

<sup>83</sup> On the ‘Bolkestein’ Draft and the subsequent process at EU level see M Schlachter (this volume, Chapter 11) and JE Dølvik and AM Ødegård (this volume, Chapter 10).

<sup>84</sup> COM(2006) 160 final. Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market.

<sup>85</sup> Essentially, Article 1(6) and (7), Article 3(1)(a), Article 16(3) and Article 17(2).

<sup>86</sup> K Alsos, S Evju, AM Ødegård, *Tjenstedirektivet og regjeringens handlingsplan mot sosial dumping*. Fafo-notat 2008:5. (Forskningsstiftelsen Fafo 2008).

<sup>87</sup> K Alsos, *Tjenstedirektivet og arbeidsretten : Kommentarer til De Factos notat «Er garantier nok?»*. Med vedlegg av Stein Evju. Fafo-notat 2009:1 (Forskningsstiftelsen Fafo 2009), discussing a report from the left-wing ‘think tank’ De Facto, S Stugu and R Eilertsen,

the Services Directive was adopted without touching on labour law issues or amending labour and employment related regulation.<sup>88</sup> Thus, despite all the concerns that surfaced during the preceding processes, the actual implementation of the Services Directive has left labour and employment law unaffected.

## 10. Summaries and Conclusions

In a general context it is noteworthy that the Norwegian regime pertaining to posted workers and the wider notion of ‘social dumping’ has evolved gradually. It was triggered initially by developments at EC level, the key factors being the ECJ’s decision in *Rush* and subsequently the Commission’s initiative to elaborate a Directive on the posting of workers. Those developments took on a particular relevance as the negotiations to establish an EEA agreement were initiated and later concluded. Thereby, the Norwegian labour market and its actors were faced with fundamentally new prospects of workers and service providers descending on the domestic scene. The Extension Act of 1993 was the first response. Not much happened for a number of years after the entry into force of the EEA Agreement on 1 January 1994; thus the Act rested in passivity. That was still the case when the Posting of workers Directive was adopted in 1996 and subsequently transposed into Norwegian law in 1999–2000. It was not until the reality of the EU/EEA enlargement drew close that making use of the Act and reinforcing measures to safeguard its effectiveness and compliance in practice became a matter of concern.

A first point to note is the early start in Norway of enacting legislation to cope with the perceived perils of the four freedoms and an internal EC/EU single market. Preceding the adoption of the PWD by far, the initiatives at national level were taken independently of the Nordic sister countries, which largely remained apprehensive and awaiting the development and eventual adoption of a Directive on the posting of Workers. In the preparatory work to the 1993 Extension Act, routine observations were made on the legal situation in the other Nordic countries. It was not they, however, that provided the basic model that was drawn on when framing the features of the Extension Act. The immediate model rather was the German institution of *Allgemeinverbindlicherklärung* – declaring collective agreements to be generally binding – as set out in the *Tarifvertragsgesetz* sec. 5.<sup>89</sup> It may be that not all aspects of that legislation were fully understood but that was of little importance. It was the

*Er garantier nok? : En vurdering av Stortingetsproposisjon nr. 34 (2008–2009) om tjenestedirektivet (De Facto 2009).*

<sup>88</sup> Lov 19. juni 2009 nr. 103 om tjenestevirksomhet (tjenesteloven) (the Services Act); Ot.prp. nr. 70 (2008–2009) *Om lov om tjenestevirksomhet (tjenesteloven).*

<sup>89</sup> Cf above n 33. It should be recalled that this was well prior to the adoption of the *Arbeitnehmer-Entsendegesetz*, 1996.

general approach that was seized on; the specificities had in any case to be adapted to domestic circumstances.

There are features of the Norwegian legislation that clearly differ from those obtaining in Germany, as well as in other EU countries where forms of declaring collective agreements generally applicable exist. Notably, the arrangement whereby the parties to the collective agreement in question sit on the decision-making body, the Tariff Board, appears to be unique. Moreover, the Tariff Board is empowered to 'rewrite' and supplement the text of the collective agreement, in other words, to stipulate provisions that differ from those of the relevant collective agreement. Also, the range of normative provisions set out in a decision on 'general applicability' in practice is restricted to a small number, in no way mirroring the full span of the collective agreement. Further, the Tariff Board is empowered to fix minimum wage rates that differ from the minimum rates of the collective agreement concerned.<sup>90</sup>

When the Posting of Workers Directive was subsequently implemented, the Extension Act formed the essential basis to which the requisite further implementation measures were added. At this juncture it can freely be said that the approach adopted was a wholly domestic one, relying on existing legislation as it stood to conform to the requirements of Article 3(1) PWD. In view of the presence of the Extension Act no real discussion concerning Article 3(8) of 3(10) PWD was embarked on.

A second point would be that at the time of the elaboration of the Extension Act a somewhat optimistic, yet apprehensive view of pertinent EC law prevailed among domestic actors. At the outset, attention was focused on the *Rush dictum* that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established' (para 18). Uncertainty resulted from the infamous *erga omnes* clause in the Commissions first draft for a Directive,<sup>91</sup> but the solution arrived at for the Extension Act was conceived of as conforming to this also.

Third, it is evident that the 1993 Extension Act was motivated primarily by considerations to protect the national labour market and prevailing national standards as regards wages and working conditions. This came to the fore even with the insertion into the objectives clause of the Act of the phrase that the Act's objective is 'to ensure foreign employees of terms of wages and employment equal to those of Norwegian employees, in order to prevent that employees perform work on terms which, based on a total assessment, are demonstrably inferior to' those prevailing according to collective agreements and otherwise. An underlying concern was to preclude the possibility of the Act being applied to solely domestic situations. Moreover, the dualism of the object of the Act was emphasised in the *travaux préparatoires*, in the Standing Committee's Report to the Stortinget, explicitly stating that the object of the Act is in part to ensure

<sup>90</sup> Cf above Section 4; TAA Stokke, 'Allmenngjøring i Europa', in T Aa Stokke (ed), *Allmenngjøring i EU og Norge*. Fafo-rapport 2010:14 (Forskningstiftelsen Fafo 2010) 9, 17–19.

<sup>91</sup> COM(91) 230 final (above n 5).

the individual employee's enjoyment of terms and conditions equal to those prevailing domestically, and in part to preclude the possibility of distortion of competition to the detriment of Norwegian undertakings in consequence of the implementation of the EEA Agreement.<sup>92</sup> This duality was reaffirmed and reinforced with the adoption of a new object clause by the 2009 amendment Act, namely sec. 1 of the Extension Act, which now reads

The object of the Act is to ensure for foreign employees terms and conditions of employment equal to those enjoyed by Norwegian employees, and to preclude distortion of competition to the detriment of Norwegian undertakings.

This clearly indicates, also, that the overriding concern in the adoption and implementation of national measures pertaining to free movement of services and posting of workers consistently has been the national labour market and national interests, rather than EU/EEA principles of free movement and free market perceptions.

The importance in relation to EU/EEA law of the second limb of the objectives of the Act has yet to be put to a real test. The Tariff Board in its practice has accepted the duality as permissible in EEA law. Moreover, the ESA in its 2009 decision on the complaint pertaining to the Extension Act went no further than to refer to the ECJ's statement 'that, whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive'.<sup>93</sup> The Supreme Court in its March 2013 decision (cf above, sub-section 7.3) held that that the Act as such is completely in tune with EEA law.

A fourth point is that once the Posting of Workers Directive was adopted it was clearly understood as a minimum Directive. This was not based at the outset on a comprehension of Article 3(7) PWD, which was clearly intended to pertain to more favourable terms and conditions under home state law. The widely held understanding was, however, that terms and conditions to be applied to foreign workers in the host country could be fixed at higher levels than statutory or collectively agreed minima. So far, this view has prevailed, with the sole modification that levels cannot be set at higher levels than collectively agreed minima unless the higher levels apply also to those employers who are bound by the relevant collective agreement as such.

A fifth point concerns national industrial relations. In this regard, bringing the Extension Act into use can be seen as a somewhat mixed experience. In particular in the building industry the major players have shown a joint interest in obtaining regulations. One underlying reason is that otherwise the apprenticeship system would be in jeopardy. Likewise, but for different reasons the collective bargaining parties in the

<sup>92</sup> Innst. O. nr. 98 (1992–93), 7 (majority statement), and since reiterated in, for example, St.meld. nr. 19 (2003–2004) *Et velfungerende arbeidsmarked*, 64–65.

<sup>93</sup> EFTA Surveillance Authority Decision of 15 July 2009 (above n 59), at 4; Case C-164/99 *Infringement proceedings against Portuguesa Construções L<sup>da</sup>* [2002] ECR I-787, para 30

cleaning sector have been in full agreement as to the need for regulations. The same is true for the ‘green sector’ – agriculture, green-houses etc. In other branches, not merely in the shipyards industry the situation has turned out to be quite the opposite. Internally in trade union organisations there has also been considerable scepticism towards ‘extension’ as a useful and effective means but again, views and experience differ. Polls among top managers of businesses employing workers from Eastern Europe and being affected by decisions on ‘extension’ have shown a majority of 60 per cent seeing a need for ‘extension’ regulations in their industry.<sup>94</sup> With controversy arising in regard to whether regulations are requisite and justified in the first place, differences of opinion on the scope and level of terms and conditions to be included once regulations are issued may nonetheless come to be intensified. The law-suit concerning the shipyards regulation of 2008 may serve as an illustration. Even if in the larger scheme of national industrial relations the discord over the Extension Act and posting regulations is not much more than a skirmish, it seems destined to remain a source of controversy and debate. However, there are no real signs that the antagonism that is expressed by the discord in this field has impacted negatively on the generally good and trustful relations between social partners in the labour market. This is true also with regard to the debate over the Services Directive and its implementation (cf above Section 9). However controversial many of the issues were, once the implementation process was concluded the disagreements seem to have faded into oblivion, perhaps primarily because the labour market-related issues were landed without having recourse to new or amending legislative measures.

Finally, it is noteworthy that the basic form of measures chosen in Norway is fundamentally different from the approaches applied in Denmark and Sweden. One – and the main – explanation is the realisation at the outset that collective agreement coverage and trade union density are not at levels that would make relying on collective bargaining and collective action measures alone a viable alternative. For that reason, the relationship between domestic law and industrial relations practices and the impending EC law was not discussed or analysed at any length in this regard. A discussion on the possibility of employing collective action measures, including boycott, similar to those employed by Swedish unions in the *Laval* case, surfaced, but just barely, after the ECJ’s decisions in *Viking Line*<sup>95</sup> and *Laval*. These issues are still moot.

Another difference is that as a result of the legislative approach that was chosen in Norway, the effects of the ECJ case law with the *Laval Quartet* are in no way as comprehensive or disturbing in the national industrial relations context as has been the case in Denmark and Sweden. The EU-level developments have not necessitated any

<sup>94</sup> See L Eldring, ‘Norske erfaringer med allmenngjøring’, in Stokke (ed) (above n 90), 59–68, 60–63, 66–68.

<sup>95</sup> Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

legislative amendments or reform. They have contributed to a certain intensification of differences between the dominant social partners but otherwise have not given rise to particular debate or initiatives to introduce new legislative measures in domestic Norwegian law.

## CHAPTER 7

# Polish Response to European Developments

*Andrzej Marian Świątkowski*

### 1. Introduction

The purpose of this chapter is to present the provisions of Polish labour law on the employment relationships of employees posted to work in the EU and EEA Member States and describe the way Polish authorities treat employment relationships governed by the provisions of labour laws applicable in the EU and EEA Member States. The presentation focuses on the situation as of 1 May 2004, in other words, when Poland entered to the European Union, and until 2008, when Poland ratified the Rome Convention on the Law Applicable to Contractual Obligations.<sup>1</sup>

The past six years are not considered a period of significant change in Polish labour law. This chapter presents the changes made to adjust Polish labour law to EU norms. The process of adjusting Polish labour law to mandatory EU laws and practice (the *acquis communautaire*) has taken the form of ‘copying’ EU regulations and incorporating them into existing legislation. To take one example, Poland’s accession to the EU gave rise to amendments to the Labour Code (LC), originally enacted on 26 June 1974 and amended nearly 50 times since 1 January 1975, when the Act entered into force. In particular, Part II ‘Employment relationship’ was extended by Chapter IIa which introduced the provisions governing the terms of employment of employees seconded to work within the territory of the Republic of Poland from EU Member States (Article 67<sup>1</sup>–Article 67<sup>2</sup>). These provisions were further added to by Article 67<sup>3</sup> which laid down the terms of employment of employees seconded to perform work in Poland from non-member States of the European Union.<sup>2</sup>

Furthermore, in the case of a Polish employer posting a Polish citizen to work in a non-EU Member State, Article 29<sup>1</sup> of the Labour Code obliged the employer to notify the employee of the period of work abroad (if longer than one month), the currency in which the employee will receive the remuneration while working abroad, additional benefits, including reimbursement of costs of travel to and from the place of work to the place of residence in Poland, the provision of accommodation in the place of work abroad and the terms of travel to Poland. The employer was obliged to promptly notify the employee abroad in writing of any change to the terms of employment.

<sup>1</sup> [1980] OJ L 266/1; Polish ratification: *Journal of Laws* 2008, No 10, item 57.

<sup>2</sup> Chapter IIa was introduced by the Act published in the *Journal of Laws* 2003, No 213, item 2081.

The requirements specified in Article 29<sup>1</sup> of the Labour Code were not applied to Polish employees posted to work within the European Union. A Polish employer employing a Polish employee on the basis of an employment contract governed by the provisions of Polish labour law had the same obligations towards the employee regardless of whether it was employing the worker in Poland or in another EU Member State. The employer was obliged to notify the employee of significant changes of the terms of the employment contract, that is, of the type of work, the place where it was to be performed, the amount of remuneration, working time and the date of commencement of work (Article 29<sup>1</sup> LC). Furthermore, the employer was obliged to conclude an employment agreement in writing and, within a period of no longer than seven days of the conclusion of the employment contract, to notify the employee of: daily and weekly working time, the frequency of payment of remuneration for work, the length of vacation the employee is entitled to, the duration of the notice period, the collective agreement the employee is governed by and work regulations applicable at the employer (Article 29<sup>2-3</sup> LC). Employers exempted from the obligation to issue work regulations were obliged to notify the employee of the period, location, date and time of payment of remuneration, as well as of the procedure applied to confirm employees' arrival and presence at work, and justifying absence from work (Article 29<sup>3</sup> LC).

The absence of provisions in the Labour Code on principles of employment by Polish and other EU employers of Polish employees in non-EU Member States did not mean that the Polish authorities undermined free movement of labour within the common market following Poland's accession to the EU.

The idea of the absolute exclusivity of Polish labour law concerning employment relationships between Polish employees and Polish employers, regardless of whether work is performed in Poland or abroad – in other words, also in any EU Member State – is the basic thesis on which the present chapter is founded. Article 6 LC clearly states that an employment relationship between a Polish employee and a Polish employer is subject *exclusively* to the Polish Labour Code. Any exception to this rule may be introduced solely by international agreement. On the day preceding Poland's accession to the EU, in reaction to EU law on the free movement of workers and services, the Polish authorities expressed their support for the basic principle governing transactions regulated by domestic labour law provisions, according to which Polish labour law takes precedence over labour law provisions in force at the place where the work is performed if that place is located outside Poland, regardless of whether the employment contract contains a foreign element or not. Consequently, the conflict of laws rules governing the choice of appropriate national labour law applicable to the employment relationship were given special importance in the 'national report'. This report covers the period before Poland's accession, the transition period and the period of Poland's full membership in the EU, which commenced on 1 May 2011 as far as the issues concerning free movement of employees and services are concerned.

With regard to relations between Poland and EU Member States during the period from Poland's ratification in 2008 of the Rome Convention, the conflict of laws of labour law was regulated by the provisions of Articles 32–33 of the Act of 12 November 1965 – Private International Law.<sup>3</sup> The Polish provisions of private international labour law did not apply the unified conflict of laws rules which were in force in the EU and which were applied to the resolution of conflicts among the national labour laws of EU Member States.

The provisions of European labour law have the character of transnational standards. In part, these provisions are aimed at achieving a uniform legal situation for all employees within the single EU/EEA labour market. A uniform legal situation for employees on the common market is ensured by the directives that harmonize national systems of labour law. Among such directives special attention must be paid to the Posting of Workers Directive (PWD).<sup>4</sup> Posted workers should, among other things, be accorded remuneration equal to the minimum remuneration pursuant to universally applicable rules adopted by the authorities of the host country or by the provisions of collective agreements applicable to a particular branch, territorial unit or establishment situated where the posted employees are temporarily employed. Two theories are expounded in the doctrine of European labour law that justify this obligation. One of them – and the more plausible – holds that the Directive was adopted in order to protect the interests of service providers operating in the single market against competition on the part of 'new' EU Member State employers taking advantage of the freedom of movement to bring 'cheaper' employees on cross-border assignments – in other words, employees receiving lower wages. The Posting of Workers Directive was adopted with a view to protecting the interests of less competitive service providers with, in particular, higher personnel costs, including higher wage rates than those received for the same or similar work by employees of the twelve Member States that joined the EU in 2004 and 2007. The other theory used to explain the harmonization of national labour law in EU Member States refers to the need to expand the social aspect of the common market, in which all EU citizens should be guaranteed equal rights within social relationships governed by the provisions of national labour law.

The two theories complement each other to a certain extent. Even if, in fact, the EU institutions aim at counteracting social dumping and harmful competition among service providers, those who benefit from the provisions laying down restrictions on introducing cheap labour to the single market – which enjoys almost unlimited freedom of movement – are employees-citizens of the 'new' Member States, posted to work in the 'old' Member States.

<sup>3</sup> *Journal of Laws* 1965, No 46, item 290, as amended.

<sup>4</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

Such a conflict between the interests of employers from the ‘new’ and ‘old’ Member States has given rise to a lot of attention among labour lawyers from the ‘old’ EU Member States. As a rule, it is the more active among service providers from the ‘new’ Member States that post their own employees to work in ‘old’ Member States. Almost all known cases concerning a conflict of interests involving employers’ and posted workers’ interests stem from differences between the wage levels and corresponding living standards of employees from the ‘old’ and ‘new’ EU Member States.

The present chapter consists of three main parts. Section 2 introduces the provisions guaranteeing employees whose employment relationships are subject to Polish labour law regardless of the location of the work being carried out equal treatment in case of their posting to work outside the territory of Poland within the European Union. Section 3 presents the conflict of laws rules applied to employment relationships with a foreign element. In the case of employees posted to work in another EU Member State by a Polish entrepreneur, the foreign element in the employment relationship is the place where the work is carried out. In the period from Poland's accession to the European Union until the ratification in 2008 of the Rome Convention the Act of 12 November 1965 on Private International Law applied, under which the employment relationships of Polish employees treated as specialists posted to work abroad on a temporary basis by Polish employers were governed by the provisions of Polish labour law.

Section 4 focuses on the situation subsequent to Poland's accession to the EU. As for foreign employees posted to work in Poland, protection of the national labour market is guaranteed by the provisions of the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions,<sup>5</sup> which imposes on foreigners an obligation to obtain a work permit. This obligation is not imposed on citizens of the EU/EEA Member States.

The decisions of the European Court of Justice of December 2007 in the *Viking Line* and *Laval*<sup>6</sup> cases engendered intense discussion among European labour law scholars involving such issues as already described. Those judgments, considered as threatening national systems of labour law, in particular in the Scandinavian countries, have not attracted particular attention in Poland. They have not met any interest among labour law practitioners or scholars. This section deals with the provisions of the Polish Labour Code governing the principles and procedure for negotiations carried out by the social partners on collective agreements, in particular the legal rules on establishing a minimum wage for work performed in Poland. It also presents the provisions of the Act of 23 May 1991 on Collective Dispute Resolution,<sup>7</sup> which must be observed by all trade

<sup>5</sup> *Journal of Laws* 2008 (consolidated text), No. 69, item 415.

<sup>6</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] EFD I-11767, respectively.

<sup>7</sup> *Journal of Laws* 1991, No. 55, item 236 as amended.

organizations and employees other than trade union members entering into a collective dispute, organizing strikes and other protest actions governed by Polish collective labour law. Essentially, the ECJ judgments in the *Laval* and *Viking Line* cases do not affect Polish legal regulations.

## **2. The period before EU accession. An outline of Polish regulations related to the employment of Polish employees in the EU/EEA**

Polish statutory provisions contain the principles governing the employment of Polish employees by Polish employers inside and outside Poland, as well as the principles of employment of foreign nationals by foreign employers to work in Poland.

Under Polish labour law a foreign employee and a foreign employer are free to choose a national system of labour law applicable to their employment relationship as regards work to be performed in Poland.

### *2.1 Employment of Polish employees by Polish employers in Poland and abroad*

#### 2.11 The Polish Labour Code

Article 1 of the Polish Labour Code is formulated in a way that may suggest that the provisions of the Code have universal application, in that they govern the rights and obligations of employers and employees, making no exception with regard to where work is to be performed. This holds true with the proviso that the Labour Code's provisions govern rights and obligations subject to the Polish system of substantive labour law. The rules on the scope of application of Polish law are set out in Article 6 LC. An *a contrario* interpretation of this provision entails that all employment relationships between Polish citizens and Polish employers are governed by Polish labour law, regardless of where work is performed (in Poland or abroad), the employee's place of residence, the employer's head office and the location of the undertaking. The provisions of the Polish Labour Code also apply to employment relationships concluded between Polish citizens and representatives of foreign states or international institutions operating in the territory of the Republic of Poland unless international agreements, treaties or arrangements provide otherwise.<sup>8</sup>

Hence, this interpretation of Article 1 read in conjunction with Article 5 LC should lead to the conclusion that the employment relationships of Polish citizens employed abroad by foreign employers, as well as the employment relationships of foreign nationals who provide work in Poland for foreign employers, are not governed by Polish labour law unless the provisions of Polish labour law are chosen as 'applicable' by the parties to the employment contract, or is indicated as the *lex loci laboris* by the connecting factors under rules of private international labour law. Needless to say, the provisions of the

<sup>8</sup> AM Świątkowski, *Kodeks pracy. Komentarz* (The Polish Labour Code. Commentary) (CH Beck 2006), 19–20.

Polish Labour Code do not govern the employment relationships of foreign employees with foreign employers when work is carried out abroad. Nevertheless, they govern the employment relationships of Polish employees with foreign employers under which work is performed in Poland within the scope set forth in separate provisions, for example, in the Act of 6 July 1982 on the principles of conducting business activity in the territory of the People's Republic of Poland in the area of small-scale manufacturing by foreign legal and natural persons. The principles of employment of Polish citizens abroad and of citizens of foreign states in Poland are set out in the Act of 14 December 1994 on employment and measures counteracting unemployment.<sup>9</sup> At the same time, the Act of 23 May 1991 on work on board merchant sea going vessels<sup>10</sup> lays down the principles and procedures for employment of Polish and foreign citizens on board merchant vessels ‘flying the flag of Poland’.

#### 2.12 The Act of 6 July 1982

The Act of 6 July 1982 on the principles of conducting business activity in the territory of the People’s Republic of Poland in the area of small-scale manufacturing by foreign legal and natural persons was amended in 1989,<sup>11</sup> revising the provision on the applicability of Polish labour law. The wording of Article 19 paragraph 1 of the Act, still in force, stipulates that the provisions of Polish labour law apply to employment relations as regards terms and conditions of employment, social matters, social insurance and activities of trade union organizations at undertakings conducted in Poland by foreign legal and natural persons. This provision – which is an overriding mandatory rule – is a classic example of the application of the *tripartite principle* in employment relationships with a foreign element. Article 19 clearly and explicitly defines the scope of Polish subjective labour law. It covers legal relations prior to entering into an employment relationship, individual and collective labour law and social security law. Accordingly, the provisions of labour law in force in Poland govern the employment relationships of Polish citizens – candidates for work in foreign enterprises to which the said Act applies – and Polish employees employed by foreign employers (legal and natural persons) conducting business activity in Poland in small and medium-sized enterprises.

#### 2.13 Act of 14 December 1994

The Act of 14 December 1994 on employment and measures counteracting unemployment and the Act of 20 April 2004 on promotion of employment and labour market institutions applies (Article 1 paragraph 2 points 1–3) to:

- Polish citizens resident in Poland seeking and taking up employment or other paid work in the territory of the Republic of Poland, as well as employment or other paid work with foreign employers abroad;

<sup>9</sup> Consolidated text: *Journal of Laws* 2003, No. 58 item 514 as amended.

<sup>10</sup> *Journal of Laws* 1991, No 61 item 258, as amended.

<sup>11</sup> Consolidated text: *Journal of Laws* 1989, No 27 item 148.

- foreigners who legally reside in Poland, being citizens of EU/EEA Member States or have a permanent resident card or who have been granted the status of refugee in Poland, seeking and taking up employment or other paid work in the territory of Poland; and
- foreigners who have been granted by a representative of the central government (*voivode*) a work permit for the territory of the Republic of Poland.

The principles and procedures for employing Polish citizens abroad by foreign employers and employing foreigners in Poland are set out in the provisions of chapter 6 of the Act (Articles 46–51). This chapter contains one rule that may fall under the category of private international labour law. The rule concerned governs the obligations of the Government of Poland to include periods of employment abroad in the period of employment in Poland as regards employees' rights pursuant to the principles in force in the state where an employee is employed and pursuant to the principles stipulated in international agreements. Article 1 of the Act requires that documented periods of employment abroad be included in the period of employment in Poland, under two conditions: (i) in case of an absence of other rules governing the said matter in international agreements, and (ii) on condition that the employee while abroad paid contributions to the Labour Fund. Article 48 § 2 of the Act stipulates that upon meeting these conditions the period of employment or performing other paid work by Polish citizens abroad are treated as a period of employment in Poland as regards the employee's rights as of the day the employee notified the competent district (*powiat* – county) labour office that they had taken up work and undertake to pay contributions to the Labour Fund in the amount of 9.75 per cent of the average remuneration for each month of employment abroad.

The Act of 1994, however, does not provide a basis for how to choose the applicable national system of substantive labour law to be applied to the employment relationships of Polish citizens carrying out work for foreign employers abroad. This is decided by the provisions of host state labour law or the connecting factors applicable in pursuance of private international labour law norms of the country where work is carried out. The same rule applies in case of the employment of foreign nationals by Polish employers at establishments located in Poland. Since the provisions of Article 1 and Article 6 LC are not automatically applied to employment relationships entered into by foreign citizens with Polish employers under which the work is performed in Poland, the parties to such relationships may choose the system of applicable substantive labour law pursuant to relevant provisions of private international labour law. The provisions of Polish labour law may govern such employment relationships as *lex loci laboris* if foreign provisions of private international labour law do not provide for other connecting factors.

The reason for the presentation of the legal solutions effective under the Act of 1994 on employment and measures counteracting unemployment is that this Act applied until 30 April 2004. As of 1 May 2004 the 1994 Act was replaced by the Act of 20 April 2004

on promotion of employment and labour market institutions.<sup>12</sup> In the part on the employment of Polish employees by foreign employers abroad (chapter XVI) the Act of 2004 repeats the legal solutions previously in force. It stipulates that documented periods of employment with a foreign employer under which the Polish employee carried out work are included in the periods of employment in Poland as regards employees' rights (Article 86 § 1). The Act of 2004 does not govern the principles of taking up work by Polish employees with foreign employers abroad. This issue is governed by foreign labour laws, in other words, by the provisions applicable in the country of employment (Article 84).

#### 2.14 The Act of 12 November 1965 – Private International Law

The conflict of laws issues concerning substantive labour law pertaining to employment relationships are governed by Title X of the 1965 Act on Private International Law (Articles 32–33). Pursuant to the Act, the parties to an employment contract with a foreign element have a limited choice of the applicable substantive labour law. The parties have the right to select the applicable law on condition that the substantive labour law selected is connected with the employment relationship (Article 32). Each of the connecting factors discussed so far may be used to resolve conflicts regarding conflict of laws issues of substantive labour law. When deciding which law to choose, the parties to the employment contract may use all the connecting factors specified by private international law: personal connecting factors (citizenship, domicile, habitual residence) or objective connecting factors (the place of the conclusion of an employment contract, the place of performance of a legal activity governed by the provisions of labour law, the place of an event other than a legal activity, for example an accident at work, incurring occupational disease, industrial action resulting in legal consequences governed by the provisions of labour law, the location of the employer's head office, the location of the work establishment, the place where work is carried out). Connecting factors that are undoubtedly relevant with regard to an employment relationship with a foreign element are those provided for in Article 33 § 1, 2 of the 1965 Act: the place of residence or the seat of the parties at the moment of entering into an employment relationship, the place of the performance of work, and the seat of the enterprise. Granting the contracting parties a choice of the applicable substantive labour law, the Act allows for using connecting factors other than those provided for in Article 33 of the 1965 Act. The principle is that the parties to an employment relationship choose the legal system most closely connected to them. The system may be selected on the basis of a personal connecting factor, for example the past habitual residence of one of the parties in a given country.

In case the parties to an employment relationship with a foreign element do not use their right to select the applicable substantive labour law, the employment relation is subject to the law of the country indicated by one of the connecting factors set out in Article 33 of the 1965 Act. These connecting factors were not listed at random but in a specific

<sup>12</sup> *Journal of Laws* 2004, No 69, item 1001.

order. The connecting factor listed first is the habitual residence common to the parties – natural persons – of the employment relationship or the location of the employee's domicile and employer's seat in the same country if work was to be, is or was carried out at the employer's seat. In cases where the employee was to carry out, carries out or carried out work at the employer's establishment, the connecting factor will be the labour law applicable in the country where the employee resides and where the seat of the enterprise where the work was to be, is or was carried out is located. In the absence of common habitual residences of the parties, the habitual residence of the employee and the place where the employer's seat or the seat of the enterprise are situated, Article 33 § 2 determines as applicable the labour law in force in the state in which the work was to be, is or will be carried out.

The interpretation of Article 33 §1 sentence 2 of the 1965, which reads: 'the work ... done at the employer's enterprise', has been in debate in the Polish literature on private international law. It has been considered whether this wording may be construed to denote the work provided exclusively 'at the location of the seat of the enterprise' or to mean work provided 'under employment at the enterprise'.<sup>13</sup> The author concludes that the actual place in the sense of the geographical area where work is carried out is of no consequence with regard to the hypothesis of the whole of Article 33, and that employment relationships of employees posted to work abroad are not to be subjected to *lex loci laboris*. Trammer puts forward this hypothesis in order to indicate that the employment relationships of Polish employees posted to work abroad are subject to the provisions of Polish labour law. In my opinion, such a conclusion may be reached on the basis of the structure of *lex loci delegationis*, whereas Trammer's reasoning is based on an erroneous distinction between two concepts relating to the place of work, 'the employer's seat' and 'the employer's enterprise'. According to Article 33 the necessary condition for subjecting an employment relationship with a foreign element (in this case that element is the place of work, located abroad) is the place of habitual residence common to the employee and the employer's seat or the employee's habitual residence and the seat of the enterprise. I understand the latter expression to refer to the location of the establishment run by the employer, which may have its seat in another state. Furthermore, there is nothing to indicate an interpretation of the concepts of 'employer's seat' or 'the seat of the enterprise' to mean the geographical area where work may be performed in the employment relationship. The above concepts are specific enough to locate work at a given point of the geographical area – in the country where the following are situated: the employer's seat, the seat of the enterprise or the enterprise.

The provision in Article 33 § 2 also provides for application of the principle *lex loci laboris* – that the parties select the applicable national system of substantive labour law in the first place. This requirement was actually not necessary since, as already

<sup>13</sup> See H Trammer, *Stosunki pracy w polskim prawie prywatnym międzynarodowym, Prawo w handlu zagranicznym* (Employment relationships in Polish Private International Law, The Law of Foreign Trade) (1968), 21, 41.

mentioned, the fundamental premise for the application of the connecting factor set out in Article 33 is the absence of the parties' choice.

Bearing in mind that the parties to an employment relationship with a foreign element have the right to choose the applicable law at any time they consider the most appropriate, it can be concluded that it may also be necessary to apply the connecting factor set out in Article 33 § 2 in cases when: the parties have not used their right to choose the law; do not have their habitual place of residence in the same country; or the centres of vital and professional interest are not located in the same country. The location of these centres is determined by the habitual place of residence as regards the employee and, as regards the employer, by the location of his seat or enterprise. When the aforesaid arrangements are being made the parties to the employment relationship may take up activities leading to the choice of the applicable law. The place where the work is carried out may be applied as the connecting factor as an alternative to the connecting factor of the common centre of vital interests only when the applicable law has not been chosen by the parties.

The interrelationship between the connecting factors referred to above may lead to the conclusion that the connecting factor set out in Article 33 § 2 of the 1965 Act is of an alternative nature, not only with regard to the connecting factors indicated in § 1 of Article 33, but also with regard to the connecting factor set out in Article 32 of the Act.

In the present chapter, what is meant by 'applicable' labour law chosen by the parties is the national system of substantive labour law chosen by the parties to an employment relationship with a foreign element in accordance with the indicator set out in Article 32 of the 1965 Act. A choice of a given national system of substantive labour law can be made only if and when that system 'is connected' with the employment relationship which is to be governed by it. In this meaning the "applicable" system of labour law is the one that meets the following necessary conditions. First, the foreign system must be freely chosen by both parties to the employment contract. Second, the national system chosen by the parties must be "connected with" the employment relationship. To be "connected with" is a phrase used to determine the interrelations between relationships of various elements connected with one another, or which influence or affect one another.<sup>14</sup> It follows that there must be an interdependence between the employment relationship with a foreign element and the national system of substantive labour law chosen as "applicable" by the parties. This entails, undoubtedly, that the national law chosen as "applicable" should have a decisive influence on the employment relationship they govern. It is a prerequisite of exerting such influence, that the rights and obligations of the parties be regulated in the same way employment relationships otherwise are regulated in the legal order of the country concerned. The nature of the

<sup>14</sup> S Skorupka, H Auderska, Z Łempicka (eds) *Mały słownik języka polskiego* (A Dictionary of the Polish Language), (PWN 1968), 1023; and Z Kurzowa, *Ilustrowany słownik podstawowy języka polskiego* (Basic Illustrated Dictionary of the Polish Language), (Universitas 1999).

relationship referred to in Article 32 should be conceived as functional. It would be hard to imagine that an employment relationship entered into by an employer registered in the United States, subject to the provisions of law in force in that country, employing a citizen of the United Arab Emirates in France, could be subject to the provisions of Polish labour law. There is no interdependence between the parties of such an employment relationship and the national system of substantive labour law chosen by the parties as “applicable”. Neither is there any such interdependence between national systems of labour law conflicting with each other. The only common connecting factor for the parties of such an employment relationship is the place where work is carried out. In my view, should the parties in a case like this choose French labour law as the law “applicable”, the employment relationship would not meet the condition of being “connected with” the chosen national system of substantive labour law.

As a matter of fact, what underlies the implied distinction between national systems of labour law are the differences existing in the legal systems of European countries. Legal mechanisms elaborated by the EU with a view to harmonization of Member States’ national systems of labour law (directives, regulations) are conducive to the process of “Europeanisation” of national systems of labour law.<sup>15</sup> These measures are the reason why the EU Member States’ national systems of substantive labour law may be indicated by the parties to employment relationships with foreign elements as “applicable”. The example above illustrates the possibility of choosing the “applicable” labour law on the basis of personal (citizenship) or objective (the employer’s seat, the seat of the enterprise or the place where work is carried out) connecting factors applied in the national provisions of private international (labour) law. Despite the fact that the application of any of the connecting factors referred to above is connected with some components of the employment relationship with foreign elements, the nature of the interdependence is formal. An assessment of this connection requires a more in-depth consideration of whether the national system of substantive labour law in force in France may be shaped by the provisions of the law selected by the employment relationship in the example above as “applicable”.

Objections against a national system of substantive law, such as in the example given above, should also be considered with regard to whether it would be acceptable to apply that system in case it was not chosen by the parties but indicated on the basis of connecting factors pursuant to private international labour law rules. Nearly all internal systems and international regulations of private international law presently regulating the resolution of conflicts of laws, in keeping with Rome I, take the place where the work is carried out as the connecting factor which, at the outset, indicates the “applicable” law (*lex loci laboris*). The question is whether a national system of substantive labour law that has been chosen as “applicable” but is nevertheless rejected

<sup>15</sup> W Sanetra (ed), *Europeizacja polskiego prawa pracy* (Europeanization of Polish Labour Law), (2004); L Mitrus, *Wpływ regulacji wspólnotowych na polskie prawo pracy* (EU Influence upon Polish Labour Law) (Zakamycze 2006).

by the State otherwise supervising the compliance with labour law provisions, on the ground that there is no necessary connection with the employment relationship and the law chosen by the parties, may be accepted and applied to an identical or similar employment relationship in case such a national system is indicated by connecting factors applied in private international labour law. This question can be answered only in the positive. Connecting factors applied in internal and international provisions of private international law indicate *lex loci laboris* as the applicable law. Unlike the restricted choice granted to the parties of an employment relationship with a foreign element, neither the national nor international norms governing the conflict of laws rules of substantive labour law introduce any additional requirements that have to be met in order to apply the system chosen by the parties to the employment contract. Hence, it should be assumed that *lex loci laboris* is *ex definitione* the “applicable” national system of substantive labour law since it was indicated by the various legislators.

It follows from this that, in the example above, French labour law, albeit chosen by the parties, may be held to be “inapplicable” to the employment relationships where the employer is subject to American law, the employee to Saudi Arabian law, while the work is carried out on the territory of France, if it turns out that the employment relationship is not “compatible” with French labour law. A separate issue is whether French labour law should be applied to the employment relationship since the connecting factor of the place where work is carried out indicates French law as *lex loci laboris*. It is not insignificant that the place where the work is carried out is determined as the final and decisive indicator for the choice of the applicable national system of substantive labour law in internal provisions of private international law. The rules set out in the Polish Act of 1965 on Private International Law may serve as an illustration. Considering the internal contradiction among the functions of the various connecting factors defined in Division X ‘Employment Relationships’ of the Act, the restriction of the parties’ freedom of choice of “applicable” substantive labour law pursuant to Article 32 of the Act should be assessed negatively. This remark is, however, of limited significance now, owing to Poland’s ratification of Rome I.

## 2.2 *Employment of foreign employees in Poland*

### 2.21 Citizens of EU and EEU Member States

Foreigners who are citizens of EU/EEA Member States have the right to take up employment in Poland without having to obtain a work permit (Article 87 of the Act of 20 April 200X on Employment Promotion and Labour Market Institutions). Their employment relationships are governed by the provisions of the applicable labour law. Employment relationships of EU citizens whose employers’ head office is situated in an EU Member State are subject to the relevant provisions of the labour law applicable in that state. Where under such conditions work is carried out in Poland, the provisions of Chapter II of the Polish Labour Code (Articles 67<sup>1</sup>–67<sup>4</sup>) determine the terms of employment and remuneration of foreign employees if these terms are less favourable than those determined by Polish labour law.

### 2.22 Citizens of other countries

Citizens of other countries must be legally resident on the territory of the Republic of Poland; this is a precondition to obtaining a work permit. The procedures for granting the permit are governed by the Employment Promotion and Labour Market Institutions Act. Work permits are issued by the administrative authority (*voivode*) as the representative of the central government for a definite period of no longer than three years. It may be extended, however. The work permit is issued on the basis of information that Polish citizens cannot be found to do the job, obtained from the representative of the local self-government (*Starosta*) competent for the foreigner's place of employment. One of the basic conditions for the issue of the permit is that the parties to the employment relationship establish that the amount of remuneration will not be lower than the remuneration of Polish employees performing work of a comparable type or at a corresponding post (Article 88 c section 1).

### **3. The radiation theory of extension of domestic labour law regulations (*lex loci delegationis*) in case of employment of Polish workers in other EU/EEA Member States**

On the basis of the Act of 22 September 2006 on the accession to the European Union of 10 Member States that acceded to the EU on 1 May 2004, the President of the Republic of Poland ratified the Rome Convention on 28 March 2007. The Convention entered into force with respect to Poland on 1 August 2007.<sup>16</sup> Article 6 paragraph 1 of the Convention on "Individual employment contracts" introduces certain restrictions on the freedom of the contracting parties as regards the choice of law. However, the underlying general norm concerning conflicts of substantive labour law, applicable to labour relations with a foreign element, is the principle of freedom to choose the applicable law laid down in Article 3 paragraph 1 of the Rome Convention. The Private International Law Act of 1965, which applied in Poland up to the day when the Rome Convention entered into force, also accepted the freedom of the parties of an employment relationship to choose the applicable national system of substantive labour law, on condition that the chosen law was connected with the employment relation. Notwithstanding this freedom, the employment relationships of Polish employees employed outside the boundaries of the People's Republic of Poland were entirely subject to Polish labour law, despite the fact that by virtue of the location where the work was to be carried out, *lex loci laboris* could be taken into consideration as the regulations connected with the labour relations in which foreign elements were present owing to the location of work to be performed. In this light, the purpose of the present chapter is to explain this particular phenomenon, which was in conflict with the then applicable provisions of private international labour law.

<sup>16</sup> *Journal of Laws* 2008, No 10, item 57, 58.

In Poland, the employment relations of employees posted to work abroad were regulated by resolutions of the Council of Ministers. The unpublished regulation No 138/65 of the Economic Committee of the Council of Ministers of 9 June 1965 on the terms and conditions for delegating and remunerating specialists posted to work abroad by foreign trade enterprises in order to render services related to exports (the KERM regulation) governed the labour relations of Polish employees (specialists) employed by Polish or foreign employers abroad. The foreign element in those labour relations was the place in which the work was to be carried out or, at times, the employing entity. Foreign trade enterprises played the role of intermediary organisations employing Polish workers at Polish or foreign employers.<sup>17</sup> The work and payment conditions laid down in this Regulation were respected in cases in which the employers of the Polish specialists posted to work abroad were Polish foreign trade agencies.<sup>18</sup> The role of Polish foreign trade enterprises as an agent in employing Polish employees abroad was affirmed in Supreme Court decisions in which it was clearly and unambiguously stated that Polish employees were not subject to employment relations abroad with Polish international trade agencies.<sup>19</sup> The KERM regulation applied only to Polish national employers who employed Polish employees abroad.

In cases where Polish employees provided work for *foreign* employers abroad, the direct employer in Poland of such employees was the Polish international trade agency. Nearly half a century ago Polish foreign trade enterprises acted as a temporary work agency for Polish employees and foreign employers. In the judgment of 18 March 1975,<sup>20</sup> the Supreme Court stated that a legal relationship established between a Polish employee (specialist) and a Polish foreign trade enterprise exhibited the features of an employment relationship. The Polish judiciary was obliged to qualify the actual work

<sup>17</sup> The European Court of Justice in Case 35/70 *S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg* [1970] ECR 1251 defined a temporary work agency in the following terms: “the object of the undertaking is ... to engage workers to put them, for a consideration, at the disposal of other undertakings”. Polish provisions on delegating employees to work abroad may be treated as the prototype of norms regulating temporary work agency activities. L Zappalá writes that the concept of temporary work agency was formulated in the case law of the European Court of Justice at the beginning of 1970s, when the three-lateral legal relation between the agency, user employer and employee was introduced. A temporary work agency was defined as an entity employing an employee posted to work at a work establishment of the user employer, see ‘Legislative and Judicial Approaches to Temporary Agency Work in EU Law – A Historical Overview’, in: K Ahlberg *et al.*, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (Peter Lang 2008), at 163–164.

<sup>18</sup> Judgment of the Supreme Court, 10 April 1974, I PR 66/74, OSNCP 1975, issue 3, item 45.

<sup>19</sup> Decision of the Supreme Court, 5 July 1973, I PZ 34/73, OSNCP 1974, issue 2, item 39; judgment of the Supreme Court, 11 September 1973, I PR 105/73, OSNCP 1974, issue 5, item 97; judgment of the Supreme Court, 18 March 1975, I PR 23/75, OSNCP 1975, issue 2.

<sup>20</sup> I PR 23/75, OSNCP 1975, issue 2.

agency relationship in that way, as it was impossible to assume that in the legal sense an employment relationship was established as a result of delegating a Polish employee to work at a foreign employer. Legal relations between Polish foreign trade enterprises and foreign employers employing Polish employees were not subject to labour law regulations. Polish foreign trade enterprises acting in the capacity of the direct employer were obliged, as regards employment relations with Polish workers employed abroad by foreign employers, by commercial contracts governed by the provisions of the private trade law to carry out legal actions required by user employers – foreign entrepreneurs. In its judgment of 11 September 1973,<sup>21</sup> the Supreme Court clearly stated that “dismissal of a specialist is justified by the circumstance related to rendering service for a foreign contractor”. The Supreme Court came to the conclusion that “the fact of making such a demand [the demand for dismissal of a Polish employee employed as a specialist by a foreign employer] reveals that the realization of the demand for dismissal is not without reservations”. The Economic Committee of the Council of Ministers resolution No 138/65 entitled Polish foreign trade enterprises that posted a Polish specialist to work abroad to reduce the period of stay or to dismiss the employee from the foreign contract at the request of the foreign entrepreneur (user employer). The consequence of the decision to reduce the period of stay was the termination of the employment contract by the Polish foreign trade enterprise acting in the capacity of a temporary work agency. Depending on when the user employer (foreign entrepreneur) notified the Polish foreign trade enterprise of its refusal to continue to employ the posted specialist, the entity being the direct employer could terminate the employment relationship with notice or with immediate effect. In the judgment of 11 September 1973, the Supreme Court examined whether the reduction of the employment of a Polish specialist on the foreign employer's application (demand) on the grounds that there had been a breach of the provisions of the commercial contract with the Polish foreign trade enterprise, constituted a sufficient reason for immediate termination of the employment contract concluded with this employee by the Polish foreign trade enterprise. The Supreme Court held that, in such a case, the demand of the foreign user employer is itself a sufficient reason to justify immediate termination of the employment relationship on grounds of the fault of the employee. The legal consequence of the failure to meet its obligations on the part of a foreign entrepreneur was transferred by the foreign trade enterprise, *de facto* a temporary work agency, onto the Polish employee.

The legal situation of Polish employees employed abroad by foreign employers was not subject to any substantial change under the subsequent unpublished resolution of the Council of Ministers No 8/72 of 7 January 1972 on pay and employment of workers of export building works and export-related services, later replaced by the regulation of the Council of Ministers of 27 December 1974 on certain rights and obligations of employees posted to work abroad in order to perform export building works and export-

<sup>21</sup> I PR 105/73, OSNCP 1974, issue 5, item 97.

related services.<sup>22</sup> The Regulation settled more explicitly than previously applicable provisions of law that a foreign trade enterprise, called the “delegating entity” prior to Regulation No 8/72, that it was justified to treat such an entity as a temporary work agency to an even greater extent than was done under previous unpublished resolutions of the Council of Ministers. Employers in Poland employing an employee posted to work abroad by a posting entity was obliged to grant such an employee unpaid leave. Applying the current criteria to an evaluation of the situation from several decades ago, it should be stated that a Polish employee with the status of “specialist” and posted to work abroad remained in two employment relationships with the Polish employer during the delegation: (i) with the parent employer, who granted him unpaid leave, and (ii) with the delegating entity, which acted in the capacity of a temporary work agency; he or she was also (iii) in a legal relationship with the user employer. Undoubtedly, the employment relations of the Polish employee with Polish employers were regulated by the provisions of Polish labour law.

What needs to be considered is whether an employment relationship was established between a Polish employee and a foreign user employer and, if the answer is positive, it needs to be asked, which provisions of national labour law were used by the parties of this legal relationship to regulate the wording of their rights and obligations and to specifying an institution of labour law by which legal action in disputes between them should be handled and resolved. The employment relationship between a Polish employee and a foreign employer under which the employee was obliged to provide work abroad was undoubtedly an employment relationship with two foreign elements: (i) the employing entity and (ii) the location where work was to be carried out. The question that arose was whether a separate employment relationship was established between the employee and the foreign employer. From the Supreme Court judgments mentioned above it follows unambiguously that on the basis of the Council of Ministers' resolutions from the 1960s an employment relationship between a Polish employee posted to work abroad and a foreign employer could not be deemed to be established. The regulation of the Council of Ministers of 27 December 1974, did not introduce any substantial changes in this regard. Personally, I definitely do not share the official opinion on private international labour law asserting that employment relations of Polish employees (specialists) employed abroad on the basis of the Regulation of the Council of Ministers of 27 December 1974 were governed by the provisions of national labour law, as indicated by Articles 32 and 33 of the 1965 Act on Private International Law. Polish specialists in private international labour law did not take into consideration whether the employment relations of a Polish specialist employed abroad by a Polish delegating entity should be analysed within the categories developed by the provisions

<sup>22</sup> *Journal of Laws* 1974, No 51, item 330 as amended. See S Kalus, *Międzynarodowe stosunki pracy. Wybrane zagadnienia kolizyjne* (International Labour Relations. Selected Problems of Conflicts of Laws) (Wydawnictwo Prawnicze 1978), 39 *et seq.*

of the 1965 Act.<sup>23</sup> Neither was this issue dealt with in the studies of lawyers specialising in labour law.<sup>24</sup>

To my mind, disregarding the rules regulating the conflicts of law of substantive labour law, it was assumed that the aforementioned relations were governed by the regulations of Polish labour law as a whole. The parties to these relations were not given any possibility to choose the applicable national substantive labour law, despite the fact that it might have seemed that there was a possibility to choose between Polish regulations and the regulations that applied at the location where work was to be performed. Instead, the employment relations of Polish employees posted to work abroad were regulated by the provisions of the Polish labour law. Hence, what needs to be considered is whether it was consistent with the provisions of Article 32 and Article 33 of the Polish Act on Private International Law to deprive the parties to an employment relationship with a foreign entity of the possibility of choosing the applicable law. The Labour Code states that employment relations between Polish citizens and Polish representative offices, missions and other agencies abroad shall be governed by the provisions of the Code (Article 6 § 1). Entities delegating Polish employees to work abroad did not have the status of Polish agencies pursuant to Article 6 § 1 of the Labour Code. Owing to the location of the work to be performed their labour relations could be regulated by the provisions chosen by the parties or the provisions of the labour law in force at the place where work was performed. Employment contracts concluded by entities delegating Polish employees to work abroad included phrases that indicated the will of the parties to these relations to subject them to the provisions of Polish labour law on the matters related to remuneration for work, working time, holiday leave, benefits granted due to accidents at work or occupational diseases.<sup>25</sup> Thus, there can be no doubt that Polish employees signing employment contracts drawn up by Polish

<sup>23</sup> S Kalus, 'Stosunki pracy specjalistów polskich zatrudnionych na budowach eksportowych' (Labour Relations of Polish Experts Employed on Exported Construction Sites), in M Pazdan, A Tynel (eds), *Zagadnienia prawne eksportu kompletnych obiektów przemysłowych*, Prace Naukowe Uniwersytetu Śląskiego, No 356, Katowice 1980, 171 *et seq.*

<sup>24</sup> B Wagner, 'Praca za granicą i jej wpływ na dalsze zatrudnienie w macierzystym zakładzie pracy' (Work Abroad and Its Impact Upon Employment in Poland), *Praca i Zabezpieczenie Społeczne*, 1978, No 2, 63 *et seq.*; J Kruszewska, *Umowa o pracę za granicą w zakresie budownictwa eksportowego i usług* (Employment Contracts Abroad in Export Construction Sites and Services) (Wydawnictwo Prawnicze 1988). There is no information on the "applicable" labour law in the studies on labour law. The authors take for granted that the employment relations of Polish employees employed abroad by Polish employers (delegating entities/entities in charge) are subject to the regulations of Polish law as a whole. They do not pay attention to the fact that the location where work is to be performed is abroad; the foreign partner of the Polish entrepreneur employing Polish employees makes demands resulting from the provisions of the foreign law concerning working time, the norms of work efficiency, safety and protection at work.

<sup>25</sup> Kalus (above n 23), 45.

employers which included the aforementioned statements on subjecting such labour law matters to the regulations of Polish labour law thereby expressed a willingness to subject their employment relations abroad to the labour law applicable in Poland. Lawyers specialising in private international law underlined that even if by way of an agreement the parties of the employment relationship had chosen a law different from Polish law, pursuant to Article 32 of the 1965 Act on Private International Law, the applicable law would have been Polish labour law as the common personal law of the parties of the employment relationship with a foreign element.<sup>26</sup> There are bases for serious doubt concerning the validity of that view. Article 32 of the Act on Private International Law allows the parties of an employment relationship to subject their relationship to the law chosen by the parties on condition that the chosen law is *connected with* this relation. I agree with M Pazdan that a choice of law may be made only in the case of an employment relationship connected with at least two separate national labour law systems.<sup>27</sup> In the case of employment of a Polish employee abroad by a Polish employer the parties to the employment relationship have the right to choose between Polish labour law and the labour law in force at the location of the work being performed. Both national labour law systems are connected with the employment relationship. An employment relationship connected solely within the scope of Polish law is governed solely by Polish labour law. Considering the absence of a foreign element in such a relationship, there is no need to apply the conflict of laws rules of private international labour law, since the provisions of the labour law included in the legal system of another state are without prejudice to the only applicable provisions of Polish labour law.

Connecting factors used to specify the applicable national substantive labour law system in the event of the conflict of laws are applied in the order established by a national legislating body or by a foreign employer. As a rule, in the case of the absence of choice by the parties to the employment relationship of the applicable national labour law system, that system is specified by way of using one of the connecting factors referred to above being part of the common provisions of private international law, or in the specific provisions of the private international labour law. The order of these factors is regulated in the conflict of laws rules. In fact, the provisions of private international law or private international labour law do not create a hierarchy of the connecting factors that would be applicable to employment relations. None of the connecting factors used for regulating the conflict of substantive law may be used as alternatives with respect to the main connecting factor, however, which is the parties' choice of the applicable system of law. But on account of the degree of the connection with the employment relationship of the alternative connecting factors for which these factors are to be applied, some of them are applied more often than others. So far, the conclusion that

<sup>26</sup> *Ibid.*, 46.

<sup>27</sup> M Pazdan, *Prawo prywatne międzynarodowe* (Private International Law) (Wydawnictwo Prawnicze LexisNexis 2007), 198.

follows from the above argument is that in employment relations, what constitutes the most important connecting factor is the location where work is carried out, which, in the case of conflict of laws of the substantive labour law, indicate the labour law in that country (*lex loci laboris*) as the applicable law.

Nevertheless, the above relationship is not taken into account in the common provisions of Polish private international law which are applied to resolutions of conflicts of laws and to the choice of the applicable substantive labour law system. Article 33 § 1 of the Act of 1965 on Private International Law determines that in the absence of the parties' choice of the applicable substantive labour law system the employment relationship shall be governed by the law of the country in which the parties have their place of residence or registered office at the moment of entering into this relationship. To my mind, there are no relevant arguments supporting *de lege ferenda* the thesis that in the absence of a choice of law by the parties, the law applicable to the employment relationship as the parties' common personal law is Polish labour law. *De lege lata* the above statement is evidence of the tendency to extend the legal regulation applied to the employment relations without foreign elements to the employment relations in which such elements appear. This kind of extension is possible, as a matter of law, and has been applied by certain Member States with reference to the “theory of radiation” (*Ausstrahlung, Ausstrahlungstheorie*). This theory was employed in German case law at the end of the 1920s and the beginning of the 1930s.<sup>28</sup> On that basis the theory of radiation was developed and elaborated on in the German and French academic literature. Franz Gamillscheg aimed to restrict its significance to that part of labour law classified as public law.<sup>29</sup> Since the theory of radiation enabled states to apply the provisions of their national labour law to employment relations with a foreign element, it was often applied by the authorities of certain countries to regulate employment relations between foreign citizens and employers registered as conducting economic activity in those Member States of which the employed workers were citizens or in which the employees had their permanent residence, if they were temporarily employed in (posted to) another Member State. The Polish Act of 1965 on Private International Law was no cause for the judicature to apply the theory of radiation, as it subjected employment relations with a foreign element to a restricted choice of the parties and, in the absence of such a choice, to the law of the country in which both parties had their place of residence or registered office at the moment of entering into an employment

<sup>28</sup> See judgments of the Reichsarbeitsgericht of 23 November 1929; 1 April 1931; 21 December 1932 referred to in the work of I Szászy, *International Labour Law. A Comparative Survey of the Conflict Rules affecting Labour Legislation and Regulations* (AW Sijthoff 1968), 118.

<sup>29</sup> F Gamillscheg, *Internationales Arbeitsrecht (Arbeitsverweisungsrecht)* (1959), 181-182. According to Gamillscheg's view the theory of radiation could be applied to social insurance relations on the grounds of the argumentation of the particular states which made the acquisition of the rights to social insurance benefits contingent upon the period of insurance.

contract (Article 33 § 1).<sup>30</sup> The Czechoslovak Code of private international law treated *lex loci delegationis* as provisions applicable to employment relations of Czechoslovak employees not residing permanently in the country in which the work was provided with the Czechoslovak employers who had their registered office in the territory of the former Czechoslovakia.<sup>31</sup> The theory of radiation was also accepted before the Second World War by the French provisions of private international law adopted on 15 May 1926. This theory played a crucial role in the case law and academic literature concerning national and international labour law. It lies at the foundation of the expansion of the “parent” law in employment relations on the basis of which, and under which domestic employees employed by domestic employers performed work abroad. Disregarding the law of the location where work was to be provided, if the provisions of that labour law were different from the provisions applicable as *lex patriae* by virtue of the same citizenship, would have been justified if this connecting factor used to identify the applicable labour law system could have been applied to employment relations with a foreign element.

The theory of radiation played a crucial role in the resolution of conflicts of laws of the national provisions of substantive labour law. It was commonly applied in the People’s Republic of Poland, which exported workers abroad. Neither the then applicable provisions, nor the judicature, nor the academic literature made any effort to justify the automatic application of the Polish provisions of labour law to employment relations with a foreign element. Furthermore, the then applicable provisions of private international law granted the right to choose between *lex loci obligationis* and *lex loci laboris* to the parties of individual employment relations, by virtue of the location of the provided work in the territory of a foreign country. Thus, the national provisions of substantive labour law were generally applied. I define this phenomenon, which was disregarded in the literature of the time or treated as obvious by authors dealing with national labour law, as *lex loci delegations*.

#### **4. The Enlargement of the European Union**

On 13 December 2002 in Copenhagen, the EU Member States established the terms of accession with the candidates for EU membership, including Poland. The accession treaty was signed by the states concerned on 16 April 2006 in Athens. The parties agreed that eight out of ten new EU Member States would be able to avail themselves of

<sup>30</sup> In the judgment of 18 April 2001, I PKN 358/00, OSNP 2003, issue 3, item 59 the Supreme Court declared that “the employment relationship between the employee residing in Poland and the employer residing and managing an enterprise in Poland is governed by Polish law, even if the employment contract were to be executed in another state, unless the parties have chosen a law” (Article 33 § 1, first sentence of the Act of 1965 on Private International Law).

<sup>31</sup> Szászy (above n 28), 118.

the principle of free movement of labour within the common market after a seven-year transition period.<sup>32</sup> The old Member States harboured concerns about a sudden inflow of employees from the new Member States into their national labour markets. A transition period therefore could be introduced to protect national labour markets in those old EU Member States whose authorities were concerned about a constant or transitional inflow of cheaper labour from the states of East and Central Europe. The transition period applied to workers from the new Member States who were intending to enter into the common market permanently or temporarily. This protection against an inflow of employees from the new Member States did not cover employees posted to work in the old EU Member States within the framework of the freedom to provide services, however.

The maximum seven-year transition period was divided into three stages: two years, three years and two years. The “old” EU Member States could shorten the transition period or derogate from it if it was not considered necessary to protect the national labour market. Not all of the old Member States availed themselves of the right to introduce the transition period, and some of them shortened the maximum seven-year transition period. Poland was among the new Member States towards which the transition period was applied nearly in full. Within the scope of Directive No 96/71 on Posting of Workers only a few old Member States (Austria and Germany) applied the transition period also to employees posted to work from Poland. The period in which the Member States may stand to benefit from the transition period as one of the measures to protect the national labour market in the old Member States expired on 30 April 2011.

The mechanism of protection of national labour markets allowed the authorities of old Member States to modify or derogate from general transition rules introducing limits to free movement of citizens of new. Based on the principle of reciprocity, the new EU Member States were entitled to introduce a transition period with regard to citizens of the old Member States seeking employment on the “new” labour market. Transition periods were not introduced with regard to legal relations between the new Member States.

Restrictions on the free movement of citizens coming from the new Member States postponed the debate on governing the common labour market without the need to interfere with the freedom to make decisions by citizens of the new Member States. In transition periods the authorities of the new Member States, which imposed the restrictions, used traditional administrative means (work permits) with regard to persons seeking employment and employers willing to employ them. It will be possible to discuss harmonization of the principle of freedom to work with the activities aimed at regulating the labour market by non-administrative methods after the expiry of the transition period in general, that is, on 1 May 2011.

<sup>32</sup> The transition period did not apply to Cyprus and Malta.

## **5 Conditions of employment of workers posted to work on Polish territory from an EU Member State**

Conditions of employment of workers posted to work in Poland from an EU Member State are governed by the provisions of Chapter II of the Labour Code (Art. 67<sup>1</sup>–67<sup>2</sup>). These rules are modelled on the Posting of Workers Directive. Chapter IIa of the Labour Code was introduced by the Act of 14 November 2003.<sup>33</sup> This Act came into force on 1 May 2004. It was amended by the Act of 23 June 2006<sup>34</sup> and entered into force on 5 August 2006.

The provisions of Chapter IIa LC are, in principle, generally applicable. Exceptions to the principle of universal application are specified by Article 67<sup>4</sup> LC. These provisions do not apply to merchant navy undertakings, in other words, to crews of commercial marine vessels who are employed by employers resident in a Member State of the European Union. The provisions regulate the employment of Polish workers delegated to work in other EU Member States by an employer who is located in Poland. The provisions of Chapter IIa apply to Polish and foreign employers who are subject to the Polish Labour Code. Polish employers can post their Polish workers to EU Member States under agreements with foreign entities. Polish and foreign employers based in Poland may send Polish workers to work in foreign branches (subsidiaries) located within the European Union. An employer includes, within the meaning of Article 67<sup>1</sup> § 1 LC, temporary employment agencies, arranging for the employment of foreign workers under fixed-term employment contracts (Art. 67<sup>1</sup> § 2 LC).

Article 67<sup>1</sup> § 1 LC concludes that an employer who posts Polish workers to work abroad in the EU is obliged to provide them – in terms of Article 67<sup>2</sup> § 1 LC – with conditions of employment no less favourable than those applicable in the Member States of the European Union, in which the employee is to render services. The meaning of Article 67<sup>2</sup> § 1 is not clear. This provision states that the minimum conditions of employment include: standards and working hours and rest periods, daily and weekly, the minimum amount of annual leave, a minimum wage for the work rendered, a minimum additional pay for overtime work, work health and safety standards, workers' rights related to parenthood and employment of young persons and non-discrimination in employment. It is not clear whether the employer posting Polish workers to work abroad in the EU should ensure workers the employment conditions that apply in the countries they are being sent to, in the matters referred to in points 1 to 7 § 1 of Article 67<sup>2</sup>, or whether the employer is obliged to ensure the posted workers the same employment conditions in matters related to standards and working hours, daily and weekly rest periods, health and safety at work, rights connected with parenthood and employment of young persons, equal treatment and

<sup>33</sup> *Journal of Laws* 2003, No 213, item 2081.

<sup>34</sup> *Journal of Laws* 2006, No 133, item 935.

non-discrimination, as well as meet the minimum requirements set out by the labour law in force in the EU Member State where the work is being rendered in matters concerning annual leave, minimum wage and additional payments for overtime work. The term “minimum conditions of employment”, used in Article 67<sup>2</sup> § 1, may relate to the scope of regulation of employment conditions or the level of regulation of these conditions or to one or the other. Pursuant to Article 3(1) PWD it should be accepted that the employer posting Polish workers must comply with the minimum labour standards in force in those countries on matters concerning leave, salary and additional payments for overtime work. In other respects, the employer is obliged to adhere to generally applicable employment standards in matters relating to maximum work periods and minimum daily and weekly rest periods, regulations and safety at work, measures to protect pregnant women, workers benefiting from the benefits of parental rights and of young workers as well as to the provisions prohibiting discrimination in employment. Minimum requirements relating to leave, minimum wage and minimum additional pay for overtime work shall not apply to employees engaged in initial assembly work or installation outside of the construction area for a period no longer than eight days (Article 67<sup>1</sup> § 2 LC).

Article 67<sup>3</sup> LC requires foreign employers located in countries outside the European Union to apply the conditions of employment that meet the standards of the place the work is being rendered, namely Poland.

Chapter IIa LC addresses the employer. Thus, workers from third countries who are posted to work in Poland are subject to legal protection, although they are not EU nationals. Employees who are citizens of European Union Member States posted to work in Poland by an employer located in a non-member European Union are also protected by provisions of the Polish labour law as applied *lex loci laboris*. The beneficiaries of the protective standards in force in Poland are therefore foreign workers – nationals of EU Member States, and other workers employed by employers located in the EU, who are posted to work in Poland.

## **6. The Posting of Workers Directive**

From the point of view of free movement of labour and of regulating labour markets by EU Member States, the provision of Article 3 PWD is of great importance. This provision lays down the obligation addressed to the authorities of the Member States to ensure that, regardless of what national system of substantive labour law is applied to the employment relationships of employees posted to work to the territory of another EU Member State by their employer, *the host state* shall guarantee the posted workers the terms and conditions of employment and the rates of pay applicable in the state where the work is performed, as specified in Article 3(1). Pursuant to that provision, less favourable provisions in the home state for employees posted to work to another Member State are replaced by more favourable provisions of host state substantive

labour law applicable, in other words, the law in force in the place where the work is carried out.<sup>35</sup> From a Polish perspective, Article 3 PWD introduced a new principle: an obligation to substitute *lex loci delegationis* with the provisions of *lex loci laboris*. The obligation to apply more favourable provisions of labour law applicable at the location where work is carried out may be introduced by statutory provisions established by the host country or by provisions of certain forms of collective agreements negotiated by the social partners in the host country. Provisions to be applied may also be introduced by arbitration awards or court decisions if applicable in the specific context of the labour law system in a given Member State. Provisions fixed by collective agreements or arbitration awards, etc., must have “universal application” as set out in Article 3(8) and (10) of the Directive.

The substantive scope of *lex loci laboris* to be applied in the place of *lex loci delegations*, if more favourable to posted workers, is specified in Article 3(1)(a–g) PWD. The list of “mandatory” topics is exhaustive. It covers the matters relating to maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination.

Article 3(2) of the Directive makes an exception as regards the application of host state provisions on minimum pay and minimum holidays if the period of the posting does not exceed eight days, save for activities in the field of building work listed in the Annex to the Directive. Furthermore, host Member States are permitted in certain other cases to not require the application of provisions on minimum pay and minimum holidays if the period of the posting does not exceed one month (Article 3(3) and (4)).

The Directive defines the basic legal terms: “posted worker” (Article 2(1)), “the Member State to whose territory the worker is posted” (Article 2(2)), “minimum rates of pay” (Article 3(1) *in fine*) and “collective agreements or arbitration awards which have been declared universally applicable” (Article 3(8)). The major objective of the Directive is to protect the employment of posted workers and local labour markets in host countries against social dumping. In the case law of the European Court of Justice, cases dealing with the application of the Directive have involved matters connected with the discrimination of employers making use of the free movement of services, now as guaranteed by the Services Directive,<sup>36</sup> and restrictions on economic freedom in the EU

<sup>35</sup> See U Liukkunen, *The Role of Mandatory Rules in International Labour Law – A Comparative Study in the Conflict of Laws* (Talentum 2004), 229 et seq.

<sup>36</sup> Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36. See F Hendrickx, ‘The Services Directive and Social Dumping: National Labour Law under Strain’, in U Neergaard, R

Member States in regard to entrepreneurs providing services on the common market. The European Court of Justice has recognized that the following legal and administrative requirements, prohibitions and restrictions established by the authorities of the host countries are inconsistent with the principle of economic freedom on the common market and the freedom to provide services by posting workers to the territory of another Member State:

- The obligation to obtain a permit to work in the host country by posted workers, citizens of the third countries legally employed in the posting country (*Webb*<sup>37</sup>) The ECJ ruled that employers availing themselves of the freedom to provide services in the EU enjoy the right to post to other EU Member State workers who are citizens of the third countries legally employed in the posting country, without the need to be granted a permit issued by an immigration office of the host country (*Rush Portuguesa*,<sup>38</sup> *Commission v. Luxembourg (non-member nationals)*,<sup>39</sup> *Commission v. Austria*<sup>40</sup>). Any requirements imposed by immigration offices of the host country, in particular the obligation to pay for a work permit for one's employees who are not citizens of the posting country or other EU Member State, were recognised by the ECJ as inconsistent with Community law as such requirements restrict free movement for the purpose of the provision of services (*Vander Elst*<sup>41</sup>).
- The obligation to establish a branch in the host country of the undertaking employing workers posted to work in another EU Member State, and the obligation on posted workers who are EU citizens to obtain a work permit (*Commission v. Belgium*;<sup>42</sup> *Commission v. Germany (procurement)*<sup>43</sup>), to obtain a residence visa (*Commission v. Germany (posting, non-EU nationals)*<sup>44</sup>), to

Nielsen, LM Roseberry (eds), *The Services Directive – Consequences for the Welfare State and the European Social Model* (DJØF Publishing 2008), 243.

<sup>37</sup> Case 279/80 *Criminal proceedings against Alfred John Webb*, [1981] ECR 3305, paras 13–14.

<sup>38</sup> Case C-113/89 *Rush Portuguesa L<sup>da</sup> v Office national d'immigration*, 27 March 1990, [1990] ECR I-1417.

<sup>39</sup> C-445/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2004] ECR I-10191.

<sup>40</sup> C-168/04 *Commission of the European Communities v Republic of Austria* [2006] ECR I-9041.

<sup>41</sup> Case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803.

<sup>42</sup> Case C-355/98 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I-1221.

<sup>43</sup> Case C-493/99 *Commission of the European Communities v Federal Republic of Germany* [2001] ECR I-8163.

<sup>44</sup> Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885.

establish a guarantee to secure the wage claims and payment of the corresponding social security contributions of workers (*Commission v. Italy*<sup>45</sup>), to keep records of employment in the official language of the host country (*Commission v. Germany* (twice)<sup>46</sup>) and to complete employees' records by providing the documents required in the host country (*Arblade*<sup>47</sup>).

- A separate category of cases involved the requirements concerning adjustment of the national norms of labour law applicable in the posting country to the norms of employment applicable in the host country. The ECJ recognised that it was a restriction on the freedom to provide services to impose an obligation on employers posting workers to pay social insurance contributions in the host country despite meeting the said requirement in the posting country (*Seco*,<sup>48</sup> *Guiot*,<sup>49</sup> *Arblade*).
- Furthermore, the ECJ recognised that the obligation of employers to pay posted workers in the amount of the minimum wage established by the authorities of the host country was consistent with international standards. However, the Court did not accept the practice according to which only employers subject to the provisions of the host country were entitled to be exempted from the obligation to apply the minimum rates of pay for work as being consistent with the principle of equal treatment of national and foreign employers who stood to benefit from the freedom to provide services (*Portugaia Construções*<sup>50</sup>). The obligation to pay posted workers according to the minimum pay calculated according to hourly rates without including in this remuneration the financial value of the benefits in kind and allowances (*Commission v. Germany (paid holidays fund)*) was directly imposed on employers who post workers by Directive 96/71/EC. Accordingly, the employer may not transfer this obligation to a subcontractor (*Wolff & Müller*<sup>51</sup>). The provisions setting forth the rates of

<sup>45</sup> Case C-279/00 *Commission of the European Communities v Italian Republic* [2002] ECR I-1425.

<sup>46</sup> Case C-244/04 (above n 44); Case C-490/04 *Commission of the European Communities v Federal Republic of Germany (paid holidays fund)* [2007] ECR I-6095.

<sup>47</sup> Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade, Arblade & Fils SARL, as the party civilly liable* (C-369/96), and *Bernard Leloup, Serge Leloup, Sofrage SARL, as the party civilly liable* (C-376/96) [1999] EFD I-8453.

<sup>48</sup> Joined cases 62 and 63/81 *Société anonyme de droit français Seco et Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223.

<sup>49</sup> Case C-292/94 *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* [2006] ECR I-1905.

<sup>50</sup> Case C-164/99 *Infringement proceedings against Portugaia Construções L<sup>da</sup>* [2002] ECR I-787.

<sup>51</sup> Case C-60/03 *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix* [2004] ECR I-9553.

minimal remuneration for work in the host country should have the character of universally applicable norms. Thus, the ECJ considered as restricting free movement for the purpose of providing services and as discriminatory actions aimed at forcing employers bound by collective agreements in the posting country to negotiate the terms and conditions of pay with the trade unions in the host country (*Laval, Viking*).<sup>52</sup> The actions of the local authorities of Lower Saxony in the Federal Republic of Germany were also considered as inconsistent with the principle of freedom to provide services. In that case, it was a requirement for participation in tendering for a contract for particular work to pay wages according to rates higher than the generally applicable minimum rates for workers of employers wishing to be awarded a public contract (*Rüffert*)<sup>53</sup>. The ECJ held that the provisions of Community law did not forbid trade unions (national and international) from initiating industrial actions justified by the protection of the overriding general interest, on condition that such actions were relevant to secure the relevant goal and that they did not go beyond the means needed to achieve this goal (*Viking*).

The PWD treats the provisions of labour law applicable in the state where work is carried out as norms establishing minimum standards of employment in the matters specified in Article 3. This means that the provisions of labour law governing employment relationships of workers posted to work in another EU Member State which are more favourable than the provisions applicable to the place where the work is carried out, are still binding. Pursuant to Article 3(7) of the Directive the Directive does not prevent application of terms and conditions of employment which are more favourable to posted workers. Assessing the legal situation of posted workers, the body supervising compliance with the provisions of labour law and courts vested with solving disputes related to workers' claims arising from employment relationships are obliged to compare terms and conditions of employment and/or pay established by the provisions applicable in the place where the work is carried out with the provisions chosen by the parties or applied on the basis of the connecting factor indicated by the applicable provisions of private international law and to apply the provisions more favourable to the posted worker. Article 3(7) PWD resolves the conflict of substantive labour law rules between *lex loci laboris* and *lex loci delegationis*.

Article 3 of the Directive specifies the set of standards that will have application. These are provisions of national substantive labour law applicable at the place where work is

<sup>52</sup> Cf ACL Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ" (2008) 37 *Industrial Law Journal* 126; J Malmberg and T Sigeman, "Industrial actions and EU economic freedoms. The autonomous collective bargaining model curtailed by the European Court of Justice" (2008) 45 *Common Market Law Review* 1115.

<sup>53</sup> Case C-346/06 *Rechtsanwalt Dr. Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989. Cf W Daübler, "Posted Workers and Freedom to Supply Services: Directive 96/71/EC and the German Courts", (2998) 27 *Industrial Law Journal*, 264.

carried out and are *ex lege* applicable to employment relationships with a foreign element, regardless of the will of the parties. These standards may be applied exclusively in case of a foreign element being present in employment relationships at the outset and governed by the provisions of substantive labour law other than the provisions applicable at the place where work is carried out. In the case of posted workers, the foreign element in the employment relationship is the place of temporary employment – an EU Member State other than the one where the worker is habitually employed. The said provision was laid down to protect local labour markets against social dumping. In the case of the employment of posted workers by employers who stand to benefit from the free movement within the EU for the purpose of the provision of services, Article 3 PWD is to counteract the lowering of costs arising from carrying out activities by means of paying the employed workers remuneration lower than the minimum rates applicable in the state where the work is carried out. Nevertheless, it should be remembered that the Directive may neither hinder nor prevent entrepreneurs from being granted the right to the free provision of services within the European Union. The necessary condition to apply its provisions is to establish by the authorities of the Member States clear and universally applicable requirements relating to employment on local labour markets.

Despite the fact that posted workers do not enter the labour market of the state where they are temporarily employed, because employers employing the workers are not permanently located on this market but temporarily provide services, the PWD requires that employers who stand to benefit from the freedom to provide services have full access to the information concerning the minimum national standards of employment and pay applicable in the state where posted workers are temporarily employed. Failure to fulfil this requirement prevents trade unions from initiating industrial action in order to protect the interests of workers employed permanently in the host country. Similarly, failure to fulfil this obligation impedes labour courts in adjudicating a possible difference between the minimum rate of pay applicable in the host country (*lex loci laboris*) and in the country where the posted workers are habitually employed. The judgment of the European Court of Justice in the *Laval* case and prior activities of European institutions overseeing the observance of international labour law norms proves that the authorities of the Scandinavian countries have difficulties in meeting the requirement in question in the matters relating to setting the minimum remuneration for work.<sup>54</sup> The character of employment relationships in Scandinavia consists in that the matters related to the establishing of terms and conditions of employment and pay for workers were essentially taken over by the social partners. As a result, the state authorities claim that they do not have any influence on the rates of pay for work. However, it is the authorities of Member States and not the social partners who retain responsibility towards European institutions monitoring and imposing sanctions for

<sup>54</sup> AM Świątkowski, *Charter of Social Rights of the Council of Europe. Studies in Employment Law and Social Policy* (Kluwer 2007), 92 et seq., 121 et seq.

failure to comply with international standards of the protection of employees' rights in employment relationships. The judgement of the ECJ in *Laval* proves that the place of work, terms and conditions of the employment relationship, and, in particular, the rate of pay constitute the values which are protected by legal measures governed by the provisions of collective labour law. Providing clear and universally applicable regulations governing the minimum terms and conditions of employment and remuneration in the host country is a necessary condition of that protection, which at the same time is the fundamental requirement imposed on the national legislator to ensure the application of the necessary provisions to posted workers. Article 3 PWD was laid down to protect posted workers. The lack of legal regulations on the terms and conditions of employment and remuneration of local workers is one reason why Article 3 may not be applied, while the terms and conditions of employment and remuneration of posted workers are governed by the provisions applicable in the posting country (*lex loci delegationis*). The Directive does not contain any provisions pertaining to terms and conditions of employment that are addressed to the authorities of the country posting workers. Article 3, which defines the legal mechanism of replacing less favourable applicable provisions of labour law by the provisions more favourable to posted workers, applicable in the host country, is an exceptional standard. As follows from the judgement of the ECJ in the *Laval* case, the rights of workers and trade unions in the host country are subject to restrictions. The scope within which their rights may be enjoyed is determined by the freedom to provide services, ensured by the Services Directive 2006/123/EC.

## **7. The Services Directive**

The goal of Directive 2006/123/EC, initially referred to in its first proposed version as “the Bolkestein Directive”,<sup>55</sup> is to reinforce the common market of services within the European Union. The Directive assumes the competitive character of services, which may be achieved by reducing labour costs, thus by reducing the number of workers and the amount of their remuneration. The Directive rests on three principles: (i) freedom of establishment; (ii) control of services within the European Union by the authorities of the Member State where the activity involving provision of services is registered (the country of origin); (iii) mutual assistance of the interested Member States monitoring the services provided within the European Union. These principles, in particular principle (ii) (country of origin), would allow business entities providing services to be excluded for a limited period from the control of the EU Member State where a given service is provided. Accordingly, the much referred to, albeit mythical “Polish plumber”, who carries out business within the scope of the provision of services in France, is excluded from the control of the competent French authorities. This concept

<sup>55</sup> See M Schlachter and P Fischinger, this volume Chapter 11.

of the freedom to provide services within the common market entails “free movement of labour law inspectors” within the EU, who monitor whether entrepreneurs comply with the provisions applicable in two Member States: the state where the registered seat of the undertaking is located and the state where the business involving the provision of given services is carried out. On account of these difficulties, Directive 2006/123/EC abandoned use of the principle of subjecting entrepreneurs to the control of the state where they have registered their service activity. The above principle would require harmonization of the rules on the registration of the exercised service activity within the common market. It would also require assurance of effective control over the activity exercised by the supervising bodies operating in the Member States where the entrepreneur’s registered seat is located.

In Poland, at the political level the Bolkestein draft directive was mostly met with approval. The principle upon which it rested and its provisions were seen as an opportunity to enhance market liberalization in the European Union which would contribute to the growth and development of the country. A directive like that would be the next essential element of integration, especially for the new Member States. The Bolkestein draft, however, was met with harsh criticism from all of the major trade unions (including NSZZ Solidarność and OPZZ). The trade unions mainly questioned the country of origin principle, pointing to a threat that employers would reduce costs and labour standards at the expense of workers and consumers. Polish trade union delegations participated in the demonstrations organized by the ETUC in Brussels. On the other hand, employers' and entrepreneurs' organizations (BCC, Lewiatan) strongly supported the Bolkestein draft, emphasising the essential importance of the country of origin principle and downplayed the risk of social dumping. Employers' organizations considered the existing regulations at European level, in particular the Posting of Workers Directive, as sufficient protection against possible social dumping.

The rejection of the Bolkestein draft’s main elements, in particular the country of origin principle, was received with great disappointment among Polish politicians and employers' organizations. On the other hand, despite substantial modifications the revised proposal did not change the critical position of trade unions towards the liberalization measures they considered crucial.

In Poland, the adopted Directive was implemented by the Act on providing services on the territory of Republic of Poland of 4 March 2010. The Act does not contain regulations concerning labour law and therefore labour law issues were not a fundamental part of the public consultation. As regards labour law the Act contains a reservation that its provisions do not exclude the application of labour law and social security regulations (Article 3 sec. 4). Neither employers nor trade unions have reported a need to amend existing labour law regulations in connection with the implementation of the Services Directive.

That Directive obliges the authorities of the Member States to impose on each entrepreneur providing services to set up a website giving information on the

requirements (“single point of contact”) which must be met in a given Member State in order to register a particular service activity.

Services constitute about 70 per cent of the economy of the common market. Thus, as a result of liberalization of the rules on carrying out service activities within the common market, a significant number of entrepreneurs (employers) will employ a significant number of employees and, at the same time, entrepreneurs employing cheaper labour will be preferred, at least in the initial stage of the activity. Hence, the Services Directive in the initial period of its application is favourable to entrepreneurs (employers) employing workers from the “newest” EU Member States.

#### **8. Polish collective labour law and freedom of services and establishment: follow-up of the *Laval* and *Viking* ECJ judgments**

The Polish statute regarding collective dispute resolution (adopted on 23 May 1991),<sup>56</sup> only recognizes a dispute as collective if it deals with the following: regulating working conditions, remuneration, social benefits or the rights and freedoms of workers as regards the right to associate in a trade union (Article 1(1)). Under Article 22 workers who do not have the right to strike may have their rights and interests protected by a trade union at another workplace and that trade union may organize a solidarity strike. The collective dispute resolution statute is applicable to workers, trade unions and employers obligated to comply with Polish labour law regulations. In accordance with the *lex loci laboris* principle this regulation usually applies to the place of work being carried out.

The situations exemplified in ECJ rulings, namely the *Laval* case, would not fall within the scope of the Polish collective dispute resolution statute, as the issues at hand do not constitute essential elements of a collective dispute within the meaning of the Act, in that they pertained to a relation of two foreign entities. However, the Swedish trade unions that carried out the collective action wanted to protect the interests of Swedish workers by preventing employers using foreign workers in Sweden from paying lower wages than those obtaining in Sweden. This type of collective action is permissible and in accordance with the Polish collective dispute resolution statute if it is to serve the purpose of protecting the interests of workers whose work agreements come under Polish labour law. The factual content of the *Laval* case proved that no local workers’ interests or rights were breached. In that regard the ECJ decision in *Laval* holds no relevance for the Polish legal order from the perspective of the Polish statute. A further point underpinning this is the existence of Article 4(2) of the statute and its social peace

<sup>56</sup> *Journal of Laws* 1991, No 55, item 236, with amendments. See AM Świątkowski, “Komentarz do ustawy o rozwiązywaniu sporów zbiorowych” (Commentary on the collective labour dispute resolution statute), in K Walczak, J Wratny (eds), *Zbiorowe prawo pracy* (Collective Labour Law) (CH Beck 2008).

clause. The protest action undertaken by Swedish trade unions may be regarded as a dispute relating to the content of the collective labour agreement entered into between the Latvian employer and Latvian trade unions, representing the interests of Latvian workers who are temporarily employed by their Latvian employer in Sweden. Swedish trade unions, which initiated the collective action, regarded such a collective agreement as unsatisfactory from the Swedish labour market point of view. The same could be applicable if the changes to such a collective agreement or levels of wages were raised concerning Latvian workers employed by a Latvian employer and applied to the demands defined by regulations concerning remuneration for Swedish workers. If the situation obtaining in *Laval* was to be adjudicated according to the Polish statute, a trade union that undertakes a collective action would be held to act in violation of Article 4(2) of the statute. This provision prohibits trade unions from entering into or organizing collective disputes concerning the implementation of changes to collective labour agreements. This prohibition obtains for the duration of the period of validity of the agreement. Thereby a trade union must refrain from collective action until the collective agreement concluded by another trade union with an employer conducting business in Sweden expires.

The ECJ's ruling in *Viking* is of no relevance to Poland's collective labour law. The call made by the ITF for national trade unions to refrain from dealing with the Finnish employer and block the ship "Rosella" has no relevance for the Polish Labour Code or for general negotiating practices with regard to collective agreements. Article 241<sup>2</sup> § 2 LC, which regulates the way in which collective labour agreements in Poland can be entered into, obliges the party seeking to initiate a collective agreement to notify all trade unions authorised to represent the interests of all workers falling within the scope of the prospective agreement. It is important to recall that collective agreements in Poland regulate working conditions and remuneration, as well as the rights and responsibilities of all workers, regardless of whether they are members of a trade union – it is enough that they are employees of an employer who is party to the collective agreement (Article 239 § 1 LC). A trade union or the employer may initiate a proposal to conclude a collective agreement. Carrying out negotiations on the said agreement is possible at the instigation of one of the specified parties. Polish labour law regulations do not obligate social partners to enter into collective agreements, however. The collective agreement regulations, which tend to benefit the workers' position more than other general labour laws do, entail that social partners (especially trade unions) are more inclined to initiate negotiations. Even if no initiative is taken or no agreement is concluded, however, laws are still in place to regulate the rights and obligations of workers and employers.

The context of individual work contracts may be regulated and in many cases is regulated by the Labour Code provisions, by other statutes or government legal acts. The parties to an individual work contract, the employer and the employee, fulfil and define the context of the rights and obligations within the contract, which are generally defined by labour law regulations. There are also rules on preventing biased,

unfavourable treatment of workers. Article 18 § 1 LC clearly states that in an individual work contract “the contractual clauses in the work agreement or in a different contract upon which a work relationship is established cannot be less beneficial to an employee than what is specified by labour law regulations”. Poland has a lower trade union density rate than the Nordic countries. Thus collective labour agreements are not as common in Poland. It is for this reason that calling upon a trade union to boycott an employer – by refusing to negotiate – would not result in the same legal consequences as were anticipated by trade unions in the *Viking* case, namely the impossibility of amending the context of individual work relations. Furthermore, Polish legislation makes it impossible to boycott a party that *has* initiated negotiations with a view to entering into a collective agreement. Article 241<sup>2</sup> § 3 LC makes it impossible for parties authorised to carry out negotiations and to enter into a collective labour agreement to refuse to negotiate. The national trade union would not be permitted to appeal to international trade union organizations, as was done in the *Viking* case. Instead, if the employer summoned the trade unions to negotiate for a collective labour agreement, they would be obliged to participate in such negotiations. In accordance with the requirements stipulated in Article 241<sup>3</sup> § 1 LC each negotiating party has the obligation to carry out such negotiations in good faith and with consideration for the legitimate interests of the other party. Should one of the parties fail to fulfil such an obligation during the negotiations, the other party has the right to withdraw from the negotiations. As trade unions in Poland are usually the initiators and the party with the higher degree of interest in wanting to enter into a collective agreement, these regulations are often taken advantage of by the employer in order to withdraw from negotiations requested by the trade unions.

The ECJ decision in the *Laval* case has had a strong impact in some Scandinavian countries in which governments left responsibility to maintain minimum wages to the social partners, who could conclude collective agreements which are not in accordance with the requirements of Article 3(8) PWD. This devolution to social partners is illustrated by the fact that state authorities do not maintain complete statistics on wage levels.<sup>57</sup> In this regard the situation in Poland is diametrically different from that in Scandinavia. State authorities define the general regulations concerning minimum wages, while the social partners are part of the decision-making process of establishing such levels. The statute which regulates minimum wages, of 10 October 2002, allows for the socio-economic Tripartite Commission, through negotiations, to establish minimum wages annually (Article 2(1)). The Ministry Council forms the basis upon which negotiations are carried out, which then pass to the Tripartite Commission (Article 2(1) point 1).

<sup>57</sup> This is revealed in the supervision by the European Committee of Social Rights of Article 4§1 on “fair remuneration” of the European Social Charter, in which Scandinavian states reported that they do not have statistical information regarding the lowest wages in the national labour markets. See, e.g., AM Świątkowski (above n 54) , 92 *et seq.*

Matters regulated by individual labour law, especially issues dealing with the establishment of minimum wages by state authorities, have not been affected by the ECJ decision in *Laval*. Nor has that decision resulted in any consequences for state authorities in establishing minimum wages or the legal mechanism by means of which minimum wages are established in Poland.

On the whole, the European Court of Justice's decisions in *Laval* and *Viking* have not caused a revolution in Polish labour law, be it collective or individual. The Polish legal system, albeit somewhat antiquated, is in accordance with the assumptions underlying those decisions. The situations at issue in the *Laval* and *Viking* cases could not have constituted the subject matter of a collective dispute in Poland under the 1991 Act on collective dispute resolution. There are no relations between an entrepreneur from an EU Member State availing itself of the freedom of movement within the common market to provide services in the territory of Poland and trade unions operating in Poland that would be subject to the regulation of Polish collective labour law. It is permitted by law that trade unions initiate collective action against an employer if such action is directly aimed at protecting the economic, professional and social interests and union freedoms of the groups of workers whose collective employment relations are subject to Polish collective labour law. Regarding the *Laval* case, no interests of the particular local (Swedish) groups of workers were directly infringed by the foreign (Latvian) entrepreneur. The entrepreneur was subject to no legal relations with local Swedish workers or with a trade union representing that group that would be governed by the national provisions of collective labour law, seen from a Polish perspective. The Polish Act on collective dispute resolution obliges the social partners to comply with the clause on social peace. Trade unions may not initiate any industrial action while the parties to the employment relationship are bound by a collective agreement. Furthermore, in Poland employment relations between employees and employers who have not entered into a collective agreement are governed by the universally applicable provisions of Polish labour law – the provisions of the Labour Code. Inter alia, the Minimum Wage Act of 10 October 2002 is applied.<sup>58</sup> Subjecting employment relationships to the provisions of Polish labour law would have made it impossible for a dispute such as those in the *Laval* and *Viking* cases to occur. It would not have been possible to raise an objection against the foreign entrepreneur for applying social dumping standards to the foreign employees in Poland by paying them a wage lower than the minimum. Every employer posting workers to work in Poland is obliged, pursuant to the PWD and its implementation into Polish law, to pay his employees a wage in accordance with generally applicable minimum rates of pay.

<sup>58</sup> *Journal of Laws* 2002, No. 200, item 1679.

### **9. *Rüffert* and *Commission v. Luxembourg* – the other half of the *Laval* Quartet**

The ECJ judgments in the *Laval* and *Viking* cases were supplemented by the Court's judgments some months later in the cases *Rüffert* and *Commission v. Luxembourg (public policy)*.<sup>59</sup> The judgment in *Rüffert* directly involved a Polish entrepreneur providing services in Germany. The Court held that the principle of freedom to provide services did not permit that a Polish subcontractor be obliged by the provisions of labour law applicable at the place where a service is provided to comply with local rates of remuneration as fixed by collective agreements, inasmuch as the pay rates in question were not laid down by statute or a generally binding collective agreement within the meaning of the Posting of Workers Directive.

The judgement in the *Commission v. Luxembourg* case clarifies that a Member State may not require that entrepreneurs providing services comply with any and all requirements specified in a collective agreement. The key in this regard is that the concept of "public policy" in Article 3(10) PWD must be interpreted strictly and as Community law concept.

In all the cases of the *Laval quartet* collective agreements play a crucial role. In effect, the ECJ requires that the authorities of Member States engage directly in matters relating to the regulation of terms and conditions of employment and pay. The universally applicable provisions in matters relating to labour law constitute legal norms established by the competent state authorities. The Polish Labour Code contains the principles on the basis of which its universally applicable provisions can be replaced by more favourable provisions in collective agreements, at the same time invalidating the provisions of collective agreements that are less favourable than the universally applicable provisions of labour law established by the state. Instead of the invalidated provisions, relevant regulations of labour law issued by the state apply; where no such regulations exist, the provisions are replaced with appropriate provisions of a non-discriminatory character (Article 18 LC). From this perspective, a system of labour law such as that of Poland is more compatible with conceptions relied on by the ECJ in the cases concerned.

### **10. Concluding remarks**

The Polish authorities implement a policy typical of nearly all new EU Member States. In principle, the Polish government takes the view that Polish provisions of labour law apply to the employment relationships of Polish employees employed by Polish employers, regardless of where the work is carried out. In employment contracts concluded for a fixed term with Polish employees posted to work abroad, Polish employers are obliged to fix the duration of the work abroad, the currency in which the employee will receive remuneration while working abroad, to inform them of the

<sup>59</sup> Case C-319/06 *Commission of the EC v Luxembourg* [2008] ECR I-4323.

benefits allocated due to the posting to work abroad and the terms of the employees' return to Poland (Articles 29<sup>1</sup> § 1-2 LC).

As an exception to the abovementioned rule, Chapter II a LC (Articles 67<sup>1</sup>–67<sup>4</sup>) lays down the terms of employment of foreign employees posted to work in Poland by employers with their seat in another EU Member State. Foreign employers are obliged to guarantee the posted employees terms of employment not less favourable than those resulting from the provisions of the Polish Labour Code. Provisions adopted by the Act of 14 November 2003 amending the Polish Labour Code concerning work remuneration came into force on the day of Poland's accession to the European Union (1 May 2004).<sup>60</sup> They may have practical application for employees posted from EU Member States where the applicable provisions of labour law are less favourable than the terms and conditions of employment and pay applicable under Polish law. However, the standards of European labour law governed by Directives which regulate the rules for the resolution of the conflict of national labour law provisions applicable in employment relationships with a foreign element, definitely favour labour law regulations applicable in the new Member States. The above tendency may be observed particularly in matters relating to the regulation of work remuneration. Each new Member State establishes generally applicable minimum rates of pay, from which the social partners may deviate for the benefit of workers covered by a collective agreement. Hence, the provisions laid down by the new Member States constitute a competitive alternative to the higher rates of pay and other terms and conditions of employment negotiated by parties to collective agreements.

In my opinion, the free movement of workers and entrepreneurs, along with a greater mobility from the “new” Member States may lead to competition between national systems of labour law between the “old” and the “new” EU/EEA Member States. The conflict of laws rules specified in the universally applicable provisions of private international labour law – that is, in the Rome I Regulation and Rome II Regulation<sup>61</sup> – give preference to the parties to individual and collective employment relations with a foreign element to choose the competitive national systems of labour law of the “new” EU Member States. In the present period of labour force management the free movement of workers, combined with non-administrative “soft” measures to regulate national labour markets by the authorities of the EU/EEA Member States, refraining from controlling employment or from requiring work permits, favour a competitive labour force.

<sup>60</sup> Cf above n 2.

<sup>61</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

## CHAPTER 8

# The Age of Innocence – and Beyond

*Kerstin Ahlberg*

Looking at things in the rear view mirror, it seems as if everything that decided Sweden's approach to the posting of workers and the Posting of Workers Directive<sup>1</sup> up to the *Laval* judgment<sup>2</sup> happened even before Sweden joined the European Union. It was the result of a political campaign aimed at convincing the Swedish people to vote in favour of EU membership, a line of policy that governments and policymakers within the trade union movement felt unable to abandon until they were forced to do so by the ECJ.

This is not to say that they wanted to do so, only that there were qualified warning already at an early stage – and not only from hardcore market liberals.

But let us not anticipate what happened.

### 1. Prior to the Posting of Workers Directive

#### 1.1 *The birth of Lex Britannia*

It started with the reactions to the Labour Court's judgment in the *Britannia* case (AD 1989/120). *Britannia* was a ship owned by a German shipping company but flying under a Cypriot flag. It had a Philippine crew, covered by a collective agreement between a Philippine trade union and a Philippine temporary work agency. When the *Britannia* docked at Gothenburg in July 1988, the Seamen's Union and the Transport Workers' Union started a boycott against it in order to force the captain to sign an ITF Special Agreement for the crew. In November 1989, the Labour Court decided that the industrial actions were unlawful according to §42 of the Co-determination Act (MBL),<sup>3</sup> as they were aimed at setting aside a collective agreement with another trade union by which the employer was already bound.

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>2</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] EFD I-11767.

<sup>3</sup> Lag (1976:580) om medbestämmande i arbetslivet.

The judgment caused the Swedish Trade Union Confederation (LO) and the Swedish Confederation for Professional Employees (TCO) to call for a revision of the MBL because of fears that the trade unions' possibilities to act in an international context would be seriously restricted. To be precise, they referred partly to the possibility to participate in international solidarity actions at the request of a trade union International, partly to the possibility to enforce Swedish collective agreements for foreign contract work in Sweden. Thus, even if the campaign for decent working conditions for crews on ships under flags of convenience was the immediate cause of calling for a revision of the rules on industrial action, the trade unions had also started to worry about the risk of social dumping by foreign service providers.<sup>4</sup>

The reason was that for a couple of years the government had been taking steps towards ever closer relations between Sweden and the European Economic Community (EEC), and the negotiations over the EEA Agreement were in progress. This had triggered a general debate on how this would affect working and employment conditions and industrial relations. Would it be possible to uphold the tradition of regulating working life through collective agreements? And would the incorporation of the *acquis communautaire* lead to lowered work environment standards and downward pressure on terms and conditions of employment? The debate was intensified after autumn 1990 when the government announced that it planned to apply for full membership of the EEC. It was obvious that it would not be an easy thing to convince the Swedish people to vote in favour of accession in the (consultative) referendum that had to come.<sup>5</sup>

In order to secure the trade unions' support for its plans, the government responded quickly to their demands for a revision of the rules on industrial action. The government worked out a memorandum with a proposal for a new provision which meant that, as an exception to §42 MBL, industrial action aiming at setting aside a collective agreement by which the employer is already bound would not be unlawful, provided it is a 'foreign' collective agreement.<sup>6</sup> When the proposal was circulated for consideration, a majority of the respondents recommended that it should not be realised. Several reacted against the word 'foreign' and argued that it was not in conformity with the prohibition on discrimination on grounds of nationality in EEC law. Also, some suggested that the exception to the main rule would not apply to any 'foreign' collective agreement, but only to those with terms and conditions below a certain standard. However, all three trade union confederations declared their support for the proposal.

In the Government Bill presented in March 1991 all the emphasis was on the necessity to guarantee the trade unions the possibility to ensure that all employers who are active in Sweden apply wages and other terms and conditions of employment corresponding to

<sup>4</sup> Prop. 1990/91:162 om vissa fredspliktsregler, Appendix 1, 22.

<sup>5</sup> B Bylund, 'Britanniadomen – ett juridiskt och politiskt dilemma' in R Eklund (eds) *Festskrift till Hans Stark*. Arbetsrättsliga föreningens skrifter volym V (Liber Förlag 2001) at 35.

<sup>6</sup> Prop. 1990/91:162 (above n 4), Appendix 1, 20.

what is customary here. International solidarity actions came only second. On one point, the government had listened to the critique expressed during the consultation round. It agreed that it would not be appropriate to speak of ‘foreign’ collective agreements. Instead, the main rule in §42 – that industrial action aimed at setting aside an existing collective agreement is unlawful – would apply only when action is taken by reason of employment relations falling directly within the scope of MBL. The idea was that employment relations that do not at all fall within the scope of MBL cannot be protected against industrial action by the same Act.<sup>7</sup> Drawn up like this, the provision would not entail any discrimination on grounds of nationality, according to the government, which stated that it attached the greatest importance to formulating national rules in a way that would be compatible with EEC law and would not obstruct the integration efforts.<sup>8</sup> However, it did not agree with the second point of critique. Thus, the new rule would apply irrespective of the standard of the terms and conditions in the collective agreement in question. The only decisive circumstance would be the employment relation’s degree of connection to Sweden.

The Parliament rapidly pushed the Bill through, and the amended legislation came into force on 1 July 1991. It was called *Lex Britannia* and it in practice allowed industrial action against foreign employers in situations in which a Swedish employer is protected against such, and it would later become known all over Europe through the *Laval* case.

### *1.2 Deliberations on the eve of EU accession*

The very same day that *Lex Britannia* came into force, the Swedish prime minister signed the application for EEC membership. Less than two months later, there was a change of government from social democrat to non-socialist. The new government was subject to heavy lobbying from organizations that wanted *Lex Britannia* to be repealed.<sup>9</sup> In May 1992, Sweden signed the EEA Agreement. In preparation for its coming into force on 1 January 1994, the government commissioned a special investigator, Sven-Hugo Ryman, to analyse issues related to social dumping and *Lex Britannia*, especially the question of whether *Lex Britannia* was in conformity with Sweden’s international commitments. The latter referred to obligations that would follow from the EEA Agreement but also to obligations stemming from ILO Conventions. For the Swedish employers had also complained to the ILO that *Lex Britannia* infringed the Conventions on freedom of association and protection of the right to organise (No. 87), the right to collective bargaining (No. 98) and on minimum standards in merchant shipping (No. 147).<sup>10</sup>

<sup>7</sup> Prop. 1990/91:162 (above n 4), 5.

<sup>8</sup> *Ibid.*, 11 f.

<sup>9</sup> Bylund (above n 5), p.38.

<sup>10</sup> In the following, I will not treat the part dealing with ILO issues. Suffice it to say that the investigator found *Lex Britannia* to be in conformity with the Conventions.

In parallel with Mr Ryman's inquiry, important developments that influenced the Swedish debate took place at European level. The Maastricht Treaty came into force on 1 November 1993. With the Social Protocol to the Maastricht Treaty, eleven of the twelve Member States (the United Kingdom had opted out) were explicitly given competence to adopt EU labour legislation.

In Denmark, it had taken two referendums before the new Treaty could be ratified. One reason for concern among the Danes was a fear that Denmark, which had a tradition of regulating the labour market almost exclusively through collective agreements, would be forced to abandon this tradition if the EU started to legislate in the labour law field. Judging from ECJ case law so far, Danish collective agreements would not have sufficient coverage for implementation of Directives. Similar concerns were occasioned by the first draft for a directive on posting of workers, which only acknowledged *erga omnes* collective agreements as instruments for regulating pay and other terms and conditions that could be extended to posted workers. Thus the debate was the same in Denmark as in Sweden.

In order to secure the Danish trade unions' support in the second referendum on the Maastricht Treaty, the Commissioner responsible for social policy and labour market, Pádraig Flynn, wrote a letter to the Danish Trade Union Confederation (LO) and also visited Denmark. In his letter, Flynn foresaw that the Social Protocol would open up new prospects for implementation of EU legislation through Danish model collective agreements. He also declared that, as far as he was concerned, he would include collective agreements as implementation instruments in all new directives. As regards the Posting Directive, the Commission would present an amended draft, in which it would add what is today the second indent in Article 3(8). And he assured that the Directive would have no impact whatsoever on the Member States' legislation on industrial action, or the social partners' practices in this respect. The only decisive circumstance was that foreign employers are to be treated equal to national employers in a similar position.

The inquiry on the Swedish Lex Britannia was finalised in December 1993.<sup>11</sup> The report contains a penetrating and from many aspects competent analysis of EEA/Community law. However, the investigator Sven-Hugo Ryman also attached much importance to what has happened in Denmark, and the Commissioner's reassurances to appease the Danes. It appears as if this is the reason why his conclusion on the crucial point is wrong. Mr Ryman concluded that from a strictly formal point of view one might arrive at the conclusion that Lex Britannia discriminates against foreign employers. The possibility that the ECJ or the EFTA court would do so could be ruled out. However, as he saw it, it is more likely that Lex Britannia *as such* will be deemed not to be in conflict with the prohibition on discrimination. Thus, there was no need to

<sup>11</sup> Departementsserien (Ds) 1994:13 Lex Britannia.

change the legislation on the ground that it is contrary to Sweden's international commitments.

But Ryman did not stop there. His 'acquittal' of Lex Britannia was conditional. It was linked to the assumption that the Swedish Labour Court would not approve of any industrial action against foreign service providers. In fact, he anticipated what the ECJ would do fourteen years later in the Laval case. Ryman noted that the effects of the legislation are dependent primarily on what standards the trade union wants – and is allowed – to enforce through industrial action and that many Swedish collective agreements include conditions that would restrict the freedom of foreign service providers to an extent that goes beyond what is justified by the legitimate aim of preventing social dumping. Thus, if a trade union tries to enforce this type of clause against a foreign enterprise, the Labour Court should deem the industrial action unlawful with application of the Articles on non-discrimination and free movement of services (4 and 36) in the EEA Agreement, Articles that have direct horizontal effect. If case law developed in that direction, no decisive objections could be raised against Lex Britannia, Ryman argued.

Nevertheless, he had an additional proposition. As a practical solution that would make life easier for foreign employers, he suggested that an impartial mediation body should be set up to which they could turn in case they face disproportionate claims. This body would help the parties to come to a reasonable agreement, for example, a modified version of the sectoral agreement. Here, Ryman mentioned the Norwegian Tariffnemnda as a model. Finally, he also addressed the trade unions and underlines that it is important that they prepare for increasing activity on the part of foreign enterprises by working out adequate forms for application agreements or other collective agreements.

Strange to say, the Summary of the report simply stated that there was no need to change Lex Britannia. Ryman's conditions for that conclusion were not mentioned. And the proposal that a special mediation body be set up was never realized.

Sweden's accession negotiations were proceeding. However, the opinion polls indicated that it would not be an easy match to secure a 'yes' to EU membership. The Swedish Government, too, thus sought help from Commissioner Flynn. The Minister of Labour, Börje Hörnlund, wrote a letter in which he referred to the dialogue that Flynn had had with the social partners in Denmark and concluded 'I would greatly appreciate it if you could develop your views on what the implications of the Maastricht Treaty would be for the Swedish system of determining conditions of work in collective agreements between the social partners, and for Swedish collective agreements as a means of implementing EC directives.'<sup>12</sup>

Commissioner Flynn answered in the following terms:

<sup>12</sup> The full text of the correspondence is published as an appendix to the Government bill Prop. 1994/95:19 Sveriges medlemskap i Europeiska unionen.

Firstly, the Maastricht Social Protocol contains in Article 2.6 an explicit statement that this part of the Treaty shall not apply to ‘pay, the right of association, the right to strike or the right to impose lock out’. This is a very important general principle which I think should allay concerns of the Social Partners. It is actually a principle already found in the ‘Social Charter’ of 1989, and therefore carries considerable weight also in relation to the present Treaty.

Secondly, it is important to note that the Maastricht Protocol is closely modelled on the existing Swedish practice in that it opens the possibility for agreements between the Social Partners at European level to take the place of legislation.

[...]

Thirdly, it goes without saying that, if directives nevertheless are adopted, then duly notified collective agreements at national level would be one way in which to implement them. And Sweden would most probably choose this way of implementation as allowed for in Article 2(4). Non-compliance by firms or individuals could in this case be solved notably by recourse to the normal procedures in effect on the Swedish labour market.

[...]

These three points taken together provide you with full assurances that the Maastricht Protocol would in no way require a change of existing Swedish practice in labour market matters. Quite the contrary: the Swedish labour market organizations may wish to become more active at the European level in order to promote their concept of harmonious labour market relations.

This correspondence was presented to the public by the government as a guarantee that the Swedish system for regulating working conditions through collective agreements would not be affected. The trade union confederations, who were in favour of EU accession, sided with the government. LO expressed its satisfaction with the outcome of the negotiations which satisfied vital trade union interests and acknowledged Swedish labour law traditions. To the TCO it was especially satisfactory that the question of the position of the collective agreements had come to a positive result. The research institute Arbetslivscentrum agreed.<sup>13</sup> The correspondence was entered in the minutes of the Government Conference preparing the enlargement, and Sweden added a Declaration to the Final Act in which it stated that it had received affirmations regarding existing practice as regards labour market issues and particularly the system for regulating working conditions through collective agreements.<sup>14</sup>

Some voices in the public debate emphasised that this so-called guarantee had several loopholes, but it was enough to convince a sufficient number. The referendum took place on 13 November 1994: 52.1 per cent voted ‘yes’, 46.9 per cent voted ‘no’ and the rest of the votes were blank. The Parliament ratified the Accession Treaty and on 1 January 1995 Sweden became a member of the European Union.

### *1.3 Bluff, ignorance or naivety?*

Already when the memorandum on the projected Lex Britannia was circulated for consideration, doubts were raised on several hands over its conformity with EU law.<sup>15</sup>

<sup>13</sup> Prop. 1994/95:19 (above n 12), 228.

<sup>14</sup> *Ibid.*, Bilaga [Appendix] 11.

<sup>15</sup> Bo Bylund, Under-Secretary of State in the Ministry of Labour before the change of government in 1991 and the person responsible for elaborating the Bill on Lex Britannia gives an interesting insight into the conflicts within the Government Offices, where the Ministry of Foreign Trade as well as the Ministry of Justice were opposed to the draft in the

Even more important, Sven-Hugo Ryman's inquiry on the eve of EU accession is full of caveats. Certainly, there were lawyers and policymakers in the Government Offices as well as on the trade union side who were well aware that this was no guarantee in the true sense of the word. Pdraig Flynn was just a Commission official, whose words could not bind the EU institutions. Also, the Declaration to the Final Act was merely a unilateral declaration made by the Swedish government. Equally important in light of the *Laval* judgment is the material contents of Flynn's dialogue with the Danish trade unions and with the Swedish Minister. When he endorses the Nordic model, it is obvious that he focuses primarily on the issue of private law collective agreements – in contrast to legislation – as instruments for labour market regulation and implementation of EU Directives. He is probably not even aware of the details of the law on industrial action in Sweden and Denmark.

And yet two governments of different political colours as well as the trade union confederations maintained that everything could go on as before after EU accession. How can one explain this? Of course, one cannot completely disregard the suspicion that some did in fact speak against their own better judgement in order to convince the hesitant to vote in favour of accession. However, it may well be that most of them really believed in what they said. That they were misled by a strong political wish combined with over-confidence in the political development towards a more 'social' Europe, with an institutional role for the social partners, that had come with the Social Protocol. With two more Nordic member states in addition to Denmark, the development was likely to continue in the direction of the tangent. An expression of naivety no doubt, but not necessarily dishonest. But it would cause trouble within the trade union movement in the years to come.

Already in connection with Sven-Hugo Ryman's inquiry on Lex Britannia, the blue-collar confederation LO had admitted that collective agreements that imposed heavier burdens on foreign companies than on national employers would be in conflict with the prohibition on discrimination on grounds of nationality in the Treaty of Rome. However, according to LO, this did not mean that the Swedish rules on industrial action were unlawful, only that the collective agreement in question could be declared null and void with reference to EU law. On the other hand, LO continued, Swedish trade unions

Memorandum [KA's translation]: 'When I listened to the officials from the Ministry of Foreign Trade it was like listening to the prosecutor of the EC Commission before the European Court of Justice. It was a matter of interpreting the rules formally to the last comma and, *in dubio*, only solutions completely in conformity with EU law would be accepted. As usual, we Swedes should be top of the class in incorporating international rules to the letter. And is it not what has happened? But rules are seldom that clear, and the scope of interpretation is often wider than one believes. – Therefore, I feel that our country should stand up for and develop our legal traditions within the framework of our international commitments. Our labour law model must be defended as far as possible. Maybe such an approach may occasionally lead to a lawsuit before the ECJ, but one has to put up with that if the question is important.' See Bylund (above n 5), 36.

had never accepted that individuals or enterprises are discriminated against on the grounds of nationality. They defended Lex Britannia precisely because it gave them the opportunity to ensure that all companies that are active in Sweden compete under the same conditions and that all employees who work there were treated equally. Therefore, LO had declared, it was a matter of course that the right to take industrial action would not be used for discriminatory purposes.<sup>16</sup>

However, at the same time, Ryman had noticed that there was room for different perceptions within the trade union movement of what was meant by equal treatment. For example, the Building Workers' Union had persistently required that foreign companies pay contributions to all collectively agreed insurance, a practice that had caused complaints from Norwegian building enterprises.<sup>17</sup> Thus, a couple of LO's affiliates would interpret the assertions that the Swedish model would not be affected very literally, and the advocates of EU membership could not very well start to shout 'April fool' at them after 1 January 1995. They had to uphold its old position in the outer world and try to influence negotiators and ombudsmen – to many of whom arguments concerning EU law were all Greek – on the quiet.

## **2. Initial implementation of the Posting of Workers Directive**

When the time for implementation of the Posting of Workers Directive came, there had again been a change of government and the Social Democrats were in power.

The implementation was prepared by a public inquiry. In its terms of reference the government underlined that it was important that the Directive was implemented in a way that adhered as far as possible to Swedish labour market traditions. Thus, it must fully consider the special position that the social partners and the collective agreements have.<sup>18</sup> With this, the government had in view, among other things, that collective agreements are the only instrument, with the exception of individual employment contracts, for the regulation of pay. Sweden has no statutory minimum wage and no system for extending the binding force of collective agreements. They are purely private (contract) law instruments, binding only on the agreement's signatories and their members.

### *2.1 Emphasis on prevention of social dumping*

In its report the Inquiry stated that the Directive has two aims: to facilitate the freedom of establishment and the free movement of services and to prevent social dumping.<sup>19</sup>

<sup>16</sup> Ds 1994:13 (above n 11), 257.

<sup>17</sup> *Ibid.*, 337.

<sup>18</sup> Kommittédirektiv (Dir.) 1997:84 Genomförande av EG:s direktiv om utstationering av arbetstagare.

<sup>19</sup> Statens offentliga utredningar (SOU) 1998:52 Utstationering av arbetstagare, 9.

Obviously, it did not see the protection of posted workers as an aim in itself. Also, even if the report mentioned prevention of social dumping in the second place, it actually put the main emphasis on this aim.

Nothing in the report indicated that the Inquiry even considered that the Directive might be a maximum Directive. It is obvious that it did not foresee any problems with obliging foreign service providers to apply more favourable conditions than the minimum, notably the standard terms and conditions of Swedish collective agreements. Thus, in addition to standard rates of pay, a foreign service provider could also be bound to apply Swedish standards on a number of matters that are not included in the 'hard nucleus'.

In its judgment in the *Laval* case several years later, the Court of Justice of the European Union would state:

It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. *It is also not disputed* that the collective agreements have not been declared universally applicable, *and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.*<sup>20</sup> (Emphasis added)

It may be a matter of words, but this is not how it is understood from a Swedish perspective. The Inquiry gave due consideration to the interpretation of the second and third subparagraphs of Article 3(8) of the Directive, which were said to have been specifically developed to fit the Swedish and the Danish systems. Its conclusion was that Sweden could use this provision to allow the social partners to use their normal means, including industrial action as authorised by *Lex Britannia*, to get posting employers to sign Swedish collective agreements, to the same extent as comparable national enterprises competing on the same market do, without specifically mentioning this in the legislation implementing the Directive.<sup>21</sup> And there was complete consensus between the social partners that Sweden should not introduce either a system for making collective agreements universally applicable or a statutory minimum wage. Thus, the proposed Posting of Workers Act<sup>22</sup> would not put any obligations whatsoever as regards pay or other terms and conditions regulated in collective agreements on the foreign employer.

Among the organisations and institutions to which the report of the Inquiry was circulated for consideration, there was massive support for this solution.<sup>23</sup> There was only one exception. Like the majority, the research institute Arbetslivsinstitutet supported the idea that foreign service providers should be obliged to apply Swedish

<sup>20</sup> C-341/05 *Laval* (above n 2) para 67.

<sup>21</sup> SOU 1998:52 (above n 20), 84 *et seq.*

<sup>22</sup> Lag (1999:678) om utstationering av arbetstagare.

<sup>23</sup> Remissynpunkter i anledning av betänkandet Utstationering av arbetstagare (SOU 1998:52), Memorandum from the Ministry of Labour 6 October 1998.

collective agreements, but nevertheless, for two reasons, it advocated that this should be laid down in the Posting of Workers Act.

First it pointed out that even if the main reason for the coming into being of the Directive was to protect workers in the host state from foreign low wage competition, its formulation meant that the focus had shifted to guaranteeing the foreign workers terms and conditions on a par with workers in the host state. And, according to Arbetslivsinstitutet, the proposal of the Inquiry was less apt to legally ensure foreign workers terms and conditions of employment of a Swedish standard. The reason was that, according to Swedish law, workers who are not members of the signatory trade union cannot themselves invoke the collective agreement as such. Also, if the employer has never applied the collective agreement, it is unlikely that it will be deemed to have normative effect on the individual employment contract of the non-unionised worker. The consequence would be that in many cases foreign workers would lack legal means to secure terms and conditions according to Swedish collective agreements. Secondly, Arbetslivsinstitutet questioned whether Lex Britannia was in conformity with EU law. However, if the Posting of Workers Act would cover terms and conditions regulated in collective agreements as well, both concerns would be met, in the view of Arbetslivsinstitutet. The rights of the posted workers would be guaranteed and the trade unions would not have to rely on Lex Britannia to force the employers to apply the collective agreement.

The private employers' confederation SAF, whose successor Confederation of Swedish Enterprise would later support *Laval* before the Labour Court and the ECJ, agreed with the Inquiry's proposal that terms and conditions regulated in collective agreements should not be extended to posted workers through legislation. According to SAF, this approach was 'natural'. However, it took the opportunity to iterate its opinion that it was very uncertain whether Lex Britannia was consistent with EU law and that it should be repealed.<sup>24</sup> SAF also argued that it must be clearly stated that foreign employers must not be forced to pay double costs, for example for paid annual holiday, when they post workers to Sweden. This problem should not be left to the courts.

However, the government was not swayed by any of these points of view.<sup>25</sup> It admitted that a non-unionised worker – irrespective of nationality – cannot require that his or her employer applies the terms and conditions in the collective agreement.<sup>26</sup> On the other hand, it pointed out, an employer who is bound by a collective agreement is obliged to apply at least its minimum conditions to non-unionised workers as well. This does not follow from the legislation but is an obligation *towards the trade union*, implied in the collective agreement itself.<sup>27</sup> Also, the government added, the foreign worker has a

<sup>24</sup> *Ibid.*

<sup>25</sup> Prop. 1998/99:90 Utstationering av arbetstagare.

<sup>26</sup> *Ibid.*, 27 *et seq.*

<sup>27</sup> This practice, that obviously seems paradoxical – if not inconceivable – for observers from countries with other industrial relations traditions, is based on the trade unions' conviction

possibility to join the Swedish trade union. Since no Swedish employers are obliged by law to apply collective agreements, it would be very tricky to formulate a statutory provision that forced foreign employers to do so without discriminating against them on grounds of nationality.<sup>28</sup> Therefore, the Government concluded, there was hardly a need for other means than those already being used by the social partners to prevent social dumping, and the mechanisms and procedures at the disposal of the different actors and guaranteed in legislation would lead to a satisfactory realisation of the minimum conditions laid down in collective agreements. As regards *Lex Britannia* it referred to Sven-Hugo Ryman's conclusion six years earlier: most likely, there is no need to change the legislation on the ground that it is contrary to Sweden's international commitments.<sup>29</sup> Neither did the government see a need to specify that posting employers must not be forced to pay double costs. It simply stated that if a foreign employer is required to pay double costs, it can go to court, in which case the court has to take ECJ case law into account.<sup>30</sup>

## 2.2 *Facilitation of free movement*

Thus, the original Posting of Workers Act included only one indication that foreign employers *might* have to apply Swedish collective agreements. It was a provision that instructed the Work Environment Authority, which was designated as the liaison office, to refer to the social partners for information about what collective agreements might be applicable. This was meant to satisfy the foreign employers' need to be able to foresee what costs the posting would involve.<sup>31</sup> It is symptomatic that neither the Inquiry report nor the Government Bill mentions the posted workers' interest with regard to being informed of the terms and conditions that may become applicable to them.

When it comes to terms and conditions regulated in collective agreements, the only task of the Authority was to forward information provided by the social partners. For example, it would not have competence to interpret collective agreements and inform on how they should be applied in case the interpretation was unclear.

## 2.3 *Other issues*

During the legislative process, very little attention was paid to 'technical' issues that seem important in retrospect, such as the scope of application of the Act or control and enforcement of its provisions. With very few exceptions, it appears that the relevant actors saw this as unproblematic.

that it is in their own interest, since it prevents under-cutting of the collective agreement. Employers who don't respect this obligation are regularly faced with claims from trade unions. In particular, the Building Workers' Union closely monitors what the employers pay their workers.

<sup>28</sup> Prop. 1998/99:90 (above n 26), 27.

<sup>29</sup> *Ibid.*, 28.

<sup>30</sup> Prop. 1998/99:90 (above n 26), 29.

<sup>31</sup> SOU 1998:52 (above n 20) 89; Prop. 1998/99:90 (above n 26), 28.

For example, the definitions of the concepts ‘posting’ and ‘posted worker’ in the Posting of Workers Act were almost a blueprint of the text of the Directive and did not contain any further specification or presumption of what is meant by a limited period or the state in which the worker normally works. The Government bill refers to the Rome Convention and its concepts ‘the country in which the employee habitually carries out his work’ and ‘temporarily employed’ and states that it will be necessary for the employer to consider before each posting whether the Posting of Workers Act will be applicable, or if the employment contracts are so closely connected with Sweden that Swedish labour law will be applicable in its entirety from day one.<sup>32</sup>

Also, information, declaration, notification or registration requirements for posting service providers were not even considered. Referring to their experience from the 1980s and 1990s, the Building Workers’ Union and the Construction Federation assured the Inquiry that they were well informed concerning both which foreign companies were active in Sweden and under what conditions they pursued their activities. Thus, the social partners had good control and were able to ensure that the collective agreements were applied.

#### 2.4 *An age of innocence*

To sum up: Again, the government, the Parliament and the social partners had almost unanimously concluded that, in principle, everything could go on as before. The ‘Swedish model’ would not be affected. The fact that EU law might not permit Member States to extend every condition in a collective agreement to posted workers was dealt with only hastily and did not occasion any legislative measures.

It is not hard to understand why everyone took for granted that the Directive was a minimum Directive in the usual sense of the word. Other Member States too made the same interpretation until the ECJ told the world that this was a mistake. But how come nobody listened to the qualified dissenting voices on *Lex Britannia*?

The answer may lie in two new questions: Had it been possible for the politicians to even think of deviating from the line of policy that they had pursued five years earlier when they wanted to convince Sweden’s citizens to vote in favour of EU membership? And why would the social partners suddenly start listening to the legal experts, when the politicians gave them the message they wanted to hear?

More surprising, though, is the social partners’ starry-eyed image of how *reality* would remain the same as it had always been – as if Sweden were a Garden of Eden that would remain unruffled, irrespective of the forces of the Internal Market. However, this may explain why they did not pay much attention to the ‘technical’ issues mentioned above. If they were confident that all foreign companies would apply the same collective agreements as Swedish employers do, it was not necessary to worry about the scope of application of the Posting of Workers Act. And if they continue to be well informed

<sup>32</sup> Prop. 1998/99:90 (above n 26), 17 *et seq.*

concerning which foreign companies are active in Sweden, there is no need for administrative provisions on notification or registration.

### **3. From implementation to Laval**

#### *3.1 Most employers sign*

However, in the years following the implementation of the Directive, the social partners' predictions came true on one point. Most posting employers did undertake to apply Swedish collective agreements. Some of them were bound by temporarily joining Swedish employers' organisations, but the majority signed so-called application agreements directly with the trade unions, engaging themselves to apply the central agreement for the sector in question. Also, the vast majority did so without the question of industrial action even arising.<sup>33</sup> Thus even if legal experts had long questioned whether *Lex Britannia* was in conformity with EU law, industrial action in connection with the posting of workers was not a big issue in practice before Laval.

Certainly, the mere existence of the prospect of industrial action may have contributed to this. However, a more important explanation seems to be that if the receiver of the service or the main contractor is a Swedish employer bound by the relevant collective agreement, it is normally easier for this employer if all subcontractors are bound by a collective agreement as well. This is due to a mechanism in the MBL: the trade union's right to negotiate and eventually put a veto on the engagement of a certain contractor. It works as follows: When an employer plans to engage someone to work without that person being an employee, the employer must first take up negotiations with the trade union, provided that they are both bound by a collective agreement for the work in question. During the negotiation the employer has to give the trade union all kinds of information that it may need in order to decide whether the contractor is an employer that fulfils its duties towards its employees and society. If the realisation of the employer's plan to engage the contractor would entail violations of legislation or of a collective agreement by which either the employer or the contractor is bound, the trade union has the right to put a veto on it. In sectors in which subcontracting is frequent, such as the building sector, the social partners have agreed on simplified procedures that may be used as an alternative to the statutory procedure. The individual employer makes up a list of contractors that it may want to engage and hands it over to the trade union. As long as the trade union does not object, the employer is free to engage any of these contractors without having to negotiate each time. This possibility to free itself of the duty to negotiate gives the employer an incentive to select reliable contractors – and contractors who are bound by collective agreements. It is true that the trade union cannot put a veto on a contractor only because it is not bound by a collective agreement, but it will not be accepted on the list (unless it is a genuinely self-employed contractor

<sup>33</sup> Statistics from the National Mediation Office's annual reports for 2003–2009.

without employees). Thus, if the employer wants to engage a contractor that has no collective agreement, it has to follow the more cumbersome procedure laid down in the MBL. As a consequence, it will encourage all subcontractors to join the employers' organisation or to sign an accession agreement. According to the collective agreements for the building sector, the receiver of the service or the main contractor is also obliged to report all new workplaces to the trade union. This enables it to start negotiations on application agreements with all employers that are not already bound.

### *3.2 Problems with control*

However, if the social partners were right that, on the whole, foreign service providers would agree to enter into Swedish collective agreements, they had overestimated their power from another aspect. In line with the consequent private law approach, there is no public monitoring of compliance and enforcement of collective agreements in Sweden. This is a matter exclusively for the social partners. Now they realised that it could be difficult to control whether foreign employers actually gave their workers terms and conditions in accordance with the collective agreements, when the posted workers were not members of the Swedish trade union. In some sectors, such as the building sector and the transport sector, the collective agreement itself obliged the employers to provide the trade union with information on individual workers' wages, irrespective of whether they were organised or not. But in other sectors employers had no such contractual obligation to inform the trade union and there was no statutory provision that the trade union could rely on.

Thus, in connection with EU enlargement on 1 May 2004, the government and the Parliament agreed that it was of vital importance to ensure that the monitoring of compliance with collective agreements was effective.<sup>34</sup> In June, the government set up an inquiry tasked with proposing rules allowing trade unions to monitor compliance with collective agreements, even when it had no members in the workplace.<sup>35</sup>

### *3.3 Contents of collective agreements called into question*

From the perspective of the posting employers, practice in Sweden confronted them with two types of problems.

First, the information provided by the Swedish liaison office was poor, to say the least.

Second, when the employers had found out what collective agreements they were supposed to apply, some of them objected to their contents, even if they were not in principle opposed to being bound by a collective agreement. First and foremost, this concerned the obligation to pay contributions to all the insurance regulated in the

<sup>34</sup> Regeringens skrivelse 2003/04:119; Socialförsäkringsutskottets betänkande 2003/04:SfU15.

<sup>35</sup> Dir. 2004/98 Bättre möjligheter till bevakning av kollektivavtal.

collective agreements for the building sector, which they asserted would impose a double burden on them.<sup>36</sup>

In June 2004, a negotiator from the Building Workers Union contacted the Latvian company Laval un Partneri Ltd in order to induce it to enter into a collective agreement for work at a building site in the city of Vaxholm. The company did not accept the contents of the agreement, and the dispute ending with the *Laval* judgment had started. In December, Laval instituted proceedings before the Labour Court.

#### *3.4 Social partners try to resume control*

The prospect that the Labour Court would refer the case to the ECJ for a preliminary ruling confronted the Swedish trade union movement with a dilemma. On the one hand, all three confederations definitely wanted to defend the Swedish model as such. On the other hand, some suspected that *Laval* was not the ideal case to be tried before the ECJ, because of the contents of the building workers' collective agreement and the trade union's demand that Laval should accept it in its entirety. Outwardly, the blue-collar confederation LO ardently defended the actions of the Building Workers Union. At the same time, it took practical measures that seemed to indicate that it was not completely satisfied with how the trade union had played its cards.

Thus, on 30 August 2005, LO and the Confederation of Swedish Enterprise reached an agreement with a recommendation to their affiliates to adapt their collective agreements to the situation of foreign employers that become temporary members of Swedish employers organisations. The day after, the Confederation of Swedish Enterprise and the bargaining cartel for salaried employees, PTK, agreed on a similar recommendation. The recommendation specifically pointed to the need to adapt the application of the rules on pay, working time and paid annual holidays to employers with temporary activity in Sweden. The affiliates were also recommended to include clauses that would give the trade union access to the workplaces and allow it to monitor the application of the collective agreement.

As already mentioned, this was a recommendation to the confederations' affiliates, as they are the masters of the sectoral collective agreements. It could not itself adapt the agreements. However, the confederations' negotiators had done their utmost to secure the approval especially of their affiliates in the building sector before the recommendation was signed. Formally, it only concerned the application of the collective agreements to the small share of foreign employers who become bound through membership of a Swedish employers' organisation. But the idea was that once the collective agreement had been adapted, it could also be used when the trade union asked an employer to sign an application agreement.

In addition to this recommendation, LO, PTK and the Confederation of Swedish Enterprise agreed to modify the terms of the insurance that employers are obliged to pay when they are bound by sectoral collective agreements in order to protect foreign

<sup>36</sup> National Mediation Office, Annual Report 2005, 143.

service providers from having to pay twice for the same type of insurance. The insurance terms are regulated directly in a collective agreement between the three organisations, which meant that this change had immediate effect.

Two weeks later, the top negotiators of LO and the Confederation of Swedish Enterprise wrote a joint letter to the Minister of Labour Hans Karlsson and suggested that the Inquiry on the monitoring of compliance with collective agreements should be withdrawn. Matters related to the system of collective agreements are best solved by the social partners, and after the two organisations' agreement on how to adapt the collective agreements for foreign employers, the primary reason for establishing the enquiry is cleared away, they argued.<sup>37</sup> In fact, the Inquiry had already worked out draft legislation. In a great hurry, it modified the report that it was about to publish and added that, with regard to the recommendation between LO, PTK and the Confederation of Swedish Enterprise which was partly intended to regulate the issue covered by the Inquiry's remit, it was highly doubtful whether there was still a need to regulate it through legislation.<sup>38</sup> Even though it was not evident what impact the recommendation would have in practice, again the social partners convinced the legislator to stay out of the collective agreements system.

### *3.5 New Government follows its predecessors*

In the 2006 elections, the Social Democrats lost government power. The question was if the new Government, a coalition between liberal and conservative parties, would defend Lex Britannia and the Swedish implementation of the Posting of Workers Directive before the ECJ. One of the parties had demonstrated an almost hostile attitude to trade union activities. But the biggest party declared that it wanted to preserve the collective agreements system, which had served Sweden well for years. Thus the new Government pursued the line of its predecessors.

## **4. Post Laval**

The ECJ's preliminary ruling in Laval on 18 December 2007 made four things clear:

- Lex Britannia was discriminatory under EU law and could no longer be applied.
- Private subjects such as trade unions cannot force foreign service providers to apply national rules on other matters than those listed in Article 3(1) of the Directive, in other words, the 'hard nucleus'.
- As regards the level of protection, posting employers can only be forced to apply the minimum laid down in legislation or collective agreements.

<sup>37</sup> K Ahlberg, 'Svenskt Näringsliv och LO vill lägga ned utredning om kontroll av utländska företag', *EU & arbetsrätt* 2005(3), 3.

<sup>38</sup> SOU 2005:89 Bevakning av kollektivavtals efterlevnad.

- Minimum rates of pay must be defined in a way that gives posting employers a possibility to ascertain what they are supposed to pay to their workers.

In April 2008 the Government set up an inquiry that was to propose how the legislation should be changed as a consequence of the preliminary ruling.<sup>39</sup> Two other processes were running in parallel with the work of the Inquiry: the implementation of the Services Directive and the final proceedings in the Swedish Labour Court.

#### 4.1 *'Lex Laval'*

Unlike the initial implementation of the Posted Workers Directive, when there was almost complete consensus, the 'reimplementation' was characterized by furious political controversies. All actors agreed that the Swedish labour market model must be preserved to the greatest extent possible, but there was no agreement on how radical the changes should be in the wake of the *Laval* judgment. Therefore, the new legislation was not in place until more than two years after the ECJ's ruling – and it is still controversial.

SFS 2010:228, which is the official notation for 'Lex Laval', came into force on 15 April 2010 and amended the Posting of Workers Act and the Codetermination Act (which is the general legislation on industrial action, including *Lex Britannia*).

##### 4.11 Restrictions on the right to industrial action

The amended Posting of Workers Act still does not impose any obligations as regards pay or other terms and conditions regulated in collective agreements on foreign employers. As before, it is based on the assumption that, as a rule, foreign employers will still be bound by the normal Swedish collective agreements, either through temporary affiliation to a Swedish employers' organisation or as signatories to an 'application agreement'. The novelty is that the Act introduces restrictions on the trade union's right to take industrial action in order to bring the foreign service provider to sign a collective agreement if it does not do so voluntarily.

Thus, Section 5a of the Act lays down four conditions that must be fulfilled:

Industrial action for the purpose of regulating conditions for posted workers through a collective agreement may be taken only if the conditions demanded

1. correspond to conditions contained in a central collective agreement that is applied throughout Sweden to corresponding workers within the sector in question;<sup>40</sup>

<sup>39</sup> Dir. 2008:38 (Committee terms of reference 2008:38 Consequences and action in response to the *Laval* judgment, unofficial translation published in SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen, 369).

<sup>40</sup> This description is meant to identify collective agreements with sufficient coverage to be 'generally applicable to all similar undertakings' within the meaning of the first indent of the second subparagraph of Article 3(8) of the directive, see SOU 2008:123 (above n 40), 252 *et seq.*; Prop. 2009/10:48 Åtgärder med anledning av Lavaldomen, 28 *et seq.*

2. refer solely to minimum rates of pay or other minimum conditions in matters referred to in Section 5 of the Act (that is, ‘the hard nucleus’); and
3. are more favourable for the workers than those following from Section 5.

However – this is the fourth condition – industrial action must not be taken if the employer ‘shows’ that the posted workers have conditions that are in all essentials at least as favourable as the conditions in the collective agreement referred to above. It is not necessary that these terms and conditions are regulated in a collective agreement in the worker’s home state (which was the case in *Laval*), an employment contract is sufficient.

The assessment of whether one condition is more favourable than another should be made by objective criteria, but based on how the workers’ side appraises the conditions.<sup>41</sup> In its bill, the government comments on how a trade union is to compare conditions in its own collective agreement and the conditions that the posted workers already have, for the purpose of deciding whether it can take industrial action.<sup>42</sup> In principle, the conditions should be compared separately for each matter within the ‘hard nucleus’. For example, an employer who applies inferior conditions as regards one matter, for example, holiday pay, should not be able to free itself by showing that it applies better conditions in another area, such as pay. However, in certain cases it may be appropriate to take other types of conditions into consideration, especially conditions on pay in relation to conditions on working time, where the level in one area is related to the level in the other. It adds that regulation of certain matters, such as annual leave, sometimes differs between countries without any of them being ‘inferior’ or ‘more favourable’. In these cases, the comparison may be more overall and summary. If this comparison leads to the conclusion that the posted workers have ‘in all essentials’ at least the same protection as afforded by Swedish minimum standards, industrial action should not be allowed.

Naturally, it will sometimes be difficult to make such a comparison, the government concludes. Ultimately decisive in the practical application should be if the result of an overall assessment in its entirety stands out as appropriate in relation to the object of the provision, which is to give trade unions the possibility to uphold a Swedish minimum standard without discriminating against foreign service providers and restricting the free movement of services in a way contrary to EU law.<sup>43</sup>

The fourth condition is one of the most controversial elements of the new legislation. The critics take the view that the trade union should at least be allowed to require that the employer confirms the conditions by signing a collective agreement. Then they would have a contractual right to control what the employer has actually paid to its workers and a collective agreement that it can invoke before a court. With the new rule,

<sup>41</sup> Prop. 2009/10:48 (above n 41), 58.

<sup>42</sup> *Ibid.*, 59.

<sup>43</sup> *Ibid.*, 60.

the trade unions' ability to monitor and enforce the rights of the posted workers will be considerably impaired, they argue. In case the employer presents a fake contract to show that it applies the conditions in the collective agreement, the trade union will probably not even manage to collect enough evidence to prove the opposite until the posted workers have returned to their home countries. The government acknowledged the problem, but deemed that it would not be consistent with EU law to allow industrial action only to satisfy the interest of monitoring and control.<sup>44</sup> The problem with fake contracts could be solved by requiring evidence of 'comparably high reliability', the Government added, without further specification.<sup>45</sup>

It adds to the critique that the trade unions are prohibited from taking industrial action even if the posted workers are members of the Swedish trade union.

Another controversy concerns the interpretation of what is included in the 'hard nucleus'. According to the three trade union confederations trade unions should be allowed to require that foreign employers apply the terms on certain forms of insurance in collective agreements, notably those concerning compensation for accidents at work and occupational group life insurance, covering health, safety and hygiene at work (Article 3(1) (e) in the Directive). Again, the government deemed that this is not consistent with the ECJ's statements in the *Laval* judgment.<sup>46</sup>

#### 4.12 Minimum rates of pay and other minimum conditions

In order to define what conditions trade unions may force through with the support of industrial action one has to 'filter' or 'strip' the normal collective agreements and sort out conditions that are not so minimal. This exercise, too, is left to the social partners and in practice to the trade unions, as they are the ones that may have a reason to take industrial action and hence to know what conditions they are allowed to require. Here the structure and substance of today's collective agreements cause special problems.

Although collective agreements on wages are negotiated at sectoral level, their substance has changed considerably – in some cases dramatically – during recent decades. Looking at the number of employees covered, most collective agreements today explicitly aim at, or in practice lead to, individual wages, albeit in a collective framework. Today's sectoral agreements contain fewer figures and more principles and procedures for bargaining at local level, where wages are negotiated to an ever increasing extent. There are even sectoral agreements with no figures at all – in other words, nothing that could be seen as a 'minimum wage' in the context of the posting of workers.

That said, one has to add that collective agreements without figures are exceptions and exist only in sectors where the posting of workers is still a rarity. Most sectoral agreements lay down some kind of pay minima – but they seldom use the term

<sup>44</sup> *Ibid.*, 35 *et seq.*

<sup>45</sup> *Ibid.*, 37.

<sup>46</sup> *Ibid.*, 34.

‘minimum wage’.<sup>47</sup> They speak of ‘starting wage’, ‘basic wage’, ‘commencing wage’ and the like, indicating that this is a wage for very young workers or those with their first job in the occupation in question, and they all imply that wages are supposed to increase along with workers’ experience. Thus, a Swedish employer who is bound by this type of collective agreement is not allowed to pay all its employees this minimum unless they all are in fact very young and/or inexperienced. Only, the ‘minimum wage’ for more experienced workers is set through collective bargaining at local level and may not emerge from the sectoral agreement. This is hardly controversial in a national context. However, when it comes to workers posted from other member states, it is debated whether ‘starting’ wages, ‘basic’ wages or ‘commencing’ wages are minimum rates of pay in the meaning of the Posting Directive, or if anything else can be included. The Posting of Workers Act itself says nothing about that. According to the preparatory work, the minimum wage is not necessarily synonymous with ‘basic’ (etc.) pay, but can include other types of remuneration that are usual in Sweden, such as overtime pay and bonuses for unsocial hours, night work and shift work. Also, nothing prevents differentiation based on, for example, the worker’s tasks, education, experience, competence and responsibilities. The government bill adds that the minimum wage for posted workers can be different depending on where in Sweden they work, if the central agreement differentiates between geographical areas.<sup>48</sup>

Against this background, the confederation for blue-collar unions, LO, carried out a project together with its affiliates in order to help them to identify the elements that can be included in the ‘minimum rates of pay’ within the meaning of the Directive and the Posting of Workers Act. After these principles had been established, each trade union was supposed to apply them to their own collective agreements. However, in September 2012, one year after the project was finalised, only two of LO’s affiliates have published what they regard as ‘minimum rates of pay’ in their sectors.

#### 4.13 Transparency

In order to ensure transparency for the posted workers and their employers, the trade unions are supposed to submit the conditions that they may force through with the support of industrial action to the Work Environment Authority, which is the Swedish liaison office. However, as before, the role of the Authority is restricted to forwarding this information. It is not competent to interpret the provisions or inform about how they should be applied in case the interpretation is unclear. Thus when foreign service providers or their workers have such questions, the Authority is supposed to direct them in the first place to the parties to the agreement.<sup>49</sup>

It remains to be seen how this will work. As the trade unions’ primary goal is still to convince foreign service providers to sign normal Swedish collective agreements

<sup>47</sup> SOU 2008:123 (above n 40), 339.

<sup>48</sup> *Ibid.*, 279 *et seq.*; Prop. 2009/10:48 (above n 41), 57 *et seq.*

<sup>49</sup> Prop. 2009/10:48(above n 41), 60 *et seq.*

voluntarily, some of them think that it is bad tactics to give a lot of publicity to the minimum conditions and prefer to wait. There is no sanction if they refrain from submitting the minimum conditions to the Authority. According to the Government bill, it should in fact not even affect the legality of industrial action taken, as this would be too far reaching a restriction of the right to collective action. The Parliament concurred with this opinion.<sup>50</sup>

#### 4.14 Monitoring and enforcement

The monitoring of compliance with collective agreements and the enforcement of the rights of non-unionised posted workers is still left exclusively to the social partners. As indicated above, this task may be more difficult with the new legislation. No new mechanisms are introduced to compensate for this.

The Inquiry had suggested that posted workers should be given a special right to claim terms and conditions according to Swedish collective agreements, even if they are not members of the signatory trade union.<sup>51</sup> The trade union side did not object to this idea, even if they pointed out that it would be an anomaly in the Swedish system. However, the Labour Court and one of the leading employers' organisations objected, the latter pointing out that such a rule would discriminate against foreign employers.<sup>52</sup> The government listened to these objections and the proposal was never realised.

#### 4.2 *Implementation of the Services Directive*

The Services Directive<sup>53</sup> was implemented through a new national horizontal statute named the Act on Services in the Internal Market.<sup>54</sup> In accordance with Sweden's line during the negotiations in the Council over the Directive, the Act does not touch upon labour law matters.

However, in addition to the new Act, acts of existing legislation that included requirements for authorisation and prior examination and so on concerning the establishment and provision of services were amended in order to ensure that they are compatible with the Directive. When the first draft<sup>55</sup> was submitted for consideration, LO, TCO and Saco drew attention to a proposal that would indirectly affect trade union activities. At that time, the Foreign Branch Offices Act<sup>56</sup> included a provision saying that business activities pursued in Sweden by national or foreign citizens residing in another country must have a manager who is resident in Sweden. According to the

<sup>50</sup> Prop. 2009/10:48 (above n 41), 48; Arbetsmarknadsutskottets betänkande 2009/10: AU5 Åtgärder med anledning av Lavaldomen och andra arbetsrättsliga frågor, 34.

<sup>51</sup> SOU 2008:123 (above n 40), 319 et seq.

<sup>52</sup> Prop. 2009/10:48 (above n 41) 50.

<sup>53</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

<sup>54</sup> Lag (2009:1079) om tjänster på den inre marknaden.

<sup>55</sup> Ds 2008:75 Genomförande av tjänstedirektivet.

<sup>56</sup> Lag (1992:160) om utländska filialer.

memorandum, this provision was not consistent with EU law and should be amended to be applicable only to business activities pursued by persons residing outside the EEA. The three confederations, which took the view that this would impair the trade unions' chances of negotiating collective agreements with foreign enterprises, suggested that, instead of a manager residing in Sweden, the firm should be obliged to register a person with a Swedish address, who is authorised to represent the firm and has legal capacity. However, the government deemed that it was uncertain if such a rule would be consistent with EU law and was not ready to propose legislation to this effect.<sup>57</sup>

Nevertheless, the government as well as the Parliament acknowledged that the trade unions' chances of establishing contact with foreign service providers should not be unnecessarily impaired, and that there was reason to further investigate the matter. Thus, the government set up an Inquiry to investigate whether it would be in conformity with EU law to introduce provisions in the Foreign Branch Offices Act that would oblige foreign service providers to designate a representative in Sweden in line with the proposal of the trade union confederations.<sup>58</sup> It was also instructed to propose amendments that would elucidate the distinction between establishment and temporary provision of services, as the Act was only meant to cover the first-mentioned.

The Inquiry presented its report on 30 June 2010.<sup>59</sup> The Inquiry noted that it is not always easy to decide if a foreign business operator provides services temporarily in the country or if it is in fact established in Sweden, especially not when it posts workers there. Therefore it proposed that, in order to meet the justified demand for legal certainty and predictability, the Act should be supplemented with guidelines for determining what is an establishment and what is a temporary provision of services. Second, the Inquiry considered that it cannot be left entirely to market actors to assess whether the provision of a service in a particular case is temporary and consequently not covered by the provisions on establishment. Thus, in order to enable independent control and to contribute to the correct application of the Posting of Workers Directive, foreign enterprises should be obliged to notify the Swedish Companies Registration Office in certain cases. If it has employees in Sweden and the operation will last more than eight days, it would also have to designate a contact person with an address in Sweden. On the basis of the information provided by the enterprise, the Companies Registration Office would decide whether the business operation qualifies as an establishment or whether it is a case of temporary provision of services. The decision should be appealable to an administrative court.

This was not exactly what the trade unions had asked for. A contact person is not synonymous with a person who has legal capacity and is authorised to represent the

<sup>57</sup> Prop. 2008/09:187 Genomförande av tjänstedirektivet, 76

<sup>58</sup> Dir. 2009:120 Översyn av lagstiftningen om utländska filialer m.m.

<sup>59</sup> SOU 2010:46 Utländsk näringsverksamhet i Sverige. En översyn av lagstiftningen om utländska filialer i ett EU-perspektiv.

firm. The Inquiry did not completely rule out that legislation to this effect might be in conformity with EU law, but took the view that this had to be investigated further. In any case, if such requirements need to be introduced, they should be added to the Posting of Workers Act, not the Foreign Branch Offices Act that is not applicable to temporary provision of services, the Inquiry concluded.

The Inquiry's proposals did not lead to legislation. Instead, the Ministry of Employment submitted a memorandum with new proposals for consideration in 2011.<sup>60</sup> The main points of the proposal were that employers who post workers to Sweden for more than five days would have to notify the Work Environment Authority and to designate a contact person in Sweden. The contact person could be one of the posted workers, but he or she must be authorised to receive documents on behalf of the employer in order to enable trade unions to submit a request for negotiations to the employer or the Work Environment Authority to service the employer with injunctions and prohibitions. The contact person shall also be able to supply different documents that show that the Posting of Workers Act is complied with and to contact somebody who is competent to represent the employer in legal matters. In September 2012, the government had still not presented a bill to the Swedish Parliament.

#### 4.3 *The Labour Court's judgment*

After the ECJ's preliminary ruling in the *Laval* case, it was beyond dispute that the blockade at the building site in Vaxholm was unlawful according to EU law. The only matter left for the Swedish Labour Court to decide was whether the trade unions were liable to damages.

Laval had claimed punitive damages and damages for economic loss of nearly 2.8 million Swedish krona (around 280,000 euros) taken together. The trade unions argued that they should not pay any damages at all, as they had acted according to an unequivocal provision of Swedish law that explicitly allowed them to take industrial action. Both sides asked the Labour Court to refer the matter to the ECJ for a second preliminary ruling rather than deciding in favour of the opposite party.

On 2 December 2009, five years after the proceedings had started, the Labour Court gave its final judgment.<sup>61</sup> Without asking the ECJ it had come to the conclusion that 'it may [...] be considered established that there is a general legal principle within EU law' that damages may be awarded between private parties upon violation of a Treaty provision that has a horizontal direct effect. Here, the trade unions had seriously violated the Treaty and this violation was sufficiently clear for them to be liable for damages, the court stated. Laval was awarded punitive damages of 500,000 Swedish

<sup>60</sup> Ds 2011:22 Anmälningsskyldighet vid utstationering samt förtydligande avseende missbruk av visstidsanställningar enligt anställningsskyddslagen.

<sup>61</sup> Arbetsdomstolens domar (AD; the Labour Court Law Reports) 2009 no. 89. An unofficial translation into English is available at <http://arbetsratt.juridicum.su.se/>.

krona (around 50,000 euros). Economic damages were denied since Laval had not proved that it had lost the amount it claimed.

The case was decided with the smallest possible majority. Three of the seven judges – two of the three neutrals – were of a dissenting opinion. The judgment is controversial among the experts as well.<sup>62</sup> The trade unions applied to the Swedish Supreme Court to have the judgment reopened, according to an extraordinary procedure in the Code of Procedure. However, the preconditions for having a case reopened are extremely restrictive and the Supreme Court rejected the application.<sup>63</sup>

## 5. Beyond the age of innocence

The age of innocence is past. The Swedes have learned that EU law does not accept the application of traditional Swedish practices in transnational situations and that it does affect national law, even in matters in which the EU has no competence to adopt secondary legislation. The Swedish legislator has made a fair try to loyally adapt the legislation to these new insights. Of course, there are still voices arguing that this is not enough. For example, the Confederation of Swedish Enterprise and the Law Faculty at Lund University claim that it can never be permissible under EU law to take industrial action against foreign enterprises with a view to obtaining a collective agreement.<sup>64</sup>

On the other hand, one may ask whether the penitence has not led to an overreaction in the opposite direction on some points, for fear of another backlash in the ECJ. For example: is it in fact obvious that a trade union cannot be allowed to take industrial action to protect the interests of posted workers even if they are members of that union?

The latter is one of the points referred to by the two confederations LO and TCO in connection with Sweden's report to the ILO Committee of Experts on the application of Conventions No. 87 and No. 98 in 2010, where they claim that Sweden no longer lives up to its commitments under these Conventions. The Committee has not yet taken a stand on the allegations. Also, in 2012 the same organisations made a collective complaint to the European Committee of Social Rights, in which they assert that the practical consequences of *lex Laval* and the Labour Court's judgment in the *Laval* case mean that Sweden violates the European Social Charter.

### 5.1 Loss of control

The social partners have also learned that their pre-accession/pre-enlargement experiences that guided the initial implementation of the Posting of Workers Directive are not really valid today. Some trade unions – for example, the Building Workers

<sup>62</sup> See, e.g., A Kruse, 'Arbetsdomstolens dom i Laval – lojal tillämpning av EG-rätten eller vågad egentillverkning?', *Europarättslig tidskrift* 2010, 381.

<sup>63</sup> Mål nr Ö 2181-10, 6 July 2010.

<sup>64</sup> Prop. 2009/10:48 (above n 41), 27.

Union and the union for forestry workers – have gradually realised that they are incapable of negotiating application agreements with an increasing number of foreign service providers. Typically, they are smaller enterprises posting workers for two or three months to work on projects where neither the receiver of the service nor the main contractor are bound by the relevant collective agreement. Often, the trade unions are not even able to identify a person who has the competence to negotiate on behalf of the employer. In case they do, they normally have to search for this person in the sending state, which makes it very difficult to even start negotiations before it is too late.<sup>65</sup>

Immediately after the *Laval* judgment, many foreign service providers still signed Swedish collective agreements. However, a direct effect of *Lex Laval* may be that they will not sign collective agreements to the same extent as earlier. Roughly speaking, there are three types of service provider in this context:

- Those that do not compete on wage costs in the first place, but on quality and productivity. These enterprises should have no problems with paying according to Swedish standards and are likely to continue to join employers' organisations or sign normal Swedish application agreements.
- Law-abiding enterprises that want to do everything by the book, but which are not prepared to give their workers more than minimum pay and other minimum conditions. They should not have problems with signing collective agreements with Swedish minimum conditions – if only the trade unions define what they are. Here, the trade unions have a dilemma. In the first place, they want the employers to sign normal Swedish collective agreements, not minimum agreements. Therefore, they may not want to give very much publicity to the latter. On the other hand, if they do not show their cards, foreign service providers who know that they are not obliged to pay more than the minimum wage may not sign collective agreements at all. There are already examples where enterprises feel that they do not have time to wait for the trade union to make up its mind. And the Swedish Construction Federation is waiting for the first case in which a subcontractor to one of its members refuses to sign a collective agreement, even at a minimum level.
- The third category includes enterprises that seek to exploit the right to free movement of services as much as they can at the workers' expense. They are less likely to join Swedish employers' organisations and they will certainly know that they cannot be forced to sign an application agreement as long as they 'show' that they already give their workers terms and conditions in all essentials as favourable as those called for by the Swedish trade union.

If posting employers will not conclude collective agreements to the same extent as before, it gets even more difficult to monitor whether posted workers are being given

<sup>65</sup> Memorandum by Annett Olofsson, LO/TCO Rättsskydd.

the terms and conditions that they should have. With no contractual relation to the foreign service provider neither trade unions nor employers organisations will have any means of control and enforcement.

In their complaint to the European Committee of Social Rights, LO and TCO argued that, according to the statistics from the National Mediation Office, there was in fact a dramatic decrease from 2007 to 2010 in the number of agreements signed by foreign companies, while there was no corresponding decrease for Swedish companies.

### *5.2 Competition with regard to tax and social security contributions*

The public debate on posting in Sweden has almost exclusively dealt with labour law aspects. But there is another aspect that deserves more attention: there is a lot of money to be earned from competition with regard to social security contributions and tax rules.

There are enterprises – especially temporary work agencies – that set up businesses in countries where the social security contributions are low in order to post workers from states with high costs. According to Regulation 883/2004 on the coordination of social security systems, posted workers can remain in the home state's social security system for two years. The worker or his/her employer simply asks the competent authority in the sending state to certify that the worker is subject to that state's social security. This is quite in order, provided that the worker has actually lived there before he or she is posted to another country. However, the system gives room for fraud. The host state's authorities are bound to respect the certificates issued by the sending state as long as they are not revoked by the latter, even if they have issued the certificates without properly controlling the information given by the employer.

In Sweden, the Social Insurance Agency checks the certificates submitted to it and decides to which state's social security system the worker belongs. Indirectly, this monitoring is also a matter for the Tax Agency, which is the competent institution for levying social security contributions. In a joint project in 2007 they identified two examples of how the rules can be misused in order to evade application of the host state's social security system.<sup>66</sup> The investigation included certificates for around 240 Polish workers who were posted to work in a large infrastructure project in southern Sweden by temporary work agencies established in Ireland and the United Kingdom. In the Irish case 93 workers had certificates saying that they should continue to be covered by Irish social security. According to the certificates, they had been living in Ireland for approximately two months before they had been posted to Sweden. However, the Social Insurance Agency discovered that 45 of them had earlier been posted from Poland to work for the same Swedish company and, strange to say, 38 of them were said to have moved to Ireland during the same period as they had been working in Sweden as posted from Poland. Another conspicuous fact was that the 93 workers were residing only at six addresses in Ireland – 46 of them even at one single address, which was not an apartment block. The course of action was the same in the British case. Thus the

<sup>66</sup> Kontroll av socialförsäkringstillhörighet vid utsändning till Sverige.

Swedish authorities concluded that the workers had in fact never lived or worked in the said countries and called the certificates into question before the Irish and British authorities. By the time that they had managed to establish contacts with these authorities, they had already received new certificates from Cyprus for some of the workers concerned.

In the project report the two authorities point out that these practices are not only a problem for the Swedish state, which may fail to secure the tax and social security contributions that it should receive, but also a real problem for the posted workers, who may be deprived of their social security rights.<sup>67</sup>

Competition on the basis of lower social security contributions and tax, and the lack of instruments for controlling that the service providers fulfil their obligations in this respect in their home states, is a problem for the Swedish employers as well. In an article in Sweden's leading business magazine, the owner of a Swedish 'Gazelle' enterprise claims that the debate so far has focussed on the wrong issues. Wage competition, he argues, is not the big problem, but competition with uncontrollable tax dodging. From the annual report of Laval, the author concludes that it had had most of its activities in Sweden for several years, and that it should therefore have paid social security contributions in Sweden. He has also studied the annual reports of 15 other randomly selected companies and found that none of them had paid tax and social security contributions as they were obliged. In some countries, annual reports do not even make this type of control possible. For example in Romania, annual reports are classified information and not disclosed at all, and in Lithuania annual reports do not specify tax, social security contributions and wages, according to the author.<sup>68</sup>

Competition based on tax and social security contributions also induces Swedish enterprises to search for means of reducing their labour costs within the borders of what is legal. A solution proposed by a big multinational temporary work agency, A, may serve as an example. A Swedish building company, B, hired Polish workers who were employed by A Sweden, which is bound by the collective agreement between the Swedish Staffing Agencies and the trade unions affiliated to LO. The workers, who had joined the Swedish Building Workers' Union, discovered that they were paid less than workers directly employed by the user company B. According to their employer, this was in line with the collective agreement as the Polish workers were not comparable with the Swedish workers. Yet, after negotiations, A agreed to the trade unions claims and to pay almost half a million Swedish krona (around 50,000 euros) retroactively for the time that the Polish workers had worked for the lower wage. However, shortly afterwards, A submitted a petition for negotiations to the trade union. A declared that it had to reduce its costs in order to be competitive and made the following proposal: the

<sup>67</sup> *Ibid.*

<sup>68</sup> O Sundin, 'Laval konkurrerar med okontrollerbart skattefusk', *Dagens industri* 4 December 2009.

Polish workers should be dismissed from A Sweden via redundancy and be reemployed by A's business in Poland where the pay roll tax is more advantageous for the employers and where the workers themselves pay part of their social security contributions. They would then be posted from Poland to do the same work as before in Sweden. They would also receive the same gross salary as in Sweden. Only their net salary would decrease as they would pay part of their social security contributions themselves. The Building Workers' Union took the view that the proposal was contrary to the collective agreement and did not accept it.

### *5.3 Wanted: Overall perspective*

In one respect, Sweden is a true paradise for enterprises that want to make use of the free movement of services. In comparison to other countries, Sweden has very little administrative control over service providers that post workers in the country. There are still no general information, declaration, notification or registration requirements that must be fulfilled by posting employers.

If the individual worker is posted in Sweden for less than 184 days during a twelve month period, his or her employer can be active in the country without having to notify any of Sweden's authorities. Only if the worker is posted more than 183 days does the service provider have to register with the Tax Agency.

If the employer does not want to pay Swedish social security contributions, it has to submit certificates from the authorities of the sending state to the Social Insurance Agency. Normally, this is in the employer's own interest.

There are cases where employers neither submit social security certificates nor register as employers with the Tax Agency. If the authorities are aware of their presence in Sweden – for example, after the trade unions have drawn their attention to it – they will be kindly asked by the Tax Agency to clarify the social security scheme to which their workers belong.<sup>69</sup>

Apart from this, there is nothing.

Instead, the Swedish legislator has relied on private monitoring and enforcement through the social partners. The strength of the self-regulatory system and especially the trade unions has been the prerequisite for the absence of public intervention and administrative control.

With Lex Laval, the social partners' chances of securing posted workers' rights will not be the same as before, without any administrative measures compensating for this having been introduced. This may be more in line with EU law on free movement of services than before. But will it work in practice to fulfil the other two aims of the Posting of Workers Directive: to guarantee the rights of posted workers and to prevent social dumping? Or will those who look back ten or fifteen years from now say that the age of innocence continued?

<sup>69</sup> Kontroll av socialförsäkringstillhörighet vid utsändning till Sverige.

As I see it, it is time to consider the regulation of matters concerned with the posting of workers from an overall perspective, taking all aspects into account, labour law as well as social security and tax aspects, the interrelation between legislation in different areas and the balance between private and public control. The Inquiry into Foreign Branch Offices noticed that there is a ‘regulatory loophole’ in the Swedish system in that it does not impose any obligations whatsoever on foreign service providers to announce their presence on the Swedish market. While awaiting the overall review, the Inquiry’s proposal that a neutral institution should investigate whether a business operation is in fact a temporary provision of services or rather an establishment – in which case it should apply Swedish labour law in its entirety – would be one step. Today, business operators’ own assertions that they are temporary service providers are seldom called into question<sup>70</sup> With *Lex Laval*, this distinction will be more important.

<sup>70</sup> One of the trade unions’ arguments in defence of its action in *Laval* was that the *Laval* company was in fact established in Sweden.



## CHAPTER 9

### UK Implementation of the Posting of Workers Directive 96/71/EC

*Tonia Novitz*

#### 1. Introduction

This paper examines UK implementation of the Posting of Workers Directive 96/71/EC (PWD), in the light of the jurisprudence of the European Court of Justice (ECJ) in what has come to be known as ‘the *Laval* quartet’: the cases of *Viking*,<sup>1</sup> *Laval*,<sup>2</sup> *Rüffert*<sup>3</sup> and *Luxembourg*.<sup>4</sup>

The first part of this paper outlines briefly the position of the UK Government in the process leading up to adoption by the European Community (EC) of the PWD. The second part then examines the extent of initial implementation of the Directive in the UK. The third and final part of the paper highlights current issues confronting the UK following European Union (EU) enlargement and the cases recently decided by the ECJ.

Prior to 1996, Conservative Governments sought to resist attempts to adopt a PWD. They were opposed to European measures which might inhibit the ability of UK employers to post workers to other EU Member States.

The Labour Government which came to power in 1997 eventually purported to implement the PWD, but did so by simply extending the application of UK legislation, that is, by removing jurisdiction clauses. There was no specific legislation introduced which sought to give particular regulatory effect to the PWD.

Due to this fairly *ad hoc* approach to the extension of UK employment legislation to posted workers, there is no explicit UK time limit on posting workers. Following also from the lack of specific legal implementation of the PWD, there are no registration or control measures which apply to posted workers in the UK. However, third country nationals cannot use posting to evade ordinary UK immigration law.

It is evident from parliamentary debates and from a case decided in the House of Lords (which performed the function of what is now the UK Supreme Court) that it was

<sup>1</sup> Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779; [2008] All E.R. (EC) 127; [2008] I.R.L.R. 143 (hereafter ‘*Viking*’).

<sup>2</sup> Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, [2008] All E.R. (EC) 166, [2008] I.R.L.R. 160 (hereafter ‘*Laval*’).

<sup>3</sup> Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 (hereafter ‘*Rüffert*’).

<sup>4</sup> Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323 (hereafter ‘*Luxembourg*’).

understood that the UK was in full compliance with the terms of the PWD, on the basis that the Directive was understood to specify a ‘floor of rights’ for posted workers as opposed to a ‘ceiling’. UK legislation operates to protect posted workers to the extent that such workers can enforce their statutory rights by recourse to the UK employment tribunals system and the domestic courts. In this way, it could be said that UK law prevents the undercutting of UK statutory labour standards (going beyond mere minimum levels of pay), thereby preventing social dumping and unfair competition. However, it is also arguable that the heavy reliance on private enforcement of legislation by posted workers may diminish the efficacy of what appears to be fairly generous legal protection. It should also be noted that UK trade unions have not been satisfied with the form that implementation of the PWD had taken and have, in particular, expressed frustration at the failure of the UK to make any provision under Article 3(8) PWD for extension of collective agreements in the construction sector.

In the period following EU enlargement and the *Laval* quartet of ECJ judgments, it is possible to identify key legal issues, which will have to be addressed by the new Conservative and Liberal Democrat Coalition Government, which entered office in May 2010. First, the legality of the transposition of the PWD into UK domestic law has been cast in doubt, now that we know that the entitlements set out in the Directive are to be regarded as a ‘ceiling’ and not a ‘floor’. In particular, the judgment in *Luxembourg* makes it clear that the UK’s extension of employment legislation to posted workers regarding matters which go beyond the list in Article 3(1) is to be regarded as violating the terms of the PWD. Second, the arguments made by unions that service contracts should only be awarded to contractors prepared to honour the terms of established collective agreements, for example in relation to preparations for the Olympic Games, would seem to be undermined by the ECJ judgment in *Rüffert*.<sup>5</sup> Third, the ability of trade unions to call industrial action in relation to matters concerning posted workers is significantly limited due to the *Laval* judgment. The consequence would seem to be extreme frustration on the part of workers that has led to wild-cat action, some of which has had extreme nationalistic undertones.

The motto ‘British jobs for British workers’ used by the ex-Prime Minister Gordon Brown in 2008 to describe the creation of opportunities in terms of training (or so it is claimed) has been converted into more xenophobic sentiment focused on competition for work. Unions assert that workers are only seeking fair competition for access to work and prevention of ‘under-cutting’ by service providers which will be to the detriment of posted workers and UK workers alike. However, this belies the popular appeal of the far-right British National Party (BNP) which has sought to be actively involved in recent wild-cat industrial action. The opportunity for mainstream UK unions, which have long been opposed to a BNP presence in unions, to represent their

<sup>5</sup> Also see Case C-271/08 *Commission v Germany* [2010] ECR I-7091, which confirms that the award of public contracts should be determined by EU public procurement standards, even where this is contrary to the terms of collective agreements.

membership and quell their fears is hampered by the legal principles established in *Laval*.

Trade union calls for reform and pleas from various backbench Members of Parliament (MPs) seem to have fallen on deaf ears. That is to say, they have been largely ignored by the past Labour and current Coalition Governments. Indeed, there seems to be an underlying determination across the political spectrum not to address (or at least not explicitly) any of the current outstanding legal issues associated with posted workers.

## **2. The UK position prior to adoption of the Posting of Workers Directive**

Conservative Governments between 1982 and 1997 were interested in limiting forms of government regulation and did not contemplate any national legislative solution to problems posed by workers posted to the UK prior to 1996. This may also be explained by the fact that the UK predominantly was, at that time, an exporter rather than an importer of cheap labour (through the provision of services in other European countries).

ILO Convention No. 94, which makes provision for award of public works contracts, by reference to wages and terms and conditions set by collective agreement, arbitration award or national legislation, was ratified by the UK in 1950 but was denounced in 1982 by the then Conservative Government. Any constraints on public procurement were subsequently imposed by virtue of EC law.<sup>6</sup>

The UK initially opposed the 1991 draft Posting of Workers Directive, ‘on the grounds that it might prove costly to UK business’.<sup>7</sup> There was also concern over the legal base, namely what were then Articles 57 and 66 of the EC Treaty, designed to remove obstacles to provision of services in the single market. The objection of the then responsible minister of the then Conservative Government in office, Ann Widdecombe, was that the proposed Directive was ‘anti-competitive and would impede the operation of the Single Market’.<sup>8</sup>

<sup>6</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14, and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33.

<sup>7</sup> V Keter, ‘Posted Workers’, House of Commons Library, Standard Note SNB/BT/301 2 February 2009, 2.

<sup>8</sup> Letter from Ann Widdecombe to Jimmy Hood MP, 29 November 1994, cited in Keter (above n 7), 2.

Back in 1995, there was appreciation in the House of Commons debates that foreign-based recruitment companies were acting unscrupulously in the UK. Such companies were recruiting British workers to work abroad, asking that they provide a deposit of a sizable sum upon payment of which it would emerge that such jobs did not really exist.<sup>9</sup> Notably, these jobs were outside the EU, but it was suggested at that time that:

‘Effective action will require co-operation between European Union member states if we are to deal with the problem satisfactorily.’ The hope was expressed by at least one MP that there would be a chance, under the French presidency, of ‘another look at the posted workers directive to see whether there is any prospect of breathing life into that initiative’.<sup>10</sup> However, Ann Widdecombe, for the Conservative Government of the time, stated that ‘European legislation will not help in dealing with the tiny minority of fraudsters who come within the terms of the debate’. Instead, the Government would boost its poster and leaflet campaign.<sup>11</sup> There was to be no regulatory action taken by the Government as this would not be ‘in proportion to the problem’.<sup>12</sup>

Indeed, the preoccupation of that Conservative Government with deregulation and promotion of free markets meant that a motion was made in March 1995: ‘That this House takes note of European Document No. 7484/93, relating to the posting of workers; and endorses the Government’s view that the present text of the draft [Posting of Workers] Directive is bureaucratic, anti-competitive and protectionist in nature, and that it would erect barriers to a free market and damage the effective operation of the Single Market.’ This motion was passed by a vote of 152 in favour to 56 against.<sup>13</sup>

The fear of the then Government, which emerged in subsequent debates, was that the PWD would prevent British workers ‘being able to offer their labour freely in any place in that European market’.<sup>14</sup> The comment made by the relevant Government minister was that ‘when European Employment Ministers meet, although supposedly unemployment is meant to be top of their agenda, they spend much of their time discussing directives which would make it more difficult for people to get jobs in Europe and more difficult to move from country to country’.<sup>15</sup> Notably, this was a time

<sup>9</sup> House of Commons debates, 22 February 1995, 12:59pm, per John Hutton.

<sup>10</sup> *Ibid.*

<sup>11</sup> House of Commons debates, 22 February 1995, per Ann Widdecombe.

<sup>12</sup> *Ibid.*

<sup>13</sup> House of Commons debates, 6 March 1995, 9:33pm.

<sup>14</sup> House of Commons debates, 4 April 1995, Social Affairs Council, Oral Answers to Questions – Employment, per Michael Portillo. See also House of Commons debates, 4 April 1995, Oral Answers to Questions – Unemployment, per Ann Widdecombe: ‘we must all compete equally in Europe, which is why we are determined that no unfair burden of regulations puts us at a competitive disadvantage and that we will not have our workers stifled, as they would have been under the posted workers directive’. For these reasons, Michael Portillo was still opposed to adoption of the PWD in June 1995.

<sup>15</sup> *Ibid.*

when the UK did not even have a national minimum wage applicable to workers, a point on which the minister was challenged.<sup>16</sup> Moreover, one might observe that a PWD would in no way impede independent free movement of UK workers and wonder whether the Conservative Government was rather more interested in protecting the ability of British commercial providers to competitively offer their services in other European countries.

### **3. Implementation of the Posting of Workers Directive in the UK**

There is little doubt that the PWD could have had much greater impact on UK law than it in fact did. On the trade union side, ‘[a]mong the three main construction unions in the UK, the Union of Construction, Allied Trades and Technicians argued that the Directive should give all employees the right to the terms of sectoral collective agreements in preference to any national legal minimum wage, regardless of the legal status of the agreement, and that it should cover the self-employed’,<sup>17</sup> but this was never done.

The Conservative Government, in office up until 1997, saw the adoption of the PWD as a failure in their European negotiations for deregulation of the internal market. The Labour Government, in power from 1997 to 2010, also did not address the issue directly. Instead, the first significant steps taken to implement the Directive arose in the broader process of reform of industrial relations legislation by an Employment Relations Act of 1999. This envisaged, *inter alia*, amendment of section 196 of the Employment Rights Act 1996, which had up until that date limited the application of that legislation to employees who ordinarily worked in Great Britain. This was to be simplified, for ‘[i]nternational law and the principles of our domestic law are enough to ensure that our legislation does not apply in inappropriate circumstances’. This would also have ‘other significant advantages’: ‘It extends employment rights to employees temporarily working in Great Britain and thus facilitates the implementation of the posting of workers directive, which otherwise would require further regulations later this year...’<sup>18</sup> In addition, a ‘parallel change’ was made to the Trade Union and Labour Relations (Consolidation) Act 1992, ‘removing the territorial restriction in that Act on rights to be consulted about mass redundancies’.<sup>19</sup>

<sup>16</sup> House of Commons debates, 4 April 1995, Social Affairs Council, Oral Answers to Questions – Employment, per Kevin Barron, who noted that the Ministers at the Social Affairs Council agreed with a national minimum wage.

<sup>17</sup> ‘Thematic feature – posted workers’ available at: <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm>.

<sup>18</sup> House of Commons debates, 26 July 1999, 3:43pm, per Ian McCartney (Minister of State (Competitiveness), Department of Trade and Industry).

<sup>19</sup> *Ibid.*

This became the route followed by this and subsequent Labour Governments, which did not adopt particular legislation designed to implement the PWD. Instead, gradually, there was repeal of legislative provisions regarding territorial limitations which would otherwise have denied protection to posted workers. This is anomalous. '[O]nly the UK and Ireland have not introduced legislation specifically to transpose the Directive into their domestic law.'<sup>20</sup>

The list of other statutory employment law provisions which apply to posted workers was listed on the Department for Business, Innovation and Skills (BIS) website as follows:<sup>21</sup>

- Working Time Regulations 1998
- National Minimum Wage Act and Regulations 1998
- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Religion or Belief) Regulations 2003
- Health and safety legislation (primarily the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999)
- Legislation regarding employment of children

This advice would now have to be updated to take account of the Equality Act 2010, but there is now no contemporary advice available on government websites. The only reference point is listed as 'archived' material. The reason would seem to be the change of government in May 2010 and substantial restructuring of government departments (and their responsibilities) which is now taking place.

The list provided in 2009 was clearly in excess of the prescriptions of Article 3(1) of the PWD. However, prior to the *Laval* quartet of cases, there was little indication that this constituted a breach of the Directive or Article 49 EC (now Article 56 TFEU), as indicated below.

(a) *'Technical' issues*

\* *Is there a time limit on what is deemed as posting?*

Posted workers are essentially expected to be temporary workers by virtue of the PWD, Article 2(1) of which says that: 'For the purposes of this Directive, "posted worker"

<sup>20</sup> Select Committee on European Scrutiny, Thirty-Third Report, 25 July 2003.

<sup>21</sup> <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/-employment/employment-legislation/employment-guidance/page19313.html>.

means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.’

However, in the absence of specific legislation implementing the PWD in the UK, there is no specified time limit in the UK as to what will be deemed ‘posting’. Rather, various requirements for ‘qualification’ are imposed on access to certain employment rights. For example, protection from unfair dismissal is, in most circumstances, only available after one year’s continuous employment with an employer.

In debates regarding the ‘Services Directive’, there has been some Parliamentary discussion of what is to be regarded as ‘temporary’. For example, Mark Platt from the Confederation of British Industry (CBI), giving evidence before the House of Lords Select Committee on European Union in 2005, suggested that one should understand the term ‘temporary’ as being ‘opposed to established’, but conceded that this was ‘an area that still needs more work’.<sup>22</sup> It may also be useful to observe that representatives from UNICE took a different view, also accepting that the term ‘temporary’ was difficult to define, but that ‘there is one limit which exists in European rules. It is the rule that in the field of social security a posted worker can only remain affiliated to the regime of the country of origin for a maximum duration of 24 months. That seems to indicate that the EU legislator considers that anything beyond 24 months is no longer purely temporary.’<sup>23</sup>

\* *What kind of registration- and control measures were put in place initially?*

The UK may be regarded as being particularly generous in its treatment of posted workers, in that it does not impose licensing and authorisation requirements which are imposed by other EU Member States.<sup>24</sup> In response to the Commission Communication of 2006 regarding the scope of registration and control mechanisms,<sup>25</sup> the then Parliamentary Under-Secretary of State for Employment Relations in the Department of Trade and Industry, Jim Fitzpatrick, commented that: ‘We will not have to change our control measures, as we do not place unjustifiable or disproportionate requirements on foreign companies temporarily posting their workers to the UK... monitoring and sanctions for non-compliance with the employment rights specified by the Posting of

<sup>22</sup> House of Lords, Select Committee on European Union, Minutes of Evidence, Examination of Witnesses, Questions 41-59, answer to Q55.

<sup>23</sup> House of Lords, Select Committee on European Union, Minutes of Evidence, Examination of Witnesses, Questions 380 – 397, answer to Q 382 per Thérèse de Liederkerke.

<sup>24</sup> House of Commons European Scrutiny Committee, 30<sup>th</sup> Report of Session 2006-7, para 3.18, cited by C Barnard, ‘The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law’ (2009) 38 *Industrial Law Journal* 122, 132.

<sup>25</sup> COM(2006) 159 Commission Communication: Guidance on the posting of workers in the framework of the provision of services.

Workers Directive is identical to that available to domestic workers...<sup>26</sup> He did however accept that, while the Government had in place material posted on the web providing advice on posting of workers, the Government would look at best practice in other EU Member States and explore ways ‘to improve content and accessibility of the UK information’.<sup>27</sup>

There has been an attempt to rely on the PWD in litigation to regularise the right to work of third country nationals in the UK. This was the case of *R. (on the application of Low) v Secretary of State for the Home Department* which was decided by the Court of Appeal in January 2010.<sup>28</sup> An Irish company, ‘Rising Sun’ had employed certain restaurant workers which it had allegedly ‘posted’ to the UK as consultants and suppliers of staff. Three of these workers were not permitted to work in the UK due to previous infringements of UK immigration law. It was held by the Court of Appeal that neither Article 49 EC (as was) nor the PWD served to regularise their employment by Rising Sun in the UK. In this respect, the *Luxembourg* judgment was relied upon since it would seem to require<sup>29</sup> that the situation of the workers is lawful in the EU country of establishment ‘as regards matters, such as residence, work permit and social coverage’ and permit the host country to check by the least restrictive or intrusive means possible that this is so.<sup>30</sup> The Court of Appeal accepted, by virtue also of *Commission v Germany*,<sup>31</sup> that the host country had to act proportionately and not unduly restrictively when monitoring the lawful and habitual employment of the posted workers in the country of establishment, but that the UK was acting appropriately to seek to deport these employees. Moreover, the Irish company could not rely on Article 49 EC for abusive or fraudulent ends.<sup>32</sup>

(b) *Overarching issues*

\* *Discussions on legality in national law*

There has been no legal challenge, as yet, to UK implementation of the PWD. There are no court cases where litigants have sought to do so and no serious discussion of the same in legislative debates.

<sup>26</sup> House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para 13.10.

<sup>27</sup> *Ibid*, para 13.10.

<sup>28</sup> [2010] EWCA Civ 4, unreported judgment of 14 January 2010.

<sup>29</sup> See *Luxembourg*, para 46.

<sup>30</sup> [2010] EWCA Civ 4, unreported judgment of 14 January 2010, para 26.

<sup>31</sup> Case C-244/04 *Commission v Germany* [2006] ECR I-885.

<sup>32</sup> [2010] EWCA Civ 4, unreported judgment of 14 January 2010 at para 47: ‘The truth... is that the Irish company has no employees lawfully present as such in Ireland and has posted none to the UK. The whole thing is a charade...’

There have been a number of cases relating to the scope of provisions amended in 1999. These explain that the extraterritorial provisions amended in 1999 to comply with the PWD have effect even as regards those persons who are not posted workers. The leading authority is the judgment of Lord Hoffmann in the House of Lords in *Lawson v Serco Ltd*, with which the four other Law Lords sitting concurred. In that case, it was noted that section 196 of the Employment Rights Act 1996 had been amended so as to comply with the PWD, but that the territorial scope of section 94(1) of that Act (relating to unfair dismissal) had to be regarded as a discrete matter of statutory interpretation.<sup>33</sup> It was acknowledged that unfair dismissal was not covered by the ‘mandatory nucleus’ in Article 3(1) of the PWD, but the Court accepted that section 94 could nonetheless be said, by virtue of the wording of the statute, to apply to a limited category of expatriate employees beyond the scope of situations envisaged for compliance with the PWD.<sup>34</sup> It is evident that the House of Lords considered that the PWD provided merely a floor of rights above which any EU Member State was free to provide more extensive protections. This is evident from Lord Hoffmann’s conclusions on ‘double claiming’:<sup>35</sup>

‘Finally I should note that in the case of expatriate employees, it is quite possible that they will be entitled to make claims under both the local law and section 94(1). For example, the foreign correspondent living in Rome would be entitled to rights in Italian law under the Posting of Workers Directive and although the Directive does not extend to claims for unfair dismissal Italian domestic law may nevertheless provide for them. Obviously there cannot be double recovery and any compensation paid under the foreign system would have to be taken into account by an employment tribunal.’

This authority continues to be applied. An example is the recent unreported case of *British Airways Plc v Ms E C N Mak & Others*,<sup>36</sup> where the Employment Appeal Tribunal took note that: ‘It is right to say that the change effected by the 1999 Regulations ( SI 3163/1999), initially limiting the exclusion in [section 10(1) of the Sex Discrimination Act 1975 and section 8(1) of the Race Relations Act 1976] by removing the word ‘mainly’ from the expression working ‘wholly or mainly outside Great Britain’ was prompted by the PWD. The explanatory note to those Regulations, to which Ms Tether drew our attention, is helpful. It explains that the Regulations extend the application of the relevant provisions to posted workers, as defined in the PWD (Directive 96/71/EC).’ However, the case concerned cabin crew on a route between Hong Kong and the UK and the issue as to whether these employees were ‘posted

<sup>33</sup> *Lawson v Serco Ltd* [2006] 1 All E.R. 823; [2006] ICR 250; [2006] I.R.L.R. 289 at para 14 and para 27.

<sup>34</sup> Applied in *Leslie Anderson v Stena Drilling Pte Limited*, unreported, No. UKEATS/0080/04/RN, Employment Appeal Tribunal, 17 August 2006, 2006 WL 2524780 before The Honourable Lady Smith (Sitting Alone).

<sup>35</sup> *Lawson* (above n 33) at para 41.

<sup>36</sup> Appeal No. UKEAT/0055/09/SM, Employment Appeal Tribunal, 20 January 2010, unreported, at paras 26 – 28.

workers' was considered, ultimately to be 'sterile'. 'Whether or not the Claimants are to be regarded as posted workers is nothing to the point. Section 10(1) does not restrict its protection to posted workers. The Directive may have caused the original amendment to the legislation, but it applies equally to all employees who are covered by s.10(1).' There is again no suggestion in that case that UK law is in breach of EU law in providing more extensive protection than that available under the PWD.

*\* Discussions on conformity with EC law*

The 2003 Commission Communication on the implementation of the PWD<sup>37</sup> took the view that the UK had not adequately transposed the Directive into national law. The posting situations covered and the rights derived from the PWD were not clearly defined in national law and the jurisdiction clause in Article 6 of the Directive was not properly implemented. In particular, the Commission referred to two recent ECJ judgments, *Commission v Greece*<sup>38</sup> and *Commission v Netherlands*.<sup>39</sup>

Nevertheless, it is evident that the Labour Government at that time had no intention of altering the UK legal position. The then Minister for Small Business and Enterprise at the Department of Trade and Industry, Nigel Griffiths, relied upon the general principle, said to be established by the ECJ in those very cases, that 'transposition of a Directive need not require a separate legal instrument', provided that:

- national law guarantees that national authorities will effectively apply the Directive in full
- the legal position is sufficiently clear and precise; and
- individuals are made fully aware of their rights and, where appropriate, may rely upon them before the national courts.'

He therefore contended that there was no clear case for reassessment of UK transposition of the PWD.<sup>40</sup>

By November 2004, it was evident that the Commission had not contacted the Government on this matter and the then Minister for Employment Relations, Consumers and Postal Services at the Department of Trade and Industry, Gerry Sutcliffe, was adamant that this was because UK law was in compliance with the PWD.<sup>41</sup>

Following the Commission Communication of 2006,<sup>42</sup> the then Government made clear its position that the PWD had been 'fully implemented' in the UK because '[a]ll

<sup>37</sup> Commission Communication on the implementation of Directive 96/71/EC (Posting of Workers) in the Member States COM(2003) 438.

<sup>38</sup> Case C-365/93 *Commission v Greece* [1995] ECR I-499.

<sup>39</sup> Case C-144/99 *Commission v the Netherlands* [2001] ECR I-3541.

<sup>40</sup> Select Committee on European Scrutiny, Thirty-Third Report, 25 July 2003.

<sup>41</sup> Select Committee on European Scrutiny, First Report, Minister's Letter of 17 November 2004.

<sup>42</sup> Commission Communication: Guidance on the posting of workers in the framework of the provision of services COM(06) 159.

employment law applies to workers posted here'.<sup>43</sup> There was no appreciation that the UK was confined to the nucleus of requirements in Article 3(1) of the PWD.

*\* Effects on/for social partners and industrial relations*

It seems that it was only after the PWD was implemented that the impact of posting of workers on job prospects for British workers and the issue of undercutting of local wages was raised in earnest in Parliamentary debates. For example, in 2004 (the year that EU enlargement was to take place), questions were asked as to the impact that the PWD was having on '(a) the job prospects for British workers in the UK and (b) the wage levels of migrant workers in the UK'. Mr Sutcliffe was again charged with the responsibility to respond, stating that: 'We have no reason to believe that its implementation has adversely affected the job prospects of British workers in the UK. Unemployment in the UK fell from 5.9 per cent in the three months ending October 1999 to 5.0 per cent in the three months ending October 2003 (ILO Unemployment Figure, Labour Force Survey ONS). UK employment rights are applicable to all workers, regardless of country of origin, so migrant workers are protected in the same way as other workers by the National Minimum Wage.'<sup>44</sup>

It was clear that, by this time, trade unions were not wholly satisfied with the manner in which the PWD had been implemented, especially in relation to the lack of provision made under Article 3(8) for collective agreements in the construction sector. There was a notable lobby seeking reform to protect the jobs of British construction workers in the UK.<sup>45</sup> This issue arose in Parliamentary debates in December 2003, Mr Sutcliffe denying that any implementation of the PWD in this matter would be appropriate given the UK's 'voluntarist system of collective employment relations'. He did however confirm that he met the national Trades Union Congress (TUC) 'periodically to discuss various issues, including matters relating to the construction industry' and that he would meet with the Transport and General Workers Union in two days' time and would be 'discussing the Posting of Workers Directive among other issues'.<sup>46</sup>

#### **4. Post EU enlargement and the *Laval* quartet**

##### *(a) Problem issues at the current stage*

By 2007, following EU enlargement, the TUC was evidently very concerned by the pending *Viking* and *Laval* litigation and was expressing the view that the UK Government had failed to implement the PWD effectively. The TUC presented an

<sup>43</sup> House of Commons, Select Committee on European Scrutiny, Thirtieth Report, 4 April 2006, para 13.8.

<sup>44</sup> Hansard, House of Commons, 7 January 2004, Col. 380W.

<sup>45</sup> Material for lobby held on 2 December 2003: [http://brickman.dircon.co.uk/cons\\_lobby.htm](http://brickman.dircon.co.uk/cons_lobby.htm), cited at Keter (above n 7), 8.

<sup>46</sup> Hansard, House of Commons, Written Answers for 9 December 2003, Col. 451W.

independent statement to the European Commission in 2007 to the effect that British unions considered that there was a lack of awareness in the UK of the protections for posted workers, indicating that this might well be attributable to ‘the lack of separate posting of worker regulations’. Too much was left to the individual posted worker to identify and seek private enforcement of their employment rights, which was complicated by narrow ‘territorial tests’ regarding the scope of their legislative entitlements. This seems to be confirmed by a study conducted by the UK Equality and Human Rights Commission (EHRC) into treatment of migrant workers in the UK meat processing industry. The EHRC found that ‘lack of English language skills often means that workers do not understand their employment status or the rights they have’.<sup>47</sup>

Further, the TUC noted that ‘the absence of a Government agency gathering information relating to the number of workers posted to the UK at any one time also undermines the enforcement of the Directive’. Finally, ‘the absence of legally enforceable sectoral agreements in some industries, in particular construction, means that the spirit of the Directive is not observed within the UK. Migrant workers are often paid less than UK workers for doing the same job.’<sup>48</sup> Nothing seems to have been done to address these concerns in anticipation of the ECJ judgments.

At present in the UK, there are at least three crucial issues which remain unresolved. The first is whether the transposition of the PWD into UK domestic law is in violation of the principles established in the *Luxembourg* judgment. The second is whether there is now any scope in the UK, following the judgment in *Rüffert*, for the award of service contracts to be made conditional on compliance with the terms of established collective agreements. The third is the extent to which the ability of trade unions to call industrial action is curtailed by the principles stated in the *Laval* judgment. The linkage between these issues and the Services Directive 2006/123/EC will also be addressed. This paper concludes by discussing the implications of the latter as regards British industrial relations, in the light of the apathy of the three main UK political parties in relation to these issues.

(b) *Legality*

\* *Legality of transposition of PWD into UK law following Luxembourg*

Legislation implementing the PWD in the UK would seem to be in actual breach of the reading of that Directive in *Laval* and *Luxembourg*. Current UK legislative protection for posted workers goes beyond the ‘nucleus of mandatory rules’ in Article 3(1) of the PWD. This is in clear violation of the interpretation adopted in respect of Article 3(7) of the PWD in *Laval*. While that provision states that paragraphs (1) to (6) of Article 3

<sup>47</sup> EHRC, *Inquiry into Recruitment and Employment in the Meat and Poultry Processing Industry: Report of the Findings and Recommendations* (March 2010), 22. The EHRC also found evidence of verbal abuse, segregation and harassment of such workers.

<sup>48</sup> UC Submission to the European Commission, House of Lords – European Union – Minutes of Evidence 2007.

‘shall not prevent application of terms and conditions more favourable to workers’, the ECJ has indicated that it is only to apply:

- (i) to the situation where service providers from another EU member state voluntarily sign a collective agreement in the host state which offers superior terms and conditions to employees; and
- (ii) to the situation where the home state laws or collective agreements are more favourable to workers.<sup>49</sup>

Nor does it seem that the UK can rely on the ‘public policy’ exception in Article 3(10), which the ECJ considers can be ‘relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’, to which end the EU member state relying on the provision must present ‘appropriate’ and ‘precise’ evidence, indicative of the expediency and proportionality of the measure taken.<sup>50</sup>

The decision in *Luxembourg* certainly casts doubt on whether current UK legislation, which enables posted workers to make a claim in respect of a ‘written statement’ and to challenge discrimination on grounds of part time and fixed term work. Since this protection has to be regarded as being adequately implemented in the home state, there are no grounds to provide additional protection in the host state.<sup>51</sup> Nor does it seem that a conflict of laws approach, based on the terms of the Brussels Regulation,<sup>52</sup> necessarily assists posted workers, given that Article 19 indicates that an employer originating from an EU Member may be sued either in the courts in which the employer is domiciled or where the employee habitually carried out work. Again, this provision can only be overcome by consent of the employer to an agreement on jurisdiction, which may be difficult to obtain.<sup>53</sup> Catherine Barnard’s conclusion is that ‘it is very unlikely that the UK will be able to continue applying all of its labour laws to posted workers as a general rule’ and this seems to be fair comment.<sup>54</sup> Her prognosis is that, following the politically sensitive Irish referendum on the Lisbon Treaty, the European Commission might be more proactive in calling into question both Irish and UK implementation of the PWD. As noted above, there has been no litigation on this issue as yet in the UK and no sign that the new UK Coalition Government will take any anticipatory legislative action on this issue.

<sup>49</sup> Barnard (above n 24), 127.

<sup>50</sup> *Luxembourg*, paras. 50 – 51.

<sup>51</sup> *Luxembourg*, paras 57 – 58.

<sup>52</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels Regulation’) [2001] OJ L 12/1.

<sup>53</sup> Barnard (above n 24), at 131-132.

<sup>54</sup> *Ibid*, 132.

Barnard reports on how the then UK Labour Government responded, prior to the decision in *Luxembourg*, to a pre-infraction letter from the Commission.<sup>55</sup> She notes the argument put forward that the rights set out in the ERA and elsewhere are usually subject to a qualifying period and therefore truly ‘temporary’ posted workers are usually excluded from protection. This explanation must be understood in the light of Article 2(1) of the PWD, which states that a ‘posted worker’ means ‘a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’. As we have no clarity from case law of the ECJ as to what will constitute ‘a limited period’, the UK’s argument may have some weight, but perhaps not in respect of entitlement to a written statement which is not subject to the qualifying periods imposed elsewhere in relevant legislation.

It might also be observed that this rather bold stance is somewhat belied by the statement made in August 2007 by Pat McFadden, the then Minister of State for Employment Relations and Postal Affairs for a new Department for Business, Enterprise and Regulatory Reform, made to the House of Lords European Union Committee. In that statement, again in advance of the judgment delivered in the *Luxembourg* case, it seems that the Government had begun to appreciate that the way in which the PWD was implemented in the UK was, ‘in effect, an “over-implementation”’ and that they were ‘unlikely to make a compelling argument on the grounds of public policy provisions’, such that ‘our arrangements are technically incompatible with the Directive’. Moreover, the Government would ‘undertake to scrutinise the full range of employment law to identify what goes beyond the provisions of the directive’.<sup>56</sup> In 2009, a House of Commons report noted that, rather than the UK, ‘the European Commission is currently reviewing the application and enforcement of the Directive’.<sup>57</sup> This appears to have been treated as a reason for UK inaction.

\* *Campaign for extension of collective agreements – the effect of Rüffert?*

There has been a campaign for the award of service contracts to be made conditional on respect for the terms and conditions established in the industry through collective agreement. This concern has been focussed on building contracts connected with the Olympic Games.<sup>58</sup> The Olympic Delivery Authority (ODA) has commissioned research about employment on the Olympics site, which is arguably currently the largest construction project in Europe, with activity likely to reach a peak of 20,000 available jobs. An early ODA survey identified 4,434 workers on the Olympic Park of whom only 20% lived in the London area. There are now however suspicions that, in fact,

<sup>55</sup> *Ibid.*

<sup>56</sup> Hansard, House of Lords, Correspondence with Ministers May to October 2007, European Union Committee ‘Posting of Workers to Another Member State: Guaranteeing the Protection of Workers’ (11052/07).

<sup>57</sup> Keter (above n 7), 2.

<sup>58</sup> ‘Construction Workers Protest Over Jobs At 2012 Olympic Site’, 6 May 2009, available at: [http://www.build.co.uk/construction\\_news.asp?newsid=93200](http://www.build.co.uk/construction_news.asp?newsid=93200)

only one in eight jobs on site have gone to local workers, following a freedom of information request by a local resident, the response to which revealed that, from a total of 6,227 workers, only 1,230 workers lived locally, including 412 who reported themselves as ‘foreign’.<sup>59</sup>

Keith Ewing and John Hendy have argued that the Government should initiate legislation under Article 3(8) of the PWD, which provides that ‘in the absence of a system for declaring collective agreements or arbitration awards to be of universal application’ (as in the UK), ‘Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory...’<sup>60</sup>

In February 2009, an Early Day Motion was put before the House of Commons specifically requesting such an initiative, stating that the PWD is ‘woefully inadequate to deal with present trends’ towards subcontracting designed to evade hire of British and local labour: ‘it is being misinterpreted by many construction companies to their advantage’. The motion called on ‘the Government to heed the call of the construction trade unions that a solution to the current problems will only be found when a register of mandatory universally applicable collective agreements is established, which would end the exploitation and undercutting of workers in this and other industries in the UK and elsewhere in Europe.’<sup>61</sup>

Such measures would go beyond those principles formally agreed in 2008 between the UK Trades Union Congress (TUC) and the London 2012 Organising Committee (LOCOG).<sup>62</sup> It is also evident that the CBI is not convinced by arguments that collective bargaining arrangements should apply to posted workers.<sup>63</sup> While it is possible that apparent barriers to use of public procurement to hire local labour or impose other terms

<sup>59</sup> The 2012 Olympics: Access to Training and Employment Opportunities Tank Consulting for EHRC, Spring 2010.

<sup>60</sup> KD Ewing and J Hendy, ‘The ECJ Decisions and Trade Union Freedom: Lessons from the United Kingdom’ in KD Ewing and J Hendy (eds), *The New Spectre Haunting Europe – The ECJ, Trade Union Rights and the British Government* (Institute of Employment Rights 2009).

<sup>61</sup> Early Day Motion EDM 789, Alan Meale, 11 February 2009.

<sup>62</sup> ‘London 2012 and UK unions agree to work together for ‘inspirational’ Games’ available at: <http://www.london2012.com/news/media-releases/2008-09/london-2012-and-uk-unions-agree-to-work-together-for-inspirational-games.php>.

<sup>63</sup> Hansard, House of Commons, Home Affairs Committee, ‘Managing Migration: Points-based System’ Examination of Witness (Questions 104 – 119), per Mr John Cridland, Q106 and Q112.

and conditions of employment are capable of being overcome,<sup>64</sup> this would seem to require some active commitment on the part of a UK government to overcome such obstacles, which is notably lacking. The Labour Government in the lead up to the 2010 election refused to contemplate any such reform.<sup>65</sup> There is, as yet, no indication that the new Coalition Government will do so.

\* *Restrictions on industrial action taken by trade unions following Laval*

Trade unions cannot organise industrial action to address the terms and conditions of posted workers, despite the express statement in the *Laval* judgment that ‘in principle’ trade unions have the right to initiate secondary action to prevent ‘social dumping’.<sup>66</sup> The Court, in *Laval*, has restricted the scope of legitimate objectives in the context of a dispute over recognition of a union in respect of posted workers. In this setting, the Court treated as illegitimate industrial action aimed at establishing workplace bargaining, which would then lead to negotiations over minimum pay. This was seen as being too uncertain and therefore too onerous for the provider of services,<sup>67</sup> in breach of the PWD.<sup>68</sup> This approach would seem to have since been affirmed by subsequent judgments delivered in the *Rüffert* and *Luxembourg* cases.<sup>69</sup>

This, then, constitutes a key exception to the basis on which UK legislation establishes the existence of a lawful ‘trade dispute’, which determines the legitimacy of objectives of industrial action. The relevant UK statutory provision makes specific reference to an entitlement to take industrial action which relates wholly or mainly to ‘the recognition by employers or employers’ associations of the right of a trade union to represent workers’ in negotiation or consultation or other procedures relating to terms and conditions of employment.<sup>70</sup> The employers of posted workers will, it seems, be exempt from this fundamental tenet of UK labour law, in that it would seem that the Posting of Workers Directive prevents a trade union from seeking to place pressure on them to ‘recognise’ the union and enter into collective bargaining. Indeed, trade unions seem to

<sup>64</sup> C McCrudden, *Buying Social Justice* (Oxford University Press 2006); C Barnard, “‘British Jobs for British Workers’: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ (2009) 38 *Industrial Law Journal* 245.

<sup>65</sup> House of Commons, Oral Evidence of 9 and 11 March 2009 before European Scrutiny Committee on ‘Free Movement of Workers in the EU’, Fourteenth Report of Session 2008-9, Report, together with formal minutes and oral evidence, printed 25 March 2009, p. 5.

<sup>66</sup> *Laval*, at para 107.

<sup>67</sup> *Viking*, para 110. One would expect the Court to take the same view of any attempt to impose compulsory statutory recognition on the employer of posted workers, seeking to supply services abroad. Cf. TULRCA, Schedule A1.

<sup>68</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>69</sup> P Davies, ‘Case C-346/06 *Rüffert v Land Niedersachsen* [2008] IRLR 467 (ECJ)’ (2008) 37 *Industrial Law Journal* 293.

<sup>70</sup> TULRCA, section 244(1), especially para (g).

be discouraged from calling such action,<sup>71</sup> in particular due to the threat of potentially unlimited liability which may arise if they do so.<sup>72</sup>

The situation would appear to be that the foreign service provider which hires posted workers may voluntarily enter into an agreement with a trade union, but cannot be subjected to industrial action pushing for negotiations towards such a collective agreement. This will make it almost impossible for the terms and conditions of posted workers to be governed by UK collective agreements, given that there is no mechanism under UK law to declare collective agreements or arbitration awards ‘universally applicable’ or to require that terms and conditions are set for posted workers under ‘generally applicable’ collective agreements or those concluded with the ‘most representative’ employer.<sup>73</sup>

It is just possible that UK courts, when applying the ECJ judgment in *Laval* could be mindful of two recent cases decided at Chamber level by the European Court of Human Rights, which indicate that interference with the right to strike needs to be justified with reference to article 11(2) of the European Convention on Human Rights 1950.<sup>74</sup> However, the treatment of these cases in the Court of Appeal case of *Metrobus*<sup>75</sup> suggests that the UK courts do not give much weight to them. There, the complex statutory procedural requirements that are strictly imposed on trade unions which seek to call industrial action were considered to be proportionate and justifiable under Article 11(2). It should be added the members of the Court did not seem to be even convinced that such justification was strictly necessary. The *Metrobus* case is widely regarded as demonstrative of the ease with which UK courts grant interim injunctions, namely with reference primarily to the convenience of the employer.<sup>76</sup> So, while the ILO Committee

<sup>71</sup> See Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No. 87 drafted by John Hendy QC, available at: <http://www.balpa.org/Document-Library/Industrial-Issues/BALPA-ILO-Application-2009-01-26.aspx> (Hereafter Application by the British Air Line Pilots Association to the International Labour Organisation). See discussion below.

<sup>72</sup> K Apps, ‘Damages Claims Against Trade Unions after Viking and Laval’ (2009) 34 *European Law Review* 141.

<sup>73</sup> See M Hall, ‘Posted Workers’ (2003) available on [www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm](http://www.eurofound.europa.eu/eiro/2003/06/tfeature/uk0306106t.htm).

<sup>74</sup> *Affaire Dilek et Autres v Turquie* (App nos 74611/01, 26876/02 et 27628/0) Judgment of 17 July 2007 (available only in French); and *Enerji Yapi-Yol Sen v Turkey* (App no 68959/01) Judgment of 21 April 2009 (available only in French). See for discussion of these and subsequent cases KD Ewing and J Hendy, ‘The Dramatic Implications of Demir and Baykara’ (2010) 39 *Industrial Law Journal* 2.

<sup>75</sup> *Metrobus v Unite the Union* [2009] EWCA Civ 829; [2009] WLR (D) 279; [2009] IRLR 851.

<sup>76</sup> R Dukes, ‘The Right to Strike Under UK Law: Not Much More than a Slogan’ (2010) 39 *Industrial Law Journal* 82; and Ewing and Hendy (above n 74). Note that this practice is

of Experts considers that the way in which the *Laval* judgment interacts with UK labour legislation is such as to violate freedom of association and Convention No. 87, this does not seem to be the view which UK courts are likely to endorse.<sup>77</sup>

*(c) The Services Directive connection*

In 2005, in the context of consideration of the draft Services Directive, the Report of the House of Lords Select Committee on European Union concluded that: ‘The only way ... that workers from a different Member State would be able to undercut host country workers is if it were customary for employment to be provided on more generous terms than the legal minimum.’ The Committee accepted that in the UK ‘there are some examples of such collective agreement that offer better employment conditions than the minimum required and which are not legally binding agreements’. It was accepted by the Committee that concerns of undercutting were related to the PWD and the extent that this ‘fails to address the particularity’ of the national system of guaranteeing employment rights. This was not the fault of the draft Services Directive.<sup>78</sup>

On the issue of social dumping, the House of Lords Select Committee further concluded that:

‘The Posting of Workers Directive largely deals with fears expressed either of “social dumping” or of “a race to the bottom”. We think there are safeguards built into the draft Directive and the Posting of Workers Directive that significantly reduce these concerns as far as employed workers are concerned. **The Services Directive would not change the present situation for posted workers in the UK or any other Member State where statutory minimum employment standards are set. Just as now, under the services directive there would be some workers employed with collective agreements above the statutory minimum and others who were not and were therefore cheaper to employ.** The Commission told us that there was a need to make clear that the directive could not ‘lead to a situation where companies can bring their labour force from a cheaper country and create a sort of unfair competition for instance on a building site (Q447). **We do not believe, however, that it is for the directive to get involved in issues of labour –employer collective bargaining relations or in matter such as minimum wage legislation. These are matters for individual Member States and their institutions.**’<sup>79</sup>

In January 2006, the then Parliamentary Under-Secretary of State in the Department of Trade and Industry, Lord Sainsbury of Turville confirmed that ‘The EU Services Directive is still under negotiation. One of the UK’s top negotiating aims is to maintain high standards of protection for workers. Under the current proposal, core host country

currently the subject of a complaint submitted by the Road Maritime and Transport (RMT) union to the European Court of Human Rights under Article 11 of the European Convention on Human Rights.

<sup>77</sup> See comment of the Committee of Experts 2010 on UK compliance with ILO Convention No. 87 – quoted in full in the Appendix to this volume.

<sup>78</sup> House of Lords, Select Committee on European Union, Sixth Report, Chapter 7: ‘Will There Be a Race to the Bottom?’, 2005, paras 143 – 147.

<sup>79</sup> *Ibid*, para 202 (Select Committee’s emphasis).

rules, such as minimum wages and health and safety standards, will continue to apply to posted workers who work temporarily in the UK for a foreign service provider.’<sup>80</sup> It now seems accepted in the UK that the Services Directive has no bearing on the PWD and the two are seldom referred to in conjunction by the Government. Rather, the UK Government is now determined to encourage UK employers to utilise the opportunities that the Services Directive can afford, and has set up ‘an online ‘Point of Single Contact’ for service providers to find out about doing business in the UK and apply for licences online’.<sup>81</sup> The Provision of Services Regulations 2009, which implements the Services Directive, contains provisions which may make it easier to scrutinise the treatment of posted workers, such as the duty placed on service providers to make contact details and other information available (Regulations 7 and 8), but otherwise provides explicitly that the freedom to provide services (guaranteed in Regulation 24) does not apply to matters covered by the PWD (Regulation 25(c)).

*(d) Effects on industrial relations*

The ‘chilling effect’ which the *Laval* quartet has had on UK industrial action is ably illustrated by the dispute between British Airways (BA) and the British Air Line Pilots Association (BALPA). This case was, as noted previously, the subject of comment by the ILO Committee of Experts on the Application of Conventions and Recommendations, in relation to UK compliance with ILO Convention No. 87.<sup>82</sup>

BALPA had voiced concern over the terms and conditions under which pilots would be employed by a new British Airways (BA) subsidiary, ‘Open Skies’, which was to operate out of other European states on US routes. The union’s fear was that terms and conditions for Open Skies pilots (and the mode of granting seniority) would undercut and thereby undermine the established terms and conditions of current BA ‘mainline’ pilots. BALPA did concede that inferior terms and conditions might need to be applicable to pilots employed by Open Skies and did accept the desirability of a separate bargaining unit for those pilots. However, BALPA did not receive the assurances and guarantees they desired.

A strike ballot was held, in which 93% of those BALPA members eligible to vote did so and 86% of those voting were in favour of a strike. BALPA then requested intervention by the ACAS in the hope that the weight of opinion in favour of collective action might lead the employer, BA, to make certain concessions. However, at the end of ACAS talks and with no settlement reached, BALPA gave seven days notice of industrial action. BA responded by arguing that any strike action taken would be unlawful by virtue of the principles established by the ECJ in *Viking* and *Laval*; so BALPA applied to the High Court for a declaration of the legality of their action. The hearing began on

<sup>80</sup> Hansard, House of Lords, 26 June 2006, Col. WA197.

<sup>81</sup> [www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/page9583.html](http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/page9583.html).

<sup>82</sup> See Application by the British Air Line Pilots Association to the International Labour Organisation (above n 71) and the Appendix in this volume.

19 May 2008, but was discontinued on 22 May 2008 after BALPA realised that, regardless of the outcome, the case would progress on appeal to the Court of Appeal and House of Lords, with the prospect of further reference to the European Court of Justice. No collective action was therefore taken.<sup>83</sup>

A complaint was made on behalf of BALPA to the ILO Committee of Experts on the basis that the practical effect of the *Laval* quartet on UK unions was to diminish their access to the right to strike. The Committee agreed that there was cause for concern. UK law relating to the manner in which an employer can seek (and gain) an injunction in UK courts, when compounded with the principles elaborated upon by the ECJ in the *Viking* and *Laval* judgements, created a situation where the rights to which the union and its members were entitled under Convention No. 87 could not be exercised. ‘The impact upon the possibility of ... workers ... being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.’<sup>84</sup>

The inability of unions to call industrial action when posted workers are involved in the dispute led in 2009 to a wave of unofficial industrial action. One example was the Alstom dispute, which started in 2008 and remains the subject of contention. This concerned subcontracting arrangements involving construction at two new power stations; Staythorpe in Nottinghamshire and Grain in Kent.<sup>85</sup> It has only just been revealed that, (as was suspected by the union, GMB), one of the subcontractors, an Italian company, Somi, was paying its posted workforce substantially less than it had claimed (by 1,300 Euros per month) thereby enabling undercutting of local wages.<sup>86</sup>

The most notorious example of a dispute involving posted workers is the industrial action taken by workers at the East Lindsey Oil Refinery and in support of their action by other workers throughout the UK. This action commenced in January 2009 following a dispute over the ability of UK workers to apply for jobs which were to be performed in the UK. Their employer at the Lincolnshire oil refinery was TOTAL, a French company, which awarded an Italian company, IREM, the contract to build the plant’s de-sulphurisation unit. IREM was awarded the contract on the basis that it undertook to

<sup>83</sup> ‘Pilots’ union drops court action’, *The Guardian* 22 May 2008.

<sup>84</sup> See the Appendix in this volume.

<sup>85</sup> Mentioned briefly in C Kilpatrick, ‘Laval’s Regulatory Conundrum: Collective Standard-setting and the Court’s New Approach to Posted Workers’ (2009) 34 *European Law Review* 844; and C Kilpatrick, *British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law*, LSE Law, Society and Economy Working Papers 16/2009.

<sup>86</sup> GMB press statement, ‘Independent Audit Confirms Underpayment of Overseas Workers on Staythorpe Site by Italian Contractor Somi’ 19 January 2010: [www.gmb.org.uk/Templates/PressItems.asp?PrintFriendly=True&NodeID=99462](http://www.gmb.org.uk/Templates/PressItems.asp?PrintFriendly=True&NodeID=99462).

supply its own skilled workforce, consisting of Portuguese and Italian workers, and pay them equivalent wages to the local workforce. These were notably jobs for which local UK workers were not eligible to apply. The workers from Portugal and Italy were brought in on a barge moored in nearby Grimsby, where they would live while performing services for IREM. In effect, they were posted workers, although not agency workers. The industrial action taken at the East Lindsey Oil Refinery was specifically aimed at ending their employment, so that British workers could have the opportunity to do the same work. The incident sparked a number of sympathy walk outs in Grangemouth Oil Refinery, Aberthaw power station, near Barry, South Wales, and a refinery in Wilton near Redcar, Teeside, to name only a few.<sup>87</sup>

The dispute gained national and international media coverage, as workers protested under banners which read ‘British Jobs for British Workers’. The far right British National Party (BNP) supported and encouraged the action,<sup>88</sup> even though local activists have denied the significance of BNP involvement.<sup>89</sup> Generally, it should be noted that there seems to be a rise in xenophobic sentiment in the UK. For example, despite a poor showing in the 2010 national and local elections, it has been observed that the number of votes cast for the BNP increased three-fold from 2005 – 2010;<sup>90</sup> and concerns have been raised in relation to protests organised by ‘the English Defence League’ established in July 2009, which operates through football supporters’ clubs.<sup>91</sup>

In response to the industrial action which took place at East Lindsey (and elsewhere), TOTAL issued a statement to the effect that:

‘We recognise the concerns of contractors but we want to stress that there will be no direct redundancies as a result of this contract being awarded to IREM and that all IREM staff will be paid the same as the existing contractors working on the project.

It is important to note that we have been a major local employer for 40 years with 550 permanent staff employed at the refinery. There are also between 200 and 1,000 contractors working at the refinery, the vast majority of which work for UK companies employing local people. On this one specific occasion, IREM was selected, through a fair and competitive tender process, as the most appropriate company to

<sup>87</sup> R Booth, ‘Mediators called in as wildcat strikes spread across UK’, The Guardian, 31 January 2009.

<sup>88</sup> BNP Supports Wildcat Strike at Coryton Refinery in Essex, see: <http://bnp.org.uk/category/news/british-jobs-for-british-workers/>.

<sup>89</sup> <http://libcom.org/history/2009-strike-lindsey-refinery-struggle-entangled-nationalism>; and it is claimed that BNP members were thrown off the picket lines: <http://www.socialistparty.org.uk/articles/7254>.

<sup>90</sup> For a statement by BNP leader (Nick Griffin) to this effect, see: <http://www.facebook.com/topic.php?uid=8644741474&topic=25094>. For similar statistics, but a very different viewpoint, see: <http://www.workersliberty.org/story/2010/05/27/bnp-when-fascists-fall-out>.

<sup>91</sup> See <http://www.englishdefenceleague.org/>; also <http://news.bbc.co.uk/1/hi/8250017.stm> and N Lowe, Searchlight, The Guardian Special Investigation, 20 May 2010.

complete this work. We will continue to put contracts out to tender in the future and we are confident we will award further contracts to UK companies.’<sup>92</sup>

The position taken by TOTAL was supported by the Labour Government. Peter Mandelson spoke out in the House of Lords in support of EC law governing free movement of workers and services, pointing out how much British workers and business had to gain from the current legal position.<sup>93</sup> In the House of Commons, the then Minister for Employment Relations and Postal Affairs, Pat McFadden, reported that he had referred the dispute to ACAS to examine the ‘accusations being aired’. If laws had been broken, then he was committed to ‘take action’.<sup>94</sup> He noted that: ‘Two key accusations have been made in recent days. The first is that the use of labour from overseas leads to an erosion of wages and conditions for all concerned because these workers are paid less than UK workers. The second is that there is discrimination in recruitment practice against British workers’. He noted that both were denied by TOTAL.<sup>95</sup> The Labour Government was not however interested in taking any action as regards underpayment of wages in the Alstrom dispute by Somi and one may wonder what would have been done if this could have been established in the more high profile East Lindsey dispute (as discussed further below).

Mr McFadden also added that: ‘The workers coming here from Italy and Portugal are protected by the EU posting of workers directive, which the UK has implemented fully. It guarantees those workers minimum standards, for example on pay and health and safety, and facilitates the free movement of services within the European Union – a vital market for British companies... Membership of the European Union and taking advantage of the opportunities for trade presented by the EU are firmly in the UK’s national interest... It is important that we respect and guarantee that principle, not least because it guarantees the right of hundreds of thousands of British workers and companies to operate elsewhere in Europe. ...’<sup>96</sup>

A well-known MP on the then Conservative Opposition Front Bench, Ken Clarke, responded to Mr McFadden by asking: ‘will the Minister confirm with clarity whether the Government believe that the posting of workers directive is satisfactory and working fairly in our interests, or whether they are seeking amendments to it? That has been left quite unclear in all the interviews given by Ministers so far.’<sup>97</sup> Furthermore, Mr Clarke pointed to the irresponsible use by the Prime Minister Gordon Brown of the phrase

<sup>92</sup> A Gillian and A Sparrow, ‘Strikes spread across Britain as oil refinery protest escalates’ The Guardian 30 January 2009.

<sup>93</sup> Statement by Lord Mandelson, House of Lords Deb. 2 February 2009, Vol. 707, C472-4. Reported by A Sparrow, ‘Foreign workers row: Mandelson defends EU labour laws’, The Guardian, 2 February 2009.

<sup>94</sup> Hansard, House of Commons Debates, 2 February 2009, Col. 579.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, Col. 580.

<sup>97</sup> Hansard, House of Commons Debates, 2 February 2009, Col.581, per Kenneth Clarke.

‘British jobs for British workers’ previously, adding that at the time ‘he was more concerned more with his job security than with anybody else’s job security in this country, and that we will all welcome the fact if he never repeats it, no Ministers ever repeats it and no such irresponsible statements are made by any member of the Government at any time in the future’.<sup>98</sup>

Mr McFadden reiterated the Government’s claim that it had ‘fully implemented’ the PWD and observed that ‘as for many such directives, the European Commission has established a group to look at its operation, and we will see if it makes any recommendations’.<sup>99</sup> This suggests that the Labour Government’s response to its blatant non-compliance was to wait to see whether there will be any amendment to the PWD recommended by the Commission before amending national legislation. Moreover, Mr McFadden claimed that what the Prime Minister had said ‘quite rightly, was that, as a country we needed to do more to equip the British workforce for the jobs, skills and industries of the future’.<sup>100</sup> In response to questions from Labour MPs, the Minister also stressed that ‘it is legal for a European company to contract for work and to say it will use its permanent employees to carry it out’. The issue of discrimination would only arise where new vacancies were advertised and not made available to British workers.<sup>101</sup>

In relation to reports of the dispute at Alstom, which was alleged to be subcontracting to evade payment of a national collective agreement, the Minister indicated that ACAS would also look into that claim.<sup>102</sup> However, it is notable that now that new information has come to light on the Alstom case, no statement was made by the outgoing or the new Coalition Government on the matter.

This reticence did not extend to more left wing MPs on the Labour back benches. For example, an ‘Early Day Motion’ presented by Jon Cruddas which called on the Government ‘to support the European TUC proposals for a Social Progress Protocol to be attached to the EU Treaty..’ and ‘to initiate effective reform of the EU Posted Workers Directive so that employers posting workers to the UK are required to observe the terms of appropriate collective agreements as well as minimum terms laid down in statute’. That motion also recognised that ‘what motivates members of the GMB, UNITE and other trade unions is not protectionism or xenophobia but a desire for fairness’ and sought to congratulate ‘their refusal to allow the British National Party to infiltrate into the action’.<sup>103</sup>

<sup>98</sup> *Ibid.*

<sup>99</sup> Hansard, House of Commons Debates, 2 February 2009, Col.581, per Pat McFadden.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, Col. 583, per Pat McFadden.

<sup>102</sup> *Ibid.*, Col. 584, per Pat McFadden.

<sup>103</sup> Early Day Motion EDM 677, Jon Cruddas, 3 February 2009.

The Advisory Conciliation and Arbitration Service (ACAS) *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (2009) was not able to confirm parity of pay levels. ACAS reported instead that (at para 11): ‘ACAS inspected the contract documentation which commits IREM to pay the going rate, but IREM were not yet in a position to provide evidence that they were doing this.’ ACAS concluded (at para 23) that there was, therefore no basis on which to conclude that IREM or TOTAL were acting unlawfully, or in a way which could give rise to an allegation of social dumping. However, other commentators have observed that the dispute raised important questions as to the appropriateness of the employers’ conduct, which have gone unanswered.<sup>104</sup> The Government decided to take this to mean, in their evidence to the House of Commons that ‘[t]he ACAS report on the dispute at the Lindsey oil refinery had found that the employees of the Italian subcontractor, IREM, had the same terms and conditions as local workers under the National Agreement ...’<sup>105</sup>

The initial industrial action surrounding the dispute at the East Lindsey Oil Refinery was settled without legal action being taken against the workers concerned and without their dismissal. A deal was struck whereby 102 jobs were to be made available on-site for which British workers could apply.<sup>106</sup> However, in June 2009 industrial unrest occurred again, when 51 redundancies were made at the Lindsey Oil Refinery in what workers believed was a breach of the deal reached when they returned in February 2009. The workers responded with a spontaneous walk out in protest, without union authorisation or endorsement, and were given an ultimatum to return to work or lose their jobs. Those who did not return were sacked and told to reapply for their jobs. Again, this decision by TOTAL generated a wave of sympathetic action across the UK. Nevertheless, the dispute was, once more, settled without dismissal or further recourse to legal action by the employer and the redundancies made were reversed.<sup>107</sup>

It may be that the employer in this dispute, TOTAL, was not able to avail itself of EC law to bring any kind of action in reliance on the ECJ judgments in *Viking* and *Laval*, as these only contemplate liability of trade unions for industrial action and not private individuals. The former can be regarded as ‘quasi-regulatory bodies’, while individual

<sup>104</sup> R Arthur, ‘Rüffert and Luxembourg: The Posted Workers’ Directive and ILO Convention No. 94’ in Ewing and Hendy (eds) (above n 60), at 48. Cf media coverage which reported that ACAS had found that union fears were groundless, eg S Coates, ‘Anti-foreign strikes branded baseless by ACAS’, *The Times*, 17 February 2009.

<sup>105</sup> House of Commons, Oral Evidence of 9 and 11 March 2009 before European Scrutiny Committee on ‘Free Movement of Workers in the EU’, Fourteenth Report of Session 2008-9, Report, together with formal minutes and oral evidence, printed 25 March 2009, p. 5.

<sup>106</sup> P Wintour, M. Wainwright and A Stratton, ‘Refinery strike is over - but jobs fight goes on’, *The Guardian*, 5 February 2009.

<sup>107</sup> G Wearden, ‘Deal ends Lindsey oil refinery dispute’, *The Guardian*, 26 June 2009; P. Stiff, ‘Lindsey dispute settled as workers reinstated’, *The Times*, 26 June 2009.

workers taking wild cat action cannot perform this function.<sup>108</sup> It should, however, be noted that it was open to TOTAL to seek an interim injunction to prevent the wildcat strike taking place, on the basis that the action taken was in breach of domestic UK common law, namely certain economic torts, and outside the scope of any statutory immunity from liability.<sup>109</sup> Moreover, other employers which were affected by secondary industrial action could have done likewise. They would seem not to have taken such action because it was not conducive to harmonious or productive industrial relations where there was a highly unionised (and activist) workforce. Nevertheless, it is also worth noting that the unions did not wish to risk associating themselves with the industrial action taken, or even calling for a formal ballot on the subject matter of the dispute. The risks of unlimited liability, following *Laval*, made this too dangerous a path to be contemplated; the result was that other far right groups instead attempted to involve themselves in the action.<sup>110</sup>

## 5. Conclusion: Future Prospects

It might seem that, in terms of scale, the PWD poses only a small problem for the UK. If the Government is correct, there are 47,000 UK posted workers on contracts in other EU countries and only 15,000 non-British posted workers in the UK.<sup>111</sup> Nevertheless, it should be added that an absence of registration requirements calls these figures into question. These statistics certainly do not support Mr McFadden's earlier claim that 'hundreds of thousands of British workers and companies' operate elsewhere in Europe.<sup>112</sup> Furthermore, the PWD and the jurisprudence of the ECJ have had some significant effects on UK industrial relations. In particular, limits have been placed on the competence of unions to represent the legitimate concerns of their members, and thereby their capacity to organise lawful industrial action. The scope for autonomous

<sup>108</sup> Apps (above n72), at 147. See also broadly in support of this view, P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 *European Law Review* 411 at 420; and see A Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' in C Barnard (ed), (2007-8) *The Cambridge Yearbook of European Legal Studies* 463 at 536.

<sup>109</sup> For the economic torts which potentially apply in this scenario, see S Deakin and G Morris, *Labour Law*, Fifth Edition (Hart Publishing 2009) at 899 – 917 and on interim injunctions see 943 - 949. See also the Trade Union and Labour Relations (Consolidation) Act 1992, sections 219 and 244.

<sup>110</sup> See <http://libcom.org/history/2009-strike-lindsey-refinery-struggle-entangled-nationalism>.

<sup>111</sup> Hansard, House of Commons, 'The Prime Minister – Liaison Committee', 12 February 2009, Q115 per Michael Connarty.

<sup>112</sup> Hansard, House of Commons Debates, 2 February 2009, Col. 580.

industrial relations and systems of bargaining has declined, as indeed Brian Bercusson predicted it might if the wrong result was reached in the *Viking* and *Laval* cases.<sup>113</sup>

In Parliamentary debates, there is evidence of serious concern with the ECJ jurisprudence voiced by backbench MPs: ‘The *Viking* and *Laval* cases, which were determined in the European Court of Justice recently, clearly signal that we should hold a debate on a neo-liberal Europe, where corporations can move across the continent uncontested by trade unions.’<sup>114</sup> ‘In other words, an employer’s right to freedom of establishment trumps the union’s right to strike.’<sup>115</sup>

There has also been fierce criticism of the Polish and UK Protocol to the Lisbon Treaty regarding Part IV of the EU Charter of Fundamental Rights, which may have negligible legal effect, but ‘seems to give a clear nudge and wink to the ECJ that it is right to interpret the hierarchy of rights and responsibilities as it has so far, and that in the minds of at least the British and Polish Governments, it is right to give primacy to the right of companies to trade, sometimes oppressively in relation to their work force, rather than to the right of workers to take collective action’.<sup>116</sup>

The outgoing UK Labour Government said that it was still waiting from news within Brussels regarding potential responses to the *Laval* and other judgments and review of the PWD: ‘As for the posted workers directive, an expert review has been set up in the European Union to look at the impact of the *Laval*, *Viking* and other judgments, and a group of employers and the work forces are also meeting to review that at the same time. When they reach their conclusions, we will look at what they have to say.’<sup>117</sup> It seems that this Government’s game was one of ‘wait and see’. There has been no official UK response to the comments of the ILO Committee of Experts on the Application and Conventions and Recommendations (appended to this paper) relating to the impact of *Viking* and *Laval* on UK labour law. As the new Coalition Government have also been silent on the subject of posted workers, it seems that no policy shift is likely to emerge at least until after the summer recess, and even then only if any reform is proposed at European level or the Commission makes renewed demands for compliance. The *Laval* case seems to have undermined trade unions’ ability to provide

<sup>113</sup> B Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 279.

<sup>114</sup> Hansard, House of Commons, 28 January 2008, Col. 76, per Jon Trickett.

<sup>115</sup> Hansard, House of Commons, 5 February 2008, Col. 836, per Michael Meacher.

<sup>116</sup> Hansard, House of Commons, 5 February 2008, Col. 843, per Jon Trickett

<sup>117</sup> Hansard, House of Commons, 4 February 2009, Col. 842 per Gordon Brown; for reiteration of this view see Hansard, House of Commons, 5 February 2009, Col. 957, per Pat McFadden, Minister for Employment Relations and Postal Affairs: ‘We supported the European Commission’s proposals to ask its group of experts to examine the operation of the posted workers directive and to ask the social partners at European level to discuss the implications of recent European Court judgments.’ See also Hansard, House of Commons, 12 February 2009, Col. 2293W, per Pat McFadden, Minister for Employment Relations and Postal Affairs.

democratic representation of workers' interests. This result is now compounded by the current lack of interest expressed in this issue by any of the major UK political parties.



## **The Struggle over the Services Directive: The role of the European Parliament and the ETUC**

*Jon Erik Dølvik and Anne Mette Ødegård<sup>1</sup>*

### **1. Introduction**

This paper analyses the two years political struggle leading to adoption of the contested Directive on Services in the Internal Market (2006/123/EC),<sup>2</sup> focussing on the roles of the European Parliament (EP) and the European Trade Union Confederation (ETUC) in shaping the compromise outcome. Hailed by some as a milestone for democratisation of EU decision-making (Kowalski 2006), the outcome implied that the Council, the Commission, and the conservative majority in the EP gave up their initial support for the controversial Bolkestein draft and accepted a compromise strongly influenced by the Socialist minority in the EP and the ETUC. This can only be understood in view of, first, the crucial role the EP has obtained under the legislative procedure of co-decision making, second, the ability of the ETUC to provide expertise and act as broker in the processes of coalition-building and negotiations within and across the EU institutions and, third, instigate external pressure by fostering broad public and political mobilisation in key Member States and at European level. On the day of the decisive vote in the EP the streets in Strasbourg were filled with 30.000-50.000 trade unionists and the dual approach of the ETUC, autonomously trying to exert public pressure and simultaneously work closely with the politicians inside the institutions to find a solution, reached a critical moment: ‘The final manifestation was like walking on eggs’ (ETUC official in interview).

When the European Commission launched the Services Directive in January 2004, the intention was to break up what was seen as the frozen internal market for services in the EU. The Bolkestein Directive, as it was called after the Dutch Commissioner for Internal Market affairs, was initially well received in the Council and the EP but soon became subject to trade union protest, political controversy and mass demonstrations across

<sup>1</sup> First of all we would like to thank all the interviewees for sharing their time and information with us. We are also grateful for comments from Georg Menz, Morten Egeberg, Ulf Sverdrup, Erik Oddvar Eriksen, an anonymous reviewer, and Claes-Mikael Jonsson in particular.

<sup>2</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

Western Europe. Associated with the infamous ‘Polish Plumber’ entering the EU after the Eastward enlargement 1 of May 2004, the Bolkestein proposal was even blamed for the defeat of the Constitutional Treaty in the French and Dutch referenda in 2005. By introducing the so-called Country of Origin Principle, implying that cross-border service providers would mainly be subject to the laws of their home country, the ETUC claimed that the directive would invite unprecedented regime-shopping and social dumping (ETUC 2004). After a long-drawn political process, the European Parliament (EP) voted for an amended version of the Directive on 16 February 2006 in its first reading, which was swiftly accepted by the Commission and adopted virtually unaltered by the Council on 12 December 2006.

The past decades of European integration have unleashed grand debates regarding the democratic accountability of EU decision-making, the division of power between EU institutions, and the possibilities for popular and parliamentary forces at the European and national levels to influence decision-making in the new multi-level European polity (Hix et al 2007). Especially in the labour movement and on the Left, the predominance of the Member States’ through the Council, and the ‘democratic deficit’ of the EU, have often been cited as major obstacles to the protection and promotion of workers’ interests at the European level. Over the past decades it has, first, been widely held that the decisive power centre in EU legislative decision-making is the Council, in which national economic interests are assumed to prevail over social and ideological concerns (Moravcsik 1993). Second, the European Parliament has in spite of its strengthened role under the co-decision procedure established by the Maastricht Treaty in 1993 and extended in subsequent Treaty revisions (Shackleton 2000), been regarded as a junior partner with limited influence on issues of vital economic importance to the Member States. Third, the Commission has been viewed as the key inter-institutional power-broker at the EU level, forcefully promoting the four freedoms constituting the core of the EU single market project, i.e. free movement of goods, labour, services, and capital between the member-states. Fourth, organized business and product market interest groups have been portrayed as by far the most influential and successful lobby groups at the EU-level (Greenwood 1997, Traxler and Schmitter 1994). Organized labour has been viewed as structurally disadvantaged by the particular opportunity structure of the EU decision-making machinery and the specific challenges of internal interest intermediation (the logic of membership) facing the highly diverse associations of European trade unionism – especially as regards key economic issues (Visser and Ebbinghaus 1992, Dølvik 1998).

The strife over Services Directive fits poorly with such understandings, and the outcome may, like the international transport worker unions’ success in getting the EP to block the contested Port Directive in 2005 (Turnbull 2010), contribute to nuance this picture and draw attention to the conditions under which trade unions can gain influence on EU legislative decision-making. How could the Socialist minority in the EP and the ETUC gain such influence on an item of fundamental importance for one of the four freedoms

where they seemingly were at collision course with organized business, a major share of the Member States, and, not least, the Commission?

The aim of this article is not to discuss the content of the compromise Directive (see Barnard 2008) but to use the decision-making process that led to it as a case to highlight, first, the central role of inter- and intra-institutional negotiations and coalition-building in shaping power-relations in EU legislative decision-making which is now governed by the co-decision-procedure (Farrell and Heritier 2002, 2004; Shackleton 2000); and, second, to discuss the key factors that in this instance enabled the alliance of parliamentary forces, European trade unions, and popular movements – acting at EU as well as Member State levels – to make such a difference in EU decision-making. Our analysis suggest that four sets of factors enabled the Socialist EP-minority and the ETUC to shape the outcome: i) the institutional interdependencies created by the co-decision procedure; ii) contextual developments and changes in actor constellations in the wake of Eastward Enlargement, the shift of Commission, and the Treaty ratification crisis; iii) the comprehensive ETUC approach, linking issue expertise and targeted lobbying within the EU institutions with public, extra-parliamentarian mobilization at both European and Member State levels; and (iv) the emergence of multilevel political interaction and coalitions across party lines.

The article is based on a case-study of this process, focusing on factors shaping the role of the European Parliament, and the ability of the ETUC to influence this instance of inter-institutional decision-making. The study builds on 16 semi-structured interviews with key actors in the European Parliament, the European Commission, and the main European social partner organizations as well as with central actors from Sweden, Germany and Poland. The interviews are supplemented by review of official papers, position papers, press-releases, and relevant research literature.<sup>3</sup> Polish and German interviewees were chosen because they represent the largest countries of the ‘New’ and ‘Old’ Member State camps in the Council and the EP, while the Swedish interviewees represented the Nordic country that was most actively engaged in the strife (Ahlberg et al 2006).

## **2. Background: Context and issues**

After the Lisbon Agenda in 2000 singled out removal of obstacles to free movement of services as a central, unfulfilled element of the internal market programme spelled out in the 1986 Single Act (De Witte 2007), the Commission presented its Internal Market

<sup>3</sup> The interviews were conducted under the insurance of full anonymity of the interviewee. A list of the interviewees, except a few respondents who preferred anonymity, can be obtained by the authors.

Strategy for Services.<sup>4</sup> Highlighting services and the information society as key drivers of the new economy, the Commission suggested a horizontal rather than a sectoral approach because of the interdependence of different service activities. In 2003, the Commission announced that it would make a proposal for a Directive on services based on a mix of mutual recognition, administrative cooperation, and harmonization.

When the draft Directive<sup>5</sup> was launched in January 2004 by Commissioner Bolkestein, it was extremely complex and broad in scope. Aimed at simplifying the establishment of service companies in other Member States ('single contact point') as well as abolishing host country restrictions on cross-border provision (trading) of services, it was hard to comprehend even for legal specialists. In terms of cross-border service provision, the most controversial element was the introduction of the so-called country of origin principle (CoOP). This implied that temporary service provision, with a few exceptions, would be subject only to the law of the country in which they were established, implying a strong notion of the mutual recognition (Barnard 2008a). The main issue of controversy related to labour law pertained to the implications for the regulation, control and monitoring of conditions for posting of workers. The proposal assured that the hard nucleus of the Posting of Workers Directive (96/71EC) should still apply – obliging host states to ensure posted workers a core of minimum rights, including working time and minimum wages laid down in law or generalized collective agreements – implying a derogation from the CoOP in respect of posted workers (see Schlachter and Fischinger 2009). But it also proposed that the main responsibility for monitoring and control of working conditions for posted workers was shifted from the host Member State to the country of origin. Given the inherent difficulties of controlling employment conditions for workers involved in fluid, complex subcontracting networks across the borders, such a transfer would in the view of Western trade unions pre-empt any effective control at the workplaces and invite circumvention of host country rules. Combined with the opportunities for Western companies to hire low cost subcontractors from the new Member States in Central and Eastern Europe occurring from 1 May 2004,<sup>6</sup> this would in their view open for unfettered regime-competition at the sites in Old Europe. Companies, workers and governments from the new Member States saw on

<sup>4</sup> COM(2000) 888 final, Communication from the Commission to the Council and the European Parliament – An Internal Market Strategy for Services. This was followed up in COM(2002) 441 final, Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services

<sup>5</sup> COM(2004) 2 final, Proposal for a Directive of the European Parliament and of the Council on services in the internal market [SEC(2004) 21].

<sup>6</sup> By 1 May 2004, Estonia, Lithuania, Latvia, Poland, the Czech Republic, Slovakia, Hungary and Slovenia (EU8) became EU members, together with Malta and Cyprus. On average, nominal labour costs in EU8 were at the time around 1/7<sup>th</sup> of those in EU15. Transitional arrangements requiring work permits and host country conditions were allowed for free movement of workers until 2011, but not for posting of workers in the context of cross-border subcontracting and provision of services (Dølvik and Eldring 2008).

their part opportunities to reap comparative advantages in the widened pan-European services markets and bring home rising taxable incomes, while contractors, consumers and governments in «Old Europe» could expect welcome cost reductions, which in the European Commission's outlook, altogether would contribute to higher effectiveness and growth in the European economy as a whole. The only losers in this picture would be the (mostly small) firms and workers in the host countries competing for contracts in the same markets, and their unions, which could expect downward pressures on labour standards and weakened capacity to defend established rights and conditions.

Being presented just before the Eastward enlargement 1 May 2004, the proposal was hailed in the new Member States, relieving some of the humiliation they felt by the simultaneous erection of transitional restrictions on free movement of workers in most of the old Member States. Among the sceptics in the old Member States and in trade unions in particular, however, the introduction of the CoOP and the weakening of control opportunities were eventually perceived as levers for a profound liberalization that would encourage regime-shopping, relocation, unequal treatment, and low-wage-dumping of posted workers (Hendrickx 2008, Kowalski 2006).

After the Commission launch of the Directive in January 2004, the proposal was subject to initial discussions in the Council while at the same time going to the European Parliament for a first reading. The legal basis for the Directive<sup>7</sup> provided for the co-decision procedure.<sup>8</sup> This procedure, introduced by the Maastricht Treaty, concedes to the European Parliament the right of legislative partnership with the Council. The final agreement of the two institutions is essential if the text is to be adopted as a law. The procedure comprises one, two or three readings in the EP. This means, for example, that if the Council agrees after the first reading, the text is adopted. If it is impossible to reach an agreement, the legislation cannot be enacted (Duff et al. 1994, Corbett et al. 2000).

The Members of Parliament, and actors wanting to influence their positions, must therefore judge the likelihood that their amendments to a proposal will be accepted by the Commission and avoid becoming subject to unanimous decision-making and the risk of blockage in the Council. The options of the various interests in the Parliament and external lobby groups thus depend on the views and constellations in the Council as well as of the stance of the Commission, shaping the room of manoeuvre, possible coalitions, and the power relations in the negotiations within the EP. The same goes for the different camps in the Council, implying that the risk of failure and non-decision weighs heavily on the actors in both institutions (Shackleton 2000: 333). Recent research has drawn attention to the importance of informal consultations (*ibid.*; Farrell and Heritier 2004) where the Council Presidency and the EP *rapporteurs* play central roles in sorting out possible common positions, the room of manoeuvre, and no-goes for

<sup>7</sup> Articles 47(2) and 55 EC.

<sup>8</sup> Article 251 EC.

the involved actors. The co-decision procedure therefore tends to spur complex inter-institutional and cross-party dialogues, implying that external interest groups will have to coordinate their work through a variety of channels in order to maximise their leverage. The principal targets that European interest groups would seek to influence are, first, the European Commission, second, the European Parliament, and, third, national governments represented in the Council. While in the early phase they will usually concentrate their lobbying on the Commission and its relevant working groups preparing the proposals (including national representatives), subsequent efforts will have to target EP which can amend or block proposals (where access mainly goes via the European party groups and national MEPs therein) and decisive government representatives in the Council (which can often best be approached via national channels) (Greenwood 1997: 27).

### **3. The process: From the Bolkestein proposal to the compromise in the Parliament**

The launch of the Service Directive did not spark any immediate reactions. Most of the Member States welcomed the draft (Miklin 2008) and also the main parties in the European Parliament appeared unaware that the Directive could become a subject of controversy. No-one seemed to grasp the dimensions of the proposal, which had been subject to little discussion outside the DG Internal Market in the Commission.

The two years of negotiations and decision-shaping in the EP can be divided in two stages: 1) The preparatory stage, positioning stage from January 2004 until the first reading in the responsible Parliamentarian Committee (IMCO) in November 2005, followed by 2) the stage when the drama culminated in the 'hot' phase of negotiations when a solution had to be found and a compromise was struck in the plenary EP first reading in February 2006.

In order to understand the broad engagement in the process it is important to bear in mind the horizontal approach the draft was based on, which meant that it would establish a general legal framework applicable to virtually all economic activities involving services. The work with the Directive became therefore very complex, with a wide range of stake-holders.

#### *3.1 The preparatory and positioning phase: Actors and events*

When the EP started to work on the Commission draft, in parallel with initial discussions in the Council, ten parliamentarian committees were involved in scrutinizing different aspects of the proposal. Eventually two of these EP committees came to play the dominant roles; the Internal Market and Consumer Protection Committee (IMCO) was responsible for preparing the EP proposal on the Services Directive, but the work proceeded in close cooperation with the Committee for Employment and Social affairs. In both committees the rapporteurs were social

democrats; in IMCO, Evelyn Gebhardt from Germany and in the CES, Anne Van Lancker from the Netherlands.

The majority of the actors inside the Parliament shared the view that a new regulation was needed to dismantle protectionist national barriers to the integration of European markets for services. The main parliamentary groups also soon realized that to shape the outcome and avoid a blocking of the Directive in the Council, they would need a solid majority in the Parliament. But as the division of views between and within the EP party groups gradually came to the fore, doubts arose about whether it would at all be possible to arrive at a solution that could gain the necessary support.<sup>9</sup> Besides the salient division of views between The Group of the European People's Party (Christian Democrats) and European Democrats in the European Parliament, (EPP-ED) and the Socialist Party (PES) concerning the CoOP, the scope, and the protection of labour law, both groups spawned highly divergent views and interests, for example between Eastern and Western MEPs, crossing traditional party lines.

(a) ETUC and the rising public opposition

During 2004, growing criticism of the Directive was seen at national level throughout Western Europe. It is not entirely clear where the external opposition to the Bolkestein draft originated, but it seems that it was spreading like a 'grass-fire' from different directions. Some point to the Belgian trade unions and Socialist Party who early on rallied against the Bolkestein Directive in the up-coming Belgian election in autumn 2004, while others point to French unions and transnational NGOs like ATTAC (Association pour la Taxation des Transactions pour l'Aide aux Citoyens). It is clear however, that during the autumn of 2003, several months before the launching of the Directive, several national trade union confederations, had got the draft and informed the ETUC. The Swedish LO immediately pushed the alarm-bell and also informed their government about their worries (Miklin 2008). When the proposal became public in January 2004, the ETUC was thus well prepared and did according to all our respondents soon attain a key role in the campaign against the Bolkestein draft.

Within ETUC the CoOP and the restrictions on host country control were quickly identified as a major challenge to the national regimes for regulation and control of employment conditions for posted workers as stipulated by the Posting of Workers Directive.<sup>10</sup> An internal Task Force, headed by Jozef Niemiec from the Polish

<sup>9</sup> The EP had 732 seats in 2006. The two major groups were EPP-ED (European People's Party and European Democrats in the European Parliament) with 268 seats and the Socialist Party (PES) with 200 seats. ALDE (Group of the Alliance of Liberals and Democrats for Europe) had 88 seats, GREENS/EFA (Group of the Greens/European Free Alliance) had 42 seats, GUE/NGL (Confederal Group of the European United Left/Nordic Green Left) had 41 seats, IND/DEM (Independence/Democracy Group) 37, UEN (Union for Europe of the Nations Group) 27 and NI (Non-attached) 29 seats.

<sup>10</sup> ETUC Executive Committee Resolution 17–18 March 2004, [www.etuc.org/IMG/pdf/Priorites\\_2004\\_EN-3.pdf](http://www.etuc.org/IMG/pdf/Priorites_2004_EN-3.pdf)

Solidarnosc, was swiftly set up, anchored at the top of the organization, and the most intensive mobilizing campaign in ETUC history was set in motion in close contact with national headquarters.<sup>11</sup> Well aware of the danger of being accused of protectionism against the new Member States – which was an issue of great sensitivity also among ETUC member associations – the ETUC soon agreed not to go against the need for a Service Directive but opt for a radical recast of the proposal (Arnold 2008). The common platform that was developed focused on erasing any links to national labour law, preserving the Posting of Workers Directive untouched, narrowing the scope of the Directive, and eliminating the CoOP (Kowalski 2006, Jonsson 2006). If that failed, the fall-back position of the ETUC leadership was to achieve a blocking minority in the Council, meaning that the established ETUC ‘Task-Force’ from the beginning worked closely with key Member States in parallel with the European Parliament.

By contrast, the employer side, where representatives of the powerful BUSINESSEUROPE<sup>12</sup> had unconditionally supported the Bolkestein draft from its birth, was soon weakened by division. The interests of small and medium-sized companies organized in UEAPME, in EuroCommerce, and even within BUSINESSEUROPE – which were likely to be most directly affected by low-cost competition from Eastern service providers – proved difficult to reconcile with the immobile, official stance of BUSINESSEUROPE, whose main affiliates are under stronger influence by large corporations that were likely to gain from more cross-border price competition among subcontractors.

Growing public mobilization developed in the Western European Member States during 2004 through trade unions, NGOs, and parliamentarians organizing hearings and demonstrations. Manifestations in the streets of Berlin, Paris, Brussels and elsewhere contributed to pull the national discussions out of the closed circles of Ministers responsible for internal market and industrial affairs, thereby also breaking up the compartmentalized structure of Council debates at the European level (Miklin 2008). It was first when the Directive became a Governmental issue involving ministers and parliamentarians across a broader specter that awareness about the potential implications for social and labour issues came to the fore. In Sweden this happened quite early as a result of tight governmental coordination of EU issues, whereas e.g. it took much longer in the Red-Green Government in Germany where the responsible Minister for industrial and economic affairs initially saw no problems at all with the proposal (Miklin 2008). It soon became clear that the launching of the Bolkestein draft was poorly prepared and badly timed by the Commission. No proper consultation or social dialogue had taken place. With the growing influx of low cost service providers

<sup>11</sup> The Swedish LO also seconded their labour law specialist Claes-Mikael Jonsson to the ETUC, working as secretary and advisor for the Task Force in close cooperation with the confederal secretaries Jozef Niemiec and the Dutch Cathleen Passchier.

<sup>12</sup> In January 2007 the employer organization UNICE changed its name to BUSINESSEUROPE.

from the new Central and Eastern European Member States after 1 May 2004, and the debate about ratification of the new Constitutional Treaty arising, the Services Directive soon became part of a much wider and more heated political struggle.

The ETUC tried to take advantage of the situation by applying a dual strategy. After an initial demonstration was staged (in cooperation with the Belgian trade unions) in Brussels 5 June 2004, a number of manifestations were eventually organized in association to important meetings in the Council and the EP as well as by affiliates in Berlin, Paris and other key capitals. By taking a leading role in the fight against the Bolkestein draft, the Task Force hoped to prove the ETUC's credentials as a genuinely popular vanguard for Social Europe, independent of the Commission, thereby strengthening its credibility in the defense of the new Treaty in the upcoming referendum campaign in France. This balancing act was further complicated by the fact that the affiliates from the new Member States saw the opening of the service markets as crucial to their membership in the EU. It was hard work to convince these member associations about the need for a more balanced Directive, where the Polish Solidarnosc and their voice in the ETUC leadership, Jozef Niemiec, played central roles. Another element of the strategy, suggested by the internal Task force, was that the ETUC should argue for lifting of the transitional restrictions on the free movement of workers.<sup>13</sup> This gained broad support in the Executive Committee of the ETUC – except from the confederations in the main western border states, Germany (DGB) and Austria (ÖGB) – enabling the ETUC to fend off accusations that its criticism of the draft Services Directive was based on disguised protectionism. In return, the majority of the organizations from the new Member States complied with the ETUC strategy when it came to the conclusive phase. Unlike BUSINESSSEUROPE, the ETUC thus managed to keep its disagreements 'in-house' and could pursue its active pressure strategy in apparent unity (Holsaae et al 2006, Arnold 2008)

(b) Pressure building up within the EU Institutions

In November 2004 the two parliamentarian committees involved – IMCO (Internal Market Committee) and the Employment Committee, headed by their social democratic rapporteurs, the Dutch Anne Van Lancker and the German Evelyne Gebhardt – staged a joint hearing with experts and representatives of the social partners. This hearing is by several of our sources pointed out as the turning point as far as public attention about the directive was concerned. Laying out the intricacies and the widely diverging understandings of the proposed Directive, the event revealed how difficult it would be to reach a viable majority in the EP. In addition to the cleavages cutting across party lines, the views in the Internal Market Committee and the Employment Committee, which was responsible for labour law issues, diverged strongly.

During the early stage after the launch, the Commission acted as if it was business as usual, holding meetings with the political groups in the Parliament, the Council,

<sup>13</sup> ETUC Executive Committee Resolutions, 15-16 March and 5-6 December 2005, [www.etuc.org / IMG/pdf/Resolutions\\_2005-EN-5-2.pdf](http://www.etuc.org/IMG/pdf/Resolutions_2005-EN-5-2.pdf).

employers and the trade unions. But as the temperature rose, it became more and more difficult for the Commission to defend the ‘hot political potato’ publicly. At the end of 2004, the Prodi Commission was replaced by the incoming Barosso regime. During the crucial stages of the decision-making process there was thus a new Commissioner, Charlie McCreevy, a pragmatic Irish, in charge of the Directive who felt no personal fatherhood and commitment to fight for the proposition, which by many of the actors was labeled the ‘orphan’ directive. Our sources suggest that the change of Commission also paved the way for a shift of Commission approach.

General Secretary of ETUC, John Monks, held meetings with McCreevy during his first month in office, a contact which was held alive until the very last days of the process. In this period Monks also had conversations with the new Council President, Jean-Claude Juncker, and with the French President Jacques Chirac, while ETUC representatives had special meetings with the Socialist faction in the EP (Kowalski 2005:10-12). Thus the ETUC worked hard to make its voice heard inside all the main decision-making institutions, trying to influence not only the protracted preparations in the EP, but also to use the shift in actors and the rise in public awareness nurtured by the ETUC itself to influence the work on the Directive in the Council and the Commission.

When Council President Juncker met with the EP to present his work program in early January 2005, he expressed skepticism of the Commission proposal.<sup>14</sup> In response to misgivings about the proposal from the French and German governments, cracks in the Commission defense of the Directive were also displayed when Commissioner McCreevy in February 2005 publicly acknowledged that the directive ‘was not going to fly’ in its current form and called for changes in the CoOP and exclusion of healthcare and public services.<sup>15</sup>

Hence, the external pressures on the EP to find a way out were building up, further magnified by the Employment Summit in Brussels on 19 March in front of which the ETUC staged a large demonstration with 75,000 participants. This was organized in cooperation with the national affiliates, who saw to that union leaders and loads of members arrived by busses and planes from all over Europe, alongside mass mobilization by the affiliates in Belgium in particular but also in other neighboring countries. With the referendum on the Constitutional Treaty to be held in France two months later, President Chirac stated during this meeting that the proposal was ‘unacceptable’ for France, and enjoyed broad backing from amongst others Germany, Sweden, Belgium, Denmark and Luxemburg (Flower 2007). The UK as usual sympathized with the new Member States’ demand for more market liberalization. Still, the symbolic impact of the ‘Polish Plumber’ was apparently gaining headway, allegedly underpinned by French electricians who had cut the electricity at Chirac’s holiday resort in Normandy.

<sup>14</sup> [www.brysselkontoret.se](http://www.brysselkontoret.se), 13 January 2005, ‘EU närmar seg fackets syn med Juncker ved roret’.

When the EP gathered after the summer 2005, the political context of its work with the Services Directive had thus changed dramatically since the launch one and half year earlier. The broad support for the Bolkestein proposal had withered both in the Council and in the Commission, and with the defeats of the Constitutional Treaty in the French and the Dutch referenda the Community faced an acute legitimacy crisis where the political establishment in Europe was desperately looking towards the EP, hoping it could find a way out of the conundrum.

### 3.2 *The «hot phase» of negotiations in the EP*

When entering the final phase in the Parliament, from November 2005 until the plenary vote 16 February 2006, the issue was pending in IMCO, but the Employment Committee was involved in all questions regarding labour law, including the country of origin-principle (CoOP). The first proposal from the IMCO was ready in November 2005. Here the scope of the directive was reduced, but still the controversial country of origin principle was intact, after rapporteur Evelyne Gebhardt unsuccessfully had tried to change the CoOP with a phrase of «mutual recognition», building on existing case law on free provision of services. The eventual vote from the committee lacked sufficiently broad support, implying that the negotiations had to continue until the plenary vote.

About two weeks before the vote, a small group consisting of MEPs from the two largest party-groups, Group of the Party of European Socialists (PES) and Group of the European People's Party (Christian Democrats) and European Democrats (EPP-ED), was set up. This was a high-level group, including the vice-chairmen and chair-women, the rapporteur and the shadow-rapporteurs (Holsaae et al 2006). Most of the controversial issues were still unsolved. But they shared the motivation for doing this: The parliamentarians had a golden opportunity to assert themselves as proper lawmakers and they were convinced that a new regulation of the services markets was needed. They were well aware that the alternative to a broad agreement about the text in the EP was most likely *status quo*, i.e. no Directive at all, which was, as mentioned, the fall-back position of the ETUC.

The final hurdles were related to article 16, where the Country of Origin Principle (CoOP) was the key issue. In the EPP-ED, especially among the members of IMCO, the majority was strongly in favor of maintaining the CoOP, which for most of the PES was a no go. Given the reluctance of the parties to concede, a third way had to be found. This was the background for the phrasing «freedom to provide services», that became the core of the compromise. During this decisive phase PES had 'secret' contacts with people in the EPP-ED negotiating group, where central participants, especially from Germany and France, had close ties with parts of the trade unions and the federations of small-and medium sized businesses in their home countries. Actors with such cross-cutting allegiances – prototypically German Christian Democrats with important

<sup>15</sup> *Financial Times*, 3 March 2005.

constituencies in the unions and the ‘Mittelstand’ – played important bridge-building roles, facilitating the give-and-take negotiations that were unfolding.

Officially, the matter was now solely in the hands of the MEPs. But there were still dialogue with representatives of the Commission and the Council. National governments and parties were also following the Parliament’s work closely and held direct contact with their MEPs. Although the grand coalition of CDU and SPD that had taken office in Germany late 2005 never took a clear position (Miklin 2008), forces inside both Governmental parties actively prompted their groups to find a compromise. In fact, both the leader of the EPP-ED (who was also President in the EP) and the leader of PES were Germans. This eventually brought the chairman of the liberal group to accuse the grand coalition in Berlin of dictating terms in the EP and thereby playing an illegitimate role in watering down the Services Directive, since the MEPs are supposed to act as autonomous European representatives and not take instructions from national governments.<sup>16</sup>

(a) ETUC: Working from within and pressuring from without

During the last hectic search for a way out of the quandary, the ETUC played an active role behind the curtains. ETUC had long worked closely with MEPs at both sides, and especially with the chairs of IMCO and the Employment Committee. By contrast, there were, as noted by a Conservative MEP, virtually no contact between the parliamentarians and BUSINESS EUROPE at this stage: ‘They tried to defend the draft but their powers were limited, because they were unwilling to discuss any change of the COOP’ (MEP). During the final negotiations, the ETUC by contrast served key actors in the negotiating teams with alternative texts. As one of the key EP players put it: ‘We were desperately looking for a way out, and there ETUC was, offering text pieces and ideas to the very end of the game’. Having worked on the basis of a ranked list of seven key demands, only the final issue then remained – ultimately to get rid of CoOP. When the magic formula «freedom to provide services» was pulled out of the hat, allegedly by the EPP-ED group, it was not clear where the idea originally came from. The ‘freedom to provide services’ proposal was also informally floated to the team of McCreevy who immediately indicated that such a formula would be accepted by the Commission. No wonder, when the final text was agreed upon in the EP negotiating group just a few days before the plenary vote, that the ETUC team saw it almost as having won game, set and match – but was careful to downplay this in their public reactions. Besides the CoOP, eight sectors, among them Temporary Work Agencies, and cross-cutting areas including labour law, criminal law and private international law had been removed from the Directive (Flower 2007:225).

Since uncertainty about the final vote remained high, some hectic days with intense work to convince doubtful MEPs followed. The ETUC efforts to mobilize public pressure continued. On the day of the debate in the European Parliament the streets in

<sup>16</sup> *Financial Times*, 28 February 2006.

Strasbourg were, as mentioned in the introduction, filled with 30,000–50,000 demonstrators including unionists from Poland, the Czech Republic, Slovenia and Cyprus (Arnold 2008). The dual approach of the ETUC, lobbying pragmatically for a compromise inside the EP and mobilizing pressure in the streets outside reached a critical moment: ‘We wanted to exert public pressure, demonstrate independence from the politicians, and simultaneously work closely with them to find a solution. The final manifestation was like walking on eggs’ (ETUC official in interview).

In the vote 16 February a majority of 394 MEPs from respectively the Socialist group (136), the Conservative group (187), and most of the Liberal group (62) supported the compromise text,<sup>17</sup> while a minority of 215, comprising the green and leftist groups as well as the rightist nationalist groups, cast their votes against.

(b) Back to the Commission and the Council

After the EP compromise was adopted, the proposal went back to the Commission, which quickly presented an amended text based on the EP compromise.<sup>18</sup> According to MEP interviewees, the DG for Internal Markets did not want to accept the compromise, while the Cabinet of McCreevy saw no other option than going along with the EP compromise. Acknowledging that the EP would reject any significant amendments in the compromise in its second reading, the revised Commission proposal followed the EP text very closely (Flowers 2007:226). Moreover, by accepting most of the EP changes, the Commission ensured that the decision in the Council could be taken on the basis of qualified majority and not unanimity, which would easily have led to a blockage.<sup>19</sup>

In the Council, there had been great uncertainty whether the Parliament really would manage to reach a compromise. The Council had therefore worked in parallel with the text of the Directive, moving in a similar direction as the EP. Negotiations in the Council normally take place behind closed doors, but in the case of the Service Directive, where the Austrian Presidency by Minister Barthelein played a key role in facilitating the compromise, representatives of both the EP and the Social Partners were invited to present and discuss issues in Council working groups, something that is very unusual.

When the Council finally adopted a Common Position 31 May 2006,<sup>20</sup> it only implied minor adjustments in the text, e.g. extending the deadline for implementation to three

<sup>17</sup> In the EPP-DE 16 abstained and 32 voted against, while in PES 9 abstained and 35 voted against (Arnold 2008).

<sup>18</sup> COM(2006) 160 final, 4 April 2006, Amended Proposal for a directive of the European Parliament and of the Council on services in the internal market.

<sup>19</sup> Still, according to key Conservative players, they had in order to ensure support in the EPP group lobbied the Commission to prepare guidelines for control of posting of workers that were launched in May 2006, containing several of the controversial elements of the deleted articles 24 and 25 of the original draft.

<sup>20</sup> COM(2006) 160 final (above n 18).

years. The Directive was then sent back to the EP for its second reading 24 October 2006, with an unambiguous message that the compromise was ‘untouchable’.

The inter-institutional compromise was in other words considered so fragile that the second reading in the EP in practice was abandoned. As the Commission had slightly amended the wording of article 1(6) and 1(7) which, together with recital 14, should assure that labour law and the right to industrial action would not be affected by the Directive, forces in the EP and the ETUC called for clarification of these passages. It has been disputed whether the Commission amendments – emphasizing that the Services Directive would not affect labour law and industrial action which *respect Community law* – implied any difference in substance (Barnard 2008a, b; Novitz 2008; Alsos 2009), but the attempt to delete the references to Community law was resolutely rejected. In the contested *Laval* decision<sup>21</sup> in 2007, concerning i.a. the legality of industrial action taken Swedish trade unions against a Latvian employer posting workers to Sweden, the ECJ invoked the same principle with reference to the Treaty provisions on free movement of services. This may clearly be taken to suggest that a different wording in the Services Directive would probably not make a difference.

#### **4. Discussion: How could the Socialists in the EP and the ETUC achieve such influence?**

As a real compromise, the outcome was contested and the battle of interpretation continued into the national implementation processes. While forces in the most liberal camp opposed the outcome for being bereft of any substance and teeth (Holsaae et al 2006), the far left claimed that the principal amendments adopted by the EP were merely about form and not of substantial importance. However, in our interviews it was striking to which extent key actors in all the involved institutions agreed on the significance of the changes the EP achieved as well as on the importance of the compromise for the standing and reputation of the EP and the EU.

Our analysis is premised on the assessment that in spite of its unclear and ambiguous wording, the compromise implied significant amendments of the original Bolkestein proposal. The meaning of the ‘freedom to provide services’-formula is far from clear-cut, but building on ECJ jurisprudence and a strong notion of ‘mutual recognition’ it has certainly less radical implications than the country of origin principle it replaced. The amendments with respect to limiting the scope of the Directive, excluding labour law, and the conditions under which host states can restrict, monitor and control foreign service providers with the purpose of protecting workers were also significant (Barnard 2008 a, b; Schlachter and Fischinger 2009). In this respect, organized labour and the

<sup>21</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

socialist camp in the EP won through with major parts of their demands for changes in the Bolkestein proposal (Kowalski 2006). Conversely, the conservative camp in the EP had to offer significant concessions, most prominently the CoOP, in order to achieve their aim of a horizontal Directive enabling effective implementation of free movement of services in a broad range of branches.

In this section we review the factors that in our view were critical for the decisive influence the Socialist group in the EP and the ETUC obtained in this case, which might also be relevant in other cases determined under the co-decision procedure pertaining to the main bulk of legislative decision-making under the new Lisbon Treaty. We will distinguish between four sets of factors that in combination enabled the Socialist EP-minority and the ETUC to shape the outcome: i) the institutional interdependencies created by the co-decision procedure; ii) the contextual developments and changes in actor constellations and power-relations; iii) the comprehensive ETUC approach, linking issue expertise and targeted lobbying within the EU institutions with public, extra-parliamentarian mobilization at both European and Member State levels; and (iv) the emergence of multilevel political interaction and coalitions across party lines.

i) The inter-institutional interdependencies created by the co-decision procedure  
The co-decision procedure grants the EP veto-power as co-legislator, but the influence of the EP and its different party groups when it comes to negotiating changes in a Commission proposal and in Council positions is highly dependent on the constellation of interests and power relations in the Council. In the Services Directive case this was a double edged sword; if the EP went along with the original draft, a blocking minority of socially minded, labour friendly governments in ‘Old’ Europe could not be precluded, while too much dilution of the Directive would risk being blocked by the liberal coalition of ‘New’ Member States, the UK and others. Such deadlocks are not uncommon and can be long-lasting, depending on whether enactment of a proposal is considered urgent or not by the respective majorities in the Council and the EP. An essential precondition in this case was that a unanimous Council had called for liberalization of the service markets as one of the key targets in its Lisbon agenda, and the same applied to the Conservative majority in the EP. With the prestige vested in the Lisbon process and in this issue in particular, the stakes were high, implying that failure was unacceptable for both the Council and the EP majority. The EP, including the Socialist camp, had from early on also embraced the aim of a Directive freeing up the service markets, implying that the credibility of the EP as a co-legislating institution was also at stake.

The fear of failure was, however, much lower in the Socialist minority than in the EP majority as well as in the Council and the Commission. Their stronger fall-back position granted the EP minority an extra edge in EP negotiations and gave ground for ideological and party-based coalition-building in the EP but also across institutional boundaries. Yet, the common EP commitment to avoid failure provided strong

incentives for a robust, broad settlement in the EP and implied that the price for non-collaboration among EP actors from the outset was high.

ii) Contextual developments and changes in actor constellations and power-relations  
The high stakes involved in opening up the European services markets were further heightened by the changes in the context associated with the ratification process of the new Constitution and the Eastward enlargement from 1 May 2004. The latter point also implied substantial shifts in the structure of interests and composition of the Council. The promise of free movement of services was an issue of key symbolic importance for the new Member States, especially in view of the shaping of transitional arrangements for the free movement of workers. In the old Member States, the emergence of the Services Directive as a centre-piece for the growing opposition against the Constitutional Treaty in France fuelled doubts about the viability of the Bolkestein proposal. When the rejection of the Constitution in the French and Dutch referenda threw the Community into an acute legitimacy crisis, the Directive became a symbolic test case for the Community's ability to deliver on key priorities and prove its democratic credentials. With the risk of a clash between new and old Member States, this created a highly delicate situation in the Council.

The shift of Commission in November 2004, alongside the newly elected Parliament, further implied that – in a situation of potential political paralysis – the entire actor and power structure of the EU was in flux. In addition to the unpredictable context of interest intermediation, this implied that former stakeholders had left, opening for shifts in positions and coalitions. As shown, this had probably most impact on the role of the Commission which was unusually low-key. Combined with the change in composition of the Council from 1 of May 2004, this provided a rare opportunity for the newly elected Parliament to assert itself as lawmaker and left a vacuum in which the ETUC could offer 'insider' advice and expertise on how the EU could find a way out of the quandary.

iii) Multi-level political interaction and coalitions across party lines

The cross-cutting coalition-building in the EP cannot be understood without taking into account the multilevel character of the EU decision-making process. Although the EP is often considered to be the only truly European branch of EU decision-making, the MEPs tend to be in close contact with their domestic parties and constituencies as well as national representatives in other EU institutions. The ETUC's role in brokering the compromise within the EP was facilitated by these well-developed ties between unions and parties in many European countries, ties that even cut across the ideological cleavage between Left and Right. In the continental/catholic European countries, the Christian unions, belonging to the ETUC since the early 1970s, have close ties with Christian Democratic and Conservative parties. In Germany, the CDU/CSU still includes a worker group with roots in the DGB. In the Services Directive process central actors in the conservative group of the EP, also within the negotiating body, had a background in such networks and played important bridge-building roles – not only

within the EP and vis-à-vis the unions, but also in relation to national governments and political constituencies. The importance of small entrepreneurs and craft companies in the voter base of many of the conservative parties clearly also enhanced the compromise-building in the EP, as such companies were likely to be more negatively affected if competition on prices and standards from Eastern service providers were liberalized.

Hence, the compartmentalized structure of the Council and the divisions between EU institutions were partly overcome by the activation of national networks, where denser relations between unions, party groups in the parliaments, and government actors enabled exertion of upward influence on national representatives in the Council. This is probably also part of the explanation why the constellations in the Council to a greater extent than usual followed ideological lines, where Western governments with a social democratic leaning tended to be more sceptical of the Bolkestein proposal than liberally oriented governments, with Christian democratic governments somewhere in between (Miklin 2008).

iv) The two-pronged ETUC strategy: Lobbying from ‘within’ and mobilizing pressure from ‘without’

Given the stakes involved in the case, the unpredictable political situation in the EU on the eve of Eastward enlargement and ratification of the Constitution, and the loyalty the ETUC traditionally had shown to the European project, the ETUC’s decision to ‘ride two horses’, combining offensive lobbying within the EU institutions with active mobilization of popular voice and protest against the proposed Directive was indeed a bold move. With the unions from the ‘new’ Member States hailing free movement as one of the main achievements of EU membership, and the French unions being engaged on both sides in the strife over Treaty ratification, the risks involved in such a balancing act were indeed considerable. Controversial choices had to be made to maintain internal unity, e.g. regarding the transitional arrangements for free movement of workers. But as far as obtaining a recast of the Services Directive was concerned, the ETUC approach probably represents the most successful example of linking mobilization of popular, democratic voice with specialist expertise and targeted lobbying of EU legislative decision-making in the organization’s history.

The scale of public mobilization at national as well as European levels in the Services Directive case was unprecedented *for an EU measure*. Besides adding to the pressures on the EP and the Council to come up with a revised proposal, it created a political space for the ETUC team working inside the institutions to engage in the development of a compromise. With the ETUC and trade unionism in the ‘old’ Member states fronting the opposition against the draft Directive, the ETUC’s acceptance of the compromise appeared critical for a viable outcome. Combined with the asymmetric bargaining power among the party groups in the EP, this enabled the ETUC to establish itself virtually as a fourth institutional, extra-parliamentarian player, acting as a broker and joker of the three-way informal negotiations that were evolving. In contrast to the

European business associations, which usually have been considered superior when it comes to Community lobbying, the ETUC made itself a gatekeeper able to draw on its access to legal expertise and the leverage of key national affiliates to influence the process across all the involved institutions.

The strategy of the ETUC in this case has been interpreted by some observers as a shift in direction of a more activist social movement kind of unionism at European level, while the leverage ETUC obtained has been taken as a proof that external mobilization of popular counter-power is more efficient than ETUC's conventional social dialogue approach from within. Such an interpretation is in our view misconceived and overlooks that the demonstrations against the 'Bolkestein draft' in the streets would most likely have been futile if it were not for the shrewd operation of the ETUC lobbying team, drawing on legal expertise and established networks to the very top within the EU institutions to obtain changes to the draft directive. Conversely, that operation would probably have been less influential without the political urgency and pressure that the mass mobilizations, in combination with the political crisis, had contributed to. A similar strategy was applied in the struggle to stop the proposed Port Directive in 2005, where coalition-building with the employer counterparts eventually also led to development of social dialogue in the sector (Turnbull 2010). In the Services Directive case, the ETUC was acutely aware of the risks associated with the potential contradictions between the logic of the problem-solving negotiations inside the institutions and the logic of popular mobilization in the streets outside, rendering ETUC susceptible to accusations of opportunistic populism and Janus face behavior.<sup>22</sup> As noted by one of the key ETUC actors, the manifestation in the streets at the same day as the final votes in the EP was 'like walking on eggs'. The ETUC victory in the Services Directive case may have come at a price, however. The struggle for ratification of the Constitutional Treaty in France was lost, but subsequent events suggest that the final outcome on that count would probably have been the same anyway. It was hardly a surprise that many of the activists who mobilized in the fight against the Bolkestein draft would never recognize the importance of the amendments ETUC obtained in the EP, but it was indeed a bitter pill that the ECJ in the *Laval* two years later arrogantly disregarded the struggle to keep labour law out of the Services Directive, albeit then not yet entered into force, and deemed industrial action to ensure equal pay for posted workers providing cross-border services incompatible with Treaty provisions (Dølvik and Visser 2008).

<sup>22</sup> As put by a frustrated source in the Commission, «The trade unions were losing members and got an opportunity to prove themselves as a fighting force. They got a common enemy on a golden plate, and could say that a danger is looming and we are your saviors». Sources in *BUSINESSEUROPE* similarly accused the ETUC of demonizing the Directive – on several occasions portrayed as the “Frankenstein Directive” – knowingly spreading misconceptions about its content.

As a whole, the interplay between the various EU institutions under the co-decision procedure helps to explain the ability of the Socialist minority in the EP and the ETUC to influence the decision-making process in the Services Directive case. The process further shows that the institutional interdependencies and power-relations of EU legislative decision-making under certain conditions can be strongly influenced by political dynamics and public reactions at Member State level, cutting across the distinctions between intergovernmental and supranational dynamics in EU governance. In contrast to popular perceptions of the EU as merely a technocratic decision-making apparatus dominated by Member State executives, the process leading to the Services Directive can in such a perspective be viewed as an indication that the EU in the legislative domain subject to the co-decision procedure slowly is developing traits of a multi-level polity where parties, ideologies, and civil society associations can sometimes, under favourable conditions, play a significant role in shaping power relations and negotiations across the lines between EU institutions, Member States, and the national and European levels.<sup>23</sup>

## **5. Conclusion: a turning point of EU decision-making?**

Although the co-decision-procedure introduced in 1993 strengthened the EP's say in EU legislative processes, the determining role of the EP in this pivotal case was indeed exceptional. In the light of this one may ask whether the EP 'victory' in the Services Directive case represents a pattern-setting event, or rather resulted from a specific conjuncture of factors conditioning power-relations in the decision-making process.

The Services Directive case was distinct in several respects: The original 'Bolkestein draft' was unusually broad and far-reaching, the timing was extremely challenging, and the broad public protest and mobilization was unprecedented. With these factors virtually placating the Council and the Commission, the ball was played into the hands of the EP and cleverly exploited by the ETUC.

These special contextual factors implied, *first*, that the EP found itself in a position where it controlled the outcome of something the Council and the Commission urgently needed, primarily the Services Directive but also the ability to rescue the Community from its credibility crisis and save their faces. Consequently, the EP was equipped with exceptional negotiating power vis-à-vis the Commission and the Council.

<sup>23</sup> Thanks to Morten Egeberg for pointing out this aspect of the case to us, and to Jon Erik Fossum who together with Ben Crum (2009) in a similar vein have proposed the concept 'Multilevel Parliamentarian Field' as a tool for analyzing the structure of different forms of democratic representation in the EU, a concept that has also been used by Crum and Miklin (2009) to analyze the extent to which different interests were represented and accommodated through the various parliamentary sites and channels in the case of the Services Directive.

Yet, *second*, it was essential to the process of compromise-building within the EP that the procedural interdependence between the EU institutions under the co-decision procedure constrained the power of the EP majority parties. Reliant on finding a solution that was acceptable to the Commission and could pass the needle eye of the Council, the EP majority was forced to seek a compromise with the main opposition group, the Socialists, which in turn allowed space for the ETUC to provide expertise and exert influence. And given the pressure on the Parliament to demonstrate its ability to deliver in a situation of political urgency, the consequences of failure were evidently considered so grave that none of the major groups in the EP were prepared to take the responsibility for turning down a possible compromise.

*Third*, as a result of the contingent relationship between decision-making in the three involved EU institutions the three-way process of negotiation and accommodation that unfolded meant, paradoxically, that the involved actors who were the most critical of the original draft and least averse to failure, i.e. the Socialist group in the EP and the ETUC, ultimately experienced a relative strengthening of their bargaining position. As is well known, when two or more actors are negotiating over an outcome that is dependent on the consent of all actors to be accomplished, the least interested does indeed have the upper hand (Coleman 1966, Hernes 1975), which may presumably explain why the Conservative group in the EP was willing to go as far in accommodating the demands of the PES, and hence the ETUC, as they actually did.

All together, the above factors enabled the ETUC actors to engage in coalition-building and development of informal networks across boundaries between the various EU institutions, ideological factions, and Member States, influencing MEPs with multiple allegiances to intermeditate a compromise formula that could be viewed as acceptable by all stakeholders. None of these factors are probably unique for the Services Directive case; the special with the case was that all these factors were present simultaneously and worked in the same direction. In other cases, where decisive actors in the Council and the EP have been less averse to failure – as in the case of the Port Directive and the Working Time Directive – the result have been a lasting deadlock. It would be an exaggeration to regard the Services Directive case as a turning point in EU decision-making processes, but it is certainly a significant example of the rising importance of the EP in EU decision-making, underlining that trade unions, NGOs, and other national pressure groups that wish to influence EU legislation will have to strengthen and broaden their relations with the European party groups in the EP.<sup>24</sup> What the Services Directive case does is to demonstrate that the contingent and interdependent character of decision-making in the multi-institutional and multi-level EU system under certain

<sup>24</sup> The EP has indeed acquired a strengthened formal role under the co-decision procedure, that is extended to new areas by the Lisbon Treaty, but whether the impasse in the Council of 27 states in this case indicates that greater difficulties in reaching common Council positions will grant the EP – with more predictable transnational party groups – more influence on a permanent basis, is yet a hypothesis which requires further empirical probing.

conditions can enable unexpected events to occur and unlikely coalitions to gain leverage. The decisive role of the EP and ETUC in the Services Directive case was probably atypical but most likely not exceptional, meaning that similar instances of conjoint parliamentarian, trade union, and popular mobilization of influence may reoccur.

## References

- Ahlberg, Kerstin et al 2006 'The Vaxholm case from a Swedish and European perspective', (2006) 12 *Transfer*, 155.
- Alsos, Kristin 2009 Tjenestedirektivet og arbeidsretten. Kommentar til de Factos notat «Er garantier nok?». Oslo: Fafo-notat 2009:1.
- Arnold, LM 2008 'Die Entstehung der europäischen Dienstleistungsrichtlinie im Spannungsfeld organisierter Interessen: Eine Fallstudie zum Einfluss von Gewerkschaften und Unternehmenverband im Europäischen Parlament'. Berlin: *Hertie School of Government Working Paper* No 36, 2008.
- Barnard, Catherine 2008a 'Unravelling the Service Directive', (2008) 45 *Common Market Law Review* 323.
- 2008b 'Employment Rights, Free Movement under the EC Treaty and the Services Directive', in Mia Rönnmar (ed), *EU Industrial Relations v. National Industrial Relations* (Kluwer Law).
- Coleman, J 1966 'Foundation for a Theory of Collective Decisions', *The American Journal of Sociology* LXXI, No 6.
- Corbett, R; F Jacobs, and M Schackleton 2000 *The European Parliament*. Fourth Edition (John Harper).
- Crum, Ben, and Jon Erik Fossum 2009 'The Multilevel Parliamentary Field: a framework for theorizing representative democracy in the EU', (2009) 1 *European Political Science Review* 249.
- Crum, B, and E Miklin 2009 Power and Inclusion across the EU's Multilevel Parliamentary Field: The Case of the Services Directive. Paper prepared for the 5<sup>th</sup> ECPR General Conference, Potsdam 10-12 September 2009.
- De Witte, Bruno 2007 Setting the Scene. How did Services get to Bolkestein and *Why?*, Florence: EUI Working Papers Law 2007/20.
- Duff, A 1994 'The main reforms', in A Duff et al (eds) *Maastricht and beyond. Building the European Union* (Routledge).

- Dølvik, Jon Erik 1998 'Redrawing boundaries of solidarity? ETUC, social dialogue and the Europeanisation of trade unions in the 1990s', in E Gabaglio and R Hoffmann (eds), *The ETUC in the Mirror of Industrial Relations Research* (ETUI).
- Dølvik, Jon Erik, and Line Eldring 2008 *Mobility of labour from new EU states to the Nordic Region*. TemaNord 2008:502.
- Dølvik, Jon Erik, and Jelle Visser 2009 'Free Movement, Equal Treatment and Workers Rights: can the European Union solve its trilemma of fundamental principles?', (2009) 40 *Industrial Relations Journal* 513.
- ETUC Executive Committee Resolution 17-18 March 2004, at [www.etuc.org/IMG/pdf/Priorites\\_2004\\_EN-3.pdf](http://www.etuc.org/IMG/pdf/Priorites_2004_EN-3.pdf).
- Flower, J 2007 'Negotiating European legislation: The Service Directive'. In: *Cambridge Yearbook of European Legal Studies* Volume 9, 2006-2007, 217.
- Hendrickx, Frank 2008 'The Service Directive and Social Dumping: National Law under Strain?', in Ulla Neergaard et al (eds), *The Service Directive. Consequences for the Welfare State and the European Social Model* (DJØF Publishing), 243.
- Hernes, Gudmund 1975 *Makt og avmakt* (Universitetsforlaget).
- Hix, S; A.G. Noury, R. Roland 2007 *Democratic Politics in the European Parliament* (Cambridge University Press).
- Holsaae, M, et al 2006 *Amending the Service Directive – ideologies in interaction and dispute*. Thesis, Roskilde University.
- Jonsson, C-M 2006 'Would the proposed Services Directive help or hurt cross-border workers?' Presentation at the European Institute of Public Administration, Luxembourg, 9-10 March 2006.
- Kowalski, W 2005 The European Commission's Services Directive: Criticism, myths and prospects. ETUI European Economic and Employment Policy Brief No 8-2005.
- Kowalski, W 2006 'The Services Directive: The legislative process clears the first hurdle', (2006) 12 *Transfer* 231.
- Miklin, E 2008 National Interests or Individual Ideological Preferences? The Service Directive inside the EU's Council of Ministers. Paper to the 4<sup>th</sup> ECPR Pan-European Conference on EU-Politics. 25-27 September 2008.

- Moravcsik, A 1993 'Preferences and power in the European Community: A liberal intergovernmentalist approach', (1993) 31 *Journal of Common Market Studies* 473.
- Novitz, Tonia 2008 'Labour Rights as Human Rights: Implications for Employers' Free Movement in an Enlarged European Union', in *Cambridge Yearbook of European legal studies*, Volume10, 2007-2008, 357.
- Schakleton, M 2000 'The Politics of Codecision', (2000) 38 *Journal of Common Market Studies* 325.
- Schlachter, Monica and Paul Fischinger 2009 From Bolkestein to the Services Directive – and further, Formula Working Paper No 9 (2009) = Chapter 11, this volume.
- Traxler, F, and PC Schmitter 1994 'The emerging Euro-Polity and Organized Interests', (1994) 1 *European Journal of International Relations* No 2.
- Turnbull, P 2010 'From social conflict to social dialogue: Countermobilisation on the European waterfront', (2010) 16 *European Journal of Industrial Relations* 333.
- Van Lancker, A 2004 *Towards A European Directive on Services in the Internal Market: Analysing the Legal Repercussions of the Draft Services Directive and its impact on National Services Regulations*, Research report Commissioned by Anne Van Lancker, Rapporteur Committee Employment and Social Affairs, European Parliament. Delivered by W. Gekieri, Institute for European Law, Catholic University of Leuven.
- Visser, Jelle, and B Ebbinghaus 1992 'Making the most of Diversity? European Integration and Transnational Organization of Labour', in J Greenwood et al (eds), *Organized Interests and the European Community* (Sage)



## CHAPTER 11

# From Bolkestein to the Services Directive – and further

*Monika Schlachter and Philipp Fischinger*

### 1. Introduction

Free movement of workers is subject to both national law and Community law. In this chapter we seek to ascertain whether and how labour law and work relations in the EU/EEA are also influenced by the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36; SD). Although at first glance the Services Directive provides little evidence of such influence, from its beginnings – that is, from its preliminary drafts – the Services Directive was met with distrust because of its potentially disastrous effects on labour relations and national labour law. How this could happen, and what impact the revised text still has will be shown in what follows.

Section 1 presents an overview of the history of the Services Directive, starting with the so-called “Bolkestein draft”. In order to clarify the effects the Bolkestein draft would have had, the legal situation before the Services Directive came into force will be explained and compared with the planned arrangements in the Bolkestein draft. Section 1 concludes with a presentation of the criticisms of the Bolkestein draft that were ultimately responsible for its failure.

In Section 2 the adopted Services Directive is scrutinized in detail. The focus is on whether the Directive in its current version still affects national working conditions.

Section 3 is devoted to ascertaining, by taking into account the recent jurisdiction of the ECJ (*Viking Line*, *Laval* and *Rüffert*), whether the Services Directive, read in conjunction with the fundamental Treaty freedoms, influences the national labour law of the Member States.

### 2. History of the Services Directive

#### 2.1 *The creation process: From the original Bolkestein draft to today's Services Directive*

##### 2.11 The Bolkestein draft and its criticisms

The forerunner of today's Services Directive was the draft on a “Framework Directive on Services in the Internal Market” (BD) presented by Frits Bolkestein on 13 January 2004. The draft differed from its predecessors that regulated individual service sectors

only through a horizontal approach. Instead, it sought comprehensive regulation of all kinds of services and all the conditions under which they could be provided across borders. This was to be achieved through the introduction of a single basic principle, namely the “country of origin principle” (Article 16 Bolkestein draft). Moreover, the Bolkestein draft had much wider scope than the later Services Directive. Among other things, it included labour law and the services of temporary work agencies. Another feature of the Bolkestein draft was the clear-cut objective of overriding all other relevant Community Regulations and Directives. The draft met with considerable criticism from legal scholars, trade unions, social organizations and non-governmental organizations (for details, see below).

## 2.12 Adoption of the Services Directive<sup>1</sup>

Against the background of this criticism, adoption of the initial draft in Parliament was politically not feasible. As a compromise, the EPP and the PES in the European Parliament agreed an amendment to the Bolkestein draft on 16 February 2006. Among other amendments, labour law, employment protection law and social security law were excluded from the scope of the Services Directive (see, in particular, Article 1 [6], [7] 2, Article 2 [22] [e] and Article 16 [3] 2 Services Directive). Moreover, Article 24, 25 BD, which would have made effective control of service providers virtually impossible, were modified. In contrast to the Bolkestein draft, the Services Directive is subsidiary to other Regulations and Directives, in particular to Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter: Posting of Workers Directive) and Regulation (EEC) No 1408/71. The amended draft was subsequently revised by the Commission<sup>2</sup> and the Council of the European Union<sup>3</sup> and approved with amendments by the European Parliament at its second reading on 15 November 2006; the Council assented to the changes on 11 December 2006. The Services Directive had to be implemented into national law by 28 December 2009.

## 2.2 Comparative overview of the different legal situations

In this chapter the labour law situation before the Bolkestein draft (1.) will be compared with the legal situation if the Bolkestein draft had been realized (2).

### 2.21 Legal situation before the Bolkestein draft

Concerning the cross-border provision of labour, temporary work and the posting of workers within the framework of work and service contracts must be differentiated. Both types have it in common that the workers concerned remain in a contractual relationship with a contractor in their home country. They therefore – from an ideal perspective – do not intend to participate in the labour market of the country of

<sup>1</sup> Cf B Bercusson/N Bruun, “Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire”, in K Ahlberg *et al.*, *Transnational Labour Regulation*, 2006, 263, 273 *et seq*; Dølvik and Ødegård, Chapter 10, this volume.

<sup>2</sup> COM (2006) 160.

<sup>3</sup> Common Ground (10003/06).

destination and do not invoke the free movement of workers provision of the Treaty, Art 39 EC. As the similarity ends there, it is still necessary to differentiate between their contractual obligations.

(i) *Temporary work* is, from a labour law perspective, characterized by a three-party relationship with contractual obligations on all sides: the lender is obliged to lend to the borrower a person whose labour he is entitled to direct. Although no contractual relationship exists between borrower and employee, the employee *has to obey the borrower's orders* due to his contractual obligation towards the lender.

(ii) Very different standards apply in a situation of *posting of workers*, which is relevant when the employer enters into a work or service contract with a foreign third party, to be fulfilled with the help of his employees. In order to deliver on his contractual obligations the employer posts his workers to work in the foreign country. In contrast to temporary work the recipient of the worker's efforts (the person who entered into the contract with the employer) here *is not legally entitled to instruct the employee*. Instead, during the whole working process the employee has to follow the instructions of his contractual employer only.

(iii) According to the general rules of international conflict of laws, both for temporary cross-border work and temporary cross-border posting the law of the State in which employer (or distributor) and employee are established is applicable (Article 6 [2] lit. a Rome Convention; from mid-December 2009 Articles 3, 8 (2) 1, 2 Rome I Regulation entered into force, superseding the Rome Convention).<sup>4</sup>

This follows from Article 6 (2) (a) Rome Convention (Article 8 (2) 1, 2 Rome I Regulation), stating that the law of the country of origin applies even if a worker is temporarily posted abroad. For that reason, in principle the law of the country of origin is applicable.<sup>5</sup> Thus, if a foreign worker is temporarily dispatched to Germany by his employer (who also resides outside Germany), foreign law and not German labour law remains applicable.

(iv) However, at the secondary Community law level the Posting of Workers Directive applies (96/71/EC). It covers cross-border posting of workers as well as cross-border temporary work, Article 1 (3) (a), (c). Its purpose is both to protect workers posted cross-border and to prevent distorting competition between Member States and a process of displacing entrepreneurs from low-wage countries by entrepreneurs from

<sup>4</sup> Cf. F Ferrari/S Leible (eds), *Ein neues Internationales Vertragsrecht für Europa* (Sellier European Law Publisher, 2007); A Junker, 'Internationales Arbeitsrecht in der geplanten Rom I-Verordnung', *Recht der internationalen Wirtschaft* 2006, 401; R Mauer, 'Die Kündigung komplexer grenzüberschreitender Arbeitsverhältnisse nach der EG-Verordnung ROM I', *Recht der internationalen Wirtschaft* 2007, 92; D Martiny, 'Europäisches Internationales Vertragsrecht in Erwartung der Rom I-Verordnung', *Zeitschrift für Europäisches Privatrecht* 2008, p. 79.

<sup>5</sup> M Schlachter/C Ohler, *Europäische Dienstleistungsrichtlinie* (Nomos, 2008), Vor Art. 19, No. 9; Bercusson/Bruun (above n 1), 301 *et seq.*

high-wage countries.<sup>6</sup> The gist of the Posting of Workers Directive (Article 3) is that the Member State of destination shall ensure that, among other things,

- maximum working hours and minimum rest periods;
- minimum annual vacation with pay;
- minimum wage rates;
- conditions for temporary work;
- occupational safety and health

can be influenced by issuing statutory regulations or administrative fiats binding also on all foreign employers posting workers in that State.

For the building industry in particular the Posting of Workers Directive also allows the application of all universally applicable collective agreements to foreign employers (Article 3(1)). As collective agreements typically regulate minimum wages, this option is especially important in countries without a statutory minimum wage, such as Germany and Sweden.<sup>7</sup> The Posting of Workers Directive also allows those Member States some influence on labour conditions for foreign workers in their territory by elevating their core conditions of work and service to the level of internationally binding rules, not only by introducing statutory provisions but also by way of universally applicable collective agreements.

(v) In Germany, the Posting of Workers Directive was implemented by the Arbeitnehmer-Entsendegesetz (the Employee Posting Act, hereinafter: “AEntG”), which was completely reformulated in April 2009. Even though the redraft is of considerable impact from a domestic perspective, the influence on posted foreign workers will remain negligible. Paragraph 7 AEntG (= § 2 (2009)) states that regulations contained in laws or administrative instructions concerning, among other things, maximum working hours, minimum annual leave with pay and minimum wages must be observed by a foreign employer regarding his employees posted to Germany. This list mirroring the scope of application of the Posted Workers Directive was inserted completely into the statute, even though Germany for the time being has no statutory regulation for minimum wages.

To exercise the Directive’s options, § 1 AEntG (= §§ 3–5 (2009)) as a sector-specific regulation has become of particular importance. It obliges foreign employers in specific fields of the building industry, postal services and building cleaning<sup>8</sup> (amended in § 4

<sup>6</sup> A Feuerborn, in H Oetker/U Preis, *Europäisches Arbeits- und Sozialrecht* (CH Beck, 2009) B 2500, Rn. 110; M Schlachter, in *Erfurter Kommentar zum Arbeitsrecht*, 9. Aufl. (CH Beck, 2009), § 1 AEntG, Rn. 1; S Krebber, Die Bedeutung von Entsenderichtlinie und Arbeitnehmer-Entsendegesetz für das Arbeitskollisionsrecht”, in *Praxis des Internationalen Privat- und Verfahrensrechts* 2001, 22, 23.

<sup>7</sup> R Eklund/T Sigeman/L Carlson, *Swedish Labour and Employment Law: Cases and Materials* (Norstedts, 2008), 28, 33, 44.

<sup>8</sup> Bundesgesetzblatt vol. I 2007, 576.

(2009) to include additional occupations, § 4 (2009)) and employers who post employees within the territorial scope of a universally applicable collective agreement must apply to their workers the minimum wages, including overtime rates and the rules governing the duration of rest leave, holiday pay and extra holiday money stipulated in such a collective agreement.<sup>9</sup> According to the 2009 version such collective agreements may also regulate other working conditions listed in the Posting of Workers Directive. In the respective sectors, such collective agreements exist throughout Germany. To render the statutory obligation more effective, § 8 AEntG (= § 15 (2009)) introduces a special scheme for jurisdiction. According to this provision, employees posted to Germany are able to sue their employer in Germany for all claims originating from the period of posting, even if they have meanwhile returned to their country of origin.

(vi) *Summary*: Traditionally, the law of the State in which the worker and distributor/employer are established (according to Article 8 [2] 1, 2 Rome I Regulation, “national law”) is basically applicable for temporary cross-border posting of workers. But for certain areas the Posting of Workers Directive and national laws implementing this allow for an exception.

However, the statute’s limited scope has to be taken into account: (1) Universally applicable collective agreements have to be observed by foreign employers for their workers posted to Germany only in industries or occupations specified in the statute (AEntG), but not in other industries not included within the scope of AEntG. (2) While, for example, legislation on the minimum paid annual leave exists, a statutory minimum wage traditionally was not known in German law. Even though the refurbished version of the *Mindestarbeitsbedingungen-Gesetz* of 2009<sup>10</sup> nowadays provides for the possibility of introducing sector-specific minimum wages through an administrative decision by the Federal Ministry,<sup>11</sup> this option has not been exercised due to political differences. For this reason the Posting of Workers Directive as transposed into German law cannot achieve the sought protection of workers in the prominent field of wages.<sup>12</sup> With the exceptions cited above the law of the country of origin remains applicable in this respect.

To what extent the Posting of Workers Directive can protect national standards on working conditions against erosion by the posting of “cheap” foreign workers depends essentially on the structure of national law. By transposing the Directive into national law the effectiveness of employee protection will relate closely to the means used for implementation: a comparably high standard of worker protection can be achieved in

<sup>9</sup> Schlachter/Ohler (above n 5), Vor Art. 19, No. 34.

<sup>10</sup> Gesetz über die Festlegung von Mindestarbeitsbedingungen, geändert durch Gesetz vom 22 April 2009, Bundesgesetzblatt I, p. 818.

<sup>11</sup> The decision to have such sector-specific minimum wages could be taken only after a complex process of reaching agreement in specific committees composed of representatives of both sides of industry and of different ministries, §§2 and 4 MiArbG.

<sup>12</sup> Schlachter/Ohler (above n 5), Vor Art. 19, No. 27.

countries setting their minimum working conditions by law or regulation. If such a task is assigned to collective bargaining, the intended protection can be secured through declaring collective agreements universally applicable. For states whose law does not provide for universally applicable collective agreements, the Posting of Workers Directive offers little benefit.

## 2.22 The legal situation due to the Bolkestein draft

(a) As already mentioned, the original Bolkestein draft had a very wide material scope of application (Article 2 Bolkestein Draft; BD), in particular including labour law. In addition, the Bolkestein draft was in principle intended to take precedence over other secondary Community law.

(b) However, all relations covered by the Posting of Workers Directive would have been exempted from the strict application of the country of origin principle<sup>13</sup> (Article 16 Bolkestein draft) (Article 17 No. 5 BD). Therefore, whenever the Posting of Workers Directive or AEntG (in Germany) was applicable, the country of origin principle would have had no significance; instead, the Posting of Workers Directive or (in Germany) AEntG would have prevailed. To that extent the Member State of destination would also have remained responsible for supervising the employer (Article 24 BD).

(c) As shown above, the effectiveness of the Posting of Workers Directive is limited in countries such as Germany, in particular concerning protection against wage dumping, as long as a commitment to universally applicable collective agreements exists only in certain sectors of the economy (§ 1 I 1 AEntG = § 4 (2009)), while a statutory minimum wage is not provided for.

(d) Because, apart from these situations, the exception of Article 17 No. 5 BD was not applicable, the country of origin principle would have applied in labour and social security law. For illustration purposes we present the following example. A foreign company concludes a contract with a German undertaking concerning software maintenance. To fulfil this contract the company posts its workers to Germany for two months. In this situation the scope of AEntG is not opened, because the company does not belong to a field enumerated in the law. As a statutory minimum wage does not exist in Germany, AEntG is not able to provide for protection of posted workers. Moreover, because the exception of Article 17 No. 5 Bolkestein draft is not applicable, the country of origin principle is still in force.

(e) What practical implications does this country of origin principle have, particularly in the field of labour law? Unlike the Posting of Workers Directive/AEntG, it means that the law of their country of origin is applicable to any foreign worker employed by a foreign employer and posted to another Member State.<sup>14</sup> This means that not only possibly existing statutory minimum wage regulations of the Member State of destination, but also all other statutory minimum regulations of labour and social law

<sup>13</sup> The meaning of the country of origin principle is described in detail in sub e).

<sup>14</sup> Bercusson/Bruun (above n 1), 278.

cannot be applied in favour of the employee. The usually less extensive protection standards of the country of origin have to be applied.

Responsible for supervision of compliance of the statutory conditions of work and services would *not* be the Member State of destination. On the contrary, while Article 24 BD is inapplicable, the responsibility for supervising the employer remains with the country of origin. According to the Bolkestein draft, the judicial competence would rest with the jurisdiction of the Member State of destination as long as the worker is working there, but those courts would have to apply the law of the country of origin, Article 5 No. 1 (b) Council Reg (EC) 44/2001.<sup>15</sup>

### 2.23 Summary

Following the original Bolkestein draft, the country of origin principle would have not been applicable in situations governed by the Posting of Workers Directive. However, as the scope of the Posting of Workers Directive is limited, particularly in countries lacking a statutory minimum wage, the Bolkestein draft would have influenced labour law and social protection significantly. This holds true, although the current statutory framework also applies (Article 6 (2) (a) Rome Convention respectively Article 8 (2) 1, 2 Rome I Regulation) the country of origin principle. That is because the Bolkestein draft would not only have significantly extended the scope of the country of origin principle but also heavily restricted the possibility of the Member States to derogate from this principle.<sup>16</sup>

### 2.3 Criticism of the Bolkestein draft

Against this background, the Bolkestein draft faced a lot of criticism. Critics argued primarily against the country of origin principle but also against the relocation of monitoring compliance with the legal provisions to the Member State of origin. Examining the criticisms in detail:

#### 2.31 Violation of the principles of contract approach

The criticism was aimed in the first place at the one-sided preference given to the interests of service providers by applying the country of origin principle in the Bolkestein draft.<sup>17</sup> Determining the applicable law in accordance with the service provider's head office runs contrary to the concept of a treaty to which at least two parties have to agree. Just as the national contract law strives to seek a fair balance between the interests of both contracting parties, in the field of conflict of law rules the

<sup>15</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12.

<sup>16</sup> M Körner, 'EU-Dienstleistungsrichtlinie und Arbeitsrecht', *Neue Zeitschrift für Arbeitsrecht* 2007, 233, 234.

<sup>17</sup> P Mankowski, 'Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt', *Praxis des Internationalen Privat- und Verfahrensrechts* 2004, 385, 386.

interests of both parties should be taken into account when determining the applicable law.<sup>18</sup>

### 2.32 *Creation of legal chaos*

Critics of the draft also referred to the potential legal chaos caused by the (permanent) coexistence of up to 27 jurisdictions within each Member State ("islands of foreign law"<sup>19</sup>).<sup>20</sup> If each service provider providing services in another Member State is allowed to apply the law of his country of origin, this necessarily means that the same incidents in one and the same Member State can be covered by entirely different legal frameworks. Thus, for example, to a contract on repairing a roof between a service recipient and a service provider based in foreign country F1, the F1 law is applicable, although the service is provided outside that country. If an enterprise from country F2 was a partner to that contract, that F2 law would be applicable. For the service recipient this would have several disadvantages. In each case he must determine the potential content of all his potential contracting partner's law. That is in many cases difficult and costly, if not completely impossible.

### 2.33 Lack of harmonization of the Bolkestein draft with Council Regulation (EC) 44/2001

Critics of the draft also referred to its lack of harmonization with Council Regulation (EC) 44/2001 in determining the local competency of courts of law, resulting in a falling apart of the applicable substantive law and procedural law. While the substantive law of the Member State of origin is applicable (Article 4 No. 4 BD), for decisions on disputes the courts of the Member State of destination are locally competent.

This leads to considerable additional expenditure for the courts (see below sub 1.4). In addition, the lack of synchronization partially negates the Bolkestein draft's purpose of facilitating exchange of services. The advantage which, from the service provider's point of view, is connected with the application of the law of his country of origin in the Member State of destination, according to the strict country of origin principle, is partially neutralized by the application of the procedural law of the posting state.<sup>21</sup> To avoid disadvantages, the service provider is, for example, forced to hire a lawyer based in the posting state, which contradicts the goal of reducing costs and effort.

<sup>18</sup> U Sonnenberger, 'Kommissions-Vorschlag für eine Rahmenrichtlinie des Europäischen Parlaments und des Rates über Dienstleistungen im Binnenmarkt', *Recht der Internationalen Wirtschaft* 2004, 321, 322.

<sup>19</sup> M Reim, 'Ein Sieg der Vernunft', *Arbeitsrecht im Betrieb* 2006, 473, 474.

<sup>20</sup> M Schlachter, 'Der Kommissionsentwurf für eine Richtlinie über Dienstleistungen im Binnenmarkt', *Zeitschrift für Gemeinschaftsprivatrecht* 2004, 245, 247; P Davies, Services, Citizenship and the Country of Origin Principle., Mitchell Working Paper Series 2/2007, 7; Workers's Chamber Austria, press release of 28.10.2004 (at: <http://www.arbeiterkammer.com/www-387-IP-17778.html>); Comments of the Vereinten Dienstleistungsgewerkschaft (ver.di) concerning the Services Directive, 16.10.2005, Bundestags-Drucksache 16(9)355, p. 7.

<sup>21</sup> Mankowski (above n 17), 390.

### 2.34 Considerable additional expenditure by the courts

Moreover, the strict application of the country of origin principle would lead to a significant additional burden on the courts of the Member State of destination (without a corresponding discharge of the courts of the country of origin).<sup>22</sup> An inevitable consequence of the Bolkestein draft would be a significant increase in legal proceedings to which foreign substantive law applies. Any determination of the legal content of foreign law results in significant personnel costs, for example in translations and legal opinions. As it can hardly be expected that Member States would increase the numbers of judges in their respective civil courts to meet that additional demand, this would also cause significant delays of all court proceedings. As such judges lack (exact) knowledge of the applicable foreign law, the probability of errors in law would also increase correspondingly. Due to a likely delay of court proceedings and an increased probability of errors in law the principles both of legal certainty and of effective law enforcement would be at risk.

### 2.35 “Race to the bottom” – reverse discrimination

The Bolkestein draft would not only have prevailed over other directives and regulations, but also covered social protection and labour law in totality. Therefore it gave rise to deep concern that the country of origin principle might lead to a "race to the bottom", a downward spiral towards the lowest standards in labour law, as well as in environmental and consumer protection laws.<sup>23</sup> Companies might want to relocate their headquarters to Member States with the lowest legal standards only to offer their services subsequently across borders again to consumers in their original country of origin (under significantly different conditions).

This would add the risk that Member States would deliberately reduce legal requirements in order to be more attractive for foreign companies (“race to the bottom”). Such a development would contradict the intentions of the European Commission. The fundamental treaty freedoms (see Article 136 EC) are based on the principle that any competition of service providers expected and encouraged by Community law should not take place through differences between social protection standards. On the contrary, social protection standards as competition parameters should be overcome.<sup>24</sup> As mentioned above, the exception of Article 17 No. 5 BD in referring

<sup>22</sup> *Ibid.*

<sup>23</sup> Cf, e.g., Reim (above n 19), 474 (“law-shopping”); E Gebhardt, EUPolitix.com, 4.10.2005, 1; Bercusson/Bruun (above n 1), 264, 271, 272; M Arnold, ‘Polish plumber symbolic of all French fear about the Constitution’, *Financial Times*, 28.5.2005; Attac Germany, press release from 23.11.2005 (at: [www.attac.de/bolkestein/](http://www.attac.de/bolkestein/)).

<sup>24</sup> D Kugelmann, ‘Die Dienstleistungs-Richtlinie der EG zwischen der Liberalisierung von Wachstumsmärkten und europäischem Sozialmodell’, *Europäische Zeitschrift für Wirtschaftsrecht* 2005, 327, 329; E Eichenhofer, Schriftliche Stellungnahme der Sachverständigen zur Öffentlichen Anhörung: EU-Dienstleistungsrichtlinie, 16.10.2006, Bundestags-Drucksache 16(9)344, 6; Comments by G Copp (at:

to the prevailing Posting of Workers Directive would have changed little, given the limited scope of that Directive and the national laws transposing it. Therefore it could not have prevented the feared “race to the bottom”.

Moreover, the country of origin principle could also undermine the rules of national competition law, as significant advantages of undertakings operating from a low-wage country could not be compensated by competitors governed by high labour standards.<sup>25</sup>

This would lead to considerable competitive disadvantages for undertakings situated in the Member State of destination, because these entrepreneurs cannot rely on Article 16 BD (the so-called problem of “reverse discrimination”).<sup>26</sup>

Due to the said disadvantages, an enterprise situated in the Member State of destination would have only two options: (1) sue in domestic courts to be treated equally with the foreign competitor (in Germany there is little to no prospect of success in that) or (2) relocate its headquarters to the Member State which has, from the company’s perspective, favourable legal standards allowing for fewer overall costs to the company.<sup>27</sup>

### 2.36 Fewer opportunities to monitor

Another reason for strong objections was Article 16 (3) BD, stipulating that the country of origin – rather than the country of destination – should control the employer’s compliance with legal requirements abroad.<sup>28</sup> This would predictably allow the circumvention of the – often already lower – protecting regulations of the country of origin. Administrative authorities of the country of origin even lack the competence to act on the territory of the Member State of destination.

<http://www.redpepper.org.uk/article346.html>); Comments by G Van Gyes (at: <http://www.eurofound.europa.eu/eiro/2004/06/feature/be0406302f.htm>).

<sup>25</sup> Mankowski (above n 17), 387; cf. Schlachter (above n 20), 247.

<sup>26</sup> L Albath/M Giesler, ‘Das Herkunftslandprinzip in der Dienstleistungsrichtlinie – eine Kodifizierung der Rechtsprechung?’, *Zeitschrift für Europäisches Wirtschaftsrecht* 2006, 38, 40; H Lorscheid, ‘Kapitalismus brutal’ (13.12.2004) (at: [www.heise.de/tp/r4/artikel/18/18965/1.html](http://www.heise.de/tp/r4/artikel/18/18965/1.html)); Schriftliche Stellungnahme der IG BAU, Bundestags-Drucksache 16(9)337.

<sup>27</sup> Lorscheid (above n 26).

<sup>28</sup> F Lorenz, ‘EU-Dienstleistungsrichtlinie und gesetzlicher Mindestlohn – rechtliche Bewertungen und mögliche Schlussfolgerungen’, *Arbeit und Recht* 2006, 91, 92; B Graue, ‘Die geplante Richtlinie über Dienstleistungen im Binnenmarkt und das Europäische Arbeitsrecht’, *Informationsdienst europäisches Arbeits- und Sozialrecht* 2005, 126, 130; Bercusson/Bruun (above n 1), 272, 304 *et seq.*; Lorscheid (above n 26); Stellungnahme der Vereinten Dienstleistungsgewerkschaft ver.di; Offener Brief der IG Bau an Bundeskanzler Schröder (at: [www.igbau.de/db/v2/inhalt.pl?e1=&e2=1&did=2749&mode=detail&edit=0&persid=1102529097.67755](http://www.igbau.de/db/v2/inhalt.pl?e1=&e2=1&did=2749&mode=detail&edit=0&persid=1102529097.67755)); W Kowalsky, ‘The Services Directive: the Legislative process clears the first hurdle’, (2006) 12 *Transfer* 231, 238: ‘this virtually destroyed the host country’s ability effectively to monitor compliance with the stipulated conditions for posted workers’.

Even if this problem may theoretically be overcome by judicial cooperation – for example, administrative assistance among courts or supervising institutions – one has to keep in mind that the authorities of the country of origin will mostly have little interest in effectively controlling services provided in another Member State. Moreover, extended judicial cooperation would face many problems (for example, personnel and material costs).<sup>29</sup> As the Bolkestein draft would also apply to situations within the scope of the Posting of Workers Directive, the lack of coordination between the Bolkestein draft and the Posting of Workers Directive was criticized as being potentially hazardous. It was feared that the Posting of Workers Directive would be eroded through the back door of reduced control opportunities of the Member State of destination.<sup>30</sup>

### 2.37 Inconsistency with the Lisbon Strategy

Another fear was that the country of origin principle would favour cross-border service providers who employ less qualified and “cheaper” workers. This contradicts the Lisbon Strategy, aimed at turning the EU into the most competitive and most dynamic knowledge-based economic area in the world by 2010 and thus explicitly supporting qualification-based employment and advanced training.<sup>31</sup>

### 2.38 Circumvention of the Posting of Workers Directive?

A frequent objection to the Bolkestein draft was its possibility of furthering circumvention of the Posting of Workers Directive (PWD).<sup>32</sup> Even for permanent posting of workers the law of the country of origin could have remained applicable, thus avoiding existing employment protection regulations of the country where the work is performed.<sup>33</sup> This accusation, however, never held true. Although the Bolkestein draft was meant to take precedence over other directives, the country of origin principle would *not* be valid in matters covered by the Posting of Workers Directive, Article 17 No. 5 BD and certainly not in matters covered by the Treaty’s free movement provisions. Therefore, this reproach was invalid.<sup>34</sup>

But there were justified complaints about splitting-up control of compliance of protection standards between the country of origin and the Member State of destination in Article 24, 25 BD.<sup>35</sup> Even though it permitted the Member State where the service is

<sup>29</sup> Albath/Giesler (above n 26), 42; J Flower, *Negotiating the Services Directive*, *Cambridge yearbook of European legal studies* Volume 9 (2006/2007), 217, 223.

<sup>30</sup> Graue (above n 28), 131.

<sup>31</sup> Workers’ Chamber Austria, press release of 28.10.2004 (at: [www.arbeiterkammer.com/www-387-IP-17778.html](http://www.arbeiterkammer.com/www-387-IP-17778.html)).

<sup>32</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

<sup>33</sup> Lorenz (above n 28), 94; ver.di, *Offener Brief* (above n 28).

<sup>34</sup> P Wiesner/D Wiedmann, ‘Die Dienstleistungsrichtlinie – Marktöffnung oder Abschottung?’, *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2005, 1210, 1213.

<sup>35</sup> Schlachter (above n 20), 248.

actually provided to check minimum working conditions ensured by the Posting of Workers Directive, control mechanisms were reduced to relatively limited scope and the creation of certain commitments was prohibited (Article 24 I lit. 1 BD).<sup>36</sup> This included several measures that would have greatly simplified the execution of controlling minimum working conditions, such as the obligation to previously apply for permission, the appointment of a responsible contact as a “representative” in the Member State of destination, the carrying and keeping of social security documents, as well as – in the building industry with a transitional period until 31 December 2008 – the obligation to register the service with administrative bodies in the state of destination in advance.

#### 2.39 Restriction of the Fundamental Freedom of Services (Article 49 EC)

Under certain circumstances the country of origin principle, as stipulated in the Bolkestein draft, may even have restricted the Fundamental Freedom of Service (Article 49 EC).<sup>37</sup> If a trans-nationally operating service provider did not want to invoke the law of his country of origin – complying with said principle – but rather a more favourable law of the Member State of destination, this would not be possible under the Bolkestein draft. Only service providers ready to transfer their headquarters to another Member State would be allowed to invoke that country’s laws for their services provided in that country. This would be contrary to Article 49 EC, treating it less favourably than a competitor from the Member State where the service is actually provided.

#### 2.4 Summary

The original Bolkestein draft, with its strict country of origin principle, could potentially have negatively influenced the labour law of the Member States. It failed because of the abovementioned points of criticism.

### 3. The Services Directive in detail

We shall now introduce the employment law regulations of the implemented Services Directive (3.1), and examine whether the Services Directive influences the national

<sup>36</sup> With regard to the legal situation of the Posting of Workers Directive the ECJ ruled that obligations to report for foreign service providers are legal only when these obligations are in accordance with the principle of proportionality, cf Joined cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)* [1999] I-8453. The obligation to report the posting of workers to the authorities of the Member State where the service is actually provided legally substitute the obligation to apply for a work permit or visa, cf Case C-455/06 *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees* [2008] ECR I-8763.

<sup>37</sup> Albath/Giesler (above n 26), 41; J Basedow, ‘Dienstleistungsrichtlinie, Herkunftslandprinzip und Internationales Privatrecht’, *Europäische Zeitschrift für Wirtschaftsrecht* 2004, 423, 424.

employment law of the Member States and, if so, under what conditions this would be possible (3.2).

### 3.1 *Content of the Directive*

#### 3.11 Extraction of employment law from the scope of the Services Directive

Unlike the original Bolkestein Draft, which in principle included employment law and only exempted affairs that came under the Posting of Workers Directive (Article 17 No. 5 BD) from the country of origin principle, the wording of the Services Directive excludes employment law completely:

Recital 14 states that the Services Directive does, inter alia, either extend to conditions of work and employment or to the services of temporary work agencies. The social partner's right to negotiate and conclude collective agreements, freedom to strike and right of industrial action is acknowledged and affirmed in Recital 15.

These topics are revisited in Article 1 (6), (7) 2 SD. Thereafter, the Services Directive affects neither the statutory or contractual terms and conditions of work and employment nor the right to negotiate or conclude collective agreements or to take industrial action, as guaranteed under national law and national customs. Article 2 (2) (e) SD excludes services of temporary work agencies from the scope of the Directive. Article 3 (1) (a) SD lays down the antecedence of the Posting of Workers Directive. Article 4 No. 7 SD stipulates that collective agreements concluded by social partners do not have to meet any standards of the directive, in other words, they are not considered forbidden requirements, restraints, conditions or limitations. Article 16 (3) 2 SD clarifies that Member States are not a priori hindered from applying terms and conditions of employment, including those in collective agreements, to foreign employers, even if this limits the freedom of services.<sup>38</sup> Finally, Article 17 (1) No. 2 SD states that Article 16 SD, as a secondary law warranty of the freedom of services, is not applicable to any matters regulated by the Posting of Workers Directive.<sup>39</sup> Set against the background of differentiating the Services Directive against its predecessor, all those exemption clauses serve the common purpose of safeguarding labour law, even if the political process of removing the "country of origin principle" from the text might not succeed.

#### 3.12 Interim result

According to the explicit formulation of the regulations just mentioned, the Services Directive – unlike the Bolkestein draft – excludes employment law completely. The Bolkestein draft, as shown above, could have led to an application of the country of origin principle in many employment law cases, even while allowing an exemption for affairs under the Posting of Workers Directive. Contrary to that, at first glance the

<sup>38</sup> In the light of Article 1 (6) SD, this provision appears to be superfluous. It seems that these provisions remained in the Services Directive due only to political reasons, see C Barnard, 'Unravelling the Service Directive' [2008] 45 *Common Market Law Review* 368.

<sup>39</sup> Because of Article 3 (1) (a) SD this provision also seems unnecessary, see Barnard (above n 38), 369 fn 269.

wording of the Services Directive leaves employment law untouched.<sup>40</sup> Consequently, the legal situation created from the interaction between Article 8 (2) 1, 2 Rome I,<sup>41</sup> the PWD and respective national implementing statutes will remain untouched.

### 3.13 Precedence of Community Law

However, the exemptions described above are limited by the Services Directive itself, as they always refer to the precedence of Community law: Article 16 (3) 2 SD stipulates that Member States are not prevented from applying their rules on conditions of employment, including those laid down in collective agreements, in accordance with Community law. Other passages quoted above contain a comparable clause (for example, Article 1 VI SD: ‘This Directive does not affect labour law ... which Member States apply in accordance with national law which respects Community law’). The Services Directive does not reveal what these caveats are aimed at and what exact consequences they are meant to have. Thus one cannot safely predict whether or not the coming into force of the Services Directive will impact national employment law regulations.

### 3.2 *Possible consequences of the Services Directive for the labour law of the Member States*

Keeping in mind that the limitations of the employment law exemptions are amply vague, one has to ask whether – and if so, under what conditions – the Services Directive can have consequences for national conditions of work and employment. First, there is the problem (naturally) that exceptions in that area apply to employment law only and, consequently, one must distinguish that from regulations concerning self-employment and disguised self-employment (3.21). Second, one must examine whether references to Community law imply a limitation of grounds for restrictions of the freedom of services or consequences for collective labour law (see 3.22). Finally, one must scrutinize Article 2 (2) (e) SD (exemption of the services of temporary work agencies) (see 3.23).

3.21 Problem of differentiation between employment and (disguised) self-employment  
The aforementioned exceptions refer only to employment law regulations but not to the services of self-employed persons. This can cause problems insofar as the majority of “traditional” working activity can just as well be performed by a self-employed person. Thus exceptions in that area could be evaded by assigning (disguised) self-employed workers.<sup>42</sup> For example, if a foreign undertaking enters into a contract with a German undertaking for maintenance of their production sites (situated in Germany) and the foreign undertaking assigns this task to a self-employed subcontractor, the Services Directive (and especially Article 16 SD) becomes applicable.

<sup>40</sup> Körner (above n 16), 233.

<sup>41</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>42</sup> Lorenz (above n 28), 94; Körner (above n 16), 234; Reim (above n 19), 475.

This shows the problem of making a precise distinction between employment and (disguised) self-employment, which can be very difficult in borderline cases. As the distinction also has enormous consequences, the importance of this problem must not be underestimated. Indeed, one must highlight that even if the Services Directive posed no threat to employment *law* of the Member States – as labour law by definition does not govern the services of the self-employed – there may very well be a danger of factual influence on the employment situation as long as the exceptions in the area of employment law can be circumvented by a clever wording of a services contract. For example, the foreign employer in the abovementioned example could pass the people performing the service off as self-employed subcontractors, while in reality they are dependent jobholders within the meaning of employment law and therefore employees. On the other hand, one may not overlook the fact that differentiating employees from self-employed persons is not a specific problem under the Services Directive. Such problems concerning making distinctions occur frequently in national and community labour law. Nevertheless, it remains questionable, which set of law governs the distinction. Options would be to employ either Community law (Article 39 EC), the law of the Member State of establishment or the law of the Member State where the service is actually provided.<sup>43</sup>

Especially problematic consequences would arise from applying the law of the Member State of establishment, as this would render impossible effective control of compliance with employment law regulations for the Member State of destination. The Services Directive itself contains no rule for this situation. Nevertheless, in Recital 87 one statement can be found which at least clarifies that the law of the Member State of establishment is not defining. In its second phrase this Recital leaves it to each Member State to make the necessary distinction. However, this statement is immediately challenged by phrase 3, which refers to Article 39 EC and the term “employee” used there. Thus, it remains unclear whether the distinction between employee and (disguised) self-employed persons has to be made according to the law of the Member State where the service is actually provided or follows the term “employee” as used in Article 39 EC.<sup>44</sup> What can be drawn from the interpretation given by the Recital is, at a minimum, that the distinction should not be governed by the law of the Member State of establishment.

According to this result, the danger of a circumvention of the exceptions in the area of employment law in Article 1 (6) SD and of the connected factual influence on the factual employment situation by assignment of disguised self-employed workers is fairly small.

### 3.22 Reference to “precedence of Community law”

<sup>43</sup> See Schlachter/Ohler (above n 5), Art. 19 No. 5.

<sup>44</sup> Barnard (above n 38), 332 fn 53.

However, unlike the problem debated above, the Services Directive could indeed influence the employment law of Member States to some extent, insofar as due to the Services Directive national employment law regulations may be applied only as long as they ‘respect Community law’ (Article 1 (6) SD and above 2.23). Those clauses take up the original intention of introducing the draft proposal. The political promise enshrined in the Lisbon Process, boosting the efficiency of the internal market for services by alleviating mobility from east to west and thereby accommodating the anger of the new Member States, can be read into the formulation of ‘respecting Community Law’. Such phrases are at least a possible momentum for influencing the thinking of the Court in the direction of a precedence of fundamental market liberties over freshly acknowledged fundamental rights to collective action. In German legal literature considerable apprehension has emerged that the Services Directive might therefore still have considerable impact on national labour law. There were two major worries:

- a) Restriction of possible grounds of justification
- aa) First, the reference to Community Law in Article 1 (6) and Article 16 (3) 2 SD could lead to the conclusion that national employment law will be acceptable only within very strict limitations as it might be considered to restrict Treaty freedoms. As soon as national regulations seem likely to render cross-border provision of services “less attractive”, they could come under the notion of “limitation” and therefore need special justification, according to the ECJ’s opinion. Here, the stipulation in Article 16 (3) 1 SD, which limits accepted grounds of justification to only four (public policy, public security, public health and protection of the environment), can lead to a comparably stricter standard.<sup>45</sup>

Beyond these restricted reasons the ECJ has acknowledged other grounds of justification in case of a limitation of the fundamental freedom of services. In particular in the area of employment law, the Court has issued several decisions naming reasons of occupational health and safety and individual protection of workers as justification for a limitation of the freedom of services by national, non-discriminatory regulations.<sup>46</sup> As the Services Directive does not contain more grounds of justification than the four mentioned above, the implied conclusion is that the Directive by its reference to Community law in Article 1 (6) and Article 16 (3) 2 SD might be aimed at reducing employment law grounds of justification for infringed freedom of services.<sup>47</sup> As a

<sup>45</sup> S Korte, ‘Was bleibt vom ursprünglichen Verständnis der Dienstleistungsfreiheit?’, *Europäisches Wirtschafts & Steuerrecht* 2007, 246, 250.

<sup>46</sup> E.g., Joined cases 62 and 63/81 *Société anonyme de droit français Seco and Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] 223; Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417; Case C-369/96 *Arblade* (above n 36).

<sup>47</sup> F Lemor, ‘Auswirkungen der Dienstleistungsrichtlinie auf ausgesuchte reglementierte Bereiche’, *Europäische Zeitschrift für Wirtschaftsrecht* 2007, 135, 138 *et seq.*; Körner (above n 16), 234.

consequence, employee protection reasons might no longer be a valid justification for limitations of the freedom of services (Article 49 EC).

Even a fairly broad interpretation of the grounds of justification laid down in Article 16 (3) 1 Services Directive could not reverse this impression: allocating all additional grounds of justification earlier acknowledged by the ECJ to the exemption of “public security” would defy both the recognisably complete enumeration in Article 16 (3) 1 Services Directive and the definition of ‘public security’ in Recital 41.<sup>48</sup>

ab) Comment: Already on the basis of the Services Directive, these worries prove to be unsubstantiated. Taking the text as a starting point and paying attention to the history of origins of the Services Directive, it is to be acknowledged that even by the reference to Community law in Article 1 (6) and Article 16 (3) 2 SD national employment law standards were not meant to be influenced. In particular, the limitation of grounds of justification for restricting freedom of services must be applied to the freedom of services of Article 16 (3) 1 SD only, but not to the freedom of services of Article 49 EC. Hence it remains that in the area of employment law, restrictions on the freedom of services under Article 49 EC can still be justified by criteria developed by the ECJ, including individual employment protection rules.<sup>49</sup>

Arguments for this interpretation of the Services Directive can be drawn from the Directive itself and from its origins. Recitals 82, 86, 89 repeatedly emphasize that the Services Directive should not interfere with national employment law regulations. Especially Recital 82 highlights that restrictions of the freedom of services can be justified by non-discriminatory, necessary and proportionate reasons. Moreover, Article 17 No. 2 Services Directive contains a clear rule for cross-border posting of workers, according to which solely the Posting of Workers Directive shall remain applicable. With regard to origins the argumentation flows in the same direction. According to Commissioner McCreevy, Article 1 (6) Services Directive should distinctly clarify that national employment law should remain untouched by the Services Directive<sup>50</sup> To the European Parliament McCreevy explained:

The Commission wants to state unambiguously that the Services Directive does indeed not affect labour law laid down in national legislation and established practices in the Member States and that it does not affect collective rights which the social partners enjoy according to national legislation and practices.

Moreover, the *Handbook on implementation of the Services Directive* emphasizes that Article 43 EC *et seq.*, 49 EC *et seq.* on the basis of ECJ case law, not the regulations of the Services Directive, remain applicable to matters exempted from the scope of the Services Directive:

<sup>48</sup> Korte (above n 45), 250.

<sup>49</sup> Schlachter/Ohler (above n 5), Vor Art. 19, No. 2.

<sup>50</sup> Evidence given by Rt Hon Ian McCartney to the House of Lords EU Select Committee on 17 May 2006, annexed to the House of Lords EU Select Committee 38<sup>th</sup> Report 2005–2006, p. 23.

It should also be clear that matters excluded from the scope of the Services Directive remain fully subject to the EC Treaty. Services excluded remain, of course, covered by the freedom of establishment and the freedom to provide services. National legislation regulating these service activities must be in conformity with Articles 43 and 49 of the EC Treaty and the principles that the European Court of Justice (ECJ) has developed on the basis of the application of these articles have to be respected.<sup>51</sup>

Consideration of the reference to Community Law in Article 1 (6) SD highlights that this displays (only) a reference to the Posting of Workers Directive:

Article 1(6) furthermore states that the application of national legislation must respect Community law. This means that, as regards posted workers, the receiving Member State is bound by the Posting of Workers Directive.<sup>52</sup>

In conclusion, the Services Directive has to be understood as having no – not even collateral – impact on the employment law of the Member States in the sense of a restriction of grounds of justification.

b) Influencing the rights of labour market parties (social partners)

Another line of reasoning highlights worries about a restriction of the rights of social partners and national regulations on industrial action.

ba) Article 4 No. 7 Services Directive

In the Services Directive, the meaning of undue “requirements” imposed on services providers is very special: for example, in Article 16 (1) 3 SD Member States are prohibited from making the uptake or exercise of a service provision in their territory dependent on special requirements. Those “requirements” are defined in Article 4 No. 7 Services Directive, stating that

Rules laid down in collective agreements negotiated by the social partners shall not *as such* be seen as requirements within the meaning of this Directive [authors’ emphasis].

Collective agreements are thus not a requirement in the meaning of the Services Directive, so that they do not restrict the freedom of service providers in such a way that they require justification. However, the meaning of the expression “as such” remains unclear. In the German legal literature, there is some doubt whether in particular cases collective agreements could still be presented as illegal requirements.<sup>53</sup> The danger was considered especially high for universally applicable collective agreements.

These worries are to be rejected. The expression “as such” could mean that a collective agreement, once it became universally applicable by governmental act, could therefore be classified as a requirement. But due to the consequences flowing from that interpretation, the Services Directive could not possibly be understood that way. Such an interpretation would require a more precise wording in order to avoid that all universally applicable collective agreements come under constant danger of a conflict

<sup>51</sup> Directorate-General for Internal Market and Services, *Handbook on implementation of the Services Directive* (European Communities, 2007), 8.

<sup>52</sup> *Handbook on implementation of the Services Directive* (above n 51), 17.

<sup>53</sup> Körner (above n 16), 235.

with the Services Directive. Considering the restriction on the grounds of justification (see above), in many cases this would lead to the inadmissibility of the terms of universally applicable collective agreements. As can be seen easily from the Posting of Workers Directive, universally applicable collective agreements are regarded as established means for acknowledged restrictions of fundamental freedoms. Furthermore, Recital 86 – in connection with the Posting of Workers Directive – explicitly mentions universally applicable collective agreements as such. The European legislator obviously was aware of the distinction; but in Article 4 No. 7 SD the broader and more extensive term of “collective agreement” is used without any qualifier. If the Directive was intended to exclude also universally applicable collective agreements from the exemption in Article 4 No. 7 SD, this would have been stated explicitly (as in Recital 86).

Lastly, Recital 14 clearly states that

This Directive ... nor does it affect relations between social partners, including the *right to negotiate and conclude collective agreements*, the right to strike and to take industrial action in accordance with national law and practices which respect Community law ... [authors’ emphasis].

Again, only collective agreements in general are mentioned, thus it can be concluded that Article 4 No. 7 SD exempts all collective agreements from the term “requirements”, so that all terms of collective agreements are exempted from Article 16 (1) 3 SD. One explanation of the reference to collective agreements ‘as such’ is the close relationship between such agreements and the industrial actions sometimes necessary to attain an agreement. Exempting agreements from the notion of requirements in need of justification does not include an equally far reaching exemption for any kind of industrial action.

bb) Reference to ‘precedence of Community law’

Article 1 (7) SD stipulates that the Directive does not affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law, and again these rights have to be practiced ‘respect[ing] Community law’. Again it remains dubious what effect this reference to Community law is meant to have. In Germany, fears are widespread that the reference must be understood as a gateway for intervention rights for the Commission in national labour law rules.<sup>54</sup>

As a starting point it is noteworthy that under Article 137 (5) EC the European Commission has no competence to regulate the right to industrial action and, probably, collective agreements.<sup>55</sup> Nonetheless, according to the decisions of the ECJ in *Laval*<sup>56</sup>

<sup>54</sup> Stellungnahme der Gewerkschaft ver.di, Bundestags-Drucksache 16(9)334, p. 24.

<sup>55</sup> Contentious, cf. C Callies/M Ruffert/S Krebber, EUV – EGV, 3. Aufl. (CH Beck, 2007), Art. 137 EGV, Rn. 11.

<sup>56</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

and *Viking Line*,<sup>57</sup> collective agreements as well as industrial actions are to be balanced against the Treaty fundamental freedoms (especially the freedom of establishment and the freedom to provide services). Against this background it is worth arguing that Article 1 (7) SD does limit the rights of collective bargaining partners and the right to take industrial action. This line of reasoning is based on two different aspects:

(1) The reference can be interpreted to mean that future collective agreements and/or industrial action will have to be regarded as requirements restricting free provision of services and therefore require justification. While considering the wording of Article 1 (7) SD it is clear that free provision of services meant the Treaty freedom of services only, not the context of Article 16 (1) SD. To differentiate between those two freedoms is of considerable importance, since only the one based on the Treaty allows for grounds of justification accepted by the ECJ, which go beyond the enumeration in Article 16 (3) 1 SD. The well established justification by employment protection grounds allows many restrictions of Article 49 EC by collective agreements and industrial action. According to this line of interpretation, the reference to Community law in Article 1 (7) SD amounts to a mere *clarification*, not establishing any additional standard for justification.<sup>58</sup>

(2) According to the alternative line of argumentation the reference could contain more than just a clarification but establish a subordination of national law of collective agreements and industrial action to the freedom of services.<sup>59</sup> In this case the reference to Community law would establish an additional prerequisite for the balancing of interests at the justification stage. However, a statement in the Commission's Handbook can be held against this interpretation:

Article 1(7) does not take any position as to whether negotiation, conclusion and enforcement of collective agreements are fundamental rights. In the context of this article, Recital 15 is of particular importance. It spells out the basic principle that there is no inherent conflict between the exercise of fundamental rights and the fundamental freedoms of the EC Treaty, and that *neither prevails over the other* [authors' emphasis].<sup>60</sup>

This can be understood as excluding any influence of Services Directive on the balancing process at Community law level. On the other hand, some doubts remain as the Handbook also refers back to Recital 15, saying:

This Directive respects the exercise of fundamental rights applicable in the Member States and as recognized in the Charter of Fundamental Rights of the European Union and the accompanying explanations, *reconciling* them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights *include the right to take industrial action in accordance with national law and practices which respect Community law* [authors' emphasis].

<sup>57</sup> Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.

<sup>58</sup> Cf B Bercusson, 'The Trade Union Movement and the European Union: Judgment Day', (2007) 13 *European Law Journal* 279, 301 *et seq.*

<sup>59</sup> Stellungnahme der Gewerkschaft ver.di, Bundestags-Drucksache 16(9)334, p. 24.

<sup>60</sup> Handbook on implementation of the Services Directive (above n 51) p. 15.

What is meant by “respecting Community Law“ leaves room for doubt. In conclusion, one can say that the reference to Community Law in Article 1 (6) Services Directive may remain of importance for future assessment of collective agreements and industrial action in light of freedom of services of Article 49 EC. A restrictive influence therefore cannot be ruled out.

(c) Article 2 (2) (e) Services Directive

According to Recital 14 and Article 2 (2) (e) SD the services of “temporary work agencies” have been excluded from the scope of the directive.<sup>61</sup> This phrasing has led to discussions in the German literature because national law differentiates between various forms of temporary work.<sup>62</sup> Whether all these forms are included in the scope of Article 2 (2) (e) SD is unclear. However, concerning labour law this question is not relevant as Article 1 (6) 2 SD applies to all forms of temporary work existing under German law.

### 3.3 Conclusion

As a starting point one must emphasize that the wording of the Services Directive completely excludes labour law from its scope. Nevertheless, impacts on employment relationships still remain possible, as the exception in that area can be evaded by assigning (disguised) self-employed workers. As the distinction between both groups is not always easy, an application of the Services Directive rather than the national labour law of the host country can be applicable.

The Services Directive’s frequent references to Community law should have no impact on the area of individual labour contract law. In particular, employment protection clauses should still remain grounds of justification for a restriction of the Treaty freedom of services.

Possible consequences for collective agreements and industrial action cannot be ruled out. Even if the Services Directive cannot be applied directly in that area, the reference to Community law has to be interpreted at least as a clarification that collective agreements and industrial action have to be balanced against the Treaty fundamental freedoms of establishment and services. Whether the reference to Community law in Article 1 (7) SD could additionally establish a precedence of freedom of establishment and freedom of services over the right of negotiating and concluding collective agreements, remains somewhat uncertain, even if this scenario is highly unlikely.

<sup>61</sup> Moreover, Recital 86 speaks of “the protection of workers hired out by *temporary employment undertakings*”.

<sup>62</sup> Cf Reim (above n 19), 475; Lorenz (above n 28), 94; Körner (above n 16), 235; Stellungnahme der Gewerkschaft ver.di, BT-Drucks. 16(9)334, p. 25 et seq.

## 4. Influence of the Services Directive on the national labour law of the Member States

### 4.1 Introduction

The Services Directive excludes labour law from its scope only on condition that regulations in national law are in accordance with Community law. National labour law is therefore exempted from the scope of the Services Directive only insofar as it respects all the relevant Treaty provisions. Those implicit boundaries to the exemption of labour law lead to the further question of whether the Services Directive could still have an impact on the labour law of the Member States, with a detour via primary Community law. Three judgements of the ECJ – *Viking Line*, *Laval* and *Rüffert*<sup>63</sup> – are of particular interest, because they significantly limit the influence of collective regulation of employment relations on national level.

Against this background many legal opinions questioned whether the restriction on the Community's competency in regulating collective labour relations at EU level might not be respected in future.<sup>64</sup> Rather than leaving this task to collective bargaining, the Court could try to interfere by regulating collective bargaining by balancing it against the Treaty freedoms. Therefore, it must be examined whether the Services Directive can widen any "attack" on collective agreements and industrial action in the Member States. Such an option would be particularly controversial, because under the Services Directive – unlike the Posting of Workers Directive which concerns only a small part of labour law – national rules for collective agreements and industrial action in all areas of labour law would be affected. In order to review their possible restrictive influence on national collective bargaining, the three decisions mentioned above will be introduced briefly, their impact on national labour law will be described and possible consequences in connection with the Services Directive will be shown.

### 4.2 *Viking Line*

#### 4.2.1 Facts<sup>65</sup> (substantially simplified)

Viking, a company incorporated under Finnish law, is a large ferry operator that owns and operates the ferry *Rosella*, which is registered under the Finnish flag. Most of the *Rosella's* crew is Finnish and therefore covered by a collective agreement of the Finnish Seamen's Union (FSU). In 2003 *Viking* decided to reflag the *Rosella* to Estonia; this would have allowed *Viking* to hire an Estonian crew and negotiate lower terms and conditions of employment with an Estonian trade union. After negotiations between Viking and FSU failed, FSU gave notice of industrial action. Hereupon, Viking commenced an application in order to stop the FSU and their international affiliates from taking any action to prevent the reflagging of the *Rosella*.

<sup>63</sup> Case C-346/06 **Rechtsanwalt Dr Dirk Rüffert v Land Niedersachsen** [2008] ECR I-1989

<sup>64</sup> European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)) Rec. No. 3, 5.

<sup>65</sup> Cf also A Norrby, 'Fler frågor om fri rörlighet', *Lag & Avtal* 15.12.2005, 11.

#### 4.22 Decision (abridged)

The ECJ had to decide whether in such a case Article 43 EC is applicable, although this restriction was not caused by the state itself but by a private party. The ECJ was of the opinion that collective actions initiated by a trade union against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, are *not* excluded from the scope of Article 43 EC (para 37). Although the ECJ ruled this for the first time with regard to collective actions initiated by trade unions, the decision refers to the settled case law, according to which Articles 39 EC, 43 EC and 49 EC do not apply to actions of public authorities only but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (para 33).<sup>66</sup> Article 137 (5) EC, which states that the Community has no competence to regulate the right to strike, is no obstacle to this assumption because in regulating the right to strike the Member States must nevertheless comply with Community law (para. 40).<sup>67</sup>

In a second step the ECJ ruled that

Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions (para 61).

Therefore under certain conditions, obviously fundamental freedoms laid down in a provision of the Treaty are *binding* not only for the Member States, but also for individuals.<sup>68</sup>

In a third step the ECJ ascertained whether a collective action can constitute a *restriction* on freedom of establishment within the meaning of Article 43 EC. It approved that, because

<sup>66</sup> Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405; Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 1333; Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-2549; Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139; cf also B Mestre, ‘The ruling Laval un Partneri: clarification and innovation’, *European Law Reporter* 2008(1), 2, 8.

<sup>67</sup> T Zwanziger, ‘Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen “Laval” und “Viking”’, *Der Betrieb*, 2008, 294, 295; for a different view see T Novitz, ‘The right to strike and re-flagging in the European Union – free movement provisions and human rights’, *Lloyds Maritime and Commercial Quarterly* 2006, 242, 245; G Thüsing, ‘Blick in das europäische und ausländische Arbeitsrecht’, *Recht der Arbeit* 2007, 307, 308.

<sup>68</sup> For a different view see R Rebhahn, ‘Grundfreiheit vor Arbeitskampf – der Fall Viking’, *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 2008, 109 *et seq.*; U Wendeling-Schröder, ‘Streikrecht und gemeinschaftsrechtliche Grundfreiheiten’, *Arbeitsrecht im Betrieb* 2008, 179, 182.

it cannot be disputed that collective action such as that envisaged by FSU has the effect of making *less attractive, or even pointless* ... Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents Viking ... from enjoying the same treatment in the host Member State as other economic operators established in that State (para 72) [authors' emphasis].<sup>69</sup>

The most important question remains, whether this restriction to freedom of establishment can be justified. This is the case only if the restriction pursues a legitimate aim compatible with the Treaty, justified by overriding reasons of public interest, and is suitable for securing the attainment of the objective pursued without going beyond what is necessary to attain it.<sup>70</sup>

In *Viking Line* the ECJ for the first time acknowledged that

the right to take collective action, including the right to strike, is recognized both by various international instruments which the Member States have signed or cooperated in, ... and by instruments developed by those Member States at Community level or in the context of the European Union ... (para. 43).

Also that

the right to take collective action, including the right to strike, must therefore be recognized as a *fundamental right* which forms an integral part of the general principles of Community law the observance of which the Court ensures ... (para 44).

However, in the same paragraph the Court states that the exercise of this right to take collective action may none the less be subject to certain restrictions. Although the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of a fundamental freedom guaranteed by the Treaty, the exercise of the fundamental rights does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (para 46).

Summing up, the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty, because the protection of workers is one of the overriding reasons of public interest recognized by the Court. Therefore,

the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital *must be balanced* against the objectives pursued by social policy, which include ... inter alia, improved living and working conditions, so as to make possible their harmonization while improvement is being maintained, proper social protection and dialogue between management and labour (para 79) [authors' emphasis].

<sup>69</sup> This statement is also applicable to the freedom of services, Article 49 EC.

<sup>70</sup> See, e.g., Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37; Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman* [1995] ECR I-4921, para 104.

In one of the final paragraphs the ECJ clarified that with regard to a collective action which intends *only*<sup>71</sup> to prevent an undertaking from relocating sites (or registering vessels) in a State other than that of which the beneficial owners of those sites or vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified.

#### 4.23 Analysis

We shall now examine the possible consequences of these decisions in practice. There will be no comment on the statements of the ECJ in the sense of an annotation. Instead, the main focus will be on the presentation of possible consequences for industrial action which in any way prevents, renders unattractive or complicates the cross-border relocation of production sites.

The ECJ does indeed recognize the right to take industrial action as an (unwritten) fundamental right (see a) but likewise emphasizes the importance of fundamental freedoms (see b). That the Services Directive could be relevant in this context cannot be ruled out (see c).

##### a) Right to industrial actions

For the first time (as far as evident) the ECJ acknowledges that the right to take industrial action including strikes is a fundamental right stemming from legal traditions of the Member States.<sup>72</sup> However, one has to highlight at this stage that – unlike the fundamental freedoms<sup>73</sup> – this fundamental right has not been secured within the meaning of a dependable and binding legal source. Because of that it is in a weaker position than actions protected by the fundamental freedoms. The right to industrial action has indeed been included in the Constitution for Europe<sup>74</sup> and in the European Social Charter<sup>75</sup> to which the EC refers. Nevertheless, these sources are weaker than

<sup>71</sup> If the policy objective is also to protect and improve seafarers' terms and conditions of employment, the collective action can be justified in accordance with the rules mentioned above.

<sup>72</sup> Mestre (above n 67), 7.

<sup>73</sup> Strongly critical of this result: European Parliament Resolution of 22 October 2008 (2008/2085(INI)) Rec. No. 19, 31, 35.

<sup>74</sup> Article II-88 Constitution for Europe states: 'Right of collective bargaining and action  
Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'

See also Article III-213: 'right of association and collective bargaining between employers and workers'.

<sup>75</sup> Article 6 ESC states: 'With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

- 1 to promote joint consultation between workers and employers;
- 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

Treaty provisions. Against this background, the right to industrial action is not protected from being ignored or at least very restrictively interpreted by the Court.

b) Relationship to fundamental freedoms, esp. Articles 43 and 49 EC

Moreover, it is significant how the ECJ determined the relationship between the fundamental right to industrial action and fundamental freedoms. Obviously, the ECJ does not consider the fundamental right to industrial action and the fundamental freedoms to be on an equal footing, but defines industrial action primarily as restricting Article 49 EC.<sup>76</sup> This has far-reaching consequences: with this conviction and context, the fundamental right to collective measures is not one of the civil rights and liberties serving as a defence against any state intervention, but merely a right of interference. Therefore its application is in need of justification whenever it restricts the exercise of fundamental freedoms in any way.

Following this line of reasoning, the Court has not balanced the right to strike against the freedom of establishment for reaching a fair balance between conflicting interests. Instead, the exercise of the right to strike was seen as a restriction on the freedom of establishment and needed justification following the principle of proportionality.<sup>77</sup> This principle says that a measure restricting a fundamental freedom is in accordance with Treaty law only if this measure is *suitable, necessary*<sup>78</sup> and *appropriate* to protect an overriding reason of public interest. A check like this has a tendency to disadvantage the intervening right, in other words, in this case the right to collective actions.<sup>79</sup> Again, it shows that the ECJ places the right to strike in a weaker position than the fundamental freedoms. While ascertaining whether all of the collective measures were necessary and appropriate, the ECJ has based its decision exclusively on the general public interest in individual protection of employees. The right to collective measures as a right of trade

3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:

4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

<sup>76</sup> For a different view see Bercusson (above n 58), 303: 'in balancing the rights in this case the question is not whether fundamental rights justify restrictions on free movement; rather free movement must be interpreted to respect fundamental rights'; Rebhahn (above n 69), 114 *et seq.*

<sup>77</sup> For a different view, see A Brücker, 'Die Rosella-Entscheidung des EuGH zu gewerkschaftlichen Maßnahmen gegen Standortverlagerungen: der Vorhang zu und viele Fragen offen', *Neue Zeitschrift für Arbeitsrecht* 2008, 212, 215; Wendeling-Schröder (above n 69), 182; M Pießkalla, 'Unmittelbare Drittwirkung der Grundfreiheiten des EG-Vertrags bei Boykottaufrufen durch Gewerkschaften', *Neue Zeitschrift für Arbeitsrecht* 2007, 1144, 1147.

<sup>78</sup> That is, if the measure is the mildest measure of all equally suitable measures to achieve the goal.

<sup>79</sup> Zwanziger (above n 68), 298.

unions was not mentioned (it was different in the *Laval* decision, see below).<sup>80</sup> It can be concluded that the ECJ has degraded the collective right of the trade union to a mere handyman of employment protection and does not ascribe it any creditable worth as in itself constituting a general public interest.<sup>81</sup> One consequence of this point of view could be that the ECJ denies the trade union that took collective measures any margin of interpretation concerning whether collective actions were necessary and appropriate for reaching their objectives. Particularly, as some Member States allow trade unions some margin of interpretation in these questions<sup>82</sup>, Community law threatens to become a “spoilsport”.<sup>83</sup> While the EU cannot award rights to trade unions because of the lack of regulating competence (cf Article 137 (5) EC), it can still establish significant restrictions on their rights by limiting them through the fundamental freedoms of enterprises.<sup>84</sup>

Finally, the ECJ construed relatively narrow the possible justification for a restriction on the freedom of establishment. Collective measures aimed at employee protection could be justified only if the jobs or working conditions of the workers concerned were “jeopardized or under serious threat” (para. 81 ff.). This disallows a justification not only in cases where there is a mere – distant – possibility of a deterioration of working conditions but also in cases where collective measures aim at improving working conditions.

**Conclusion:** It cannot be ruled out that *Viking-Line* will have extensive consequences for the collective measures of trade unions in a cross-border context because the ruling strongly emphasizes the fundamental freedoms. Fundamental rights are in a much weaker position, as their exercise must be justified. National regulations characterized by strikes and other collective measures could be heavily impacted,<sup>85</sup> as strikes lawful under national law could nevertheless become unjustifiable restrictions of fundamental Treaty freedoms when applied in a transnational labour conflict.<sup>86</sup>

#### c) Relation to the Services Directive

Given these influences, it remains an open question whether the Services Directive might add to those consequences for the right to take collective action protected by

<sup>80</sup> F Bayreuther, ‘Das Verhältnis zwischen dem nationalen Streikrecht und der EU-Wirtschaftsverfassung’, *Europäische Zeitschrift für Arbeitsrecht* 2008, 395, 401; Rebhahn (above n 69), 110.

<sup>81</sup> E Kocher, ‘Kollektivverhandlungen und Tarifautonomie – welche Rolle spielt das europäische Recht?’, *Arbeit und Recht* 2008, 13, 15 *et seq.*

<sup>82</sup> With respect to German Law see U Preis, *Arbeitsrecht – Praxis-Lehrbuch zum Kollektivarbeitsrecht* (Verlag Dr. Otto Schmidt, 2003), 306; BAG 31.10.1958 AP Nr. 2 zu § 1 TVG Friedenspflicht.

<sup>83</sup> Bercusson (above n 58), 303; Kocher (above n 82), 14.

<sup>84</sup> Thüsing (above n 68), 308.

<sup>85</sup> European Parliament Resolution of 22 October 2008 (2008/2085(INI)), Rec. No. 3, 5.

<sup>86</sup> Bercusson (above n 58), 279, 289, 293 *et seq.*; Rebhahn (above n 69), 110.

national law. As Article 1 (7) SD explicitly includes a caveat with regard to the exercise of the right to strike and the right to negotiate and conclude collective agreements, it affirms the stance of the ECJ to balance collective measures for employee protection against fundamental Treaty freedoms. To the line of reasoning handed down in *Viking Line*, the ECJ can now also refer to a secondary law source. Additionally, also the vague caveat in Article 1 (7) SD could be interpreted as fortifying the “attack” on the collective rights of trade unions, as in *Viking Line*. First, the caveat could be interpreted to mean that the Services Directive intended the reference to adherence to Community law to be a hint at the precedence of the fundamental freedoms over the right to take collective measures. Second, the reference to Community law could otherwise mean that such collective measures not in compliance with Community law still fall in the scope of the Services Directive and are therefore subject to stricter rules.<sup>87</sup>

### 4.3 *Laval*

#### 4.31 Facts<sup>88</sup> (substantially simplified)

Laval, a company incorporated under Latvian law, posted 35 workers to Sweden to construct a school building at Vaxholm. Byggnads is a trade union that organizes workers in the construction sector in Sweden. Byggnads, to which 87 per cent of Swedish building sector workers were affiliated, has a collective agreement with the central organization for employers in the construction sector. Laval, which had signed collective agreements with the Latvian building sector’s trade union, was not bound by any collective agreement entered into with *Byggnads*, none of whose members were employed by Laval. Byggnads demanded that Laval (1) should sign the collective agreement for the building sector in respect of the Vaxholm site, and (2) guarantee that the posted workers would receive an hourly wage of SEK 145. After *Laval* refused, *Byggnads* blockaded the building site by, among other things, prohibiting Latvian workers and vehicles from entering the site.

With respect to Swedish law, it is noteworthy that no system exists for declaring collective agreements universally applicable. Moreover, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not even all Swedish employers are bound by a collective agreement. The Posting of Workers Directive (hereinafter: PWD) was transposed in Sweden by the “Law on the posting of workers” which regulates terms and conditions of employment applicable to posted workers but does not provide for minimum rates of pay, as referred to in Article 3 (1), (c) PWD.

#### 4.32 Decision (substantially abridged) and analysis

The decision deals mainly with two questions:<sup>89</sup>

##### a) Right to take industrial action

<sup>87</sup> Barnard (above n 38), 346 *et seq.*

<sup>88</sup> Cf B Bylund/L Viklund, *Arbetsrätt i praktiken : En handbok* (Norstedts, 2011), 283.

<sup>89</sup> T Sigeman, *Arbetsrätten : En översikt*, 5. uppl. (Norstedts juridik, 2010), 88, 124.

#### aa) Decision

As in *Viking Line*, the ECJ in *Laval* sought to ascertain whether the collective action taken by the trade union was in accordance with Article 49 EC. Many statements in *Laval* paralleled those in *Viking Line*.<sup>90</sup> Beyond that, however, there are some *noticeable statements* in *Laval* departing from the lines of reasoning in *Viking Line*. In *Laval* there are hints that the ECJ may even have considered the collective rights of trade unions while ascertaining the justification of the restriction of Article 49 EC:<sup>91</sup>

In that regard, it must be pointed out that the *right to take collective action for the protection of the workers* [authors' emphasis] of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (para 103).

However, one must point out that the ECJ has drawn no obvious conclusions from such a possible reference to a collective right, especially not with regard to any assessment prerogative of the trade unions concerning whether collective measures are necessary and appropriate.

Moreover, the ECJ ruled that the restriction cannot be justified with the objective of protecting workers in a situation such as that at issue in the main proceedings, because

the level of protection which must be guaranteed to workers posted to the territory of the host Member State *is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71* (para 108, 81) [authors' emphasis].

#### And

with regard to workers posted in the framework of a transnational provision of services, their *employer is required*, as a result of the coordination achieved by Directive 96/71, *to observe a nucleus of mandatory rules for minimum protection in the host Member State* (para 108) [authors' emphasis].

#### ab) Analysis

Concerning the relationship between fundamental Treaty freedoms and the fundamental right to take collective measures, *Laval* unsurprisingly affirms the essentials of *Viking*.<sup>92</sup> Therefore, it can be referred to the observations above. However, it is notable that the statements quoted in aa) could be understood as restricting the means of collective bargaining parties even further than the statements in the *Viking* decision. The basis of the *Laval* decision is that in cases of cross-border posting, employers have already been

<sup>90</sup> For example, although the right to take collective action is recognised as a fundamental right which forms an integral part of the general principles of Community law (para 91) a strike constitutes a restriction of the freedom to provide services within the meaning of Article 49 EC; such a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; furthermore it must be suitable for securing the attainment of the pursued objective and not go beyond what is necessary in order to attain it (paras 99, 101).

<sup>91</sup> Kocher (above n 82), 17.

<sup>92</sup> Rebhahn (above n 69), 109.

obliged to stick to a minimum of worker protection by the Posting of Workers Directive. Thus, the (in principle acknowledged) goal of protecting individual employees could not justify the restriction of *Laval*'s freedom of services (para. 108). Carried to extremes this could be interpreted as assigning the task of achieving an adequate level of worker protection primarily to the *legislator* instead of *the labour market parties*.<sup>93</sup> According to this line of argumentation a minimum standard (Posting of Workers Directive) could mark what is automatically "adequate", therefore containing both the upper and the lower limit of any level of employee protection justifying the restriction of a fundamental freedom.<sup>94</sup> Labour law models essentially developed on the basis of collective bargaining<sup>95</sup> would be heavily impacted by this assumption.<sup>96</sup> The future will show whether the ECJ actually intended to restrict collective bargaining rights to such an extent.

## b) Posting of Workers Directive

### ba) Decision

Besides, the Court reasoned on the relationship between Posting of Workers Directive and Article 49 EC:

Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 *expressly lays down the degree of protection for workers* of undertakings established in other Member States who are posted to the territory of the host Member State *which the latter State is entitled to require those undertakings to observe* (para. 80) [authors' emphasis].

Therefore,

the level of protection which must be guaranteed to workers posted to the territory of the host Member State *is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71* [authors' emphasis] (para. 81) [authors' emphasis].

### bb) Analysis

Like the *Rüffert* decision, the *Laval* decision brings up the question of the relationship between the Posting of Workers Directive and the fundamental freedom of service provision. Among other things, this allows for conclusions about the relationship between the Services Directive and Article 49 EC. As both decisions need to be taken in conjunction, this question will be discussed in detail following a brief description of the *Rüffert* decision.

<sup>93</sup> Zwanziger (above n 68), 297.

<sup>94</sup> European Parliament Resolution of 22 October 2008 (2008/2085(INI)), Rec. No. 11,17.

<sup>95</sup> See S Evju, 'Labour Courts and Collective Agreements – The Nordic Model', *Europäische Zeitschrift für Arbeitsrecht* 2008, 429 et seq.

<sup>96</sup> Köhler, 'Das kollektive Arbeitsrecht Schwedens auf dem europarechtlichen Prüfstand', *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 2008, 65, 74; T Sigeman, 'Lavaldomen sätter spärr mot social protectionism', *Lag & Avtal* 31.1.2008, 34–35; E Örnerborg, 'Bara minimilöner kann stoppa lönedumpning', *Lag & Avtal* 31.1.2008, 7.

#### 4.4 *Rüffert*

##### 4.41 Facts (substantially simplified)

The ECJ had to decide whether a law such as the Law of the German Land Niedersachsen on the award of public contracts (*'Landesvergabegesetz'*) is in accordance with Treaty law. Paragraph 3(1) of the *Landesvergabegesetz* states:

Contracts for building services shall be awarded only to undertakings which, when lodging a tender, *undertake in writing* to pay their employees, when performing those services, *at least the remuneration prescribed by the collective agreement at the place where those services are performed* and at the time prescribed by the collective agreement [authors' emphasis].

In 2003, Niedersachsen awarded a Polish undertaking a contract for the structural work in a building. The contract demanded compliance regarding payment of employees working on the building site of at least the minimum wage in force at the place where those services were to be performed, pursuant to the collective agreement mentioned in a list of attached sample collective agreements. It is noteworthy that these collective agreements *are not* universally applicable under German law.

The Polish undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the 'Buildings and public works' collective agreement. After investigations a penalty notice was issued against the person primarily responsible at the undertaking established in Poland.

##### 4.42 Decision (substantially abridged)

In *Rüffert* the ECJ ruled that Posting of Workers Directive 96/71/EC, interpreted in light of Article 49 EC, *precludes* a Member State from adopting a legislative measure requiring the contracting authority to designate for public works contracts only those undertakings which agree in writing to pay their employees at least the remuneration prescribed by a collective agreement regulating the minimum wage in force at the place where those services are performed.

Reasons for the decision:

a) In a first step the ECJ ascertained whether such a measure constitutes a minimum rate of pay within the meaning of Article 3 (1) (c) PWD. As already mentioned, this Directive enables Member States to set certain minimum requirements for undertakings established in another Member State, which posts, within the framework of the transnational provision of services, workers on its account and under its direction to the territory of the host Member State. However, this is possible only if these requirements are set by law, regulation or administrative provision, and/or by collective agreements that have been declared universally applicable (Article 3 (1) PWD). The ECJ ruled that the reviewed terms of the *Landesvergabegesetz cannot* be considered to be a law or even a collective agreement that has been declared universally applicable.<sup>97</sup>

<sup>97</sup> Therefore, 'It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as

b) In a second step the ECJ looked at Article 49 EC.

ba) The Court decided that such a condition is capable of constituting a *restriction* within the meaning of *Article 49 EC* (para. 37), because it may impose on service providers established in another Member State (where minimum rates of pay are lower) an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.

bb) As a “restriction” that law is in accordance with Article 49 EC only if it is justifiable. Hereby the ECJ ascertained whether such a measure can be justified by the objective of ensuring the *protection of workers* and/or the objective of *ensuring the financial balance of social security systems*. At the end of the day the ECJ answered both questions in the negative. For our purposes the detailed reason for this decision is not important. However, it is notable and important that the Court seems to be of the opinion that basically a restriction of Article 49 EC can still be justified by the objective of ensuring the protection of workers<sup>98</sup> and the objective of ensuring the financial balance of social security systems.<sup>99</sup>

#### 4.43 Analysis

The importance of the decision lies not in its concrete result but in its ruling on the relationship between the Posting of Workers Directive and Article 49 EC (see a). As the relevant statements of the *Laval* decision are acknowledged, both decisions are evaluated in a synopsis, as important conclusions to the relation of Services Directive to Article 49 EC – also for the labour law aspect – could be drawn (b).

##### a) Relation of PWD – Freedom of Services

The *Rüffert* decision, just like *Laval*, raises the question of the relationship between the Directive and the freedom of services under Article 49 EC. Two possible interpretations come into consideration on the merits:<sup>100</sup>

aa) The Posting of Workers Directive for this line of reasoning constitutes an exception to the country of origin principle rooted in Article 49 EC. Article 49 EC otherwise guarantees the service provider that in trans-national cases he is fundamentally subject only to the regulations of his country of origin. This is held to be necessary for the creation of a single market, until the national laws of Member States are completely harmonized – which is unthinkable at the moment. The Posting of Workers Directive

that at issue in the main proceedings, a rate of pay such as that provided for by the ‘Buildings and public works’ collective agreement’ (para 35).

<sup>98</sup> See paragraph 38: ‘In addition [...] such a measure cannot be considered to be *justified by the objective of ensuring the protection of workers* [authors’ emphasis].’ This statement can be interpreted only in the manner that the EC still accepts the objective of ensuring the protection of workers as a reason with which a restriction of Article 49 EC can be justified.

<sup>99</sup> See para 42: ‘Lastly, with regard to the objective of ensuring the financial balance of the social security systems ... *an objective which the Court has recognised* ....’ [authors’ emphasis].

<sup>100</sup> E Kocher, ‘Die Tariftreueerklärung vor dem EuGH’, *Der Betrieb* 2008, 1042, 1043.

was meant to deviate from the country of origin principle in order to protect employees as well as service providers in the host country. Seen as an exception to the rule, the Posting of Workers Directive would contain a *complete catalogue of grounds of justification for admissible restrictions on the Treaty freedom of services*. As a consequence, national regulations restricting the freedom of services in the factual scope of the Posting of Workers Directive (Article 1) can only be *in conformity with European Law if they could meet the criteria of Article 3 PWD*. In the *Rüffert* case conformity could not be concluded, as the *Landesvergabegesetz* was not seen as a generally applicable statutory regulation or administrative fiat and no universally applicable collective agreement existed. Because of that alone, the *Landesvergabegesetz* would contradict European Law.

ab) But there are also other options for determining the meaning of the Posting of Workers Directive. If that Directive is regarded as a tool to protect employees and their rights to bargain for minimum standards to protect them against ruinous competition, the Posting of Workers Directive would contain a *catalogue of grounds of justification* which could always justify the restriction of the freedom of services that accompanies national regulations, but this catalogue *would not be complete*. Under this line of argumentation a national regulation that restricts the freedom of services of Article 49 EC and does not meet the criteria of Article 3 (1) PWD could still be justified if the restriction is justified by general principles. *Employee protection* would still act as a ground of justification for restricting Article 49 EC, because it constitutes an important public interest.

ac) How the Posting of Workers Directive is to be understood and how its relationship with the freedom of services is interpreted is therefore of the utmost importance for the admissibility of the Member States issuing regulations for the protection of employees and local industry from a race to the bottom. When following the interpretation under aa), all measures of Member States that are connected to cross-border states of affairs, as in Article 1 (3) PWD, are automatically contrary to European Law if they infringe fundamental freedoms without coming under the scope of Article 3 PWD.

However, the interpretation presented in bb) would allow Member States to balance any restriction of the freedom of service providers against general grounds of justifications earlier acknowledged by the ECJ. If the said regulation was necessary and appropriate for the protection of employees, it would not contradict Article 49 EC and therefore be in conformity with European Law.

ad) The *ECJ's* understanding of the relationship between the Posting of Workers Directive and Article 49 EC was not explicitly stated in either *Laval* or *Rüffert*. Quite the contrary, there are clues for both interpretations in both decisions.

**(1)** In both decisions, some remarks speak in favour of acknowledging the Posting of Workers Directive as the standardization of a completed catalogue of justification

grounds for admissible restrictions of the freedom of services (the interpretation as under aa)):

As early as in paragraph 2 of the *Rüffert* case the ECJ highlights that

in order to give a useful answer to the national court, it is necessary to *take into consideration the provisions of Directive 96/71* [authors' emphasis] when examining the question referred for a preliminary ruling (para 18).

Similarly the Court argued in *Laval*:

In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that Directive, to laying down, in the interests of the employers and their personnel, *the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State* for the purposes of providing a service (para 58) [authors' emphasis].

Nevertheless, both decisions ignore Article 49 EC while ascertaining the respective national regulations exclusively in the light of Article 3 (1) Posting of Workers Directive. Since these statutes are not considered to represent a minimum wage regulation in compliance with Article 3 (1), the ECJ ascertains whether they could be regarded as more favourable working conditions within the meaning of Article 3 (7) PWD. The ECJ negates this since

As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly *lays down the degree of protection for workers* of undertakings established in other Member States who are posted to the territory of the host Member State which the latter *State is entitled to require* those undertakings to observe (*Rüffert* para 33; see also *Laval* para 80) [authors' emphasis].

Therefore the *level of protection* which must be guaranteed to workers posted to the territory of the host Member State *'is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71 ...'* (*Rüffert* para 34; see also *Laval* para 81) [authors' emphasis].<sup>101</sup>

The ECJ therefore concludes that

It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the 'Buildings and public works' collective agreement. (*Rüffert* para. 35)

The following statement also speaks in favour of the interpretation presented in aa):

That interpretation of Directive 96/71 is confirmed by reading it *in the light of Article 49 EC*, since that *Directive seeks in particular to bring about the freedom to provide services*, which is one of the fundamental freedoms guaranteed by the Treaty (*Rüffert* para. 36) [authors' emphasis].

This allows for the conclusion that the Posting of Workers Directive is apparently meant to realize the freedom to provide services, thereby leading to the assumption of a

<sup>101</sup> Cf also Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-4323, especially paras 26, 31.

decisive complete catalogue of grounds of justification for a restriction of Article 49 EC.

(2) On the other hand, both decisions also contain evidence that the ECJ does *not* want the Posting of Workers Directive to be interpreted as a complete enumeration of grounds of justification. National regulations are balanced against the Posting of Workers Directive only because if they comply with its requirement, there will be no need to question a justification of the restriction to Article 49 EC. This line of reasoning could invoke the following arguments:

At first, the ECJ itself does not expressly refer to interpreting Article 49 EC in light of the Posting of Workers Directive, but emphasizes that the Posting of Workers Directive has to be interpreted against the background of Article 49 EC:

... the first question must be examined with regard to the provisions of *that*<sup>102</sup> *directive interpreted in the light of Article 49 EC* [authors' emphasis] (Case C-60/03 Wolff & Müller [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself. (*Laval* paragraph 61)

That interpretation of Directive 96/71 is confirmed by reading it in the light of Article 49 EC, since that Directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty (*Rüffert* para 36).

Additionally, the Court does indeed examine national regulations under Article 49 EC after they failed to meet the requirements of Article 3 (1) PWD. After characterising the regulations as a restriction,<sup>103</sup> the ECJ examines whether that measure can be justified. As grounds for justification the decision invoked the objective of worker protection and as a newly added reason the *financial balance of social security systems*.

In addition ... such a measure cannot be considered to be justified by the objective of ensuring the protection of workers (*Rüffert* para 38);

... it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... (*Laval* para 103);

... with regard to the objective of ensuring the financial balance of the social security systems [...] an objective which the Court has recognized ... (*Rüffert* para 42).

Even though in *Rüffert* both grounds for justification were actually rejected, for the sake of the argument this outcome makes no difference. What could be drawn from the Court's line of reasoning is in both cases that possible grounds for justification of the respective restriction of fundamental freedoms were not restricted to those laid down in Article 3 (1) PWD but also included the general interest of the protection of workers. This contradicts the idea of the ECJ wanting the Posting of Workers Directive to contain a complete catalogue of grounds for justification. If the list of admissible grounds for justification were meant to be complete, any further consideration of justification according to Article 49 EC would be superfluous.

<sup>102</sup> That is, the Posting of Workers Directive.

<sup>103</sup> 'Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC' (*Rüffert* para 37).

ae) Nevertheless, the final interpretation of the relation between Posting of Workers Directive and other acknowledged grounds for justification remains an open question. Both possible interpretations (aa and ab) are backed up by passages in the decisions. One even cannot determine a clear tendency of the ECJ.

*In conclusion*, it cannot be ruled out that the ECJ means to restrict Member States' regulations of cross-border situations as listed in Article 1 (3) PWD to statutory provisions of Article 3 (1) PWD.

b) Conclusion for the Services Directive?

It is even more debatable whether this would have consequences for the Services Directive and its relation to the fundamental freedom of services. Should the ECJ regard the Posting of Workers Directive to entail a complete catalogue of grounds for justification for a restriction of the freedom of services, this reasoning may have to be transferred to the relationship between the *Services Directive* and Article 49 EC. As a consequence, all cross-border constellations contained in the Services Directive, any restriction of the Treaty freedom of services could be justified only if one of the grounds mentioned in *Article 16 (3) 1 SD* was at hand. There would be no possibility to come back to one of the grounds acknowledged earlier by the ECJ under Article 49 EC, such as worker or consumer protection. If this was the case, some consequences for national labour law might follow from the Services Directive, considering that exempting labour law and labour relations from the Services Directive's scope are always limited by a reference to Community law. Given that it is the Services Directive's objective to implement and render operational the Treaty fundamental freedom of service provision, those references to Community law could very well exclude from the scope of the Directive national measures/regulations otherwise compatible with EU law.

Despite these considerations, it is highly unlikely – at least in the area of labour law – that the ECJ will draw these effects from the Services Directive. The Services Directive distinctly excludes labour law from its scope and thereby realizes the explicit and unmistakable will of the legislator (detailed above). It could not be brought in line with that exception if the Services Directive influences national law by invoking Treaty provisions. Additionally, it would be less than convincing to apply the Services Directive only where there is already stated nonconformity with European Law. A possible (additive) breach of the Services Directive would be meaningless. Even the fact that the Services Directive was issued almost at the same time as the decisions in *Laval* and *Viking Line* does not lead to another conclusion; instead, one can assume that it was a temporal coincidence.<sup>104</sup>

#### 4.5 Conclusion

1. In the *Laval* and *Viking Line* decisions, the ECJ indeed acknowledges a fundamental right to take collective measures (including strikes), but first and foremost considers such measures to be a restriction of the fundamental freedoms of Articles 43, 49 EC

<sup>104</sup> Bercusson (above n 58), 279 ('coincidentally').

legitimate only in case of justification. This could lead to an extensive limitation of collective actions otherwise legal under national law.

2. It is not safe to conclude what relationship the Court acknowledges between the Posting of Workers Directive and Article 49 EC. Either the Court might interpret the Posting of Workers Directive as containing a complete catalogue of measures admissible for protecting posted workers in cases of cross-border posting from other Member States. If this holds true, Member States could not fall back on other grounds of justification (especially general worker protection) that have been acknowledged as admissible under Article 49 EC.

3. If the Court indeed has to be understood that way, it still remains questionable whether these observations can be applied also to the Services Directive. In our view, this is not the case. Instead, the *Services Directive* will have *no consequences* of its own for national labour law. Consequences, which can be extensive by all means, will be caused by applying fundamental Treaty freedoms themselves and the secondary law implementing them. As the Services Directive excludes labour law from its scope, it does not fortify the already existing hazardous potential of Community law.

## **5. Conclusion**

The original version of the Services Directive – the Bolkestein Draft – would have heavily influenced national labour law by a strict realization of the country of origin principle. The draft failed politically due to ferocious criticism, which was particularly based on the worries that it could lead to a “race to the bottom” towards the lowest work and social standards.

In the area of individual labour relations, the Services Directive in its final version should have no consequences, as general worker protection remains a viable ground of justification for any restriction of the Treaty freedom of services.

In the area of industrial relations, things might differ a little as the reference to Community law in Article 1 (7) SD can be understood as a secondary law affirmation of the legal opinion of the Court, which has to be applied as a standard to balance collective agreements and forms of industrial action against Treaty freedom of services and freedom of establishment

In our view, statements in the decisions *Laval* and *Rüffert* concerning the relationship between the Posting of Workers Directive and the Treaty freedom of services under Article 49 EC cannot be transferred to the relationship between the Services Directive and Article 49 EC. Even if the Court’s line of reasoning indeed could be transferred, no additional restrictions of national law would result from this, since the Services Directive in itself does not contain any additional standards for labour law. What influences national industrial relations are the Treaty fundamental freedoms and/or the

Posting of Workers Directive. Standards set by these legal provisions are in no way changed or amended by the entering into force of the Services Directive.