

Stein Evju (ed.)

**Regulating Transnational Labour in Europe:  
The quandaries of multilevel governance**

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Stein Evju (ed.)

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## Preface

This book is the end product of the FORMULA project, fully entitled *Free movement, labour market governance, and multilevel governance in an enlarged EU/EEA – a Nordic and comparative perspective*. Funded by the Research Council of Norway programme *Europe in Transition* (award no. 182747), the project was organized as a four year interdisciplinary international and comparative study, the main objective of which was ‘in a Nordic and comparative perspective to analyse the development of a multi-layered system of labour market governance in Europe, focusing on the interplay between legal and institutional change at the supra-national and national levels in the current context of enlargement and deepened market integration in the EU/EEA’. The project period ran from 2008 until, at the outset, mid-2012.

Given the wave of events occurring in the field of study during the project, not least with the European Court of Justice’s decisions in what has become known as the ‘*Laval Quartet*’ (cf n 1 of Chapter 1, below), which, next to the financial crisis and its after-shocks, made it one of the most heated and contested areas of European integration, our work in many respects became a case of ‘action research’ trying to capture the essence of a moving target. This is, also, a reason why the project was not effectively brought to a close in 2012. The contributions in the present volume emanate from working papers that were presented at the Third FORMULA Conference, on 22 and 23 March 2012. The efforts involved in preparing those papers for book publication was continuously facing the challenge of on-going further developments in case law and, not least, at the legislative level. Thus it was not just a “work in progress” but also a waiting game of sorts. It was a mere few weeks prior to finalizing the editing of this book that the last pieces in the puzzle were finally in place, the Directive 2004/66/EU on third country nationals and the long-awaited ‘Enforcement Directive’ 2004/67/EU pertaining to the Posting of Workers Directive 96/71/EC, which plays a key role in the present book and in the FORMULA project as a whole.

This is illustrative of the dynamics of the issues we have addressed in the course of the FORMULA project. They are ever present and omni-present in a vivid, on-going debate on the issues and conflicts involved within EU/EEA law, with labour market regulation, and with international labour standards and fundamental social rights. This is amply attested to, inter alia, by the broad ranging research project “European Strains”, under way as the main project of the second leg of the RCN programme *Europe in Transition*, which includes some of the issues as well as some of the researchers involved in the FORMULA project. The quandaries of multilevel governance and the conundrums of conflictual normative systems remain topical. We believe the FORMULA project has succeeded in feeding into and informing the broad-ranging discourse in this field.

In the course of the project period a series of Research Group Workshops and three international conferences were organized. In addition to working papers presented by members of the research team, those events had the benefit of the participation and contributions by a range of leading scholars, experts, and practitioners in the field from national governments, the EU Commission, and the social partners at European and

national levels. These events provided us with indispensable insights, impulses, and reflections about the issues under study and offered opportunities for exchange of views and experiences between the research team and centrally involved actors in the field. Serving as an on-going reflection and learning process, alongside the unfolding of events at the EU and national levels, these exchanges were both useful and inspiring, we hope also for those taking part outside of the research team. In this sense, the project has acted as a micro-cosmos of multilevel knowledge development, mirroring the complex machinations of the EU regime in the field.

A first harvest of these collaborative efforts was reaped with the publication in 2013 of the volume ‘Cross-Border Services, Posting of Workers, and Multilevel Governance’, which focussed essentially on case law and legislative developments at EU level and reactions to those developments at the national level of EU/EEA Member States within the scope of the FORMULA project. The present volume builds on and adds to this by presenting cross-cutting and horizontal studies of the substantive issues forming the basis of the research questions of the FORMULA project and which have proved themselves even more topical, and controversial, than could be imagined at the time the project application was drafted.

The FORMULA project moreover has served as a basis for one PhD fellowship in the Department of Private Law, University of Oslo, and the support of two more, in the University of Uppsala, and has also spawned a number of Master’s dissertations on subjects within the larger context of the project, thereby contributing to building long term recruitment and competence development in the field of legal science and labour law in particular.

The FORMULA project Research Group was headed by Professor *Stein Evju*, of the Department of Private Law, University of Oslo, where the project was situated, backed by the main collaborating partners, Head of Research *Jon Erik Dølvik*, Fafo Institute for Labour and Social Research, Oslo, and Professor *Jonas Malmberg*, University of Uppsala (now Chairman, the Labour Court of Sweden), acting in various regards as the project’s “executive committee”, and has involved a range of European experts in labour law and industrial relations. The full Research Group and information on the many collaborators in Research Group Workshops and Conferences are presented in the “Tabula Gratia” included at the end of this volume.

We owe thanks to all those who have contributed in the project. Senior Adviser Bodil Silset in the Labour Law Group of the Department of Private Law provided invaluable help throughout the project in organizing Research Group Workshops, conferences and in-between activities. Warm thanks to her. Thanks also to James Patterson, who undertook the better part of the task of language checking the majority of contributions, and to the many student research assistants in the Labour Law Group who assisted at workshops and conferences to ensure the smooth running of the events.

Oslo, 10 June 2014

*Stein Evju*

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# Introduction and Overview

*Jon Erik Dølvik and Stein Evju*

## 1 Context and issues

There is, at the outset, nothing new to cross-border movement of labour. Since ancient times, workers, craftsmen and traders have crossed the borders in Northern Europe to offer their labour, skills, and services in search for a living. From the days of the Vikings and the Hanseatic League to the establishment of a common Nordic labour market in 1954 and the Common Market in the EEC in 1957, such movements of labour have formed part of peoples' everyday struggle to improve their lot and contributed to economic and social evolution. The uneasy relationship between international trade and labour standards is also not new. A century ago it was a key basis for the foundation of the International Labour Organisation, resulting from multifarious developments internationally in the first phase of "globalisation", in the second half of the 19<sup>th</sup> century.

It all took on new dimensions at European level with the enlargements of the original EEC in terms of Member States and the gradually deepening economic integration. After a brief spell of closed border policies from the 1970s, when European countries – inside and outside the EEC/EC – allowed only free movement of labour from their closest neighbour countries, the 1994 Northern extension of the single market in EU/EEA, and its further Eastward extension in 2004 and 2007, established the largest borderless area for work and provision of services in the world. Now comprising 32 countries and more than 800 million people, this historical unification linked together labour markets in the Eastern and Western parts of Europe. For people in the Eastern accession states this ended fifty years with wired borders to the West, granting the freedom to move for work and other purposes in the entire single market. Since 2004, millions of people from the accession states have seized the opportunity. Huge numbers of citizens from especially Poland and the Baltic states have found work and livelihood in their neighbour countries in Northern Europe, some as employees in destination country firms, others as posted workers sent by contractors or agencies in the home country, or as self-employed service providers. At workplaces across Europe they often work side shoulder to shoulder alongside workers from the host country. The rights, rules and conditions associated with the various forms of cross-border work differ, and in spite of common EU regulations they differ from country to country and industry to industry. So do also the customs and expectations of the workers.

The relationship between free movement of services and labour within the EU/EEA, on one hand, and national regulation of labour markets and worker rights, on the other, has in recent years become one of the most contested issues in public, political and judicial

debate in Europe. The issue crystallizes conflicts of objectives, interests, and governance that go to the very heart of the EU construction. It is epitomized by the controversial decisions of the CJEU in the so-called ‘*Laval Quartet*’,<sup>1</sup> contrasting the fundamental freedom of movement for workers and service providers with the fundamental principles of equal treatment and the right to organize and have recourse to industrial action. This has exposed one of the main contrasts of the European project; that is, the inherent asymmetries and conflicts between the principles of market integration and the means to improve social protection and ensure upward convergence of labour and living standards. In the wake of the EU enlargements in 2004 and 2007, the tension arising from those contrasts has brought to the fore a range of diverging interests and principles built into the European project – between rich and poor countries and regions, between capital and labour, national and European regulations and different models of regulation, and between judicial and political-democratic governance, to mention some.

The overarching aim of the FORMULA research project<sup>2</sup> and, consequently, of this book summing up the project’s findings is to broaden our understanding of the dilemmas arising from these divergences and contradictions. The FORMULA project enabled us to organize a four year interdisciplinary international and comparative study, the core objective of which has been to study, at EU and national levels, key (EU) regulations pertaining to the internal/single market and free movement, and the interaction with processes and adaptations at national levels. With emphasis both on the emergence of key regulations and on recent developments, the focus is on the legal, institutional and political implications of the Treaty principles of free movement, the Posting of Workers Directive (96/71/EC), the Services Directive (2006/123/EC), the Directive on Temporary Work Agencies (2008/104/EC), and related ECJ (CJEU) cases in the wake of Eastward enlargement. A central aim of the book is to account for the developments in this core area of European integration by situating them in a broader context of historical and comparative analyses of the principles, actors, and rules that have shaped the evolution and impact of Europe’s multi-level regime of labour market governance. Viewing this as a distinct and important case of more general characteristics and challenges of the current mode of European governance,<sup>3</sup> we hope that our study will contribute to the broader scholarly and political debate about the problems and remedies

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<sup>1</sup> We use this here, and in following chapters, as a common designation for the CJEU decisions in Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989; and Case C-319/06 *Commission v Luxembourg* [2008] EFD I-4323. Full references to court decisions and legislative instruments are given in the References section at the end of this volume.

<sup>2</sup> Briefly outlined in the Preface to this volume. Further Project information, working papers, and some other publications are available at the FORMULA project website, [www.jus.uio.no/ifp/english/research/projects/freemov/index.html](http://www.jus.uio.no/ifp/english/research/projects/freemov/index.html).

<sup>3</sup> Eg, G Marks and L Hooghe, ‘Contrasting visions of multi-level governance’ in I Bache and M Flinders (eds), *Multi-Level Governance: Inter-disciplinary Perspectives* (OUP 2004), 15.

of the European integration project. Hopefully it can also be of use for the political, social, economic, and judicial actors struggling to resolve the quandary of reconciling free movement and labour market regulation at national and European levels.

In the subsequent sections of this introductory chapter we will, first, briefly describe the background of the European regime of free movement and labour market regulation, and, second, the dynamics behind the rise in cross-border labour movements, and the changes they have brought about in the patterns of mobility, hiring practices, and competition in European labour markets. In so doing, we sketch the main lines of interests that are at stake, and how the challenges arising for European and national labour market regulators in reconciling the divergent principles and interests involved have evolved over time and led to the pattern of multilevel governance of European labour markets we know today. Finally, we review the main research questions that have guided the study and provide an overview of the chapters of the book and the way in which they address these questions.

## **2 Background: The quandary of market integration and social regulation**

The creation of a common market with free movement of goods, capital, labour and services – eventually renamed the Single Market (SM) – has since the inception of the European Economic Community in 1957 been the centrepiece of European integration. Market integration involves processes of de- and re-regulation, nationally as well as supra-nationally, and alters conditions for labour market governance. The institutions for regulation of work, labour markets, and social rights have been cornerstones in the national regimes of governance in Europe,<sup>4</sup> not least in the North-European countries where strong organizations and systems of collective bargaining have played key roles in the determination of employment and working conditions as well as in the representation of social and economic interests vis-à-vis political-democratic authorities.<sup>5</sup>

As we have indicated already, none of these issues are new, however. Every major cross-road or widening of the European Community has activated conflicting principles and interests that had to be reconciled or accommodated somehow. The key issues have shifted but they have, to varying extent, always had to do with tensions along the following axes and with the relationships between them:

- Market integration vs social regulation;
- Free movement and non-discrimination vs national protection;

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<sup>4</sup> J Visser, 'Traditions and transitions in industrial relations: A European view' in J Visser and JV Ruyssveldt (eds), *Industrial Relations in Europe : Traditions and Transitions* (Sage 2006), 1.

<sup>5</sup> S Rokkan (ed), *Party Systems and Voter Alignments. Cross-National Perspectives* (The Free Press 1967); TAa Stokke, 'Collective bargaining and state intervention in the Scandinavian countries' (1999) 5 *Transfer – European Review of Labour and Research* 156.

- Capital vs labour;
- Low-cost vs high cost Member States;
- Political vs legal methods of governance;
- Democratic vs corporatist representation;
- Sovereignty vs supra-nationality;
- Subsidiarity vs harmonization, or diversity vs uniformity of regulatory systems;
- Legitimacy vs efficiency.

Since the Spaak report prepared for the conference in Messina establishing the Community in 1957, the relationship between market integration and national labour market regulation has re-surfaced, most pronouncedly at occasions of Community widening, which most often have come along with deepened political integration. As already mentioned, the ‘dual track’ chosen in Messina, in the late 1960s bolstered by the coordination rules for free movement of workers and their social security rights, functioned quite smoothly for several decades.

Cross-border movement of workers involve choice of law issues (see Chapter 2 by Evju and Novitz). This was addressed in early EEC secondary legislation. The first legislative measure, Regulation 1612/68,<sup>6</sup> was directed at the *free movement of workers* and laid down a requirement of equal treatment with national workers in respect of ‘any conditions of employment and work, in particular as regards remuneration, dismissal’, reinstatement or re-employment, and ‘social and tax advantages’, effective from ‘day one’ in the host state. This principle is also evident in early secondary legislation on social security. Regulation 1408/71,<sup>7</sup> its purpose in general terms being co-ordination of national social security legislations to ‘secure mobility of labour under improved conditions’, was based on the Treaty provisions on free movement of workers (Article 51 EEC; Article 48 TFEU). In part, Regulation 1408/71 was an expression of a different stance on the scope of application of host state law but, more importantly in the present context, it was at the same time a clear manifestation of assimilating cross-border posting of workers to the domain of Treaty rules on free movement of workers. It was only with the ECJ decision in *Rush*, 1990,<sup>8</sup> that the legal basis in their regard was vested in the rules on freedom to provide services (Article 59 EEC; Article 56 TFEU). This led on to the Posting of Workers Directive and a plethora of new legal issues and ‘blurring boundaries’ as discussed by Houwerzijl in Chapter 3.

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<sup>6</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>7</sup> 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, [1971] OJ L149/2. The Regulation is superseded, per 20 May 2004, by Regulation (EU) No 883/2004 of the European Parliament and of the Council of 29 April 2004 [2004] OJ L166/1. Regulation 883/2004 is incorporated into the EEA Agreement per 1 July 2011 but has not yet entered into force for the EFTA states, Iceland, Lichtenstein and, Norway.

<sup>8</sup> Case C-113/89 *Rush* [1990] ECR I-1417

Except for matters of gender equality, the European Community (EEC/EC) at the outset had a modest role in social and labour market regulation pursuant to the Social provisions in Title VIII of the EEC Treaty. Except for after the establishment of the Customs Union and the accession of the United Kingdom, Denmark and Ireland in 1972 – when several directives on equal treatment and workers’ rights related to mass redundancies and transfer of undertakings were adopted – its activity in this field was limited during the first three decades of Community existence. Hence, as described by Dølvik, Eldring and Visser in Chapter 4, labour market regulation largely remained the responsibility of the Member States. The resulting ‘dual track’ of integration whereby Member State precedence in labour and social policy issues was kept intact, while economic integration increasingly became subject to supranational regulation, worked quite smoothly. In fact, the first twenty years of market integration went hand in hand with the development and expansion of the national welfare states and industrial relations systems as we used to know them. Reflecting the relative proximity of the first Member States in terms of economic and social development,<sup>9</sup> this implied that the asymmetry between the Community’s capacity to promote ‘negative integration’ by removing obstacles to market integration and its limited political capacity to promote ‘positive integration’ that enhanced the Treaty aims of upward, social harmonization, attracted scant attention and caused little concern.<sup>10</sup>

Then in the 1980s, a confluence of factors contributed to change the course of events. In response to the influx of foreign firms posting construction workers on conditions well below national standards in the wake of Southern enlargement and the fall of the Berlin Wall, the European social partners in construction pressed for EC legislation to counter that problem. And, when the idea of the Single Market was launched in the mid-1980s discussions quickly followed about the risk for ‘regime competition’ and ‘social dumping’.<sup>11</sup> The *social dimension* launched by the then President of the Commission, Jacques Delors, was meant to curb such problems through establishing a floor of common minimum regulations in the labour market. Alongside a strengthening of the social dialogue at Community level, an important aim was to entice trade union support for the Single Market project and bolster legitimacy for the subsequent launch of Political and Monetary Union in the Maastricht Treaty.<sup>12</sup> Promising to counter negative

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<sup>9</sup> The founding Member States in 1957 were Belgium, France, Germany, Italy, Luxemburg, and the Netherlands.

<sup>10</sup> FW Scharpf, ‘Negative and Positive Integration in the Political Economy of European Welfare States’ in G Marks, FW Scharpf, PC Schmitter, W Streeck (eds.), *Governance in the European Union* (Sage 1996) 15

<sup>11</sup> W Streeck and PC Schmitter, ‘From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market’ in W Streeck (ed), *Social Institutions and Economic Performance. Studies of Industrial Relations in Advanced Capitalist Economies* (Sage 1992)

<sup>12</sup> See Chapters 2 and 4; JE Dølvik, *Redrawing boundaries of solidarity? ETUC, social dialogue and the Europeanisation of trade unions in the 1990s* (Fafo/ARENA 1997).

effects of the Single Market and prevent erosion of national labour relations, Delors managed to get most European trade unions and their umbrella association ETUC on his side.

As also discussed in Chapter 2, an initiative in response to the influx of foreign firms posting construction workers to EC Member States was foreseen in the context of the Commission's 1989 Social Action Plan. This was overtaken by the ECJ's landmark decision in *Rush*. Following that decision and the subsequent Commission initiative in 1990-91 for a Directive on posting of workers, several states adopted national legislation enabling wages and working conditions for posted workers to be regulated by forms of extension of national collective agreements.<sup>13</sup> In turn, the Posting of Workers Directive was adopted, in spite of strong opposition from main sending countries like Portugal, and the United Kingdom. The purpose of the directive was to strike a balance between securing service providers of all Member States access to national markets and securing proper conditions for posted workers and fair competition for host country workers and enterprises. As such, this was an archetypal example of multi-layered regulation by which the EU tried to balance market-opening measures with protection of workers and national systems, seeking to coordinate the interaction between different national systems. The Directive lays down a list of terms and conditions of employment, including minimum wages that shall apply in the host state if prescribed by statute or extended collective agreements. The taxonomy of core conditions was widely conceived of as minimum requirements, allowing Member States to impose additional terms and conditions. A decade later the broader version of that view was emphatically disallowed by the ECJ in *Laval, Rüffert* and *Commission v Luxembourg*, as discussed in-depth in Chapter 2.

With the 1993 signing of the Annex to the Maastricht Social Protocol, the EC mandate in labour issues was – in spite of the British 'opt-out' – strengthened, and the scope for qualified majority voting in the Council of eleven was widened, enabling adoption of a range of minimum directives on worker rights in the 1990s, three of which resulted from framework agreements negotiated by the European social partners.<sup>14</sup> Hence, at the time the EC of eleven – joined by Austria, Finland and Sweden in 1995, and the United Kingdom's renouncement of its 'opt-out' in 1998 – was politically able to strengthen its capacity to instigate positive, social integration. Many observers saw this and the professed 'social dimension' as a step towards a Social Europe where coalitions of political actors and social partners could mitigate detrimental effects of the Single

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<sup>13</sup> G Menz, *Varieties of Capitalism and Europeanization : National Response Strategies to the Single European Market* (OUP 2005); and Chapter 2, this volume, with further references.

<sup>14</sup> ie, Directive 96/34/EC on the on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Directive 97/81/EC on the Framework agreement on part-time work (Council Directive 97/81/EC); Directive 1999/70/EC on the Framework agreement on fixed-term work.

Market on national systems through supranational re-regulation.<sup>15</sup> The scope for qualified majority voting was narrowly confined, however. Issues of pay and collective action were exempted from the EU legislative mandate according to the Maastricht Social Protocol clause incorporated into Article 137 EC (now Article 153 TFEU),<sup>16</sup> thus leaving to Member States to ensure that national systems of wage setting and collective bargaining were kept intact under the Single Market's free movement regime. Some, more reserved observers saw the discrepancy between the wide prerogatives of the EU pertaining to economic integration and its narrow mandate in the social field as indication that EU labour market regulation would remain a weak appendix to the market-liberal economic constitution and to the national systems of industrial relations.<sup>17</sup> Strictly subject to the principle of subsidiarity, and dependent on passing the 'needle eye' of the Council and the goodwill of employers to enable European negotiations – 'bargaining in the shadow of the law'<sup>18</sup> – Wolfgang Streeck predicted that the 'neo-voluntarist' EU social policy regime would continue to be dominated by the national systems and primarily be pre-occupied with coordinating the horizontal interfaces between its constituent national entities.<sup>19</sup>

Nonetheless, as described by Dølvik, Eldring and Visser in Chapter 4, a unique trans-national system of multi-layered labour market governance evolved in the EU, shaped by complex and contested interaction between European framework legislation, the free movement rules of the Treaty, and the diverse systems of social regulation and labour law in Member States.<sup>20</sup> With competences shared between national and European

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<sup>15</sup> B Bercusson, 'Maastricht: A fundamental change in European labour law' (1992) 23 *Industrial Relations Journal* 3; J Goetsch, '1992 and the Social Dimension: Normative Frames, Social Actors and Content' (1991) 12 *Economic and Industrial Democracy* 2; O Jacobi, 'Der Soziale Dialog und der Europäischen Union' in M Mesch (ed) *Sozialpartnerschaft und Arbeitsbeziehungen in Europa* (Manz Verlag 1995).

<sup>16</sup> Article 137(5) EC, 'The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs' (now Article 153(5) TFEU).

<sup>17</sup> W Streeck, 'The Rise and Decline of Neo-Corporatism' in L Ulman, B Eichengreen and WT Dickens (eds), *Labor and an Integrated Europe* (The Brookings Institution 1993); W Streeck, 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy' in S Leibfried and P Pierson (eds), *European Social Policy. Between Fragmentation and Integration* (The Brookings Institution 1995), (1995); Dølvik (above n 12).

<sup>18</sup> B Bercusson, 'European labour law and sectoral bargaining' (1993) 24 *Industrial Relations Journal* 257.

<sup>19</sup> Streeck, 'From Market Making to State Building?' (above n 17).

<sup>20</sup> Dølvik (above n 12), G Falkner, *EU Social Policy in the 1990s. Towards a Corporatist policy community* (Routledge 1998); J Kenner, *EU Employment Law : From Rome to Amsterdam and beyond* (Hart Publishing 2003); M Rhodes, 'A Regulatory Conundrum: Industrial Relations and the Social Dimension' in S Leibfried and P Pierson (eds), *European Social Policy. Between Fragmentation and Integration* (The Brookings Institution 1995).

levels and between governmental and civil society actors, the relationship between the principles of subsidiarity, non-discrimination, and free movement has been subject to numerous controversies and Court cases. Such quandaries have frequently been associated with the complex constellation of interests which arises when cross-border mobility leads to conflicts between actors from different national systems that are differently affected by the range of EU rules that are not always easily reconcilable.

### **3 Changes in labour migration within the EU/EEA**

When labour markets are widened by removal of barriers to migration, increased cross-border labour flows are likely to reduce the effective coverage of labour law and collective agreements and weaken national industrial relations institutions. The successive EU enlargements in the 1970s and 1980s, culminating with the accession of Spain and Portugal in 1986, extended the territorial scope of the labour market, but the expectation of massive migration to the North never materialized. Also historically, internal EU migration streams had been very small, in most countries accounting for less than 2 per cent of the labour force.

From the late 1980s though – especially after lifting of the Iron Curtain in 1989 and German re-unification – there were noticeable movements of labour into building sites in Berlin, Paris, and Brussels. Posting of low-paid workers by foreign sub-contractors drew renewed attention to the old issue of regulating cross-border competition in the labour market. As already mentioned, this prompted enactment of national posting laws in France, Germany and other countries – based on existing devices for extension of collective agreements – and the adoption of the Posting of Workers Directive in 1996. With surging economies in the EU periphery and sluggish growth in the EU core in the late 1990s, however, the issue of cross-border movements of labour and services lost salience until the Eastward enlargements in 2004 and 2007.

As pointed out in Chapter 4, the Eastward enlargements of the EU/EEA were bold moves; nowhere before had politicians agreed to allow free movement of not only goods and capital but also services, citizens and workers between countries with such huge welfare gaps. The contrast with the wired borders between the southern and northern parts of NAFTA – the North American Free Trade Area – is striking. Still, contrary to earlier pledges, all the ‘old’ Member States, except the United Kingdom, Ireland, and Sweden, chose to make use of ‘transitional arrangements’ (TAs) similar to those introduced when Spain and Portugal became members in 1986. Allowed for a maximum of 2+3 years (under extraordinary circumstances for another two years),<sup>21</sup> the

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<sup>21</sup> The TAs varied in strictness from quotas and labour market probing in several continental countries to basically free movement in Denmark and Norway (provided that pay and conditions were in accordance with national collective agreements). See T Boeri and H Brücker, *Migration, Co-ordination Failures and EU Enlargement*, IZA Discussion paper

TAs did not stem the increase in labour emigration from the accession states, but they influenced the direction and pattern of the flows.<sup>22</sup> As no such restrictions were allowed for workers posted by cross-border service providers, except in Germany and Austria, an unintended consequence was that it became relatively more attractive for employers to hire workers from the accession states through foreign subcontractors. As a result, substantial shares of the flows of migrant workers came through cross-border services provided by temporary work agencies, self-employed, and sub-contractors.<sup>23</sup>

May 1, 2004, became a milestone in EU history, opening for the greatest mass migration of labour within Europe in modern time. From 2004 to 2007, an annual average of 650,000 new citizens from the accession countries, mostly Poland and the Baltic states, was registered in the ‘old’ Member States – culminating with more than 700,000 in 2007.<sup>24</sup> Even if the flows from Poland resided during the financial crisis, emigration from the crisis-stricken Baltic states, Romania, and Bulgaria continued to grow.<sup>25</sup> The estimated stock of registered migrants from the accession states in EU15 thus rose from about 2 million in 2004 to around 5 million in 2009.<sup>26</sup> In addition came considerable flows of unregistered temporary migrants, posted workers, and self-employed. Poland and Romania, as the biggest countries, accounted for three quarter of the registered flows. The largest destinations for Polish and Baltic migrants were the UK, Ireland, and Germany – through bilateral schemes for seasonal work in agriculture – while Spain and Italy were the main destinations for migrants from Romania and Bulgaria. Eventually it seems that unemployed migrants and citizens in the debt- and crisis-stricken countries in Southern Europe, Ireland, and, temporarily, the UK, have directed their search for work to other North European destinations. So, even if some of the potential for emigration from the largest sending countries, such as Poland and Romania, may have

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1600 (2005); JE Dølvik and L Eldring, *Mobility of labour from new EU states to the Nordic Region* 502 (Nordic Council of Ministers 2008).

<sup>22</sup> M Kahanec, *Labor Mobility in an Enlarged European Union* (IZA Discussion Paper No 6485 2012). The TAs for EU8 citizens were successively repealed from 2006 to 2009, except in Germany and Austria where they were lifted per 1 May 2011, while the restrictions for Bulgarian and Romanian citizens were in most countries lifted by 2012.

<sup>23</sup> JE Dølvik and J Visser, ‘Free movement, equal treatment and workers’ rights: Can the European Union solve its trilemma of fundamental principles’ (2009) 40 *Industrial Relations Journal* 491.

<sup>24</sup> MV Desiderio, ‘Free mobility areas across OECD: an overview’ in OECD, *Free Movement of Workers and Labour Market Adjustment. Recent Experiences from OECD Countries and the European Union* (OECD 2012) 35.

<sup>25</sup> J Chaloff *et al.*, ‘Free labour mobility and economic shocks; the experience of the crisis’ in OECD 2012 (above n 24), 71.

<sup>26</sup> D Hollande *et al.*, *Labour Mobility within the EU: The Impact of Enlargement and Transitional Arrangements* (NIESR Discussion paper 379 2011).

been exhausted,<sup>27</sup> persistent welfare gaps and untapped potentials in other accession states and the acceding countries at Balkan – together with rising outmigration from crisis-stricken euro-countries – suggest that the increased levels of intra-EU/EEA labour migration are here to stay, even if they are likely to ebb and flow with shifting economic cycles.

Reliable statistics on posting of workers is rare, but evidence from countries with reliable registry data, together with numerous media-stories, actor reports, and anecdotic evidence, suggests that posting has become an important ingredient in the new pattern of mass migration evolving in Europe. In countries like Switzerland and Norway, which compared to population are among those having received most labour migrants from the EU, studies indicate that posted workers and service providers in the peak period prior to the 2008 crisis represented as much as 50 per cent of the gross labour inflows. In spite of the supposedly temporary, or circular, character of posting, workers hired through foreign services providers and temp agencies thus constitute a substantial share of the workforce in main user industries such as construction and yards, and are increasingly employed also in other branches.

The dynamics behind the rise in cross-border subcontracting and posting are complex. Besides the past decades' general trend towards project organization, outsourcing, and a sharper division between core and periphery in the labour market,<sup>28</sup> the East–West gap in prices and labour costs pertaining to wages, taxes, and social charges has been a major economic incentive for clients, contractors and posted workers alike. As pointed out in Chapter 4, splitting the difference among them may be irresistible, and with the logistical infrastructure provided by websites, cheap air-carriers and migratory networks a growing market for agents, middlemen, and hiring-firms has emerged. This has added to the domestic dynamics towards more fluid and flexible work practices at the low end of the labour market.

While workers moving under the auspices of free movement of labour are entitled to equal treatment with host country workers, the situation is quite different for workers posted by foreign subcontractors, temp agencies, or acting as self-employed. As the different categories of migrant labour according to EU rules are subject to different employer responsibilities, workers' rights, wages, and social protection, this affects the terms of competition in job and product markets and provide, as described by Houwerzjl in Chapter 3, legal and material basis for creative company adjustments – so-called 'regime shopping' – to increase contract flexibility and lower labour costs. At the same time the boundaries between the different categories of labour migrants have become more blurred and fluid. Apparently, the rise in labour mobility through cross-border services interacts with domestic changes in labour law and hiring practices in

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<sup>27</sup> P Kaczmarczyk 'Labour Market Impacts of Post-Accession Migration from Poland' in OECD 2012 (above n 24).

<sup>28</sup> OECD Employment Outlook 2011(OECD 2011).

contributing to the segmentation of the labour market. As all of the following Chapters demonstrate, this poses new challenges to the actors involved in regulation and enforcement of worker rights and has occasionally also given rise to cross-border conflicts.

#### **4 Research questions, and what follows**

Regulation and enforcement of the rights and conditions pertaining to the freedom to work and provide services across borders involve governance issues that go to the core of the EU project – the relationship between economic and social integration, between politics and law, and between national and supranational decision-making. How such issues are to be handled in the evolving EU system of multi-level governance is doomed to be contested as they affect conflicts of interests between capital and labour in wealthy and poor countries, the demarcations between political-democratic, corporatist, and judicial decision-making, and accentuate thorny questions about how aims of efficiency, distribution, and legitimacy should be balanced.

It is in this context and against the backdrop sketched in the sections above that the FORMULA research project was framed. In general terms, it 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, these were the questions we started with:

- 1) How the interplay between extension of the EU/EEA market, growth in cross-border services, supra-national regulations and national responses influences the evolving multi-layered 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.

The overarching aim of the FORMULA project is by way of combining various contributions to provide an updated and deepened understanding of how interacting political, legal, socio-institutional and economic logics have influenced the interplay between the different institutions and organised actors shaping supra-national decision-making and national adjustments in particular, in the multi-layered European polity, with particular focus on the formation, adaptation, and application of legal regimes in the labour market.

The contributions in the present volume interact with, and to a large extent build on, the studies included in the first book from the FORMULA project.<sup>29</sup> That volume includes studies on the development of ECJ (CJEU) case law in the field of cross-border services and posting of workers and on the emergence and impact/role of the Services Directive, 2006, in this context. It also comprises “vertical” studies of national adaptation prior to and after the adoption of the Posting of Workers Directive and the Services Directive by the EU/EEA Member States covered by the project. Above, we have already indicated some facets of some of the chapters in the present volume. Adding to this we note that in Chapter 2 Evju and Novitz build on the theme specific and vertical studies in the previous volume, providing an unprecedented in-depth analysis of the genesis of the Posting of Workers Directive in context with “horizontal” analyses of responses at the domestic level of the Member States concerned. In Chapter 3, Houwerzijl expands on the issues of the scope and choice of law issues involved in the Posting of Workers Directive and discusses their implications for the pitfalls of ‘regime shopping’. Chapter 4 by Dølvik, Eldring and Visser enlarges on the European and national labour market features merely touched upon in preceding sections of the present Chapter 1, situating and discussing developments in a larger industrial relations and multilevel governance perspective. The following Chapters 5 and 6, by Ahlberg, Johansson, Malmberg and Bruun and Malmberg, respectively, discuss cross-cutting issues of monitoring, enforcement and sanctions for ‘EU unlawful’ industrial action, also from a “horizontal” perspective confronting EU/EEA law with domestic law of Member States – or the other way around, as the case may be. Chapters 7 and 8 are devoted to topics that, each in their own way, interlink with the Posting of Workers Directive and the Services Directive. In Chapter 7 Ahlberg and Bruun discuss EU legislation on public procurements and their relation to ‘social clauses’ and labour standards, whereas Schlachter in Chapter 8 dissects the Directive on Temporary Agency Work with a primary focus on its cross-border dimensions and potential impacts. Chapter 9 by Herzfeld Olsson addresses an additional dimension of cross-border movement of labour which is highly topical, that of the rights of third country nationals in the EU/EEA labour market context. Then, to round off this volume and with it the contributions from the FORMULA project Catherine Barnard in Chapter 10 takes on the task of discussing whether an answer really may be found to the question ‘Squaring the circle?’, that is to say, the

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<sup>29</sup> S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013).

seeming incongruities of on one hand market liberalist freedoms as fundamental principles of the EU/EEA treaties and construed by the Court of Justice of the EU, and on the other hand fundamental principles and standards in international law otherwise concerning rights to organize and to collective bargaining for the protection of worker's interests. This is, as it turns out, a riddle yet to be resolved.



# The Evolving Regulation: Dynamics and Consequences

*Stein Evju and Tonia Novitz*

## 1 Introduction

In this chapter, we seek to examine what the FORMULA project is able to tell us about the dynamics and consequences of multilevel governance leading to the regulation of transnational labour. Even after extensive study, our conclusions are necessarily tentative. We have not been able to examine the experiences of all 27 EU Member States and are aware that, in terms of associated trade agreements, we are examining only the experience of Norway under the EEA.<sup>1</sup>

What we are able to observe is that each stage of enlargement of the European project, and accompanied perceptions regarding labour cost differentials, has encouraged legislative action (such as the adoption of the Posting of Workers Directive<sup>2</sup> and the Services Directive<sup>3</sup>) and judicial intervention (regarding the scope of free movement of services). The political position taken by particular Member States in response to proposed legislation and court proceedings would seem to reflect whether they believe they are in a position to benefit from competition on the basis of low labour costs, such that we see a state such as the United Kingdom shift its position as it changes from being a net exporter to a net importer of cheaper labour, while Germany has been more rigorous in maintaining its position and developing its mechanisms for self-protection. Similarly, we detect differences in the responses of Member States to EU instruments and judgments of (what is now) the Court of Justice of the European Union (CJEU), such that these are implemented in multifarious ways. We do not consider that such variety is necessarily a matter for concern, but we do consider that it reflects the ways in which different EU States subscribe to different varieties of capitalism.<sup>4</sup> This is not to say that

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<sup>1</sup> Agreement on the European Economic Area of 17 March 1993 ([1994] OJ L 1; and EFTA States' official gazettes), between the EU and (now) the EFTA States Iceland, Lichtenstein, and Norway (EEA Agreement and EEA, respectively). As for the EU and preceding treaties we use the standard abbreviations EEC, EC, TEU, and TFEU.

<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 (The Posting of Workers Directive, PWD).

<sup>3</sup> Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2008] OJ L 376/36 (The Services Directive; SD).

<sup>4</sup> 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).

differences reflect the desires of a given government of a particular political persuasion for a set term, but rather the relative influence of social actors, such as employers and trade unions, and the domestic institutional framework within which they operate. What is clear is that both at domestic level and on the European stage, there is active contestation over the content of EU and domestic regulation of transnational labour, the mode of operation of any such regulation and what their acceptable effects would be. Here, we endeavour in a modest way to track these processes of implicit and explicit conflict.

Moreover, we detect not only evidence of conflict within and between EU Member States, but also competition for control between EU institutions. At a simple level, this could be seen as arising between the Council, which adopts EU legislation, and the Court, which applies such legislation and determines its validity in light of the Treaties.<sup>5</sup> However, the scope for conflict at EU level goes beyond this. Different parts of the Commission would seem to have proposed and supported different measures, such that DG Employment and Social Affairs has taken a much more socially oriented perspective, protective of the interests of labour, to that of the DG for Internal Market and Services, which tends to reflect the perceived business needs of EU transnational companies.<sup>6</sup> There was also an interesting tussle between the Commission and Council, on one hand, and the European Parliament, on the other, as regards the content of the Services Directive, including the treatment of posted workers and the scope for protecting labour standards permitted thereunder.

This suggests that the content of the so-called ‘European social model’ remains unsettled, as it is being shaped and reshaped. Efforts to develop and expand the Single Market have also engendered the idea of a ‘social dimension’, materializing in an Action Programme<sup>7</sup> and the Community Social Charter,<sup>8</sup> to foster new dynamism and development in the social policy field.<sup>9</sup> That has turned out to be a fairly elusive ambi-

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<sup>5</sup> eg P Syrpis (ed), *The Judiciary, the Legislature and the Internal Market* (Cambridge UP 2012).

<sup>6</sup> eg J Peterson 1995, ‘Playing the Transparency Game: Consultation and Policy-Making in the European Commission’ (1995) 73 *Public Administration* 473; M Bauer ‘Diffuse Anxieties, Deprived Entrepreneurs: Commission reform and middle management’ (2008) 15 *Journal of European Public Policy* 691, also see n 9 below.

<sup>7</sup> COM(89) 568 final, Communication from the Commission concerning its action programme relating to the implementation of the Community Charter of Basic Social Rights for Workers.

<sup>8</sup> Community Charter of the Fundamental Social Rights of Workers, 1989 (Social Europe 1/90, 45).

<sup>9</sup> eg J Bridgford and J Stirling ‘Britain in a social Europe: industrial relations and 1992’ (1991) 22 *Industrial Relations Journal* 263; J Kenner, *EU Employment Law : From Rome to Amsterdam and beyond* (Hart Publishing 2003) 109–152; J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’ in TK Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective* (OUP 2003) 1, 5–13; and, critical, E Vogel-Polsky ‘What Future Is

tion, however. The aspiration of a ‘European Social Area’ had to yield and was substituted by the notion of a ‘Social Dimension of the Internal Market’,<sup>10</sup> tempered by reference to an EU Charter of Fundamental Rights<sup>11</sup> now incorporated into the Treaties. In other words, we are examining the evolution of regulation regarding transnational labour at an important juncture in the EU’s understanding of its aims and objectives.

## 2 Free movement of workers and early EEC legislation

Cross-border movement of workers, whether in an individual capacity or in the context of provision of services, entail conflict of laws issues. If a worker departs from country A to perform work in country B the question arises, simply put, whether that worker shall be covered by the law of ‘home country’ A, or by the law of the place of work, the ‘host country’ B, or whether both legal regimes may apply in combination. This issue surfaced in the EU context long before the first draft for a Posting of Workers Directive was tabled in 1991, but it is part of the legislative history of that Directive. The private international law dimension stands as the first line of development ultimately leading up to the Posting of Workers Directive and the regulations that were drafted in that early phase emerge, as we shall see, as precursors to essential elements of Article 3 PWD.

It is common to all EU and EEA Member States that prior to the entry into force of the Posting of Workers Directive the law applicable to the individual employment contract of workers moving across borders, to and from the state concerned, was governed by the private international law of that state, private international law in spite of its appellation being national law. Later, effectively from about the same time the first drafts for a Posting of Workers Directive was circulated, the rules of the Rome Convention, 1980, on the law applicable to contractual obligations,<sup>12</sup> entered into force and proceeded to play a part in the PWD legislative process. The Directive, however, as we shall see, lays down separate rules on matters of choice of law and private international law.

Concerning cross-border movement of workers, early EEC secondary legislation saw two different approaches to the choice of law problem. The first legislative measure,

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There For A Social Europe Following the Strasbourg Summit?’ (1990) 19 *Industrial Law Journal* 65.

<sup>10</sup> eg Vogel-Polsky (above n 8) 75.

<sup>11</sup> Charter of Fundamental Rights of the European Union (Consolidated version) [2012] OJ C 326/391.

<sup>12</sup> Convention on the law applicable to contractual obligations, of 19 June 1980 [1980] OJ L 266/1 (Consolidated version [1998] OJ C 27/34). The Convention entered into force on 1 April 1991. The Convention now is superseded by the Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, per 17 December 2009.

Regulation 1612/68,<sup>13</sup> was directed at the *free movement of workers*, focused on the right of nationals of a Member State to take up an activity as an *employed person* within the territory of another Member State. The Regulation proscribed limitations on recruitment by national employers of workers from another Member State (Articles 3–6) and, pertinent to the private international law dimension, laid down a requirement of equal treatment with national workers in respect of ‘any conditions of employment and work, in particular as regards remuneration, dismissal’, reinstatement or re-employment, and ‘social and tax advantages’. This applied in respect of legislation, as well as any collective agreement or individual employment contract (Article 7; also Article 7 of the 2011 Regulation). The non-discrimination principle in Regulation 1612/68, in keeping with Article 48(2) EEC (Article 45(2) TFEU) on freedom of movement of workers entails in principle the application from ‘*day one*’ of host-state labour law to persons utilizing the right to free movement of workers. A worker in cross-border employment is entitled to benefit from the law of the Member State where he or she performs work, from the very first day. On its wording, the fourth recital of the Preamble, Regulation 1612/68 could in principle be held to apply also to what is now understood as posted workers. It was only with the *Rush* judgment<sup>14</sup> in 1990 that the legal basis in their regard was vested in the rules on freedom to provide services (Article 59 EEC; Article 56 TFEU).

This context is even more evident as regards the early secondary legislation on social security, in which a different approach in part was adopted towards the issue of applicable law. Regulation 1408/71<sup>15</sup> was based on the Treaty provisions on free movement of workers (Article 51 EEC; Article 48 TFEU), its theme in general terms being coordination of national social security legislations to ‘secure mobility of labour under improved conditions’ (fourth and ninth recitals of the Preamble). Under this Regulation, also, the principle of equal treatment and a ‘*day one*’ principle applies, the starting point and general rule being that ‘persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State’ (Article 3(1), cf Article 13). What sets the 1971 Regulation apart from its 1968 counterpart, however, is that a specific exception is made for ‘posted workers’. They shall con-

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<sup>13</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. The Regulation is superseded, per 15 June 2011, by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

<sup>14</sup> Case C-113/89 *Rush* [1990] ECR I-1417.

<sup>15</sup> 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 [1971 OJ L 149/2. The Regulation is superseded, per 20 May 2004, by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 [2004] OJ L 166/1.

tinue to be governed by their home state law as regards social security if a posting lasts (or is anticipated to last) more than twelve months (Article 14(1)(a)(i)),<sup>16</sup> now twenty-four months pursuant to the 2004 superseding Regulation (Article 12(1)). Thus Regulation 1408/71 was not merely an expression of a different stance on the scope of application of host state law; it was at the same time a clear manifestation of assimilating cross-border posting of workers to the domain of Treaty rules on free movement of workers.

The 1968 and 1971 regulations, adopted at an early stage,<sup>17</sup> were key instruments in the implementation of free movement for workers. This body of law was forcefully followed up by the then European Court of Justice (ECJ, now CJEU) in its decisions such as *Commission v France, Walrave*, both 1974,<sup>18</sup> and *Bouchereau*,<sup>19</sup> 1977, and a short decade later in *Prodest*.<sup>20</sup> Little headway had been made on the right to establishment and the freedom to provide services, however.<sup>21</sup> Applying Article 48 EEC the decision in *Commission v France* emphasized the requirement of non-discrimination of workers making use of the right to free movement, and thereby readily lent itself to be construed to correspondingly lay down as a principle that *host* state workers shall not risk having to compete with cheap foreign labour.<sup>22</sup>

In that case, concerning nationality discrimination in the maritime sector, the Court held that the ‘absolute nature’ of Article 48(2) EEC has the effect of ‘guaranteeing to the state’s own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, [because] such acceptance is prohibited’ (para 45).

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<sup>16</sup> Article 14(1)(a)(i) of Regulation 1408/71 reads, ‘A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting’.

<sup>17</sup> In this field implementation was ‘ahead of schedule’, commented JM Laslett, ‘The Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in the European Community’ (1990) 17 *Legal Issues of European Integration* 1. The ensuing process was still long and complicated, see B Bercusson, *European Labour Law* (Butterworths 1996), 388–390.

<sup>18</sup> Case 167/73 *Commission v France* [1974] ECR 359; Case 36/74 *Walrave* [1974] ECR 1405.

<sup>19</sup> Case 30/77 *Bouchereau* [1977] ECR 1999.

<sup>20</sup> Case 237/83 *Prodest* [1984] ECR 3153.

<sup>21</sup> See Laslett (above n 17) 1.

<sup>22</sup> This point is forcefully made by J Hellsten, ‘On the Social Dimension in Posting of Workers’ in J Hellsten, *From internal market regulation to European labour law* (Helsinki University Print 2007), 8.

This brings out the contrast to subsequent developments and the law on freedom to provide services. If it is considered a restriction within the meaning of the EEC Treaty (now TFEU) if a service provider has to comply with host country wage levels or other terms and conditions of employment, the implicit premise is, then, that a service provider is entitled to compete by grossly undercutting prevailing terms and conditions in the labour market it gains access to, which is rather contrary to norm relied on by the ECJ in *Commission v France*.

However, the question of posted workers arose when the right of workers to free movement was curtailed due to transitional provisions related to enlargement of the then European Economic Community (EEC), such that a Host State was permitted to ask workers from new Member States to satisfy their requirements for work permits. The issue which arose in this case was whether their employer could rely as a service provider from another Member States on the Treaty guarantee of free movement of services to overcome the need for a work permit for ‘posted workers’.

Our starting point, when examining EU regulation of transnational movement of labour, is therefore the expansion of what was then the EEC in 1986 to include Portugal and Spain. This expansion presented the prospect of movement of cheaper labour from these two Iberian countries to the existing Member States. Here, we look at the concerns that underlay the determination regarding ‘work permits’ by the ECJ in the *Rush* case, and the subsequent positions taken by Member States in response to *Rush*. The *Rush* decision was proclaimed in a formative phase of policy relating to posted workers and came to serve as a catalyst, in part also a model, in the subsequent wider process.<sup>23</sup> As we shall see, the Member States that are the subject of this study viewed the Court’s judgment in that case as granting permission to extend national labour standards (including norms established through collective bargaining) to workers posted from one Member State to another. This shaped their bargaining position in respect of the subsequent Posting of Workers Directive, but also, very significantly, the preparedness of certain states to join the EU and to be bound by that Directive under the mechanism of the EEA. However, our interest in this section lies primarily with anticipatory measures taken by certain Member States to regulate wages paid to posted workers.

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<sup>23</sup> See, among many examples, G Tuts ‘Detachement et droit du travail: la directive 96/71/C.E. du Parlement et du Conseil du 16 decembre 1996 concernant le detachement de travailleurs effectue dans le cadre d’une prestation de services (1997) *Journal des tribunaux du travail* 265, 267 ; S Krebber ‘Anmerkung [zu EuGH Vereinigte Rechtssachen C-369/96 and C-376/96, Arblade]’ (2001) *Zeitschrift für Europäisches Privatrecht* 368; P Davies ‘The Posted Workers Directive and the EC Treaty’ (2002) 31 *Industrial Law Journal* 298, 300, E Kolehmainen, *The Posted Workers Directive: European Reinforcement of National Labour Protection* (European University Institute 2002), 112; C Barnard, *The Substantive Law of the EU : The Four Freedoms* (OUP 2004), 345; T Sigeman, ‘Fri rörlighet för tjänster och nationell arbetsrätt’ (2005) *Europarättslig Tidskrift* 465, 467.

We approach this by looking first at the private international law background and the *Rush* decision, before turning to the adoption process of the Posting of Workers Directive. In 1996, at the date that the PWD was adopted, there were 15 member states, including (in terms of countries that come within the scope of the FORMULA study) Denmark, Finland, Germany, the Netherlands, Sweden and the United Kingdom. In the analysis presented here, we are heavily dependent on the information that stems from the case studies presented by members of the FORMULA project, analysing the responses of each country to *Rush*. We have also taken note of the similarly significant actions and interventions by Norway, which as a member of the European Free Trade Association (EFTA) signed the European Economic Area (EEA) agreement in 1994. It was determined that the EEA would include the PWD in November 1998, but Norway had already taken national measures to address issues of posting and had entered into a notable dialogue with the Commission. The only country represented in the FORMULA project not so engaged was Poland, the Eastern European representative of our study. Instead, this country has had to make accommodations subsequent to joining the EU in 2004 and is not discussed in this part of our chapter.

### 3 The conflict of laws dimension – towards restriction of choice and national freedom<sup>24</sup>

The 1968 Regulation (1612/68/EEC), albeit relying essentially on a host state, or *lex loci laboris* principle, still left issues of private international law unresolved. It is a general point of departure in private international law, common to almost all states, that a principle of party autonomy applies, meaning, in the labour and employment law context, that the parties to an employment contract have a freedom to choose which country's law is to apply in their contractual relationship. Private international law being national law, however, the law of the Member States differed considerably on how to determine the applicable labour law, in particular as regards the extent to which domestic law recognised freedom of contract. Vast differences obtained, and in part still do notwithstanding the later partial harmonisation within the EU by the Rome Convention of 1980, as regards the views on and the reach of domestic law rules considered to be '*lois de police*' or '*ordre public*', which are mandatory, immediately applicable and overriding contractual choice. While in some countries virtually all individual or protective labour law is considered *ordre public*,<sup>25</sup> in other Member States the concept is

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<sup>24</sup> The issues discussed in this Section and Section 4 below are further discussed, from a different perspective, by Houwerzijl, Chapter 2, this volume.

<sup>25</sup> As illustrated later by, eg, the CJEU decisions in Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453; and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323. See also S Evju, *Evaluering av almengjøringsordningen – høring* (2006), 11–13. For France, see, eg, J Pélissier, A Supiot, A Jemmaud, *Droit du travail* (24<sup>e</sup> éd, Dalloz 2008), 45–46, 118–119; JE Ray, *Droit du travail. Droit vivant* (14<sup>e</sup> éd, Éditions Liaisons

reserved for norms of a ‘public law’ nature or is unknown or plays merely a minor role in the labour law field. There is a distinction also between ‘unilateralism’ and ‘bilateralism’.<sup>26</sup> While a unilateralist approach emphasises territoriality, predominantly *lex fori*, bilateralism is based on the idea of the equivalence of legal orders. It will accept the applicability of a worker’s home state labour law, at least for work assignments that are in some way temporary or of a limited duration.<sup>27</sup> In this context bilateralism and a broad notion of *ordre public* are two sides of the same coin.

These problems were recognized at the outset. On the adoption of Regulation 1612/68 the Council instructed the Commission ‘to examine thoroughly the problems raised by conflict of law rules with regard to labour law, in order to find the most suitable solutions as soon as possible’.<sup>28</sup> The process that was to follow was not so swift, however. In March 1972 the Commission tabled a proposal for a regulation on conflict of laws pertaining to employment relations within the Community.<sup>29</sup> In light of the opinions of the ECOSOC later the same year<sup>30</sup> and of the European Parliament<sup>31</sup> an amended proposal was submitted to the Council by the Commission in 1976.<sup>32</sup>

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2005), 33–36, illustrating also that the French notion of *ordre public* is both relative and complex; and further N Meyer, *L’ordre public en droit du travail : Contribution à l’étude de l’ordre public en droit privé* (L.G.D.J. 2006).

<sup>26</sup> See J Malmberg and C-M Jonsson ‘National Industrial Relations v. Private International Law – A Swedish Perspective’ in M Rönnmar (ed.), *EU Industrial Relations v. National Industrial Relations : Comparative and Interdisciplinary Perspectives* (Wolters Kluwer 2008) 217, 218.

<sup>27</sup> See for Germany, eg, A Junker and J Wichmann, ‘Das Arbeitnehmer-Entsendegesetz – Doch ein Verstoß gegen Europäisches Recht’ (1996) *Neue Zeitschrift für Arbeitsrecht* 505, 506; O Deinert, ‘Arbeitnehmerentsendung im Rahmen der Erbringung von Dienstleistungen innerhalb der Europäischen Union’ (1996) *Recht der Arbeit* 339, 341; the literature on the topic is otherwise immense. The state of law in the Scandinavian countries is essentially similar at the outset.

<sup>28</sup> COM(76) 653 final, Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community, Explanatory Memorandum, 3.

<sup>29</sup> Proposition de règlement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté, 23 mars 1972.

<sup>30</sup> Avis de Comité économique et social sur une proposition de règlement du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté, 29 et 30 novembre 1972. OJ C 142/5, 31.12.72.

<sup>31</sup> [1973] OJ C 4/14.

<sup>32</sup> COM(75) 653 final. Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community, 28 April 1976.

At the same time, work was also ongoing – since 1969 – with an instrument on the law applicable to contractual and non-contractual obligations,<sup>33</sup> which ultimately resulted in the 1980 Rome Convention. A first draft Convention was tabled already in 1972.<sup>34</sup>

The two efforts were obviously not coordinated and the rules proposed differed quite significantly.<sup>35</sup>

The Convention, in draft and as adopted, essentially embodies the principle of party autonomy and, also, a principle of legal certainty. Furthermore, the rules, applicable to contractual obligations in principle are neutral to the sort of social and socio-economic interests with which substantive law is concerned, labour law in particular, inasmuch as the rules of the Convention are based on an assumption that national legal systems are interchangeable. Article 3(1) of the Convention stipulated free choice of law by contracting parties, including parties to employment contracts, as a general rule. This point of departure was restricted, however, in different ways based on the foundational notion in labour law of the worker being the weaker party.<sup>36</sup> First, a choice of applicable law could not deprive an employee of protection flowing from mandatory rules of law that would be applicable to the employment contract in the absence of choice (Article 6(1)). In other words, notwithstanding the freedom of choice at the outset the Convention's rule was that parties are free to choose the law applicable to their employment contract only insofar as the chosen law were more favourable to the employee than the mandatory standards of the law that would otherwise apply. Within the meaning of Article 6(1), mandatory rules that cannot be opted out of were not only provisions related to the contract of employment itself, but also provisions such as those, for example, concerning health and safety which are regarded in certain Member States as provisions of public law.<sup>37</sup> The Giuliano/Lagarde report stated that

‘The mandatory rules from which the parties may not derogate consist not only of the provisions related 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

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<sup>33</sup> While the initiative was taken in 1967 the actual work commenced in 1969; see M Giuliano and P Lagarde, *Report on the Convention on the law applicable to contractual obligations*, 1 (the Giuliano/Lagarde report).

<sup>34</sup> EEC Commission, XIV/398/72 –E.

<sup>35</sup> For some pertinent observations on this, see B Hepple, ‘Conflict of Laws on Employment Relationships within the EEC’ in K Lipstein (ed), *Harmonisation of Private International Law by the E.E.C.* (Institute of Advanced Legal Studies, University of London 1978) 39.

<sup>36</sup> Cf Giuliano and Lagarde (above n 33), 24 – the ‘explanatory memorandum’, having a status as *travaux préparatoires* of the Rome Convention 1980.

<sup>37</sup> Cf *ibid.*, 25.

employment agreements by the choice of law of another State in the individual employment contract’ (p 24).

Second, in the *absence* of choice the contract of employment is governed by the law of the country in which the employee habitually carries out his work in performance of his contract (Article 6(2)(a)). This would apply *even if* the worker is *temporarily* employed in another country, that is to say, also when he or she is on a temporary assignment abroad. Furthermore, if the employee does not habitually carry out his or her work in any one country, the employment was to be governed by the law of the country in which the place of business through which he was engaged is situated, in simple terms, the location of the employer’s business (Article 6(2)(b)).<sup>38</sup> Once again simplified and in contemporary terms, in the absence of choice a ‘country of origin’ principle would apply also as far as posted workers are concerned.

Although the Rome Convention provided for fairly uniform<sup>39</sup> law of conflict rules in the Member States, until 2004 the Convention could only be interpreted exclusively by national courts; the CJEU did not have any jurisdiction with respect to the Rome Convention.<sup>40</sup> Therefore, in a number of Member States national private international law traditions still give their flavour to the application of the Convention, and now the Rome I Regulation, in the Member States. This has been facilitated by the fact that the Convention does not provide a clear definition of the notion of ‘mandatory rule’, leaving a ‘margin of appreciation’ to states with regard to what should be treated as a mandatory rule and what not, an area where traditions differ considerably.<sup>41</sup> The same may be true in states that are not a party to the Rome Convention, as is the case for Norway, but the source material is too limited to permit conclusions to be drawn.

The now outlined provisions of the Rome Convention are replicated in the superseding Rome I Regulation, cf Articles 3 and 8.

Turning to the drafting process related to specific choice of law rules for temporary cross-border work, the approach was rather different. The 1972 and 1976 draft regulations offered no freedom of choice, except in very limited circumstances. The general rule, its object being to secure *equal treatment* of all workers in an *establishment*, was that the law of the normal (habitual) place of work was applicable (1976 draft, Article 3). As regards the scope of a possible regulation there was a fundamental shift from

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<sup>38</sup> Both alternatives are subject to a reservation, ‘unless it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country applies’ Article 6(2) final paragraph.

<sup>39</sup> Not fully, since some Member States made a reservation to Art. 7(1), implying that Member States may give different effect to internationally mandatory rules not belonging to the law of the adjudicating body (*lex fori*).

<sup>40</sup> The first judgment of the CJEU on a (non-labour law) Rome Convention case was in 2009, Case C-133/08 *Interfrigo* [2009] ECR I-9687.

<sup>41</sup> See extensively A van Hoek, *Internationale mobiliteit van verknemers* (SDU 2000).

1972 to the subsequent 1976 draft. The 1972 proposal covered posting within a company group (Article 4, similar to Article 2(3)(b) PWD), the 1976 amended proposal was extended to encompass posting in general, the sending of workers ‘to carry out temporary activities’ in another Member State. The reach of the Article, by way of referring to Article 51 EEC, was linked to that of Regulation 1408/71. For workers being posted in another Member State the point of departure was in keeping with this. Home state law – the ‘country of origin’ law, in contemporary terms – would continue to be applicable. This was restricted, however, pursuant to Article 8, by the requirement that on a number of enumerated points the law of the place of work was to apply as mandatory law. The host state rules to be applicable can readily be seen as a precursor to the Posting of Workers Directive, its Article 3(1) in particular. The law of the place of work to be mandatory in posting situations were (Article 8(1) of the 1976 draft):

- provisions on maximum daily and weekly working hours, time off per week and public holidays;
- provisions related to minimum holidays;
- provisions on minimum guaranteed wages, ‘similar guaranteed payments by the employer’, and payment of wages;
- occupational safety and health;
- special protection for children, adolescents, women and mothers, and the handicapped;
- provisions on official approval of the termination of employment relationships; rules on the invalidity of restrictive covenants and similar contract clauses;

and, new to the 1976 draft,

- provisions on the protection of employees’ representatives; and on
- the business of hiring out workers.

It is a paradox of sorts that the draft regulation seemingly would provide less protection than the draft Convention. Whereas the latter would exclude free choice in respect of all mandatory rules for the protection of the employee, the regulation would *restrict* the application of mandatory rules applicable at the place of work to the topics specified in Article 8(1).<sup>42</sup> On the other hand, Article 8(3) of the draft regulation stipulated that insofar as *home state* law ‘offer[s] better protection for the worker’ home state law would remain in force. That provision can readily be seen as a precursor to the much debated Article 3(7) PWD.

The proposals for a regulation did not materialize into actual secondary legislation. Both proposals were regarded critically, in some Member States, at least, and also within the Council.<sup>43</sup> With time, political constellations and priorities changed and when in 1980

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<sup>42</sup> Cf Hepple (above n 35), 43.

<sup>43</sup> For example, F Gamillscheg, ‘Intereuropäisches Arbeitsrecht : Zu zwei Vorschlägen der EWG zum Internationalen Arbeitsrecht’ (1973) *Rabels Zeitschrift für ausländisches und*

the Rome Convention was adopted, the still pending regulation proposal was ultimately withdrawn in the fall of 1981.<sup>44</sup> This early initiative nonetheless merits a certain attention. Both a link to and a distinction from the later Posting of Workers Directive are evident. The distinction lies in the Treaty base and thematic reference. Deriving from Articles 48, 49 EEC (Articles 45, 46 TFEU) and Regulation 1612/68/EEC the proposed regulation was aimed at the *free movement of workers*, not the freedom to provide services. The link has been pointed to above. Furthermore, a line was drawn to *ordre public*. The initial proposal of 1972 opened that door wide; it would permit states to impose as mandatory such rules in the domestic legal order as were founded on reasons of ‘*ordre public, de sécurité publique ou de santé publique*’, though within the bounds of the EEC Treaty Articles 48 and 49.<sup>45</sup> This potentially far-reaching empowerment was *discarded* in the amended proposal of 1976, however. The underlying idea was that the proposed Article 8(1) reflected the current state of law as regards the range of mandatory rules in conflict of laws settings in Member States. The proposed list in Article 8(1) therefore was a ‘*comprehensive list of legal provisions*’ that would take precedence in the host state over home state or other chosen law.<sup>46</sup>

Both facets reappear and are easily recognizable when it comes to the elaboration of the Posting of Workers Directive. As no specific regulation was arrived at, what remained in the interim as a frame of reference with regard to matters of choice of law pertaining to cross-border employment relations was the Rome Convention of 1980. Accordingly, the choice of law perspectives and the Convention came to play a role in the PWD legislative process, however subsidiary.

#### 4 Rush Portuguesa

The ECJ decision in *Rush*, preceding the actual PWD process, adds to this picture. The decision was proclaimed in a formative phase and came to serve as a catalyst, in part also a model, in the subsequent process. It is the catalyst function with which we are concerned here.

*Rush* involved a dispute between the Portuguese company Rush Portuguesa and the French Immigration Office (*Office national d’immigration*). Rush had concluded a contract with a French undertaking as a sub-contractor, which entailed participation in the construction of a railway (TGV) in France. In order to perform the contract, Rush brought to France their employees from Portugal. After inspections had been carried

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*internationales Privatrecht* 284; B Borgmann *Die Entsendung von Arbeitnehmern in der Europäischen Gemeinschaft* (Peter Lang 2001), 197-98.

<sup>44</sup> Commission 1981 [item 8].

<sup>45</sup> 1972 proposal Article 4(2).

<sup>46</sup> COM(75) 653 final, Explanatory Memorandum, 11 (emphasis added).

out, Rush was fined for a breach of the French Labour Code which concerned employment of foreigners in France, as this was to be regulated by the French Immigration Office. As noted above, this case arose in the context of the recent accession of Portugal to the EEC, with all the political sensitivities that this entailed. Notably, Portuguese workers did not have full free movement rights (as yet) but Portuguese enterprises could claim rights to free movement of services. France was nonetheless precluded from applying its immigration laws.

The Court found, first, that Portuguese workers ‘posted’ for a short time to perform services in France should not be subject to ordinary work permit requirements, because 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. The employer pursuant to Articles 59 and 60 EEC as a service provider was entitled to move freely on the territory of another Member State ‘with all his staff’. However, throwing the French authorities (and what were then the ten ‘old’ Member States) a crumb of comfort,<sup>47</sup> the Court also made a second statement, by way of an *obiter dictum*, namely that Member States have some discretion in terms of imposition of labour standards on posted workers:

‘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).

Expanding on the precursor in *Seco*<sup>48</sup> (para 14), the Court here widened the scope for national regulation from ‘minimum wages’ to the entire spectrum of labour law, seemingly granting a host state a wide licence to apply its national law to employees of cross-border service providers. The Court offered no explanation or reasoning to underpin this sweeping statement.<sup>49</sup> By answering a question that was not requisite to the decision it has been argued that the Court committed ‘a basic error of the craft of judicial decision-making’.<sup>50</sup> But it may also be seen as a considered policy statement, intended both to discourage cross-border service providers from using Articles 59 and 60

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<sup>47</sup> Paraphrasing L Gormley, ‘Freedom of establishment and freedom to provide services. Workers and Services distinguished’ (1992) 17 *European Law Review*, 63, 66. See also P Davies, ‘Posted Workers: Single Market or Protection of National Labour Law Systems’ (1997) 34 *Common Market Law Review* 571, 589.

<sup>48</sup> Joined cases 62 and 63/81 *Seco* [1982] ECR 223.

<sup>49</sup> See, eg, P Davies, ‘Market Integration and Social Policy in the Court of Justice’ (1995) 24 *Industrial Law Journal* 49, 74; C Barnard, ‘Employment Rights, Free Movement under the EC Treaty and the Services Directive’ in Rönmmar (ed) (above n 26) 138, 147.

<sup>50</sup> Davies (above n 23) 300.

to mount comprehensive challenges to host state labour laws and to appease France, in particular, and host states generally.<sup>51</sup>

There were no cogent legal foundations in advance to compel an outcome like this. The Advocate General in *Rush* took a more reserved position, proposing to assimilate only ‘personnel in a position of responsibility and trusted personnel’ and ‘workers who have a specialization or special qualifications which are essential for the provision of the service and who could not be obtained on the labour market’ of the host state to the service provider and thereby being subject to the rules on free movement of services. He considered that otherwise employees of the service provider generally should be deemed to fall within the ambit of the freedom of movement of workers. The Court did not engage this line of argument or issues of distinction at all, however.

Thereby the Court effectively established a new legal basis for the movement of workers, while at the same time encroaching on another. The Treaty provisions, primarily Articles 48 and 49 EEC (Articles 45 and 46 TFEU), are aimed at promoting the free movement of workers by requiring that migrant workers have full access to host state protection. Relocating moving workers instead to the domain of free movement of services on one hand deprives them of this stronger protection, and on the other hand entails a potential deregulatory impact on national labour law regimes.

By rejecting a distinction the Court took a stronger economic market integrationist stance than did the Advocate General. The Court’s position in *Rush* is still controversial; it is in debate whether workers moving within the framework of cross-border provision of services may invoke Articles 45, 46 TFEU and conjoint secondary law. However, it is the Court’s position in *Rush* that has prevailed in subsequent case law. Indeed, the Court’s line of reasoning on the free movement issue laid the ground for a complex and uncertain situation assessing features of host state labour laws, their sustainability under Community law, and was obviously threatening to national labour law regimes. This could be countered by adapting, if need be, domestic legislation and other regulatory measures.

However, the reaction by Member States to *Rush* was far from uniform. In particular, it is possible to detect a broad discrepancy between what we might term ‘labour exporter’ and ‘labour importer’ states. At the same time, there was a palpable difference between the ways in which different labour importing Member States chose to seek to regulate the terms of posted work, Germany possibly being the most interventionist, as opposed to the Netherlands which arguably had comparable concerns. Finally, we should note that *Rush* seemed to offer (false) reassurance in terms of accession (in 1995) for Finland and Sweden, and also contributed to Denmark’s confidence in ratifying the EU Treaty.

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<sup>51</sup> eg Davies (above n 49) 74; Davies (above n 47) 589–90; B Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005), 166.

However, we should also note that the two statements made in *Rush*, highlighted above, were far from clear in their scope. What, for example, is meant by the statement that the Portuguese workers in that case ‘did not at any time gain access to the labour market of the host state’? Arguably, it is comprehensible only in the context of *Rush* where the workers concerned did not yet benefit from freedom of movement in Community law. Is it sufficient for this purpose that the workers are merely posted by the service provider and will return home once the service provider’s task is complete? This would not seem to be what the intended meaning was, given that non-entry to the host state labour market is made as a separate point. Or does this mean that the posted worker will not stay in the country long enough to disrupt access to the job market by those actually resident in the host state? Arguably, that assertion by the Court is rather a narrow-minded one. It is hardly to be contested that the posting of workers affect the labour market situation of a host state, and more so the longer the duration of the posting.<sup>52</sup>

Second, it would seem that *Rush* prevents a host state from placing additional requirements on the entry of workers posted by a service provider, but allows national labour laws and collective bargaining to apply. The difficulty is that such a statement would seem to have a number of unspoken limitations; for example, we would expect that labour standards imposed in this way must not be discriminatory (by virtue of other facets of what was then EEC law) and must not be so extensive as to operate as a block on free movement rights (raising the question as to what test would be applicable to assess this). Arguably such uncertainties fed into what would later emerge as disputes as to the scope and meaning of the PWD.

## **5 Labour market backgrounds, responses of Member States to *Rush***

As Monika Schlachter has observed, ‘[s]ince 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 about posting of workers’.<sup>53</sup> This was, however, very much the response of those states who were net labour importers. For example, the United Kingdom, as a net labour exporter took a different approach.

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<sup>52</sup> The actual duration of the contract period in that case cannot be gleaned from the decision in *Rush*. It appears from the proceeding in France that the contract was for a longer period than one year.

<sup>53</sup> M Schlachter, ‘The Posting of Workers Directive – German Reactions and Perceptions’ in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013) 137, 139–140.

Between 1990 and 1996 the United Kingdom exported cheap labour, often in the construction industry, through the provision of services in other European countries.<sup>54</sup> There was no political call for protection of UK labour standards from encroachment by cheap labour from other European states. Rather, emphasis was placed (in a time of UK recession) on the ability of UK workers to find employment ‘in Europe’. At that time, UK labour legislation placed strict jurisdictional limitations on the applicability of the labour standards contained therein. You had to be ‘ordinarily working’ in the United Kingdom to claim those statutory rights. UK workers posted abroad for lengthy periods with a new employer were not, subject to conflict of laws principles, usually considered to come within the scope of UK labour legislation (and the protections that it offered). This allowed such workers to work in conditions abroad which would have been in contravention of UK labour law. Workers posted to the United Kingdom also did not receive any protection by virtue of these statutory provisions, insofar as they were expected to return to work for their employer again in another country. The aim was, as Tony Blair stated, when he came to power in 1997, to have the most lightly regulated and competitive labour market in Europe. The United Kingdom initially opposed the 1991 draft for a Posting of Workers Directive on the grounds that it might prove costly to UK business, particularly the construction industry. It was described in the UK Parliament as: ‘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’. The fear was that a Posting of Workers Directive would encourage countries to reduce the demand for British workers. UK labour was already very cheap. It would be difficult for workers from other states to undercut those rates, even if ‘posted’ to the United Kingdom.

The net labour importers pursued a different approach. Following *Rush*, there would seem to be at least three ways of imposing significant controls on the conduct of foreign service providers. The first is by ensuring that the wages of posted workers do not undercut those operating in the domestic labour market. The second was to use legislation or collective bargaining to impose other labour standards (such as health and safety or working time). The third would seem to be to use systems of registration, work permits or other bureaucratic controls as a deterrent. The latter arguably comes under scrutiny by virtue of the first statement in *Rush*, but the first two mechanisms would seem to be open to Member States. It is interesting that when countries anticipated introduction of a PWD by taking advance legislative measures (such as Germany and Norway), their focus in part was primarily on wages. Wages can be controlled through a number of means, such as imposition of a national minimum wage, a nationally arbitrated ‘award’ rate of pay or collectively agreed rates of wages. In terms of the FORMULA study, four countries – Germany, the Netherlands, Finland and Sweden – are of interest in this respect.

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<sup>54</sup> This paragraph draws on the contribution by T Novitz, ‘UK Implementation of the Posted Workers Directive 96/71’ in Evju (ed) (above n 53) 329.

During the German presidency of the European Council, in the second half of 1994, Germany tried to advance adoption of a PWD. However, the Government also sought to anticipate the adoption of such a directive and its eventual implementation, by addressing the crisis then arising in the German construction sector.<sup>55</sup> Foreign undertakings paid their workers only half of the amount that German employees earned or even less while deploying them on German construction sites. This meant that foreign undertakings could undercut German competitors' prices easily by 25 per cent. The result was that the number of insolvencies of domestic construction companies rose dramatically. In the area of Berlin, the number had tripled from 1991 to 1994. The aim was therefore to regulate wages paid to posted workers. A draft bill was tabled in September 1995. When drafting the bill for an *Arbeitnehmer-Entsendegesetz* (AEntG),<sup>56</sup> the German legislator relied specifically on the second statement in *Rush* (which anticipated the PWD) and covered the whole construction sector. The proposed legislation aimed at establishing minimum wage levels in the German construction sector by introducing 'uniform minimum working conditions', thereby diminishing the comparative cost advantage of foreign undertakings. Such minimum standards were considered so important to preserve the public interest and to function as mandatory norms within the meaning of the private international law rule in Article 34 EGBGB,<sup>57</sup> thus overriding the labour law norms of the sending country otherwise governing the contract of employment.<sup>58</sup> The material scope of the draft bill was limited to the construction sector,<sup>59</sup> as this was the economic area in which immediate action was most needed. In addition to providing the substantive minimum working conditions, foreign undertakings must participate in the German social contribution system for the construction sector, unless they already participate in a comparable system in their home country, in which case the German system allowed for consideration of the already granted benefits.<sup>60</sup>

The first draft bill, by the Government, drew criticism from different quarters. The Bundesrat (Upper House of Parliament) decided by a majority to reject the draft bill and to introduce its own proposal to the Bundestag, shortly before the opposition party in the Bundestag (Lower House of Parliament) came up with another alternative. All of the drafts pursued the same intentions but the implementation measures were highly controversial. A compromise solution was hammered out by the Bundestag's Committee on Labour and the Social Order and the *Arbeitnehmer-Entsendegesetz* was adopted in February 1996, entering into force on 1 March 1996. Essentially, the substantive features noted above remained intact but measures of control and enforcement from the first

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<sup>55</sup> This part draws on M Schlachter (above n 53).

<sup>56</sup> Bundesgesetzblatt (BGBl) I 1996, 227.

<sup>57</sup> Einführungsgesetz zum Bürgerlichen Gesetzbuche, BGBl I 1994, 2494.

<sup>58</sup> § 1 AEntG gov. draft: '... zwingend Anwendung, wenn ...'.

<sup>59</sup> § 1 I AEntG gov. draft.

<sup>60</sup> § 1 II AEntG gov. draft.

draft bill were altered and reinforced. The success of any such regulation demanded that posted workers need to be notified to the German authorities, and undertakings would be liable for administrative offences. Collective agreements could be made generally applicable where there was consent by a majority in the Committee on Collective Agreements.

A similar trend to that in Germany took place in the Netherlands construction sector:<sup>61</sup> ‘Isles of foreign labour law were observed at big construction sites as a consequence of chains of cross-border subcontracting’. Belgian building companies quintupled their turnover on the Dutch construction market between 1983 and 1996. The European Federation of Building and Woodworkers (EFBWW) pleaded for a solution in Community law analogous to the ILO Convention No 94 on ‘labour clauses’ in public procurement contracts in the Directive on liberalisation of public procurement, for which a first proposal was tabled in late 1986 (COM(86) 679 final). The Dutch trade union FNV Bouw & Hout supported this stance, but it did not emerge on the domestic agenda as a very pressing issue. Houwerzijl suggests that this was because, in practice, the operation of cartels in the Dutch construction industry meant that there was no significant undermining of Dutch companies or the terms and conditions of Dutch workers. There was little or no experience of ‘social dumping’.

For posted workers on the territory of the Netherlands before the implementation of the PWD, the application of private international law meant that not all, but only some provisions of extended collective labour agreements (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. However, as Houwerzijl observes, this was only a possibility and not a duty and it seems that this was left to the social partners to decide for themselves. Until 1995, the Dutch CLA for the construction sector excluded posted workers from its scope. Although already on the bargaining agenda of the union side from 1990 onwards, as a consequence of the *Rush* judgment, this situation only altered five years later following the example of Belgium. ‘In fact, this is all that can be said about the reception of the *Rush* judgment in Dutch labour law with regard to the application of host state labour law.’ Legislative measures were only taken to address the issue of posting in the course of implementation of the PWD in 1999. The Posting of Workers Directive was officially implemented by means of the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (Terms of Employment (Cross-Border Work) Act), which entered into force on 24 December 1999. Although that limitation was controversial, the Act was limited to the construction sector; only in 2005 was it amended to cover all sectors.

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<sup>61</sup> This part draws on M Houwerzijl, ‘Implementation of the Posting of Workers Directive in the Netherlands’ in Evju (ed) (above n 53) 177.

Why then did Germany and the Netherlands differ in their approaches? Various factors can be identified, including the scale of impact in the construction sector, the extent of trade union pressure and the degree of public concern and engagement.

Like Germany, Finland initially acted prior to the adoption of the PWD.<sup>62</sup> In 1995, the same year as Finland joined the European Community, the key labour market organisations and the government agreed on the introduction of a specific regulation aimed at addressing ‘posting’ of workers to Finland. The law was changed to ensure that the pre-existing ‘*erga omnes*’ system in Finnish labour legislation applied to foreign service providers so that, with the exception of short-time installation work (and similar situations), foreign service providers have to apply generally binding Finnish collective agreements in accordance with Finnish legislation. This would be mandatory and apply regardless of any individual or collective contracts between a posted worker and his/her employer. This measure was taken in reliance on *Rush* and following the debate on the draft Directive on posting of workers. ‘The promise to regulate the issue of social dumping was clearly one of the measures taken in order to secure a favourable attitude from the trade unions towards EU membership and the referendum on membership’.

The ECJ decision in *Rush*, 1990, and the subsequent first draft for a posting of workers directive tabled by the Commission in the summer of 1991 set wheels in motion in the Nordic countries. With the exception of Finland, none of the countries had a system of ‘*erga omnes*’ or general applicability of collective agreements. A Nordic conference in December 1991 on European Integration and Nordic Labour Law focussed especially on prospective issues in collective labour law in view of European law developments. At the time, Denmark was the only member of the EC (EU). For Finland, Norway and Sweden negotiations for an EEA agreement were under way. The countries later went different ways. Just a year after the entry into force of the EEA Agreement, on 1 January 1994, Finland and Sweden joined the EC, while Norway remained in the EEA. The four Nordic countries also took differing approaches to the posting of workers issue.

Among the Scandinavian countries, Norway adopted a different course from Denmark and Sweden. While the latter held the matter in abeyance, action was swift in Norway. Towards the end of 1991 the Norwegian Trade Union Confederation (LO) turned to the Government with what was effectively a demand, as a precondition of providing political support for an EEA agreement, to have legislation put in place with the aim of counteracting ‘social dumping’. There was a simple reason for this. Trade union density is lower than in Denmark and Sweden, and being well aware that collective agreement coverage in the private sector is also not high, it could easily be anticipated that posting of workers to Norway might fall outside the scope of existing agreements. In case the union had no members among workers being posted, which obviously was the likely

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<sup>62</sup> The text on the Nordic countries draws on the contributions by M Gräs Lind (Denmark), N Bruun (Finland), S Evju (Norway), and K Ahlberg (Sweden), in Evju (ed) (above n 53), respectively.

situation, the scope and effectiveness of industrial action, however lawful, would be limited. The Ministry of Labour tabled a first draft for a bill, on minimum wage setting, in mid-1992. It did not meet with the approval of the LO and some other trade union confederations who wanted instead an act allowing for the possibility of declaring collective agreements ‘generally applicable’. In December the same year a bill on this was put to the *Stortinget* (Parliament). It immediately became highly controversial, in particular because the bill proposed a wholly different solution from that included in the earlier draft, with no public consultation. Following a protracted procedure in Parliament the Act was adopted, largely as proposed, in June 1993. It established an independent administrative law body with tripartite membership, *Tariffnemnda* (the Tariff Board), which is empowered pursuant to certain procedural rules to adopt decisions on ‘declaring a (part of a) collective agreement generally binding’. In legal terms, decisions are delegated legislation issued in the form of Regulations, setting minimum terms on the basis of a limited selection of provisions of the relevant collective agreement. The Act was dormant in its first ten years but was revived with the EU enlargement in 2004. Since then it has been in part fully accepted, in part contentious, by both sides of industry.

There are various similarities between Finland, Denmark, Sweden and Norway. One is the appreciation of the possibility that posting can undermine national systems of collective bargaining. In the first three states, not counting Norway, there was reliance on the second statement in *Rush* and explicit reassurance from the European Commission that they could rely on existing systems, although by the Commissioner for social policy and not that of the internal market.

It is therefore possible to conclude, on a preliminary basis, that whether a state was a net importer or exporter of posted workers significantly influenced their political position in relation to the regulation of posting. Also influential was the extent to which that state offered its workers significant protection under labour legislation and/or collective bargaining. Domestic measures were taken, in reliance on *Rush* or in reaction to the first draft for a directive, in advance of the PWD in Finland, Germany and Norway – and even extension of CLAs to posted workers in the construction sector in the Netherlands. The pressure of the ‘old’ Member States for adoption of a Directive was to clarify *Rush* and ensure their ability to place controls on treatment of ‘posted workers’, so as to prevent ‘social dumping’. The notion that there would be less scope for control under the PWD was not (apparently) contemplated. We will see these dynamics played out again in debates in the drafting of the PWD and later interpretation of the meaning of that text. What is lacking, however, would seem to be appreciation or anticipation of further effects of future enlargement.

## 6 The PWD drafting process

### 6.1 Introduction: *The social dimension of the single market*

The Posting of Workers Directive was not drafted in a legal vacuum. It can be seen as a true offspring of the EU Single Market and the conjoined ‘social dimension’ (even if the latter’s content remains the subject of contestation, as noted above). It was born during the renaissance of economic liberal ideology in the 1980s, in the context of developing the Single Market as one of several measures to oblige also the ‘social cohesion’ side of the coin. Community policies had long been at an impasse as regards labour and employment matters.

Prior to *Rush* the development of a ‘social dimension’ to the Single Market, foreshadowed by Jacques Delors in 1986, began during the Belgian Presidency in 1987 and, buttressed by Delors’ 1988 resolve to start drafting a ‘Social Charter’ forked into two interlinking documents adopted in November–December 1989, the Community Charter of the Fundamental Social Rights of Workers and the accompanying Action Programme for the implementation of the Charter.

The PWD purports to be, and is to some extent, a worker protection measure. But the Directive has mixed objectives. It also serves to promote the transnational provision of services and to facilitate cross-border competition. The two dimensions were key pieces in the shifty drafting and elaboration of the PWD. The Directive has in reality been ridden with ambiguity since its inception. The conflict between economic interests and social cohesion has been exacerbated with the enlargement of the EU and EEA.

In the section on ‘new initiatives’ concerning freedom of movement the Action Programme included an outline on a ‘Proposal for a Community instrument on working conditions applicable to workers from another state performing work in the host country within the framework of the freedom to provide services, especially on behalf of a subcontracting undertaking’. The gist of this proposal was that there was a need to ensure the application of host state legislation on ‘public order’ and national ‘generally binding collective agreements’. The Action Programme curtly stated that the Commission would ‘resort to the appropriate Community instrument to ensure respect for’ those two ‘principles’.

The Action Programme offered no further suggestion of the kind of instrument to be made use of. The Programme also did not indicate which legal bases the Commission could rely on when launching its proposals. The options had to be found in the Preamble to the Community Social Charter to which the Action Programme was linked. A wide array of alternatives was then available. The Preamble to the Charter refers, among other things, to the freedom of movement of workers (Articles 7, 48–51 EEC; now Articles 25, 45–48 TFEU) and to the right of establishment (Articles 52–58 EEC; now Articles 49–54 TFEU), but not to the provisions on the freedom to provide services. This may be seen, but not cogently, as indicating that at the time it was host state domestic law, not service providers’ and market interests that took precedence, although the risk of ‘distortions of competition between undertakings’ was also mentioned. The

perspective conveyed by the sole mention of *ordre public* and generally binding collective agreements was anyhow rather narrow and suggestive of a certain legal-cultural bias. All of these aspects reappear in new forms in the PWD elaboration process.

It is possible to trace the drafting and adoption of the PWD through a three-stage process. In the first stage, the potential for conflict between key European institutions was revealed through for example battles over the threshold requirements for application of host country labour standards. In the second, a more flexible proposal showed promise, but was again rejected by virtue of differences between member states over threshold requirements.

### 6.2 *The first phase – the first draft, 1991*

A few months after the Action Programme was presented, in March 1990, the ECJ came down with its decision in *Rush*. As we have noted already, *Rush* has a prominent place in the saga of the Posting of Workers Directive. The Court in *Rush* may at the outset be taken to follow the lead from the Commission Action Programme. There is an important difference, however. Whereas the Action Programme made no reference to a legal basis and could be taken to refer to the free movement of workers, the Court as we have seen placed the problem firmly within the domain of Treaty law on the freedom to provide services.

This, then, set the tone for the framing of a Posting of Workers Directive. It should be noted, also, that adding to the uncertainty flowing from the choice of legal basis and the wide-ranging *dictum*, the Court in *Rush* did not at all touch on or discuss issues of *ordre public* or mandatory norms in private international law. The conflict of laws dimension was conspicuously absent from the rather cursory reasons given by the Court.

Following the Action Programme, and intensified after the decision in *Rush*, the Commission consulted formally and informally with Member States. From September 1990 until 8 May 1991 DG V also conducted a series of consultation meetings with European and national social partners.<sup>63</sup> In mid-April 1991 DG V circulated to Member States a draft proposal for a directive, to be discussed at an informal meeting in Brussels on 14 May. Subsequently the Commission put out a draft proposal for consultation on 8 June, and a revised draft appeared on 17 June.<sup>64</sup> This text was adopted by the Commission without amendments and tabled as its official proposal for a new directive, COM(91) 230 final, on 28 June.

The 8 June draft was somewhat more extensive than the DG V draft from May, expanding on the Preamble with, among other things, references to the Rome Convention

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<sup>63</sup> See 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; DA 1991 (see list of Documents – Primary sources); and W Eichhorst, *Europäische Sozialpolitik zwischen nationaler Autonomie und Marktfreiheit : Die Entsendung von Arbeitnehmern in der EU* (Campus Verlag 2000), 149–150.

<sup>64</sup> Commission 1991a, 1991b, 1991c.

and to ILO Convention No 94, and including from the DG V draft what can be seen as a precursor to Article 3(7) PWD in the provisions proper. The latter was not included in the 17 June draft, in which the infamous ‘*erga omnes*’ notion made its first appearance. All drafts proposed, for the purpose of achieving certain flexibility, a threshold of three months for the application of host state rules on minimum wages and holidays. Moreover, the proposal maintained the essential approach of the conflict of laws regulation proposals of 1972 and 1976 with a list of host state terms and conditions to be applicable, but it did not include any reference to or delimitation by a notion of ‘public order’.

The first draft for a directive formally tabled by the Commission is distinctly distanced from the *Rush* approach and at the same time signalled the intention to arrive at solutions departing from the norms embodied in the Rome Convention. The draft referred in its Preamble to the Rome Convention, party autonomy (Article 3) and the connecting factors in the absence of choice (Article 6(2)), and to the precedence of mandatory law (Article 6(1)). This was added to by pointing to Article 20 of the Convention,<sup>65</sup> on ‘Precedence of Community law’, pursuant to which

‘This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules related to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.’

The structure of the proposed substantive provisions was similar to that of the 1976 draft regulation. Article 3(1)(b) sets out a list, albeit less extensive than in the 1976 draft, of topics on which host state law should apply, ‘whatever the law applicable to the employment relationship’.<sup>66</sup> The Commission proposal did not contain a ‘favourability clause’ of the kind that appeared in previous drafts and later made its way into Article 3(7) and Recital 17 PWD. This quickly became an issue in the legislative process, however (see further in 6.5.4 below).

When receiving the Commission’s proposal the Council at its meeting in September referred the proposal to its Working Party for Social Affairs for discussion. Placing the matter on its agenda at a first meeting on 1 October 1991 the Working Group played an active and important role in the subsequent process, discussing the various issues involved in about 25 meetings, as the Presidency was able, when willing, to effectively take over to a considerable extent the initiative otherwise pertaining to the Commission. The European Parliament (EP) was also to play an important role, however.

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<sup>65</sup> COM(91) 230 final, Preamble, recitals five and ten to thirteen. Article 20 is paralleled by Article 23 of the Rome I Regulation.

<sup>66</sup> This was subject to an exception for a period of up to three months for rules on holiday with pay and minimum wages, Article 3(2). This ‘threshold provision’ turned out to be highly controversial and figured prominently in the ensuing process.

The Commission's proposal was transmitted to Parliament in September. The Committee on Social Affairs, Employment and Work Environment tabled its final report in April 1992,<sup>67</sup> but at the reading in Plenary on 13 May a final stance was not adopted. Parliament instead referred the matter back to the Committee, the reason being that the Commission was unwilling to accept several of the proposed amendments, in particular to do away with the three month threshold. Thereby the adoption process was blocked for months to come, as a completed 'first reading' in Parliament was a prerequisite to a common position in the Council. The Committee on Social Affairs, Employment and Work Environment deliberated in a number of meetings, presenting a draft second report in September and a final report in January 1993 with reinforced amendment proposals.<sup>68</sup> Informal consultations between Parliament and the Commission paved the way for a compromise, reducing the threshold to one month, and on 10 February the EP adopted the proposal for a directive with 31 amendments. Among those were proposals, emanating from the Committee's 1992 report, on information, cooperation and enforcement, topics that were wholly absent from the Commission's proposal.

The basic structure and approach of the 1991 draft were maintained throughout the legislative process but expanded and elaborated on. So were the Preamble recitals referring to the Rome Convention, with the addition of a reference to the Convention's Article 7 stating that under certain conditions effect may be given to mandatory rules of the law 'of another country, in particular the law of the Member State within whose territory the worker is temporarily posted', *concurrently* with the law applicable pursuant to the Convention.<sup>69</sup> This underlines the relationship between 'home state law' (as a proxy for the law applicable at the outset) and the law of the host state (place of work). Rules that are mandatory in the host state irrespective of the law otherwise applicable to the contract, can be applied in that country (*lex fori*, the law of the forum), cf. Article (72) of the Rome Convention. Article 7(1) on so-called internationally mandatory rules allows for the 'inverse' application of mandatory rules of another *country*.

### 6.3 *The second phase: new proposal, progress and stalemate between Member States*

Following the EP's adoption and informal consultations with Member States the Commission circulated a draft revised proposal on 10 May (Commission 1993c), which was essentially identical to the amended proposal adopted on 16 June, COM(93) 225 final.<sup>70</sup> The proposal included the one month threshold and a number of other amendments, among other things, the scope of application should not be linked to undertakings but to

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<sup>67</sup> EP Com 1. The tripartite ECOSOC had delivered its opinion on 18 December 1991, essentially welcoming the proposal but suggesting a number of concerns and amendments, see ECOSOC 1991.

<sup>68</sup> EP Com 2, and Doc. No. A3-0022/1993 [1993] OJ C 72/4. In between, the Council had held a discussion on the major issues in December 1992, see Council 1992.

<sup>69</sup> PWD, Preamble, Recital (10), cf Recitals 6 to 9, 11, and 12.

<sup>70</sup> Amended proposal for a Council Directive concerning the posting of workers in the framework of provision of services (15 June 1993) [1993] OJ C 187/5.

employment relationships, the ‘*erga omnes*’ clause was removed and a new Article 3(4), precursor to Article 3(8) PWD, was included. So was a ‘favourability clause’ (Article 3(3)), some additions were made to the ‘hard core’ list, and new provisions on information, cooperation and remedies were brought in. Overall, the proposal had a stronger social profile than its predecessor and appeared to be more in the line of flexibility towards different legal orders.

To begin with, little happened. Despite efforts there was no real progress in the second half of 1993 and the Greek Presidency for the first half of 1994 had declared, already in October the year before, that it would not touch the file. It was not until the German Presidency in the second half of 1994 that it was reactivated. Germany convened a meeting of the Council Working Party on 12 June to examine the proposal as it stood and thereafter tabled a revised draft on 25 June for the Party meeting on 27 July. It included, *inter alia*, a restructuring of the provisions on scope (Articles 1 and 2), simplified wording on several counts and draft declarations for the Council minutes.

Two main points of controversy quickly crystallized, the threshold issue and the means to lay down ‘hard core’ provisions (laws, and so on, and collective agreements). In addition, Germany raised the question of limiting the scope of a directive to the building sector only. The collective agreements issue was of special concern to Denmark, who engaged actively on this, but also to Italy, who presented a proposal in October to include agreements concluded by ‘the most representative’ organizations. Germany, on the other hand, had tabled a proposal that possible collective agreement regulation should only be applicable to the building sector. Following a series of meetings in September and October Germany then put forward a new revised draft, ‘a compromise suggestion’, in early November. Two subsequent Working Party meetings and thereafter Coreper<sup>71</sup> mainly discussed technical issues, leaving the controversial ‘political’ issues to the upcoming Council. The Council met on 6 and 21 December but did not reach a common position. The three main issues that remained unresolved were the scope of application of a directive and means of stipulation (laws, collective agreements), whether the list of topics in Article 3(1) should be exhaustive, and the threshold period. While six states favoured a ‘zero threshold’, six insisted that there should be a threshold, of one, three or four months. On this point, the Commission also insisted that a threshold of minimum one month was essential out of consideration for the free movement of services.

#### *6.4 The third phase: renouelance, adjustment, and conclusion*

The French Presidency for the first half of 1995 picked up where Germany left and issued a questionnaire, in January, to the Member States on the three main questions, adding also third countries should be covered by a directive. A revised proposal was tabled on 7 February and first discussed in Working Party meetings and Coreper, however without any notable progress. The new feature in this period was that at its meeting

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<sup>71</sup> Comité des représentants permanents (Committee of permanent representatives).

in February the Working Party for the first time was presented and discussed the text of the proposed Preamble to the directive.

The French proposal had two key elements. One was an *optional* one month threshold provision, allowing Member States to decide individually whether to apply national rules on minimum wages and holidays from day one or to establish a threshold period. The other was whether the ‘hard core’ list in Article 3(1) should be exhaustive. France wanted the list to be ‘open’ so that more favourable and extensive regulation could be applied. In addition, the proposal included the previous German proposal for terms and conditions laid down by collective agreements to be mandatory only for the building sector. The proposal was on the Agenda for the Council on 27 March, but again, no agreement was reached. The main point of contention, dominating the debate, was the threshold issue. France maintained a fairly rigid and unyielding stance, insisting on a ‘zero threshold’ solution, maintaining that a mandatory threshold would be considered ‘social regression’ and hence unacceptable. A national concept of *ordre public (social)* quite evidently played a part in this. To one delegation, at least, it also expressed outright resentment towards what from the French point of view was seen as willingness to depart from the principle that employment and working conditions in national law should not be deteriorated by EC regulation. Along with the non-exhaustive list issue this was the essential point of the French position, clearly motivated by and geared towards defending her national labour law regime (as a net labour importer). That said, it must be added that, obviously, France was not the only player acting on that kind of motivation.

In June, pursuing an indication from Commissioner Flynn during the Council lunch in March, the French Presidency put forward a compromise proposal on the threshold issue, reducing the mandatory threshold period to a number of days, the number being left open. A Coreper meeting on 16 June revealed quite differing opinions, and again no agreement was reached at the subsequent Council meeting. Besides the main issue, the matter of a threshold, differences of opinion persisted on the idea of a directive as a whole, on the scope, certain aspects of collective agreements, and more.

Spain took little interest in the directive proposal and during her Presidency in the second half of 1995 there was no progress in the matter. An informal Council session on 27–29 November, attended also by the ETUC, the UNICE and the President of the EP Committee on Social Affairs, was unable to reach any agreement, and at the Council meeting on 5 December the matter was relegated to a brief discussion at lunch.

On that occasion Italy, taking over the Presidency for the first half of 1996, and who for a long time had maintained a somewhat reserved position on the directive proposals, indicated a will to be flexible and take the file forward. The Italian Minister of Labour, Tiziano Treu, had clearly resolved to attempt to bring the matter to a successful close. He unfolded an exceptionally active diplomacy, touring the European capitals and consulting with his counterparts in the various Member States, in addition to meeting with the EP Committee on Social Affairs on 24 January. On 26 January he circulated a

memo sketching proposals, with a view to having it discussed at the informal Council meeting on 3 February. The European Parliament adopted a resolution supporting the new draft on 14 February. A consolidated proposal was tabled on 16 February (Council 1996b), and after discussions in the Council Working Party and Coreper it was put, with some amendments, to the Council for its meeting on 29 March. There were three main topics in addition to the threshold issue. First, a fairly technical point on the scope of the directive (Article 1(3)(a)), second, the notion of ‘minimum pay’, and third, the matter of an ‘open list’. On the latter, the proposal’s Article 3(6), initially introduced by Germany in November 1994 and finding its final form in March 1996, appears substantially unchanged in Article 3(10) PWD. The proposal on threshold provisions was fairly complex, with a ‘zero threshold’ as a point of departure but including also, among other things, an ‘assembly clause’ with an eight-day threshold. This compromise, ‘brilliantly suggested by the Commission’ in the words of Marco Biagi who took part in the events,<sup>72</sup> eventually made it possible to attain political agreement in the Council, leading to the adoption of the Posting of Workers Directive. The threshold provisions, one mandatory (the ‘assembly clause’), three not, were carried through to Article 3(2)–(5) PWD.

There were still contentious issues and discussion on possible adjustments but in May agreement was reached on a draft Common Position which was subsequently adopted on 3 June 1996, the United Kingdom voting against and Portugal abstaining. The Common Position was approved by the EP Committee on Social Affairs, rejecting a number of amendment proposals, on 24 July, and subsequently by the European Parliament on 17–18 September. The final adoption by the Council took place on 24 September (again with the United Kingdom voting against and Portugal abstaining). The finalization of the legislative act was protracted somewhat, due to objections from the side of the EP to not having been presented the declarations to the Council minutes. Once this was resolved the Posting of Workers Directive was duly signed on 16 December 1996, with a three-year implementation deadline.

### 6.5 *Bones of contention*

As indicated in the preceding sections, a number of issues were discussed during the deliberations on the PWD. The object in this section is to look more closely at some of those issues, in part some that figured prominently in the tug-of-war between Member States in the drafting process, in part some that have come to the forefront subsequently, with the ‘Laval Quartet’ and ensuing debate.

#### 6.5.1 Legal basis and objectives

The Commission in its first formal draft, COM(91) 230 final, put forward Article 57(2) EEC (Article 47(2) EC, Article 53(2) TFEU) on the right of *establishment* as the legal

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<sup>72</sup> ‘Fortune smiles on the Italian EU Presidency: talking half-seriously about the posted workers and parental leave directives’ (1996) 12 *The International Journal of Comparative Labour Law and Industrial Relations* 97.

basis for a new directive and underlined that the purpose was not to harmonise Member States labour law (p 16). This met with immediate objections in the Working Group. Several Member States argued that the relevant legal basis would be Article 49 EEC (Article 40 EC, Article 46 TFEU) on free movement for *workers*. The Commission budged no further than to indicate that it would consider whether Article 49 EEC might be added as an additional legal basis. This position remained essentially the same throughout 1992. The Commission backed down from its suggestion to include Article 49 in August and instead introduced Articles 59, 60 and 66 EEC (Articles 49, 50 and 55 EC; Articles 56, 57 and 62 TFEU) on free movement of services in addition to Article 57(2) EEC. In the second draft directive, COM(93) 225 final, tabled in June 1993, Articles 57(2) and 66 EEC were specified as the legal basis. A majority of Member States were still opposed to this and wanted the legal basis to be Article 49 EEC, France in particular. It took until December 1994 before the issue was effectively settled. The Commission Legal Service then had submitted an extensive opinion arguing that the main objective of a directive was the free movement of services and therefore Articles 57(2) and 66 EC were the proper legal basis.<sup>73</sup> The United Kingdom objected, but to no avail. That legal basis was accepted and eventually adopted. The UK objection, however, illustrates a point made by Kolehmainen that the Commission's choice of legal basis was strategic one in order to enable qualified majority voting in the Council.<sup>74</sup> The United Kingdom demurred in part based on her view of the content of the proposed directive but also precisely on the point of voting procedure. Although settled in the end by the adoption of the PWD, its legal basis has been an issue in debate also subsequently.<sup>75</sup>

#### 6.5.2 Personal scope and forms of posting<sup>76</sup>

The Directive appertains to the cross-border posting of *workers*. The definition of worker in Article 2(2) devolves on the *host* state; it is the definition that applies in that Member State that is decisive. This solution was proposed by Belgium in October 1994 and met with little opposition.<sup>77</sup>

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<sup>73</sup> Commission Legal Service. Avis du service juridique. Objet: Proposition modifiée de directive "Détachement de travailleurs effectué dans le cadre d'une 85 prestation de services" - Base juridique – doc 7484/93 SOC 203, 5 December 1994.

<sup>74</sup> Cf Kolehmainen (above n 23) 150.

<sup>75</sup> See, eg, U Preis/F Temming *Die Urlaubs- und Lohnausgleichskasse im Kontext des Gemeinschaftsrechts* (Peter Lang 2006), 83–89, and 115 *et seq* with extensive references. For case law examples see, eg, Case C-18/95 *Terhoeve* [1999] ECR I-345 (posted worker vs. home state, application of Article 48 EEC and Regulation 1612/68); Case C-202/97 *Fitzwilliam* [2000] ECR I-883 (Regulation 1408/71).

<sup>76</sup> See further Houwerzijl, Chapter 3, this volume.

<sup>77</sup> The United Kingdom, however, argued that the definition should be that applicable in the *home* state (sending state).

A second aspect pertains to the concept of ‘posted worker’. Pursuant to Article 2(1) PWD this means a worker who, for *a limited period*, performs work in the territory of a different Member State from the one in which he normally works. It is striking that the notion of ‘a limited period’ was not discussed to any appreciable extent. It is also not discussed in the seminal ECJ decision in *Rush*. The definitions encompassed in Article 2 were brought into the drafting process at late stage, by the German presidency in October 1994. The proposal made was for a more detailed provision and used the expression ‘a specific period’ (Council 1994b). The later reformulation appears not to have given rise to debate or dissent. The overriding concerns were with the threshold issue and the scope of a directive in terms of undertakings and activities to be covered. As regards what is a ‘limited period’ that notion is perhaps as vague and open as suggested by Rollason, that it covers ‘the duration of the contract, however long that may be’.<sup>78</sup>

The third aspect of the notion of a posted worker is the requirement in Article 1(3) PWD that ‘there is an employment relationship between the undertaking making the posting’, or ‘the temporary employment undertaking or placement agency’, as the case may be, and the worker ‘during the period of posting’. This requirement has a model in Article 14(1)(a)(i) of Regulation 1408/71,<sup>79</sup> which pertains to the choice of applicable law, as does the PWD.

The threshold issue is discussed above (in 6.2–6.4). Suffice it here to note that the move from a three-month threshold, as considered requisite by the Commission to not unduly impede free movement of services, to a ‘zero threshold’ as the main rule, was obviously fairly significant for service providers and host state undertakings and labour markets alike.

The other side of the personal scope is that set out in Article 1 PWD on undertakings and activities covered. In the Commission’s initial proposal what is now Article 1 was divided between Articles 1 and 2, the latter being the more extensive one. Essentially, just three issues gave rise to debate in the drafting process, where Germany moved to limit a directive to the construction industry (see Section 6.3 above). In May and June 1992 Greece, followed by Denmark, pressed for exempting merchant shipping (Council Working Party 1992c, 1992d). That proposal met with considerable opposition but was backed by the EC Ship-owners’ Association in a direct application to Commissioner Flynn in May 1993. The issue remained contentious, however, and it was not until the German compromise draft in November 1994 that a substantive solution was found (Council 1994d; Council Working Party 1994d). The major concern of those in favour

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<sup>78</sup> N Rollason, ‘The posting of non-EU workers to provide services in EU states’ (2000) 2 *Immigration and International Employment Law* 11, 12.

<sup>79</sup> Cf W Boecken ‘Arbeitnehmerentsendung im EG-Sozialrecht: Freizügigkeit versus Schutz von Wettbewerbsverzerrungen de lege lata und de lege ferenda’ (1999) *Zeitschrift für internationales Arbeits- und Sozialrecht* 219, 232 *et seq.*

was to exclude sailing personnel from the scope of the Directive, which was achieved and is reflected in Article 1(2) PWD, according to which the Directive ‘shall not apply to merchant navy undertakings as regards seagoing personnel’.

The body of Article 1 is in paras 1 and 3. The Directive covers undertakings in one Member State posting workers to another Member State ‘within the framework of the transnational provision of services’, in three categories of situation. First, it covers posting on the posting undertaking’s own account to perform a contract between that undertaking and a party in the host state for whom the services are intended (para 3(a)). Second, intra-group postings (para 3(b)) are encompassed. Third, the *hiring out* of workers by a temporary work undertaking or a placement agency to a user undertaking in another Member State are within the scope of the PWD (para 3(c)). These provisions correspond essentially to those proposed in the Commission’s first formal draft for a directive, in 1991. In the Explanatory observations to the proposal on hiring out of workers, the Commission emphasized that all three situations should be covered; otherwise the Directive would become prey to circumvention. In conjunction with this it should be noted that the Directive as adopted contains two provisions specific to temporary work agencies and hiring out of labour, in Article 3(1)(d) and Article 3(9) PWD. Moreover, it is worth noting that from the outset the Commission emphasized that the inclusion of temporary work agencies would not entail an obligation for Member States to legislate on hiring-out services (Council Working Party 1991). Some states were still concerned and in particular France wanted to have a guarantee that Member States could apply their existing legislation also to foreign temporary work agencies posting workers to their territory, a stand the Commission at first was in favour of but two months later expressed reservations about (Council Working Party 1992c (May), 1992e (July 1992)). This issue remained a point of debate until the final stages, but at the adoption of the PWD a Statement in the Minutes was also adopted on the issue, which essentially set out three points:<sup>80</sup>

- a Member State having no legislation on temporary agency work should not be obligated to adopt legislation;
- a Member State prohibiting hiring-out of labour (labour only contracting) should not be obligated to permit such activity; and
- this should not preclude Member States from applying their statutory law on temporary work or the hiring-out of labour to businesses established in a different state involved in the provision of a service pursuant to the [EC] Treaty.

Considering the scope of the PWD in this regard as well as the above reservations, some uncertainty exists concerning the relationship between the PWD provisions on tempo-

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<sup>80</sup> Council 1996t, Statement 231/96.

rary work and the more recent temporary work directive of 2008.<sup>81</sup> However, we will not deal with this issue here.

### 6.5.3 Forms of collective agreements

Whereas Article 3(1) PWD sets out the *nature* of the terms and conditions of employment that a host state is obliged to guarantee to workers posted to its territory, Article 3(1) in conjunction with Article 3(8) and (10) second indent stipulates the *means* by which such terms and conditions may be prescribed. While the alternatives ‘law, regulation or administrative provision’ in Article 3(1) first indent never attracted actual debate or opposition, the remaining alternatives pertaining to collective agreements<sup>82</sup> certainly did. This was clearly the most debated and most complex issue in the drafting process.

The draft put forward in COM(91) 230 final included collective agreements ‘covering the whole of the occupation or industry concerned’ and having an ‘*erga omnes*’ effect and/or being made legally binding in the occupation or industry concerned. This particular framing, building on *Rush*, seemingly was modelled on the French legal institution of ‘*extension du convention collectif*’.<sup>83</sup> It was novel to the first formal draft; it did not appear in DG V’s preliminary draft from April 1991 or in the revised preliminary draft of 8 June. It first appeared in the 17 June draft immediately preceding the formal proposal in COM(91) 230 final. A number of Member States reacted by enquiring what was the meaning of ‘*erga omnes*’, to which it was replied in February 1992 that the intention was to make clear that a collective agreement needed to be legally binding on all employers and employees in a given occupation or industry. The Commission emphasized that it could not be required of a foreign service provider to comply with a collective agreement that was not binding on all domestic undertakings concerned; that would amount to discrimination.<sup>84</sup> This corresponded to its opinion expressed in the Working Group some two weeks earlier in response to a suggestion that collective agreement coverage of at least 80 per cent should be sufficient (Council Working Party 1992b). The Commission conceded, however, that the expression ‘*erga omnes*’ might well be deleted. Denmark anyhow saw the Commission’s stance as rejecting to solve the problems of states with a high collective agreement coverage rate. By the end of May the ‘*erga omnes*’ clause was gone but the substantive issues remained.

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<sup>81</sup> 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.

<sup>82</sup> We leave out the alternative ‘arbitration awards’, as it is of no independent significance here.

<sup>83</sup> See Code de Travail Article L2261-15 *et seq*; and, eg, B Bercusson, ‘European labour law and sectoral bargaining’ (1993) 24 *Industrial Relations Journal* 257, 258.

<sup>84</sup> See Commission 1992a, Commission ‘non-paper’ 27 February 1992, responding to questions raised by Member States.

On home turf, Denmark framed a formulation, inspired by Article 2 of ILO Convention No 94, referring to collective agreements ‘that have to be observed or are generally observed by undertakings ...’ with the aim of obtaining acceptance for this alternative formulation in the drafting process (cf Council Working Party 1992f). It did not succeed, however, and in October 1992 Denmark put forward an alternative proposal, according to which a posted worker should be entitled to at least as favourable terms and conditions as those prevailing in the district where work was to be performed (see Council Working Party 1992h). This was strongly opposed by Germany, however, on grounds of regional differences that would entail less favourable treatment of German workers, and Germany insisted that only collective agreements that were declared generally binding should be accepted. At the first reading in the European Parliament in January 1993 several different proposals for a wording of Article 3(1) were put forward but were rejected by the Commission, sticking to its already formulated opinion. It may be noted, still, that the proposal tabled from Denmark set out a ‘collective agreement which is the most representative in the sector in the area where work is performed’.<sup>85</sup> This can be seen as a precursor to the later proposal that made it into the final text of the PWD.

Denmark was continuously concerned about attaining a text that would be compatible with her industrial relations and labour law system. A revised proposal was put to the EP in February containing two additions and some rephrasing. First, instead of collective agreements ‘which must be observed by all undertakings in the geographical area and in the occupation or industry concerned’, the Danish proposal read ‘which must be observed in the region or on the location concerned’. Second, modifying the January proposal it was suggested to expand the last alternative in Article 3(1) to include also non-legally binding collective agreements, with the formulation ‘is legally binding for ... the region or on the location concerned or is commonly prevailing at the place in question and does not discriminate against undertakings established abroad’.<sup>86</sup> The Commission responded to this by suggesting that foreign service providers should comply with a collective agreement if comparable Danish undertakings also had to do so.<sup>87</sup>

The Commission’s second formal draft for a directive, COM(93) 225 final, tabled on 15 June 1993 gave a new twist to the issue. The starting point remained that a collective agreement should ‘be observed by all undertakings in the geographical area and in the occupation or industry concerned’. If such an agreement was not at hand, however, a Member State ‘in the absence thereof’ might include collective agreements ‘which are generally applicable in the area or in the profession or industry in question, provided that their application ... ensures equality of treatment on matters itemized ... between

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<sup>85</sup> See PE 152.299/2/Am. 37, 12 January 1993.

<sup>86</sup> See PE 170.124 [Am. 33], 10 February 1993.

<sup>87</sup> See Denmark’s AM 93/2, 10 March 1993.

that undertaking and national-level undertakings being in a similar position'. As can be seen from this, the final formulations in Article 3(3) were slowly emerging. There were still hurdles to be passed, however. To start with, several Member States balked at the inclusion of collective agreements not covering everyone in a region or industry. While Germany under her Presidency in the second half of 1994 attempted to frame a compromise, Portugal and later also the United Kingdom were adamant on only accepting agreements legally binding on 'all'. Denmark drew support only from Italy, who emphasized that it should be acceptable to include 'collective agreements concluded between the most representative organisations in the sector' (Council Working Party 1994a). Later in September, at the Council meeting on 22 September 1994, Sweden also joined in, arguing the essential importance of finding a solution that would allow Sweden to maintain her collective bargaining and industrial relations traditions (cf Arbejdsministeriet 1994). The positions remained essentially unchanged throughout 1994 and into 1995 even though a number of more technical points were addressed, Ireland joining in with Portugal and the United Kingdom and Italy drawing criticism for tabling diverse proposals of a more extreme nature (Council Working Party 1994d). It would seem that Italy at this stage did not succeed in explaining her position sufficiently lucidly. It was only in 1996, under the Italian Presidency, that real progress was made. Soliciting an additional alternative deliberation in January and February resulted in a text, supported by the majority of Member States, officially presented to the Working Party in March (Council Working Party 1996b). It included a first indent (to then Article 3(4)) on collective agreements 'which are generally applicable to all similar undertakings ...' (the Italian alternative) and a second indent on collective agreements 'which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory' (the Danish alternative). Effectively, what was to become Article 3(8) PWD was then settled.

The rather drawn out and conflict-ridden process of settling the kinds of instrument that should be permitted as means to prescribe terms and conditions of employment applicable to foreign service providers and their posted workers primarily reflects different legal cultures and industrial relations systems. While any form of 'extension' or '*Allgemeinverbindlicherklärung*' were alien to the Scandinavian countries<sup>88</sup> and also Italy, these were familiar and important institutions in France, Germany and other countries. But not only the coverage of collective agreement-based regulation was involved, so were the fundamental tenets of collective bargaining and the conjoint law on industrial action. This would surface even more clearly later on, with the *Laval* case and its progeny.

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<sup>88</sup> With the exception – at that time – of Norway, for which the same essential features, however, applied prior to the act of 1993 on declaring collective agreements generally applicable (see in Section 3 above).

## 6.5.4 Favourability – and a Minimum Directive?

Following its adoption the opinion was widespread that the PWD was a ‘minimum directive’, meaning that a host state was free to impose other terms and conditions than those enumerated in Article 3(1) PWD and to set higher standards than the minima indicated therein. Those views were seemingly based, for the most part, on the first subparagraph of Article 3(7) PWD, which reads

‘Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.’

A passage in the Explanatory memorandum to COM(91) 230 final might lend itself to such a reading. It may seem contradicted by the preceding informal drafts, however, as well as by later ones. In the draft of 8 June 1991 the text referred explicitly to more favourable conditions according to the law applicable to the employment relationship; that is, as a rule, the worker’s *home* state law, and not that of the host state (see Commission 1991b). While the text was not included in the first formal draft the substance remained uncontested and, moreover, was emphasized by Member States in the ensuing process (see Council Working Party 1992b, 11 February 1992). It was equally emphasized by the European Parliament (see EP Com 1 (April), EP Com 2 (September 1992)). Likewise, the explicit text appeared in the revised formal draft of June 1993, COM(93) 225 final, in Article 3(3) and the twentieth recital of the Preamble. The reference to ‘the law applicable’ was removed from the draft discussed by the Coreper in November 1994.

The focus of discussion concerning this provision was primarily the criteria for comparing whether terms and conditions in the home country were more favourable than those prevailing under the directive in the host country. This we shall leave aside here, however. The disappearance of the words ‘the law applicable’ paved the way for another dimension of what was to become Article 3(7) PWD, one on which the construction of Article 3(7) is a fundamentally crucial point.

The issue is whether host states may impose standards that are *more favourable* to posted workers than the mandatory minimum standards otherwise applicable. Laying down a form of ‘principle of favourability’, Article 3(7) states that the preceding paragraphs of Article 3 ‘shall not prevent application of terms and conditions of employment which are more favourable to workers’. Many have held this to imply that the PWD is a ‘minimum directive’, meaning that host states have a freedom to impose higher standards than the domestically applicable minima.<sup>89</sup> It is emblematic of this, and

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<sup>89</sup> See, for example, Biagi (above n 71), M Biagi, ‘The “posted workers” EU directive: from social dumping to social protectionism’ in *Labour Law and Industrial Relations in the European Union* (R Blanpain, ed), *Bulletin of Comparative Labour Relations* 32 (Kluwer 1997) 173; JE Dølvik and J Visser, ‘Free Movement, Equal Treatment and Worker Rights: Can the EU solve its trilemma of fundamental principles?’ (2009) 40 *Industrial Relations Journal* 491.

of differing views within the Court of Justice, that the Advocates General in both *Laval* and *Rüffert* argued that the PWD should be interpreted in such a way that it did not prevent the imposition of improved protection in the host state.<sup>90</sup> This view, and the very notion of the PWD as a ‘minimum directive’, was widely held to have been thwarted by the CJEU in *Laval*.

There is more to the issue than this, however. A ‘middle ground’ is discernible. It is obviously open to speculation why the wording of the provision was amended the way it was in late 1994.. It is a fair assumption, however, that deleting the reference to home state law (‘the law applicable’) was intended to accommodate the position the CJEU later adopted explicitly in *Finalarte*.<sup>91</sup> In *Finalarte* the Court held that it is for each Member State to determine more favourable standards than statutory minima ‘which is necessary in the public interest’.<sup>92</sup> Hence the PWD is not a “maximum directive” in a strict sense. It should be construed so as to allow more favourable standards than otherwise applicable statutory minima within the scope of Article 3(1) and, as the case may be Article 3(10) of the Directive, if such standards are deemed ‘necessary in the public interest’ by the host state, are proportional and apply on a non-discriminatory basis. In this sense the PWD is a “minimum directive”.

The decision in *Finalarte* is based on Articles 59 and 60 EEC (now Articles 56 and 57 TFEU). Several prior and subsequent decisions rest in substance on the same ground.<sup>93</sup> As emphasized by the Court in *Wolff & Müller*<sup>94</sup> and again in *Laval* (para 61) the PWD must be ‘interpreted in the light of Article [56 TFEU]’. Hence the *Finalarte* position remains sound. Moreover it can be seen to be reinforced by the Court’s underlining that the PWD does ‘not harmonise the material content of those mandatory rules for minimum protection’ (eg *Laval* para 60).

It may be added, likewise in retrospect, that the EFTA Surveillance Authority (ESA) and the EFTA Court have taken the same stance in cases concerning Norway. First by ESA in 2009 when considering, inter alia, Regulations issued in pursuance of the 1993 “extensions act” (cf in Section 5 above),<sup>95</sup> then by the

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<sup>90</sup> See *Laval*, Opinion of Advocate General G Mengozzi, paras 197–199, and *Rüffert*, Opinion of Advocate General Bot, paras 81–84.

<sup>91</sup> Joined cases C-49/98 a.o. *Finalarte* [2001] ECR I-7831; facts preceding the entry into force of the PWD.

<sup>92</sup> Cf para 58.

<sup>93</sup> eg Joined cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453; Case C-165/98 *Mazzoleni*, [2001] ECR I-2189; and later Case 164/99 *Portugaia* [2002] ECR I-787; Case C-341/02 *Commission v Germany (minimum wage)* [2005] ECR I-2733.

<sup>94</sup> Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, cf para 45.

<sup>95</sup> EFTA Surveillance Authority decision of 15 July 2009 (Case 63724, Dec. No. 320/09/COL); cf S Evju, ‘Almengjøring på norsk’ (2009) 4 *Arbeidsrett og arbeidsliv*, 1, 30–31; S Evju, ‘Safeguarding National Interests : Norwegian Responses to Free Movement of Services, Posting of Workers and the Services Directive’ in Evju (ed) (above n 52) 225, 244–249.

EFTA Court in the *STX* case, 2012, Case E-2/11 *STX Norway Offshore AS and Others and The Norwegian State, represented by the Tariff Board* [2012] EFTA Ct Rep Book 3, 4.<sup>96</sup>

The other side of the coin was the provision that in the end became Article 3(10) first indent, whereby a Member State may stipulate terms and conditions of employment to apply to foreign service providers and their posted workers ‘on matters *other* than those referred to in the first subparagraph of paragraph 1 in the case of *public policy* provisions’ (emphasis added). The overarching issue was whether the list of terms and conditions set out in what was to become Article 3(1) was exhaustive. This was continually a bone of contention, perhaps the most contentious one as otherwise regards Article 3(1) and 3(7) PWD. The first textual proposal was put forward by Germany in November 1994, but without the ‘public policy’ clause. It was the Commission that then insisted that the provision must be limited to terms and conditions that ‘have the character of “*ordre public*”’. If not, free movement of services would be impeded. As noted already (in 6.4 above) that was also a contentious issue, and reminiscent in a way of the move from the 1972 to the 1976 draft that we have briefly noted in Section 3, above.

In the subsequent deliberations a narrow majority of Member States supported an amended proposal by Germany, in December 1994, opening up for host country regulation as far as mandatory provisions under Article 7 of the Rome Convention were concerned (see Council 1994h). Under the French Presidency in the first half of 1995 the positions of Member States essentially remained unchanged. Portugal, however, insisted that only ‘public order provisions’ should be encompassed (Council Working Party 1995a). The wording on ‘public policy provisions’ appeared first in the minutes of the Labour and Social Affairs Council of 27 March (Council 1995f). It then remained unchanged throughout the subsequent process, in the end opposed only by Ireland, Portugal and the United Kingdom.

It is obvious that underlying this degree of consensus differing conceptions of the notion of ‘public policy’ and the ensuing scope for host state regulation prevailed. The general impression, however, is that the notion was considered to defer to the concept of ‘public policy’ in the law of the individual Member States, thus granting them a margin to stipulate on further topics than those covered by the (non-exhaustive) list of terms and conditions set out in Article 3(1) PWD. It is perhaps symptomatic that Marco Biagi, closely involved on the Italian side in the efforts to hammer out a final solution, conceived of Article 3(10) in this light. Shortly after the adoption in substance of the Directive in the spring of 1996 he commented that

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<sup>96</sup> For some comments on the case and the subsequent Norwegian Supreme Court decision *see* Evju, ‘Safeguarding National Interests ...’ (above n 95), 249–250; S Evju, ‘Supreme Court Rt. 2013, p. 258’ (2014) 33 *International Labour Law Reports* (forthcoming); Barnard, Chapter 10, this volume.

‘More importantly, the directive will not preclude the application by Member States to national undertakings and undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those already listed, in the case of ‘public policy provisions’. In other words, it is based on the principle of a non-exhaustive list. Every Member State has the discretion to extend (unlimitedly?) the concept of ‘public policy provisions’.<sup>97</sup>

This view can be seen to find some support in the Council’s Statement to the Minutes adopted alongside the PWD, although the wording is non-committal. The Statement pertaining to Article 3(10) PWD reads

The expression ‘public policy provisions’ shall be understood to cover the mandatory rules that cannot be derogated from and by virtue of their nature and objective meet some invariable requirements of public interest. In particular, this may be a prohibition on forced labour or the participation of public bodies in the supervision of compliance with conditions of work.<sup>98</sup>

The text in context can readily be understood to pertain to the notion of ‘public policy provisions’ in Member States. On the other hand, it suggests a restrictive scope for provisions of this kind and less far-reaching autonomy for Member States, as suggested by Biagi. In any case, it is safe to say that a notion of the PWD as a ‘minimum directive’ is rooted also here, in Article 3(10) and its drafting history, and not merely in Article 3(7) PWD, at the outset at least. Later developments have disallowed the interpretation advanced by Marco Biagi and others, however. The ECJ did not pronounce on this issue in *Laval* but did so forcefully six months later in Case C-319/06 *Commission v Luxembourg* (2008).

## 6.6 Summary observations

### 6.6.1 On the instrument

Looking back, it is evident that in terms of the choice of law applicable to employment contracts the Posting of Workers Directive imposes a regime different from that of the Rome Convention, and now the Rome I Regulation. Right from the start, with the 1972 and 1976 draft regulations, the focus was on securing the application of certain standards existing in host-state law. The Posting of Workers Directive is based on the same template. The prescription in Article 3(1) PWD, listing the host state rules that shall apply ‘whatever the law applicable to the employment relationship’ entail a principle of *territorial application* in part. The scope for party autonomy under Article 3 cf Article 6(1) of the Rome Convention (Article 8(1) Rome I) is correspondingly precluded. Moreover, by Article 6(2) of the Convention (Article 8(2) Rome I), in an ideal-typical case of posting the worker most likely would ‘habitually’ carry out his or her work in

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<sup>97</sup> Biagi (above n 71) 104.

<sup>98</sup> Council 1996t, Statement 232/96, translated from the Danish by Stein Evju.

the home state or, alternatively, the employer would be based in the home state.<sup>99</sup> The Directive can be said to ‘compensate’ in favour of the worker as the weaker party by encompassing also a principle of favourability. As we have seen, Article 3(7) PWD entails that host state rules are not applied separately if that would be to the disadvantage of the worker. This provision still implies that rules of the law otherwise governing the employment relationship apply if they are more favourable to the worker.<sup>100</sup> In so doing, the PWD strikes a form of balance between a host state’s interest in having national terms and conditions of employment applied to all employment relationships involved in performing work on its territory, and a Community – now EU – interest in harmonising basic standards with a view to reducing obstacles to the free movement of services, as well as the safeguarding of workers’ interests. The Directive provides protection for posted workers and respects national labour law regimes – up to a point – without imposing substantive harmonisation or a general principle of equal treatment.

#### 6.6.2 On the actors

Many issues and many actors were involved in the adoption of the PWD. The EFBWW played an active role leading up to first phase and remained active throughout, joined by its employers’ counterpart, FIEC, a little into the process. Other social partners at national or European level also made their voices heard at various stages and with varied intensity. Roughly speaking, with the exception of the building industry the trade union side favoured a directive, whereas employers’ organizations were reserved or opposed to the idea.

Member States likewise took different views and exhibited varying degrees of intensity during the adoption process. Some remained steadfast on positions taken early on, while others were more inclined to adjust their initial position with a view to finding unifying compromises. Again speaking roughly, the main dividing line was between prospective host states and sending states (or labour importers and labour exporters). But that distinction was not particularly sharp, some States taking a middle position and views also shifted with the different issues. A considerable number of issues, large and small, were involved and positions varied not merely across Member States but also over time as regards individual Member States. Largely, the lines of conflict were not one-dimensional.

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<sup>99</sup> This would be different in a typical case of a worker’s individual mobility – not posting. Then the state to which he or she moves would be where work is ‘habitually’ carried out and, also, where the employer would be most likely to be situated.

<sup>100</sup> Cf Kolehmainen (above n 23) 198.

## 7 PWD implementation in the states under study

As we have seen (in section 5 above) the countries in our study reacted differently to the *Rush* decision of 1990 and the prospect of a directive on posting of workers being adopted. There is seemingly no simple correlation with industrial relations systems to explain this. In Germany, the state of private international law was a key factor behind the adoption of a special law on general applicability of collective agreements, the *Arbeitnehmer-Entsendegesetz* of 1996. In Finland and Norway trade union density and collective agreement coverage can be identified as key reasons for the adoption of legislative amendments to the existing general applicability system in Finland in 1995 and the novel act on extension of collective agreements in Norway in 1993. The Netherlands, on the other hand, already had a comprehensive system of universally applicable (generally binding) collective agreements but no need was felt to require that all or a part of its employment regulations and (extended) collective agreements would be applicable to posted workers on its territory. Thus what remained once the PWD was finally adopted, in the Netherlands as well as in Germany, Finland and Norway, was merely to adjust, for the most part in technical terms, to the provisions of the Directive and, in particular, Article 3(1), which in all countries was done through legislative amendments in 1999 and 2000.

The situation was different as regards Denmark and Sweden. No measures had been taken in anticipation of the directive. Sweden was well-aware of potential effects of competition from cheaper foreign labour. This was due to the *Britannia* case (1989),<sup>101</sup> which led to the adoption on 1 July 1991 of the *Lex Britannia* statutory amendments, later challenged in *Laval*. Unions wished to ensure that Swedish collective agreements could cover foreign workers. Hence the *Lex Britannia* law permitted industrial action against foreign employers even if already bound by a collective agreement, where a Swedish employer would be protected if the purpose was to displace an existing agreement. The aim was to prevent ‘social dumping’ (or significant undercutting of labour standards established by the system of Swedish collective agreements). On the day that *Lex Britannia* was adopted, the Swedish Prime Minister made his application for EEC membership and in May 1992 Sweden signed the EEA Agreement.

There were still concerns that EU membership would affect the Swedish collective bargaining system. Denmark shared similar concerns in relation to the Maastricht Treaty on European Union and its Social Protocol (which was to make greater provision for social policy and labour market regulation than previously). In response to this, with a view to securing the Danish trade unions’ support in the second referendum on the Maastricht Treaty, the then Commissioner for social policy, Padraig 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

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<sup>101</sup> AD (the Labour Court Law Reports) 1989 no 120.

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, where it would add what is today the first indent in Article 3(8)<sup>102</sup> and gave his assurance that the Directive would have no impact whatsoever on the Member States' legislation on industrial action or social partners' practice in this respect. The only decisive circumstance was that foreign employers are treated equal with national employers who are in a similar position.<sup>103</sup>

As regards Denmark and Sweden, there was explicit reliance on Flynn's statements that their respective collective bargaining systems and law on industrial action would not be affected by accession to the Maastricht Treaty on European Union. Both countries continued to rely on this and their wish to maintain the well embedded collective labour law systems when later faced with implementation. Neither country has mechanisms to set minimum wages or means of granting collective agreement regulation general applicability. Instead, they relied on the existing high union density rates and the strength of trade unions to obtain collective agreements also with foreign employers posting workers to their countries. Legislation attending to the minimum requirements of the PWD was adopted in both countries in 1999, shortly prior to the implementation deadline. The decisive factor behind this 'minimum approach' in both countries was their strong commitment to and reliance on their industrial relations and collective bargaining systems.

The United Kingdom also opted for a minimal approach, albeit on different grounds, collective agreements in the continental sense playing no role. No specific legislation was introduced that sought to give particular regulatory effect to the PWD but this was done, by amendments in 1999 through the Employment Relations Act and to the Trade Union and Labour Relations (Consolidation) Act 1992, by simply extending the application of UK legislation, that is, by removing jurisdiction clauses. It was understood that the United Kingdom then 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. Completing the loop, as in Germany private international law conceptions played a major role.

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<sup>102</sup> A proposal along such lines appeared in the Commission's second draft directive, COM(93) 225 final, but was displaced by later proposals by Denmark and Italy.

<sup>103</sup> Letter of 11 May 1993 from Pádraig Flynn to Bent Nielsen, President of the Danish LO (Trade Union Confederation) (Commission 1993b).

## 8. The Services Directive

### 8.1 Introduction

The Services Directive – Directive 2006/123/EC – went through a number of incarnations before its adoption in 2006. In the process, it stirred up considerable concern among trade unions in particular with regard to its possible impact on national industrial relations regimes and its relations to the Posting of Workers Directive. In this part, we examine the institutional dialogue which resulted in significant modifications to its content and therefore implications for national labour laws and transnational labour. In so doing, we link EU developments concerning services to political divisions within and between Member States, which had their effect on the dynamics of deliberations among EU institutions.

For older Member States (the EU15), the achievement of popular support in referenda for the Lisbon Treaty reforms was likely to be conditional on restricting the scope of the Services Directive, protecting established labour standards and their usual mode of regulation.<sup>104</sup> However, their position was complicated by the views of employers' associations within their countries who saw the clear advantages of establishing subsidiaries in newer Member States so as to take commercial advantage of the benefits of free movement. Newer Member States were eager to benefit from their new status within the EU and therefore favoured the removal of extensive obstacles to free movement of services, which would aid entrepreneurs established within their jurisdiction (whether as parent companies or subsidiaries) so that they could compete effectively for service contracts in other States.<sup>105</sup> Newer Member States clearly preferred the 'country of origin' principle, which would allow the provision of services to be regulated by the law of the country of origin of the service provider, but were ultimately prepared to compromise on its application, so that the Services Directive could still be adopted.

Trade unions, in the form of the European Trade Union Confederation (ETUC), campaigned actively for the abandonment of a 'country of origin' principle contemplated in the first draft of the Directive, but appeased their membership base (in both old and new Member States) by not opposing the adoption of a Directive facilitating free movement of services *per se*. Similarly, the Swedish Trade Union Confederation (LO) favoured the free movement of services, but did express fears 'that the Services Directive would transform the Posting Directive from a "floor" to a "ceiling";'<sup>106</sup> a result arguably

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<sup>104</sup> C Barnard, 'Unravelling the Services Directive (2008) 45 *Common Market Law Review* 323, 329; T Novitz, 'Labour Rights as Human Rights: Implications for Employers' Freedom of Movement in an Enlarged European Union' in 9 *The Cambridge Yearbook of European Legal Studies* 2006–2007 (C Barnard, ed) 357, 358; M Schlachter and P Fischinger 'From Bolkestein to the Services Directive – and further' in Evju (ed) (above n 53) 383.

<sup>105</sup> JE Dølvik and AM Ødegård, 'The Struggle over the Services Directive: The Role of the European Parliament and the ETUC' in Evju (ed) (above n 53), 359.

<sup>106</sup> E Sjödin, Notes on the Implementation of the Services Directive in Sweden. FORMULA Paper (Uppsala, September 2011) at 2.

achieved in any case, albeit in a restricted sense, through the *Laval* litigation, which we discuss subsequently.<sup>107</sup>

The compromise eventually agreed by Council, Commission and European Parliament clearly sought to resolve tensions arising between social actors in old and new Member States in the context of enlargement.<sup>108</sup> The end result, as we shall see, leaves the issue of labour relations to the courts, so that they will decide ultimately whether collective bargaining and industrial action (or indeed the imposition of a variety of labour standards) are in conformity with EU law. These political developments were, therefore, very much the precursor to the *Laval* litigation.

## 8.2 The First ‘Bolkestein’ Draft Services Directive

In 2002, the Commission had identified extensive impediments to a free market in services.<sup>109</sup> In 2003, the Commission stated its intention to propose a Directive on Services, which was very much welcomed by the European Parliament.<sup>110</sup> It was little surprise, then, when in 2004, Commissioner Bolkestein stated his ambition to ‘remove obstacles to economic activity’, ‘solve cross-border problems’ and to ‘utilise economies of scale’.<sup>111</sup> The Commission Proposal for a Directive emerging in 2004 therefore aimed to reduce restrictions to freedom of establishment under what was then Article 43 EC (now Article 49 TFEU) and to promote the exercise of freedom to provide services under what was then Article 49 EC (now Article 56 TFEU). Given the new focus of European economies on services, rather than industry or agriculture, further integration in this field has been described as ‘simply indispensable’.<sup>112</sup> There is no doubt that there were significant and extensive calls for reform in the field of law related to services; the fierce debate surrounding the Services Directive concerned the manner in which ‘red tape’ was to be removed.<sup>113</sup>

The Commission initially envisaged that this would be achieved by the application of a ‘country of origin’ principle, such that service providers would be subject only to the laws applying in the country where they were originally based, as opposed to the host

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<sup>107</sup> See section 9 below. But see also in section 6.5.4 above

<sup>108</sup> See [http://ec.europa.eu/enlargement/enlargement\\_process/past\\_enlargements/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/past_enlargements/index_en.htm).

<sup>109</sup> COM(2002) 441, 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>110</sup> European Parliament Resolution, 13.2.03. Reported in JE Dølvik and AM Ødegård, ‘The struggle over the services directive: the role of the European Parliament and the ETUC’ (2012) 53 *Labor History* 69.

<sup>111</sup> See [http://ec.europa.eu/internal\\_market/finances/docs/actionplan/stocktaking/conference-summary\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/actionplan/stocktaking/conference-summary_en.pdf).

<sup>112</sup> G Majone, ‘Legitimacy and Effectiveness: A Response to Professor Michael Dougan’s Review Article on Dilemmas of European Integration’ (2007) 32 *European Law Review* 70, 73.

<sup>113</sup> Barnard (above n 104) 357.

State in which they were currently operating.<sup>114</sup> As Schlachter and Fischinger have observed, '[t]he original version of the ... Bolkestein draft ... could have heavily influenced national labour law by a strict realisation of the country of origin principle'.<sup>115</sup> This was welcomed by governments of many new Member States, such as Poland, which saw this legal reform as 'an opportunity [for] market liberalization in the European Union which would contribute to ... growth and development'.<sup>116</sup> In this, they were joined by employers' and entrepreneurs' associations (BCC, Lewiatan). Indeed, often employers' organisations in the older Member States saw the advantages for them in operating in another EU Member State and simply following their home country's legislation.<sup>117</sup> Presumably, this appealed because they could, with ease, establish a subsidiary in another new EU Member State, which would then be able to operate under the laws of that country, undercutting established labour law protections.

However, trade unions were not necessarily so sympathetic. Major unions in Poland questioned the country of origin principle, which they saw as a potential threat, namely that employers could reduce costs and labour standards at the expense of workers and consumers.<sup>118</sup> Similarly, Danish trade unions objected strongly. The Chairman of HK/Private commented: 'It seems completely grotesque that work performed at an IT company in Copenhagen should be carried out following, for example, Indian or Greek rules. We cannot have the lowest standard applied to the labour market in Denmark or the EU. Therefore, a company must meet certain minimum requirements in order to provide services in another country ...'<sup>119</sup>

Indeed, the European Trade Union Confederation (ETUC) expressed the anxiety of unions from old and new Member States that the proposed Services Directive (as then drafted) 'would encourage organisations to relocate to Member States with lower standards, and could spur a downward spiral in working conditions', referring to the effects of enlargement.<sup>120</sup> The ETUC also stated its concern that commercial services and services of more general economic interest, such as health care and social services, were to

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<sup>114</sup> See COM(2004) 2 final, Proposal for a Directive of the European Parliament and of the Council on services in the internal market, Article 16.

<sup>115</sup> Schlachter and Fischinger (above n 101) 394.

<sup>116</sup> AM Świątkowski, Addendum to FORMULA Working Paper No. 18 (2010), para 1.

<sup>117</sup> M Gräs Lind, The Implementation of the Services Directive in Denmark. FORMULA memorandum (2011), 2.

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

<sup>120</sup> ETUC comment on 'Draft Directive on Services in the Internal Market' available at <http://www.etuc.org/a/499>. See also Schlachter and Fischinger (above n 52) 391, who also observe that Member States would thereby be placed under commercial pressures deliberately to reduce the labour standards and national competition law regulations otherwise applicable. For the inconsistency of such an outcome with the Lisbon Treaty, see *ibid.* at 393.

be regulated under the same directive. While the ETUC was prepared to accept the need for the Services Directive, it became fiercely opposed to this *modus operandi*.

The initial Bolkestein draft did state that the Posting of Workers Directive would be exempt from the country of origin principle under the Services Directive. Nevertheless, fears were expressed that the proposed directive would indirectly affect posting, insofar as it ‘would have virtually destroyed the host country’s scope effectively to monitor compliance with the stipulated conditions for posted workers ([by providing a] ban on demanding notification, registration, representation and keeping of employment documentation by posting firms)’.<sup>121</sup> This was because the original draft would have placed responsibility for compliance with statutory conditions of work within the host state with the state of origin, which was unlikely to be effective in terms of the capacity of posted workers to bring complaints to host state authorities and legal tribunals.<sup>122</sup>

There were other potential reasons to oppose the Bolkestein draft as originally formulated. First, this approach diminished contractual freedom because, de jure, the law governing the contract would become, by default, that which the service provider is bound to prefer, namely where its head office is situated. Second, there was the potential for legal chaos, because each service provider in the host state could be bound by different laws, depending on country of origin. Third, there was potential inconsistency with EC Regulation 44/2001 in respect of the local competency of law courts. Finally, the Bolkestein draft appeared to be costly, insofar as it would increase the frequency of foreign legal proceedings.<sup>123</sup>

The view expressed by Giandomenico Majone was that:

‘... the original draft of the Services Directive, including the country-of-origin principle, probably would have been approved in the old EU-15, where wages and social entitlements do not differ significantly. However, the enlarged union is so heterogeneous that income inequality ... is now even larger than in the EU than in the arch-capitalist United States’.<sup>124</sup>

In other words, the Services Directive would have been a viable proposition prior to the fifth enlargement, but was rendered unworkable by stark differentials in the cost of labour in different Member States. Donaghey and Teague regarded these developments in a rather different light, as they doubted that such differences in income would have led to mass labour migration. Instead, they considered that the effect would not have

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<sup>121</sup> W Kowalsky, ‘The Services Directive: The Legislative Process Clears the First Hurdle’ (2006) 12 *Transfer* 231, 238. See for useful elaboration on the problems, J Cremers, ‘Free movement of services and equal treatment of workers: the case of construction’ (2006) 12 *Transfer* 167, 180.

<sup>122</sup> Schlachter and Fischinger (above n 104) 391–394.

<sup>123</sup> *ibid.*, 391.

<sup>124</sup> Majone (above n 112) 74.

been so much a downward spiral in labour standards due to export of services, but the xenophobic preoccupation with this possibility:

‘... to have installed a completely liberalised regime for the service sector in the EU at the same time as labour migration from the new to the old members was increasing could have well inflamed the fermenting nationalist sentiments in the Member States. It would have been the wrong policy mix for the EU as it would not have created neoliberal Europe, but xenophobic Europe’.<sup>125</sup>

As it was, trade unions across Europe responded with intensive lobbying and opposition. The first protest took place in Brussels on 5 June 2004.<sup>126</sup> Investigation into the drafting process has indicated that this began to have political repercussions within the European Parliament, for example, in terms of Belgian and Swedish representation.<sup>127</sup> By November 2004, it emerged that, internally, within the European Parliament, the Internal Market Committee and the Employment Committee took sharply opposing views regarding the adequacy of the Bolkestein Directive.<sup>128</sup> It is notable that, at this time, Fritz Bolkestein stood down as Commissioner, to be replaced by Charlie McCreevy who was less committed to the original draft. This change of personnel left space for reconsidering the draft of the Services Directive.<sup>129</sup> Moreover, the protests led by the ETUC continued to add pressure.<sup>130</sup> In March 2005, the ETUC reported that over 75,000 people had attended demonstrations against the Directive in Brussels and there were also extensive demonstrations in front of the European Parliament on 14 February 2006, just before the Parliament was due to vote on its first reading under the co-decision procedure on 16 February.

### 8.3 *The compromise reached on the Services Directive*

It was perhaps no surprise then that in those circumstances the country of origin principle was abandoned in the amendments made by the European Parliament to the original Bolkestein Directive. The Parliament also removed sensitive sectors such as temporary work agencies and private security services, as well as services of general interest and general economic interest from the scope of the Directive.<sup>131</sup>

One development, which may have indirect relevance for posted workers, is the provision made under Article 7 of the final Services Directive for a ‘Point of Single Contact’ (PSC) through which all service providers are to apply for information and satisfy any

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<sup>125</sup> J Donaghey and P Teague, ‘The Free Movement of Workers and Social Europe: Maintaining the European Ideal’ (2006) 37 *Industrial Relations Journal* 652, 661–662.

<sup>126</sup> Dølvik and Ødegård (above n 105).

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> For a useful summary, see Kowalsky (above n 121) 243.

regulatory formalities which are reasonably imposed by the host State, whether at central, regional or local level.<sup>132</sup> This is to the advantage of service providers insofar as the PSC will expedite and rationalize previously slow and complex procedures. However, it is also potentially helpful to local or national administrations, labour inspection bodies and trade unions as a means by which information on service providers (and posted work) is registered and collated. ‘Liaison points’ established under Article 28 may also assist labour inspectors and trade unions in terms of representing the concerns of ‘competent authorities’, such as professional service associations, within the host state. Mutual assistance is to be provided through communication between ‘liaison points’, which may be aided by the operation of the new ‘Internal Market Information System’.<sup>133</sup> But, these developments have to be read in light of the intentional exclusion of posted workers and labour law from the ambit of the Directive.

This is because the European Parliament followed the precedent of the Monti Regulation, seeking to exclude specifically ‘the field of labour law’ from the scope of the Directive.<sup>134</sup>

‘In particular, [the Directive] shall fully respect the right to negotiate, conclude, extend or enforce collective agreements, and the right to strike and to take industrial action according to the rules governing industrial relations in Member States ... [and]... shall not be interpreted as affecting in any way the exercise of fundamental rights as recognised in the Member States and by the Charter of the European Union, including the right to take industrial action.’<sup>135</sup>

The ETUC greeted this new text as ‘a major victory for European workers’.<sup>136</sup> Governments and employers in newer Member States were not so pleased.<sup>137</sup> This compromise by the European Parliament was accepted by McCreevy, despite objections from his DG, which then presented its own amended text of the Directive, which was subtly but nevertheless significantly different.<sup>138</sup> ‘The Directive was then sent back to the [European Parliament] for its second reading on 24 October 2006, with an unambiguous message that the compromise was “untouchable”.’<sup>139</sup>

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<sup>132</sup> Barnard (above n 104) 388 *et seq.*

<sup>133</sup> *ibid.*, 389–392.

<sup>134</sup> Texts Adopted by Parliament, 16 February 2006, Provisional Edition, P6\_TA-PROV(2006)0061, available at <http://www.europarl.eu.int>, Amendment 9, Recital 6(d) (new).

<sup>135</sup> *ibid.*, Amendments 72, 233/rev, 403, 289, 290, 292, 297 and 298, Article 1(7) and (8).

<sup>136</sup> Kowalsky (above n 121) 246. This change was also greeted with enthusiasm by Danish trade unions. See Gräs Lind (above n 117) at 3: ‘It is a victory for the Danish model’.

<sup>137</sup> Świątkowski (above n 116) para. 2.

<sup>138</sup> Dølvik and Ødegård (above n 105).

<sup>139</sup> *ibid.*

The 2006 Directive did address some ETUC and European Parliament concerns by removing (at least on the face of it) the country of origin principle and taking services of general interest from the scope of the directive. However, the human rights clause inserted by the Parliament in respect of labour law and human rights was diluted. It now read, in Article I(7):

‘This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.’

What is notable is the insertion of the reference to ‘Community law’, not found in the Monti Regulation (where what was deemed significant were fundamental rights ‘as recognised in Member States’).<sup>140</sup> This wording omits reference to the ‘right to strike’, referring instead only to ‘industrial action’, although it does suggest that this may also be a ‘right’. More curiously, Article 1(7) indicates that a right to take industrial action is only a legitimate exception to a freedom to provide services insofar as this is consistent with Community law, which opens up the possibility that industrial action which the Court would deem inconsistent with Community law will be covered by the Services Directive. This wording is similar to that of Article 28 of the 2000 EU Charter of Fundamental Rights, which, unlike the relevant provisions of the 1989 Community Charter of the Fundamental Social Rights of Workers, states that the right to strike can be circumscribed with reference to Community law.

There were attempts to amend this wording in the second reading before the Parliament, so that the provision would read: ‘This Directive does not affect the exercise of fundamental rights as recognized in the Member States and by the *Charter of Fundamental Rights*. Nor does it affect the right to negotiate, conclude and enforce collective agreements, *the right to strike and* to take industrial action in accordance with national law and practices.’<sup>141</sup> It is not clear from the records of the debates why the amendment failed, but it may have been due to the more generous wording of the Preamble to the Services Directive, which at least refers explicitly to the ‘right to strike’ in Recital 14, even though it does still contain the formula requiring ‘respect’ for ‘Community law’. Perhaps more persuasive may have been the undertaking made by Commissioner McCreevy at the European Parliament Plenary Session on 15 November 2006, who stressed that:

‘Concerning the impact of the Services Directive on labour law, the European Parliament and the Council wanted to avoid that the Services Directive affects labour law or the rights of the social partners to defend their collective interests.

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<sup>140</sup> See the ‘Monti Regulation’, Council Regulation (EC) 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L 337/8, Article 2.

<sup>141</sup> Amendment 11 by Francis Wurtz *et al*, 8 November 2006, A6-0375/11.

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. The Services Directive is neutral as to the different models in the Member States regarding the role of the social partners and the organisation of how collective interests are defined according to national law and practices. ... However, Community law and in particular the Treaty continue to apply in this field.’<sup>142</sup>

This last statement perhaps serves as a reminder that this same Commissioner indicated that he considers that the actions of Byggnads in the *Laval* case constituted a breach of free movement provisions under the EC Treaty.<sup>143</sup> Moreover, we know that it can be difficult to distinguish between provision of services as an independent contractor and as a worker. In this way, as has been observed by FORMULA researchers, ‘impacts on employment relationships still remain possible’.<sup>144</sup>

What was intended by the insertion of a requirement in the 2006 Directive to respect ‘Community law’ is difficult to ascertain. This is arguably a political message to the Court that the right to strike is not intended to be caught by the Services Directive itself, but ventures no opinion (apart from the Commissioner’s own) as to whether or to what extent industrial action may contravene economic freedoms set out in the EC Treaty. What the clause suggests, as did the wording of Article 28 of the EUCFR, is that the political institutions are willing for the scope of the right to strike to be limited by national laws and practice, but also subjected to restraint by virtue of the Court’s interpretation of the EC Treaty and legislation. It seems to be an abdication of political responsibility to the Court in difficult circumstances.

It might seem, at least, that the Services Directive as finally adopted seems to pose very little danger to the PWD as negotiated, or indeed continued national regulation of labour law.<sup>145</sup> Nevertheless, as we shall see, the CJEU has responded by taking the obligation upon itself to enforce what it sees as the true meaning of freedom of services under the Treaty, as manifested under the PWD. The result is that the Court has acted to curtail collective labour relations, industrial action and the application of labour law to posted workers.

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<sup>142</sup> Commissioner Charlie McCreevy’s Statement on the Vote in the European Parliament on the Services Directive, SPEEC/06/687, European Parliament Plenary Session, Strasbourg, 15 November 2006.

<sup>143</sup> Reported, for example, in I Ekman and D Bilefsky ‘EU Service Sector: East-West Rift’ *International Herald Tribune*, 22 November 2005.

<sup>144</sup> Schlachter and Fischinger (above n 104) 396.

<sup>145</sup> *ibid.*, 393–394.

#### 8.4 *Implementation in the Member States*

By way of contrast, national-level implementation of the Services Directive does not seem to have been taken to have any obvious detrimental effects on national labour laws or provision made for posted workers. This is because implementing legislation tends to exclude coverage of labour-related issues, and has usually been accompanied by political reassurance that national labour law and industrial relations systems would remain unaffected by the Services Directive. It is perhaps interesting that in Nordic/Scandinavian countries, this reassurance has been reinforced by participation of the social partners in the national implementation process, countering fears that there will be significant flow-on effects for labour. Elsewhere, mere political rhetoric has been deemed to be sufficient.

In relation to implementation of the Services Directive, it is evident that certain discrete consequential measures have been taken in certain States (such as Sweden and the United Kingdom) in relation to posted workers. In this respect, there would seem to be distinctions that can be drawn in terms of usage of the point of single contact (PSC) as a more effective means of securing registration of service providers and monitoring terms and conditions of posted workers.

##### 8.4.1 Nordic/Scandinavian approaches

We can get a flavour of Nordic/Scandinavian approaches by considering those of Denmark, Norway and Sweden to implementation of the Services Directive. These follow a familiar trend in terms of reassurance that the new services legislation would not have effects on the existing labour law system, arguably reinforced by involvement of national labour and employer representatives, seeking to ensure that there were no unintended effects. Furthermore, in these states, use has been made of the point of single contact to improve enforcement of labour standards for posted workers.

The first legislation implementing the Services Directive was the Act on Services in the Internal Market which was adopted in Denmark on 7 May 2009 and came into force on 28 December 2009. Alongside this legislation, ‘the Danish implementation model includes that each national authority is responsible for implementing parts of the directive through the alignment of sectoral legislation both at the legislative and the administrative level’.<sup>146</sup> There has therefore also been implementing action by various ministries, such as the Ministry of Justice and the Ministry of the Environment, including adjustment or composition of executive orders. This was done with the consultation and input of a wide range of organizations (217 in all), including key social partners. The central Act on Services does make clear that it does not relate to labour law (Article 1, sub 2 no 9). The EU Commission has noted that, following implementation, various administrative obstructions to free movement of services had been addressed.<sup>147</sup> The one significant development, comparable to that of Swedish implementation, is an Executive

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<sup>146</sup> Gräs Lind (above n 117) at 1.

<sup>147</sup> *ibid.*, at 5.

Order on an electronic point of contact (Single Point of Contact Executive Order) which enables service providers to be held accountable in the host Member State.<sup>148</sup> Rather than obstructing operation of posted worker controls, it is arguable that, in this way, implementation of the Services Directive has been used to bolster labour law protections (such as they are permitted under EU law) for posted workers.

When the first Bolkestein draft of the Services Directive appeared, the Governing Body of the Norwegian LO required guarantees from the Norwegian Government that national labour market institutions and terms and conditions would not be affected.<sup>149</sup> The Ministry of Trade and Industry responded by commissioning a series of independent studies, which did conclude that measures aimed at precluding the use of bogus self-employed workers could be seen as contravening the Services Directive. However, despite these concerns and extensive discussion between the different political factions and social partners, the Act on the implementation of the Services Directive was eventually adopted ‘without touching on labour law issues or amending labour and employment related regulation’.<sup>150</sup>

In relation to the revised Services proposal, the Swedish Ministry of Foreign Affairs issued a memo stressed that the proposal was not intended to ‘affect the Swedish labour model’.<sup>151</sup> The report of the Swedish Ministry of Foreign Affairs had stated that the Services Directive should not affect national labour law. Nevertheless, there was involvement of the social partners in the forum created for implementation of the Directive. The one significant change recommended as a result of the forum’s report was that there be a change to ‘the Branches Act’ (*filiallagen*). Previously, under Swedish law, there was a requirement that there be, in Sweden, a residing supervisor for foreign branches operating in Sweden. The removal of this supervisory role was opposed by those who observed that removal of the legal obligation to have such a supervisor ‘weakened the trade unions’ possibilities [to] negotiate with the foreign employer’.<sup>152</sup> The Government has since sought to find a specific labour law solution to the problem, which it has done through amendment to the Swedish Posting Act, such that (from 2 July 2012) service providers who post workers to Sweden will be obliged to report their activities to the Swedish Work Environment Authority (*Arbetsmiljöverket*) and to appoint ‘contact persons’ in Sweden.<sup>153</sup> Thereby some target for accountability and a repository of appropriate information will be retained.

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<sup>148</sup> *ibid.*

<sup>149</sup> Evju, ‘Safeguarding ...’ (above n 95) 254.

<sup>150</sup> *ibid.*, 255.

<sup>151</sup> Sjödin (above n 106) at 2.

<sup>152</sup> *ibid.*, 2–3.

<sup>153</sup> *ibid.*, 3.

#### 8.4.2 Labour-importing states: Germany and the Netherlands

The response of other labour importing states, Germany and the Netherlands, was different again. German trade unions were very much up in arms in protest at the initial Bolkestein draft of the Services Directive. Schlachter reports the fury of the response in Germany, as 'information spread across borders on how to achieve coverage by the media, to influence the political debate and to mobilise workers' and political representatives for a common cause'.<sup>154</sup> There was, perhaps, more social mobilization in terms of protest than was witnessed in Nordic or Scandinavian countries. However, the outcome in Germany ended up being much the same as that in Norway, or even arguably more passive. As Schlachter reports, 'the prevailing view was that the defence was a success and labour relations had been saved from the EU's influence'.<sup>155</sup> This led to the transposition of the Services Directive into national law being undertaken without the active intervention of the social partners, or even labour lawyers. There was seemingly more faith in the outcome than was the case in Denmark and Sweden.

In the Netherlands, curiously, 'the central-left politicians ... were more supportive of the draft Services Directive than central right-wing parties'. It seemed like the left wished to be fair-minded and non-xenophobic. Houwerzijl suggests that this exemplifies 'the predominantly EU-loyal free market mindset of the Dutch political and industrial establishment'.<sup>156</sup> The mood of the establishment may not, however, have accorded with that of the general populace, for despite the claims of the chairman of the Netherlands' largest employers' association, VNO-NCW, that the tone of the debate on the Services Directive was sensitive and civilized, unlike France in which it was referred to as the 'Frankenstein' Directive, eleven days later, almost 62 per cent of Dutch voters rejected adoption of Lisbon Treaty (whereas in France only 55 per cent voted against). However, in the end, because the content of the Services Directive was evidently more limited than that originally envisaged, it did not 'stir any noticeable commotion among the Dutch social partners and the major political parties'.<sup>157</sup> It seems to have become a political non-issue.

#### 8.4.3 Labour-exporting states: United Kingdom and Poland

It is now perhaps a matter of doubt whether the United Kingdom is a net labour importer or exporter of labour to other EU Member States. Recent events indicate a shift to the former, but there is still no firm statistical basis for this, which is more a matter of conjecture than certain fact.<sup>158</sup> In the United Kingdom, the House of Lords Select Committee took the view that:

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<sup>154</sup> Schlachter (above n 53).

<sup>155</sup> *ibid.*, 54.

<sup>156</sup> Houwerzijl (above n 61).

<sup>157</sup> *ibid.*

<sup>158</sup> Novitz (above n 54).

‘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 matters such as minimum wage legislation. These are matters for individual Member States and their institutions.’<sup>159</sup>

It now seems accepted in the United Kingdom 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 United Kingdom and apply for licences online’.<sup>160</sup> The Provision of Services Regulations 2009, which implements the Services Directive, contains provisions that 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)). In this sense, the measures taken in Denmark and Sweden (albeit with more input from the social partners) have some resonance in the United Kingdom.

In Poland, the Act on providing services on the territory of Republic of Poland, of 3 March 2010, does not contain regulations concerning labour law and labour law issues. These were also not of concern in the public consultation procedure.<sup>161</sup> Indeed, that legislation specifically contains a reservation that its provisions do not exclude the application of labour law and social security regulations (Article 3, para 4). Instead, posted work is governed by provisions implementing the Posted Workers Directive incorporated into the Polish Labour Code on 5 August 2006.<sup>162</sup> In formal terms, the two are kept very separate; but arguably, this is not very different from Norwegian, German and Dutch approaches.

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<sup>159</sup> House of Lords, Select Committee on European Union, Sixth Report, Chapter 7: ‘Will There be a Race to the Bottom?’, 2005, para. 202 (Select Committee’s emphasis).

<sup>160</sup> See: <http://www.bis.gov.uk/policies/europe/eu-services-directive>.

<sup>161</sup> Świątkowski (above n 116) para. 3.

<sup>162</sup> *ibid.*, para. 4.

What is unspoken in this analysis of national implementation, however, is the scope of the exemption provided for national labour law in the Services Directive. The relevant clause states 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 practices *which respect Community law*’ (our emphasis). It is this final proviso which opens the door for a potential services-based challenge to collective bargaining or industrial action considered by the CJEU to be in breach of Community law. It should raise, in the minds of national social and political actors, the conditions in which such a breach could be said to arise. It is possible that, in this respect, the ongoing interest of the social partners in countries such as Denmark and Sweden in the content of the legislation implementing the Services Directive (and its potential effects on labour laws and industrial relations systems) was very much framed by the context of the *Laval* dispute. Discussion of that case follows in Section 9.

## 9 The *Laval* quartet and responses

The Posting of Workers Directive gives rise to a great number of issues. We have touched upon some in preceding sections. Building on that we focus here on the issues that figure more prominently in the four decisions by the CJEU in the ‘*Laval Quartet*’, as these are the issues that have impacted immediately on some national legal orders and moreover fuelled a wide-ranging debate.

### 9.1 The ECJ and the ‘*Laval Quartet*’

#### 9.1.1 Forms and levels of standards to be imposed

One crucial question is what kind of standards a host state can require for employees of cross-border service providers. The starting point obviously is the ‘list’ in Article 3(1) PWD. A core question is whether the list of terms and conditions related to employment is *exhaustive*. This bifurcates into two issues of different dimensions. One is the *kinds* of provision that may be imposed, the other relates to the standards, or *levels*, of protection of permissible rules.

The prevailing opinion at the time of adoption was one of liberal construction, memorably epitomised by Marco Biagi in his account of the final stages of the adoption process, when noting that the Directive is based on the principle of a non-exhaustive list and that Member States have the ‘discretion to extend (unlimitedly?) the concept of “public policy provisions”’.<sup>163</sup> The ECJ has, however, decisively settled the issue in a different vein. The message in *Laval* is abundantly clear in the Court’s analysis of the Directive,

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<sup>163</sup> See Biagi (above n 72) 104.

as well as in its assessment of the compatibility of industrial action with Article 56 TFEU:

- (i) The list in Article 3(1) is *exhaustive*, save for the sole exception prescribed in Article 3(10) PWD. The host State is barred from going beyond the thematic scope described in Article 3(1), regardless of whether the law applicable to domestic employers and employees is more comprehensive. It is only those rules that fall within the scope of this ‘limited list of matters’ that may be imposed (also) on a transnational service provider posting workers to the host State.
- (ii) By its first indent, Article 3(10) permits Member States, ‘on a basis of equality of treatment’ to apply provisions on terms and conditions of employment on matters other than those referred to in Article 3(1) ‘in the case of *public policy provisions*’ (emphasis added).
- (iii) As a paradox, we may add, whereas the Court, building on previous case law, holds in *Laval* that trade unions are subject to obligations under the treaty rules (“direct horizontal effect”), they are not entitled to invoke or themselves attain “public policy” regulation; cf immediately below here.

As suggested already, the crucial point here is what falls within the ambit of ‘public policy’. In *Laval* the Court did not comment on the thematic scope of the concept but emphasised that public policy provisions must be emanations of government (‘national authorities’). Trade unions and employers’ associations ‘not being bodies governed by public law’ consequently cannot invoke Article 3(10) to attain public policy status for collective agreement rules or arrangements.<sup>164</sup>

Building on this in Case 319/06 *Commission v Luxembourg*, the Court went on to underline the very significant view that ‘public policy’ in the PWD is a Union law concept. Its scope cannot be determined unilaterally by a Member State; and it must be regarded as an exception clause derogating from the basic free movement principles and must therefore be ‘interpreted strictly’.<sup>165</sup> From this the Court proceeded to give Article 3(10) a fairly narrow scope in assessing a number of statutory measures in Luxembourg law, thereby also demonstrating that a Member State is not at liberty to decide what, in its labour law, is so important that everyone should abide by it.

A different matter from the thematic scope is the question of the *level* at which a standard may be fixed. Here, Article 3(1) PWD is no more than a starting point. The ‘list’ includes ‘minimum paid annual holidays’, ‘minimum rates of pay’ and ‘maximum work periods and minimum rest periods’. In *Laval* the Court, starting with Article 3(1), held that inasmuch as the Directive does not ‘harmonise the material content’ of rules on matters covered by it, the content of such rules may ‘be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law’.

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<sup>164</sup> See *Laval*, paras 60 and 83–84.

<sup>165</sup> See *Luxembourg*, paras 26–33. The ‘strict interpretation’ clause is of course familiar from Court of Justice case law in general.

Thus in principle, it is for the (host) Member State to decide on the *level* of protection. The words ‘freely defined’ cannot be taken at face value, however. Continuing, the Court underlined that the standards that may be imposed are *mandatory minimum* rules (‘mandatory rules for minimum protection’). The Court made very clear that, pursuant to Article 3(1), it is solely domestic mandatory (minimum)<sup>166</sup> standards on topics listed in items (a) to (g), and Article 3(10) as the case may be, with which a cross-border posting employer can be required to comply.<sup>167</sup>

The starting point of freedom to set levels is nonetheless important. As discussed already, in Section 6.5.4 above, Article 56 TFEU and the PWD do not preclude a state from fixing higher standards for a branch or industry than would otherwise be the national mandatory minimum standards. This is a matter of state autonomy within the general bounds of Union law. This distinction, between permitted topics under Article 3(1) and, as the case may be Article 3(10), and the level of protection afforded on those topics is of the essence.

#### 9.1.2 Means of regulation

What content is permitted is crucial, but form (that is, the means by which a regulation may be laid down) is equally essential. Article 3(1) PWD, read in conjunction with Article 3(10), second indent, and Article 3(8), permits the setting of important minimum standards by law, regulation or administrative provision, and/or by collective agreements. As regards the latter, Member States are offered two alternatives: either collective agreements that are ‘generally applicable’, or agreements that are concluded by ‘the most representative’ organisations at national level.

The first of the two became relevant in the *Laval* case. Wage fixing in Sweden is essentially a collective bargaining matter. The Swedish Act on implementation of the PWD was based on this, but did not contain any provision to that effect nor any stipulation that existing collective agreements could apply. The Court’s – however cursory – observation (offered three times over) was that Sweden ‘has not made use of the possibility provided for in the second subparagraph’ of Article 3(8). The requirement implicit in this reasoning evidently is that if a state wishes to ‘so decide’ pursuant to Article 3(8), some form of explicit mention of this must be made in the legislation implementing the PWD. This should hardly be surprising. The Court’s stance coincides with that of the Working Party of national experts on the implementation of the Directive. The underlying consideration surely is to ensure ‘transparency’, a notion that figures prominently in the *Laval* decision on other points. The approach is alien to Scandinavian legislative traditions, but the end result is clear. To leave norm-setting to collective bargaining without explicit state regulation is not acceptable. This is simply another illustration of *étatisme* taking precedence over *collective autonomy*.

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<sup>166</sup> As for the concept of “minimum”, see in Section 6.5.4 above.

<sup>167</sup> See also *Laval*, paras 60 and 73–84.

### 9.1.3 A first summing up

The conclusion presented above is but one part of the much more far-reaching impact that ensues from Treaty law on the freedom to provide services and the Posting of Workers Directive as construed by the ECJ, and in particular from the ‘*Laval Quartet*’ of decisions. In short, the PWD is seen as imposing not only minimum but also maximum requirements. It thereby restricts what may be required of a foreign service provider. Arguably, on a strict construction these restrictions pertain to the host state. In *Laval*, the Court held that the restrictions apply similarly to host state trade unions. Trade unions are not at liberty to pursue demands beyond the permitted topics and levels – and the host state is barred from allowing freedom for trade unions to act to that extent. This is a form of vertical effect of EU law on private legal subjects, and it exposes trade unions to possible liability in damages, as demonstrated by the follow-up in Sweden to the ECJ’s ruling in *Laval*.

## 9.2 *Collective bargaining and collective action*

### 9.2.1 Opposites converge

The Court’s construction of EU law in the ‘*Laval Quartet*’ impacts dramatically on collective bargaining rights. That is not unique to the Nordic or Scandinavian countries, but the effects are perhaps more immediately visible there. It is basic that an employer may be met with a demand from a trade union for a collective agreement, and that this is a matter for collective bargaining which, eventually may lead to collective action. There is no other way to conclude a collective agreement.

The state of EU law impinges upon traditional and fundamental collective bargaining autonomy, and on the very tenets of the industrial relations systems. Moreover, the narrow interpretation of permissible standards and means of regulation adopted by the Court in *Laval*, *Rüffert* and *Luxembourg* links up with the Court’s stance in *Viking* and *Laval* on possible recourse to industrial action. Concisely, a common denominator to the two decisions is that the prospect of being met with industrial action – strike action, for example, – in the host state,<sup>168</sup> as a means for a trade union to impose demands on an employer, amounts to a restriction on freedom of movement under Articles 43 and 49 EC (Articles 49 and 56 TFEU).<sup>169</sup> It can hardly be said more emphatically that the *state of domestic law as such* is a restriction in EU law. It is not a prerequisite that there be an actual threat or application of collective action. The basic principle on which the Court rests implies that even if positive regulation of such matters is the prerogative of Member States, the state of national law cannot be such as to counteract or conflict with otherwise applicable EU law.<sup>170</sup>

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<sup>168</sup> Or the *home* state or ‘state of departure’, as in *Viking*.

<sup>169</sup> See *Viking*, paras 32 *et seq.*, and *Laval*, paras 96–100, 99 and 100 in particular.

<sup>170</sup> See Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paras 39–41, and in particular *Viking*, paras 39–47, and *Laval*, paras 86–88.

### 9.2.2 The right to strike in harness

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 EU law, namely those pertaining to the freedom of movement.<sup>171</sup> Thus, having been placed squarely within the reach of EU law, the right to take industrial action is consequently subject 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 may 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.

Effectively, restrictive limits apply on both counts. The *Laval* decision invites us to perceive the notion of ‘overriding reasons’ as one referring to the mandatory minimum rules applicable in pursuance of the PWD, both as a floor and as a ceiling.<sup>172</sup> Similarly, in *Viking* the Court recognises protection of jobs and employment conditions from being adversely affected by a reflagging of the ship concerned as a form of legitimate protection of workers. But this comes with the proviso that it is no longer tenable if jobs or employment conditions are actually ‘not jeopardised or under serious threat’.<sup>173</sup> This is an important reservation and one that immediately links in with the problem of proportionality. That issue was dealt with differently in *Viking* and *Laval*, but the difference lies more in form than in substance. In *Laval*, the ECJ took a definitive stand on the industrial action that had been taken. The Court’s reasoning forcefully suggests that the host-state trade unions had no basis for making wage demands inasmuch as no relevant minimum wage regulation was applicable. What the Court said explicitly is that this applies if pay-setting is a matter for ‘negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees’, negotiations which, moreover, might be of ‘unspecified duration’. This amounted, in the Court’s view, to

‘a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for [a service provider] to determine the obligations with which it is required to comply as regards minimum pay’.<sup>174</sup>

In addition, the Court made a point of noting that the provisions included in the trade union’s demand for a collective agreement in the *Laval* case went beyond what the transnational service provider was required to observe in terms of mandatory rules for

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<sup>171</sup> Cf *Viking*, paras 43ff, and *Laval*, paras 90ff.

<sup>172</sup> See in particular *Laval*, para 108 and the reference to paras 81 and 83 therein.

<sup>173</sup> See *Viking*, para 81.

<sup>174</sup> See *Laval*, paras 69, 71, 100 and 110.

minimum protection applicable in pursuance of the PWD. It thereby linked the proportionality assessment with the limitations flowing, in the Court's view, from the Directive. Moreover, given the way the Court framed its reasons, this 'excessiveness' of bargaining demands in itself was sufficient to render collective action disproportionate.<sup>175</sup> In *Viking* there was a possibly legitimate objective, but as the situation had not yet matured the Court was confined to laying down guidelines for the referring court. It did so, emphasising that collective action must not go '*beyond what is necessary to achieve the objective pursued*' (emphasis added). This includes considering whether other, less restrictive measures might be used *and* an '*ultima ratio*' standard framed to the effect that all such other means should be exhausted before recourse is had to collective action.<sup>176</sup> Coupled with the 'serious threat' clause,<sup>177</sup> this is a requirement of vast import.

### 9.2.3 Clashing with fundamental rights

There is a paradox inherent in this case law. Whereas collective action is recognised in principle as a fundamental right, at the same time it is qualified as a 'restriction'. Thereby the issue is turned into whether the exercise of this fundamental right in EU law may actually be lawful in EU law. Put differently, the exercise of the fundamental right needs to be justified vis-à-vis the fundamental freedoms. Arguably, this is turning the issue on its head; conventionally, a legal right takes precedence over a freedom.

The more serious discord is with public international law and human rights. The way in which the Court has chosen to limit possibly legitimate objectives by its construction and use of the PWD, and with the 'serious threat' clause, the application of the proportionality test and the use of an '*ultima ratio*' standard, imposes considerably more strict limits on the right to strike than those ensuing from ILO Conventions Nos 87 and 98 and relevant case law. The inconsistency has been emphasized by many, including the ILO itself.<sup>178</sup> It was confirmed by the ILO Committee of Experts in its Report to the

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<sup>175</sup> See *Laval*, para 108 and paras 81 and 83 referred to therein.

<sup>176</sup> Cf *Viking*, para 87.

<sup>177</sup> See the text to n 173, above.

<sup>178</sup> eg, S Evju, 'Norway' in *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 (R Blanpain, AM Świątkowski, eds) (Wolters Kluwer/Kluwer Law International 2009) 123, 134–135. Furthermore, the Court's stance in *Rüffert* is not reconcilable with ILO Convention No 94. The ESA infringement case on the ground of Norway's implementation of Convention No 94, settled in the end, illustrates this point. See EFTA Surveillance Authority Decision of 19 December 2012 closing an own-initiative case against Norway concerning labour clauses in public procurement (Case No: 64849, Event No: 653338, Dec. No: 510/12/COL); S Evju, 'ESA ger sig om arbeidsklausuler vid offentlig opphandling' (2013) *EU & arbeidsrett* 1, 3; for a critical comment on the ESA's decision K Weltzien, 'Feil i faktum og feil i jus – ESA om lønns- og arbeidsvilkår' (2012) *Arbeidsrett* 174; cf Ahlberg and Bruun, Chapter 6, this volume, at n 39–43.

2010 Labour Conference, noting with reference to the United Kingdom and the BALPA case<sup>179</sup> that

‘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 [No. 87].’<sup>180</sup>

In *Viking* and *Laval* the CJEU merely took note of Conventions Nos 87 and 98 and refrained from elaborating. The same is true as regards the European Social Charter (1961),<sup>181</sup> to which, as the Court duly noted, express reference is made in Article 151 TFEU. By the stance it adopted, the Court of Justice has framed a fundamentally different conception of the right to collective action from that obtaining pursuant to Article 6(4) ESC. The ESC recognises that the right to collective action may be *restricted*, but solely on narrow grounds.<sup>182</sup> Under Article 6(4) it is deemed unacceptable, *inter alia*, to subject the exercise of this human right to a proportionality standard or otherwise construe the right as relative in domestic law.<sup>183</sup> This is now, in keeping with prior case law of the European Committee of Social Rights (ECSR), expressly stated in the ECSR’s decision in the Collective Complaint on the Swedish legislative amendments post *Laval* (“*Lex Laval*”).<sup>184</sup>

The Court’s failure to take further account of these human rights instruments is remarkable. First of all, it places EU law in conflict with public international law obligations

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<sup>179</sup> 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, London, 5 October 2009.

<sup>180</sup> Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 99th Session, 2010 (International Labour Office 2010), 208–209. The Committee of Experts stance is reiterated in its 2011 Report and 2012 General Survey, cf Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 100th Session, 2011 (International Labour Office 2011), 187; General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008. International Labour Conference, 101st Session, 2012 (ILC.101/III/1B) (International Labour Office 2012), 46–50. – See to this also Bruun and Malmberg, Chapter 6, this volume, at n 39–40.

<sup>181</sup> And equally the European Social Charter (revised) 1996. Hereafter both Charters are referred to jointly with the abbreviation ‘ESC’.

<sup>182</sup> See ESC 1961 Art 31, and Art G of the 1996 revised Charter; the exception clauses are similar to that of Art 11(2) ECHR.

<sup>183</sup> See, for example, ESC, European Committee of Social Rights, *Conclusions XVIII-1* (Council of Europe 2006), vol. 1, 74–75 (Belgium) and 306–307 (Germany).

<sup>184</sup> Complaint No 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Decision on admissibility and merits, 3 July 2013, public on 20 November 2013. Cf Barnard, Chapter 10, this volume, at n 18.

incumbent on all – or the vast majority of – Member States. Furthermore, it thereby raises the prospect of Member States being compelled to denounce fundamental human rights instruments, pursuant to Article 351 TFEU. That would be nothing less than an outrage and devastating to human rights efforts in the field of working life, if not beyond. Conventions Nos 87 and 98 belong to the list of core conventions included in the ILO Declaration on Fundamental Principles and Rights at Work (1998).<sup>185</sup> It would seriously undermine the credibility of international standards and the ILO's efforts in this field if the EU legal order were seen to condone de-recognition of these fundamental standards. Moreover, it would also be in sharp contrast to EU policy commitments and statements on international and EU law, in particular during the past 10 years and in conjunction with the Decent Work Agenda.

Moreover, in its “*Lex Laval*” decision the ECSR held that the Swedish legislation, restricting the right to take collective action in support of demands exceeding the scope of Article 3(1) PWD was in violation also of Article 19(4)(a) and (b) ESC. Posted workers, so the ECSR, are “migrant workers” within the meaning of Article 19 ESC and thus ‘have the right, for the period of their stay and work in the host State to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining’. From ‘the point of view of the system of values, principles and rights embodied in the Charter’ the Committee was explicit in holding that EU market freedoms ‘cannot be treated as having a greater a priori value than labour rights’ embodied in the ESC’, and that ‘excluding or limiting the right to collective bargaining or action with respect to foreign undertakings, for the sake of enhancing free cross border movement of services and advantages in terms of competition within a common market zone, constitutes, according to the Charter, discriminatory treatment on the ground of nationality of the workers’.<sup>186</sup>

In short, the ECSR in effect holds that the correct construction of Article 19(4)(a) and (b) ESC requires host state law to be diametrically opposite, more or less, that which is implied in Article 3(1) (and Article 3(10)) PWD.

#### 9.2.4 A second summing up: a persistent dilemma

In conclusion, on this point it can safely be said that the Court of Justice, in the name of market freedoms, has created both a serious and a highly complicated dilemma for the EU and for EU/EEA Member States. Some like the outcomes of the Court's case law, some do not. That is, no doubt, a part of the problem as it stands. Either way, the current case law entails a wide range of problems. Member States are faced with the prospect of having to enact legislative change in order to fall into line with the state of EU law as decreed by the Court of Justice. The EU itself is confronted with the dilemma of how to

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<sup>185</sup> | This Declaration has subsequently been reinforced by the ILO Declaration on Social Justice for a Fair Globalization, 2008.

<sup>186</sup> Cf Complaint No 85/2012 (above n 184), paras 134, 140–141.

reconcile the Court's doctrines with conflicting Member States' interests, and with international policy declarations and commitments.

## 10 National responses to the CJEU case law

At the outset, the implications of the Posting of Workers Directive on domestic law seemed to be manageable for most countries. But this was changed dramatically by the CJEU's interpretations of the directive limiting the Member States' discretion. Still, the immediate problems faced by national jurisdictions in consequence of the *Laval Quartet* rulings evidently differ in form and degree. Unsurprisingly, there is a strong relationship between the state of national law preceding the CJEU decisions and their immediate impact on the domestic scene.

Germany revised the Arbeitnehmer-Entsendegesetz in 2009 but the objective of the amendments was only to a very limited extent a reaction to developments at EU level. The primary cause and objective pertained to the domestic situation and the absence of a statutory minimum wage and the solution was to extend the scope of the AEntG to six new branches.<sup>187</sup>

In the Netherlands, too, the repercussions of the *Laval Quartet* decisions are largely negligible. The *Viking* and *Laval* decisions may in principle discourage trade unions from calling solidarity strikes in cross-border situations, but so far there is no evidence to underpin this observation. Similarly as with Germany, a 2006 amendment to the Extension of Collective Agreements Provisions Act aimed at closing a loophole in its exemption policy for extended CLAs was motivated predominantly by the wish to shield organised labour from *domestic* "social dumping", because no service provider from another Member State had ever used the loophole in practice. Although the Netherlands ratified ILO Convention No 94 as early as 1952, ironically, the *Rüffert* judgment did not have any impact because in practice the Convention's provisions are not applied. As for the *Commission v Luxembourg* judgment, this had no impact because the PWD was implemented as if it were a "maximum" directive right from the outset.

Essentially the same is true for Finland and Norway. The *Laval Quartet* decisions had no immediate impact on the domestic legal situation.<sup>188</sup> There was a muted discussion in Norway, however, on the reach of *Viking* and *Laval* with regard to collective bargaining and collective action in situations where employees of a foreign service pro-

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<sup>187</sup> That is, in addition to the construction sector the sectors of nursing care, private security business, coal mining operations, laundry services for property client services, waste management, apprenticeship and retraining. Further amendments have been made in 2014.

<sup>188</sup> Cf S Evju, 'Norway' in M Freedland and J Prassl (eds), (Hart Publishing 2014; forthcoming).

vider take up membership of a Norwegian trade union. This is a different type of situation from that in *Laval*, where the Swedish trade union taking primary action (in the form of a boycott) had no members in the Latvian firm. No firm conclusions have been drawn, however.

As a more indirect effect, with regard to the *Rüffert* decision, the EFTA Surveillance Agency (ESA) in 2009 opened a case against Norway's statutory rules on wage standard in public procurement, which implement ILO Convention No 94. The case was subsequently settled. See in n 178 above.

The late comer in this study, Poland, joined the EU as of 1 May 2004. With regard to implementation of the PWD Poland apparently relied essentially on existing domestic legislation, including minimum wage legislation. The general regulations pertaining to minimum wages are set by the state. Social partners are part of the decision-making process involved in establishing such levels. The statute that regulates minimum wages, passed on 10 October 2002, allows for the socio-economic Tripartite Commission, through negotiations, to establish minimum wages annually (Article 2(1)). The '*Laval Quartet*' decisions of the CJEU have had no immediate impact on Polish law. The key point in this regard is that collective action in circumstances such as those in *Viking* and *Laval* would be unlawful pursuant to the Act on collective dispute resolution of 23 May 1991, which only recognises a dispute as collective if it deals with regulating working conditions, remuneration, social benefits, or the rights and freedoms of trade union workers. Under the Act collective action is permissible if such action is aimed at protecting the interests of workers whose contracts of employment are subject to Polish labour law. Collective action is precluded, however, if aimed at an existing collective agreement, including a collective agreement concluded between a foreign trade union and a foreign employer but applicable (also) in Poland. Moreover, a duty to bargain in good faith prevails under Articles 241<sup>3</sup>§1 and 242<sup>1</sup>§3 of the Labour Code and a national trade union would not be permitted to appeal to an international trade union association, which taken together seemingly would rule out a conflict of the kind at hand in the *Viking* case. Furthermore, the *Rüffert* and *Commission v Luxembourg* decisions had no repercussions, essentially on account of the minimum wage legislation and the reach of Polish collective agreements. Collective agreements in Poland regulate the working conditions, remuneration, and rights and responsibilities of all workers in an undertaking regardless of whether they are members of a trade union; it is enough that they be employees of an employer who is party to the collective agreement (Article 239§1 Labour Code).<sup>189</sup>

Faced with the decisions in *Viking* and *Laval* – the latter in particular – Denmark recognized a need to amend its legislation on posting of workers, in that the prevailing law on collective bargaining and collective agreements could not fully be relied on. Still, Denmark has maintained a strong collective bargaining-based approach. On the basis of a tripartite committee report tabled in June 2008, a new provision was inserted into the

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<sup>189</sup> This paragraph draws on AM Świątkowski, 'Polish Response to European Developments' in Evju (ed) (above n 53) 261.

Act on Posting of Workers.<sup>190</sup> Explicit reference is made in the Act (section 6(a)) to the applicability of collective agreements concluded by the ‘most representative’ labour market organisations and having nationwide geographical scope.<sup>191</sup> A collective agreement will not, however, apply automatically to a foreign service provider. If it is sufficiently clear with regard to payable wages and the employer has been notified of the relevant provisions, a trade union is free to undertake collective action, in accordance with the rules that apply on the domestic labour market, to press for the conclusion of a collective agreement. The solution arrived at is perhaps tenuous, and certainly controversial, but has not yet been put to the test.

When implementing the PWD in 1999, Sweden also relied essentially on the embedded system of collective bargaining and collective action, including the 1989/1991 *Lex Britannia*, as a means to counteract ‘social dumping’ and to maintain Swedish wage standards. As a result of the *Laval* decision some measure of reform was urgent. Similar to Denmark, Sweden commissioned an Expert Report, which was tabled in December 2008 and submitted to public consultation.<sup>192</sup> The Report proposed inserting an explicit reference to collective agreements in the Act on Posting of Workers, coupled with provisions *restricting* the right of trade unions to have recourse to collective action, so as to comply with EU law. The proposals met immediately with considerable controversy, on several grounds, and have remained controversial. In November 2009, the Swedish government tabled a Bill largely adhering to the Report’s proposals.<sup>193</sup> It met with significant opposition in the *Riksdag* (Parliament) and was sent back and forth several times between the independent Advisory Council on Legislation (*Lagrådet*) and the *Riksdagen*’s (Parliament) Standing Committees on the Labour Market and on Constitutional Affairs, before the Labour Market Committee finally tabled a Report on 18 February 2010. The Report contained a large array of separate motions, demonstrating the many differing opinions; and when brought up for debate in the *Riksdagen*, the key points – in particular the reference clause and the provisions on restrictions of the right to strike – passed by a small majority only. The Amendment Act was finally approved on 24 March 2010, and the amendments entered into force on 15 April

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<sup>190</sup> Act No 933 of 15 December 1999 on Posting of Workers, as amended by Act No 1394 of 27 December 2008, inserting a new s 6a. Cf the committee report, *Betänkning fra udredningsarbejdet om Laval-afgørelsen*, 19 June 2008 (Copenhagen, Beskæftigelsesministeriet).

<sup>191</sup> There is a certain irony in this. The ‘most representative’ option in Art 3(8) PWD was an Italian proposal. The alternative that was proposed and insisted on by Denmark is the ‘generally applicable’ option in the first indent of Art 3(8); cf above n 92. The choice made in 2008 can be seen as a reluctant recognition of reality on the part of Danish industrial relations actors.

<sup>192</sup> SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen Betänkande av Lavalutredningen (SOU = Swedish official “white papers”).

<sup>193</sup> Regeringens proposition 2009/10:48 *Åtgärder med anledning av Lavaldomen*.

2010.<sup>194</sup> The new legislation came under scrutiny by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) later that year, in the course of the supervisory procedure based on national reports, and was followed up by submissions by Swedish social partners and the Swedish government. In late 2012 the CEACR adopted an expressly critical observation on the legislative amendments (published in March 2013).<sup>195</sup> In consequence of this and the ECSR ‘*Lex Laval*’ decision (cf in 9.2.3 above), the Swedish government in December appointed an expert commission to consider eventual legislative measures; its report is due to be tabled in December 2014.

## 11 The Temporary Agency Work Directive

Labour-only contracting falls within the ambit of the Posting of Workers Directive. In Article 1(3)(c) it states that the Directive applies to the extent that the undertakings within the framework of the transnational provision of services,

‘being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.’

The posting of temporary agency employees is at the outset subject to rules that differ from those applicable to posted workers otherwise, however. To be sure, a host state may impose the same minimum terms and conditions as apply to national employment relations, pursuant to and within the bounds of Article 3(1)(d) PWD. But Article 3(9) stipulates that Member States may provide that undertakings operating transnational temporary work services must guarantee their posted workers ‘the terms and conditions which apply to temporary workers in the Member State where the work is carried out’. This provision conveys acceptance of a *principle of equal treatment*, which, as we have seen is not quite what the PWD allows for in general. Moreover, a host state may require a cross-border temporary work undertaking to abide by ‘the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings’, which, seen in isolation, may amount to a restriction on the freedom to provide

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<sup>194</sup> Sveriges Riksdag (available at <http://www.riksdagen.se/>) Redovisning förslagspunkter 2009/10:AU5 and Kammarrens beslut Beslut i korthet Onsdag 24 mars 2010.

<sup>195</sup> Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 102nd Session, 2013 (ILO 2013), 178–179. The CEACR moreover denounced the posterior decisions by the Swedish Labour Court on the trade unions’ liability in damages for what was effectively lawful collective action at the time it was undertaken; cf *ibid.*, 179–180. See also Bruun and Malmberg, Chapter 6, this volume, at n 39–40.

services. This was, however, a conscious choice in the adoption process, in view of the considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union that were still prevailing.<sup>196</sup>

In 2008, the EU adopted a separate directive on labour-only contracting, the Temporary Agency Work Directive (TAWD).<sup>197</sup> The TAWD applies strictly to national cases but also to cross-border temporary work relations. In the latter capacity it intersects with the Posting of Workers Directive. This was clear from the start of the legislative process, the intention being that a new directive would not alter the scope of the PWD, or the possibilities for exemptions from it. A directive on temporary agency work should rather be seen as an ‘extension of arrangements already in force for transnational posting of temporary workers’, meaning that its special provisions would take precedence over the limiting provisions of the PWD.<sup>198</sup>

The Temporary Agency Work Directive has a mixed background. On one hand, it embodies social policy aims by establishing protection and rights for temporary workers; on the other hand, it pursues employment policy aims, also as encompassed in the Lisbon Strategy, in the form of provisions expressly oriented towards improving the functioning of the labour market.<sup>199</sup> The TAWD explicitly rests on a *principle of equal treatment*,<sup>200</sup> the headline of Article 5, which states the basic rule as being

‘The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job’ (Article 5(1), first subparagraph, TAWD, cf also Recital 14 of the Preamble).

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<sup>196</sup> Cf Schlachter, Chapter 8, this volume. It is still deemed to be the case, cf Recital 10 of the Preamble to the Temporary Agency Work Directive (see the next footnote for reference).

<sup>197</sup> 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.

<sup>198</sup> Cf COM(2002) 149 final, Proposal for a Directive of the European Parliament and of the Council on working conditions for temporary workers, 9–10 in particular. See also Recital 20 of the 2002 pre-draft, Recital 13 of the amended proposal in COM(2002) 701 final, and Recital 22 of the TWA.

<sup>199</sup> Cf L Zappalà, ‘Transnational Soft Regulation of Temporary Agency Work and Adaptability Policies: A Future of Guidelines with No Rights?’ in Ahlberg, K, B Bercusson, N Bruun, H Kountouros, C Vigneau, L Zappalà, *Transnational Labour Regulation : A Case Study of Temporary Agency Work* (Peter Lang 2008) 169, 171; A van den Heuvel, ‘Bemanningsdirektivet : EF-direktivet om arbeidsleie, fremvekst, regler og konsekvenser for nasjonal rett’ (2011) 5 *Arbeidsrett og arbeidsliv* 155, 164–166. On the Lisbon Strategy, see, eg, <http://ec.europa.eu/social/main.jsp?catId=782&langId=en&newsId=447&furtherNews=yes>.

<sup>200</sup> Referred to in the *travaux préparatoires* also as a principle of non-discrimination.

It should be noted, however, that this principle of equal treatment is limited to very basic conditions of employment as specified in Art. 3(1)(f) TAWD. This seems a regressive step when compared with the more generous principle of equal treatment we see in the Fixed Term Work Directive 1999/70/EC.<sup>201</sup> This limited scope can be seen as consistent with the turning of Article 3(1) PWD from a minimum into a form of maximum in *Laval*, insofar as it mitigates against inconsistency between the application of the two instruments. As noted above (a fn. 181) both instruments seem desirous of facilitating trade in services, including ‘transnational temporary agency work’ (see the paragraph below).

The TAWD intersects also with the Services Directive, 2006/123/EC, which is aimed, essentially, at removing barriers to the freedom of establishment and the free movement of services and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the TFEU.<sup>202</sup> As noted above, regulation of the conditions for hiring out workers, among other things, may constitute restrictions within the meaning of Treaty law. This is left outside the reach of the Services Directive, however, which explicitly does *not* apply to ‘services of temporary work agencies’ (Article 2(1)(e)). This exemption was not included in the original ‘Bolkestein’ proposal<sup>203</sup> but was included, along with the labour law exemption clauses (Article 1 nos. 6 and 7) following the first hearing in the EP, as one of several amendments accepted by the Commission.<sup>204</sup> The Temporary Agency Work Directive itself captures the Services Directive’s thrust, however, by Article 4 that stipulates that ‘Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented’. The predominance of Treaty principles again is manifested.

The Temporary Agency Work Directive is discussed further and in-depth in Chapter 8.

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<sup>201</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43. See N Countouris and R Horton, ‘The Temporary Agency Work Directive: Another Broken Promise?’ (2009) 38 *Industrial Law Journal* 329, 332.

<sup>202</sup> Cf Recital 5 of the Preamble to the Directive.

<sup>203</sup> COM(2004) 2 final/3 Proposal for a Directive of the European Parliament and of the Council on services in the internal market.

<sup>204</sup> Cf the preliminary amended proposal circulated in March 2006, COM(2006) 160 (2006/0001 (COD)), 41, and subsequently COM(2006) 160 final, Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market (4 April 2006). In the former, the exemption read simply ‘temporary work agencies’, the words ‘services of’ were added in the latter.

## 12 Observations in closing

The present chapter has focused mainly on the Posting of Workers Directive but also on the links with the Services Directive and the Temporary Work Directive. It can be seen that, despite differences in national approaches and opinions voiced by social actors, the EU policy orientation that has prevailed is one of only very limited EU regulation of transnational service provision. We see this in a number of ways but primarily through a judicial shift to strict limitations on the labour standards that host states may impose on posted workers, which is further bolstered by the obvious regulatory omissions that follow from the content of the Services Directive and Temporary Work Directive. In this way, priority has been given to internal market objectives as opposed to social objectives.

A key question will be how these conflicting concerns are mediated by regulatory and judicial developments to come. In the final stages of drafting this Chapter the ‘Enforcement Directive’ to the PWD was in the process of being adopted, which finally came about on May 15, 2014,<sup>205</sup> whereas the proposed ‘Monti II’ regulation addressing, among other things, the right to collective action had failed. Conflicts between EU to provide services and CJEU case law concerning collective action on one hand and international protection of the right to strike on the other remain topical. These are issues that are reappearing in chapters that follow, in particular in the closing Chapter 10 by Catherine Barnard discussing the overarching and fundamentally important issue of whether the conflictual conundrum may somehow be resolved.

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<sup>205</sup> Directive 2014/67/EU of the European parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) [2014] OJ L 159/11



# ‘Regime shopping’ across (blurring) boundaries

*Mijke Houwerzijl\**

## 1 Introduction

This chapter identifies and explores the (blurring) boundaries between the legal regimes for labour mobility across the EU in connection with what is sometimes called the scope for ‘regime shopping’.<sup>1</sup>

If we take a closer look into the law on freedom of movement, several categories of transnational labour mobility can be distinguished. Two of these categories concern self-employed: self-employed EU nationals can either move across a border on a temporary basis by using the freedom to provide services in another Member State (Article 56 TFEU), or on a permanent basis, by using the freedom of establishment in another Member State (Article 49 TFEU). Regarding workers’<sup>2</sup> mobility, the picture is less straightforward. Up to seven categories of workers, further described below, can be traced who can move within the EU under – again – two regimes: the free movement of workers (Article 45 TFEU) and the free movement of services (Article 56 TFEU). Notably, the latter possibility cannot be traced in the text of Article 56 TFEU but originates in the case law of the Court of Justice of the EU<sup>3</sup> (hereinafter CJEU).<sup>4</sup>

The central focus in this Chapter is on the distinction between movement of migrant workers and movement of posted workers.

To distinguish between movement of migrant workers under Article 45 TFEU and movement of posted workers under Article 56 TFEU, the CJEU developed the so-called ‘labour market access test’. Other criteria that can be used to distinguish between the two regimes for workers’ mobility can be found in the notions of what is temporary and

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\* I am grateful to Stein Evju for comments on a previous draft of this Chapter, to Line Eldring and Claudia Schubert for their observations and comments during the Third FORMULA Conference held in Oslo on 22 and 23 March 2012, as well as for the discussion with others participating in the Conference.

<sup>1</sup> See, eg, F Traxler and B Woitech, ‘Transnational Investment and National Labour Market Regimes: A Case of ‘Regime Shopping’?’ (2000) 6 *European Journal of Industrial Relations* 141.

<sup>2</sup> Contrary to the British distinction between workers and employees, these two terms will be used synonymously in this chapter.

<sup>3</sup> And its predecessor the European Court of Justice (ECJ). The remainder of this chapter refers to the CJEU only.

<sup>4</sup> For a detailed account of this evolution see Evju and Novitz, Chapter 2, this volume.

what is habitual in the context of the Posting of Workers Directive<sup>5</sup> (hereinafter PWD) and the Rome I Regulation<sup>6</sup> (Rome I). However, as will be shown, the use of these criteria does not result in a clear divide between the two regimes for workers' mobility. Exemplary is the special case of cross-border movement of temporary agency workers, which seems to fall under both regimes concurrently.

Whereas unclear legal criteria may facilitate the blurring of boundaries, they do not create it. Hence, the trigger for 'regime shopping' must be found somewhere else. Empirical findings, further discussed below, point to labour cost advantages as an important factor. In any event, the blurring of boundaries would never have become an issue if no difference in labour costs was attached to workers' mobility under Article 45 TFEU, on one hand, and under Article 56 TFEU, on the other.

In my conclusion to this chapter, I plead for a slight resetting of the boundaries, boiling down to different treatment of the three forms of posting lumped together in the PWD. In my view, at least some posted workers should be treated as fully equal with national workers regarding working conditions and other rights at work, because they do not qualify (only) as posted workers but (also) as (temporarily moving) migrant workers.

The chapter is structured as follows. We begin with a sketch of how intra-EU labour mobility has evolved after enlargement (Section 2). Against this non-legal backdrop, Section 3 starts by examining the original setting of the boundaries between Article 45 and 56 TFEU and identifies the (original) categories of workers' mobility under Article 45. Section 4 describes the shift in the original demarcation brought about by the well-known *Rush* judgment<sup>7</sup> and identifies the categories of labour mobility under Article 56 and Article 49 TFEU. Together, Sections 3 and 4 provide a detailed overview of the legal regimes and their boundaries. By outlining the rules determining the applicable labour law attached to these regimes, Section 5 shows why these legal boundaries matter in practice. From there, the focus shifts to the criteria that are or may be used to distinguish between the legal regimes, in law and in legal practice (in Section 6). In this context, attention is paid to the special, complicated case of temporary agency work (Section 7). Finally, a short excursion is made to the interplay between Article 45 and Article 56 TFEU regarding the position of posted workers under social security law (Section 8). The chapter ends with a summarizing conclusion on the problems encountered and possible solutions to reset or transcend the blurring boundaries between both regimes (Section 9).

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<sup>5</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 (the Posting of Workers Directive, PWD).

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

<sup>7</sup> Case C-113/89 *Rush* [1990] ECR I-1417.

## 2 Labour mobility within the enlarged EU

Cross-border labour mobility within the EU used to consist of a comparatively small group of migrant workers, mainly frontier workers, who made use of their right to free movement enshrined in Article 45 TFEU.<sup>8</sup> Facing the inflows of workers in recent years from new (EU8 and EU2<sup>9</sup>) into old Member States (EU15<sup>10</sup>), this image had to be revised. Despite the existence of transitional arrangements in most of the EU15,<sup>11</sup> demand factors, such as the demand for low-skilled and flexible labour, led to a steady increase of intra-EU labour mobility from new to old Member States. Also supply factors, such as the chance for workers from the EU8/EU2 to improve living standards, were strong drivers behind (the size of) this trend.

The enlargement of 2004 was unprecedented in terms of the number of states and people joining the EU. Together, the twelve Member States that joined the EU in 2004 and 2007 represented almost 21 per cent of the EU27’s population in 2007, some 103.3 million persons.<sup>12</sup> Compared with previous enlargements in the EU, there was also a larger gap than ever before in average wealth and minimum wage levels between new and old Member States.<sup>13</sup> At the accession date, the EU8 countries had attained only about one-third of average EU15 per capita income.<sup>14</sup> Measured in euros, the ratio of

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<sup>8</sup> Due to a decline in economic motivations, such as differences in wage levels, living standards and employment opportunities across EU Member States, the geographical mobility of EU citizens in the 1970s, 1980s, and 1990s was lower than in the 1950s and 1960s. In 2002, only 600,000 people, or 0.4 per cent of the total employed population, worked in a country different from their country of residence. However, cross-border commuting was continuing to grow. See Report ‘The Social Situation in the European Union 2002’, 23. Data for mobility within the EU15 showed that about 1.5 per cent of employed people (including legally residing third country nationals) within the EU15 moved in one year from another region *within* their Member State *or* from another Member State. See EC Press Release IP/04/267.

<sup>9</sup> The EU8 states are the Czech Republic, Poland, Slovakia, Hungary, Estonia, Latvia, Lithuania and Slovenia; the EU2 states are Bulgaria and Romania.

<sup>10</sup> The EU15 are those states that were EU members prior to 1 May 2004: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

<sup>11</sup> Apart from Ireland, Sweden and the United Kingdom, all other EU15 states initially imposed transitional restrictions on the right to free movement of workers for citizens of the EU8. The citizens of the other two acceding states in May 2004 – Malta and Cyprus – were granted full free movement of workers because of the countries’ small size and relative economic strength. For citizens of the EU2, transitional restrictions on the right to free movement of workers were imposed by all EU15 states except Finland and Sweden.

<sup>12</sup> Eurostat, *Europe in figures: Eurostat yearbook 2008* (Office for Official Publications of the European Communities, 2008) 23.

<sup>13</sup> According to a press release of the European Commission in 2003, ‘average GDP per head in the EU would fall by 13 per cent in EU25 or by 18 per cent in EU27’. See IP/03/265.

<sup>14</sup> D Vaughan-Whitehead, *EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model* (Edward Elgar 2003) 419–422; J Kvist, ‘Does EU enlargement

the lowest minimum wage level (Bulgaria) to the highest minimum wage level (Luxembourg) was 1:13 in 2009. Measured in purchasing power this ratio dropped to 1:6.<sup>15</sup> Levels of unemployment also played a role; for instance, in some Polish regions the unemployment rate in 2004 was above 20 per cent.<sup>16</sup> Hence, it comes as no surprise that studies on post-enlargement labour mobility patterns consider self-regulating supply and demand factors to be the decisive determinants of why people moved and for which kind of jobs they were recruited.<sup>17</sup>

Nonetheless, the transitional restrictions undeniably influenced the places where most workers went.<sup>18</sup> In exploring their opportunities to move to EU15 countries with transitional restrictions, EU8/EU2 workers often seem to have opted for ‘diversification strategies’.<sup>19</sup> Part of the available low-skilled labour has moved to the desired country of destination through illegal channels or even by ‘grey’ use of legal routes meant for non-

start a race to the bottom? Strategic interaction among EU member states in social policy’ (2004) 14 *Journal of European Social Policy* 301.

- <sup>15</sup> T Schulten, ‘Minimum wages in Europe: new debates against the background of economic crisis’ (2009) *ETUI Policy Brief* Issue 2 European Economic and Employment Policy 2.
- <sup>16</sup> Eurostat, *Regions: Statistical yearbook 2005* (Office for Official Publications of the European Communities 2005) 68.
- <sup>17</sup> K Tamás 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); COM(2006) 48 final, Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004-30 April 2006); M Kahanec and KF Zimmerman (eds), *EU-labor markets after post-enlargement migration* (Springer-Verlag 2010).
- <sup>18</sup> According to a study commissioned by the European Commission, there is clear evidence that the pattern of transitional restrictions in place at the beginning of the 2004 enlargement diverted mobile workers away from traditional destinations – namely Germany – and towards the more easily accessed labour markets in the United Kingdom and Ireland. The research findings also suggest that, due to network effects, transitional arrangements can have permanent effects on the pattern of migration. See D Hollande *et al*, *Labour mobility within the EU. The impact of enlargement and the functioning of the transitional arrangement*’ (NIESR Discussion paper 379 2011), <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1108&furtherNews=yes> (accessed 13 August 2012).
- <sup>19</sup> Support for this stance is provided by socio-legal studies such as S Currie, *Migration, work and citizenship in the enlarged European Union* (Ashgate 2008); C Pool, *Migratie van Polen naar Nederland in een tijd van versoepeling van migratieregels* (Bju 2011). Based on qualitative interviews with various key-actors in the field, both studies highlight tangible experiences of Polish migrant workers in, respectively, the United Kingdom and the Netherlands and show how the legal framework and the formal status they are granted shapes their attitudes and experiences. The term ‘diversification strategies’ is from Hein de Haas, ‘The Determinants of International Migration’ (2011) IMI Working Papers Series 32, University of Oxford <<http://www.imi.ox.ac.uk/pdfs/imi-working-papers/wp-11-32-the-determinants-of-international-migration>> accessed 13 August 2012.

economically active migrants, such as the family migration or student route.<sup>20</sup> Others went abroad through alternative legal routes, namely as posted workers or (bogus) self-employed.<sup>21</sup> Some workers seem to have switched between the different channels for work during their stay in the EU15.

Regime shopping or switching was attractive for the supply side because the routes to move as a posted worker or self-employed were not restricted. With regard to the freedom to provide services (Article 56 TFEU) and of establishment (Article 49 TFEU) no transitional arrangements were agreed upon in the Accession Treaties.<sup>22</sup> For the demand side, these routes also proved attractive. Notably, only a hard core of labour standards may apply mandatorily during the temporary posting in the host country.<sup>23</sup> Next to this, the posted worker stays insured under the social security schemes in the sending state.<sup>24</sup> When posted from ‘low wage’ to ‘high wage’ countries, this<sup>25</sup> makes posted workers (far) less costly than locally hired workers. Nevertheless, posted workers can still be ‘beaten’ on cost by transnational self-employed. Moving under the legal status of a self-

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<sup>20</sup> M Ruhs and B Anderson, ‘Semi-compliance and illegality in migrant labour markets: an analysis of migrants, employers and the state in the UK’ (2010) 16 *Population, Space and Place* 195.

<sup>21</sup> See the study commissioned by the European Commission of A van Hoek and M Houwerzjl, *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 2011), especially Annex I, [ec.europa.eu/social/BlobServlet?docId=6677&langId=en](http://ec.europa.eu/social/BlobServlet?docId=6677&langId=en) (accessed 13 August 2012). The choice for illegality was observed by the Bureau of European Policy Advisers and the Directorate-General for Economic and Financial Affairs, ‘Enlargement, Two Years After: An Economic Evaluation’, *European Economy Occasional Paper 24* (European Commission, 2006), [http://ec.europa.eu/economy\\_finance/publications/publication7548\\_en.pdf](http://ec.europa.eu/economy_finance/publications/publication7548_en.pdf) (accessed 13 August 2012).

<sup>22</sup> Austria and Germany, however, were entitled to impose transitional restrictions on EU8 nationals concerning the freedom to provide services in certain sectors because of the potential for serious labour market disturbances in sensitive sectors, such as construction and industrial cleaning.

<sup>23</sup> Pursuant to Article 3 PWD. For more details see section 3.5 below, and extensively Evju and Novitz, Chapter 2, this volume, Section 9.

<sup>24</sup> Pursuant to Article 12 of Regulation 883/2004 on the coordination of national social security systems, which deals with the issue of affiliation to a social security system in case of movement to another Member State. In principle, during the first 24 months of posting, the worker remains affiliated to the social security system of the Member State where he normally works.

<sup>25</sup> Note that there may also be fiscal cost advantages attached to posting. Taxation of workers lies within the competence of Member States. Bilateral agreements exist between most Member States in order to avoid double taxation. These agreements set out the rules according to which taxes must be paid either in the country of residence of the worker or in the country of posting. Normally, for posting up to 183 (calendar) days income taxes are paid in the country of residence of the worker. In case of posting beyond 183 days income tax has to be paid in the country where the worker is posted.

employed entails giving up all labour law protection and (most) social security law protection.

It is important to note that the majority of EU8/EU2 workers did not find these alternative opportunities to (il)legally move abroad on their own. In fact, high demand for ‘cheap labour’, combined with scarce information about possibilities to move on the supply side, seems to have encouraged the reliance on migration facilitators, ranging from bona fide temporary agencies and subcontractors to middlemen and gangmasters operating in the shadow economy.<sup>26</sup>

For the demand side, the intermediaries take care of administrative formalities and other ‘employer’ responsibilities, if any,<sup>27</sup> and seek to gain maximal profit from the wage gap between EU8/EU2 countries and the EU15. The abundant supply of ‘cheap labour’ made available by the intermediaries has also been a significant driver of ever fiercer wage competition in labour-intensive sectors such as road transport, construction, agriculture, fish and meat processing, hospitality and temporary employment agencies.<sup>28</sup>

For the supply side, these intermediaries provide the logistical infrastructure and access to the foreign labour markets/user companies, and control the contract terms. Workers tend to depend on them not only for work but also for housing, medical insurance and so on during their stay in the host country. Arguably, this in turn has had the effect of increasing the likelihood that workers will find themselves in precarious or exploitative employment relationships.<sup>29</sup> Notions of precariousness and exploitation must be put in perspective, however: labour conditions below the prevailing standards in the host country may still be acceptable for the (illegal) workers concerned if set against the terms and conditions they are used to in their country of origin.<sup>30</sup> At the same time, they represent a controversial undercutting of labour standards on the labour market of the host country.

The continuing trend to use ‘cheap labour’ from new Member States has fuelled resistance against social dumping. Now that alternative regimes for labour mobility have been discovered, and, from a cost perspective, have become even more attractive after

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<sup>26</sup> J Cremers, JE Dølvik and 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.

<sup>27</sup> Depending on the specific legal, grey or black route chosen.

<sup>28</sup> See for the Netherlands HM ter Beek *et al*, *Poolshoogte. Onderzoek naar juridische constructies en kostenvoordelen bij het inzetten van Poolse arbeidskrachten in drie sectoren* (Regioplan Beleidsonderzoek 2005); MC Versantvoort *et al*, *Evaluatie werknemersverkeer MOE-landen* (ECORYS 2006).

<sup>29</sup> Sometimes even resulting in situations that may be labelled ‘human trafficking’ and/or ‘forced labour’. For the United Kingdom see Currie (above n 19) Chapter 3. However, there are also positive assessments of the role of (bona fide) intermediaries in the popular press. See van Hoek and Houwerzijl (above n 21).

<sup>30</sup> van Hoek and Houwerzijl (above n 21).

the rulings of the CJEU in the *Laval* quartet,<sup>31</sup> the use thereof will not stop now that the last transitional restrictions on EU8/EU2 workers’ freedom to move (for Bulgarian and Romanian workers) have been lifted.<sup>32</sup> On the contrary, there seems to be a growing market for cross-border subcontracting with the use of ‘cheaper’ posted workers, which is facilitated in particular by the *Rüffert* judgment. The (perceived threat of) social dumping that comes along with it provides a source of political tensions, especially in times of economic downturn. The scapegoating of Polish workers by the PVV hotline in the Netherlands was a radical example of it.<sup>33</sup> Expressions such as ‘British jobs for British workers’ basically address the same logic of *ressentiment*.<sup>34</sup>

Against this non-legal backdrop<sup>35</sup> of commercial interest and societal unease with labour-cost driven mobility of workers, we will now turn to the legal framework of intra-EU labour movement.<sup>36</sup>

### 3 Original setting: all workers move under Article 45 TFEU

As already mentioned, if EU nationals qualify as employees, they may move to another Member State for work by using their right enshrined in Article 45 TFEU. The employer can also post his employees to another Member State by using Article 56 TFEU. If EU nationals are self-employed, Article 49 TFEU and Article 56 TFEU enable them

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<sup>31</sup> This is used here as a joint denomination for the decisions in the following four cases: Case C-438/05 *Viking* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>32</sup> Ultimately on 1 January 2014, all transitional restrictions on EU2 workers had to be lifted. Transitional restrictions on EU8 workers were only possible until 1 May 2011. Currently, transitional regimes are applicable to workers from the 28<sup>th</sup> EU Member State Croatia, which joined the EU on 1 July 2013.

<sup>33</sup> This provoked a statement of Commissioner Viviane Reding on (and against the content of) the PVV's website [http://ec.europa.eu/commission\\_2010-2014/reding/multimedia/news/-/2012/02/20120211\\_en.htm](http://ec.europa.eu/commission_2010-2014/reding/multimedia/news/-/2012/02/20120211_en.htm) (accessed 22 April 2014) and a European Parliament resolution of 15 March 2012 on discriminatory internet sites and government reactions (2012/2554(RSP)).

<sup>34</sup> See 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; C Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’ (2009) LSE Working Paper 16, <http://ssrn.com/abstract=1424662> (accessed 22 April 2014).

<sup>35</sup> For more details, see Dølvik, Eldring and Visser, Chapter 4, this volume. See also J Donaghey and P Teague, ‘The free movement of workers and social Europe: maintaining the European ideal’ (2006) 37 *Industrial Relations Journal* 652.

<sup>36</sup> For a discussion of the general foundations and perspectives of free movement rules and their relation to fundamental rights, see Barnard, Chapter 10, this volume.

to move freely within the EU. Below and in Section 4, the specific categories of labour mobility governed by the three free movement regimes are identified.

### 3.1 *The original demarcation line between Article 45 and Article 56 TFEU*<sup>37</sup>

We start at the beginning of the EU integration process. In the early 1960s, before the opening of the ‘common market’ in 1970, the content of the four freedoms (of workers, services, establishment and goods) had to be defined. In these days, as a main rule it was stipulated that all workers, whether permanently or temporarily moving to another Member State, fell under the free movement of workers.<sup>38</sup> Hence, all forms of workers’ mobility of EU nationals were lumped together under the free movement of workers. Nonetheless, it was also acknowledged from the very beginning that the law on the free provision of services may interfere with the law on the free movement of workers.<sup>39</sup> Such a tension can be seen, in particular, in situations where an employer exercises his right to provide a cross-border service. Provision of services often involves employees who carry out the tasks. Therefore, cross-border provision of services often means that the service provider may want to post his employees temporarily to the Member State where the service is provided (hereinafter ‘host Member State’). In secondary legislation based on the freedom to provide services, the following standard sentence, referring to the free movement of workers, used to be included in the Preamble:

‘Whereas the position of paid employees accompanying a person providing services or acting on his behalf will be governed by the provisions laid down in pursuance of Articles 48 and 49 of the Treaty (now Articles 45 and 46 TFEU).’<sup>40</sup>

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<sup>37</sup> On this subject see also Evju and Novitz, Chapter 2, this volume, Section 2.

<sup>38</sup> Evidenced by the texts and scope of Council Regulations 1612/68 on freedom of movement for workers within the Community (now superseded by Regulation 492/2011), Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (now superseded by Regulation 883/2004 on the coordination of social security systems) and Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ L 257/13 (now superseded by Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States). See also M Houwerzijl, *De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Kluwer 2005) 31-32; M Houwerzijl, ‘Towards a more effective posting directive’ (2006) 58 *Bulletin of Comparative Labour Relations* 179.

<sup>39</sup> See D Vignes, ‘Le droit d’établissement et les services dans la C.E.E.’ (1961) 7 *Annuaire Français de Droit International* 674; U Everling, *Das Niederlassungsrecht im Gemeinsamen Markt* (Verlag Franz Vahlen Berlin 1963) 72.

<sup>40</sup> Cited from Council Directive 64/429/EEC (now repealed) concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries). For an overview of the other Directives that contain this sentence, see Houwerzijl, *Detacheringsrichtlijn* (above n 38) 35.

To make sure that a cross-border service provider would not be denied the right to post his workers to the host Member State, a special provision was laid down in Article 6(3) of Directive 68/360/EEC, based on the free movement of workers, which reads as follows:

Where a worker is employed for a period exceeding three months but not exceeding a year in the service of an employer in the host State or in the employ of a person providing services, the host Member State shall issue him a temporary residence permit, the validity of which may be limited to the expected period of the employment.<sup>41</sup>

Hence, in this original approach the status of the employing company – as cross-border service provider – was separated from the status of the posted worker.

### 3.2 *Categories of workers governed by Article 45 TFEU*

Already in its early case law the CJEU insisted that the definition of a ‘worker’ is a matter for EU law, not national law. To qualify as a worker exercising a right to free movement under Article 45 TFEU, and thus be eligible for the right not to be discriminated against as regards employment, remuneration and other conditions of work and employment, one must be classified as undertaking effective and genuine work, under the direction of an employer, for which one receives remuneration.<sup>42</sup> Elaborating upon Article 45 TFEU, recital 5 of Regulation 1612/68 (now replaced by Regulation 492/2011) established that such a right should be enjoyed without discrimination by four categories of workers.<sup>43</sup>

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<sup>41</sup> This Article must be read in conjunction with Article 8(1)(a) of Dir. 360/68 stipulating that: Member States shall, without issuing a residence permit, recognise the right of residence in their territory of: (a) a worker pursuing an activity as an employed person, where the activity is not expected to last for more than three months. The document with which the person concerned entered the territory and a statement by the employer on the expected duration of the employment shall be sufficient to cover his stay; a statement by the employer shall not, however, be required in the case of workers coming within the provisions of the Council Directive of 25 February 1964 on the attainment of freedom of establishment and freedom to provide services in respect of the activities of intermediaries in commerce, industry and small craft industries.

<sup>42</sup> Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case 196/87 *Steymann* [1988] ECR 6159.

<sup>43</sup> However, no reference is made to what may be seen as yet another category of workers, namely those with jobs involving international mobility, such as international transport workers (truck drivers, flight crews, railway personnel, seamen). In the framework of Regulation 883/2004 on the coordination of social security systems, these workers are ‘caught’ by the category ‘working simultaneously in two or more countries’. This category will be left out of the survey, because it does not play an essential role in the (blurring) boundaries between the legal regimes. See on the specific case of international transport A van Hoek and M Houwerzijl, “‘Posting’ and ‘posted workers’ – The need for clear definitions of two key concepts of the Posting of Workers Directive’ in 14 *Cambridge Yearbook of European Legal Studies* 2011–2012 (C Barnard and M Gehring with I Solanke (eds)) (Hart Publishing 2012) 419, especially section 6.1.

- (1a) permanent workers;
- (1b) seasonal workers;
- (1c) frontier workers;
- (1d) workers who pursue their activities for the purpose of providing services.

Remarkably, by continuing the reference to this latter category (1d) in the current Regulation 492/2011, the EU legislator still seems to uphold the message that this Regulation ‘undoubtedly extend to protect workers of suppliers of services’.<sup>44</sup> Indeed, it cannot be denied that posted workers ‘undertake effective and genuine work, under the direction of an employer, for which one receives remuneration’. However, it is unclear how such an approach can be reconciled with the decision in *Rush* which gave posted workers their well-known ‘*status aparte*’.

#### 4 Resetting the boundaries: posted workers move under Article 56 TFEU

In its landmark ruling in *Rush*, in 1990, the Court established that Article 56 TFEU allows a EU-based service provider to move to another Member State with his own labour force, which he brings from the state where they normally work, even if these workers do not have the right to move under Article 45 TFEU.

*Rush Portuguesa* was a Portuguese employer that temporarily employed 58 of its own Portuguese workers for a construction assignment on French territory. Given the provisions of the 1985 Accession Treaty the free movement of workers did not yet apply to Portugal, a new member of the EU at the time. Therefore, Portuguese nationals were, at the relevant time, in a similar position to third country nationals. In light of this, the French immigration office tackled *Rush Portuguesa* because its workers were staying in France without work permits. The CJEU, however, confirmed the stance held by *Rush Portuguesa* that no work permit could be requested for the employment of posted workers in France who ‘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.’<sup>45</sup> Hence, the revolutionary aspect of the ruling was that third country nationals<sup>46</sup> who do not have the right to freely move to another EU country to work without a work permit, acquired a right to movement derived from their employer, albeit a limited one.<sup>47</sup>

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<sup>44</sup> As stated by AG Van Gerven, para 14 of his Opinion in Case C-113/89 *Rush* [1990] ECR I-1417.

<sup>45</sup> *Rush*, para 15.

<sup>46</sup> If legally residing and regularly employed in a Member State. See Case C-43/93 *Vander Elst* [1994] ECR I-3803.

<sup>47</sup> In this chapter, the position of third country national workers will not be dealt with in further detail. I refer to Herzfeld Olsson, Chapter 9, this volume.

#### 4.1 *Categories of workers governed by Article 56 TFEU*

Since *Rush*, the concept of the free provision of services was to be interpreted as covering a situation in which there is a temporary movement of workers who are sent to another Member State to carry out work as part of a provision of services by their employer. In later case law it was confirmed that the principle of freedom of movement for workers would not be involved in the event that posted 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.<sup>48</sup> Regarding the interests of the settled workforce in the host state and national systems of labour law, the CJEU had stated in *Rush* 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.’<sup>49</sup> In 1996, this para 18 of the *Rush* judgment was codified and elaborated upon by the Posting of Workers Directive, legally based exclusively on the freedom to provide services.

Article 1(3) PWD defines three categories of posting which may in fact be read as sub-categories of the, nowadays ignored, category 1d above:

- (2a) posted workers by service providers (subcontractors);
- (2b) intra-concern posted workers;
- (2c) posted workers via intermediaries such as temporary work agencies (TWA).<sup>50</sup>

The position of posted workers is characterized by the fact that they maintain their employment relationship with their own employer established in another Member State during the posting in the host Member State. As a rule, the employment contracts of posted workers are governed by the law of their habitual country of work instead of that

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<sup>48</sup> Case C-43/93 *VanderElst* [1994] ECR I-3803; Joined cases C-49/98 a.o. *Finalarte* [2001] ECR I-7831; Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191; Case C-244/04 *Commission v Germany* [2006] ECR I-885; Case C-168/04 *Commission v Austria* [2006] ECR I-9041.

<sup>49</sup> *Rush*, para 18, with reference to Joined cases 62/81 and 63/81 *Seco*; confirmed subsequently, albeit amended with the crucial restriction to minimum wages, by Cases C-43/93 *VanderElst*, Case C-272/94 *Guiot* [1996] ECR I-1905; Joined cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453; Case C-165/98 *Mazzoleni* [2001] ECR I-2189; Joined cases C-49/98 a.o. *Finalarte* [2001] ECR I-7831; Case C-164/99 *Portugaia* [2002] ECR I-787.

<sup>50</sup> More precisely as stipulated in Article 1(3) PWD: the PWD applies to undertakings which, within the framework of the transnational provision of services, post workers to the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting (1) on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended; (2) to an establishment or to an undertaking owned by the group; or (3) as a temporary employment undertaking, to a user undertaking.

of the host country. This contractual perspective reveals an important aspect of the legal position of the posted worker: the employment contract of a posted worker is typically influenced by more than one legal system, as the employment contract is concluded in one Member State (home state) and the performance of the service takes place in another Member State (host state). Here the interface with private international law comes into play, as we will discuss in Section 5 below.<sup>51</sup>

#### 4.2 *Self-employed persons governed by Article 56 TFEU*

As can be derived directly from the text of Article 56 TFEU, the main category of labour mobility governed by this freedom concerns self-employed EU nationals. They may move temporarily as:

(2d) service providers.

Whether a provision of services falls within the scope of Article 56 TFEU depends (pursuant to Article 57 TFEU) on the nature of the services that must be economic (commercial), in the sense that they must be provided for remuneration. A person may rely on the free movement of services in order to temporarily pursue his activities in the Member State where the service is provided under the same conditions as imposed by the host state on its own nationals. Furthermore, Article 57 TFEU stipulates that the free movement of services is residual to the other fundamental freedoms.<sup>52</sup> According to the TFEU when distinguishing between the three regimes, only when a situation cannot fall under the freedom of establishment or the freedom to move as a worker will it be governed by the free movement of services.

#### 4.3 *Self-employed persons governed by Article 49 TFEU*

Self-employed EU nationals may permanently settle in another country by using the freedom of establishment enshrined in Article 49 TFEU. As interpreted by the CJEU, the concept of establishment is a very broad concept, allowing an EU national to participate as a self-employed on a stable and continuous basis in the economic life of another Member State than his state of origin and to profit therefrom, so contributing to economic and social interpenetration within the EU.<sup>53</sup> It has been defined as the right to take up and pursue economic activities as a self-employed person and to set up and manage undertakings which this person effectively controls, under the same conditions as are laid down by the law of the Member State of establishment for its own natio-

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<sup>51</sup> See for more details Section 5. On the private international law (conflict of laws) dimension, see also Evju and Novitz, Chapter 2, this volume, Section 3.

<sup>52</sup> Reading as follows: ‘Services shall be considered to be “services” within the meaning of the Treaties where they are normally provided for remuneration, *in so far as* they are not governed by the provisions relating to freedom of movement for goods, capital and persons’ (emphasis added).

<sup>53</sup> See Case 2/74 *Reyners* [1974] ECR 631, para 21; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, para 18 and the case-law cited.

nals.<sup>54</sup> Hence, Article 49 TFEU prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.<sup>55</sup>

#### 4.4 Overview of the categories of labour mobility

To sum up, four categories of labour mobility governed by (1) Article 45 TFEU were identified above, followed by four categories of labour mobility governed by (2) Article 56 TFEU and one category of labour mobility governed by (3) Article 49 TFEU:

- (1a) permanent workers;
- (1b) seasonal workers;
- (1c) frontier workers;
- (1d) workers who pursue their activities for the purpose of providing services;
- (2a) workers posted by their employer in the context of subcontracting processes;
- (2b) workers posted intra-concern;
- (2c) agency workers posted via intermediaries such as TWAs;
- (2d) ‘posted’ self-employed service-providers;
- (3) permanent self-employed.

From this categorization exercise a picture emerges of ‘permanent’ and ‘temporary’ categories of labour mobility. Two of these categories concern self-employed (2d and 3) and will not be further examined. Regarding the seven distinguished categories of workers’ mobility it should be noted that category 1d overlaps with categories 2a, 2b and 2c. In reality, there are only six categories. Before exploring the criteria in terms of which the six categories of workers’ mobility governed by Article 45 and Article 56 TFEU can be distinguished from each other, we will first turn to the applicable labour law attached to both regimes. As established in Section 2, it is the difference in labour costs that provides the impetus for ‘shopping’ across the blurring of boundaries between both regimes. Therefore, it is important to know how this is legally underpinned.

## 5 Applicable labour law

### 5.1 ‘Article 45’ movement of workers

Let us first of all turn again to the free movement of workers. By granting entitlement to EU nationals to access the labour markets of the other Member States these provisions are meant to be the main source (the ‘cornerstone’) of EU labour movement to another Member State. Pursuant to Article 7 of Regulation 492/2011, EU nationals who move as

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<sup>54</sup> See, to that effect, Case C-212/97 *Centros* [1999] ECR I-1459, para 19, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, para 20.

<sup>55</sup> Case 270/83 *Commission v France* [1986] ECR 273, para 24. As confirmed in Case C-161/07 *Commission v Austria* [2008] ECR I-10671, para 28.

employees to another Member State are entitled to equal treatment with national workers as regards remuneration, dismissal, other labour conditions in law, laid down in collective or individual agreement or any other collective regulation and, should they become unemployed, reinstatement or re-employment, access to training in vocational schools and retraining centres, and the same social and tax advantages.

Workers moving under Article 45 TFEU will also be able to utilise the provisions on the aggregation and exportability of social security benefits under Regulation 883/2004. Moreover, the case law of the CJEU on ‘social advantages’ pursuant to Article 7(2) of Regulation 492/2011, has made a broad type of welfare benefit<sup>56</sup> available to workers based on a broad concept of a worker including those working part-time, those carrying out work that falls below a state’s minimum subsistence level and those claiming benefits in conjunction with working.<sup>57</sup>

### 5.2 ‘Article 56’ movement of workers

The PWD coordinates Member States’ legislation in such a way as to provide a core of mandatory rules on minimum protection with which employers who post workers to the Member State in which the service is to be provided must comply in the host country. This is laid down in Article 3 PWD. Article 3(1) states that Member States are to ensure that undertakings falling within the scope of the PWD guarantee workers posted to their territory the terms and conditions of employment laid down by mandatory law including collective agreements which have been declared universally applicable insofar as they concern the construction sector referred to in the Annex of the PWD. This equal treatment principle concerns the duration of the work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, the conditions of hiring-out of workers, protective measures for pregnant women, for women who recently gave birth, for young people and children, and equality of treatment between men and women. Hence, Article 3(1) PWD determines the nature of the labour standards that the Member States must apply but not the substance of these standards.

According to Article 3(10) first indent PWD, the host Member States may add public policy provisions on other subjects than those explicitly listed in Article 3(1) PWD.

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<sup>56</sup> There is an abundance of case law on the issue of ‘social advantages’ in which it was stressed that the concept should be interpreted broadly: Case 207/78 *Even* [1979] ECR 2019. ‘Social advantages’ has been held to include discretionary benefits: Case 65/81 *Reina* [1982] ECR 33; benefits granted after employment has been terminated: Case C-57/96 *Meints* [1997] ECR I-6689; Case 32/75 *Cristini v SNCF* [1975] ECR 1085. It also covers benefits not directly linked to employment, such as a right to be accompanied by an unmarried partner: Case 59/85 *Netherlands v Reed* [1986] ECR 1283. Hence, it has come to be understood as referring to almost any form of social welfare available to the state’s own nationals. See also Article 9 Regulation 492/2011 (housing).

<sup>57</sup> See Case 53/81 *Levin* [1982] ECR 1035; Case 139/85 *Kempf* [1986] ECR 1741; Case C-357/89 *Raulin* [1992] ECR I-1027.

This was part of the delicate political compromise needed to get the PWD adopted.<sup>58</sup> We know now that the CJEU, with the judgment in *Commission v Luxembourg*, has chosen a restrictive interpretation of this provision, by cutting back the margin of appreciation the Member States have in defining what is to be understood under public policy. The CJEU has pointed out that the concept of public policy, first, comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society and, second, must, as a justification for derogation from a fundamental principle of the Treaty, be narrowly construed.<sup>59</sup>

### 5.3 Role of Private International Law (PIL)<sup>60</sup>

Importantly, whereas equal treatment between (migrant/posted) workers and domestic workers is stipulated within the framework of the free movement law, this exists only in interaction with and can in practice be limited by the law of conflicts. Because of the private law character of the employment contract between employer and employee, parties are in principle free to choose the law applicable to their employment contract. However, in order to protect the employee, Article 8(1) Rome I (previously Article 6(1) Rome Convention<sup>61</sup>) limits the effect of such a choice of law since it may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from under the law applicable in absence of such a choice. Hence, it is always relevant to ascertain the latter law, which can be done following the choice of law rules in Article 8(2)–8(4) Rome I.

In the absence of a choice of law by the parties, Article 8(2) submits the individual contract of employment to ‘the law of the country in which or, failing that, *from which*<sup>62</sup> the

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<sup>58</sup> See Evju and Novitz, Chapter 2, this volume, Section 9.1.

<sup>59</sup> See Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, para 50; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, para 28; Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para 49.

<sup>60</sup> See in more detail van Hoek and Houwerzijl (above n 43).

<sup>61</sup> In 1980, the Member States signed the Convention on the law applicable to contractual obligations (the Rome Convention) [1980] OJ L 266/1. The Convention came into effect as of 1991 in most Member States. Articles 6 and 7 contain rules for international employment contracts. However, (employment) contracts signed after 17 December 2009 must be interpreted according to the rules laid down in the Rome I Regulation of 2008. In Rome I, Article 8 and 9 contain the rules for international employment contracts.

<sup>62</sup> The Rome I Regulation differs from the Rome Convention in its specific reference to the country *from which* the employee habitually carries out his work in the text of the provision. This phrase is added to adjust the conflict of laws rule to the interpretation given by the CJEU to the rule on jurisdiction in the Brussels I Regulation which (like Article 6(2)(a) of the Rome Convention) merely refers to the habitual place of work. The CJEU interpreted this as including the situation in which the employee habitually works in more than one country, but does so from an identifiable centre of activities. Hence, the phrase refers to the base from which the worker operates and not to the country of establishment of the employer. See Case C-29/10 *Koelzsch* [2011] ECR I-01595.

employee habitually carries out his work in performance of the contract. Additionally, it states that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country. Hence, in case of postings, Article 8(2) Rome I subjects the individual contract of employment only to the law of the habitual place of work. This will in most situations be the country of origin of both worker and employer.<sup>63</sup> If the place of work is undetermined or changes so frequently as not to allow the identification of a place where or from which the work is habitually performed, than Article 8(3) Rome I comes into play. Under Article 8(3) ‘the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated’.<sup>64</sup> Finally, pursuant to Article 8(4), in all cases another law may be applied where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in Article 8(2) or 8(3).<sup>65</sup> Hence, even though the actual place of work has considerable gravity, a ‘closer connection test’ may lead to the applicability of the law of another country than that of the habitual place of work.

The rules on mandatory protection laid down in the PWD can be understood to form an application of Article 9 Rome I. The Preamble to the PWD acknowledges this overlap by explicitly referring to private international law.<sup>66</sup> More implicitly, private international law plays a role in Article 3(1) PWD which states that:

Member States shall ensure that, *whatever the law applicable to the employment relationship* (emphasis added by the author), the undertakings referred to in Article 1(1)

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<sup>63</sup> However, it is not necessarily the case: neither the employee nor the employer has to be established in the country where the work is habitually performed. An example of the worker not living in the country where the work is performed is frontier work. An example of the employer not being established in the country of work would be the foreign correspondent working in country A for a newspaper or television station in country B. Compare also the case law on jurisdiction in individual employment disputes under the Brussels Convention and the Brussels I Regulation, especially Case C-125/92 *Mulox* [1993] ECR I-4075; Case C-383/95 *Rutten* [1997] ECR I-57; Case C-37/00 *Weber* [2002] ECR I-2013.

<sup>64</sup> See on the broad interpretation of Article 8(2), which limits the scope of Article 8(3), Case C-384/10 *Voogsgeerd* [2011] ECR I-13275.

<sup>65</sup> See on the interpretation of Article 8(4) Case C-64/12 *Schlecker* (judgment 12 September 2013, not yet reported). The CJEU ruled that even if there is a habitual place of performance, this may be trumped by other circumstances. However, at para 40 it is made clear that: ‘the court called upon to rule in a particular case cannot automatically conclude that the rule laid down in Article 6(2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country’. See also van Hoek and Houwerzijl (above n 43), at 5.1 Since this case was not about a posted worker, it is possible that but unclear yet if the CJEU would apply the same reasoning to situations of (intended) posting of workers.

<sup>66</sup> See recitals 6–11 of the PWD.

PWD guarantee workers posted to their territory the terms and conditions of employment covering the following matters...

Thus, it is made clear that the law applying to the labour contract is regulated by private international law (currently the Rome I Regulation), but the PWD superimposes – if necessary – the minimum protection of the law of the host state upon the protection already offered under the law applying to the contract by virtue of Article 8 Rome I.<sup>67</sup>

If we apply the PIL rules to migrant, frontier and seasonal workers covered by Article 45 TFEU (**categories 1a, 1b, 1c**), Article 8 Rome I will always point to the *lex loci laboris*, being the law of the country where they habitually carry out their work in performance of the contract. Leaving aside the –so far [ ] situations in which the closer connection test leads to another outcome, this means that all mandatory laws and collective agreements in the receiving Member State are applicable to their contracts. Hence, in a system with relatively few mandatory and/or collectively agreed labour law standards, the equal treatment principle enshrined in Article 45 TFEU may suffer from the PIL rules.<sup>68</sup>

Regarding (genuinely) posted workers (**categories 2a, 2b, 2c**), whose movement is covered by Article 56 TFEU, Article 8(2) Rome I points also to the law of the state where they habitually work, which creates the well-known unequal treatment with settled workers in the host state. Only with regard to the listed key areas may Article 3(1) PWD override this effect of Article 8(2) Rome I, under the condition that host state law is more favourable (see Article 3(7) PWD).<sup>69</sup>

## 6 Demarcating workers’ mobility under Article 56 from movement under Article 45

The different applicable labour law to the employment contracts of workers moving under Article 45 and Article 56 TFEU makes the need for clear and legitimate boundaries between the two regimes pertinent. One possible way of demarcating, emerging from the analysis above, is to take the (intended) duration of the labour mobility into account: is the move permanent or temporary? As we have seen, the rationale behind the ‘*status aparte*’ of posted workers in the PWD and in Rome I is that they only work

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<sup>67</sup> Compare with the relationship between Rome I and the PWD: COM(2002) 654 final, Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, 36.

<sup>68</sup> The interference of PIL rules with the equal treatment postulate under Article 45 was also clearly visible in the draft Regulation on conflict of laws pertaining to employment relations within the Community (COM(76) 653 final, Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community), discussed by Evju and Novitz, Chapter 2, this volume, section 3.

<sup>69</sup> Within the meaning of better working conditions (more protection) for the employee.

‘temporarily’ or ‘for a limited period’ in the host state. Notions such as ‘habitual’ in Rome I and ‘permanent’ in Regulation 492/2011<sup>70</sup> (recital 5) seem to contrast this with the position of migrant workers, suggesting that they are employed on a more continuous basis in the receiving state. But is that really and necessarily the case?

### 6.1 Categories involving ‘permanent’ movement under Article 45

Of the categories grouped under the free movement of workers (Article 45 TFEU), **category 1a** (permanent workers) clearly involves movement to another Member State with – intentionally – a permanent character (so without any foreseeable limit). In the archetypal situation the migrant worker will sign an employment contract with an employer in (or at least under the law of) the new country of employment, which will also be his new country of residence. In contrast, **category 1c** (frontier workers) refers to the situation on which a migrant worker will only change his place of work or his place of residence to the other Member State.<sup>71</sup> Probably, taking into account that the rules were made before the rise of atypical, more flexible forms of employment, also here the drafters had jobs with an open-ended character in mind.

However, nowadays many migrant and frontier workers may be employed on fixed-term contracts. In case law, it is established that also part-time workers, on-call workers and trainees qualify as workers within the meaning of Article 45 TFEU, as long as their work is of an economic nature and is not (too) marginal or ancillary.<sup>72</sup> In light of that case law, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU. For instance, someone who only worked on a temporary basis for two and a half months on the territory of another Member State than his state of origin should be regarded as a worker within the meaning of Article 45 TFEU on condition that his activities are not purely marginal and ancillary.<sup>73</sup> Clearly, what was once referred to as ‘permanent’ movement of migrant work-

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<sup>70</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1

<sup>71</sup> The situation of an EU national who, following the transfer of his residence from one Member State to another State, works in a Member State other than that of his residence falls, after that transfer, within the scope of Article 45 TFEU (Case C-527/06 *Renneberg* [2008] ECR I-7735, para 37).

<sup>72</sup> See eg Case 53/81 *Levin*; Case 139/85 *Kempf*; Case 66/85 *Lawrie-Blum* [1986] ECR 2121; Case C-357/89 *Raulin*. See also M Schlachter, ‘Die Freizügigkeit der Arbeitnehmer in der Europäischen Union – Wer ist Träger dieses Rechts?’ (2011) *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 160.

<sup>73</sup> Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paras 25 and 32. See also Case C-169/03 *Wallentin* [2004] ECR I-6443 and Case C-109/04 *Kranemann* [2005] ECR I-2421, regarding trainees one of whom only worked abroad several weeks, as discussed by H Verschueren, ‘Cross-border workers in the European internal market: Trojan horses for Member States’ labour and social security law?’ (2008) 24 *International Journal of Comparative Law* 176.

ers nowadays includes many cross-border movements with very much a temporary (fixed-term) nature.

### 6.2 *Categories involving ‘temporary’ movement under Article 45*

Apart from the case law that broadened the coverage of categories 1a and 1c, the drafters of Regulation 1612/68 (now Regulation 492/2011) already referred to in the text of recital 5 to one sort of employment relationship with an undoubtedly temporary character, namely seasonal work (**category 1b**). Also with regard to the forgotten **category (1d)**, referring to those who pursue their activities for the purpose of providing services, it can be held that in 1968 the focus must already have been on *temporary* service provision abroad, although the underlying engagement in the habitual country of work was probably supposed to have an open-ended character.

In any event, it is crystal clear that Article 45 TFEU includes both categories of permanent and temporary movement, a finding that is in fact fully in line with its original purpose to cover all EU workers’ mobility. Hence, the (intended) duration as such cannot be deemed the distinguishing feature between the regimes for workers’ mobility. Still, ‘temporariness’ is an essential feature of workers’ mobility under Article 56 TFEU. In order to qualify as a worker within the meaning of Article 2 PWD, the person concerned must be posted for a limited period of time to a Member State other than the one in which he normally works. In Article 8(2) Rome Convention, the reference is again to ‘temporary’ employment. Below we take a closer look at what these notions exactly entail.

### 6.3 *What is ‘temporary’ within the meaning of Rome I?*

The definition of ‘temporariness’ was one of the most controversial issues in the debate on the transformation of the Rome Convention of 1980 into the Rome I Regulation. It turned out to be impossible to reach agreement on a definition of temporary posting in the text of the new regulation. However, some indications were included in the Preamble (recital 36),<sup>74</sup> which reads as follows:

‘As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.’

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<sup>74</sup> In COM(2005) 650 final, Proposal for a Council Regulation on the implementation of the 10th European Development Fund the specifications were contained in the relevant Article itself, rather than in the preamble.

Whereas the first sentence limits the notion of posting, the second sentence actually expands the notion of posting.<sup>75</sup> In fact, the first narrowing sentence contributes to a clearer definition of posting in highlighting the importance of a habitual place of work to return to.<sup>76</sup> The fact remains, however, that Rome I does not contain any specific limits as to the duration of the posting.

#### 6.4 What is ‘temporary’ within the meaning of the PWD and Article 56?

For the three situations of posting (**categories 2a, 2b, 2c**) covered by the PWD, Article 1(3) states that there must be a link to a cross-border service provision that is temporary in nature. In fact, it is this relationship to a transnational service that distinguishes the posting of workers from other types of temporary work, such as seasonal work, discussed above in Section 6.2. Nevertheless, neither case law nor legislation based on Article 56 TFEU gives a workable definition of what is exactly meant by the phrase ‘temporary’. In *Rush* the CJEU stated that a service provider ‘may move with its own work-force which it brings from its own Member State for the duration of the work in question’.<sup>77</sup> Hence, the temporary character of posting seems to be linked to the duration of the service abroad. With the aim of preventing abuse and ‘creative’ use of posting, Article 3(6) PWD stipulates that the length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting. Because there is no case law yet on the interpretation of this aspect of the PWD, it is not clear how Article 3(6) must be read in light of the ‘open’ reference in Article 2(1) to ‘a limited period of time’.

In the absence of specific case law, generally, reference is made to the interpretation in case law of what constitutes the temporariness of a service provision and how it should be distinguished from the exercise of the freedom of establishment. This includes in fact the distinction between our two categories of self-employed mobility: on a temporary basis in the context of services (**category 2d**) or permanently, in the context of establishment (**category 3**).

So far, in this general case law on services no limitation in time to the temporariness of a service provision has been accepted. A key element when determining whether the activities constitute a service or an establishment is whether or not the self-employed (company) is registered in the Member State where the economic activities in question

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<sup>75</sup> It can be traced to a proposal of the Groupe Européenne de Droit International Privé and caters for expatriates who, for reasons of immigration, might enter into a contract with an establishment in the country of posting while maintaining their contractual link with the original employer in the home country.

<sup>76</sup> This indicator is also included in Article 3(2)(c) of the proposal on an ‘enforcement directive’, COM (2012) 131 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. See in more detail van Hoek and Houwerzijl (above n 43).

<sup>77</sup> *Rush*, paras 17 and 19.

are pursued.<sup>78</sup> Apart from that, as stated in *Gebhard*, the temporary nature of the activities has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity.<sup>79</sup> In *Schnitzer*,<sup>80</sup> application of these criteria made the CJEU conclude that Article 56 TFEU includes services such as construction projects involving large building works that are provided over an extended period, even over several years. Whether it is relevant that this period of time concerns only a single project or may include several (consecutive) projects is not clear. At least, the fact that a company often provides the same service to the same Member States, and equips itself with some form of infrastructure in the host state(s) (including an office, chambers or consulting rooms) if such infrastructure is necessary for the purposes of performing the services in question, is not sufficient to deem him as being established there. On the other hand, the CJEU held in *Trojani* that an activity carried out on a permanent basis or without any foreseeable limit would not be considered a service within the meaning of Article 56 TFEU.<sup>81</sup> Also, it was ruled that a construction company exclusively focused on a different country than that of establishment cannot be considered a service provider by the CJEU.<sup>82</sup>

What lessons can be learned from this case law analysis? First, that in drawing the boundaries between Article 56 and Article 49 TFEU the temporal dimension of the cross-border economic activity pursued is a distinctive feature indeed.<sup>83</sup> This reveals an important difference with the boundaries between workers’ mobility under Article 45 and Article 56, which, as we saw, are less straightforward. Second, it is noteworthy that the distinction between Article 56 and Article 49 is in reality difficult to operationalize. In the words of AG Léger in his Opinion to *Gebhard*:

‘On the strictly legal level, this distinction is a tricky one, in so far as it is the upshot of a combination of criteria, closely depends on the factual circumstances in question and has never been precisely and systematically defined.’

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<sup>78</sup> Case C-514/03 *Commission v Spain* [2006] ECR I-963, para 22. This paragraph draws on the paper by E Sjödin, ‘Labour Market Regulation as Restrictions : A Developmental Study of ECJ Case Law at the Interface between Free Movement and Posting of Workers’ in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013) 19, 20-22.

<sup>79</sup> Case C-55/94 *Gebhard* [1995] ECR I-4165, para 27; Case C-131/01 *Commission v Italy* [2003] ECR I-1659, para 22.

<sup>80</sup> Case C-215/01 *Schnitzer* [2003] ECR I-14847, para 30.

<sup>81</sup> Case C-456/02 *Trojani* [2004] ECR I-7573, para 28.

<sup>82</sup> This clearly follows from the judgment in Case C-404/98 *Plum* [2002] ECR I-9379, situated in the context of Regulation 1408/71.

<sup>83</sup> As shown by the very wording of Article 57 TFEU, in contradistinction to the permanent nature of the activity carried out by an economic operator who is established in a Member State (observation of AG Léger, Opinion in *Gebhard*, para 32).

Although the non-limited, open character of the duration of posting certainly promotes the use of the freedom to provide services, it is at the same time problematic in light of the protection of workers. As Kilpatrick observes:<sup>84</sup>

‘Socially, it is not difficult to imagine that long-stretches of life in a (typically more expensive) host-state on a minimum skeleton of host-state labour standards can seem exploitative to posted workers and host-state inhabitants alike. Yet that is the effect of applying the new [post-*Laval*] approach in combination with the expanded area of application of Article 49 [now Article 56].’

Undeniably, a long period of posting blurs the distinction between temporary posting under Article 56 and workers’ movement under Article 45 TFEU. The fact that no (rebuttable) temporal limit restricts the duration of services and posting, clearly complicates the development of clear guidelines and hence of an enforceable<sup>85</sup> distinction between situations falling within Article 49 and Article 45, on one hand, vis-à-vis situations falling within Article 56, on the other hand. Remarkably, the expansive interpretation of ‘services’ in case law runs counter to the wording in Article 57 TFEU that the free movement of services is residual to the other fundamental freedoms.<sup>86</sup> According to Giesing:<sup>87</sup>

‘It can be safely assumed that, given the concept of the EC-Treaty, only short-time ‘temporary’ services would be covered by Article 49 EC [now 56 TFEU]. However, as the Court has decided to take a differentiating point of view within the freedom to provide services, there is no choice but to accept this.’

On the other hand, law is never static; as time goes by, also contemporary interpretations will be modified and/or amended again. Actually, in current law there are two examples of temporal limitations to ‘services’ and ‘posting’, showing that the expansive approach discussed above is not carved in stone. One example, dating from the early days, is the temporal limit on affiliation to the social security system of the home state instead of the host state in case of *posting* as enshrined in Article 12 of Regulation 883/2004 on the coordination of social security schemes.<sup>88</sup> By uncoupling the duration of ‘posting’ from the duration of the ‘service’ this example seems to reflect the traditional approach to separate the status of the posted worker from the status of the service.

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<sup>84</sup> Kilpatrick (above n 34) 27.

<sup>85</sup> For more details on the complicated monitoring and enforcement of the PWD, see Ahlberg, Johansson and Malmberg, Chapter 5, this volume. See also van Hoek and Houwerzijl (above n 21).

<sup>86</sup> See above text to n 52.

<sup>87</sup> R Giesen, ‘Posting: Social protection of workers versus fundamental freedom s?’ (2003) 40 *Common Market Law Review* 155.

<sup>88</sup> In principle, during the first 24 months of posting, the worker remains affiliated to the social security system of the Member State where he normally works.

If that is possible in the context of social security law, why not consider this also with regard to labour law?

The other example concerns the introduction of a temporal limit on services in the context of the international transport sector: *cabotage*.<sup>89</sup> *Cabotage* operations consist of the provision of *services* by hauliers within a Member State in which they are not established. In line with the general case law on services *cabotage* operations may not be prohibited as long as they are not carried out in a way that creates a permanent or continuous activity within that Member State. Interestingly, in 2009, a temporal limitation was adopted which was motivated as follows: ‘In practice, it has been difficult to ascertain which services are permitted. Clear and easily enforceable rules are thus needed.’<sup>90</sup> Therefore, ‘the frequency of cabotage operations and the period in which they can be performed should be more clearly defined’.<sup>91</sup> Hence, this example highlights how concerns about the applicability and enforceability of the rules may lead the way to a less expansive approach.<sup>92</sup>

### 6.5 ‘Active’ and ‘passive’ movement of workers

The analysis developed above demonstrates that the categories under Article 45 TFEU involving permanent movement also include temporary workers mobility, whereas the categories of temporary movement under Article 56 TFEU may in practice include situations that tend to have a more permanent character than originally intended. This is undesirable, especially from the viewpoint of workers’ protection. Apart from two exceptions where a time-limit was enacted, both from an internal market perspective and from a private international law perspective the predominant notion of temporariness is still unclear and impractical: everything is left to an assessment on a case-by-case basis. Clearly, this does not help in creating ‘sustainable’ boundaries between the two legal regimes for workers’ mobility within the EU.

It may therefore be more apt to put the (intended) duration of the labour mobility as a criterion aside and take the ‘initiator’ of the labour mobility as criterion: is it the employee, or the employer who initiates the cross-border movement of the employee? The former situation may be labelled ‘active’ movement, the latter situation ‘passive’ movement of workers. The reasoning is as follows: under Article 45 TFEU workers move actively to another Member State, which may be illustrated by the fact that they

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<sup>89</sup> *Cabotage* is limited to three operations within seven days. See Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast) [2009] OJ L 300/72, Article 8(2). See van Hoek and Houwerzijl (above n 43), text to n 53 *et seq.*

<sup>90</sup> Recital 15 of Regulation No 1072/2009.

<sup>91</sup> *ibid.*

<sup>92</sup> The Enforcement Directive to the PWD is another example (Directive 2014/67/EU). On this see in more detail Ahlberg, Johansson and Malmberg, Chapter 5, this volume; van Hoek and Houwerzijl (n 43).

accept work and conclude an employment contract with an employer established in the state of destination or seek work in that state. These indicators seem to imply that such workers have access to the labour market of the state where they move for work. In contrast, under Article 56 TFEU, it is the employer in his capacity as service provider who actively uses his freedom to provide a service in another Member State from the one he is established in. If he needs employees to perform the service contract he has agreed upon with the recipient in the other Member State, the employer may post his own workers to that Member State to carry out the actual work that has to be done. A posted worker does, according to the CJEU, not have access to the labour market of the host Member State, but will instead immediately return to the state where he normally works once the service is carried out. This passive movement (namely because the employer assigns him to) may be illustrated by the fact that the posted worker has concluded an employment contract with his employer governed by the law of the habitual country of work. Another indicator of passive movement, often used in the context of PIL, and included in the proposal for the Enforcement Directive of the PWD, is the provision or reimbursement of travel, board and lodging costs by the employer.<sup>93</sup>

The distinctive criterion in this way of demarcating Article 45 mobility from Article 56 mobility is ‘labour market access.’ However, the CJEU judgment in *Vicoplus*<sup>94</sup> concerning of three Polish service providers against the Dutch Ministry of Social Affairs, sheds new light on the criteria constituting ‘labour market access’.

## 7 The special case of temporary agency work: the ‘labour market access test’

### 7.1 From *Rush* to *Vicoplus*

In countries that imposed a transitional period for the free movement of workers, a particularly problematic point concerned the status of EU8/EU2 nationals who were posted to EU15 Member States as temporary agency workers. Belgium, Denmark, Luxembourg and the Netherlands considered posted agency workers (our **category 2c**) to be subject to the restrictions on the free movement of workers. This view was strongly opposed by other Member States (for example, Romania) and the European Commission.<sup>95</sup> Against the background of this controversy, in *Vicoplus* it was asked whether the Dutch requirement of a work permit for making workers available within the meaning of Article 1(3)(c) PWD is compatible with the free movement of services.

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<sup>93</sup> This indicator is made explicit in Article 3(2)(d) of the proposal on the enforcement of Directive 96/71 concerning the posting of workers in the framework of the provision of services, Brussels 21 March 2012, COM (2012) 131 final. See in more detail van Hoek and Houwerzijl (above n 43).

<sup>94</sup> Joined cases C-307/09 to C-309/09 *Vicoplus* [2011] ECR I-453.

<sup>95</sup> See van Hoek and Houwerzijl (above n 21).

According to the Commission the question had to be answered in the negative. This view was based on a rather formal argument, namely that a posted worker does not access the labour market of the receiving Member State *because* no labour agreement is entered into between this worker and the user undertaking (emphasis added by the author).<sup>96</sup> Admittedly, Article 1(3) PWD states that during the period of posting an employment relationship must exist between the temporary employment undertaking or the placement agency and the worker. However, in the PWD no connection is made between this requirement and gaining or not gaining access to the labour market of the host Member State. In fact, the PWD does not mention the term ‘labour market’ at all, which is logical in light of the fact that this Directive merely gives substance to the *Rush* judgment as regards the applicable labour standards from the host Member State.<sup>97</sup> Hence, AG Bot argued that the PWD does not aim at bringing prejudice to the possibility for ‘old Member States’ to control or restrict the access of workers from the new Member States to their labour market.<sup>98</sup> Therefore, the fact that the transnational making available of temporary workers was brought under the personal scope of the PWD does not preclude this type of activity also being within the scope of transitional provisions for the free movement of workers. Furthermore, the Advocate General qualified the making of a distinction according to whether a worker gains access to the labour market of the receiving Member State directly and independently or by means of a company that makes available workers as artificial:

‘Although the worker remains linked to his initial employer, it is true that the actual work is provided by the employer in the host Member State for the needs of his company and it is carried out under his control and direction. The worker made available is hired in the same way as a local worker and thus directly competes with local workers on the labour market of the receiving Member State, which inevitably has consequences for that market.’

Moreover, it was put forward that this artificial line of reasoning does not take into account the specific nature of making temporary agency workers available nor the possible consequences thereof for the labour market of the host Member State.<sup>99</sup> The Advocate General thus took the side of the Dutch government that had invoked the *Rush* judgment in defence of its policy.

Why was this judgment from 1990 so crucial to the assessment of the *Vicoplus* case? As mentioned, in this ruling the CJEU considered that posted workers do not really leave the labour market of the Member State of origin, they remain part thereof and thus have no access to the labour market of the host Member State.<sup>100</sup> The French work permit

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<sup>96</sup> As referred to in the Opinion of AG Bot in *Vicoplus*, para 70.

<sup>97</sup> *Rush*, para 18. See above text at n 49.

<sup>98</sup> Opinion of AG Bot in *Vicoplus*, paras 54, 55, 52.

<sup>99</sup> *ibid.*, paras 51, 70–71.

<sup>100</sup> *Rush*, para 15.

arrangement was therefore deemed to be an unjustified obstacle to the free movement of services. Nevertheless, by way of reaction to a remark from the French government the CJEU had made one reservation:

‘... an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.’<sup>101</sup>

In later case law the Court never got back to this issue. And the inclusion of the cross-border hiring out of temporary agency workers in the scope *ratione personae* of the PWD, seemed an indication that this type of activity was exclusively brought within the reach of the free movement of services. Against this background, the referring national court wondered whether the reservation expressed in *Rush* still applied to the posting of temporary agency workers.

### 7.2 *Temporary agency work is a provision of services that grants access to the labour market*

In *Vicoplus*, the CJEU confirms that (transnational) temporary agency work is a provision of a service, as was first established in *Webb*.<sup>102</sup> In that case, the CJEU acknowledged that:

‘... such activities may have an impact on the labour market of the Member State of the party for whom the services are intended. First, employees of agencies for the supply of manpower may in certain circumstances be covered by the provisions of Articles 45 TFEU to 48 TFEU and the European Union regulations adopted in implementation thereof (see *Webb*, paragraph 10). Secondly, owing to the special nature of the employment relationships inherent in the making available of labour, pursuit of that activity directly affects both relations on the labour market and the lawful interests of the workforce concerned (para 18).’<sup>103</sup>

It was in this respect that the Court had made its remark in *Rush*, already quoted above, 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. In *Vicoplus* the Court reiterates this line of reasoning. 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. 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 justi-

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<sup>101</sup> *ibid.*, para 16.

<sup>102</sup> Case 279/80 *Webb* [1981] ECR 3305, paras 9, 27. See also Case C 298/09 *RANI Slovakia* [2010] ECR I-81 (Summary publication), para 36.

<sup>103</sup> *Vicoplus*, paras 28–29.

fied as a measure allowed on the basis of the Act of Accession and is therefore compatible with the free movement of services. This is in line with the purpose of the transitional provisions, which aim to avoid entirely opening up the labour market immediately.<sup>104</sup>

Noteworthy, the CJEU explicitly embraced the objective reasoning the Advocate General had used in the matter; namely that it would be artificial to draw a distinction with regard to the influx of workers on the labour market of a Member State according to whether they gain access to it by means of transnational making available of labour or whether they gain access to it directly and independently. Indeed, in both cases, the potentially large movement of workers can disturb the labour market. The exclusion of posted temporary agency workers from the transitional regime would therefore be liable to deprive the effectiveness of the provisional measure.<sup>105</sup>

### 7.3 *The impact of Vicoplus on demarcating ‘Article 45’ from ‘Article 56’ workers’ mobility*

It is apparent from *Vicoplus* that the distinction between workers’ mobility on the basis of the free movement of workers and on the basis of the free movement of services remains troublesome. The CJEU has now explicitly confirmed that both freedoms are involved with respect to transnational temporary agency work (**category 2c**). This conclusion had been hovering ‘in the air’ for twenty to thirty years, given the considerations about the specific nature of temporary work in *Rush* and *Webb*. The reasoning in *Vicoplus* is consistent: an undertaking making labour available may be a provider of services within the meaning of Article 56 TFEU but carries out activities that aim at providing workers access to the labour market of the host Member State (the so-called allocation function). Indeed, whether foreign workers are hired by a company in the host state or are made available there through a foreign undertaking making a posting, in both cases they fill a vacancy on the labour market of the country of destination that could otherwise have been assigned to a resident worker.

Interestingly, *Vicoplus* and the other Polish service providers involved in the *Vicoplus* case disputed that they were hiring-out workers only. Allegedly, their posted workers carried out activities that pertained to the core business activities of the companies. Hence, they took the stance that posting of **category 2a** (in the framework of contracting of work) was at issue, not posting of **category 2c**. In view of this, the referring court wondered which criteria must be used to determine whether hiring-out of workers is at stake (second question).

In its answer, the CJEU explained that the said provision of service is characterized by (1) the fact that the movement of the posted worker to the host Member State constitutes the very purpose of the provision of services and that (2) this posted worker carries out

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<sup>104</sup> *ibid.*, paras 38–40. See also the AG’s opinion, paras 56–57.

<sup>105</sup> *ibid.*, paras 34–35.

his tasks under the control and management of the user undertaking.<sup>106</sup> In contrast, in a relationship of subcontracting, (**category 2a**, as referred to in *Rush* and in Article 1(3)(a) PWD), there is no transfer of authority as regards the carrying out of the tasks assigned to the workers.<sup>107</sup> Moreover, in the event of **category 2a** posting, the movement of the workers is secondary and ancillary to a provision of service of a different nature, in the construction sector for instance, whereas with **category 2c** posting, the (main) purpose of the provision of services is the movement of the workers to another Member State.<sup>108</sup> Therefore, the CJEU concludes that in respect of **category 2c** posting, it is not relevant that the worker returns to his Member State of origin at the end of the period of employment elsewhere. The return does not preclude the worker having been made available in the host Member State.<sup>109</sup>

The CJEU also observed that there are situations in which the main activity of the service provider and the tasks carried out by the worker in the host Member State do not correspond. The employee may carry out a task related to secondary or new activities of that employer. Conversely, another main activity of the employer does not preclude that the posted worker has been made available in compliance with the characteristics of **category 2c** posting as defined by the CJEU. This circumstance is mainly relevant for intra-group posting (our **category 2b**).<sup>110</sup> With this remark the Court seems to support the Dutch government's line of reasoning that **category 2b** posting in principle too aims at moving workers to another Member State. Hence, the *Vicoplus* ruling draws a clear distinction, between, in the words of the CJEU (para 45):

‘... on the one hand, the making available of workers and, on the other, a temporary movement of workers who are sent to another Member State to carry out work there as part of a provision of services by their employer (see, to that effect, *Rush Portuguesa*, paragraph 15).’

The conclusion seems to be that the latter group is still assessed as moving exclusively under Article 56 TFEU. However, regarding the former group the conclusion must be that their movement is (also) covered by Article 45 TFEU, whereas their employer at the same time makes use of his right to free service provision enshrined in Article 56 TFEU.

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<sup>106</sup> *ibid.*, para 51.

<sup>107</sup> *ibid.*, AG's Opinion, para 64.

<sup>108</sup> *ibid.*, paras 45–46.

<sup>109</sup> *ibid.*, para 49. The Advocate General's phrasing is less cryptic: the circumstance that temporary agency workers return to their Member State of origin at the end of the posting is less important than the fact that they have held posts, even temporarily, which have actually been offered by an undertaking in the host Member State and that they therefore entered the labour market of that state for a certain period.

<sup>110</sup> *ibid.*, para 50.

#### 7.4 *The importance of the Vicoplus judgment from a labour law perspective*

In contrast to *Rush*, the *Vicoplus* judgment gives no clue about the consequences of the new distinction between the different categories of posting in terms of labour law. I hold the view that the judgment should – at least – have consequences for the unequal treatment in terms of working conditions which were hard to justify before that as well, between temporary agency workers hired-out through a foreign temporary work agency (TWA) and through a domestic TWA. When, for example, a TWA recruits Polish workers for jobs in Sweden, the actual circumstances may not change according to whether the TWA is Polish or Swedish, but the legal situation does. Pursuant to article 3(1) PWD the former group is only entitled to a hard nucleus of working conditions as laid down in legislation and in generally binding collective labour agreements in the host Member State, whereas the latter group is entitled to the entire package.<sup>111</sup>

Currently, amending the PWD is a (too) sensitive matter in terms of politics. Nonetheless, Member States can put a stop to the unequal treatment of posted agency workers and agency workers made available through a domestic TWA. They can use the option available to them in virtue of Article 3(9) PWD to determine that posted temporary agency workers must be employed under the same terms and (working) conditions as domestic temporary agency workers. Thus enabling fully equal treatment of temporary agency work with respect to labour standards, regardless of the place of establishment of the temporary employment undertaking and the place where the work contract with the temporary agency worker was entered into, is valid in terms of substance and also in line with the Temporary Agency Work Directive which had to be implemented on 5 December 2011 at the latest.<sup>112</sup>

Pursuing this pragmatic line of reasoning a little further, it is noteworthy that no action of the European legislator is required either to grant posted agency workers entitlements

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<sup>111</sup> The different entitlements of both groups of temporary agency workers not permanently resident in the host country are perfectly illustrated by the rules laid down in Dutch Collective Labour Agreement for Temporary Agency Workers 2012–2017. See Article 44, 44a, 45, 46 and Appendix IV, at <http://www.abu.nl/publicaties/cao> (accessed 22 April 2014). A difference is made between the rules applying to temporary agency workers who are recruited outside the Netherlands but who are working under an employment contract with a Dutch TWA and temporary agency workers who are deployed from abroad by a foreign private employment agency to a user company in the Netherlands, and whose employment contract is governed by the law of a country other than the Netherlands.

<sup>112</sup> 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 (TAWD). For more details see Schlachter, Chapter 8, this volume. As stated in recital 22 TAWD the above-mentioned provisions of the Directive on the posting of workers take precedence over the TAWD’s provisions. See also COM(2014) 176 final, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, 17.

as fleshed out in Article 7 of Regulation 492/2011.<sup>113</sup> Hence, it would be interesting to see whether the linkage of our **category 2c** with Article 45 TFEU, can bring the forgotten **category 1d** (partially) back to life. In fact, as quoted above, in *Vicoplus* the CJEU re-affirmed that agency workers may be covered ‘by the provisions of Articles 45 TFEU to 48 TFEU and *the European Union regulations* adopted in implementation thereof’ (emphasis added).<sup>114</sup> To test what hidden promises are behind this phrase, there is first and foremost a need for posted workers who dare to claim such (hypothetical) rights before the court. Actually, they may be inspired by a judgment in the context of another Regulation that fleshes out the free movement of workers: Regulation 1408/71. In *Hudzinski and Wawrzyniak*,<sup>115</sup> the claim of a posted worker on a tax-related benefit scheme in the host state was rewarded by the CJEU.

Embedded in a brief survey on how the boundaries between Article 45 and Article 56 TFEU are drawn with regard to the position of posted workers under social security law, this judgment is examined below.

## 8 The position of posted workers under social security law

The (original) intention to include posted workers in the scope of the free movement of workers, is clearly visible in (the legal basis of and the case law based on) Regulation 883/2004 and its predecessor Regulation 1408/71.<sup>116</sup> Nevertheless, a closer look at the sparse case law related to this subject reveals a subtle but unmistakable interference of the law in the free provision of services with the law related to the free movement of workers.

As a general rule, laid down in Article 12 of Regulation 883/2004, for postings up to 24 months, the posted worker remains affiliated to the social security system of his normal country of employment and he and/or his employer will continue to pay contributions into that system. This ‘posting provision’ is a derogation from the main rule in the Regulation, which is the state of employment principle (*lex loci laboris*).<sup>117</sup> Originally, in *Manpower*, an early case of 1970 on the posting of temporary agency workers, the CJEU stated that the posting provision:

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<sup>113</sup> See in more detail above, text to n 56.

<sup>114</sup> Above, text at n 103.

<sup>115</sup> Joined cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* (judgment 12 June 2012, not yet reported) para 68.

<sup>116</sup> According to settled case law the provisions of Regulation 1408/71 must be interpreted in light of the purpose of Article 48 TFEU, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. See, *ia*, Case C-388/09 *da Silva Martins* [2011] ECR I-5737, para 70.

<sup>117</sup> See also Evju and Novitz, Chapter 2, this volume.

‘... aims at overcoming the obstacles likely to impede *freedom of movement of workers* and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organizations (emphasis added).<sup>118</sup>

Thirty years later, in *Fitzwilliam* and in *Plum*, the CJEU expressed the rationale behind the posting provision, as follows:<sup>119</sup>

‘... the aim is *to facilitate the freedom to provide services* for the benefit of the employers which post workers to Member States other than that in which they are established, *as well as freedom of workers* to move to other Member States. These provisions also aim at overcoming the obstacles likely to impede *freedom of movement for workers* and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings (emphasis added).<sup>120</sup>

Hence, in the latter rulings, the CJEU amends the rationale behind the posting provision with reference to the free movement of services, while upholding the (principal) link to the free movement of workers.

Notably, in the context of social security law, relying on both freedoms concurrently is fairly unproblematic if we limit our analysis purely to the interests of posted workers and their employers.<sup>121</sup> Generally, their interests seem to coincide: during short postings, it is usually more attractive for a worker to remain affiliated to the social security system of the country where he normally works than to interrupt this in return for acquiring only small benefits rights under the system of the host country. The complications that a change in the applicable social security legislation may entail could arguably have the effect of deterring a posted worker from exercising his right to free movement of workers. Self-evidently, for the employer, continuation of his contributions to the system of the country of origin is attractive because it avoids costs and ad-

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<sup>118</sup> Case 35/70 *Manpower v Caisse Primaire d'Assurance Maladie, Strasbourg* [1970] ECR 1251, para 10.

<sup>119</sup> For posting longer than two years the general rule is that the worker has to be affiliated to the social security system in the country where he is posted although there are possible exceptions. For a combined account of labour and social security implications of posting, see Verschueren (above n 73) 187-195.

<sup>120</sup> Case C-202/97 *Fitzwilliam*, para 28; Case C-404/98 *Plum*, para 19, with reference to Case 35/70 *Manpower*, para 10.

<sup>121</sup> From the viewpoint of social security institutions (indeed referred to in the cited paragraph from *Manpower* but left out in *Fitzwilliam* and in *Plum*), proper control of the posting provision is extremely problematic and so is the combatting of ‘social dumping’. See Verschueren (above n 73), 190-195.

ministrative complications that might arise as a result of a change in the applicable national legislation.<sup>122</sup>

Remarkably, the *Hudzinski and Wawrzyniak* judgment shows how posted workers may despite their affiliation to sending state law, under circumstances still benefiting from non-contributory benefit schemes in the host state where this does not conflict with the interests of their employers in exercising the freedom to provide services. *Hudzinski and Wawrzyniak* case involves two Polish nationals who were respectively posted and seasonally employed in Germany. Under German law, a person who is not permanently or habitually resident in Germany is entitled to child benefits if he is subject to unlimited income tax liability in Germany. After having requested that they be made subject to unlimited income tax liability in Germany, both workers applied for child benefit of € 154 per month per child to be paid for the period during which they worked in Germany.<sup>123</sup> Their requests were refused on the ground that Polish law instead of German law had to apply, in accordance with Regulation 1408/71.

The CJEU ruled that EU law does not prevent Germany from granting both workers child benefits although it is not, in principle, the competent Member State under Regulation 1408/71.<sup>124</sup> Earlier, in *Bosmann* the CJEU had already decided that Germany, even if it is not competent under Regulation 1408/71, has nonetheless the power to grant family allowances to a migrant worker under national law.<sup>125</sup> However, unlike the facts in *Bosmann*, Mr Hudzinski and Mr Wawrzyniak had not suffered any legal disadvantage by reason of their temporary work in Germany because they remained entitled to family benefits of the same kind in the competent Member State (Poland). Also unlike *Bosmann*, neither they nor their children habitually resided within the territory of Germany. So in essence the question was whether the judgment in *Bosmann* would also hold for posted and seasonal workers. The CJEU answered in the affirmative, reasoning that the differences with *Bosmann* were of less importance than the fact that the granting of German child benefits would contribute to improving the living standards and

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<sup>122</sup> In Joined cases 62/81 and 63/81 *Seco*, the CJEU considered legislation that imposed social security contributions on foreign service providers indirectly discriminatory because these contributions did not lead to any social advantage for their posted workers. See also M Houwerzijl and F Pennings, ‘Double charges in case of posting of employees: the Guiot judgment and its effects on the construction sector’ (1999) 1 *European Journal of Social Security* 93.

<sup>123</sup> According to the information in this case, the Polish child benefits amounted to approximately 12 euros per month.

<sup>124</sup> Joined cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, para 68.

<sup>125</sup> Case C-352/06 *Bosmann* [2008] ECR I-3827, para 32.

conditions of employment of the two Polish (posted) workers,<sup>126</sup> and hence to the free movement of workers.

Germany had argued that it would not be in line with the rationale behind the ‘posting provision’ in Regulation 1408/71 to grant German child benefit in this situation. Pointing to the fact that the receipt of the German child benefit was not in any way made dependent on employers’ obligations such as contributions or administrative formalities, the CJEU rejected this stance; the applicability of the German child benefit scheme to a posted worker would not complicate the exercise of the freedom to provide services by his employer.<sup>127</sup>

The possible impact of this judgment for posted workers depends first on the existence of similar non-contributory benefit schemes that do not require permanent or habitual residence,<sup>128</sup> and second on the creativity and empowerment of posted workers to find and claim such benefits. Perhaps some of these benefits could also or even rather be classified as a social or tax advantage under Article 7(2) of Regulation 492/2011. In light of the *Vicoplus* judgment which clearly ‘repairs’ the link between posted agency workers and the free movement of workers, it would be extremely interesting to see what would happen if such a worker tried to claim eligibility with reference to recital 5 of Regulation 492/2011.<sup>129</sup>

## 9 Resetting or transcending blurring boundaries? A summarizing conclusion

With a view to enlarging on the scope and perspectives dealt with by Evju and Novitz in Chapter 2, this chapter identified and examined the different regulatory regimes under which labour, in particular employed labour, can move across borders within the EU. EU nationals may look for work in other Member States, using their right to free movement of workers, go there as self-employed or be posted by an employer in their home state. These modalities are governed by three legal regimes. The differences in labour costs and labour mobility opportunities attached to the regimes triggered a pro-

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<sup>126</sup> Joined cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, para 57, under reference to the purpose of Article 48 TFEU and the first recital in the preamble to Regulation 1408/71.

<sup>127</sup> Joined cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, paras 82–85.

<sup>128</sup> Especially tax-based criteria might be relatively easy to fulfil. In case of postings beyond 183 days income tax has often to be paid in the country where the worker is posted.

<sup>129</sup> In Case C-57/96 *Meints*, para 50, and in Case C-337/97 *Meeusen* [1999] ECR I-3289, para 21, the CJEU deduced from this recital (in the former Regulation 1612/68) read in conjunction with Article 7(2), that a Member State may not make the grant of a social advantage within the meaning of Article 7 of the Regulation dependent on the condition that the beneficiaries be resident within its territory.

cess which may be labelled ‘regime shopping’. The crucial role of private international law in this development was highlighted.

A central theme in the legal analysis was the blurred demarcation between the movement of migrant workers under Article 45 TFEU and the movement of posted workers under Article 56 TFEU. An exploration of the original setting of the boundaries between Article 45 and Article 56 revealed that once all EU workers, including posted workers, were deemed to be covered by Article 45. Subsequently, *Rush* and the PWD changed the original setting, by replacing the movement of posted workers under Article 56. After analysing the setting and resetting of boundaries, we turned to the (possible) criteria underpinning the new demarcation line.

One way of demarcating is the (intended) duration of labour mobility: is the move of a permanent or of a temporary character? However, it was observed that this criterion fails to clarify the boundaries. In fact, Article 45 TFEU includes both permanent and temporary workers’ mobility, whereas the categories of temporary movement under Article 56 TFEU may in practice include situations that tend to have a more permanent character than desirable, especially from the viewpoint of workers’ protection. Also, both from an internal market perspective and from a private international law perspective the predominant notion of ‘temporariness’ is still unclear and impractical: everything is left to an assessment on a case-by-case basis without any (rebuttable) limitations in time. Clearly, this does not help in creating ‘sustainable’ boundaries between the two legal regimes for workers’ mobility within the EU.

Another way is to take the ‘initiator’ of the labour mobility as leading criterion: is it the employee, or the employer who initiates the cross-border movement of the employee? The former situation may be labelled ‘active’ movement, the latter ‘passive’ movement of workers. As was clarified in *Vicoplus* the feature distinguishing between active and passive movement of workers is not the place where they sign their employment contract, but whether they have access to the labour market in the host state. In this respect, the CJEU confirmed that posted agency workers join the labour market of the host country, which implies that Article 45 TFEU is involved, notwithstanding their employment contract with a foreign TWA. An undertaking engaged in the making available of labour, although a supplier of services within the meaning Articles 56 and 57 TFEU, carries on activities that 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. Importantly, the posted agency worker carries out his tasks under the control and management of the user undertaking.

From *Vicoplus* a new distinction between these ‘labour-only’ posted workers and workers posted ‘secondary and ancillary to the service’ seems to emerge. This two-tier distinction clearly deviates from the categorization laid down in Article 1(3) PWD. That provision defines *three* situations of posting within the framework of the provision of

services: (a) the sub-contracting of workers (for example in the construction sector), (b) intra-concern or intra-group secondments (the expatriation of workers, for example key personnel) and (c) the cross-border hiring out of workers by temporary employment agencies.

As confirmed in *Vicoplus*, the first group is still deemed to be covered exclusively by Article 56 TFEU as it embodies the archetypical *Rush* posting: the service provider moves with his workforce for a short period to the host state to carry out a service. There is no transfer of authority as regards the carrying out of the tasks assigned to the workers, and the movement of the workers is secondary and ancillary to a provision of service of a different nature, in the construction sector for instance. In my view, to strengthen the rationale behind passive movement, it would be best to make reimbursement of travel costs obligatory for these 'genuine' posting situations.

Regarding the third group of posted agency workers, I hold the view that their link to Article 45 TFEU as established in *Vicoplus* cannot be without consequences for their labour law position. It is difficult if not impossible to legitimate the unequal treatment between posted agency workers and agency workers under contract in the host state. Looking for a solution, from a dogmatic point of view, deleting Article 1(3)(c) PWD or broadening of the legal base of the PWD with Article 45 TFEU would be interesting options. However, in the current political 'stalemate' with regard to the PWD, these options must be rejected as nostalgic and/or utopian. Instead, it may be best to 'transcend' the effect of the boundaries, by choosing a pragmatic piecemeal approach. First and foremost, the option to impose host state law in full, as laid down in Article 3(9) PWD should be used. This will close the gap in labour standards between both groups of agency workers, which is a solution that also fits with Article 5 of the Temporary Agency Work Directive. Second, it was considered whether the pragmatic solution could also include entitlements under Regulation 492/2011. Theoretically, this may be conceivable, but in practice, all depends on an active litigation strategy of (or on behalf of) posted agency workers. In search of inspiring examples, we made a short excursion to the position of posted workers under Regulation 1408/71 and Regulation 883/04 on the coordination of social security law. Interestingly, in this context, a posted worker was recently rewarded for his efforts to claim host state tax-related benefits. In *Hudzinski and Wawrzyniak*, the CJEU opened the door for granting non-contributory benefits to posted workers in the host state although this is not, in principle, the competent Member State under Regulation 1408/71. In this judgment, the CJEU emphasized that the granting of such benefits would contribute to improving the living standards and conditions of employment of the posted worker, and hence to the free movement of workers, whereas it does not conflict with the interests of their employers in exercising the freedom to provide services.

What about the second group of intra-concern posting? In *Vicoplus* the CJEU also observed that there are situations in which the main activity of the service provider and the tasks carried out by the worker in the host Member State do not correspond. In the

words of the CJEU, another main activity of the employer does not preclude that the posted worker has been made available in compliance with the characteristics of the third category of posting. Hence, with regard to the second category host state authorities should be encouraged to investigate whether allegedly intra-concern posting is in reality used to make labour available. If so, the workers concerned should ideally be ‘relabelled’ posted agency workers. Although the CJEU gave no clue on that, in my view the same approach would be sensible with regard to alleged situations of subcontracting (the first category), whereas in reality labour-only subcontracting is at stake.

True enough, this pragmatic piecemeal approach will be neither quick, nor make it easier to explain the boundaries between workers’ mobility under Article 45 and Article 56 TFEU, because they remain as complicated. Also, some loose ends remain, such as the problem of the, in practice unlimited, duration of posting. However, the biggest advantage of the pragmatic approach, if effectively applied and enforced, would be a loss of interest in ‘regime shopping’ on the demand side because that would not be so lucrative anymore. Hence, the piecemeal approach may help to restore ‘fair competition’ on the internal market for services. That may be assessed as an important step in the right direction, at least if we agree with Däubler that:<sup>130</sup>

‘... competition based on better performance’ and ‘competition based on worse working conditions,’ are two different things in reality within the meaning of the Treaty; they are not on an equal footing. The first one is a fundamental principle of the Community, the second one is potentially in contradiction with legal principles of the EC and therefore a ‘revocable’ phenomenon.’

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<sup>130</sup> W Däubler, ‘Posted Workers and Freedom to Supply Services’ (1998) 27 *Industrial Law Journal* 266.

# Setting Wage Floors in Open Markets: The Role of the Social Partners in Europe's Multilevel Governance

*Jon Erik Dølvik, Line Eldring and Jelle Visser*

## 1 Introduction

The aim of this chapter is to account for the variation in industrial relations responses to the challenges posed by the integration of European markets for labour and services. The first part briefly reviews the role of the trade unions and employers in the evolution of the EU regime for regulating cross-border work since the early 1990s. The second part analyses how national governments and employers have responded to union demands for 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.

Our analysis has some self-imposed limits; first, in the choice of issues. Although embedded in a review of the broader impact of European integration on labour since the mid-1980s, our analysis is concerned solely with the labour market effects of, and the regulatory responses to, migration and posting of workers. The time frame, second, is post-1989 or the re-uniting of the Eastern and Western halves of Europe, culminating in the EU enlargements of 2004 and 2007. We compare the challenges and responses of the early 1990s, when the effects of deeper market integration, the convergence process in the Economic and Monetary Union (EMU) and the immediate consequences of lifting the Iron Curtain became apparent, with the challenges and responses following the recent EU enlargements. Third, we deal only with the effects on, and the policies of destination countries, without considering what migration has done, or might do, to industrial relations and unions in sending countries.<sup>1</sup> Finally, we have limited our comparative analysis to host countries located, roughly speaking, north of the Alps and west of the Oder-Neisse, comprising Austria, Belgium, Denmark, Germany, Finland, France, Ireland, Iceland, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.<sup>2</sup> Arguably, these are the 'rich' EU/EFTA states with the most elaborate labour standards, wages, and industrial relations systems that have become attractive

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<sup>1</sup> See eg M Kahancová and ME Kaminska, 'Emigration and labour shortages: An opportunity for trade unions in the New Member States?' (2011) 17 *European Journal of Industrial Relations* 189; G Meardi, *Social Failures of EU Enlargement. A Case of Workers Voting with Their Feet* (Routledge 2012).

<sup>2</sup> We have omitted Luxembourg, mainly for reasons of comparability given its large non-resident workforce.

destinations for migrant labour and posted workers originating in Central and Eastern Europe (CEE) and subject to low cost competition.

Although the challenges of market integration, migration and low cost competition may look the same everywhere and have encouraged similar debates in the countries we study, we do not expect similar responses or convergent outcomes. One of the key themes in Crouch's landmark analysis of the different state and law traditions in European industrial relations<sup>3</sup> was that a similar external shock, such as opening the borders to foreign competition or a sudden rise in labour migration, is unlikely to produce similar responses. Reflecting differences in union power and capacity to build intra- and cross-class coalitions, as well as differences in traditions of state intervention, collective bargaining and industrial action, we expect variation in national responses, both in the methods used to establish a wage floor, and in the degrees of coverage and success. But these differences are not set in stone. Indeed, one of our themes is how the responses after 2004 differ from those of the early and mid-1990s. Depending on the magnitude of the 'migration' and 'posting' issue itself, the success or failure of earlier policies, shifts in power and coalition building, as well as possibilities for domestic and cross-border learning, key actors within countries may change course and bring in elements that seem 'alien' to their tradition of industrial relations or collective labour law. The result may be a 'revised diversity'.<sup>4</sup> We will argue that revision of diversity in industrial relations systems applies to our case, mainly as an effect of the limitation of regulatory means imposed by the decisions of the European Court of Justice (now CJEU), with its bias favouring state regulation over self-regulation.

The first part of the chapter provide an overview of labour's responses to European market integration and the development of a European regime of worker minimum rights and labour relations. The next section reviews developments in posting and analyses national responses and strategies to maintain or establish national minimum wage floors. The country cases include liberal market economies (United Kingdom, Ireland), large continental countries (France, Germany), small continental states (the Netherlands, Belgium, Switzerland, Austria) and the Nordic countries. The final parts provide a comparative analysis of the pattern of national responses and its determinants, followed by concluding remarks.

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<sup>3</sup> C Crouch, *Industrial Relations and European State Traditions* (OUP 1993).

<sup>4</sup> C Crouch, 'Revised Diversity: From the Neo-liberal Decade to Beyond Maastricht' in JJ Van Ruysseveldt and J Visser (eds), *Industrial Relations in Europe. Traditions and Transitions* (Sage 1996).

## 2 Market integration and labour's responses

The analysis of labour's attempts to (re-)establish effective wage floors in response to the free movement of workers and services cannot be isolated from the challenges that emanated from the creation of the Single Market (1992) and the Single Currency (1999). The '1992' programme moved significantly beyond the Treaty of Rome by forcing member states not only to remove non-tariff barriers to trade but also to eliminate domestic policies that inhibited intra-Community competition. Opening up their markets to each other was seen as a way to reduce regulation and make Europe fit for global competition. The Single European Act 'ratified a "move to the market", that was a reaction against the poor economic performance of the 1970s and the activist state intervention associated with it'.<sup>5</sup>

Add to this the structural reforms that are, or should have been, the consequence of the decision, codified in the Maastricht Treaty of 1992, to create a monetary union from among a group of rather diverse economies. With no EU capacity for fiscal redistribution, very limited migratory streams and no longer able to set currency and interest rates, the adjustment to economic imbalances has to come mainly from the supply side, through policies increasing the 'efficiency' of the markets for labour, services, capital and goods.<sup>6</sup>

Market and monetary integration have changed the fundamentals for labour. Entailing both promises and threats, the question was whether it would bring more growth and employment, as suggested in various Commission and expert reports, or rather result in fiercer regulatory competition with downward pressures on wages and standards. Two well-known American labour specialists took the second view and warned that the elimination or attenuation of (national) state power to place restrictions on (international) markets

'... could beset the European unions with the same dilemma U.S. unions have faced: either to create more highly centralized structures able to cope with unified markets (as the U.S. unions were able to do in the nineteenth century and again in the 1930s) or, lacking that capacity, to suffer decentralization and organizational loss (as happened to the U.S. unions in the 1970s and 1980s under the impact of legal deregulation and intensified international competition)'.<sup>7</sup>

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<sup>5</sup> PA Hall, 'The Evolution of Varieties of Capitalism in Europe' in B Hancké, M Rhodes and M Thatcher (eds), *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complementarities in the European Economy* (OUP 2007) 63.

<sup>6</sup> B Eichengreen, *The European Economy since 1945* (Princeton University Press 2007); E Jones, *The Politics of Economic and Monetary Union. Integration and Idiosyncrasy* (Roman & Littlefield 2002).

<sup>7</sup> L Ulman and M Reder, 'Unionism and Unification' in L Ulman, B Eichengreen and WT Dickens (eds), *Labor and Integrated Europe* (The Brookings Institution 1993) 38.

European labour was more inclined to adopt the first view and bought into the idea of more growth and employment, with stronger EU-level safeguards for protection. With few and minor exceptions, Europe's mainstream social democratic parties and trade unions supported both the 1986 Single European Act and the 1992 Maastricht Treaty, judging the advantages of deeper integration to be greater than the threats. They pleaded for a stronger focus on growth, a more relaxed monetary stance and a stronger 'social dimension' in the European integration process.

Although their European-level organizations were strengthened during this time, European trade unions did not bet the house on centralization and building up their European-level organizations and policies.<sup>8</sup> Instead they kept playing their different national cards. The fact that the then twelve member states, except Britain and Ireland, were coordinated market economies<sup>9</sup> with a strong role for both unions and employers' associations and fairly developed systems of social protection, as well as the fact that cross-border labour mobility was miniscule compared with the United States, may have directed union action towards attempts to repair at the national level whatever was lost, or threatened, at the European level. Moreover, what deep integration would actually involve for national labour relations was not at all clear.

The single market and EMU initiatives contained many ambiguities and had, like most leaps forward in European integration, only been possible by shifting difficult decisions to the future.<sup>10</sup> In particular, the opening of the market for services was put off to an undefined future.<sup>11</sup> Similarly, the full force of the 'delayed' agendas of structural reform and increased labour market flexibility, inherent in the EMU set-up, became apparent only during the recent financial and economic crisis. At this time labour also felt the more intense pressures of labour migration and cross-border sub-contracting following the 2004 and 2007 enlargements. The integration of ten ex-Communist, very poorly performing economies, still in the process of reform, with wages averaging one-fifth of German wages, and high and increasing levels of unemployment, was bound to produce significant migration streams, although this was downplayed in Commission documents. In combination with growing relocation of business and domestic labour market flexibilization, with a greater share of temporary work and a liberalized market for

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<sup>8</sup> J Visser and B Ebbinghaus, 'Making the Most of Diversity? European Integration and Transnational Organization of Labor', in J Greenwood, J R Grote and K Ronit (eds), *Organized Interests and the European Community* (Sage 1991); JE Dølvik, *Redrawing boundaries of solidarity? ETUC, social dialogue and the Europeanisation of trade unions in the 1990s* (ARENA-report 5/97, Fafo-report 238, 1997).

<sup>9</sup> 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).

<sup>10</sup> A Menon, *Europe. The State of the Union* (Atlantic Books 2008) 51.

<sup>11</sup> Eichengreen (above n 6) 344.

temporary work agencies, this made defending an effective wage floor at once more urgent and more difficult.

In the unions' responses to deeper European integration we can, in fact, discern three patterns. The first has been based on political lobbying and coalition building in pursuit of a stronger minimum floor of rights throughout the EU (the 'social dimension'). The second pattern is a variant, still seeking further centralisation, but manifesting itself through promoting European-level collective bargaining and coordination of negotiations at the level of countries, sectors and companies across Europe. The third pattern goes in another direction and has relied on political pressure, collective bargaining efforts and coalition building at the national level in an attempt to restore some of the lost or disappearing national capacity to define policies and standards. Where this is combined with attempts to repatriate competences and powers at the EU level to the member states it might be called 'renationalization'. A variant of this is evidently what Erne has called the 'democratic-national' strategy, which he associates with deliberate union attempts to challenge the predominantly market-liberal thrust of EU policies by mobilizing issue coalitions with NGOs and civil society associations on the ground in a 'bottom-up' approach to influence and democratize EU policies.<sup>12</sup>

Clearly, the three patterns or strategies are not mutually exclusive.<sup>13</sup> Success in building a European floor of rights may help to maintain the integrity and viability of national systems and it may include elements that facilitate transnational bargaining and coordination. On the other hand, if standards and policy capacities can be successfully defended, or even expanded, at the national level by means of the third strategy, unions have less reason to invest in transnational bargaining or influencing EU policies.<sup>14</sup> Moreover, the third strategy, based on national capacities and coalitions, is likely to produce different results in different countries; success in some and failure in others will increase the already difficult task of bridging interest differences and finding common ground for carrying on with coordinated political and bargaining strategies at European level.

The three strategies also differ in the type of external supports and coalition efforts. The first strategy relies most on state support, at both the European and national levels, for bringing about the coalitions needed to obtain the necessary qualified majority in the Council and support of the European Parliament (EP). It also builds most clearly on a coalition with the Commission, as the agency that has the prerogative of initiative in EU

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<sup>12</sup> R Erne, European Unions. *Labour's Quest for a Transnational Democracy* (Cornell University Press 2008).

<sup>13</sup> JE Dølvik and J Visser, 'ETUC and European Social Partnership: A Third Turning Point?' in H Compston and J Greenwood (eds), *Social Partnership in the European Union* (Palgrave 2000).

<sup>14</sup> G Ross and A Martin, 'Through a Glass Darkly' in A Martin and G Ross *et al*, *The Brave New World of European Labour. European Trade Unions at the Millennium* (Berghahn Books 1999).

legislation. The second strategy, based on transnational bargaining, supported by the social dialogue proceedings of Articles 154–155 TFEU,<sup>15</sup> may also yield results, but the reality is that European employers will move only under political pressure and that unions often find it hard to define a common strategy.<sup>16</sup> For the third, national strategy the unions need most of all effective coalitions with employers. These can be facilitated or supplemented by the state, or indeed develop under the ‘shadow of hierarchy’.

In this chapter our main objective is to analyse the diversity, and effectiveness, of the third or national response. However, as these responses or strategies partly interact, helping or hindering each other, we will first briefly review what has come out of the first and second responses, aimed at creating a European floor of minimum rights and frameworks for transnational bargaining and coordination.

### **3 The emergence of a European regime of minimum rights and labour relations**

#### *3.1 Overview*

In the 1990s, facilitated by the conditions for qualified majority voting in the Council as defined in the Maastricht Treaty and the annexed Agreement on Social Policy, labour achieved political support for regulating a number of long-standing labour market issues in the form of EU minimum rights directives. In accordance with the subsidiarity principle, and the Treaty of Rome, wages and collective action were excluded from EU legislative action (Article 153(5) TFEU). Among the most important achievements for the trade unions were the EU directives on consultation and information rights in transnational undertakings/European Works Councils (1994) and the framework agreements on parental leave (1995), part-time work (1997) and fixed-term employment (1999) reached between European unions and employers and implemented through EU directives. Other important directives, relevant also for migrant and posted workers, are the two 1989 framework directives defining employers’ responsibility for the health and safety of workers, the 1991 directive obligating employers to inform employees of the conditions applicable to the contract or employment relationship (1991), and the 1993 working time directive, revised in 2003. Another milestone was the Posting of Workers

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<sup>15</sup> Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47

<sup>16</sup> K Ahlberg, ‘A Story of Failure – But Also of Success: The Social Dialogue on Temporary Agency Work and the Subsequent Negotiations between the Member States on the Draft Directive’, in K Ahlberg *et al*, *Transnational Labour Regulation. A Case Study of Temporary Agency Work* (Peter Lang 2006).

Directive (PWD)<sup>17</sup> which in 1996 was adopted on the basis of Treaty provisions regarding free movement of services.<sup>18</sup> Except for enactment of the directive on temporary work agencies in 2008 – which had been blocked since the breakdown of social partner negotiations in 2001 – very little workers’ rights legislation was adopted in the 2000s. With the Lisbon agenda and eastward enlargement, the political focus shifted to completing the single market and opening up the services market (see below).

The impact of EU labour legislation has been contested. The directives of the 1990s could pass the Council only after the Commission gave up on harmonization and accepted a more flexible approach, and after diluting many of the original proposals in order to overcome the opposition of employers and intransigent Member States. According to Menon ‘many EU “social policies” are little more than declaratory initiatives intended to belie the impression of market creation as a neo-liberal, deregulatory affair’.<sup>19</sup> Streeck has emphasized the ‘neo-voluntarist’, non-binding character of many EU social policies and stresses that the main action is at the national level, with EU directives, for instance on Works Councils or posting, creating an interface between national systems, in some cases allowing them to expand their coverage to extra-territorial situations or activities.<sup>20</sup> From his British perspective, Brown gives EU social policies a higher mark, ‘partial but impressive’, adding that Europe’s labour markets ‘would surely be a harsher place without the EU’s legislative innovations’.<sup>21</sup>

The second response, transnational bargaining, has been far from impressive. Through the Maastricht Treaty provisions (Articles 154 – 155 TFEU), Europe’s trade unions and employers’ associations obtained the right to be consulted on social policy legislation and have become, in principle, co-regulators of the European labour market by means of negotiating agreements between them. Implementation happens either by jointly asking the Commission to convert these agreements into EU legislation (as in the case of parental leave, part-time work, fixed-duration work and a fair number of sectoral agreements), or in accordance with ‘the procedures and practices specific to management and labour and the Member States’. The second method has been used as a means to propagate common rules and ‘best practices’.<sup>22</sup> The fact that European unions and employers’

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<sup>17</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>18</sup> Evju and Novitz, Chapter 2, this volume.

<sup>19</sup> Menon (above n 10) 119.

<sup>20</sup> W Streeck, ‘Neo-Voluntarism: A New European Social Policy Regime?’ (1995) 1 *European Law Journal* 31.

<sup>21</sup> W Brown, ‘Building Social Partnership at the European Level’ in M Biagi (ed), *Towards a European Model of Industrial Relations?* (Kluwer Law International 2001) 34.

<sup>22</sup> On telework (2002), work-related stress (2004), sexual harassment (2007) and inclusive labour markets (2010), and some sectoral agreements, mainly on training, certification and health and safety standards.

organizations have been willing and able to negotiate EU framework agreements, and to take responsibility for implementation, has been interpreted as the start of EU collective bargaining. However, it is more akin to standard setting by means of ‘shadow legislation’, and the employers’ willingness to participate tends to depend on the possibility of avoiding or pre-empting hard legislation. The bargaining power of the unions remains contingent on the likelihood that such a political initiative will pass the Council (and the EP). In its Social Agenda 2006–2010, the Commission proposed an optional framework for transnational collective bargaining in sectors and companies. This was welcomed by the European Trade Union Confederation (ETUC), but BusinessEurope, the European organization of private sector employers, argued against any governance tool that facilitates bargaining above the national level and might contribute to centralisation. The Commission duly dropped the proposal.<sup>23</sup>

Attempts at wage coordination, meant to defend real wage growth against alleged beggar-thy-neighbour wage policies, evolved in the context of Economic and Monetary Union (EMU). Starting in 1993, the European Metalworkers Federation (EMF) has been quite active in this field, but the best it can do is to agree on common principles and information exchange aimed at influencing the policies of national affiliates through ‘soft coordination’. Its efforts have not prevented a decade of severe wage restraint, based on widespread concession bargaining in the metal sector in the leading economy, Germany. This has actually put more pressure on wages in other countries, where the demand for concession bargaining through opening clauses or derogation from standards has become widespread, and is now also voiced by the European Commission. In the recent Euro-plus Pact, member states have been asked to review their systems of **collective bargaining, recommending more decentralized wage setting, local opening clauses, more pay flexibility, revision of mandatory extension, abolishment of indexation mechanisms, and alignment of wage setting with productivity growth, especially in the public sector.** There is an obvious tension with Article 153 TFEU which says that EU policy competences do not apply to pay.<sup>24</sup>

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<sup>23</sup> M Keune and W Warneck, ‘An EU framework for transnational collective bargaining: an opportunity for European trade unions?’ (2006) 12 *Transfer – European Review of Labour and Research* 637.

<sup>24</sup> For example, in the Commission recommendation to Sweden 2012 (COM(2012) 328), it was suggested that Sweden should ‘encourage greater wage flexibility, particularly at the lower ends of the wage scale’, but after protests from the Swedish unions, which won support from the government, this was erased in the Council with reference to the fact that wage setting in Sweden is the prerogative of the social partners. See K Ahlberg, ‘Ministerrådet avvärjde inblandning i svensk lönebildning’(2012) *EU & Arbetsrätt* 2, 6. See also J Visser, *Wage bargaining institutions – from crisis to crisis*. Report commissioned by DG ECFIN (European Commission 2013); T Schulten and T Müller, ‘A new European interventionism? The impact of the new European governance on wages and collective bargaining’ in D Natali and B Vanhercke (eds), *Social developments in the European Union* (ETUI 2013).

As for transnational union coordination on migration, the German building union IG BAU tried in 2004 to establish a European Migrant Workers Union (EMWU).<sup>25</sup> The attempt failed, however, because other unions in Germany and Europe did not support the idea of a separate, transnational union for migrants, which could easily engender jurisdictional disputes with existing national unions.<sup>26</sup> This was illustrated in a case in which EMWU staff supported Polish workers subject to malpractice in a building project at a Finnish nuclear plant, causing a turf war with the responsible Finnish union. It also proved difficult to recruit and retain members among migrants. The project was transformed in 2009 into an information and service point for migrant workers run in cooperation with Polish unions, which subsequently has been lined up with a joint, web-based European project coordinated by the European Federation of Building and Wood Workers (EFBWW). The aim of the European Construction Mobility Information Network,<sup>27</sup> which involves unions from about half of the EU/EFTA member states, is to provide information and support for migrant labour in construction. The European social partners in construction have, with Commission support, also established a website to inform posted workers about their rights and available services in different countries.<sup>28</sup> These projects have in many instances been supplemented by national initiatives to give advice and support to migrant workers, frequently in bilateral cooperation with the main unions in Poland.<sup>29</sup>

Finally, there are bargaining activities in multinational companies, involving European works councils and, more recently, the European trade union federations.<sup>30</sup> Pressure on MNCs to ensure compliance with international labour standards has resulted in a number of international framework agreements.<sup>31</sup> The only known example of such an agreement remotely dealing with international staffing and migration was in the case of a merger between two MNCs in France. This agreement guaranteed core workers with high levels of protection their jobs abroad.

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<sup>25</sup> M Kahmann, 'The posting of workers in German construction industry: responses and problems of trade union action' (2006) 12 *Transfer – European Review of Labour and Research* 183.

<sup>26</sup> I Greer, Z Ciupijus, and N Lillie, *Organizing Migrants in the Enlarged EU: A Case Study of the European Migrant Workers Union* (CERIC Working Paper 13 2011).

<sup>27</sup> See: <http://ecmin.efbww.org>.

<sup>28</sup> See: <http://www.posting-workers.eu>.

<sup>29</sup> G Meardi, 'Union immobility? Trade unions and the freedoms of movement in the enlarged EU' (2012) 50 *British Journal of Industrial Relations* 99.

<sup>30</sup> T Müller, HW Platzer and S Rüb, 'European collective agreements at company level' (2011) 17 *Transfer – European Review of Labour and Research* 217.

<sup>31</sup> L Riisgaard, 'International Framework Agreements: A New Model for Securing Workers Rights?' (2005) 44 *Industrial Relations: A Journal of Economy and Society* 707; C Nifourou, 'International Framework Agreements and Industrial Relations Governance: Global Rhetoric versus Local Realities' (2011) 50 *British Journal of Industrial Relations* 352.

### 3.2 *Social dialogue in the field of labour migration and posting*

EU-level social dialogue and negotiations have, with few exceptions, shown very limited progress in the domain of labour migration and posting of workers. The reason is, presumably, that setting the conditions for cross-border supply and hiring of labour touches on some of the most sensitive conflicts of interest built into the European project; that is, how to handle the inherent tension between the EU principles of free movement, equal treatment and sovereign rights of member states, or civil society, in matters of association, industrial action, collective bargaining and wage setting, recognized in the Treaties.<sup>32</sup> Besides the usual conflicts of interest between employers and unions, such issues highlight divisions of interest between organized actors of different countries (high vs low-cost), different sectors (home vs export market oriented) and state vs society (autonomy from state interference)

#### 3.2.1 The Posting of Workers Directive: the impact of cross-class coalitions

The complex pattern of interests involved in EU regulation of cross-border work showed up in the process leading to adoption of the Posting of Workers Directive.<sup>33</sup> The peak organization of private employers (BusinessEurope, at that time called UNICE), dominated by representatives of the export-oriented manufacturing industry, preferred a general adoption of the Rome Convention rather than a new directive,<sup>34</sup> and wanted any regulation to be as light-touch as possible. By contrast, the European Construction Industry Federation (FIEC), representing the companies most exposed to foreign low-cost competition in home markets, entered into a coalition with the European Federation of Building and Wood Workers (EFBWW) and lobbied for a more restrictive approach. In response to the launch of the single market project and the rise in cross-border posting, the EFBWW had, in accordance with ILO Convention No. 94 and the David Beacon Act in the United States, advocated a social clause in procurement rules for public works to guarantee compliance with working conditions and collective agreements in the country where the work is carried out.<sup>35</sup> This idea had support in the European Parliament (EP), but since the Council opposed the idea of an obligatory clause, the Commission signalled in its 1991 Action Programme based on the Charter of Fundamental Social Rights of Workers that it would instead propose a specific directive on posting of workers. The intention was, as described in Chapter 2, this volume, by

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<sup>32</sup> JE Dølvik and J Visser, 'Free movement, equal treatment and workers' rights: Can the European Union solve its trilemma of fundamental principles?' (2009) 40 *Industrial Relations Journal* 491.

<sup>33</sup> Evju and Novitz, Chapter 2, this volume.

<sup>34</sup> J Arnholtz, *Slowing down Social Europe? The role of coalitions and decision-making arenas. Report 4 – the posting of workers issue* (FAOS Research Paper 125 2012). See also J Arnholtz, 'A legal revolution' in the European field of posting? *Narratives of uncertainty, politics and extraordinary events* (University of Copenhagen, 2013).

<sup>35</sup> J Cremers and P Donders, *The free movement of workers in the EU*. CLR Studies 4 (Reed Business Information 2004).

Evju and Novitz, to strike a balance between promotion of free movement of services and protection of workers.

With the purpose of influencing the outcome, the social partners in construction initiated an informal dialogue (formalized from 1992) and in 1993 issued a Joint Opinion on the first draft of the Posting of Workers Directive. Representing the main sector of cross-border subcontracting, FIEC and EFBWW came to play a central role in the decision-shaping process leading to the directive. Acting as experts for the Commission, for the Economic and Social Committee and for the Social Committee of the EP, they emphasised the principle of equal treatment with host country workers and warned against ‘distortion of competition’, abuse and social dumping.<sup>36</sup> The Joint Opinion of FIEC and EFBWW was also put before the Social Council of Ministers and apparently caused the French and German governments to change positions. With the ETUC behind it, the EFBWW played an active role in lobbying key governments,<sup>37</sup> the Italian Presidency and the German Commissioner for the Internal Market who was in charge of the dossier.<sup>38</sup> Hence, when the final deal was brokered under the Italian Presidency by Labour Minister Treu, this was seen as a victory by the EFBWW and ETUC and as proof that organized labour can be quite influential at EU level when it is capable of building alliances with key governments and stage cross-class, sectoral coalitions that divide the employer side.<sup>39</sup> As a trade unionist engaged in the process recalled: ‘To begin with, only the Belgian government and the Commission backed the idea of a directive, but then we beat the rest of them into place one by one.’<sup>40</sup> In the following

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<sup>36</sup> J Cremers, ‘Free movement of services and equal treatment of workers: the case of construction’ (2006) 12 *Transfer – European Review of Labour and Research* 167.

<sup>37</sup> Besides important ties with the German government, via its German affiliate, the EFBWW coordinated closely with the governments of the Nordic countries, where Denmark and Sweden (as a new member state together with Finland from 1995) had received strong assurances from the Commission that their autonomous systems of collective bargaining and wage setting would not be prejudiced by the single market regime.

<sup>38</sup> Conversation with former secretary general, Jan Cremers, EFBWW, August 2007. The Commissioner for Internal Market affairs was in charge because the directive, partly in order to avoid a veto by the British and Portuguese governments, was proposed on the basis of Treaty provisions for free movement of services (and not on Treaty provisions concerning workers’ rights, which required unanimity).

<sup>39</sup> In DG Internal Market, however, the outcome was seen as breached the free movement logic of the single market (interview in JE Dølvik and AM Ødegaard 2009, ‘The Struggle over the Services Directive: The Role of the European Parliament and the ETUC’ in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013) 359). While the unions came to regard the PWD as a cornerstone of the EU *social acquis*, opponents in DG Internal Market looked for ways to redress the effects of this, and had their day with the ‘Bolkestein’ draft services directive of 2004 (COM (2004) 2 final, Proposal for a Directive on services in the internal market).

<sup>40</sup> Arnholtz (above n 34).

years the social partners in construction managed to retain their function as an expert advocacy coalition on posting issues and sponsored several joint studies on the implementation and enforcement of the directive, on undeclared work, health and safety and portability of supplementary pension rights.<sup>41</sup> By contrast, posting did not feature in the social dialogue in any other sectors, or at the inter-professional level, during this period (1990–2004).

### 3.2.2 Temporary agency work: breakdown of social partner negotiations

Regulating temporary agency work was the next issue to raise tensions between labour market regulation and product market liberalization. In 1999 the Commission invited BusinessEurope,<sup>42</sup> CEEP, which represents public sector employers, and ETUC to discuss an initiative to complement the directives on equal treatment of part-time and fixed-term workers with an instrument regulating the conditions of temporary agency workers, which would also include workers posted by foreign temporary work agencies. The presumption was that in the same way as in the agreement on fixed-term employment, the right to equal treatment was to be balanced by acceptance of temporary work agencies as a legitimate form of employment.

While BusinessEurope and CEEP were willing to negotiate, the ETUC hesitated, partly due to discontent among its affiliates with the agreement on fixed-term employment, and partly due to diverging views on whether or not to legitimate the temporary work agency business.<sup>43</sup> A further complicating factor was that the newly established employer federation in the temporary agency industry – the International Confederation of Temporary Work Businesses (CIETT) – was eager to achieve recognition and had made clear that it was ready to negotiate an agreement on these terms with the European union federation in services Euro-FIET (in 2000 renamed UNI-Europa). This created tensions in the peak associations. Although representatives of CIETT and UNI-Europa were included in the negotiating teams of BusinessEurope and ETUC, it soon transpired that representatives of customer companies had a much more restrictive view of the issue of equal treatment than representatives of temporary work agencies. BusinessEurope was not ready to accept that equal treatment should pertain to pay and that conditions for agency workers should be similar to those of comparable employees in the user company.<sup>44</sup> The ETUC, for its part, was divided on how far it could go in recognizing that temporary work agencies could play a positive role in enhancing employment and the functioning of the labour market.

While representatives of the temporary work agencies were less concerned with the extra costs associated with equal treatment than with achieving political recognition and

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<sup>41</sup> Cremers and Donders (above n 35).

<sup>42</sup> At that time still called UNICE (Union of Industrial and Employers Federations in Europe). We have chosen to use its current name, BusinessEurope, throughout the text.

<sup>43</sup> Ahlberg (above n 16).

<sup>44</sup> *ibid.*

abolition of restrictions on temporary work agencies, representatives of user companies in export-oriented industries, such as manufacturing, voiced a strong interest in keeping down the costs of hiring agency workers and workers posted by foreign temporary work agencies. Despite disagreement on both sides and limited progress, negotiations went on for nine months and a solution seemed within reach when, in March 2001, BusinessEurope suggested asking for three extra months. Since the employers appeared unwilling to accept the ETUC's demands regarding equal pay and working conditions, the ETUC refused to partake in further negotiations.<sup>45</sup> Underscoring the division of views on both sides, CIETT and UNI-Europa resumed talks in their sectoral dialogue committee and issued a joint declaration with common objectives for a regulatory instrument just before the Commission started the process of drafting a directive by seeking out the views of the representatives of the member states in October 2001.

When the Commission eventually presented its draft Directive in March 2002, it was basically a merger between the unions' demands for non-discrimination and the employers' demand for abolishing restrictions on temporary work agencies. Due to British resistance the proposal was blocked until 2009 when the Council agreed a package deal whereby some member states, principally the United Kingdom, were allowed to maintain the 'opt-out' from parts of the working time directive in exchange for accepting, with a voluntary three-month threshold period, the temporary work agency directive.<sup>46</sup> When the EP rejected the working time part of the deal but embraced the temporary work agency directive, Britain was ring-fenced whereas the ETUC, after a decade of delay, celebrated that a growing loophole in EU-level protection against low-wage competition had been closed.

### 3.2.3 The Revised Services Directive: Another result of cross-class coalescing

The draft Services Directive launched by Commissioner Bolkestein in 2004 sparked a new conflict between unions and employers over the issue of posting.<sup>47</sup> The aim of the directive was to free up the European market for services, which in many countries was subject to a host of restrictions. In essence, the draft directive proposed that the rules of the country of origin should apply to providers of cross-border services, except for the core of working conditions stipulated in the Posting of Workers Directive; control and enforcement should be the responsibility of the country where the services originate; a range of control measures frequently used by host member states were explicitly ruled out.<sup>48</sup> As an internal market directive, the draft had not been subject to consultation with the social partners. Predictably, BusinessEurope supported the proposal and the ETUC

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<sup>45</sup> *ibid.*

<sup>46</sup> Schlachter, Chapter 8, this volume; 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

<sup>47</sup> JE Dølvik and AM Ødegård, 'The struggle over the services directive: the role of the European Parliament and the ETUC' (2012) 53 *Labor History* 69.

<sup>48</sup> Ahlberg, Johansson and Malmberg, Chapter 5, this volume.

opposed it. Although the ETUC recognized the need to promote integration of the market for services, it argued that the Bolkestein draft would effectively change the Posting of Workers Directive from a ‘minimum’ into a ‘maximum rights’ directive, limiting member states’ freedom to expand on the rights protected by the directive; moreover, control and enforcement of posted workers’ rights would become impossible.<sup>49</sup>

In the context of eastward enlargement and national referenda over the EU constitution, the proposal stirred up controversy in many member states. Besides exploiting public scepticism in its efforts to mobilize against the proposal, the European trade unions, as in the strife over the posted workers directive, managed to build alliances with actors on the employer side to underpin their demands for amendments. While BusinessEurope publicly maintained its unconditional support, in spite of misgivings in the French employers’ federation Medef,<sup>50</sup> the employer federations of small and medium-sized enterprises (UEAPME), public enterprises (CEEP), construction (FIEC) and also temporary work agencies (Euro-CIETT) expressed substantial reservations. Yet again the social partners in construction (EFBWW and FIEC) played an active role, issuing a range of very critical joint opinions. Arguing that non-discriminatory control in the host country was crucial, they declared that the proposed text would render enforcement of the Posting Directive impractical and ‘facilitate the wrong kind of free movement, namely that of unfair competition, social dumping and undeclared work’. Furthermore, they argued that the country-of-origin principle would facilitate ‘abusive practices’ and encourage the proliferation of ‘mailbox’ companies, which ‘should be banned’.<sup>51</sup>

While sectoral division thus led to fragmentation of the support for the directive on the employer side, the ETUC and its affiliates managed to retain unity. Most importantly, they got the unions from the accession countries on board by supporting their demand for repeal of the transitional arrangements for free movement of workers.<sup>52</sup> Through a two-pronged strategy, in which mobilisation in the streets of Brussels and in member states was combined with active coalition-building in the EP, with key governments and in the Commission, the European trade unions had considerable influence on the compromise reached in the EP in January 2006. The country-of-origin principle was

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<sup>49</sup> W Kowalski, ‘The Services Directive: the legislative process clears the first hurdle’ (2006) 12 *Transfer – European Review of Labour and Research* 231.

<sup>50</sup> A Crespy, ‘When “Bolkestein” is trapped by the French anti-liberal discourse: a discursive-institutionalist account of preference formation in the realm of European Union multi-level politics’ (2010) 17 *Journal of European Public Policy* 1253, 1257.

<sup>51</sup> FIEC and EFBWW, Joint Statement on the Services Directive, 2 April 2004.

<sup>52</sup> Reneging on their earlier promises, most member states introduced temporary limits on the application of the key free movement of workers right for citizens from the new member states of Central Eastern Europe (CEE). This was granted, under EU law, by so-called transitional agreements (TAs) with the possibility to delay free movement for a maximum of 5+2 years.

scrapped, several sectors, not least temporary agency services, were exempted from the directive's regulatory scope, and all references to labour law in the interpretation of the Posting of Workers Directive were erased.<sup>53</sup>

### 3.2.4 The Court takes over: social partner polarization in the wake of the *Laval Quartet*<sup>54</sup>

The Services Directive compromise was evidently celebrated as a victory of the unions and a defeat of the free marketers in DG Internal Market and BusinessEurope. But the European tier of the EU system of multilevel governance has many arms and layers. At the same time as the Swedish government and trade unions worked hard to obtain amendments in the draft services directive, the Swedish business confederation (SN) actively encouraged the Latvian company Laval, which had become subject to a union blockade in Vaxholm outside Stockholm, to try its case in the Swedish Labour Court and eventually in the European Court of Justice (CJEU). Providing funding and legal expertise, and visiting all the governments in the new member states, SN played a key role in facilitating the *Laval* case. In parallel, the losing camp in the Services Directive strife lobbied the Commission to develop guidelines for posting, published in May 2006, in which the restrictions on host country controls that were erased from the Services Directive<sup>55</sup> were re-instated.<sup>56</sup>

When eventually the ECJ rulings in *Laval* and three similar cases were issued in 2007–2008,<sup>57</sup> the ETUC felt as if the political achievements obtained in the struggles over the directives on posting and services had suddenly been wiped out by the judiciary. Furthermore, the application of the right to industrial action, which the trade unions had considered immune from EU interference, as indicated by Article 153(5) TFEU, was curtailed by the Court in instances of cross-border services and establishment. The result of this conspicuous example of judicial re-interpretation of politically adopted EU legislation provoked an outcry of protest in European trade unions and the ETUC's Sec-

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<sup>53</sup> W Kowalski (above n 49); Dølvik and Ødegaard (above n 47).

<sup>54</sup> We use this as a common designation for the CJEU decisions in Case C-438/05 *Viking Line* [2007] ECR I-10779; Case C-341/05 *Laval* [2007] ECR I-11767; Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>55</sup> Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2008] OJ L 376/36.

<sup>56</sup> The Commission Communication with guidance on posting (COM(2006) 157 final) sparked a highly critical Joint Opinion (June 30, 2006) from the social partners in construction (FIEC and EFBWW), in which they regretted that the Commission arbitrarily selected arguments from case law to justify a de facto re-introduction of the deleted Articles 24 and 25 of the draft directive. It also opposed the Commission rejection of prior declarations, which according to FIEC and EFBWW were necessary, adequate and proportional means for host countries to organize proper control. Cf Ahlberg, Johansson and Malmberg, Chapter 5, this volume.

<sup>57</sup> Evju and Novitz, Chapter 2, this volume.

retary General, John Monks, warned that ‘the licence for social dumping’ given by the Court’s ruling could fuel ‘protectionist reactions’.<sup>58</sup>

### 3.2.5 Futile attempts at political re-regulation

In response, the ETUC demanded that a social regression clause be included in the Treaty and for a revision of the posted workers directive, arguing that the Court in contradiction to the explicit intentions underlying its adoption had altered the directive from a minimum into a maximum directive.<sup>59</sup> It also deplored the curb on the application of the right to strike. Similar views were expressed in a report drafted for the EP by the Swedish social democrat MEP Jan Andersson, although the wording was substantially toned down in the plenary, yet ‘a partial review of the PWD’ was not precluded.<sup>60</sup> Also, when he had to defend his re-appointment as Commission President in the EP in 2009, Barroso promised to do something to clarify the issues of posting and the right to industrial action. This led to the appointment of Professor Mario Monti, a former commissioner himself, with the assignment to deliver a report on how to resolve these issues.

In 2008 and 2009 the Commission staged several conferences and meetings with national government experts, unions and employers’ organizations, discussing the implications of the Court’s rulings and possible remedies. On all these occasions the same political message came across. Legal or political initiatives to recast the posted workers directive would not only be futile but also risky, because further unpredictable changes could not be excluded, given the balance of power in the Council, where an issue coalition of new member states and market liberal governments was able to block any initiative seen as hindering free movement. Moreover, the unions could in this instance not rely on a coalition with employers in construction; in September 2008, FIEC firmly refused to support the unions’ demand for a revision of the directive.<sup>61</sup> Soon after, BusinessEurope published a position paper stating that the four ECJ rulings, dubbed the *Laval* Quartet, ‘will contribute to a better functioning of the internal market while at the same time protecting workers’ rights’, adding that any problems caused by these rulings should be solved in the countries concerned.<sup>62</sup> That there was no common ground between employers and unions in this case became clear in 2009–2010 when, solicited by

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<sup>58</sup> Arnholtz (above n 34). According to R Hyman, the Court decisions featured prominently in the campaign that led to the Irish No to the Lisbon Treaty in May 2008, see R Hyman, *Trade unions and ‘Europe’: are the members out of step?* (LSE ‘Europe in Question’ Discussion Paper Series 14. London School of Economics and Political Science 2009).

<sup>59</sup> ETUC, statement issued on 4 March 2008.

<sup>60</sup> European Parliament 2008, see Arnholtz (above n 34).

<sup>61</sup> In a statement after *Laval*, in 2008, FIEC nonetheless underscored that the PWD was to be regarded as a minimum standard, which the member states could go beyond by means of Article 3(10) if properly justified.

<sup>62</sup> Arnholtz (2012) (above n 34) 47.

the Commission and the French Presidency, BusinessEurope and ETUC issued a joint opinion in which they simply reiterated their opposite views.<sup>63</sup>

Monti's report, *a New Strategy for the Single Market*, brought the issue back into the EU political arena. Arguing that it is urgent to solve the problems regarding posting in order to prevent progress and legitimacy of the Single Market from being jeopardized, Monti suggested that initiatives should be taken to 'clarify the implementation of the Posting of Workers Directive' and 'introduce a provision to guarantee the right to strike modelled on Article 2 of Council Regulation EC No 2679/98'. He also suggested the establishment of a mechanism for the informal solution of labour disputes related to application of the directive. In its Communication 'Towards a Single Market Act' and its 2011 Working Programme, the Commission signalled that it would follow up on these proposals. The draft directive on enforcement of posting rules, launched in March 2012,<sup>64</sup> contained in the view of ETUC (and employers) useful proposals to curb 'letter-box' companies and improve cooperation on monitoring and control, but did not bring anything new concerning the material interpretation of the Posting of Workers Directive. By contrast, the proposal for a Monti-II regulation<sup>65</sup> which was envisaged to restore the balance between the fundamental rights of free movement and industrial action was received by the ETUC as close to adding insult to injury. Apart from reiterating that the freedom to strike must not impair the freedom of movement, and vice versa, the proposal suggested that, in order to draw the line, the Court would have to apply a proportionality test (as it did in *Viking* and *Laval*). For the trade unions, some employer associations, mainly in the Nordic countries, and a few member state governments – for example, France – the suggestion that the legality of industrial action was to be tried by the ECJ was received as a further encroachment on the autonomy of national industrial relations and the subsidiarity principle that supposedly underpins the EU system of multi-level labour market governance. Even if the finer nuances of the preamble and the explanatory notes could be read as a plea to shore up the protection of the right to industrial action, it was clear that the political room for manoeuvre at EU level, where adoption in the Council would require unanimity, had become so miniscule that the Commission eventually withdrew the proposal in September 2012. No wonder organized labour started looking for ways to overcome the stalemate both beyond and below the EU level. At the level of international law the ILO conventions (ratified by

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<sup>63</sup> Still, in a ritualistic exercise, the ETUC tabled a complete proposal for a revision of the directive.

<sup>64</sup> COM(2012) 131 final. When a (provisional) deal between the EP and the Council on the directive was eventually struck in March 2014, making clear that all new control measures are to be notified by the Commission and have to meet the requirements of a proportionality test, it was denounced by the ETUC as 'very disappointing' and 'nowhere near enough to stop ongoing social dumping' (ETUC resolution 5 March 2014).

<sup>65</sup> COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.

most EU countries), the European Social Charter, and the European Convention of Human Rights (ECHR, now envisaged to be acceded by the EU), have recently given basis for legal decisions applying narrower interpretations of the scope for restrictions on the right to strike than the one applied by the CJEU<sup>66</sup> (see below n 189; and Barnard, Chapter 10, this volume). Trying CJEU decisions in the European Court of Human Rights, the European Committee of Social Rights or the ILO may open avenues for trade unions where they can exert pressure on member states to comply with international obligations (possibly in contradiction with EU rules) and thereby put pressure on the CJEU to align its practice with the other sources of European law.

### 3.3 Summarizing remarks: the stalled European tier of labour market governance

Does the EU regime of labour market regulation establish a European floor of rights and standards? In some areas, such as discrimination and health protection, the answer is yes; in most other areas this depends on the implementation and enforcement at the national level, or – as in the case of the Posting of Workers Directive – on the cooperation between international and national actors and regulators from different countries. Abandoning the harmonization perspective has in the area of workers' rights made European standard-setting a multi-level game.

Moreover, the outcome is not stable. To begin with, and demonstrated by ECJ case law, European integration has a Janus-face. The direct impact of EU labour market regulation can be, and from time to time has been, overshadowed by Court decisions 'striking down features of national systems that are deemed incompatible with the development of the single market'.<sup>67</sup> The *Laval* Quartet is a clear illustration of this and it touched the core of labour relations and national sovereignty. Corrective political action at the European level has in recent years turned out to be extremely difficult, with blocking minorities in the Council and within Europe's main employers' associations. Hence, unless higher-order sources of European law can be invoked, the remedies must be found at the national level, within the very narrow space defined by EU law. According to Pierson the losses in autonomy and sovereignty of member states and national actors have 'occurred without member states paying a great deal of attention',<sup>68</sup> but as indicated in a number of referenda in recent years this may have changed and given rise to increased scepticism about, and even opposition to European integration.

One can easily sum up the reasons why EU labour market legislation is weak: different interests of actors in richer and poorer countries; the high hurdles for passing legislation in the Council which makes it easier to block changes than to enact them; limited finan-

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<sup>66</sup> FC Ebert and M Walter, *Cross-Border Collective Action: Jurisprudential Conflicts between European Courts over the Right to Strike*. Global Union Research Network (GURN), Discussion Paper No 16 (ILO 2013).

<sup>67</sup> P Pierson, 'Social Policy and European Integration' in A Moravczik (ed), *Centralization or Fragmentation? Europe Before the Challenge of Deepening Diversity and Democracy* (Council on Foreign Relations Books 1998) 140.

<sup>68</sup> Pierson (above n 67) 145.

cial resources, which excludes significant redistribution compensating for expensive social policy initiatives; reliance on member states' often poor capacities of implementation and enforcement; weakness, and weakening, of the social democratic forces most interested in a strong 'social dimension'; declining union power, as well as deep and continuing differences between them; the difficulty of harmonizing widely divergent and deeply institutionalized national social models.

EU-level social policy – and EU-level labour relations – tend to be built around a 'hollow core' – the metaphor is Pierson's. In other words, the action is mostly elsewhere, not in the centre, and whatever happens or is decided in Brussels is strongly conditioned by laws, patterns of collective organization, and interests that have crystallized over the course of a century at the national level. Moreover, for good or worse, changes in employment contracting come from below, in new practices of international sub-contracting, dependent self-employment, temporary agency work, pay-rolling and many more and 'boundary-less work' is fuelled by fiercer competition and market integration. Labour legislation, both at the national and European level, has a hard time catching up. Especially in the domain of cross-border mobility of services and labour, market making is way ahead of market correcting. With legislation on these matters stalling at the European level, and with EU directives that leave important gaps, either between them (as in the case of the temporary work agencies and posting directives) or in the definition of their scope (who or what is a posted worker?) outcomes are often ambiguous and fragile.

## 4 Strategies to maintain national wage floors

### 4.1 *Market extension and national labour market regulation*

A central rationale of national trade unionism and collective bargaining has been to establish a floor under competition in the labour markets and prevent competitive underbidding. When the labour market is widened, either by extension of its outer boundaries or by abolition of barriers to labour migration, such national wage floors can become subject to erosion and effective coverage of the law or collective agreement tends to shrink.<sup>69</sup> The successive EU enlargements in the 1970s and 1980s extended the territorial scope of the labour market and the potential for large-scale migration. The accession of Spain and Portugal in 1986, two countries with wage levels only half those in northern member states, raised concerns in many unions. Around that time, the mid-1980s, most European countries suffered from high unemployment. For precisely that reason, the 'freedom of movement of workers' was subjected to transitional arrangements (TAs), with a maximum of seven years, for both Spanish and Portuguese

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<sup>69</sup> JR Commons, 'American Shoemakers, 1648–1895: A Sketch of Industrial Evolution,' (1909) 24 *Quarterly Journal of Economics* 24.

workers. It was this regime that was rediscovered, and re-applied, in the 2004 and 2007 enlargements.

The fears of massive migration to the North proved ill-founded and actual labour mobility was – except in certain border regions – so limited that national wage setting regimes remained largely unaffected. As shown by Flanagan,<sup>70</sup> internal EU migration streams had been very small in spite of consistent and significant differences in the real value of wages and incomes across member states. These streams had become smaller after the foundation of the European Community in 1957 and were persistently out-paced by migration from outside the Community (especially from former colonies, and from Turkey and North Africa).

Why would it have been different in the 1990s and 2000s? Was it the sheer size of market opening? The much further advancement in integration through liberalizing markets? The weaker position of trade unions? Soon after the lifting of the Iron Curtain in 1989 and German re-unification, there was noticeable migration into building sites in Berlin, Paris and Brussels. This combined with the rise of independent contractors, and workers posted by subcontracting firms, especially from Ireland, Britain and Portugal, where unemployment was high. Especially in the building industry, posting of cheap labour by foreign firms drew renewed attention to the old issue of regulating competition in the labour market. In Austria, Belgium, the Netherlands, France and Germany the unions won support for national legislation on posting, using existing devices for extending collective agreements, eventually paving the way for adoption of the Posting of Workers Directive in 1996.

In this section we will review how member states have responded to the trade union demands for defending a national wage floor, first in the early 1990s and later in the wake of the 2004 and 2007 enlargements.

#### 4.2 *Establishment of national posting regimes and the role of labour and business*

The initial phase, before the adoption of the 1996 directive on posting, was driven by expectations of rising labour migration and sub-contracting. These expectations seemed to be confirmed by the surge in posting of workers during the construction bonanzas in Berlin, Brussels, and Paris,<sup>71</sup> where foreign labour was offered wages and working conditions way below the going rate in the host-states.

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<sup>70</sup> RJ Flanagan, 'European Wage Equalization since the Treaty of Europe. Labor and an Integrated Europe' in Ulman et al (above n 7).

<sup>71</sup> In the mid-1990s, there were reportedly 165-200,000 posted construction workers in Germany, accounting for around 17 percent of all construction workers in the country (Kahmann (above n 25); G Bosch and K Zühlke-Robinet, 'Germany: The labour market in German construction industry' in G Bosch and P Philips, *Building Chaos. An international comparison of deregulation in the construction industry* (Routledge 2003).)

In response, and in view of the *Rush* judgment of the ECJ in 1990,<sup>72</sup> the French unions, supported by the employers, in 1993 convinced the French government to extend all national labour and social regulations, including collective agreements that had been declared generally binding, to posted workers in all sectors.<sup>73</sup> A parallel move was instigated by the unions in Austria in 1993, where the prospect of EU membership had caused concern about a downward spiral of wages, while lifting the Iron Curtain and the Balkan wars had made the country a gateway for foreign labour and entrepreneurs from South-Eastern Europe. In Germany a joint delegation of unions and employers called for legislative measures to bring low wage competition to a halt. After lengthy negotiations at the Labour Ministry, the unions gave up their demand for 'equal pay for equal work' and accepted adoption of a German Posting of Workers Act (*Arbeitnehmer-Entsendegesetz*, AEntG)<sup>74</sup> applying only to construction and only to the two lowest wage brackets in the collective agreement.<sup>75</sup> In contrast to the French employers who embraced the government proposal to extend the entire French *social acquis* to posted workers in all sectors, resistance from German employer federations outside construction resulted in a much more limited regime. As shown in Chapter 2 by Evju and Novitz, the emerging European Posting of Workers Directive steered a rather unclear course between these national antecedents.

According to Menz's study of national variations in the response to the posted workers' challenge, union influence on the national strategies was contingent on their ability to build broad coalitions with employers.<sup>76</sup> Besides the organizational strength of the trade unions, this ability depended on the power relations between different sectoral associations in the employer confederations, and on traditions of centralized vs sectoral coordination with the state. The extent of exposure to low cost competition also affected the position of employers.

In Austria, France, Belgium and Finland the unions won acceptance of a maximalist interpretation of the Directive, aiming for equal treatment, whereas in the Netherlands and Germany, the government limited implementation to the nucleus of statutory conditions in Article 3(1) of the Directive. The Netherlands has a statutory minimum wage, whereas Germany made the minimum wage set by collective agreement mandatory in construction. In Sweden and Denmark, in line with a longstanding tradition, unions and employers rejected state interference in wage setting and relied on their strong autonomous systems of collective bargaining, underpinned by trade union rights to launch industrial action to pressure foreign services providers to sign or abide by the standards

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<sup>72</sup> Evju and Novitz, Chapter 2, this volume; Houwerzijl, Chapter 3, this volume.

<sup>73</sup> G Menz, *Varieties of Capitalism and Europeanization. National Response Strategies to the Single Market* (OUP 2005) 101, 103.

<sup>74</sup> Arbeitnehmer-Entsendegesetz (AEntG) 1996, Bundesgesetzblatt (BGBl) I 1996, 227.

<sup>75</sup> Kahmann (above n 25).

<sup>76</sup> Menz (above n 73), 64-65.

set in the collective agreement.<sup>77</sup> In the United Kingdom, the Conservative government had gained an opt-out of the Agreement on Social Policy of the Maastricht Treaty. The Conservative government in 1993 had abolished the Wage Councils, as the last vestiges of a mandatory sectoral minimum wage. Elected in 1997, the Labour government ended the opt-out, in line with its promise to the unions, and in 1999 instituted a national minimum wage.<sup>78</sup> The Posting of Workers Directive was implemented without any statutory measures beyond the statement that British employment law applies to all workers in the United Kingdom.<sup>79</sup> In Ireland, where a statutory minimum wage was introduced in agreement with the social partners in 2000, the Directive was implemented by extending the Irish Protection of Employees Act of 2001 to eligible workers.<sup>80</sup> With the implementation of the PWD and the fading of the building booms in the early 2000s, attention to the issue of posting waned until the 2004 and 2007 eastward enlargements.<sup>81</sup>

### 4.3 Post-2004 developments in posting and labour migration

The enlargements of the EU/EEA markets for labour and services in 2004 and 2007 were bold moves. Nowhere before had politicians agreed to allow free movement of not only goods and capital but also services, citizens and workers between countries with such huge welfare gaps. However, in the final stage of negotiating the Accession Treaty free movement of workers suddenly became an obstacle. German and Austrian trade unions had flagged their opposition at an early stage. With unemployment rising after 2001 and uncertainty about the scale of immigration, trade unions in most EU15 member states, in some countries and sectors with the support of employers, pressed their governments to negotiate a temporary ban on free movement under the transitional regime. Reneging on their promises and deeply disappointing and offending the new member states, 12 of the EU15 member states decided to apply transitional arrangements (TAs) which, to varying extents, restricted the freedom of movement for workers from the Eastern accession states for at least two, in some cases five or even seven years under the 2+3+2 regime.<sup>82</sup> Except for Austria and Germany, which had also been

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<sup>77</sup> JE Dølvik and L Eldring, 'Industrial relations responses to migration and posting of workers after EU enlargement: Nordic trends and differences' (2006) 12 *Transfer* 213

<sup>78</sup> From October 2012 the British minimum wage is 6.08 GBP/hour for workers aged 21+.

<sup>79</sup> T Novitz, *UK Implementation of the Posted Workers Directive*, FORMULA Working Paper 22 (2010); Evju and Novitz, Chapter 2, this volume.

<sup>80</sup> M Doherty, 'Ireland' in J Cremers, *In Search of Cheap Labour Working and living conditions of posted workers* (CLR Studies 6, International Books 2011) 81.

<sup>81</sup> J Cremers, JE Dølvik and G Bosch, 'Posting workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) 38 *Industrial Relations Journal* 524.

<sup>82</sup> These arrangements varied from strict quotas in some continental countries to virtually free movement in Denmark and Norway, provided that Central and Eastern European workers were ensured equal conditions. The transitional agreements expired on 1 May 2009 but were prolonged to 2011 in Austria and Germany, and several countries have prolonged

granted limits on the freedom of service provision, an unintended consequence of these TAs was that it became relatively more attractive for employers to hire workers from the CEE countries through foreign subcontractors.<sup>83</sup>

Transitional agreements notwithstanding, labour mobility from Central and Eastern Europe grew rapidly. While during the period 1990–2003, on average, 215,000 EU8 workers had entered the EU15 annually, an average of 650,000 annual entries were registered in the period 2004–2007, hitting a record high of 708,000 in 2007.<sup>84</sup> In the main sending countries – such as Poland, Romania and the Baltic states – 6 to 14 per cent of the labour force had moved abroad by 2009. Gross annual outflows from Bulgaria and Romania rose from an average of 129,000 to 330,000 following their accession in 2007,<sup>85</sup> with more than 280,000 Romanians entering Italy only in 2007.<sup>86</sup> Poland and Romania, as the biggest countries, accounted for three-quarters of these outflows. The United Kingdom and Ireland, which had not imposed any restrictions on labour migration, and Germany, which had, were the destination countries for most Polish and Baltic migrants; despite restrictions, Spain and Italy were the most sought after destinations for labour migrants from Romania and Bulgaria. The United Kingdom had registered more than 800,000 labour migrants from the new Eastern member states by 2008; 300–400,000 had moved to Ireland; several hundred thousand to Germany; and some 225,000 to Nordic countries;<sup>87</sup> while continental countries, such as the Netherlands, Belgium and France, also received sizable flows of registered workers. In addition to a stock of almost five million migrants from the accession states residing in the EU15 by 2009,<sup>88</sup> there were sizable flows of posted workers, self-employed service providers and an unknown number of unregistered workers. The volume of labour on the move was much larger than officially expected.<sup>89</sup> During the financial crisis,

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restrictions for Romania and Bulgaria that should have been repealed by January 2012, except in Austria and Germany.

<sup>83</sup> Houwerzijl, Chapter 3, this volume.

<sup>84</sup> MV Desiderio, ‘Free mobility areas across OECD: an overview’ in *Free Movement of Workers and Labour Market Adjustment. Recent Experiences from OECD Countries and the European Union* (OECD 2012).

<sup>85</sup> D Hollande, T Fic, P Paluchowski, A Rincon-Aznar and L Stokes, *Labour Mobility within the EU: The Impact of Enlargement and Transitional Arrangements* (NIESR Discussion Paper 379 2011); M Kahanec, *Labor Mobility in an Enlarged European Union* (IZA Discussion Paper No 6485 2012).

<sup>86</sup> Desiderio (above n 84).

<sup>87</sup> JE Dølvik and L Eldring, *Mobility of labour from new EU states to the Nordic Region*. TemaNord 502 (Nordic Council of Ministers 2008).

<sup>88</sup> Hollande *et al.* (above n 85).

<sup>89</sup> While reports made for the Commission estimated net outflows of around 3 million during the first 30 years and around 300,000 annually in the first years (T Boeri and H Brücker, *Migration, Co-ordination Failures and EU Enlargement* (IZA Discussion paper 1600, 2005)). H Brücker *et al.*, *Labour Mobility within the EU in the Context of Enlargement and*

outmigration seems to have decreased, especially from Poland where the economy continued to grow, albeit with an unemployment rate still above 12 per cent. However, migration from the Baltic countries and Romania, all of them severely hit by the crisis, increased.<sup>90</sup> Finally, while the capacity to absorb labour migration has dwindled in debt- and crisis-stricken countries in Southern Europe, the United Kingdom and Ireland, where unemployment has risen steeply, evidence suggests that some of their citizens and former migrants from the accession countries have re-directed their search for work to other countries in northern Europe.

The posted worker conundrum can be viewed as an unintended consequence of the restrictions placed on regular labour migration after 2004. Much creativity was spent on inventing other contractual avenues to satisfy the need for income of the new CEE citizens and the appetite for cheap and dependable labour in sectors such as construction, manufacturing, horticulture, cleaning, housekeeping and other services. Inevitably, migration became a much more varied and complex phenomenon and differences between various legal titles and channels for migration spurred creative company adjustments of contracts and ‘regime shopping’ between regular movement of labour, posting, hiring through temporary work agencies and self-employment.<sup>91</sup>

Because registration schemes for posted workers are deemed ‘disproportionate restrictions’ on the freedom to provide services, no viable European statistics for their numbers exist. Referring to the number of so-called E101 social insurance certificates that people working abroad ‘shall carry with them’, the Commission has asserted that the flows of posted workers have been modest.<sup>92</sup> Roughly one million E101 certificates were issued to posted workers in 2007, corresponding to 0.4 per cent of the EU15 labour force.<sup>93</sup> The number of certificates rose by 24 per cent between 2005 and 2007, a rise which ended after 2008 during the financial crisis. Experience in countries with compulsory registration for posted workers, however, suggests that these Commission statistics vastly underestimate actual flows of posted workers. In Belgium, 99,000 E101 certificates were issued in 2007 whereas the national database on notification of posted

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*the Functioning of the Transitional Arrangements. Final Report* (IAB, CMR, FRDB, GEP, WIFO, wiiw, 2009) estimated that the number of CEE citizens residing in EU15 by 2020 would reach 8.4 million.

<sup>90</sup> J Chaloff, J Jauer, T Liebig and P Puhani, ‘Free labour mobility and economic shocks; the experience of the crisis’ in *Free Movement of Workers and Labour Market Adjustment. Recent Experiences from OECD Countries and the European Union* (OECD 2012).

<sup>91</sup> Dølvik and Visser (above n 32).

<sup>92</sup> COM(2008) 765 final, *The impact of free movement of workers; ‘Posting of workers in the European Union and EFTA countries: Report on E101 certificates issued in 2008 and 2009’* (European Commission 2011).

<sup>93</sup> A van Houk and M Houwerzijl, *Comparative study of the legal aspects of the posting of workers. Executive Summary*, Conference on Fundamental Social Rights and Posting of Workers in the Framework of the Single Market, Brussels 27–28 June 2011 (European Commission 2011).

workers indicates that their actual number was 145,000 in 2007 and over 200,000 in 2008.<sup>94</sup> In Switzerland the registered number of posted workers increased from 93,000 in 2005 to 127,000 in 2009. This amounted to 41 per cent of all migrant labour, with the self-employed adding another 11 per cent. In Norway, where EU workers account for roughly 10 per cent of the labour force, tax registry data indicate that posted workers accounted for almost half of the labour inflows between 2004 and 2009.<sup>95</sup>

If we look at the sectors where posting is most common, case studies in European ship-yards suggest that around 50 per cent of the workforce comes from CEE and is hired through foreign sub-contractors and temp agencies. Some of the posted workers eventually gain regular employment contracts, but their number is a minute share of the in-house workforce.<sup>96</sup> In construction, studies estimate that posted workers account for 10–15 per cent of employment in Germany, Britain and Denmark, and around 20 per cent in Finland.<sup>97</sup> In Germany and the Netherlands a sharp rise in the number of self-employed was witnessed after enlargement. Whatever the exact number, these figures indicate that posting of workers accounts for a sizeable share of intra-EU/EFTA labour migration.

The dynamics behind the growth of cross-border subcontracting are complex. First, most countries have over the past 15 years seen a general restructuring trend towards more project-based organizations, outsourcing and contract flexibility, leading to sharper divisions between the labour market core and periphery.<sup>98</sup> These divisions have been further increased by the partial reforms of employment protection legislation in many countries, easing the hiring and firing of temporary workers, while continuing to protect the core of workers employed under standard contracts. Third, the East–West gap in labour costs pertaining to pay, taxes, employer levies and social charges – likely to be complemented by a growing South–North gap in the wake of the debt crisis – is a

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<sup>94</sup> J Pacolet and F De Wispelaere, ‘Belgium’ in Cremers (above n 80).

<sup>95</sup> B Bratsberg, J E Dølvik and O Raaum, *Economic shocks, the Legal Environment and Work-related Migration* (Paper presented at the conference ‘Migration: Global Development, New Frontiers’, 10–13 April 2013, London).

<sup>96</sup> AM Ødegård and RK Andersen, *Østeuropeisk arbeidskraft i hotell, verft, fiskeindustri og kjøttindustri* (Fafo 2011); N Lillie, *Transnational work and the consequences of restructuring: Evidence from construction and ship-building industries in Finland* (Paper presented at IREC Conference: Industrial Relations and Labour Market Governance during Crisis, Fafo, 8–10 September 2010); B Lefebvre, ‘Posted workers in France’ (2006) 12 *Transfer – European Review of Labour and Research* 231.

<sup>97</sup> N Lillie and I Greer, ‘Industrial relations, migration and neo-liberal politics: the case of the European construction sector’ (2007) 35 *Politics & Society* 551; JA Hansen and SK Andersen, *Østeuropæiske arbejdere i bygge- og anlægsbranchen – Rekrutteringsstrategier og konsekvenser for løn-, ansættelses- og aftaleforhold* (Forskningsnotat, FAOS 2008); Lillie (above n 96).

<sup>98</sup> PS Emmenegger, B Häusermann, B Palier and M Seeleib-Kaiser, ‘How we grow unequal’ in PS Emmenegger, S Häusermann, B Palier, and M Seeleib-Kaiser (eds), *The Age of Dualization. The Changing Face of Inequality in Deindustrializing Societies* (OUP 2012).

major economic incentive for clients, contractors and posted workers themselves. Splitting the difference among them may be irresistible, and with the logistical infrastructure provided by websites, cheap air-carriers and migratory networks, a mushrooming cloud of agents, middlemen and hiring-firms has sprung up.

This has added to the domestic dynamics towards more fluid and flexible work practices at the low end of the labour market. The boundaries between different categories of external labour and between the national and international labour markets have become blurred. For a Polish worker going to London, Berlin or Oslo, it is not uncommon to shift between temporary jobs in a firm established in the host country, spells of self-employment and short-term assignments for foreign sub-contractors and temp agencies, intermittent with periods of joblessness.<sup>99</sup> As these statuses, according to EU law, are subject to different social and labour rights, companies have been encouraged to develop new forms of ‘regime shopping’ in order to increase flexibility and lower labour costs.

During the aftershocks of the financial crisis, foreign workers employed by sub-contractors and temp agencies were usually the first to go, serving as an external cushion for the core workforce.<sup>100</sup> During the slow recovery in 2009 and 2010, as much as 85 per cent of all net employment growth in the EU came from temporary jobs. Even though this share fell somewhat during in 2011, the interplay between high unemployment in times of crisis and austerity, domestic dualization in employment protection legislation, and growing cross-border mobility seems likely to reinforce competition in the second tier of European labour markets. With companies changing their staffing strategies accordingly, there is an obvious risk that the collective institutions of labour market regulation and wage setting will become ever more restricted to a shrinking core of skilled, ‘insider’ workers.

As evidenced in numerous media stories, court cases and reports about abuse of foreign workers,<sup>101</sup> the turn to sub-contracting of posted workers and other forms of regime-shopping have given rise to conflicts, sometimes with nationalist and ethnic undertones. The most known cases, such as the disputes at Irish Ferries, Gama, Laval, Viking, Lindsay and Pocheville, made their way into the news headlines, but under the radar working life is changing in ways that are hard to reverse for politicians and organized actors. One of the most visible attempts to do just that, however, is the union effort to re-establish national wage floors.

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<sup>99</sup> JH Friberg and L Eldring (eds), *Labour migrants from Central and Eastern Europe in the Nordic countries. Patterns of migration, working conditions and recruitment practices*. TemaNord 570 (Nordic Council of Ministers 2013).

<sup>100</sup> European Commission, *EU Employment and Social Situation. Quarterly Review*, December 2011.

<sup>101</sup> See eg van Houk and Houwerzijl (above n 93) appendix; L Berntsen, *The reality of posting*. (Report from EFBWW workshop 15 June 2012, Brussels, Groningen University/AIAS).

#### 4.4 *National responses to Eastward enlargement and the rise in posting*

Variations in geographical proximity, growth, labour market conditions and transitional arrangements imply that the recruitment of migrant labour from Central and Eastern Europe differs markedly between destination countries. Variations in transitional arrangements and in posting regimes also imply that the incentives for posting and the temptation to evade national rules and wage floors have differed. In this section we review the main responses to union efforts to maintain or re-establish a national wage floor.

##### 4.4.1 The liberal market economies

In the United Kingdom and Ireland no transitional arrangements applied, except certain restrictions on social security rights. With booming economies, especially in Ireland, labour immigration from Central and Eastern Europe soared. With deregulated labour markets, decentralized collective bargaining with low coverage and statutory minimum wages, the economic incentives to hire posted workers instead of regular employees are weaker in the United Kingdom and Ireland than in our other cases. Yet, especially in the United Kingdom there was a strong growth of companies and staffing agencies offering foreign labour through posting. In both Ireland and the United Kingdom this triggered several disputes with national unions, who have mobilised quite extensively to prevent abuse of posted workers. In Ireland this led to a tightening of enforcement and some national rules. The United Kingdom did not adopt any regulatory measures, but controls on trafficking were tightened.

##### *The United Kingdom*

No changes were made in the UK rules regarding pay and rights for posted workers in the wake of enlargement. Except in construction and some public services, all collective bargaining is at company level and coverage is low, at 20.5 per cent in 2004, decreasing to 16.8 per cent in 2011.<sup>102</sup> Extension to non-organized firms is applied only in the National Health Service, where private (cleaning) contractors have to comply with the pay scales in the collective agreement.<sup>103</sup> Consequently, the wage floor for most posted workers is set by the statutory minimum wage, £6.31 per hour for workers aged over 21 (October 2013), which is far below the going rate in construction, where most posted labour is located. As posted workers are not obliged to register, official figures concerning posting are hard to come by. An ad hoc Eurostat survey, however, indicated that the numbers were not insignificant, and that posting predominantly affects construction, engineering construction and agriculture.<sup>104</sup> In construction self-employment and staffing agencies play a central role in the supply of migrant workers – recently attracted by

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<sup>102</sup> ICTWSS database, see Table 4.1 below.

<sup>103</sup> D Grimshaw, C Shepherd and J Rubery, *Minimum wage systems and changing industrial relations in Europe: National UK Report* (European Commission 2010).

<sup>104</sup> M Hall, 'UK: Posted workers' <http://www.eurofound.europa.eu/eiro/studies/tn0908038s/uk0908039q.htm>.

the London Olympics boom – whereas international sub-contractors have been more salient in several large engineering construction projects, such as the Lindsay Refinery.<sup>105</sup>

With lax statutory protection and the statutory minimum wage as the only regulatory framework in the private sector, enforcement is left mainly to various public inspectorates who are generally ill equipped for the task. Some innovative, coordinated enforcement approaches have been developed under the Gangmasters Licensing Act, leading to exposure of several bogus posting chains of Bulgarian temp agencies in agriculture.<sup>106</sup> In construction and engineering construction, the unions have, as in the Lindsay Refinery dispute, campaigned and succeeded in strengthening cooperation with the employers' association based on collective agreement clauses regarding the use and rights of posted workers.<sup>107</sup> While the press and many foreign unions portrayed the disputes at Lindsay and other places – where the slogan 'British Jobs for British Workers' appeared – as examples of xenophobic responses amongst British unions, others have emphasized that this element was vastly exaggerated and that the essence of the union actions was to fight abuse of foreign workers and defend the terms of the collective agreement. Meardi and Fitzgerald *et al*<sup>108</sup> argue that British unions have been quite efficient in supporting foreign workers, mobilizing against misuse of posted workers and scaring *bona fide* employers from engaging in such practices. Still, also in the United Kingdom the ECJ decision in *Laval* has constrained union action in cross-border contexts, as experienced by the pilot union BALPA when its strike against the British Airways Open Sky project was halted by legal injunction and eventually deemed disproportionate and in breach of EU law.<sup>109</sup> Paradoxically, the implication might be that the *Laval* decision in cross-border situations tends to outlaw the kind of flexible, decentralized collective bargaining found in the United Kingdom – to which the threat of strike action is germane – which EU policymakers and economists have singled out for praise.<sup>110</sup>

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<sup>105</sup> I Fitzgerald, 'UK' (in Cremers above n 80) 169.

<sup>106</sup> *ibid.*, 170.

<sup>107</sup> 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>108</sup> Meardi (above n 1); I Fitzgerald and J Hardy, 'Thinking outside the box? Trade union organizing strategies and Polish Migrant Workers in the UK' (2010) 48: *British Journal of Industrial Relations* 131.

<sup>109</sup> See <http://www.balpa.org/News-and-campaigns/News/PILOTS-TO-TAKE-UK-GOVERNMENT-TO-ILO.aspx>; J Malmberg, *The Impact of the ECJ Judgments on Viking, Laval, Rüffert and Luxembourg on the Practice of Collective Bargaining and the Effectiveness of Social Action* (European Parliament 2010).

<sup>110</sup> ACL Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; L Hayes, T Novitz and H Reed, 'Applying the *Laval* quartet in a UK context: chilling, ripple and disruptive effects on industrial relations',

Besides collective bargaining, and this applies to most workers in Britain, the rights of posted workers are not really different from those of ‘regular’ workers. However, more of them are paid at or close to the statutory minimum wage. Hence, the equal treatment principle of the temporary work agency directive could imply an improvement for posted agency workers. However, the three-month opt-out from applying this principle, obtained by the United Kingdom, as well as the exemption for permanently employed workers in agencies who are paid between assignments, provides the staffing agencies business room for circumvention over and against the protests of unions.<sup>111</sup>

### *Ireland*

Since the deep malaise in the 1980s, when one in five Irish workers was unemployed and huge numbers emigrated, Ireland had developed a growth model based on social partnership and strong reliance on inward FDI by multinational companies. Except in construction, where sectoral collective agreements are universally applicable and binding, collective bargaining has been decentralized to company level and agreements are not legally binding. The only legally enforceable pay regulation has been the statutory national minimum wage, which was introduced in 2000 and amounts to roughly half the level stipulated in the main collective agreements in construction.<sup>112</sup> After 15 years of strong growth, the Celtic Tiger Miracle culminated in a credit-driven building boom coinciding with the eastward opening of the labour market. Hence Ireland became one of the main destinations for migrant labour from Central and Eastern Europe.<sup>113</sup>

The disputes at *Gama* and *Irish Ferries* in 2005 made big media headlines and turned posting into a contentious issue. In the *Gama* case, a company based in the Netherlands was accused of employing Turkish workers below agreed standards in Ireland.<sup>114</sup> At around the same time Irish Ferries, a company organizing passenger transport between Ireland, France and the United Kingdom, announced its intention to outsource services to a Cypriot sub-contractor and to lay off more than 500 seafarers, to be replaced by agency workers from Latvia.<sup>115</sup> The Irish Congress of Trade Unions (ICTU) saw this as

in A Bücker and W Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (ETUI 2010).

<sup>111</sup> The Telegraph, 3 November 2011: [www.telegraph.co.uk/finance/jobs/8865772/Temps-get-out-clausecould-be-tested-in-court.html](http://www.telegraph.co.uk/finance/jobs/8865772/Temps-get-out-clausecould-be-tested-in-court.html)

<sup>112</sup> The hourly minimum wage was €7.65 in 2005 and €8.65 in 2012, compared with the minimum pay-scale of €18–20 in the main collective agreements in construction (Doherty, above n 80) 89; L Eldring and K Alsos, *European Minimum Wage: A Nordic Outlook* (Fafo 2012).

<sup>113</sup> Doherty (above n 80) 82.

<sup>114</sup> A Afonso, ‘The Domestic Regulation of Transnational Labour Markets: EU Enlargement and the Politics of Labour Migration in Switzerland and Ireland’ in L Bruszt and R Holzacker (eds), *The Trans-nationalization of Economies, States, and Civil Societies* (Springer Science+Business Media LLC 2009).

<sup>115</sup> G Menz, ‘Are you served? Europeanizing and re-regulating the single market in services’, (2010) 17 *Journal of European Public Policy* 971, 980.

a flagrant failure on the part of existent regulations to ensure compliance with agreed terms and conditions, and played the issue up during the negotiations of the new Social Partner agreement ('Towards 2016'), which were taking place at that time. ICTU threatened that without new regulations and stronger enforcement to protect the 'going rate', they would not sign a new agreement. Irish business and the government were afraid that the unions' demand for re-regulation would provoke a negative response from the strong multinational business lobby and have negative consequences for FDI and the country's export position. Lengthy negotiations resulted in an amendment of existing legislation aimed at ensuring stronger monitoring and enforcement of existing employment rights. A National Employment Rights Authority was set up for this purpose. Among the most important measures were the threefold increase in the number of labour inspectors, new rules for record keeping, higher penalties for breaches and proper licensing of temporary work agencies.<sup>116</sup>

In essence, Ireland maintained its liberal posting regime, entailing that posted workers were covered by statutory employment rights and the national minimum wage, as in the United Kingdom, except in construction where the collective agreement is universally applicable. According to Afonso,<sup>117</sup> the failure of the unions to obtain re-regulation of the posting regime can be attributed to the decentralized bargaining structure and the strong position of the export-oriented sector, alongside fears among the employers' associations and the government about the reactions of the multinationals.

#### 4.4.2 The large continental countries

Besides being the two largest countries in the euro zone, France and Germany have often served as pattern-setters for policy-making in the EU. In terms of industrial relations, and posting-regimes in particular, they represent contrasting cases. While France early on established a maximalist posting regime based on 'equal treatment', Germany developed a fairly minimalist regime. In the wake of reunification, Germany has seen a huge transformation of national industrial relations, whereas France has followed a more stable path, combined with quite different responses to enlargement of the labour market.

##### *France*

In France, the posting regime established in 1993 by *Loi Quinquennale* No 93-1313, has largely been maintained. The main change is that, in line with the ECJ's 2007 *Laval* ruling, only minimum wages and not as before the entire pay section in generally extended collective agreements or if no agreement applied the statutory minimum wage (SMIC), are now applicable to posted workers.<sup>118</sup> Furthermore, in line with the TWA directive posted temporary agency workers have become entitled to the same pay and

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<sup>116</sup> Menz (above n 115).

<sup>117</sup> Afonso (above n 114) 102, 104.

<sup>118</sup> J Cremers, *In Search of Cheap Labour: Working and living conditions of posted workers*. CLR studies 6 (International Books 2011) 59.

conditions as workers employed by the user company. In addition, the legal amendments made by decree of 11 December 2007, included additional sectors (agriculture and transport), strengthened control and enforcement measures, and made clear that in cases where the activity can no longer be considered temporary all binding French rules and provisions apply. Companies posting workers have in that case to set up shop in France. In effect, all this implied that the French regime was made more rather than less stringent.

Apart from the hype about the ‘Polish Plumber’ during the Constitution referendum campaign in 2005, tightening of enforcement practices reflected the findings of several reports that the actual volume of posting by far exceeded the official number based on E101 certificates (149,000 in 2007) and that unregistered postings were often associated with inferior labour practices.<sup>119</sup> A Senate report showed that, without breaking any rule, posting can reduce labour costs for a French user company by half, mainly thanks to lower social security charges and minimum rather than standard wages.<sup>120</sup> According to a recent study, pay rates of 20–50 per cent below the agreed (‘going’) rates are quite common.<sup>121</sup> The Senate report also suggested that many posting companies do not pay overtime and subtract the legally obligatory compensation for lodging and travel from the minimum pay.

Such practices have triggered a number of disputes. In Porcheville (2005), where Alstom was constructing a power station, a Polish subcontractor posting 40 workers subtracted lodging costs from the minimum wage. A Polish worker and member of the NSZZ Solidarność union received assistance from the local French (CGT) union and brought the case to court, which ordered the sub-contractor to repay €10,000 in unpaid earnings to the workers.<sup>122</sup> The *Flamanville* case, in 2009, where a hundred Polish workers were recruited in Cyprus via an Irish staffing agency to do construction work on a nuclear plant, illustrated the sophisticated ways rules can be circumvented.<sup>123</sup> Recently, a subsidiary of a Portuguese company, Alpha Group, which for many years simply ignored the French rules, faced repeated strikes among Portuguese workers, backed by French unionists. The French unions, especially in construction, have been able to have such cases tried in industrial tribunals.<sup>124</sup> Still, despite the stringent French regime, reports confirm that circumvention is substantial and that the labour inspec-

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<sup>119</sup> According to a Ministry estimate the numbers in 2008 were between 210,000 and 300,000. J Thoemmes, *Regulation and Enforcement of Posted Workers Employment Rights (PostER). National report: France* (European Commission 2012).

<sup>120</sup> F Grignon, *Le BTP français face à l’élargissement de l’Europe – Sénat* (No.28). (Sénat 2006).

<sup>121</sup> Thoemmes (above n 119) 108.

<sup>122</sup> Cremers (above n 118) 66, 107.

<sup>123</sup> N Oulai, *Belgian Case Study Final report. Regulation and Enforcement of Posted Workers Employment Rights (PostER)* (ULB 2012).

<sup>124</sup> Thoemmes (above n 119) 108.

torate and unions have difficulties in enforcing the rules, due to missing notification, false posting, lack of information among posted workers and user companies looking the other way.

France has been among the few member states that has actively supported an overhaul of EU rules. The Employment Ministry, still under the Sarkozy presidency, welcomed the proposed enforcement directive, saying it had long been calling for an update of the posted workers directive to avoid ‘social dumping’. The employment minister declared that attaching conditions to the right to strike, as proposed under the now withdrawn Monti II Regulation, was ‘not acceptable’ for France.<sup>125</sup> In short, regardless of the right or left orientation of its government France has stuck to its stringent posting regime, leaving adjustments to the *Laval* verdict to the required minimum. French trade unions are fairly active, but with a unionization rate of only 5 per cent in the private sector, they face tremendous difficulties in monitoring and enforcing the rights of posted workers.<sup>126</sup>

### *Germany*

Germany, together with Austria, negotiated transitional restrictions to apply to cross-border services and posted workers after the 2004 enlargement. Perhaps as an unintended consequence, there was a rise in the use of self-employed migrants in sectors such as food manufacturing and industrial cleaning. While German employers and some researchers maintained that Germany had lost out in the competition for labour in Europe, this picture changed in the wake of the euro-crisis and the phasing out of the transitional arrangements from 2011, when Germany received increasing flows of labour from crisis-ridden Southern and Eastern countries.<sup>127</sup>

Union efforts to establish minimum standards for posted workers have in recent years become interwoven with strategies aimed at tackling the growing low wage issue in the German labour market. In the wake of the post-unification recession, after a decade of high unemployment, the German labour market was opened up for flexible and low wage jobs, whereas unemployment benefits have been curtailed.<sup>128</sup> From 1992 to 2009,

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<sup>125</sup> <http://www.euractiv.com/socialeurope/new-rights-posted-workers-proble-news-511672>.

<sup>126</sup> A Grommerch, *No 3150 Rapport d'information de Mme Anne Grommerch déposé par la commission des affaires européennes sur le détachement des travailleurs* (Assemblée Nationale 2011).

<sup>127</sup> T Baas and H Brücker, ‘EU Eastern Enlargement: The Benefits from Integration and Free Labour Movement’ (2011) 9 *CESifo DICE Report Ifo Institute for Economic Research at the University of Munich* 44; S Bertoli, H Brücker and JF-H Moraga, ‘The European Crisis and Migration to Germany: Expectations and the Diversion of Migration Flows,’ *FEDEA, Documento de Trabajo* 2013:03.

<sup>128</sup> R Bispinck and C Schäfer, ‘Low pay and minimum wages in Germany’ in T Schulten, R Bispinck and C Schäfer (eds), *Minimum wages in Europe* (ETUI-REHS 2006); G Bosch and T Kalina, ‘What role for minimum wages on low-wage work?’ in D Vaughan-

unionization fell from 34 to 19 percent and bargaining coverage declined from 70 to 62 percent (see Table 4.1). In 2010, private sector coverage was estimated at 56 per cent.<sup>129</sup> In the same period the increase in low-wage workers was stronger than in most other European countries, in 2007–2008 accounting for more than one-fifth of the workforce, of which a large proportion were women, unskilled workers and immigrants.<sup>130</sup> In light of this, there were widespread union fears that existing wage standards would be further undermined after the end of the transitional arrangements on migration and posting in 2011.<sup>131</sup>

The narrow posting regime adopted in Germany in 1996 implies, according to the Federal Labour Court, that posted workers, whose labour contracts are not regulated by German law, are not covered by ordinary extensions of collective agreements. In any case, since the 1990s most extension proposals have been vetoed by the employers, and as a result very few wage agreements are subject to extensions.<sup>132</sup> The Posted Workers Act (AEntG) has nevertheless created a path to industry-level minimum-wage regulation. Since 2000, several new industries have been included in the Act, such as cleaning, electrical work, mining and postal services. These have typically been industries with growing shares of unorganized, low-cost firms, where the trade unions have managed to build coalitions with sectoral employers' associations on the need for re-regulation despite opposition in the peak employers' association (BDA). The critics of the AEntG have claimed that its real purpose is not to protect posted workers, but to compel German enterprises to pay collectively agreed wages even in sectors where posting is not common.<sup>133</sup> In 2009, the Ministry of Labour estimated that the industries covered by the AEntG employed around three million workers. In 2011, the Act on Temporary

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Whitehead (ed) *The Minimum Wage Revisited in the Enlarged EU* (Edward Elgar/ILO 2010).

<sup>129</sup> R Bispinck and T Schulten, 'Extension of collective agreements: A precondition for stable multi-employer bargaining,' presentation at WSI Collective Bargaining Conference, 27–28 September 2011.

<sup>130</sup> T Schulten, 'Niedriglöhne in Deutschland. Ursachen, soziale Folgen und Alternativen' in G Wallraff, F Bsirske and FJ Möllenberg (eds), *Leben ohne Mindestlohn – Arm wegen Arbeit* (VSA 2011).

<sup>131</sup> L Eldring and T Schulten, 'Migrant workers and wage-setting institutions: Experiences from Germany, Norway, Switzerland and the UK' in B Galgóczi, J Leschke and A Watt (eds), *EU labour migration in troubled times* (Ashgate 2012).

<sup>132</sup> R Bispinck, R, H Dribbusch and T Schulten, *German Collective Bargaining in a European Perspective. Continuous Erosion or Re-Stabilisation of Multi-Employer Agreements?* (WSI-Diskussionspapier 2010); L Eldring, 'Allmenngjøring og minstelønnsregulering i Tyskland' in T Aa Stokke (ed), *Allmenngjøring i EU og Norge* (Fafo 2010).

<sup>133</sup> M Schlachter, 'From collective agreements to statutory minimum wages – the German debate on the new posting of workers legislation' in *Studia z zakresu prawa pracy 2009* (Uniwersytetu Jagiellonskiego 2009).

Agency Work was amended to implement the Temporary Agency Work Directive;<sup>134</sup> a change in the law allowed making the collectively agreed minimum wage in the sector generally binding.<sup>135</sup> By August 2013, extended agreements were in force in construction, electrical work, mining, cleaning, guard and security services, waste disposal, and care, further education services and for temporary agency work. The hourly minimum wages regulated by the AEntG ranged from €7.50 (security services in some regions) to €13.70 (skilled construction workers in West Germany). For agency work, the minimum wage rate was set at €8.19 in the West and €7.50 in the East.<sup>136</sup>

Despite the broadened scope of the AEntG the main German trade union confederation (DGB) raised a demand to establish a national statutory minimum wage.<sup>137</sup> Linked to its campaign, the DGB **wanted** to expand the applicability of the AEntG to all industries.<sup>138</sup> The unions' plea for a national minimum wage **was** therefore not intended to replace the demand for broadening the practice of extending collective agreements. On the contrary, the union strategy **acknowledged** that the erosion of collective bargaining **required** statutory measures to shore up broad minimum-wage guarantees.

The public debate on statutory minimum pay followed lines of division and support similar to the discussions about the AEntG. Some sectoral employer federations faced with low-cost competition expressed sympathy, while the BDA has remained deeply sceptical. In the former coalition government especially the liberal junior partner, the FDP, was hostile to the idea, whereas the Christian Democrats, at their congress in 2011 adopted a resolution favouring statutory minimum wage setting. In March 2013, The Federal Council, the upper house of the German parliament, approved a draft law on the introduction of a statutory national minimum wage at €8.50 an hour, but the bill did not pass the lower house of the parliament. The introduction of a national minimum wage therefore became a central issue in the 2013 election campaign, and in the post-election negotiations over establishment of a new government the SPD made it a key precondition for entrance into a Grand Coalition with the CDU/CSU. The coalition platform that was eventually agreed comprised a range of initiatives to strengthen the wage floor in German labour markets. Besides establishing a national minimum wage at €8.50 per

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<sup>134</sup> See Schlachter, Chapter 8, this volume.

<sup>135</sup> German legislation regarding TWA presumes equal treatment with employees of the user company, but exemptions allowed for agencies with collective agreements led to wide-ranging circumvention by means of agreements struck by bogus company unions. Such agreements have recently been denounced in court, and the adoption of a minimum wage in the sector can be seen as a measure to shore up the wage floors in the user sectors.

<sup>136</sup> Bundesministerium für Arbeit und Soziales, Mindestlöhne im Sinne des Arbeitnehmer-Entsendegesetzes (AEntG) and Lohnuntergrenze nach dem Arbeitnehmerüberlassungsgesetz, Stand 1. August 2013.

<sup>137</sup> This happened in the wake of much debate and controversy among the unions, after it was launched by the hotel and restaurant workers in 1999. The powerful unions in manufacturing remained opposed until 2006, when the demand was embraced by all the unions in DGB, except one (Eldring above n 132).

<sup>138</sup> DGB press release, 20 February 2010.

hour from 1 January 2015, the scope of the Act on Posting of Workers (AEntG) is to be broadened so as to open for extension of minimum pay rates in collective agreements in all sectors and amendments in the Collective Agreement Act (*Tarifvertragsgesetz*) will open for regular extension of collective agreements also in sectors with less than 50 per cent coverage in instances where specific public interests are at stake, e.g. bolstering the normative effects of collective agreements to counter abusive company practices.<sup>139</sup> As minimum wages set in extended collective agreements have supremacy, the national minimum wage can be seen as a safety net meant to underpin the collective bargaining system. Furthermore, the platform promised measures to combat misuse of *Leiharbeit* and temporary work agencies, alongside strengthened control and enforcement of labour market regulations. Another area in which German wage floors have been subject to contestation and change is public works. The ECJ 2007 decision in the *Rüffert* case ruled that the practice in several German *Länder* requiring public procurement contractors to comply with wages and terms defined in the relevant regional collective agreement is in breach of EU posting rules.<sup>140</sup> Germany has not ratified ILO Convention No. 94, but the declining coverage of collective agreements has provoked interest in alternative measures to secure fair wages.<sup>141</sup> Lower Saxony had obliged a Polish construction contractor to follow the regional collective agreement, but the ECJ held that the only legal minimum wage for posted workers was the extended minimum wage of the national collective agreement in accordance with the AEntG. Eventually, in response to trade union demands, a number of *Land* governments enacted new minimum pay regulation applying to public tenders and sometimes also to organizations receiving public financial support.<sup>142</sup> In the platform of the new government it is declared that, in conformity with EU rules, initiatives will be taken to establish similar mechanisms at the national level.

In short, through coalition-building first with sectoral employers and regional (state-level) governments, and eventually with the main national parties, SPD and CDU, German unions have succeeded in obtaining a significant broadening of the wage floor

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<sup>139</sup> Koalitionsvertrag CDU CSU SPD (27.11.2013). Now, see the Bill tabled on 2 April 2014 (cf. Pressemitteilung des BMAS 02.04.14) and the Stellungnahme des Bundesrates – Entwurf eines Gesetzes zur Stärkung der Tarifautonomie (Tarifautonomiestärkungsgesetz) of 23 May 2014. Until 31 December 2016 exemptions shall be permitted only on the basis of collectively agreed terms under the AEntG and the Act on Temporary Agency Work (*Arbeitnehmerüberlassungsgesetz*). From 1 January 2017 the minimum wage of €8.50 shall apply with no exceptions.

<sup>140</sup> See K Ahlberg and N Bruun, Chapter 7, this volume.

<sup>141</sup> N Bruun, A Jacobs and M Schmidt, 'ILO Convention No. 94 in the aftermath of the Rüffert case' (2010) 16 *Transfer – European Review of Labour and Research* 245.

<sup>142</sup> The new regulations require all suppliers of the public sector to comply with extended collective agreements in accordance with the AEntG; in transport they refer to the public branch collective agreement, and in sectors with no minimum pay regulations the *Länder* have enacted a regional minimum pay for such work ([http://www.boeckler.de/pdf/wsi\\_ta\\_trifftreue\\_stellungnahme\\_schulten.pdf](http://www.boeckler.de/pdf/wsi_ta_trifftreue_stellungnahme_schulten.pdf)).

applying to posted workers. Compared with the narrow posting law enacted in 1996, the changes that are implemented, together with those promised by the new government, amount to a significant transformation of the German labour and posting regime. While the German notion of a statutory minimum wage presumes priority for minimum pay rates in collective agreements and extended collective agreements, it is worth noting that the measures to develop a broader minimum wage regime for posted workers are complemented by measures to strengthen collectively agreed wage floors in the labour market in general.

#### 4.4.3 The small continental states

In contrast to their bigger neighbours, Austria, Belgium, the Netherlands and Switzerland have a legacy of tripartite concertation. From different starting points, they have come up with a mix of statutory and collective bargaining responses to the challenge of posting, both before and after enlargement. Extension of agreements to entire sectors has played an important role, in some cases buttressed by a statutory national minimum wage.

##### *The Netherlands*

As a liberal corporatist country, the Netherlands has moved from a narrow to a fairly extensive posting regime in the wake of enlargement. After a decade of decline, trade union density stabilized at around 24 per cent in the 1990s amidst very strong employment growth, only to fall again after 2000 to 19 per cent. Collective agreement coverage remained above 80 per cent, and despite the rise of company bargaining most employees are covered by sectoral agreements. Repeated criticisms from within the liberal parties notwithstanding, extension of collective agreements has remained an important tool in many sectors (agriculture, retailing, cleaning, construction, temporary work agencies) and both unions and employers have continued to defend this instrument against critics (also within the main employers' peak federation). Extension explains about 11 percentage points of total coverage, which makes it a more important and less contested policy instrument than in Germany, but far less widespread than in France, Belgium or Austria, where extension is quasi-automatic. One condition is that before extension any agreement must achieve a 50-60 per cent coverage rate, which in the Dutch case always depends on employer organization and, hence, the willingness of employers to negotiate a sectoral agreement.

When the Posting of Workers Directive was implemented in 1999 by the WAGA ('employee conditions in cross-border employment') Act, employers of posted workers only had to meet the minimum requirements in the Minimum Wage Act, the Working Time Act and the Health and Safety Act. Posted workers were, except in the construction sector, not covered by extended collective agreements,<sup>143</sup> a situation similar to Germany. After 2004, it soon became evident that the imbalance between service providers and posted workers from abroad and domestic companies complying with col-

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<sup>143</sup> Cremers (above n 118).

lective agreements could lead to a distortion of competition with serious substitution effects in the labour market. As a result, WAGA was revised in 2005, stipulating that posted workers were to be protected by generally binding collective agreements (ibid.). This applies to the core provisions in Section 3(1) PWD.<sup>144</sup>

The Dutch wage floor has several foundations. Legally, collective agreements are binding only on the signatory parties and their members, but it is common practice that employers who are bound by an agreement apply its terms also to non-union members (the same applies in Germany and many other countries). Extension to non-organized employers plays an important role in some sectors (especially those with many small firms), where employer organization and collective bargaining would otherwise be very fragile and fragmented.<sup>145</sup> The Minister's decision to extend an agreement, taken after advice from the social partners, also reflects public policy considerations. In many instances the intention is that the non-wage clauses in the agreement, for instance pension fund or extra-legal social insurance contributions, are shared throughout the sector. In the 1990s this criterion was used to seek lower wage scales for new entrants and narrow the distance (of about 20 percent) between the statutory minimum and the lowest collective bargained wages.<sup>146</sup> Both employers and unions have also accepted a wider use of dispensation or derogation clauses for new businesses and starting firms.

The statutory minimum wage is augmented every half year on the basis of an index derived from the pay rises in a basket of collective agreements. The Minister can suspend indexation in times of high or rising unemployment and this has happened several times in the past decades. The statutory minimum applies only to a very small percentage (2–4 per cent) of adult workers, but its importance is more that it sets the floor for the minimum level of old age pensions and social assistance schemes that are derived from it.

The Dutch wage floor regime – with a longstanding practice of making collective agreements generally binding and a national minimum wage – has contributed to much less growth in the low pay sector than in Germany, despite the steep rise in the use of flexible contracts.<sup>147</sup> In recent times, several issues related to abuse of migrant workers and posting have arisen. In a case at Eemshaven, one of the largest Dutch building sites, unionists reported that four to five thousand workers were posted from central and eastern Europe and that it was commonplace to ignore working time rules, holiday

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<sup>144</sup> EIRO NL0908039Q: Posted worker, <http://eurofound.europa.eu/eiro/studies/tn0908038s/-nl0908039q.htm>.

<sup>145</sup> It is common in the Netherlands to extend minimum wages at different levels of the collectively agreed pay scale (Stokke, above n 127).

<sup>146</sup> J Visser and A Hemerijck, *A Dutch miracle: job growth, welfare reform and corporatism in the Netherlands* (Amsterdam University Press 1997).

<sup>147</sup> A Afonso and J Visser, 'The Liberal Road to High Employment and Low Inequality? Social Models and Employment Performance in the Netherlands and Switzerland' in JE Dølvik and A Martin (eds), *From Crisis to Crisis: European Social Models, Employment and Inequality in the Era of Monetary Integration* (Cambridge UP 2014) (forthcoming).

rights and the pay terms in extended collective agreements.<sup>148</sup> The liberalization of the market for temporary work agencies in 1998, which abolished the requirement to register, has created a large market for illegal and semi-legal firms, some specialising in cross-border posting. The main issues here are non-payment of taxes and social security contributions. Major temp agencies, such as Randstad and Adecco, and the employers' association for agencies, have tried to regulate the market through codes of conduct and have been in favour of extending the agreement despite a very weak union presence in the sector, in order to cut off rival, free booting competitors which, often with the help of rival unions set up for this purpose, undercut collectively set wages and rules, especially in the case of cross-border postings.<sup>149</sup> But there are still thousands of staffing agencies around that flout the rules, and the unions have been pressing for a registration requirement, which came into force in 2012. Recent governments, first the coalition (2011-12) which drew Parliamentary support from Mr Wilders's anti-immigration party, next the Liberal-Labour coalition which gained office after the general elections of 2013, pressed for stricter application and a review of EU immigration policies, together with the curtailment of the social rights of (unemployed) workers from Central and Eastern Europe. The social pact on social policy reforms that was negotiated with the unions in April 2013 promises stricter regulation of the market for flexible (temporary and agency) work, limits on the number of years (from 3 to 2) of consecutive temporary jobs, and longer intervals (from 3 to 6 months) in between jobs, as well as more controls on the application of collective agreements, minimum wage and social security laws.

### *Belgium*

When transposing the Posting of Workers Directive in 2002 the Belgian legislator, supported by the social partners, followed in the footsteps of France and applied a broad interpretation of the mandatory rules to be applied to posted workers, which went well beyond the 'nucleus' of conditions laid down in Article 3.1 of the PWD.<sup>150</sup> Invoking the principle of 'equal pay and conditions for equal work', compliance with all labour, wage and employment conditions set out in the statutory labour provisions and in collective agreements (made generally binding by a Royal decree) was to be enforced by the labour and social inspection services based on prior notification of all posted workers.<sup>151</sup> Later Belgium also established joint liability in the supply chain in the con-

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<sup>148</sup> Berntsen (above n 101).

<sup>149</sup> Houwerzijl, Chapter 3, this volume.

<sup>150</sup> Cremers et al (above n 81) 524, 532.

<sup>151</sup> As such, the implementation of the directive clarified the Civil Code, stipulating that legislation falling under criminal law had to be respected by all who live on Belgian territory. Cf Cremers and Donders (above n 35).

struction sector, requiring that the main customer firm should withhold 15 per cent of the payments, but this scheme was declared unlawful by the ECJ.<sup>152</sup>

In the wake of eastward enlargement, electronic notification of all postings was made obligatory from 1 April 2007 and special units and data bases were set up to combat fraud. Foreign undertakings have to notify the posted workers, their working conditions and activities on Belgian territory prior to the start of the work (in the so-called LIMOSA system), including data about the posting undertaking, the Belgian client or employer involved, the duration, sector and venue of the works. After notification, a receipt is given to be shared with the user firm in order to free the user from further registration. Relevant documents have to be kept at the disposal of the labour inspectorate at the place of work or in the Belgian residence of a representative of the employer.<sup>153</sup>

According to the European Commission,<sup>154</sup> approximately 113,000 E101 certificates were issued to workers posted to Belgium in 2007, whereas the LIMOSA system registered 145,000 declarations in 2007 and 204,000 in 2008.<sup>155</sup> Most of these came from neighbouring countries, while 17.3 per cent came from Poland and Romania and 5 per cent from Portugal. In spite of the stringent Belgian regime, reports suggest that abuse and circumvention are widespread,<sup>156</sup> and both employers and unions complain about unfair competition, bogus posting and self-employment, disrespect of working time and holiday rules, underpayment, housing problems and alike. Foreign letter-box companies and dubious staffing agencies, often located in the Netherlands, are referred to as a rising source of such problems both from the employer and union side. According to the unions, it is very hard to address these problems, as the posted workers tend to be afraid of disclosing any information that can impair their contract. This may explain the discrepancy between the many instances of fraud cited in the press and the very low number of court cases reported.<sup>157</sup>

The Commission has long been critical of the Belgian posting regime and has signalled that it is considering an infringement procedure, but the government with support of the social partners has stayed its course and defended a maximum interpretation, and tight enforcement, of the Posting of Workers Directive. Nonetheless, the evidence does not

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<sup>152</sup> Oulai (above n 123) 24. The Limosa system requirement that self-employed service providers have to register was in 2012 ruled in breach of EU rules (EFD 2012 577-10).

<sup>153</sup> Exemption from the notification duty is only possible for certain short-term activities such as concerts, professional sport arrangements, seminars and conferences, maintenance of supplied machinery and initial assemblage, and for international transport.

<sup>154</sup> European Commission 2008 (above n 92).

<sup>155</sup> Pacolet and De Wispelaere (above n 94) 49–50; Oulai (above n 123) 95; Berntsen (above n 101).

<sup>156</sup> Pacolet and De Wispelaere (above n 94) 53, 57.

<sup>157</sup> van Houk and Houwerzijl (above n 93) 140.

suggest that posting practices in Belgium are less problematic than in neighbouring countries.

### *Switzerland*

Switzerland has long been very open to immigrants, who make up one-fifth of its labour force. However, the rights of immigrants were quite limited and in economic hard times foreign workers ('guest workers') were usually sent home. Switzerland is not a member of the EU and could long set its own rules. However, in exchange for gaining access to EU markets Switzerland gradually opened its labour market to EU citizens and service providers. In so doing it had to apply EU law on non-discrimination and the Posting of Workers Directive, and could no longer withhold the rights granted to domestic workers from immigrant labour. In 2002, the Swiss labour market was made fully open to EU15 citizens; additional agreements extended this to the new member states. The Swiss law requires registration of posted workers, notification of cantonal authorities, and for postings of more than 90 days a work permit is required. In May 2012 Switzerland invoked a safety clause in its bilateral agreement with EU to re-introduce restrictions on labour migration from eight CEE Member States for one year. Given that Swiss minimum working and wage conditions are met, work permits were automatically granted, but an annual quota of 2130 permits was set for stays above 30 months. After an inflow of 90,000 EU residents the preceding 11 months, especially from the crisis-ridden southern countries, the restrictions were in April 2013 tightened and extended to all EU Member States with quotas for stays longer than one year of 53,000 for citizens from EU17 and 2130 for CEE citizens. Then, 9 February 2014, a referendum called for by the Swiss Peoples Party, resulted in a tiny majority (50.4%) in favour of a proposal to introduce a constitutional ban on free movement of labour, most likely implying that Switzerland will have to withdraw from the bilateral agreement with the EU. While the consequences of the decision remain to be seen, the subsequent section reviews the development in the Swiss regime up till the referendum.

Switzerland has often been characterised as a liberal corporatist economy. However, from the 1990s onwards the corporatist element was weakened.<sup>158</sup> Unionization levels dropped to 17 per cent in 2010 and collective bargaining was further decentralised, although the employers have retained a coordinating role. Less than half of the agreements contain a wage clause and offer effective minimum wage protection. Switzerland has no national (federal) minimum wage. There is a mechanism for extending sectoral agreements to all firms in a sector, but extension has been subject to strict legal conditions and until recently very few agreements have been made generally binding.<sup>159</sup>

The bilateral agreements on free movement with the EU were subject to referenda, the last in 2009 resulting in a 60 per cent majority in favour of its continuation. This offered

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<sup>158</sup> Afonso and Visser (above n 145).

<sup>159</sup> R Fluder and B Hotz-Hart, 'Switzerland' in A Ferner and R Hyman (eds), *Changing Industrial Relations in Europe* (Blackwell 1998).

the Swiss unions an opportunity to gain concessions in labour market regulation in exchange for supporting free movement. With the dominant conservative/nationalistic block divided between those opposing free movement and a more liberal element and the business community in favour, the outcome of these referenda depended very much on the positions of the left parties and the trade unions.<sup>160</sup> Against the opposition of employers in export industries, but with support from small employers, especially in construction, the unions obtained significant improvements in the conditions for setting sectoral wage floors.<sup>161</sup>

First, the Swiss Posting Act of 1999 guaranteed application of labour laws and generally binding collective agreements also for posted workers. Second, in 1999 the threshold for extending collective agreements was lowered, and extension is now also possible for agreements covering only a minority of employees. Third, in sectors that have no generally binding collective agreements the state (at the federal level or the individual cantons) can determine so-called ‘standard work contracts’ guaranteeing minimum wages in a particular sector.<sup>162</sup> According to the unions these measures have helped to stem the decline in the coverage of collective agreements – from around 50 per cent in the mid-1980s to close to 40 per cent in the mid-1990s. Since 1999 bargaining coverage has slowly edged up to between 46 and 49 per cent.<sup>163</sup> Extension plays a major role in guaranteeing coverage, especially in construction, retail and crafts. According to the Swiss Statistical Office, of the 1.7 million Swiss employees covered by collective agreements in 2009, 700,000 (41 per cent) were covered by extended agreements.<sup>164</sup> Not all agreements have a clause on minimum wages or ‘normative’ or binding effects on individual employment contracts. In 2009, for example, only 1.4 million employees (about 40 per cent of all Swiss employees, not counting public servants) were covered by agreements with a binding minimum wage. Recently the unions also succeeded in negotiating a binding agreement for employees dispatched by temporary work agencies. Thus far, the federal state has only once used its mandate to set statutory minimum wages through the issuing of standard work contracts, in 2011 for housekeeping. A few cantons have set minimum wages for sectors such as domestic work, beauty parlours, call centres and repair services. As a significant part of the economy is regulated neither by collective agreements nor by standard work contracts, the Swiss trade unions have

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<sup>160</sup> Eldring and Schulten (above n 131).

<sup>161</sup> Afonso (above n 114); Cremers (above n 75); Eldring and Schulten (above n 131).

<sup>162</sup> Cremers 2011 (above n 118); Eldring and Schulten (above n 131).

<sup>163</sup> M Hartwich and L Portman, *Switzerland’s Trade Unions’ experiences with the extension/enlargement of collective agreements* (WSI Tarifpolitische Tagung, 27.9.2011 Düsseldorf). For internationally comparable figures see: ICTWSS database.

<sup>164</sup> Bundesamt für Statistik 2011, Eldring and Schulten (above n 131).

run a prolonged campaign for the introduction of a nation-wide statutory minimum wage.<sup>165</sup>

It was against this backdrop of surging labour immigration and heated debates over flanking measures to curb low-wage competition that the Swiss Peoples Party won a tiny majority behind its proposal of a constitutional ban on free movement. There is no doubt that Switzerland stands out in international comparison in terms of immigration. In 2011, 27.3 per cent of the Swiss population had a migration background, in Germany and the US the proportion is about half (some 13 per cent). Recently, net migration rates in Switzerland were around 9 per cent of population, in Germany around 2 per cent and United Kingdom some 4 per cent. Since 2010 three-quarters of employment growth was due to recruiting foreign workers, according to one interpretation leading to popular unease because ‘low income employees [had] to carry an extra burden through additional competition from immigrants with low wages.’ This interpretation has been disputed by observers suggesting that Swiss low income workers actually had become quite well protected and that it was rather the political struggle over further flanking measures to curb low-wage competition that led to a demobilization of the business community and political right that previously had secured comfortable majorities in referenda over labour migration. Whatever interpretation is correct, the salience of the issues underscores the stakes involved in the European debacles over how to regulate posting and labour migration.<sup>166</sup>

#### *Austria*

Proto-corporatist Austria,<sup>167</sup> before entry into EEA in 1994 and membership of the EU in 1995, had already established a posting regime based on application of the entire Labour Code and extension of the universally binding national collective agreements to all foreign undertakings and workers. This was instigated by the trade unions, especially in construction, which feared downward wage pressure when entering the single market. The employers’ association and the Social Democratic and Christian Democratic coalition government went along with it.<sup>168</sup> A law on ‘Changes in the Labour Code’ (*Arbeitsvertragsrechts-Anpassungsgesetz – AVRAG*) was swiftly enacted in 1993,<sup>169</sup> stipulating that wages for all foreign labour, including those sent by foreign companies, should be in accordance with the law and collective agreements. In effect this implied that the whole bracket of the pay scale was mandatory also for posted workers, who in

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<sup>165</sup> Eldring and Schulten (above n 131).

<sup>166</sup> J Schweighofer, ‘The Swiss Referendum, Free Movement, Xenophobia, and Substitution Effects’ (28.2.2014) <http://www.social-europe.eu/2014/02/swiss-referendum-free-movement-xenophobia-substitution-effects/>; R Erne, ‘How To Explain The Swiss Vote Against The Free Movement Of Workers’ (6.3.2014) <http://www.social-europe.eu/2014/03/explain-swiss-vote-free-movement-workers-european-union/>

<sup>167</sup> F Traxler, ‘Collective bargaining in the OECD: Developments, preconditions and effects’ (1998) 4 *European Journal of Industrial Relations* 207.

<sup>168</sup> Menz (above n 73) 132.

<sup>169</sup> Bundesgesetzblatt für die Republik Österreich 1993/172.

addition were entitled to coverage of transport and accommodation.<sup>170</sup> Extension was not controversial because all employers in Austria are compulsory members of the Economic Chamber (*Wirtschaftskammer*), which acts as an employers' association, and are bound by its agreements. A four-week exemption to allow for installation and servicing of equipment was closed in 1995 (*Antimissbrauchsgesetz*), while certain adjustments were made in the AVRAG in the course of implementation of the Posting of Workers Directive (PWD) in 1999 and 2002. The entire Labour Code was also made applicable to workers posted by foreign temporary work agencies.

Already in 1996, long before enlargement, Austrian trade unions and governments, supported by employers, campaigned at the European level for transitional rules regarding free movement of workers and services from Central and Eastern Europe. When German Chancellor Schröder in 2000 called for a seven-year transitional phase, this was heartily welcomed in Austria who eventually declared the EU consent as 'one of the biggest successes of Austrian diplomacy'.<sup>171</sup> Nonetheless, in 2004 the European Commission initiated a lawsuit against Austria for breaches of the PWD. This pertained to the Austrian requirement that posted workers had an open-ended employment relationship with the employer sending them to Austria,<sup>172</sup> which was subsequently amended to a contract whose duration exceeds the posting period.

When the repeal of the transitional agreements was getting closer, the trade unions gained support from employers and the government for a substantial package of measures to curb wage competition. In 2007, the Austrian Federation of Labour (ÖGB) obtained an agreement of principle from the employers to establish a minimum wage at €1,000 or more per month in all collective agreements,<sup>173</sup> which by 2009 was codified in a statutory regulation. The social partners in 2009 also pressed the government into introducing a law on contractor liability for social security levies in sub-contracting chains, complementing former legislation regarding minimum wages. When the transitional agreements expired, in May 2011, the government heeded calls from the social partners and introduced stricter controls and stiffer penalties for breaches of the law.<sup>174</sup> However, the posting regime has been adjusted so that only minimum wages in the collective agreements and the parts of the Labour Code that fall within the core of the PWD are applied to posted workers.

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<sup>170</sup> Menz (above n 73) 133.

<sup>171</sup> *De Standard* 2001; A Afonso, 'Employer Strategies, Cross-class Coalitions and the Free movement of Labour in the enlarged European Union' (2010) 10 *Economic Review Advance Access* 1.

<sup>172</sup> EIRO 2009/studies/tn0908038s/at0908039q.htm

<sup>173</sup> EIRO (AT0707019I): *Social partners agree to minimum wage increase*, <http://www.eurofound.europa.eu/eiro/2007/07/articles/at0707019i.htm>.

<sup>174</sup> EIRO (AT0908039Q): *Posted workers*, <http://www.eurofound.europa.eu/eiro/studies/tn0908038s/at0908039q.htm>.

#### 4.4.4 The Nordic countries

In the Nordic countries, the 2004 eastward enlargement engendered a sharp rise in the mobility of low cost workers and service providers. This contributed to the booming years of the 2000s but also raised issues of unfair competition, wage dumping, and – as illustrated by the *Laval Quartet* – regulatory clashes between EU law and the Nordic systems.

When originally implementing the Posting of Workers Directive (PWD), the Nordic countries chose very different approaches. In Denmark and Sweden, where the social partners have traditionally rejected state interference in wage setting, the actors chose to rely on their longstanding tradition of signing collective agreements with foreign companies based on the principle of equal treatment, if necessary by means of legally protected industrial action.<sup>175</sup> Receiving assurances from the Commission about their systems, neither Sweden nor Denmark included in their transposition laws of the PWD a reference to Article 3(8), which allows minimum wages set by generally binding national agreements, or by accords signed by the most representative social partners.<sup>176</sup> Proto-corporatist Finland, by contrast, followed the path of France, Austria and Belgium, referring in its posting legislation to the entire range of labour rights and all relevant clauses in the countries' routinely extended collective agreements.<sup>177</sup> The same applied to Iceland. As a condition for supporting Norway's entry into the EEA or EU, the trade unions, in order to ensure equal treatment, demanded a statutory right to extend wages and conditions in collective agreements to posted workers. Despite protests from the employers' camp, which preferred statutory minimum wages at branch level, the extension law was adopted by the centre-left majority in 1993. In 2000 when the PWD was first transposed, the centre-right government of the time basically stuck to the hard (minimum) core of Article 3(1). The right to make all labour law applicable to posted temporary agency workers was, for instance, not utilised – without union complaints.<sup>178</sup>

The Nordic countries responded in different ways also to the enlargement of the labour and service markets in 2004. Initially, all countries except Sweden applied transitional arrangements, but these were repealed after two years in Finland and Iceland and after

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<sup>175</sup> K Ahlberg, N Bruun and J Malmberg, 'The *Vaxholm* case from a Swedish and a European perspective' (2006) 12 *Transfer – European Review of Labour and Research* 155; K Alsos and L Eldring, 'Labour mobility and wage dumping: The case of Norway' (2008) 14 *European Journal of Industrial Relations* 441.

<sup>176</sup> Dølvik and Eldring (above n 87).

<sup>177</sup> N Bruun, *Finland*. FORMULA Working Paper 15 (2010). A national system for extension of collective agreements was established in Finland already in the 1970s, requiring at least 50 per cent coverage of the agreement in question.

<sup>178</sup> See eg S Evju, 'Safeguarding National Interests : Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive' in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013).

five in Norway and Denmark.<sup>179</sup> As no such restrictions were allowed for mobility of services and posted workers, substantial parts of the migration flows from Central and Eastern Europe took place through subcontracting, posting of workers and temporary work agencies, often associated with inferior pay and working conditions and circumvention of taxes and levies.

In response to union demands, Finland, Iceland and Norway followed mainly the continental European countries in relying on statutory extension of minimum pay and core standards defined in collective agreements, underpinned by strengthened state control and enforcement measures.<sup>180</sup> In contrast to Finland and Iceland, extension in Norway met with strong objections from employers in export industries, eventually leading to court cases.<sup>181</sup> By contrast, employers in domestic markets, such as construction and cleaning which faced significant low-cost competition, tended to support extension to preserve a floor in the labour market.<sup>182</sup> In order to settle internal rifts, the Norwegian employer confederations have repeatedly floated the idea of a statutory minimum wage,

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<sup>179</sup> For Romania and Bulgaria, the Norwegian TAs expired in 2012.

<sup>180</sup> These include, amongst others, contractor liability in subcontracting chains and union access to information about subcontractors' pay and working conditions (in areas with extension); social clauses in public contracts; ID-cards for workers in construction and other branches; strengthened conditions for operation of TWAs, registries and services centers for foreign workers; strengthened labour inspection and cooperation between state agencies etc. See L Eldring, AM Ødegård, RK Andersen, M Bråten, K Nergaard and K Alsos, *Evaluering av tiltak mot sosial dumping* (Fafo 2011) and L Eldring, K Ahlberg and K Pedersen, *Arbeidstilsynenes roller, strategier og redskaper i arbeidet mot sosial dumping: En nordisk pilotstudie* (Nordisk Ministerråd 2013).

<sup>181</sup> The 2008 decision of extending parts of the collective agreement for the shipbuilding industry was disputed in court by nine shipyards represented by their main confederation NHO. They lost in the first instance in 2010, but appealed to a higher court, which asked the EFTA Court for advice. In January 2012 the EFTA Court ruled that the Norwegian practice was acceptable except that application of national rules concerning compensation for overnight stays away from home and travel, board and lodging expenses were in breach of the PWD, unless this could be justified on the basis of public policy provisions; [2012] EFTA Ct Rep Book 3, 4. The appeal court ruled in favour of the state in May 2012, despite the EFTA Court's ruling. In June 2012, the shipyards and NHO appealed the case to the Supreme Court which on 5 March 2013 – Rt. 2013, 258 – rejected all the employers' complaints and held that compensation for travel, board and lodging was required to hinder pre-emption of the extended minimum wage and therefore justified by public policy provision. See to this eg S Evju, 'Safeguarding National Interests : Norwegian Responses to Free Movement of Services, Posting of Workers and the Services Directive' in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013) 249–250, and also Barnard, Chapter 10, this volume. – Eventually the judgment was indirectly criticized by the EFTA Court in an entirely different case (E-3/12). At the time of writing it was under scrutiny by EFTA Surveillance Authority, ESA, while a Finnish case involving similar issues (see n 183) was pending in the CJEU.

<sup>182</sup> Eldring and Alsos (above n 112 and n 176).

formerly anathema in Nordic contexts. Also among the trade unions, extension has been contested, in fear that it would increase the incentive for free riding. By 2014 only four industries – agriculture, construction, shipyards and cleaning – were covered by mandatory minimum wages based on publicly extended collective agreements.

In Denmark and Sweden the insistence on maintaining their ‘state-free’ bargaining regimes has produced major clashes with the ECJ’s understanding of the EU free movement regime. In the *Viking* case (2007), which concerned a Finnish seafarers’ union that had threatened industrial action against a Finnish shipping company planning to relocate a ship to Estonia, the ECJ ruled that the threat of union action was a disproportional restriction of the freedom of establishment and sent the case back to the national court.<sup>183</sup> In the *Laval* case (2007), involving the Swedish construction union which had organized a blockade in order to pressure a Latvian company to sign a collective agreement, the ECJ deemed the union action disproportional and in breach with EU law, because they had demanded that Laval sign an agreement without clear minimum pay provisions (as stipulated in the Posting of Workers Directive, PWD) and containing conditions outside the nucleus of the directive.<sup>184</sup> Besides declaring the union attempts unlawful, the ECJ held that the Swedish, and by implication the Danish, approach to implementing the directive was in breach of EU law because national legislation contained no reference to the use of Art 3.8 of the PWD. The court had declared Sweden’s and Denmark’s national models of collective bargaining incompatible with the EU regime for free movement of services,<sup>185</sup> and understandably this caused widespread consternation among unions and even among employers (in Denmark).

In response to these ECJ rulings, Denmark and Sweden felt compelled to amend the legal basis by invoking Article 3(8) of PWD which, as mentioned before, allows regulation of core conditions for posted workers by collective agreements that are nation-

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<sup>183</sup> The dispute was settled by a secret ‘gentlemen’s agreement’ before it came back to the national court. A new Finnish case, with parallels to the contested Norwegian shipyards case (above n 181), was at the time of writing pending in the CJEU (Case C-396/13). The case concerns a group of posted Polish employees working on a nuclear power station in Olkiluoto who has not been paid according to the relevant extended collective agreement. Besides questions regarding how to define the concept of minimum pay (notably, can eg daily allowance and compensation for travel-to-work time be included, and what is the proper pay grade) and the use of public policy provision to justify inclusion of pay elements beyond Art. 3(2) PWD, the case entails complex, principled issues regarding choice of law (Finnish vs Polish). The defendant Polish company contends that Polish law must be applied, according to which the posted workers cannot be represented by their Finnish union (the claimant), arguing also that the workers cannot invoke the freedom of association enshrined in the EU Charter of Fundamental Rights because it is not signed by Poland.

<sup>184</sup> Evju and Novitz, Chapter 2, this volume; Dølvik and Visser (above n 32).

<sup>185</sup> Malmberg (above n 109).

wide or signed by the most representative social partners. While the Danes swiftly signed a tripartite agreement laying the basis for only minimal changes in national practices, boldly aiming at equal treatment and equal pay, the Swedish centre-right government chose a cautious approach, reflecting deep conflicts between unions and employers.<sup>186</sup> Accordingly, the Swedish Parliament adopted an EU-proof solution which, against union protest, only permits industrial action against foreign firms for the purpose of obtaining minimum pay rates defined in nation-wide agreements and in conformity with minimum rights stipulated in the amended Swedish posting law.<sup>187</sup> Rendering collective bargaining in cross-border contexts virtually meaningless, the new Swedish posting law was in 2013 deemed in breach of ILO convention 87 on freedom of organization by the ILO Expert Committee. Paradoxically, foreign employers in Sweden now enjoy stronger protection against industrial action than domestic employers, a form of inverse discrimination that is likely to affect domestic subcontracting practices and power relations.<sup>188</sup> In response, Swedish trade unions have started to negotiate minimum pay rates in sectoral agreements in which actual pay setting had previously been delegated to company bargaining – another paradox of re-centralisation and reduced flexibility driven by EU-law which was clearly at odds with the EU economic policy recommendations.

The twofold pressures posed by EU law and growing cross-border competition in the market for services and labour have thus engendered a process of judicial re-regulation of the Nordic labour markets. Especially in Finland, Norway and Iceland a range of initiatives to strengthen state control and enforcement have been launched. Also in Denmark union and employer voices have floated ideas of introducing extension of minimum wages in collective agreements, whereas the leading private sector employer federation in Sweden has called for a statutory minimum wage – lately leading three

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<sup>186</sup> The Swedish business confederation (SN) had actively supported the Latvian employer and the new Member State governments in the *Laval* case, causing rage in the union camp - and raised eyebrows even in the centre-right government, which publicly defended the Swedish practice in the Court.

<sup>187</sup> Union action is allowed only if the foreign company cannot ‘document’ that the minimum conditions are met, which in the view of Swedish unions invites use of fake papers and inhibits so-called enforcement agreements.

<sup>188</sup> Malmberg (above n 109). With a view to n 66 and the discussion above, at n 186–188, it is also worth noting that the European Committee of Social Rights (ECSR) found the revised Swedish legislation in breach of Article 6(2) and (4) of the European Social Charter, with respect to the State’s duty to promote collective agreements and recognise the right to collective action, as well as with Article 19(4), with respect to the State’s obligation to secure for foreign workers treatment not less favourable than that of nationals; see ECSR Collective Complaint No 85/2012.

main trade unions (Transport, SEKO and IF Metall) to counter that they were prepared to try out extension mechanisms even in Sweden.<sup>189</sup>

ILO Convention No. 94 has been implemented in Denmark, Finland and Norway, but is still not ratified in Sweden. The trade unions have been calling for Swedish ratification, but the centre-right government has claimed that the Convention may contravene EU directives on public procurement – an argument that may lose relevance after the EU in 2013 revised the Directive on public procurement (see Ahlberg and Bruun, Chapter 7, this volume).

Unlike in most countries, the EU Directive on temporary agency work was met with deep scepticism among Norwegian trade unions – reflecting growing unease with the labour market implications of the EEA-agreement – but was finally implemented in January 2013, together with a package of measures to combat social dumping within the staffing industry. This sparked protest from the employer side, which complained that Norway, had not made use of the option to allow exemptions from equal treatment by collective agreement (as in Denmark, Finland and Sweden) and for agency workers with permanent contracts and pay between assignments (as in Sweden).

In all Nordic countries there are signs that new secondary tiers of employment are evolving, setting a new challenge for the trade unions.<sup>190</sup> This also affects domestic workers and firms competing in the same markets, and increases the incentives for employers to exit from existing collective agreements and outsource jobs. Ten years after EU's eastward enlargement it is no longer possible to categorize the Nordic countries as a united strongly corporatist group establishing 'equal treatment' for posted workers.<sup>191</sup> Finland, Iceland and Denmark can perhaps still fit into such a category, but both Sweden and Norway have seen rising strife between unions and employers and new lines of conflict in national industrial relations.

#### 4.5 Comparative observations: trends of convergence and divergence

We observe that during the two decades since the completion of the single market ('Europe 1992') the development of national wage floors has been influenced by two opposing tendencies. On one hand, a tendency of weakening and erosion of wage set-

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<sup>189</sup> B Moos, 'Almengørelse av overenskomster – lovsikret almengørelse kan være et redskap i kampen mod lønsdumping' (2012) 14 *Tidsskrift for Arbejdsliv* 105; Teknikföretagen, Förslag till åtgärder med anledning av Lavaldomen, <http://www.teknikforetagen.se/hem/-Publicerat/Remissvar> (Publicerat: 2009-12-09); K Ahlberg, 'Svenska fack beredda pröva allmängiltiga kollektivavtal' (2013) *EU & arbetsrätt* 2, 4.

<sup>190</sup> JH Friberg and L Eldring, 'Europeisk arbeidsmobilitet: Utfordringer for de nordiske arbeidsmarkedene' (2013) 30 *Søkelyset på arbeidslivet* 1-2; Lillie (above n 96); C-M Jonsson, *Vinnare och forlorare. Om konkurrens med arbeidskraftskostnader inom EU* (LO 2013); SK Andersen and J Feldbo-Kolding, *Danske virksomheders brug af østeuropæisk arbejdskraft* (FAOS 2013). SK Andersen, JE Dølvik and C Lyhne-Ibsen, *The Nordic labour market models in open markets – challenges and perspectives* (Fafo 2014).

<sup>191</sup> Menz (above n 73).

ting institutions, especially trade unions, caused by changes and restructuring in domestic labour markets combined, in several countries, with partial deregulation of employment protection and opening up of a market for atypical and temporary labour; on the other hand a tendency of re-regulation and transformation of national methods of minimum wage setting in response to the integration of EU/EEA labour markets and to EU regulations and Court decisions. The latter tendency can be divided into two phases. The first phase was prompted by national responses to the perceived effects of the Single Market, the southern enlargement of 1986, the lifting of the Iron Curtain and the subsequent adoption of the Posting of Workers Directive. The second phase was prompted by the eastward enlargement of the EU and the resultant surge in labour migration and posting. Table 4.1 summarizes the changes in union density, bargaining coverage and the variety of national means of regulation by the end of the period.

**Table 4.1** *Trade union density and collective bargaining coverage (1992-2009), extension mechanisms and statutory minimum wages – in case countries*

	Union density		Bargaining coverage		CA extension		Statutory minimum wage		
	1992	2009	1992	2009		Scope	1992	2009	Method
Finland	78	67	82	82	yes	large	no	no	
Sweden	85	69	89	91	no		no	no	
Denmark	76	68	84	80	no		no	no	
Norway	58	54	72	74	no	small	no	no	
UK	38	28	40	34	no		no	yes	Govt low pay committee
Ireland	57	37		44	yes	small	no	yes	Govt low pay committee
Germany	34	19	70	62	yes	Medium	no	(yes)*	
Austria	44	29	99	99	yes	Large	no	no**	National agreement
Switzerland	23	18	48	48	yes	Medium	no	no***	(Standard work contracts)
Netherlands	25	19	82	82	yes	Medium	yes	yes	Govt, indexed to CAs
Belgium	54	52	96	96	yes	Large	yes	yes	National agreement, ext
France	10	8	92	90	yes	large	yes	yes	Govt decision

Source: ICTWSS database

\* Germany will adopt a statutory minimum wage by 1.1.2015.

\*\* Determined by legally binding sectoral agreements.

\*\*\* Federal or canton level can enact Standard Work Contracts in vulnerable sectors

In the initial phase (1990–2000), the *liberal market economies*, United Kingdom and Ireland, did very little, though in Ireland the sectoral agreements in construction allowed for extension of the core terms and conditions. Among the *continental countries* one could distinguish between, on one hand, Austria, France and Belgium, three countries which early on established comprehensive ‘equal treatment’ regimes, applying the entire Labour Code and extended collective agreements to posted workers, and on the other hand the Netherlands and Germany, which adopted a regime that was limited mainly to the hard **nucleus** of the Posting of Workers Directive and application of collectively agreed minimum wages in the construction sector. Among the *Nordic countries*, Sweden and Denmark relied on their autonomous systems of collective bargaining, while Finland, Iceland and Norway based their initial responses on extension of collective agreements and fairly broad understandings of the statutory employment rights to be applied.

Apart from the broad classification of liberal versus coordinated market economies,<sup>192</sup> which seems to fit the British and Irish case compared with the others, the variation in initial responses can hardly be explained by differences in union strength, the party composition of governments, or particular types of coordination between labour market agents. The differences appear more related to the availability of particular instruments, possibly laying dormant, within a specific national system of labour relations. Another important factor was whether the choice of a particular instrument was contested among the main actors and whether the dominant actor, be it the state, the employers or the unions, was powerful enough to promote or block a particular regulatory approach in response to migration and posting.

Although there are many elements of continuity between the two phases, the review of national responses to the eastward enlargements and the CJEU decisions in the *Laval* Quartet points towards a revised diversity of national industrial relations. Five broad tendencies are detected:

- first, national posting regimes based on statutory extension of collectively agreed minimum wages (*erga omnes*) have been maintained, and in several countries – such as the Netherlands, Germany, Switzerland and partly Norway – they have been broadened so that they apply to all or many more sectors than was the case before (usually only construction);
- second, in line with the Court’s interpretation of the Posting of Workers Directive in the *Laval* case most countries have converged on extension practices that only include minimum rates in collective agreements, but the extent of differentiation of minimum pay scales related to skill and tenure varies;
- third, the liberal market economies, the United Kingdom and Ireland, have joined the large group of EU countries (now 20 out of 27) that have a statutory national minimum wage. This also pertains to Germany, but the approach chosen by the

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<sup>192</sup> Hall and Soskice (above n 9).

new Grand Coalition government, broadening the scope for extension of collectively agreed minimum rates, conforms more with the Continental tradition where the statutory minimum wage provides a supplementary wage floor in sectors and companies where minimum rates in extended collective agreements do not apply. In the same vein the Austrian social partners have introduced a minimum wage in all sector agreements, which with a coverage rate of 99 per cent (mostly due to compulsory organization of employers) in effect means a national minimum wage.

- fourth, most countries have developed more stringent control and enforcement measures, ranging from strengthened labour inspectorates and schemes for notification and registration with tax and social security authorities to establishing contractor and chain liability for subcontractors;
- fifth, in most countries trade unions have stepped up their efforts to provide services and support and to offer membership for posted workers, sometimes with success but mostly with modest results in terms of organizing and signing collective agreements.

Altogether, in the context of the CJEU decisions and the political stalemate at EU level, the responses to increased inflows of cheap labour and posted workers go in the direction of national re-regulation through a broadening of national minimum wage floors and a stronger state hand in enforcing basic labour standards.<sup>193</sup> With the dissemination of *erga omnes* practices to new sectors and countries, statutory extension of minimum terms in collective agreements has become the predominant means of regulating wages for posted workers. With few exceptions, the trade unions have been compelled to give up their demand for ‘equal pay for equal work’ and have accepted that conditions for posted workers are restricted to the hard nucleus Article 3(1) of the Posting of Workers Directive. These adjustments can be viewed as pointing in the direction of harmonization of national approaches in response to the Court-driven tightening of EU rules. The extended coverage of collective agreements has thus in many instances also implied establishment of a new pay floor in parts of the domestic labour market without collective agreements; in some countries this ‘boomerang’ effect can be expected to raise actual domestic wages (for example, in the growing low pay sectors in Germany); in other cases it may legitimate establishment of a new, lower wage tier (for example, in Norwegian branches with low density and coverage).

The idea of moving towards hybrid forms of minimum wage regulation, based on a mix of statutory and collective bargaining instruments, as illustrated by the German approach, has surfaced also in the Nordic countries, where employers in Norway and Sweden have played with proposals to establish a statutory minimum wage. The Nordic unions have, in contrast to their German counterparts, strongly opposed such ideas,

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<sup>193</sup> The recent adoption of new EU public procurement rules, allowing more emphasis on social aspects and tougher provisions on subcontracting, may operate in the same direction. See Ahlberg and Bruun, Chapter 7, this volume.

fearing a weakening of incentives to organize and enter agreements, as well as unwanted juridification, and legitimization of alternative, lower wage floors. This reflects the fact that introduction of a statutory minimum wage will have very different implications in sectors and countries with high vs low coverage and organization rates;<sup>194</sup> in the latter it is likely to underpin collective bargaining, in the former the opposite effect is more likely.

The picture of revised diversity emanating from our review reflects significant differences in actor constellations and resilience of national labour market institutions. The first condition for union success is coalition building. A coalition with employers' associations in domestic sectors, especially construction, whose members face low-cost competition from unorganized firms, unites the cases (countries) in which the unions have achieved political backing for strengthening the national wage floor and can thus be seen as a necessary condition. Whether it is sufficient depends, first of all, on the power balance within the employers' camp and how this translates into the political arena. Employers in export sectors often view access to cheap labour as a means to boost competitiveness and retain production in the home country. Consequently, they tend to oppose regulation; put under pressure, they prefer flat statutory minimum wages as an alternative to extension of collective agreements. Our cases suggest that especially the weight of the small and medium-sized enterprise sector in terms of employment and votes for parties that are usually located on the centre-right has helped the unions in making their political case for extension. Union success, secondly, seems to be influenced by the type of coordination of collective bargaining and traditions for concertation with the government. In countries with centralized coordination employer confederations usually have more authority over their member associations and they tend more often than in countries with sectoral or decentralized pattern bargaining to heed the demands of their members in domestic sectors calling for protection against low-wage competition. The reluctance of the German employers' confederation to join such calls as compared with the Dutch and the Belgian employers' associations, where internal critics of the practice of extension have been silenced, illustrates this point. In each of the three countries, exports and export industries are extremely important, but the difference may be that in no other country in Europe with the possible exception of Sweden is the dominance of large firms in industrial production as strong as in Germany. Third, differences may also be explained by the fine detail of institutions, such as the original extension regime that, in the German case, has been conditioned by the veto power of employers, but is much less constrained in other countries.

In this respect, interesting variations are also seen among Nordic employers. While there has been tripartite consent to re-regulatory responses in Finland, Denmark and Iceland, employers in Sweden and Norway have been much more reluctant to support re-regulation and have instead flirted with the idea of a statutory minimum wage as an

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<sup>194</sup> Eldring and Alsos (above n 176 and 183).

alternative to extending the coverage of collective agreements. The Swedish employers' federation, in its aim of strengthening the competitiveness of a relatively large export sector dominated by large firms, wanted to do away with the equal treatment regime for posted workers and does not hide its desire for weaker unions. This seems to have influenced their support for the ECJ's judgment in *Laval* and to have shaped their policies of rejecting a joint solution with the unions to the regulatory problems opened by the Court ruling. Collective agreements in Sweden, while negotiated at the sectoral level, have very wide coverage. Rather than extending these agreements to cover all foreign and posted workers, it appears that Swedish employers in the export sector are looking for ways to establish a second, significantly lower wage floor, based on a mandatory minimum wage, for such workers and use this as a tool to put downward pressure on union wage claims. In combination with rising low wage competition, this has prompted several unions to consider introduction of a legal extension mechanism, implying a significant shift of principles in Swedish industrial relations. In Norway, where bargaining coverage is much lower and more uneven across sectors, the main employers' confederation has been deeply divided on the issue of extension. While some employers' associations in export sectors with high coverage and high wages, like in Sweden, seem tempted to open a second wage floor based on a mandatory minimum wage, some employers' associations in domestic sectors have supported the extension of collective agreements as a means of safeguarding their membership base, political influence and ability to influence competitive conditions in their sector.

Public policy and state support have become more important for union efforts to establish and defend national minimum wage floors. The unions have thus engaged in coalition-building that goes well beyond the old alliance with the political left. Recent initiatives of re-regulation and stricter enforcement have been set in motion under centre-right governments in France, the Netherlands, Austria, Belgium, Switzerland, Finland, Iceland, Denmark and lately also in Germany. Also the Swedish centre-right government, which came to power with a substantial share of union votes, has defended the primacy of collective agreements and rejected statutory minimum wages. While the central role of Christian Democratic parties in many continental countries may be declining, similar centre or centre-right parties with an electoral base in the SME sector have tried to steer a middle course between adherence to the European integration process, and its core project of market liberalization, and defending national standards. In Norway, the views on measures against low wage competition have been more divided along party lines, but after the 2013 election the governing Conservative coalition parties have apparently accepted extension of collective agreements as a necessary means of defending the wage floor.

## 5 Conclusion: Setting wage floors in open markets – Europe's multilevel governance in practice

When the vision of a single European market was launched in the mid-1980s, national labour markets were largely separated, migration was low, the impact of EU employment law was very limited (except in the domain of non-discrimination), social policies were a matter for member states (if they guaranteed the employment and social security rights of migrant workers) and industrial relations were a national affair. This has changed; with shared and shifting responsibilities between the EU and its member states, a fairly complex pattern of multilevel governance has evolved. Initially, the principle of subsidiarity enshrined in the Maastricht Social Protocol meant that European regulation was only warranted when issues could not be adequately addressed at the national level, and that implementation of Community regulations should respect national practice and tradition in industrial relations. As long as market integration was mainly about trade in goods between countries with similar living standards, where differences in wage costs were mirrored by differences in capital endowments, productivity and exchange rates, this 'dual track' of labour market governance worked fairly well. But with the leap into monetary union, where exchange rates were irrevocably fixed, and the rise in labour mobility in the wake of German reunification and eastward enlargement, the conditions for labour market governance were altered. Using the example of setting and defending national wage floors, one of the key concerns of trade unions at all times, we have in this chapter examined how the EU system of multilevel governance has changed and worked in practice during the past two decades.

Our answer can be summarized in three points. First, the original premise of European integration based on a two-track development built on open markets and national (compensatory) social policies was no longer tenable with the deepening of integration implied in the Single Market initiative of the mid-1980s.<sup>195</sup> The idea that supranational market integration and national systems of labour market regulation can help each other, as envisaged in the Treaty notion of upward social harmonization, has proved ill-founded. The rise in cross-border provision of services has engendered growing conflicts between the supranational free movement rules and national industrial relations, and the principle of subsidiarity underlying the multilevel EU system of labour market regulation has been trumped by EU market-making rules – what Fritz Scharpf has called 'negative integration'.<sup>196</sup> Simply put, the space for national regulation has become progressively smaller. What has evolved is a skewed model in which the supremacy of EU market-making rules has altered the balance between economic and social regulation within member states.

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<sup>195</sup> M Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP 2005).

<sup>196</sup> FW Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

Second, in the absence of political capacity to amend the European rules of the game, the European Court of Justice (CJEU) has become the key arbitrator in conflicts of rules and has attained a crucial role in shaping the evolving regime of European governance of labour markets and industrial relations. This has moved the actual locus of decision making in the EU further away from the reach of unions. Constrained to seek corrective action at the national level, and within the limits proscribed by the Court's interpretation of EU law and EU politics, the unions' voice and vision in shaping European integration have weakened. Conflicts and inconsistencies at the EU level are now being catapulted back to the national level, where they drive actors to seek shelter in solutions that can pass the test of the Court's interpretation of EU law, mainly in the direction of a 'juridification' of employment relations and a greater role for the state. This is quite the opposite of the lofty principles of 'sovereignty' and 'subsidiarity' in the Treaties and the intentions expressed in the Social Partners' Agreement of 31 October 1991 on the eve of the Maastricht Intergovernmental Conference, which paved the way not only for the Economic and Monetary Union but also for many of the social policies of the following decade and for the European Social Dialogue itself.

Third, while the emergence of this asymmetric, judicially driven EU regime has homogenizing effects across member states, it has paradoxically not fuelled the development of a European system of employment relations with transnational bargaining, or a shift in competences and political regulation of employment regulation to the European level. Even among the unions ideas on laying down European principles for minimum wage setting have been contested. Rather the outcome has been a constrained form of re-nationalisation in which member states, unions and employers, united or divided at the national or sectoral level, seek to guard their interests through reactive, albeit occasionally creative adjustments of national regulation to the requirements imposed on them by the evolving EU jurisprudence. Rather than supporting diversity, the legal constraints of EU law and the Court's interpretation of it tend to push member states towards convergence, at least in the issue we studied in this chapter: the setting of national wage floors. There may be other compelling reasons to establish minimum wages through extension of collective agreements to non-organized employers or through statute (less earnings inequality and prevention of working poor and benefit claims of low wage earners are two of them), but surely EU law is another driver in this direction and has forced countries that achieved the same goals through non-statutory, union-based means to adopt techniques that are alien to their industrial relations systems.



# Monitoring Compliance with Labour Standards

## Restriction of economic freedoms or effective protection of rights?

*Kerstin Ahlberg, Caroline Johansson and Jonas Malmberg*

### 1 Introduction

#### *1.1 Restriction of economic freedoms or effective protection of rights?*

According to the Posting of Workers Directive, the Member States shall ensure that posted workers are guaranteed ‘the hard nucleus’ of the labour law in the host state. This chapter will deal with the legal and institutional arrangements aimed at ensuring that these basic employment conditions are actually applied to posted workers.

From a labour law perspective different institutional arrangements for monitoring employment conditions are analysed primarily as means of effective protection of rights. Because posted workers will not be fully integrated into the industrial relations of the host state, they will not in practice be covered by the normal mechanisms for supervision and control of working conditions in the host state. Neither will they, in practice, be under close scrutiny by the control mechanisms in the state of establishment. In this way there is a risk of creating a free zone for irregular or undeclared work where the labour laws of neither the host state nor the state of establishment are enforced. The potential effect of monitoring is not limited to individual posted workers, but could also affect the functioning of the national labour market. The absence of effective control mechanisms for posted workers, it is argued, risks distorting competition between domestic and foreign service providers and employees.

From the perspective of market integration and particularly the free movement of services, on the other hand, national monitoring measures are analysed primarily as restrictions of economic freedoms. National monitoring measures could make it impossible for a foreign service provider to operate in another Member State using its own employees. Such measures could also cause delays or administrative burdens for the service providers. Furthermore, it is sometimes argued that national control measures are not in practice aimed at protecting posted workers, but rather at protecting national markets from foreign competition. In this way the national monitoring measures are obstacles to realising a fully integrated service market.

The aim of this chapter is to analyse how these different perspectives on arrangements for monitoring of labour standards for posted workers are reflected in the position taken by the EU institutions and the Member States. Are these arrangements viewed as restrictions of economic freedoms or effective protection of rights? Another question concerns who is responsible for the monitoring: the host state or the state of establishment?

Section 2 contains an analysis of the legal evolution. We will describe the role of different actors in the developments shaping the present state of law. We will also show how this evolution has affected the balance of national monitoring and enforcement measures from industrial relations processes to an increased role for administrative enforcement processes.

Section 3 contains a legal analysis of the restrictions on national monitoring measures following from EU law as it stands today compared with the Commission's proposal for a directive on the enforcement of the Posting of Workers Directive, which was presented in March 2012, and the final compromise on the same directive reached early in 2014 between the Commission, the Council and the European Parliament.

### *1.2 Enforcement of national labour law*

The Member States have traditionally used a range of methods to ensure compliance with their labour law, on their own citizens as well as on posted workers. It is possible to distinguish between three main categories.<sup>1</sup>

The first is the enforcement of employment and working conditions through judicial procedures in courts or tribunals initiated by the employees themselves, possibly with the support of workers' representatives or public bodies (the judicial process).

In the second category, enforcement is entrusted to trade unions, works councils or other workers' representatives (the industrial relations process). It is widely accepted that employee representatives in the workplace have an indispensable role to play in the enforcement of labour law. Where there are suspicions that a certain law has been violated, information, consultation and negotiation will be used to assess the facts and to discuss whether there has indeed been a breach of the law and how this should be remedied. In most Member States we find rules that are aimed at underpinning industrial relations processes as means of enforcing substantive rules of labour law. Such rules strengthen the opportunities for workers' representatives to influence managerial decisions (notably, for example, on collective redundancies) and control how substantive rules are applied in the workplace.

The first two categories could be described as private enforcement. In the third category, enforcement and supervision are the responsibility of public authorities such as labour inspectors or equality bodies (the administrative process). When health and safety legislation was introduced at national level, it was clear that it would not be effective if enforcement was left to the parties themselves.<sup>2</sup> Thus, specific administra-

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<sup>1</sup> For the following, see J Malmberg *et al*, *Effective Enforcement of EC Labour Law* (Kluwer 2003); J Malmberg, 'Enforcement of Labour Law' in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945–2004* (Hart Publishing 2009), 263.

<sup>2</sup> See T Ramm, 'Laissez-faire and State Protection of Workers' in B Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (Mansell Publishing 1986) 73, 77–88.

tive processes were introduced. Such administrative procedures are particularly common in the enforcement of legislation on health and safety, including working time. Various forms of administrative enforcement of discrimination legislation have also been introduced in most Member States.

Methods from all three categories are often applied alongside each other at national level, but it differs between countries which method is the most prominent.

A comparative analysis of national labour law clearly indicates that the Member States have not considered it enough for effective enforcement of employment rights to leave it to the workers themselves to go to court. The judicial processes have regularly been complemented with other enforcement measures. Furthermore, national experiences indicate that monitoring of employment and working conditions has to take place close to the workplace.

## 2 The legal evolution<sup>3</sup>

### 2.1 *Posting before the Directive*

#### 2.1.1 Introduction

Before the Posting of Workers Directive the *acquis communautaire* did not contain any set of laws regarding employment conditions for posted workers. In *Seco*<sup>4</sup> from 1982 the Court of Justice of the European Union (CJEU) made it clear that EU law does not preclude Member States from extending their national legislation or labour agreements to any person who is employed, even temporarily, within the Member State, no matter where the employer is established. This statement was repeated in *Rush* from 1990.<sup>5</sup>

Also, in *Rush* the CJEU found that workers who carry out work as part of a service contract, provided by their employer, never get access to the labour market of the Member State where the work is carried out. Hence, these workers are not subject to the provisions on the free movement of workers but form part of the free movement of services. Such workers, the Court explained, 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.<sup>6</sup>

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<sup>3</sup> Cf more in-depth E Sjødin, 'Labour Market Regulation as Restrictions : A Developmental Study of ECJU Case Law at the Interface between Free Movement and Posting of Workers' in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013); S Evju and T Novitz, Chapter 2, this volume.

<sup>4</sup> Joined cases 62/81 and 63/81 *Seco* [1982] ECR 223.

<sup>5</sup> Case C-113/89 *Rush* [1990] ECR I-1417.

<sup>6</sup> Case C-113/89 *Rush*, para 15. However, at the same time the Court stated: 'the same conclusions are not necessarily appropriate in all cases. In particular, it must be acknowledged ... that an undertaking engaged in the making available of labour, although a

The Member States' choice to extend national labour laws to posted workers was considered part of their competence to pursue a national social policy. However, this competence must not be used contrary to the economic freedoms according to the Treaty, especially the free movement of services (now Article 56 TFEU). Thus the interpretation of the limitations on the Member States' competence to pursue national social policies was in the hands of the CJEU, which shall ensure that the law is observed in the interpretation and application of Treaty (now 19 TEU).

### 2.1.2 The Member States

Prior to the Posting of Workers Directive, monitoring of workers' rights in most of the Member States covered by our study was left to the trade unions, except for health and safety issues. This was the case in *Denmark, Norway, Sweden, the United Kingdom and the Netherlands*.

After the *Rush* judgment, *Sweden, the United Kingdom, the Netherlands and Denmark* continued to rely entirely on their traditional industrial relations systems and did not take any further legislative action as regards monitoring and enforcement until many years after the adoption of the Directive.<sup>7</sup>

*Norway* took a different stand when, in preparation for accession to the EEA Agreement, it introduced the first legislation that made it possible to declare certain conditions in collective agreements generally applicable.<sup>8</sup> It did not foresee any role for public inspection bodies, but reinforced the power of the social partners.

Among the Nordic countries, *Finland* was a special case with a mixture of private and public enforcement. Finland had had a system with generally applicable collective agreements since the 1970s. Still, private monitoring and enforcement was the main rule, but this was supplemented by public supervision of the generally applicable collective agreements and the provisions of the Employment Contracts Act by non-organized employers, including foreign enterprises posting workers to Finland.

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supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.' In such a case, the Court concluded, transitory provisions restricting the free movement of workers would be applicable (para 16). See now also Joined cases C-307/09, C-308/09 and C-309/09 *Vicoplus* [2011] ECR I-453.

<sup>7</sup> See K Ahlberg, 'The Age of Innocence – and Beyond' in Evju (ed) (above n 3) 297; T Novitz, 'UK Implementation of the Posting of Workers Directive 96/71', *ibid.* 329; M Houwerzijl, 'The Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: A Neutral Approach?', *ibid.* 177; M Gräs Lind, 'Danish Law on the Posting of Workers', *ibid.* 85.

<sup>8</sup> See S Evju, 'Safeguarding National Interests : Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive' in Evju (ed) (above n 3) 225.

The prominent exception at that time was *Germany*.<sup>9</sup> Germany had early experiences of posted workers and adopted a national Posting of Workers Act before the legislative action at Community level had produced a result. The substantive requirements were combined with rules on registration and provision of information, mandatory for undertakings posting workers on German soil. Monitoring of compliance with the law was provided by the Federal Employment Agency and the Main Customs Offices. The fact that Germany already had developed rules for posted workers made it an early subject of scrutiny by the CJEU, as can be seen from the case law presented later in this chapter.

### 2.1.3 The Court

Already in *Seco* and *Rush Portuguesa* the Court made it clear that the Member States had the right to enforce such national rules by appropriate means.<sup>10</sup> Consequently, regardless of whether the worker was a migrant or a posted worker, the host state had the possibility to ensure that employers complied with its domestic labour law. At the same time, the CJEU indicated that there were some limits to the host state's power to monitor the application of its labour law:

‘... such checks must observe the limits imposed by Community law and in particular those stemming from the freedom to provide services which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities’.<sup>11</sup>

The position taken in these two cases was that the host states were, within certain limits, entitled to extend their domestic labour law to posted workers. In doing so they were pursuing national social policies and not EU law. Furthermore, at that time the interpretation of the Treaty provision on free movement of services was that it precluded all discrimination against a service provider on the grounds of its nationality or the fact that it was not established in the host state.

However, in the early 1990s the CJEU made it clear that not only discriminatory measures could amount to unlawful restrictions to the free movement of services.<sup>12</sup> An early statement is found in *Säger*:

‘... 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 other-

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<sup>9</sup> M Schlachter, ‘The Posting of Workers Directive – German Reactions and Perceptions’ in Evju (ed) (above n 3) 137.

<sup>10</sup> Joined Cases C-62 and 63/81 *Seco* para 14; Case C-113/89 *Rush* [para 18].

<sup>11</sup> Case C-113/89 para 17.

<sup>12</sup> See further, C Barnard, *The Substantive Law of the EU: the Four Freedoms* (3<sup>rd</sup> edn, OUP 2010) 17 *et seq.*

wise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.<sup>13</sup>

Thus the Court made clear that it is not sufficient to take non-discrimination into consideration, while extending national labour law to posted workers or establishing which control measures accompany them. The Member States also have to analyse what restrictive effects the national measures might have. According to the Court, restrictions of the free movement of services can be accepted only if justified by overriding reasons of public interest and if they are proportional (that is, the measure is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it). This formula has been applied by the CJEU ever since (although with some differences in the wording).<sup>14</sup> In *Arblade*, which concerned the situation prior to the adoption of the Posting of Workers Directive, the CJEU applied this formula, *inter alia*, in relation to a requirement of the host state regarding the keeping and retention of documents by an employer established in another Member State.<sup>15</sup>

The Court's strengthening of its interpretation of what constitutes a restriction to the free movement of services took place in parallel with the process of establishing the Single Market.<sup>16</sup> Since then most cases regarding enforcement measures brought before the CJEU have concerned non-discriminatory, but restricting, measures.

## 2.2 *The Posting of Workers Directive*<sup>17</sup>

### 2.2.1 The Directive

The Posting of Workers Directive (PWD) was adopted in 1996. According to the Directive the host state must ensure that some parts of its national labour law – the hard nucleus – are applied to the posted workers. With the adoption of the Directive the question of how to protect the employment conditions for posted workers is no longer purely a matter of national social policy, but forms part of the *acquis communautaire social*.

The Directive does not give the Member States any detailed instructions on how to - ensure posted workers the rights conferred on them. Member States shall take appropriate measures in the event that a posting employer fails to comply with the Directive. In particular they shall ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the Directive (Article 5). Furthermore, Article 6 reads that the posted worker may institute proceedings against

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<sup>13</sup> Case C-76/90 *Säger* [1991] ECR I-4221, para 12.

<sup>14</sup> See Section 3 below.

<sup>15</sup> Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453.

<sup>16</sup> COM(85) 310 final, Completing the Internal Market: White Paper from the Commission to the European Council.

<sup>17</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.

the employer in the host state without prejudice to his or her right to institute proceedings in another state. Apart from this, no concrete measures are required or recommended.

In addition, the Directive establishes a system of cooperation on information. According to Article 4 Member States have to designate liaison offices, which are to work as links between monitoring authorities in the Member States, but also to facilitate access to national work and employment conditions relevant for posting employers and posted employees. The liaison offices are obliged to cooperate with each other by, for example, answering questions from corresponding authorities in other Member States, and in particular to reply to requests for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

In this way the Directive indicates, on one hand, that the host state is responsible for arranging the monitoring of the employment conditions for posted workers and, on the other hand, that the host state and the state of establishment have a joint responsibility to cooperate in order to strengthen the monitoring and enforcement measures.

However, although the Directive prescribes that the Member States shall take appropriate measures to guarantee that posted workers are ensured the employment conditions following from the Directive, these measures are not harmonized at European Union level. The Court has stressed that the Posting of Workers Directive seeks to coordinate the substantive employment conditions of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored. The various control measures do not fall within the scope of the Directive and may be freely defined by the Member States, in compliance with the Treaty and the general principles of European Union law.<sup>18</sup>

### 2.2.2 Transposing the Directive

The implementation of the Posting of Workers Directive did not occasion many novelties in the field of monitoring and enforcement, except, of course, the establishment of liaison offices in all Member States. This constituted a public feature which, in some of the Member States, differed from the traditional, private enforcement measures. In the years to come it would turn out that the liaison offices hardly served as such important parts of the monitoring systems as foreseen in the Directive.

Furthermore, all Member States examined in the FORMULA project – except *the United Kingdom* – explicitly implemented the jurisdiction clause in Article 6. Nevertheless, workers posted in the United Kingdom can bring claims before the Employment Tribunal.<sup>19</sup>

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<sup>18</sup> Case C-515/08 *Santos Palhota* [2010] ECR I-9133.

<sup>19</sup> A van Hoek and M Houwerzijl, *Comparative Study of the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* (Radboud University Nijmegen 2011) 137.

Nevertheless, most of the Member States focused on the substantive issues – what parts of their labour law could be extended to foreign workers – when implementing the Directive.

Again, *Germany* was the exception, even though the amendments made to the already existing national Posting of Workers Act were not so much a consequence of having the Directive in place, as a means of closing loopholes that had been discovered during the application of the Act. For example, in 1996 posting enterprises' duty to register and submit information to the employment agencies was expanded, and they henceforth would have to designate an authorized recipient of documents in Germany and to report a specific location where the authorities could inspect the necessary documents. The formal transposition of the Directive into national law took place two years later.<sup>20</sup> A new, strict liability of the client for claims of workers deployed by its subcontractors was introduced. The rules made the client liable for wage claims, as well as for unpaid contributions to the social funds of the construction sector.<sup>21</sup>

### 2.3 *Posting in light of the Lisbon strategy and enlargement*

#### 2.3.1 Introduction

From 1992 until the beginning of the new millennium, further integration on the Internal Market was mainly brought about by the CJEU, through its preliminary rulings. However, by the end of the 1990s, other Community institutions once again started to stress the importance of the service sector, claiming that it was time to continue the work initiated in the 1980s in order to reach the objective of full unification of the Internal Market.<sup>22</sup> At its summit in Lisbon 2000, the European Council framed the European Union's strategic goal for the coming decade: 'to become the most competitive and dynamic knowledge-based economy in the world', thereafter known as the Lisbon Strategy.<sup>23</sup>

The Commission drew up a comprehensive strategy for strengthening services on the internal market. The aim of this strategy was to allow services to move across national borders as easily as within a Member State. The package proposed contained, *inter alia*, launching a systematic survey of barriers to services at national level and identifying

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<sup>20</sup> Schlachter (above n 9) 160–161.

<sup>21</sup> *ibid.*, 164.

<sup>22</sup> See eg CSE(97) 1 final, Action Plan for the Single Market; COM(99) 464 final, Communication from the Commission to the European Parliament and the Council - The strategy for Europe's internal market; COM(99) 624 final/2, Communication from the Commission to the European Parliament and the Council - The strategy for Europe's Internal Market. See also B de Witte, *Setting the Scene – How did Services get to Bolkestein and Why?* Cadmus Working Paper EUI Law, No. 20, 2007.

<sup>23</sup> European Council, 'Lisbon Presidency Conclusions' (March 2000), paras 5, 23 and 24.

areas in which infringement procedures were needed. In addition, the Commission initiated the process of adopting a horizontal directive on the free movement of services.<sup>24</sup>

### 2.3.2 Intensified infringement procedures

Based on the findings of the CJEU in *Säger* and *Arblade*, mentioned earlier, and the preliminary ruling in the case *Finalarte*, where the Court found that certain rules in German law had a discriminatory effect on foreign service providers,<sup>25</sup> the Commission's intensified efforts in the beginning of the millennium to remove barriers to the transnational provision of services also made it initiate a series of infringement procedures concerning national control measures. Several of these were brought before the CJEU.

Three cases concerned requirements for posting of temporary agency workers to Germany and Italy, respectively, countries in which national law at that time imposed many restrictions on temporary agency work.<sup>26</sup>

In *Germany*, temporary agency work was prohibited in the construction sector according to the legislation subject to the first of these cases.<sup>27</sup> However, by exception, contracting out of labour was allowed between undertakings in a consortium or between construction undertakings, in both cases on condition that the enterprises involved were covered by the same collective agreements. According to the Commission this constituted an unjustified restriction on the transnational provision of services, as enterprises established in other Member States simply could not be subject to German collective agreements and, consequently, could not contract out building workers to Germany. In addition, if they wanted to establish operations in Germany, the criteria for being recognized as construction undertakings (and as such covered by the collective agreements for the industry) were more difficult to fulfil than for domestic enterprises, the Commission argued.

Like Germany, *Italy* applied its rules on temporary agency work without distinction to domestic and to foreign undertakings, which meant that they could not get a license unless they had at least a branch office in Italy. In addition, foreign and domestic agencies alike had to deposit 700 million Italian lire at a credit institution in Italy. Not only

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<sup>24</sup> COM(2000) 888, Communication from the Commission to the Council and the European Parliament – An Internal Market Strategy for Services, 8–9; COM(2002) 441, 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>25</sup> Joined cases C-49/98 a.o. *Finalarte* [2001] ECR I-7831.

<sup>26</sup> For further reading see K Ahlberg, 'Germany: "Premature Implementation" of the Draft Directive – In Spite of Resistance in the Council', in K Ahlberg *et al*, *Transnational Labour Regulation: A Case Study of Temporary Agency Work* (Peter Lang 2008) 119; L Zappalà, 'Italy: From Prohibition to Introduction of Temporary Agency Work as a Measure to Promote Employment', *ibid.* 99.

<sup>27</sup> Case C-493/99 *Commission v Germany* [2001] ECR I-8163.

did this constitute a de facto negation of the freedom to provide services, according to the Commission, but Italy also failed to take into account comparable obligations that a service provider might have in the Member State of establishment.<sup>28</sup>

A couple of years later, *Germany's* regulation of temporary agency work once again attracted the attention of the Commission.<sup>29</sup> The legislation had now been relaxed, but temporary agency work would still be kept under administrative control. Among other things, all agencies had to inform the authorities of the place where the worker would be employed. However, unlike domestic agencies, agencies established abroad also had to report if that place changed. By contrast, when workers were hired from agencies established in Germany, this supplementary obligation was imposed on the user enterprise. The Court agreed with the Commission that this directly discriminatory rule could not be justified. In this case the Commission also raised two additional complaints, but they were rejected by the Court. This was the only one out of eight infringement cases in which the Court did not concur with the Commission on all its complaints.

Another three infringement cases concerned specific requirements for posting of workers who were nationals of non-Member States.<sup>30</sup> Here, Luxembourg, Austria and Germany had similar rules, which meant that undertakings established in another Member State could not post a third-country national unless he or she fulfilled a number of conditions that the national authorities would check before they granted permission to come and work, among them that the worker had been employed by the same undertaking for a certain period (6–12 months) and/or had an open-ended employment contract.

The two remaining cases both concerned Luxembourgian control measures. In the first (which did not concern the protection of workers), Luxembourg itself acknowledged that its law on patents was incompatible with the Treaty insofar as it required that patent agents who wanted to provide services in Luxembourg must elect domicile with an agent approved there.<sup>31</sup> In the second case, the Commission let off a broadside against Luxembourg's legislation on posting of workers.<sup>32</sup> Among other things, it argued, foreign service providers were likely to be dissuaded from posting workers to Luxembourg because of the lack of clarity of the provisions on what information must be provided to the authorities, and when this must be done, while undertakings that failed to comply with these provisions could be subject to considerable fines. Another complaint concerned the fact that foreign undertakings had to designate an agent residing in Luxem-

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<sup>28</sup> Case C-279/00 *Commission v Italy* [2002] ECR I-1425.

<sup>29</sup> Case C-490/04 *Commission v Germany* [2007] ECR I-6095.

<sup>30</sup> Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191; Case C-168/04 *Commission v Austria* [2006] ECR I-9041; Case C-244/04 *Commission v. Germany* [2006] ECR I-885.

<sup>31</sup> Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351.

<sup>32</sup> Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

bourg by whom it must lodge, and retain for an indefinite period, the documents necessary for monitoring purposes.

And as already mentioned, in all these infringement cases except one, the Court upheld all of the Commission's complaints.

### 2.3.3 Adopting the Services Directive<sup>33</sup>

Another item on the Commission's agenda was a proposal for a directive on services in the internal market. A first proposal – commonly known as the Bolkestein proposal – was presented in 2004.<sup>34</sup> One of its key features was the 'country of origin' principle. It laid down that the service provider would be subject exclusively to the provisions of the Member State of establishment, no matter where the service was carried out. Furthermore, the state of establishment would have the main responsibility for the supervision.

In order to ensure supervision the Member States would be obliged to assist each other. That included supplying information to other Member States and to the Commission. The host state could supervise undertakings providing services within its territory – at the request of the state of establishment. It also had the possibility to conduct checks, inspections and investigations on the spot as long as these were objectively justified.

On the other hand, the country of origin principle was not applicable on matters covered by the Posting of Workers Directive. Contrary to the main rule, the host Member State would be responsible for carrying out checks and inspections to ensure compliance with the working conditions applicable under that Directive.<sup>35</sup> However, in doing so it would have to submit to certain restrictions contained in a list, which in practice made it subject to the same restrictions as regards what measures it could take as for services not falling under the Posting of Workers Directive.

The requirements that would be banned were in fact used by several Member States in order to ensure that undertakings providing services on their territory complied with labour regulations. They had also been, or were about to be, examined by the CJEU by the time the Bolkestein proposal was presented. And while it is true that the CJEU had

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<sup>33</sup> For more in-depth discussions of the legislative process, see JE Dølvik and AM Ødegård, 'The Struggle over the Services Directive: The Role of the European Parliament and the EUC' in Evju (ed) (above n 3) 359; M Schlachter and P Fischinger, 'From Bolkestein to the Services Directive – and further', *ibid* 383.

<sup>34</sup> COM(2004) 2 final, Proposal for a Directive on services in the internal market, 3.

<sup>35</sup> The Bolkestein proposal was presented almost four years before the *Laval* judgment. At that time, there was a widespread understanding among labour law experts that the Posting of Workers Directive, being a minimum directive, allowed Member States to extend substantive rules that were more favourable than 'the hard nucleus' to posted workers. Therefore critics argued that the Bolkestein proposal would change the Posting of Workers Directive into a maximum directive and, unlike before, restrict what substantive conditions host states could impose on posting undertakings. See eg N Bruun, 'Employment Issues Memorandum' (Employment issues, Memorandum 11.11.2004), 13 – 14.

recognized, or was about to recognize, their restrictive effect, it would still consider them justifiable under certain conditions.

As is well known, the Bolkestein proposal triggered an intense debate, and the Commission presented a new proposal in 2006.<sup>36</sup> The country of origin principle was replaced with a provision on the freedom to provide services. The host state would be allowed to apply its national rules provided that these were justified on grounds of public policy, public security, public health or the protection of the environment, and that they were non-discriminatory, necessary and proportionate. A specific provision clarified that the Member States could apply their employment conditions, in conformity with Community law. And as before, matters covered by the Posting of Workers Directive would not be covered by the Services Directive.

Nonetheless, the Commission stressed that it was of great importance to address any unjustified administrative burdens which hinder the opportunities for businesses to provide cross-border services by posting their staff, and to improve administrative cooperation between the Member States in order to combat black labour and social dumping. These issues were therefore to be addressed in a different context.<sup>37</sup>

With only minor amendments, the Directive finally adopted corresponded to the Commission's amended proposal.<sup>38</sup>

#### 2.3.4 The Commission's interpretative guidelines

On the same day as the Commission presented its amended proposal for a Services Directive, from which the provisions on administrative control of posted workers were deleted, it also published a guide for the Member States with its own interpretations of what kind of national requirements could be considered consistent with Community law.<sup>39</sup> The purpose of the guide was to 'tell the Member States how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC [now Article 53 TFEU<sup>40</sup>] and how to achieve the results required by the [Posting of Workers] Directive in a more effective manner'.<sup>41</sup> Thus, it dealt partly with the prevailing Community law on administrative procedures, partly with the mutual assistance regulated in Article 4 of the Posting of Workers Directive.

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<sup>36</sup> COM(2006) 160, Amended proposal for a Directive on services in the internal market.

<sup>37</sup> *ibid.*, 13.

<sup>38</sup> Council 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>39</sup> COM(2006) 159 final, Guidance on the posting of workers in the framework of the provision of services.

<sup>40</sup> Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47.

<sup>41</sup> COM(2006) 159 final (above n 39), 3.

The guide focused on the four types of administrative requirement that would all have been banned under the Bolkestein proposal:

- the requirement to obtain authorization from, or to be registered with, the host state’s authorities or any equivalent requirement,
- the requirement to make a declaration to the host state’s authorities,
- the requirement to have a representative in the host state; and
- the requirement to hold and keep employment documents.

In the Commission’s opinion, the limitations to these national measures needed to be clarified urgently.

According to the Commission, a requirement to have a representative domiciled in a specific Member State ‘appears to be incompatible with Article 49 EC Treaty’.<sup>42</sup> The Commission referred to *Arblade* but also to the case concerning Luxembourg’s Patent Law and the obligation to elect domicile with an agent approved in Luxembourg, which was found inconsistent with Community law.<sup>43</sup> It concluded that the obligation to have *a representative domiciled in the host Member State* is disproportionate.

Furthermore, the Commission stated that a general requirement to obtain an *authorization*, applicable to all activities, constitutes a disproportionate restriction. The Member States may, however, require prior authorization for certain activities as long as this can be justified. Such a requirement must take into account the controls and monitoring already carried out in the Member State of establishment.

Regarding the requirement to *make a prior declaration*, the Commission referred to Case C-445/03 *Commission v. Luxembourg* and Case C-244/04 *Commission v. Germany*, in which the CJEU establishes that a prior declaration is a less restrictive but just as effective measure to monitor compliance with the relevant national labour law. Consequently, the Commission concluded that an obligation to submit a prior declaration that contains information on the posted workers, the type of service they will provide, where, and how long the work will take, is a proportionate measure.<sup>44</sup>

As regards the obligation to keep and maintain *social documents* on the territory of the host Member State, the Commission found that it was in line with Community law as long as the Member States considered the requirements laid down in the legislation of the Member State of establishment.<sup>45</sup> The Commission claimed, however, that the scope for requiring social documents is reduced by the system of cooperation and information laid down in Article 4 of the Posting of Workers Directive.<sup>46</sup> In the Commission’s view, the cooperation between the Member States would partly replace host states’ require-

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<sup>42</sup> *ibid.*, 4.

<sup>43</sup> Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, para 19.

<sup>44</sup> COM(2006) 159 final (above n 39), 6.

<sup>45</sup> *ibid.*, 7–8.

<sup>46</sup> *ibid.*, 7.

ments on service providers. It had poor support for that assumption in the CJEU's case law, but it seems to be in line with the intentions behind the duty of mutual assistance in the proposal for a Services Directive.<sup>47</sup>

The second part of the guide dealt with the Member States' obligation to cooperate on information. The Commission presented an inventory of how this cooperation had worked so far<sup>48</sup> and concluded that the Member States needed to redouble their efforts to improve access to information for service providers and their posted employees on the terms and conditions of employment that must be applied, as well as to deepen their cooperation in order to facilitate cross-border exchange of information between the competent authorities.<sup>49</sup>

In 2007, the Commission presented a follow-up of the 2006 guide that dealt mainly with the duties of the liaison offices.<sup>50</sup> It showed that the situation had improved, but that deficiencies still existed. The main problem was the quality of the information addressed to posting employers and posted workers. As regards the cooperation between Member States, it was clear from the few contacts between liaison offices that the methods developed at EU level were still rarely used. In fact, the virtual absence of administrative cooperation might explain why they reverted to unnecessary and/or disproportionate control measures, the Commission concluded.<sup>51</sup>

### 2.3.5 Opposite developments at national level

At the same time as the efforts at EU level focussed on facilitating the free movement of services and realising the Lisbon Strategy, the point of departure for legislative activity in many Member States was another. It was the 2004 enlargement that occasioned new legislation on monitoring and enforcement of employment conditions for posted workers. Instead of deregulating, many Member States found it necessary to introduce additional control measures, due to increased – or fear of increased – worker mobility

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<sup>47</sup> The Commission referred to Joined Cases C-369/96 and C-376/96 *Arblade* para 61, in which the Court stated that the protection of workers could require that certain documents be kept in the host state '*particularly* where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71/EC' (emphasis added). One could add that in para 79 of the same judgment, the Court notes that the organized system for cooperation and exchanges of information 'will shortly render superfluous the retention of documents in the host Member State after the employer has ceased to employ workers there'.

<sup>48</sup> SEC(2006) 439, Commission staff working document Commission's services report on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>49</sup> COM(2006) 159 final (above n 39), 8–10.

<sup>50</sup> COM(2007) 304 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers.

<sup>51</sup> *ibid.*, 9.

from the new Member States in Central and Eastern Europe. This activity was intensified after the judgments in the *Laval* quartet and is still going on.

*Norway*, which, until the enlargement, had not even made use of the possibility to declare conditions in collective agreements generally applicable (introduced in 1993), now reinforced its control and enforcement instruments in several steps.<sup>52</sup> A feature introduced to facilitate control of posting undertakings was a possibility to require a compulsory ID and to keep records on workers at workplaces, which was swiftly implemented in the building industry. A number of obligations were imposed on the client; in other words, the person who orders the work. First, the client has to submit detailed information on its contractors and their employees to the Tax Authority. This duty both has a fiscal objective and serves as a basis for controlling employment relations. Second, the client has to inform its contractors of the obligations following from generally applicable collective agreements, as well as to ensure that the contractors comply with these obligations. Lastly, as from 2010, all clients have joint and several liability for wages and holiday pay due on its contractors and subcontractors. Also, the competences of the Labour Inspectorate were broadened as, for the first time, it was vested with supervision of terms and conditions of employment pursuant to the Extension Act and the Immigration Act. This altered the formerly essentially private enforcement regime significantly. After *Laval*, the Norwegian government also gradually increased the resources of the authority. However, private monitoring was also strengthened by the introduction of a right for trade union representatives in the client's undertaking to obtain – and a corresponding duty of their employer's contractors to provide – information on the terms and conditions of the contractors' employees.

As already mentioned, posting of workers in *Finland*, to the extent that it existed, was already subject to public monitoring and enforcement, but did not really become a big issue until the neighbouring countries in the Baltic became EU Member States. As a result of the enlargement, Finland step by step reinforced its control measures, introducing new obligations on posting undertakings, as well as on the clients.<sup>53</sup> As from 2006, posting undertakings must have a representative in Finland, who is authorized to act in court and to receive writs of summons and other official documents on behalf of the company. The client, for its part, has an obligation to ensure, through the contract or otherwise, that the posting company selects a representative. Foreign service providers also have to keep certain social documents available in Finland, and inform the client for whom the work is performed of who is in possession of the documents. Further duties for the client were introduced in 2007 with the Act on the Contractor's Obligations and Liability when Work is Contracted Out. The Act is applicable to those who use temporary agency workers or subcontractors, and its essential provision is an obligation on the client to make certain checks before it enters into a contract with a service

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<sup>52</sup> Evju (above n 8), 250–254.

<sup>53</sup> N Bruun, 'Finland', Formula Working Paper No. 15, 2010, 7–9.

provider, for example, that it is registered in certain fiscal registers, that it has paid taxes and pension insurance fees and what principal terms of employment will be applicable. In addition, the client has to give the trade union/workers' representative and the safety representative detailed information on any contract concerning temporary agency work or subcontracted labour. A client who fails to comply with these provisions will be obliged to pay a negligence fee. However, it will not be liable for the subcontractor's duties. The responsibility for monitoring compliance with all these new rules lies with the Occupational Safety and Health Authorities, which also control whether posted workers have the necessary permits according to the legislation on aliens. As a consequence, the government has also gradually given the Authorities increased resources.

However, this is not the end of the story. The new government, which took office in Finland in 2011, has adopted a programme to combat the 'grey' economy and economic crime. Among the measures to be considered are amendments to the Act on Contractors' Obligations, and reinforcing the possibilities of the Occupational Safety and Health Authorities to check that workers are paid in accordance with the law and collective agreements.<sup>54</sup>

As in Finland and Norway, the measures taken in *Denmark* were occasioned by a sharp increase in the number of posted workers after the enlargement. However, their design was in fact inspired by, and deemed to be in line with, the Commission's Communication COM(2006) 159 final.<sup>55</sup> Thus, in 2008 Denmark introduced an obligation for posting undertakings to notify the authorities at the latest on the day when work starts, by registering in a newly established register, RUT, accessible via a website. The provisions were reinforced in 2010. According to the new rules additional information must be provided, and even foreign one-man undertakings have to register, to enable an assessment of whether they are genuinely self-employed or in fact employees according to Danish law. Another novelty was that the client was made partly responsible in certain sectors, namely the building industry and the 'green' sectors, for instance, agriculture. Contractors in these sectors have to provide the client with documentation showing that they have fulfilled the registration requirements. If the client has not received such documentation within three days of the commencement of work, or if the information given is wrongful, the client has to report to the Work Environment Authority which is responsible for enforcement of the obligation to register. The duties of the client as well as of the contractor are sanctioned by a fine.<sup>56</sup> The information provided by the foreign undertakings is used for monitoring compliance not only with the Posting of Workers Act, but also with the tax legislation and the Law on immigration of illegal

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<sup>54</sup> Finnish Ministry of Finance, Effektiviserat åtgärdsprogram för bekämpning av grå ekonomi och ekonomisk brottslighet 2012–2015, Förslag till principbeslut 22.12.2011, Bilaga 2. Regeringen påskyndar kampen mot grå ekonomi, pressmeddelande från Finansministeriet och Inrikesministeriet 19.01.2012.

<sup>55</sup> Gräs Lind (above n 7), 92–94.

<sup>56</sup> *ibid.*, 125–126.

workers. Several authorities such as the National Labour Market Authority, the police and the Working Environment Authority are using RUT. Still, the responsibility for ensuring that posted workers receive the substantive terms and conditions of employment they should have (except those that follow from the legislation on health and safety) remains with the social partners, notably the trade unions, which can also have access to some of the information in the register, for example the name of the undertaking's contact person in Denmark who should be designated among the posted workers. However, their possibility to monitor terms and conditions is limited to undertakings bound by collective agreements.<sup>57</sup>

Like Finland, Denmark will continue on the course entered upon. Late in 2011, the new government and the opposition made a political agreement anticipating that further control measures would come, as the existing provisions were not effective enough.<sup>58</sup>

In *the Netherlands*, the enlargement together with the debate following the Bolkestein proposal led to a shift from reluctance to legislate on enforcement measures to a more active approach.<sup>59</sup> As a precondition for lifting the transitional regime for workers from the new Member States, the government and the social partners concluded a framework agreement on measures aimed at enhancing the enforcement of the conditions covered by the Posting of Workers Directive. The Labour Inspectorate was given a more active role, and a penal provision was added to the Minimum Wages Act. This was a remarkable step because it added public enforcement to the (underused) private enforcement of the legislation on minimum wages. The number of labour inspectors was doubled and the number of inspections increased even more. In sectors with much abuse, the Labour Inspectorate and other competent authorities – for example, the tax authorities – started to cooperate in so-called intervention teams, which control all possible forms of undeclared labour. Another novelty consisted of a mix between self-regulation and legislation. The employers' organization for temporary work agencies developed a quality label that enables user companies to distinguish reliable agencies from unreliable ones, and helps them choose agencies that fulfil the requirements concerning statutory minimum wages, taxes and social insurance and legitimate employment in the Netherlands. This was followed by legislation in 2010, which makes companies that use an agency without such a label liable for the wage claims of the temporary agency workers.

Among the countries studied in our project *Germany* was a special case, as it already had a history of regulating and controlling the posting of workers. As a consequence, as we have seen, a number of these measures were subject to the CJEU's scrutiny at the beginning of the millennium. Thus, while other countries introduced elements of public

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<sup>57</sup> *ibid.*, 102.

<sup>58</sup> Danish Ministry of Employment, Kommissorium, *Udvalget om modvirkning af social dumping*, 9 January 2012.

<sup>59</sup> Houwerzijl (above n 7), 208–215.

control that were new to them, Germany was busy revising its control measures, making them less burdensome and more in line with the findings of the CJEU.

Only two countries, *Sweden* and *the United Kingdom*, continued to rely exclusively on private enforcement.<sup>60</sup>

In *Sweden*, the new legislation adopted as a consequence of the CJEU judgment in *Laval* in fact weakened the trade unions' possibilities to monitor and enforce the rights of posted workers. As in Denmark, trade unions in Sweden have no right to monitor and enforce, for example, rates of pay, unless they have a collective agreement with the employer. In *Laval*, the Court ruled that the trade union could not take industrial action in order to force a service provider to sign a collective agreement *such as that at issue in the main proceedings*. However, the Swedish legislator interpreted the Court's case-law as prohibiting industrial action in order to force through even a clear and transparent minimum agreement, as long as the posting undertaking 'shows' that it applies conditions that are in all essentials at least as favourable as these minimum conditions.<sup>61</sup> It is, according to the new legislation, not possible for trade unions to initiate industrial actions in order to conclude collective agreements solely for the purpose of monitoring and enforcing the employment conditions of posted workers. If the employer does not sign a collective agreement, the trade unions have no legal title to rely on for monitoring and enforcement purposes. Even though this involved a clear weakening of the trade unions' monitoring power, it obviously did not occur to the legislator that some new control and enforcement mechanisms could be needed, in order to compensate for this loss of control by traditional means.<sup>62</sup> Also, it was not until 2013 that Sweden finally introduced legislation on a duty for posting undertakings to register with the Work Environment Authority and to designate a contact person in Sweden, similar to the Danish legislation.

### 2.3.6 Post-*Laval* – a new European strategy?

A possible change in the Commission's strategy may be perceived after the judgments in the *Laval* quartet. Monitoring in the sense that we are dealing with in this chapter was not the primary issue in the debate triggered by these cases. It focussed mainly on the balance between the right to take industrial action and the economic freedoms, and on the material contents of the rights that workers should be afforded according to the Posted Workers Directive. However, it had the indirect effect of forcing the Commission to see and acknowledge that Member States have problems with monitoring and enforcement which might give cause for action at EU level.

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<sup>60</sup> Novitz (above n 7); Ahlberg (above n 7).

<sup>61</sup> N Bruun and J Malmberg, 'Lex Laval – Collective Actions and Posted Work in Sweden' in R Blanpain and FHR Hendrickx (eds) *Labour Law Between Change and Tradition – Liber Amicorum Antoine Jacobs* (Kluwer Law International 2011) 21

<sup>62</sup> Ahlberg (above n 7).

This was done within the framework of a ‘relaunch of the Single Market’ as a key strategic objective of the Commission that took office in October 2009.<sup>63</sup> In his report with recommendations for a new strategy for the Single Market, Professor Mario Monti concluded that it was necessary to bring more clarity to the interpretation and implementation of the Posting of Workers Directive.<sup>64</sup>

In preparation for this, the Commission had already launched a number of comparative studies in order to evaluate the existing rules on posting of workers from different aspects. Unlike the traditional ‘implementation reports’ they were not restricted to investigating the extent to which the Member States had transposed the Directive in accordance with EU law; they gave as much attention to the problems caused by EU law at national level.

One of the studies noted that concerns about abuses of the freedoms granted by the EU internal market, especially in the area of provision of manpower, were reported from almost all countries covered. Sometimes intermediaries in other Member States are used with the sole purpose of turning migration into posting. Other contested practices were the creation of letter-box companies with no genuine activities in the country of establishment and whose workers cannot be deemed to ‘normally work’ in the state where their employer is established.<sup>65</sup>

As regards monitoring and enforcement the authors concluded that it is problematic that the Directive contains neither guidance nor minimum requirements regarding the level and nature of monitoring and enforcement, and that ‘some help’ at European level appears indispensable. A concrete proposal was to introduce a legislative instrument at EU level, saying that sanctions based on private law alone are not likely to be sufficient to deter certain unscrupulous employers. Another observation was that, despite considerable progress, both the internal cooperation between national authorities and the cross-border cooperation still displayed serious shortcomings and needed to be enhanced.

A specific problem in effectively monitoring the application of the Directive mentioned in the report is how to distinguish between a posted worker and a genuinely self-employed subcontractor. If a worker presents a certificate indicating that he or she is affiliated as a self-employed person to the social security system of the sending state, EU law lays a heavy burden of proof on the host state if it is to rebut that presumption.<sup>66</sup>

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<sup>63</sup> Pres(2009) D/2250, Mission letter from the President of the European Commission to Professor Mario Monti, Brussels 20 October 2009.

<sup>64</sup> M Monti, *A New Strategy for the Single Market : At the Service of Europe’s Economy and Society*. Report to the President of the European Commission José Manuel Barroso [Brussels] 9 May 2010, 68.

<sup>65</sup> van Hoek and Houwerzijl (above n 19), 56 *et seq.*

<sup>66</sup> *ibid.*, 198 *et seq.*

### 3 The Directive on the enforcement of the Posting of Workers Directive and the current state of law

#### 3.1 Introduction

On 21 March 2012 the Commission officially tabled its proposal for a Directive on the enforcement of the Posting of Workers Directive.<sup>67</sup> Early in 2014, the Commission, the Council and the European Parliament reached a compromise that was adopted by Parliament on 16 April 2014 (hereafter the Enforcement Directive).<sup>68</sup> At the time of writing this, the Directive is not yet formally adopted, but the Council has undertaken to endorse the Parliament's decision.<sup>69</sup>

Like the original Directive, the proposed Enforcement Directive is based on the Treaty Articles on the right of establishment (Article 53(1) TFEU) and free movement of services (Article 62 TFEU), not on the Articles on social policy. Thus, even though the main reason for introducing a new Directive was the need to strengthen the position of posted workers, it is a Single Market instrument. This means that the objectives of facilitating the free movement of services and promoting fair competition between service providers are just as important as the protection of posted workers. As a consequence, the Directive not only lays down what the Member States must or may do; it also puts restrictions on what they are allowed to do.

Compared with the Posting of Workers Directive, which leaves it to the Member States to decide what mechanisms they should use in order to ensure that posted workers are guaranteed the protection afforded to them by the Directive, the Commission's proposal entailed a far reaching harmonization of monitoring and enforcement measures. According to the Commission's Explanatory Memorandum, this would benefit small and medium-sized enterprises and especially micro-businesses, as it would limit Member States' possibilities to impose excessively onerous administrative requirements.<sup>70</sup>

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<sup>67</sup> COM(2012) 131 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (hereafter the Commission's proposal).

<sup>68</sup> Directive 2014/67/EU of the European parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11. See the preceding European Parliament legislative resolution of 16 April 2014 on the proposal for a directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM(2012)0131 – C7-0086/2012 – 2012/0061(COD)). All references to "the Enforcement Directive" in the following text relate to this document.

<sup>69</sup> P7\_TA-PROV (2014)0415

<sup>70</sup> *ibid.*, 10.

### 3.2 *Emphasis on administrative cooperation*

The proposal for an Enforcement Directive aims, *inter alia*, to give Member States' authorities some help in defining whether the Posting of Workers Directive is at all applicable to a certain situation. Article 4 on Identification of a genuine posting and prevention of abuse and circumvention contains a non-exhaustive list of qualitative criteria that the competent authorities shall take into account to determine whether or not there is a genuine link between the employer and the sending state and whether the worker carries out his or her work only temporarily in the host state – in other words: whether there is a proper case of posting for the provision of services. Here, the Member State of establishment is given an explicit responsibility for assisting the host state with information (Article 7(3)).

When it comes to the question of the state in which different control measures should take place, the Commission's proposal was somewhat confusing. In the Explanatory Memorandum the Commission (rightly) admitted that

‘For certain aspects of the notion of posting, such as the genuine link of the employer with the sending Member State, the Member State from which the posting takes place plays the key role, whereas matters such as compliance with the terms and conditions of employment to be respected in the country where the services are provided can only be controlled in the host Member State.’<sup>71</sup>

However, this did not emerge clearly from the text of the draft Directive itself. Here, the role of the sending state in monitoring was described before the role of the host state, and Article 7(1) began as follows:

‘The Member State of establishment of the service provider shall continue to control, monitor and take the necessary supervisory or enforcement measures, in accordance with its national law, practice and administrative procedures, with respect to workers posted to another Member State.’

In addition, certain checks in the host state were to be carried out ‘at the request’ of the authorities in the state of establishment. This could easily give the impression that the Commission had a ‘state of origin principle light’ in mind, where the state of establishment has the main responsibility for monitoring working and employment conditions for workers posted to other Member States.

However, seen in its context and in light of the Explanatory Memorandum, the emphasis on the responsibilities of the state of establishment was more likely an expression of the Commission's persistent favouring of cross-border cooperation between national authorities as a solution to all kinds of problems.

As we will describe further below, the Commission's proposal seemed to be based on the perception that certain monitoring measures currently applied by host states (such as

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<sup>71</sup> COM(2012) 131 final (above n 71), 16.

Finland) were already superfluous thanks to cross-border administrative cooperation and should be prohibited. This was obvious from the proposed provisions on inspections and other national control measures, which the (host) state would be allowed to apply.

If there was any doubt about which state would be responsible for monitoring according to the Commission's proposal, it was set aside in the text finally agreed between the three institutions. The title of Article 7 on administrative cooperation was changed from 'Role of the Member State of establishment' to 'Role of the Member States in the framework of the administrative cooperation'. Also, the Article begins with a paragraph that lays down that inspection of terms and conditions of employment to be complied with during the period of posting is the responsibility of the host state, in cooperation, where necessary, with the state of establishment. Article 7 (3) adds that the latter state's obligation to assist the host state does not reduce the possibilities for the host state to monitor, control and take necessary enforcement measures in line with the Enforcement Directive and the Posting of Workers Directive.

### 3.3 *Inspections*

According to Article 3 PWD the host state must ensure that posted workers are guaranteed the minimum protection laid down by the Directive, but it does not say how. The draft Enforcement Directive states that appropriate and effective checks and monitoring mechanisms must be put in place and adequate inspections carried out in order to guarantee the proper application and enforcement of Posting of Workers Directive (Article 10). It further specifies that inspections must be based primarily on risk assessments, and how these risk assessments should be done. If there is a need for information in order to determine whether there is a proper situation of posting for provision of services, the host state and the state of establishment have to cooperate (Article 10(3) and Article 7).

Even if the draft Enforcement Directive is based primarily on the presumption that monitoring and enforcement is a task for public authorities, it also takes industrial relations systems, such as those in Sweden and Denmark, into account. In countries where the minimum terms and conditions of employment are regulated management and labour, the monitoring of these conditions may be left to them, provided that an adequate level of protection is guaranteed (Article 10(4)).

### 3.4 *Other control measures*

Apart from the statement that the checks, monitoring and inspections must be adequate and effective, no specified control measures are mandatory.

In fact, the Commission's proposal obviously aimed at restricting administrative requirements and control measures as much as possible. In its capacity as host state, a Member State would be allowed to choose one or more administrative measures from a closed list in Article 9.

The list was based on the CJEU's case law, where the Court has tried whether different monitoring measures restrict the free movement of services in a way that cannot be

justified. According to the Explanatory Memorandum, the Commission's proposal was meant to codify this case law.<sup>72</sup> In fact, however, it would not merely codify the state of the law. First, on some points, the Commission added restrictions that cannot be inferred from the case law. Second, the list of potential control measures is meant to be exhaustive. This means that the Directive would limit the Member States' competence, turning an open-ended list of possible administrative requirements and control measures that the Member States might choose to adopt, into a closed enumeration.

This part of the proposal was one of the most controversial during the negotiations over the Directive, and in the final wording of the Enforcement directive the perspective is reversed. Article 9 opens with a general statement that Member States may impose administrative requirements and control measures, but only on condition that they are necessary in order to ensure effective monitoring and pass the proportionality test, and instead of establishing an exhaustive list, it mentions the measures enumerated in the Commission's proposal as examples of administrative requirements and controls that the Member States may, in particular, impose.

However, even though the final compromise is less restrictive than the Commission had proposed, it will keep a strict watch over the Member States' doings. The Directive underlines that Member States shall communicate any control measures to the Commission, which shall evaluate their compliance with Union law and 'where appropriate, take the necessary measures in accordance with its competences under the TFEU' (Article 9(5)).

The options according to the Commission's proposal and the amendments made during the negotiations over the Enforcement Directive are presented below.

#### 3.4.1 A simple declaration

First, the host state may require that the service provider make a simple declaration at the latest at the commencement of the service provision (Article 9(1)(a)). This is in line with the CJEU case law, which has clarified that the host state may require a declaration prior to the posting as long as it is not combined with any kind of prior registration procedure or prior control.<sup>73</sup>

However, the draft provision also specified what information this declaration might contain. Here, too, the enumeration was meant to be exhaustive. Thus, for example, it would not be possible to require prior information on working and employment conditions for the posted workers. Instead the idea seemed to be that the host state should contact the competent authority in the state of establishment in order to receive such information, or carry out checks at the work site after the posting has started. Such a limitation of the host state's capacity to require information in the prior declaration does not follow from the case law of the CJEU.

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<sup>72</sup> COM(2012) 131 final (above n 71), 16.

<sup>73</sup> See Case C-515/08 *Santos Palhota*.

In the final wording of the Enforcement Directive, Article 9(1)(a) lays down that the simple declaration may contain ‘the relevant information necessary in order to allow factual controls at the workplace’. The items specified in the Commission’s proposal are mentioned merely as examples of what may be included. Thus, also on this point, a closed list has been revised to an open list.

#### 3.4.2 Social documents

Pursuant to the Commission’s draft a host state may also require that posting undertakings hold certain “social documents” available in an accessible and clearly identified place in the host state’s territory, for example the workplace. These documents, specified in Article 9(1)(b), are employment contracts (or equivalent documents according to Directive 91/533/EEC), pay slips, timesheets and proof of payment of wages or copies of equivalent documents. This list of social documents, which has not been changed from the Commission’s proposal, appears to be exhaustive, which would mean that no other documents could be required. Such a restriction cannot be derived from the CJEU case law.<sup>74</sup> Evidently, documentation requirements have to be proportionate, but if anything, the case law in the first place leaves to the Member States to judge the proportionality of requirements for information.<sup>75</sup>

The Article also specifies that the requirement to keep social documents available in the host state can be upheld ‘during the period of posting’. The Commission’s proposal did not say anything explicitly about controls after the posting has ended. The idea seemed to be that the host state may monitor the employment conditions of the posted workers through inspection of the social documents during the posting. But if a need to control the employment conditions occurs after the posting has ended and the worker has returned to the state of establishment, the host state has to request the information from the competent authority in the state of establishment.

Since the judgment in *Commission v Luxemburg*,<sup>76</sup> the CJEU seems to share this standpoint. In 1999 it found in *Arblade* that an obligation to retain social documents at the address of a natural person in the host state (Belgium) for five years after the posting had ceased was contrary to EU law because less restrictive measures could be taken. For example, the posting undertaking could send copies of the equivalent documents drawn up under the legislation of that state to the host state. The Court did not comment specifically on the fact that the documents were to be kept in the host state after the posting had ended, but commented on the way the documents were to be kept (at the address of a natural person in Belgium). However, it added:

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<sup>74</sup> Joined cases C-369/96 and C-376/96 *Arblade*; Joined cases C-49/98 a.o.; Case C-490/04 *Commission v Germany* [2007] ECR I-6095.

<sup>75</sup> Joined cases C-369/96 and C-376/96 *Arblade* para 75; Joined cases C-49/98 a.o. *Finalarte* para 75.

<sup>76</sup> Case C-319/06 *Commission v Luxemburg* [2008] ECR I-4323.

‘For the rest, it should be noted that the organised system for cooperation and exchanges of information between Member States, as provided for in Article 4 of Directive 96/71, *will shortly render* superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.’<sup>77</sup>

Nine years later, in *Commission v Luxembourg*, the Court obviously thought that the time had come. It rephrased its statement from *Arblade* as follows:

‘For the rest, the Court noted, in paragraph 79 of *Arblade and Others*, that the organised system for cooperation and exchanges of information between Member States provided for in Article 4 of Directive 96/71 *renders* superfluous the retention of the documents in the host Member State after the employer has ceased to employ workers there.’<sup>78</sup>

In the final compromise over the Enforcement Directive a new paragraph, Article 9(1)(c), was added according to which the host state may impose an obligation to deliver the aforementioned social documents after the period of posting at the request of the authorities in that state, ‘within a reasonable period of time’.

Furthermore, according to Article 9(1)(d) the Member State may also require that the social documents be translated. This is in line with the Court’s judgment in *Commission v Germany*.<sup>79</sup> The Commission wanted to restrict translations to documents that are not excessively long, but this condition was deleted in the final wording of the Enforcement Directive.

### 3.4.3 A contact person

A measure considered crucial for the Nordic countries is that foreign service providers have representatives in the host state with whom the trade unions can negotiate and conclude collective agreements. The Enforcement Directive seems to meet this need, at least to some extent, by allowing the host state to require that the posting undertaking designates a contact person to negotiate on behalf of the employer with the relevant social partners.

The possibility of requiring a contact person with the authority to negotiate on behalf of the employer has not been subject to the CJEU’s scrutiny. Cases before the Court have concerned obligations to designate a representative domiciled in the host state in order to keep and maintain social documents, requirements which have been deemed incompatible with EU law. A less restrictive and just as effective solution, the Court has argued, would be to designate one of the posted workers with the responsibility to keep the documents available for the national authorities.<sup>80</sup> However, it has never addressed

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<sup>77</sup> Joined cases C-369/96 and C-376/96 *Arblade*, para 79 (emphasis added).

<sup>78</sup> Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, para 92 (present tense, emphasis added).

<sup>79</sup> Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paras 66–72.

<sup>80</sup> Case C-319/06 *Commission v. Luxembourg*, para 91.

the question of whether a host state may require a representative or a contact person with the authority to negotiate with the trade unions, a task that could not as easily be entrusted to one of the posted workers.

The Commission's proposal seemed to meet this need, at least to some extent, by allowing the host state to require that the posting undertaking designates a contact person to negotiate on behalf of the employer with the relevant social partners. However, there was no further explanation of the purport of the provision in the Explanatory Memorandum. It did not, for instance, spell out whether the Member States may require that the contact person be authorized not only to negotiate, but also to conclude collective agreements concerning the posted workers.

In the Enforcement Directive as adopted, this issue is somewhat further elaborated. First, according to Article 9(1)(e), the host Member State may oblige the foreign service provider to designate a person "to liaise with the competent authorities" and to send out and receive documents and/or notices. Second, according to Article 9(1)(d), it may oblige the foreign service provider to designate a contact person acting as a representative through whom the relevant social partners may seek to initiate collective bargaining 'within the host Member State'. This person does not have to be present in the host state but has to be available on a reasonable and justified request.

#### 3.4.4 Joint and several liability in subcontracting

In *Wolff & Müller*<sup>81</sup> the CJEU held that joint and several liability might be a justified and effective means to ensure posted workers' rights according to the Posting of Workers Directive. Thus, because the Commission's proposal for a directive was said to codify the Court's case-law, it is not surprising that it included provisions on joint and several liability in subcontracting. The Enforcement Directive aims at clarifying when and how the Member States should or may implement such a system. However, this was another of the very controversial elements of the Directive, and the final compromise is less obliging for the Member States than the Commission had proposed.

The main idea is that if the posted workers have outstanding claims against their employer, they could direct their claims against its contractor. However, only the employer's direct contractor can be held responsible for its subcontractor's debt. Other contractors – higher up in the contract chain – will not be liable according to the system prescribed by the Directive.

The liability covers the relevant minimum pay and/or contributions due to common funds or institutions of social partners, in so far as they are covered by the mandatory minimum requirements of the Posting of Workers Directive.

So far, the provisions in the final compromise are in line with the Commission's proposal. However, according to the latter, the Member States would have to introduce a mandatory system for joint and several liability in subcontracting in the construction

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<sup>81</sup> Case C-60/03 *Wolff & Müller* [2004] ECR I-9553.

sector. At first glance, Article 12 (2) of the Enforcement Directive as well seems to impose such a mandatory system. But a bit further down, Article 12 (6) states that instead of liability in subcontracting in the construction sector, Member States may take other enforcement measures ‘which enable...effective and proportionate sanctions against the contractor, to tackle fraud and abuse in situations when workers have difficulties in obtaining their rights’.

On the other hand, in its final wording, the Enforcement Directive opens a possibility for Member States to prescribe a strict joint and several liability. This would not have been an option according to the Commission’s proposal, which prescribed that a contractor who has undertaken due diligence should not be held liable.

Another restriction is that the Member States’ systems for joint and several liability must be non-discriminatory ‘with regard to the protection of the equivalent rights of employees of direct subcontractors established in its territory’. Thus, although the Enforcement Directive only concerns liability in posting situations, this provision in practice implies that the Member State will have to adopt similar provisions for purely national situations.

Finally, if a Member State so wishes, it may provide for more stringent liability rules as regards the scope and range of subcontractor liability, as long as they are non-discriminatory and proportionate. This could, for instance, include liability for others than the direct contractor, in other words, chain liability, and joint and several liability in sectors other than the construction sector.

#### **4 Concluding remarks**

As we have seen, from the end of the 1990s onwards the Member States and the European Commission have based their policies on very divergent perceptions of what had to be done in the area of posting of workers. While the Commission’s primary ambition has been to remove any disincentives to using the freedom to provide cross-border services by enforcing deregulation at national level, Member States have, with some exceptions, moved in the opposite direction and introduced new regulations in order to monitor and enforce the proper application of the Posting of Workers Directive. The most conspicuous confrontation between these two perspectives took place at the presentation of the first draft of a Services Directive.

At EU level, the legal development has taken place mainly through a judicial dialogue between the Court and the Commission. With the exception of the vague provision in the Posting of Workers Directive, national monitoring measures have, in this case law, been addressed mainly as restrictions on the free movement of services. The Commission’s ambition to regulate the Member States’ competence of choosing monitoring measures through the legislative route failed in the case of the Bolkestein proposal.

Instead the Commission used an interpretative guideline as an instrument for influencing the Member States' behaviour.

When looking at national monitoring measures, which have been under the scrutiny of the CJEU, we have found that the overwhelming proportion of these measures are designed in a way that indicates that they are not aimed primarily at making sure that the posted workers are ensured the hard nucleus found in the Posting of Workers Directive. Instead, these measures taken by the Member State indicate that they first and foremost aim at protecting the national labour markets from wage competition. This is for instance the case with the different forms of demands on authorizations and other forms mandatory controls prior to posting.

It seems that neither at EU level nor at national level has the main focus been to protect posted workers' rights. The Commission has never initiated infringements procedures against any Member State for not adopting effective measures to ensure that the posted workers receive employment conditions according to the hard nucleus. On the other hand, the most prominent – if not the only – example of a national measure directed mainly at protecting employment conditions in the case law of the CJEU is *Wolff & Müller*, which concerned a German system for joint and several liability and not a method for authorities or trade unions to monitor compliance with the Posting of Workers Directive.

However, after the judgments in the *Laval* quartet, it seemed that the Commission had changed strategy. This was probably a reaction to the criticism that followed from several stakeholders. The Commission took legislative measures in order to meet this criticism and, as presented above, the Enforcement Directive was part of the result. In doing so, it acknowledged the need for national monitoring in order to ensure posted workers' rights. The proposal for an Enforcement Directive was presented as a concrete action to ensure that posted workers are treated on an equal footing and enjoy their full social rights across Europe. The question is whether it will fulfil this promise.

The most promising element was the introduction of a mandatory system for joint and several liability in the construction sector. As the *Wolff & Müller* case illustrates, it is the only measure that serves to protect the individual worker directly. At the same time it attacks the problem at its root; in other words, it is likely to have a preventive effect and make contractors more careful not to engage unreliable subcontractors.

From other aspects the Commission's 2012 proposal was more problematic.

First, it reflected an overoptimistic belief in cross-border cooperation between authorities as a panacea. Undoubtedly, there is a need for enhanced administrative cooperation and to address, in particular, the duties of the state of establishment. Background information needed for establishing whether there is a genuine link between the employer and the sending state or for checking the employer's reliability in general (which would be crucial for a contractor who plans to engage a subcontractor) is hard to find from other sources. Thus, as far as possible, the state of establishment should be obliged to

assist the host state with this kind of information. However, moving from this to believing that enhanced administrative cooperation will reduce (and has in fact already reduced) the need for control measures in the host state must be described as wishful thinking to say the least, considering that even monitoring authorities in the same country find it difficult to cooperate,<sup>82</sup> and given the very different administrative traditions and – to be frank – levels of corruption in the Member States.

Even though the finally agreed provisions in Chapter IV ‘Monitoring compliance’ are less restrictive than in the Commission’s proposal, this over-reliance on cross-border cooperation, partly shared by the CJEU, in combination with the fact that the proposal is based on the Treaty Articles on free movement of services, is likely to influence the interpretation of the Enforcement Directive also in the form eventually adopted. With this background may well be interpreted as a coordination of what measures the Member State are allowed to adopt in relation to posting undertakings in order to secure the rights of the posted workers. When a system of cooperation on information has been put in place, the Member States will have less scope to demand information directly from the posting undertakings.<sup>83</sup> In this way the Enforcement Directive might – just like the Posting of Workers Directive – more or less pre-empt the host state’s power in relation to posting undertakings. The emphasis seems to be on market integration rather than social rights.

Second, by pointing at certain methods of monitoring and control, and thereby potentially excluding other methods, the draft proposal seems to overlook how closely the different enforcement mechanisms are linked to the different institutional arrangements in the Member States. Its main focus is on administrative enforcement rather than empowering trade unions or other parts of the civil society (although these are by way of exception mentioned from time to time).

Third, by establishing at Union level which methods for monitoring and enforcement should apply, the Directive might obstruct development of other methods. For instance, in more and more countries, among them *Finland*, *Norway* and *Sweden*, systems for standardised and mandatory ID cards in the building sector have been introduced through legislation or by the social partners. Other examples are standard conditions developed by Swedish local authorities for their public contracts, according to which all contractors and subcontractors have to submit certain reports to the Swedish Tax Agency. Even if this does not specifically aim at protecting posted workers, it indirectly serves the purpose of protecting them (as well as domestic workers) as it has proved to be very effective in combination with the mandatory ID for uncovering undeclared work. However, this type of requirement might not be in line with the Enforcement Directive. In this way the proposal it may put a check on legal and institutional

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<sup>82</sup> van Hoek and Houwerzijl (above n 19), 201.

<sup>83</sup> Compare COM(2006) 159 (above n 39), 7.

evolution through mutual learning, which has often been an essential part of EU social policy.<sup>84</sup>

The solutions developed through the CJEU's case law, which the Commission adopted in its initial draft as models for all Member States, are often developed by the Court itself as suggestions for less restrictive alternatives to the contested provisions. They may not be the most creative, nor the most effective instruments for protecting posted workers' rights.

The emphasis in the Commission's proposal seemed to be on market integration rather than social rights. In the final compromise on the Enforcement Directive, the EU legislator has answered some of the criticism, leaving more options for the Member States to develop enforcement measures. The Commission will, however, keep a careful check on the Member States. The future will tell if the Directive will have its expected effect and ensure that posted workers are treated on an equal footing and enjoy their full social rights across Europe.

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<sup>84</sup> R Rogowski and S Deakin, 'Reflexive Labour Law, Capabilities and the Future of Social Europe' in R Rogowski, R Salais and N Whiteside (eds), *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (Edward Elgar, 2011).

# Sanctions for ‘EU-unlawful’ Collective Action

*Niklas Bruun and Jonas Malmberg*

## 1 Introduction

Since the middle of the twentieth century it has been generally accepted – especially in the democratic states of the European Union – that a national industrial relations system based on free collective bargaining between trade unions and employers’ organisations, as well as a right to take collective action form an integral part of the modern welfare state and the so-called European Social Model. The right to take collective action, including the right to strike, has traditionally been viewed as essential for the balance between the parties of the labour market and as a foundation for the regulation of wages and employment conditions.<sup>1</sup> This is particularly so for labour market relations of the Nordic type, which are regulated primarily through collective agreements concluded between labour market organisations representing the vast majority of workers.

This view of industrial relations has been confirmed by several global and European human rights conventions, including the core ILO Conventions (especially Conventions No. 87 and No. 98), which not only recognise the right to collective bargaining and the right to strike, but also establish an obligation for State Parties to promote and facilitate collective bargaining. The EU’s Lisbon Treaty marked a final confirmation of the EU’s commitment to this basic value, by making the EU Charter of Fundamental Rights<sup>2</sup> an integral part of EU Law.<sup>3</sup>

This approach to industrial relations is also reflected in the approach to economic sanctions generally and, especially, to damages for unlawful collective action. On one hand, economic sanctions are regarded by most European countries as a reasonable measure to prevent unlawful collective action; on the other hand, these sanctions are designed in such a way that they do not endanger a continuation of the contractual relationship between the parties and the capacity of the trade unions to fulfil their roles.

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<sup>1</sup> A Jacobs, ‘Collective Self-Regulation’ in B Hepple (ed), *The Making of Labour Law in Europe : A Comparative Study of Nine Countries up to 1945* (Mansell Publishing 1986) 193; A Jacobs, ‘Collective Labour Relations’ in B Hepple and B Veneziani (eds), *The Transformation of Labour Law in Europe : A comparative study of 15 countries 1945–2004* (Hart Publishing 2009) 201.

<sup>2</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>3</sup> See Article 28 of the Charter.

The fundamental problem with the regulation of economic sanctions for collective action is that its whole purpose is to exert pressure on the employer by threatening, or actually causing, economic losses by not performing work. However, there is normally also a significant loss on the employee side, because, as a rule, during collective action no wages are paid and the participating employees lose their daily income.

In most cases, the actual economic impact of collective action on the employer is very difficult to foresee. It can depend on contractual arrangements with business partners, for instance on whether collective action meets the criteria for '*force majeure*' within the framework of contractual relations. These contractual relations are often so-called 'trade secrets' to which employees and trade unions have no access.

Within the industrial relations system there is a need for predictability of sanctions and a need to relate them to different degrees of gravity in the breach of a peace obligation. Therefore, in many legal systems, economic sanctions for unlawful collective action are related to a number of such factors, for example: Is the unlawfulness of the action obvious? Was the employer guilty of the conduct that caused the action (for instance, non-compliance with collective agreements)? Has an obligation to give prior notice of intended action been complied with? For how long has the collective action been going on?

Through the internationalisation of the economy and the development of the EU's internal market, especially since the enlargement in 2004, collective action has become a sensitive issue. On one hand, it is argued that enterprises, through the globalisation of the economy and new ways of organising production, have become more vulnerable to collective action. Furthermore, collective action will easily affect international trade. This is, for instance, the case if the actions concern posted workers, cross-border relocation of undertakings or international transport. The effect of such actions, taken by trade unions with strategic positions, can be drastic for the individual actors on the market. On the other hand, economic globalisation has provided several exit routes for employers dissatisfied with the labour market or labour market regulation in a certain country. They may offshore some parts of the production or simply move it to another country. The mere threat of such a 'strike by capital' is a strong argument in any discussion on wages and working conditions.<sup>4</sup>

The conflict between free trade and collective action was in focus in the *Laval* and *Viking* cases, where the Court of Justice of the European Union (CJEU) made it clear that collective action taken by trade unions might, under certain circumstances, violate the freedom of services and the right of establishment under the Treaty (Articles 49 and

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<sup>4</sup> B Hepple, *Labour laws and global trade* (Hart Publishing 2005) 186.

56 TFEU).<sup>5</sup> These cases have, together with *Rüffert* and *Commission v Luxembourg*, given rise to an intense debate.

This chapter will not address the circumstances under which collective action might be 'EU-unlawful'. Instead it will concentrate on which remedies are to be available if such EU-unlawful collective action is initiated.

The issue of remedies for EU-unlawful collective action has been at the fore in three high profile disputes: the *Viking* case, the *Balpa* dispute and the *Laval* case. The *Viking* case, which concerned a collective action in Finland, was settled out of court and the content of the settlement is not known. In the *Balpa* dispute in 2008 the threat of huge damages claims made the trade union withdraw its notice of collective action.<sup>6</sup> In those two disputes no final judgments were given. The question was, however, dealt with by the Swedish Labour Court in its final judgment in the *Laval* case.<sup>7</sup>

## 2 The judgment of the Swedish Labour Court<sup>8</sup>

The Swedish Labour Court (*Arbetsdomstolen*) gave its final judgment in the *Laval* dispute in December 2009.<sup>9</sup>

The facts of the *Laval* case are fairly well known. Laval un Partneri Ltd was a Latvian company that posted workers from Latvia to work for construction companies in Sweden. Laval was subject to collective action by Swedish trade unions. The aim of the collective action was to force Laval to sign a collective agreement. Laval commenced

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<sup>5</sup> Case C-341/05 *Laval* [2007] ECR I-11767; Case C-438/05 *Viking* [2007] ECR I-10779. See also Case C-346/06 *Rüffert* [2008] ECR I-1989, and Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

<sup>6</sup> See below at n 39; K Apps, 'Damages claims against trade unions after Viking and Laval' (2009) 34 *European Law Review* 141.

<sup>7</sup> The judgment of the Swedish Labour Court has been commented by U Bernitz and N Reich, 'Case no A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment no 89/09 of 2 December 2009, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet et al' (2011) 48 *Common Market Law Review* 603; A Kruse, 'Arbetsdomstolens dom i Laval – lojal tillämpning av EG-rätten eller vågad egentillverkning?' (2010) *Europarättslig tidskrift* 381; M Rönnmar, 'Laval returns to Sweden: The final judgment of the Swedish Law Court and Swedish Legislative Reforms' (2010) 39 *Industrial Law Journal* 280.

<sup>8</sup> The following three sections draw on Jonas Malmberg, 'Trade Union Liability for EU-unlawful Collective Actions' (2012) 3 *European Labour Law Journal* 5.

<sup>9</sup> The Labour Court Judgment AD 2009 no 89. An unofficial translation of the judgment is available at: <http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr-%2089%20Laval%20English.pdf>. The Swedish Labour Court is the first and final instance for many labour disputes, among other things disputes on collective actions. The Court has a tripartite composition. See further A Adlercreutz and B Nyström, *Labour law in Sweden* (Wolters Kluwer 2010).

proceedings before the Swedish Labour Court against the trade unions, seeking both a declaration that the collective actions were unlawful and an order that the actions should cease. Laval also claimed compensation for the damage suffered.

The Labour Court made a preliminary reference to the CJEU. The CJEU answered two questions. The first question was whether the collective actions were precluded by (now) Article 56 TFEU<sup>10</sup> and the Posting of Workers Directive.<sup>11</sup> The second question was whether a specific piece of Swedish legislation – the so-called *lex Britannia* – was in breach of EU law. The shortest possible summary of the preliminary ruling is that the CJEU answered both questions with a ‘yes’. The collective actions were in conflict with Article 56 TFEU and the Posting of Workers Directive, and *lex Britannia* was in breach of Articles 56 and 57 TFEU.

Since the CJEU in its preliminary ruling had found that the collective actions were unlawful according to EU law, the only question the Swedish Labour Court had to take a stance on was whether the trade unions were obliged to pay damages to Laval due to the unlawful collective actions. Laval claimed damages for economic losses of around 150,000 € and punitive damages (that is, damages for non-economic losses) of almost the same amount.

The reasoning of the Labour Court is very thorough and complex. The findings cover 28 pages in the court report. In what follows we will summarise some of the main arguments.

The Labour Court observed that there are no national rules, either in statutes or in case law that gave Laval a right to damages for collective actions that violate the Treaty. Liability in damages for the trade unions had therefore to be based solely on EU law.

The Court first recalls the case law of the CJEU concerning *Member State liability* for breaches of EU law. The principle of state liability was first applied in *Francovich* and has been developed in subsequent case law.<sup>12</sup> According to this case law, a *Member State* may be liable for loss and damage caused to private entities as a result of breaches

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<sup>10</sup> Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47.

<sup>11</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>12</sup> Joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357. See also, *ia*, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029; Case C-224/01 *Köbler* [2003] ECR I-10239; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119. See also, *ia*, TC Hartley, *The foundations of European Union law : an introduction to the constitutional and administrative law of the European Union* (7<sup>th</sup> edn, OUP 2010) 248.

of European Union law. Private entities harmed have a right to damages when three conditions are met:

- (i) the rule of Community law breached is intended to confer rights upon individuals;
- (ii) the breach is sufficiently serious; and
- (iii) there is a direct causal link between the breach of Community law and the damage sustained by any individual.

We could call these the *Brasserie du Pêcheur* conditions.

The Labour Court states that liability for damages on an EU law basis, in the case law of the EU Court, has been extended to *horizontal relations*, that is when a private party claims damages in accordance with EU law against another private party. The Labour Court refers to two cases dealing with competition law (*Courage v Crehan* and *Manfredi v Lloyd*)<sup>13</sup> and one case concerning free movement of workers (*Raccanelli*).<sup>14</sup> One prerequisite for such horizontal liability is that the piece of EU law that has been violated has horizontal direct effect (that the EU provisions create rights for individuals that the national courts have to protect in horizontal relationships). From this case law the Labour Court draws the conclusion that it may be:

‘... considered established that there is a general legal principle within EC law that damages are also to be able to be awarded between private parties upon a violation of a treaty provision that has horizontal direct effect. That this principle is not only applicable within the area of competition law but also ought to be applicable with respect to violations against other treaty provisions can be seen from the judgment in the case *Raccanelli*’.

The Labour Court found that the trade unions, in principle, were liable in damages ‘assuming that the remaining criteria for such liability are fulfilled’. The Court then referred to the *Brasserie du Pêcheur* conditions, with one adjustment: the infringed EU law must have horizontal direct effect (it is not enough that it is ‘intended to confer rights on individuals’). When applying this formula to the case, the Labour Court found that Article 56 TFEU has horizontal direct effect in relation to the trade unions. It was also, according to the Court, evident that there is such causality as is required. Furthermore, the Court considered the breach of Article 56 TFEU sufficiently serious.

The Labour Court stressed that the *Brasserie du Pêcheur* conditions do not constitute an exhaustive regulation of damages. In the absence of any EU legislation it is in accordance with the rules of national law on liability that the Member States must make reparation for the consequences of the loss and damage caused. Therefore, the Labour Court applied the regulations concerning damages in the Swedish Co-Determination

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<sup>13</sup> Case C-453/99 *Courage* [2001] ECR I-6297; Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

<sup>14</sup> Case C-94/07 *Raccanelli* [2008] ECR I-5939.

Act analogously. A trade union organising a collective action that is unlawful according to the Co-Determination Act is liable to pay both reparation for economic loss and punitive damages (*allmänt skadestånd*), the latter being a particular form of damages that may be payable in addition to compensation for the economic loss.

According to the Labour Court, it was evident that Laval had suffered economic losses as a consequence of the unlawful collective actions, but that Laval had not been able to prove that it had suffered economic loss to the amount claimed. The claim with respect to the economic damages was therefore denied. The Labour Court set the punitive damages that Laval were to receive from the trade unions to 550,000 SEK (about 55,000 €).

Three out of seven judges in the panel were of a dissenting opinion.

### **3 Is there a general principle of EU law on liability of private entities to pay damages for breach of EU law (analogous to the state liability principle)?**

The stance taken by the Labour Court gives rise to the question of whether the CJEU has established a general principle of EU law concerning the liability of private entities to pay damages for breach of EU law (analogous to the state liability principle). As already mentioned, the Labour Court refers to three cases: *Courage*, *Manfredi* and *Raccanelli*.

Both *Courage* (from 2001) and *Manfredi* (from 2006) concerned breaches of EU competition law (now Article 101 TFEU). In *Courage* a pub tenant had concluded a standard form of agreement for lease of a pub, which contained a provision that he had to buy beer exclusively from the Courage brewery. The pub tenant argued, inter alia, that the beer tie in his contract was contrary to Article 101 TFEU and that he had suffered damages since the price he had to pay for the beer was substantially higher than the price Courage applied for independent pubs. In the *Manfredi* case, a consumer claimed damages from an insurance company for the increase in the cost of premiums paid by reason of an agreement between several insurance companies, which had been declared unlawful according to competition law.

In both cases the CJEU stated that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to private entities to claim damages for losses caused them by a contract or by conduct liable to restrict or distort competition.<sup>15</sup> Article 101 is thus interpreted as meaning that private entities can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.<sup>16</sup>

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<sup>15</sup> Case C-453/99 *Courage* para 26; Joined cases C-295/04 a.O. *Manfredi* para 60.

<sup>16</sup> Joined cases C-295/04 a.O. *Manfredi* para 63.

Could these cases be regarded as expressions of the general principle of horizontal liability as proclaimed by the Labour Court?

The interpretation of *Courage* and *Manfredi* has been subjected to thorough debate in the literature. The common position seems to be that the *Courage* and *Manfredi* cases do not express a general principle of horizontal liability, analogous to the state liability principle.<sup>17</sup> There are several reasons for this position.

*First*, it can be noted that the *Brasserie du pêcheur* or subsequent state liability case law are not mentioned at all in *Courage*. In the subsequent case, *Manfredi*, the Court does refer to *Brasserie du pêcheur* (paras 93 and 96). The reference, however, is not made when answering the question of whether Article 101 TFEU entitles a harmed individual to claim damages in horizontal relations. Rather, the reference to *Brasserie du pêcheur* is given when the Court addresses the specific question of whether Article 101 is to be interpreted as requiring national courts to award punitive damages and compensations for loss of profit (*lucrum cessans*), when such damages are available in national law (see more about the principle of equivalence below).

*Second*, it must be stressed that the Court, when explaining the conditions for awarding damages, neither refers to nor applies the *Brasserie du pêcheur* conditions. The reasoning of the Court in *Courage* and *Manfredi* follows another line of reasoning, which we will return to below.

*Third*, the reasons put forward by the Court for establishing the doctrine on state liability differ from the *ratio legis* for horizontal liability in the event of a breach of Article 101 TFEU. The basis for state liability is, according to the Court, first, the full effectiveness of Community rules and the effective protection of the rights that they confer and, second, the obligation to cooperate imposed on Member States by (now) Article 4.3.<sup>18</sup> *Francovich* is often explained as a reaction to a lack of commitment by the Member State to honour at home what they have promised in Brussels.<sup>19</sup> The argument is not valid in horizontal relations. Private parties, such as trade unions, could not be under an obligation to cooperate.<sup>20</sup> In *Courage* and *Manfredi* the Court stressed only that the full

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<sup>17</sup> See eg M Dougan, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart Publishing 2004) 378; R Nazzini, 'Potency and Act of the Principle of effectiveness : The Development of Competition Law Remedies in Community Law' in C Barnard and O Odudu (eds), *The outer limits of European union law* (Hart Publishing 2009) 420; A Ward, *Judicial review and the rights of private parties in EU law* (2<sup>nd</sup> rev edn, OUP 2007) 249; Advocate General van Gerven argued in his famous opinion in Case C-128/92 *Banks* [1994] ECR I-1209 that the *Francovich* doctrine should apply also in horizontal relationships.

<sup>18</sup> Joined cases C-6/90 and C-9/90 *Francovich* paras 31–36.

<sup>19</sup> See eg M Dougan 'The vicissitudes of life at the coalface: remedies and procedures for enforcing Union law before the national courts' in P Craig and G de Búrca (eds), *The evolution of EU law* (OUP 2011) 414.

<sup>20</sup> Ward (above n 17) 252.

effectiveness of Article 101 TFEU would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

In *Racanelli* the Court confirmed its earlier case law according to which (now) Article 45 TEUF could, under certain circumstances, apply in horizontal relations.<sup>21</sup> The Court was also asked what the consequences in law are if there has been a violation of Article 49 TFEU. The Court's answer contains, in our opinion, reference to the procedural autonomy of the Member States, limited by the principle of effective judicial protection, to which we will return below. However, the wording used by the Court is somewhat ambiguous. After stating that Member States are free to choose between different remedies (para 50, cited below), the Court holds that it is for the court of the Member State to assess 'the nature of the compensation which he *would be entitled to claim*' (para 51, italics added).<sup>22</sup> The wording indicates that this sentence is to be read as

'the Member State court shall decide both if damages are to be awarded and the more precise modalities', rather than 'damages must be available at national level, but the more precise modalities are to be decided by the Member State court.'

This interpretation is also consistent with the starting point of the Court, according to which the Member States are free to choose between the different remedies. Furthermore – and perhaps most importantly – it seems most unlikely that the CJEU would finally decide such a controversial issue as horizontal liability for breaches of directly effective Treaty provisions in a judgment with only three judges and without an opinion from the Advocate General, and without giving any further reason for its decision.<sup>23</sup>

It follows from the foregoing that the Labour Court's arguments are far from convincing. As a court of last instance, the Labour Court is required to make reference to the CJEU before giving a judgment that constitutes an interpretation of EU law. A national court may refrain from requesting a preliminary ruling if the point of law at issue is clear from the settled case-law of the Court or leaves no room for reasonable doubt.<sup>24</sup> From the above it follows that the issue of liability for private entities to pay damages for breach of EU law is manifestly unclear. Furthermore, according to the so-called CILFIT criteria, the national court must be convinced that the interpretation is equally

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<sup>21</sup> See eg Case C-281/98 *Angonese* [2000] ECR I-4139; C Barnard, *The substantive law of the EU: the four freedoms* (3<sup>rd</sup> edn, OUP 2010) 233.

<sup>22</sup> Danish: 'som han måtte være berettiget til'; French: 'la nature de la réparation à laquelle il serait en droit de prétendre'; German: 'welche Art von Wiedergutmachung er beanspruchen könnte'. The Swedish version, which is the one the Swedish Labour Court referred to, instead uses the indicative: 'fastställa den ersättning som denne har rätt att kräva', which would be translated to English as 'the compensation which he is entitled to claim'.

<sup>23</sup> For another reading of the case, see Bernitz and Reich (above n 7) 612.

<sup>24</sup> See eg Case C-99/00 *Lyckeskog* [2002] ECR I-4839.

obvious to the courts of the other Member States and to the CJEU.<sup>25</sup> In this case, three out of seven judges did not agree with the interpretation of the majority of the Court. When the interpretation is not obvious to all members of one and the same court, it certainly cannot be obvious to the courts of all Member States.

The conclusion of the Swedish Labour Court, that it is established that there is a general principle of EU law on liability of private entities to pay damages for breach of EU law (analogous to the state liability principle), must have particularly low value as a precedent, taking into account the lack of support for the reasoning in the case law of the CJEU, the small majority dictating the judgment and the fact that no preliminary reference was made.

#### **4 A method for determining when liability of private entities to pay damages for breach of EU law is required**

If there is no such principle, as the Labour Court argues, what should apply instead? Even if one does not accept the Labour Court's view, this does not imply that *Courage* and *Manfredi* lack relevance for the question of whether a trade union arranging an 'EU-unlawful' collective action is liable to pay damages according to EU law.

The main finding in *Courage* and *Manfredi* was that individuals are entitled to claim compensation for the harm caused to them by an agreement or practice violating Article 101 TFEU. This *finding* – which is specific to Article 101 TFEU and the kinds of violation of Article 101 TFEU specific to those cases – could not in itself be applied analogously to other violations of other pieces of EU law. The judgments do, however, provide a *method* or programme for determining whether or not it should be possible for private entities to claim compensation for a violation of EU law caused by another private entity. In our opinion, this method is not limited to competition law, but might also be relevant to other EU provisions with horizontal direct effect, although the requirements for awarding damages must be qualified.<sup>26</sup> The reasoning of the CJEU in *Courage* indicates an analysis in five steps.<sup>27</sup>

*First*, the Court concludes that individuals may rely on breaches of Article 101 TFEU before national courts in horizontal relations (para 24), consequently, it has *direct horizontal effect*.

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<sup>25</sup> Cf Case 283/81 *CILFIT* [1982] ECR 3415.

<sup>26</sup> A Arnall, *The European Union and its Court of Justice* (2<sup>nd</sup> edn, OUP 2006) 328; A Biondi and M Farley, *The right to damages in European law* (Wolters Kluwer 2009) 75; Dougan (above n 17) 379. See also Case C-253/00 *Muñoz* [2002] ECR I-7289.

<sup>27</sup> The following is inspired by a responsum given by Professor Torbjörn Andersson in the *Laval* case (available in the file of the Labour Court).

It is a debated issue how the legal effects of a directly effective provision are best described and understood.<sup>28</sup> We will not enter into that discussion. In short, a national court should apply a directly effective EU provision instead of a conflicting norm of national law or in the absence of transposition.<sup>29</sup>

However, just by stating that a national court should directly apply, for instance, Article 56 TFEU does not answer the question of when liability of individuals to pay damages for breach of EU law is required. EU provisions often only give a norm concerning what behaviour is accepted or not (a rule of conduct or a substantive provision), but do not specify what should happen if these rules are violated.<sup>30</sup> To give one example: Article 18 TFEU prescribes that any discrimination on grounds of nationality should be prohibited, but does not indicate how a breach of the prohibition shall be remedied. The EU provision is, in this sense, incomplete.

Due to this, a directly effective EU (substantive) provision will usually be complemented with national remedies. In, for instance, *Raccanelli* the Court explains this.

‘... [EU law does not prescribe any specific measure] to be taken by the Member States ... in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise’ (para 50).

This starting point is often described as a principle of national procedural autonomy.<sup>31</sup> The fact that a directly effective (substantive) EU provision has to be complemented with national remedies does not give the Member States full procedural autonomy. The limitation in the procedural autonomy of the Member State is addressed in the following questions posed by the Court in *Courage*.

*Second*, after concluding that Article 101 TFEU has direct horizontal effect, the Court in *Courage* poses the question of whether the possibility of seeking compensation for loss is required to ensure the full effectiveness (*effet utile*) of the piece of EU law in question (para 25). This question is answered with arguments closely connected to the enforcement of the particular piece of EU law at hand. The Court mentions that agreements or

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<sup>28</sup> See eg B de Witte ‘Direct effect, primacy and the nature of the legal order’ in Craig and de Búrca (eds) (above n 19) 323; P Craig and G de Búrca, *EU law: text, cases and materials* (4<sup>th</sup> edn, OUP 2008) 268; S Prechal ‘Direct effect, indirect effect, supremacy and the evolving constitution of the European Union’ in C Barnard (ed), *The fundamentals of EU law revisited: assessing the impact of the constitutional debate* (OUP 2007) 35; D Edward, ‘Direct effect: Myth, Mess or Mystery?’ in JM Prinssen and A Schrauwen (eds), *Direct effect: rethinking a classic of EC legal doctrine* (Europa Law Publishing 2002).

<sup>29</sup> A Rosas and L Armati, *EU constitutional law: an introduction* (Hart Publishing 2010) 64.

<sup>30</sup> On the concepts of substantive rules and rules of conduct, see J Malmberg et al, *Effective enforcement of EC labour law* (Kluwer 2003) 30 *et seq.*

<sup>31</sup> Arnall (above n 26) 268.

practices that are liable to restrict or distort competition are frequently covert. From that point of view, the possibility of actions for damages by parties of such an agreement before the national courts can make a significant contribution to the full effectiveness of Article 101 TFEU. The Court's conclusion is that an absolute bar in national law against bringing damages claims for breaches of Article 101 is not compatible with EU law (paras 26–27). In *Manfredi* the Court went one step further and stated that any individual can claim compensation for the harm suffered from a breach of Article 101 (para 63).

The Court then iterates that, in the absence of EU rules governing the matter, remedies and sanctions for breach of horizontal, directly effective EU law are to be decided by the domestic legal system, subject to the principles of equivalence and effectiveness (para 29).

The *third* question is, therefore, whether the claim made by the claimant may be awarded according to national law. If this is the case, the national court need not address the requirements of EU law.

If, on the other hand, the question is answered in the negative, two more questions must be asked. It follows from the case law of the CJEU that EU rules are not to be discriminated against by being subject to less favourable conditions for enforcement in comparison with domestic rules of a similar nature (*the principle of equivalence*) and that national rules may not render the exercise of (rights conferred by) Community law virtually impossible or excessively difficult (*principle of effectiveness*). This case law is now reflected in the Treaty of the European Union, where it is prescribed that Member States should provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (Article 19 TEU<sup>32</sup>).

*The fourth question* is, therefore, whether it is possible, according to national law, to award damages in similar cases. If this is the case, the same possibility must apply with respect to claims based on EU law (*the principle of equivalence*). This was not an issue in *Courage*. In *Manfredi*, however, the Court made it clear that if, for instance, punitive damages may be awarded in similar actions according to national law, it must also be possible to award such damages pursuant to actions founded on the EU law (paragraph 93).

*The fifth question* is whether a national rule that limits the possibility of claiming for damages renders the exercise of EU law excessively difficult (*principle of effectiveness*). The Court had already (in paragraph 26) determined that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract liable to restrict or distort competition. The arguments then focused on the effectiveness of *EU law*. The Court at this stage turns to *national law* and analyses whether the exclusion or reduction of the right to

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<sup>32</sup> Treaty on European Union (Consolidated version) [2012] OJ C 326/13.

damages pursuant to national law might be justified. In *Courage* the CJEU gives a list of considerations that are acceptable for limiting the liability, such as preventing unjust enrichment and that a party should not profit from his own unlawful conduct. Furthermore, it is possible to take into account the economic and legal context of the parties, as well as their market position and the possibility of reducing loss.

It is obvious that the grounds that could justify national limitations of the right to damages mentioned in *Courage* do not constitute an exhaustive list. It should also be noted that the justifications which the CJEU discusses in *Courage* relate to damages for violation of Article 101 TFEU. Furthermore, when discussing which limitations of damages are justified, the Court takes into account whether the restrictions are recognised in most of the legal systems of the Member States.<sup>33</sup>

## 5 The method of assessing damages in EU law

What then, would be the answer if the method just mentioned were to be applied regarding claims for damages against trade unions for arranging ‘EU-unlawful’ collective action? We will not try to give a full answer to that question, but limit ourselves to some short remarks.

(1) In *Laval*, the CJEU explained that (now) Article 56 TFEU confers on individuals rights that the national courts must protect. Furthermore, the Court held that this Article applies also to obstacles created by private organisations exercising their legal autonomy in order to collectively regulate the provision of services.<sup>34</sup> In *Viking*, the CJEU stated that (now) Article 49 TFEU may be relied on by a private undertaking against a trade union or an association of trade unions.<sup>35</sup> The Court has thus clarified that Articles 49 and 56 TFEU have direct horizontal effect when a trade union exercises its legal autonomy in order to collectively regulate the provision of services and that a national court should apply these articles instead of a conflicting norm of national law.

(2) When it comes to the question of whether the interest of the full effectiveness of EU law requires damages as a remedy, it is possible to point to several differences between the situations in *Courage* and *Manfredi*, on one hand, and the kind of ‘EU-unlawful’ collective action discussed here, on the other.

It may be noticed, first, that the practices in *Courage* and *Manfredi* had an illegal aim. EU-unlawful collective action will, on the other hand, typically have the aim of protecting workers. This aim is regarded as a legitimate interest, which in principle could jus-

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<sup>33</sup> Case C-453/99 *Courage* para 29.

<sup>34</sup> Case C-341/05 *Laval* paras 97–98.

<sup>35</sup> Case C-438/05 *Viking* para 60.

tify restrictions of the fundamental freedoms of the Treaty.<sup>36</sup> The central issue will be whether a collective action goes beyond what is necessary to achieve this aim. When considering whether the interest of the full effectiveness of EU law requires damages as a remedy, due account must also be taken of the fact that the right to strike is regarded as a fundamental right<sup>37</sup> and that the threat of severe damages might risk creating a situation in which the right to strike cannot be exercised.

One of the main arguments in *Courage* was that the practices in such a case are covert and difficult to detect. A right to damages would give each of the parties an incentive to reveal the practices that distort competition and thus strengthen the practical working of competition law. Collective actions, in contrast, are almost without exception made public. Furthermore, in Member States there are often mechanisms for preventing unlawful collective action *ex ante*, for example different forms of mediation or interim decisions by Courts, which serve as an alternative to damages claims *ex post*.

It may also be mentioned that the EU has exclusive competence as regards the establishment of the competition rules for the functioning of the internal market (Article 3 TFEU). In such areas, Member States may adopt legally binding acts only if so empowered by the Union or for the implementation of EU acts (Article 2 TFEU). Thus, it is natural that the EU provides full regulation of the area, including both what behaviour is acceptable or not on the market, and the sanctions available in case of a breach of EU law. In the areas of internal market and social policy, on the other hand, the competence is shared between the EU and Member States. In areas of shared competence the EU may – according to the principle of subsidiarity – act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (Article 5 TEU). Arguably, intrusions in the procedural autonomy of a Member State require stronger justifications in areas of shared competence than in areas of exclusive competence.

Furthermore, collective actions are excluded from the competence of the EU to adopt directives according to its competence in social policy (Article 152(5) TFEU). Even though this provision does not exclude collective action from the domain of the economic freedoms,<sup>38</sup> it requires providing the Member State with a margin of appreciation in regulating remedies for unlawful collective actions.

The restriction of EU competences under Article 152(5) TFEU does not apply only to collective action, but more generally to the principle of freedom of association. It is worth noting that this principle covers important elements, for example the autonomy of the collective bargaining system and the possibility for the social partners to decide upon procedures and rules related to collective bargaining. In some Member States the

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<sup>36</sup> Case C-438/05 *Viking* para 77.

<sup>37</sup> See eg Article 28 EU Charter of Fundamental Rights.

<sup>38</sup> Case C-341/05 *Laval* para 88; Case C-438/05 *Viking* para 41.

autonomy of collective bargaining is constitutionally guaranteed. Against this background, sanctions and remedies in the context of industrial action can also be seen as part of the national identity that is embedded in the political and constitutional structures of Member States and which the European Union must respect in accordance with Article 4(2) TEU.

Taking this into account, it is far from obvious that the CJEU would consider that, for instance, Article 56 TFEU must be interpreted as meaning that an individual must be able to claim compensation for the harm suffered from an ‘EU-unlawful’ collective action if the Member State provides other effective methods of preventing such collective actions.

However, the issue of whether the interest of the full effectiveness of EU law requires damages as a remedy will often not be decisive, because damages will be awarded in similar cases according to national law in many Member States. The remedies for ‘EU-unlawful’ collective action must not be less favourable in comparison with domestic remedies for collective action that is unlawful under national law (*the principle of equivalence*).

A crucial question is whether national rules that limit the possibility of claiming for damages render the exercise of EU law excessively difficult (*principle of effectiveness*). In Member States it is not unusual to have rules limiting trade unions’ liability. The question, then, is whether the exclusion or reduction of damages in national law may be justified. This analysis should take into account the nature of the violation of EU law and the reason for the restrictions, as well the extent to which such restrictions are recognised in most of the legal systems of the Member States.

On the other hand we should note that excessive sanctions or the threat of sanctions can in itself be a restriction of the freedom of association as understood by the ILO supervisory bodies. An observation of the Committee of Experts involving the right to strike illustrates this point. In its 2010 report under Convention No. 87 addressed to the United Kingdom, the Committee of Experts considered an alleged infringement by the United Kingdom of the freedom of association. In this dispute, the employer, British Airways, had engaged in negotiations with the pilots’ union, BALPA, about the terms of employment of its members working out of London Heathrow. The employer decided to establish a fully owned subsidiary company and to have that company use an airport in another country where the company would be able to fly customers from Europe to North American locations. The union, fearing the loss of work for its members at Heathrow to those pilots at the new location, threatened to strike. The employer stated that if the union did so, it would seek to enjoin the strike on the grounds that it would be successful in a lawsuit based on the law the UK court would apply based on the EU restrictions as defined in the *Viking* and *Laval* cases. The employer also stated that as any disruption at London Heathrow would cause substantial economic loss, it would ask for damages of at least £100 million per day. Facing bankruptcy if it went on strike for one day, the union decided not to strike. The Committee of Experts was of the opinion that the

United Kingdom had infringed freedom of association by failing to provide sufficient legal protection for workers acting in defence of their occupational interests: the Committee observed that the omnipresent threat of an action for damages that could bankrupt the union, possible in light of the *Viking* and *Laval* judgments issued by the CJEU, created a situation in which the rights under the Convention could not be exercised. The Committee furthermore recalled that it had been raising the need to ensure fuller protection of the right of workers to exercise legitimate collective action in practice and it considered that adequate safeguards and immunities from civil liability are necessary to ensure respect for this fundamental right, which is an intrinsic corollary of the right to organise.<sup>39</sup>

Further the Committee of Experts in its 2012 Report, in the context of 'Permitted restrictions and compensatory guarantees'

'... noted with concern the potential impact of the recent case law of the Court of Justice of the European Communities (CJEC) concerning the exercise of the right to strike, and particularly the fact that in recent rulings the Court has found that the right to strike could be subject to restrictions where its effects may disproportionately impede an employer's freedom of establishment or freedom to provide services.'<sup>40</sup>

Also the Freedom of Association Committee (FAC) has underlined that excessive sanctions may have an intimidating effect on trade unions and inhibit their legitimate trade union activities.<sup>41</sup> In light of the ILO case law there are good reasons to argue that restrictions on excessive sanctions are not only legitimate, but required under the ILO Convention No. 87.

Regardless of the possible restrictions on sanctions emanating from the ILO Convention No. 87 it is clear that an analysis of the implications of the principles of equivalence and effectiveness in EU law on sanctions and remedies in the field of collective action will benefit from comparative analyses of the law on remedies for unlawful collective action in Member State. In the following section we will conduct such an analysis.

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<sup>39</sup> Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 99th Session, 2010 (ILO 2010) 209. This opinion was, moreover, reiterated in the Committee's 2011 Report, cf Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 100th Session, 2011 (ILO 2011), 187.

<sup>40</sup> General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008. International Labour Conference, 101st Session, 2012 (ILC.101/III/1B) (ILO 2012) para 128 at 52.

<sup>41</sup> See International Labour Office. Committee on Freedom of Association, *Freedom of association: digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4<sup>th</sup> edn, ILO 2006), para 670 at 135.

## 6 Economic sanctions for unlawful collective action in the EU Member States

Especially in the legal systems within the EU with a long tradition of autonomous collective bargaining, specific criteria for determining economic sanctions against trade unions<sup>42</sup> for unlawful collective action have been developed. In the following we provide an overview of the existing approaches to this issue within the European Union.<sup>43</sup>

*The Nordic Countries.* In the Nordic Countries economic sanctions are clearly defined by statute for situations in which a collective agreement is in force and collective action is undertaken in breach of the peace obligation emanating from the collective agreement. In Finland, for instance, the Collective Agreements Act<sup>44</sup> prescribes an obligation to maintain collective peace while the agreement is in force. This passive duty to maintain collective peace lies also upon the affiliated organizations, such as the local trade union branches. Furthermore, the associations have an active duty to ensure that their members do not undertake collective action in breach of the agreement. This pertains to all organizations bound by the collective agreement, not only to the signatory parties.

*Denmark* was the first Nordic country to regulate the question of remedies for breach of collective agreements by statute. The main remedy is of an economic nature in the form of a hybrid of damages and private law fine (in Danish, *bod*). This makes it possible to sanction breaches of collective agreements irrespective of whether economic loss has been incurred. On the other hand, if economic loss has been incurred, the amount is taken into consideration when deciding the size of the economic sanction. The Labour Court should take all circumstances in the case into consideration, which implies that the economic sanction can both exceed and be below the economic loss of the other party.

For breaches of collective agreement that are considered gross, the sanction can be considerable. There are many examples of trade unions being fined between DKK 100,000 and 500,000 (approximately 13,500 to 135,000 €) and, in a few cases, up to 1 million Danish crowns. There are a couple of exceptional cases from 1981 in which two unions were fined DKK 10 million and 20 million, respectively.

In *Sweden*, damages shall compensate for any economic loss that has been incurred due to the collective action (*economic damages*). However, the court shall also take into

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<sup>42</sup> In this context we are not assessing the possible liability of individual employees, an issue that falls outside the scope of liability under EU law.

<sup>43</sup> The following is based on national reports written by Filip Dorssemont (Belgium and the Netherlands), Claire Kilpatrick (United Kingdom), Sylvaine Laulom (France), Antonio Lo Faro (Italy), Jonas Malmberg and Lisa Sjöstrand (Sweden), Magdalena Nogueira Guastavino (Spain), Dagmar Schiek and Jule Mulder (Germany and Austria), Tove Söderberg Lundmark (Denmark and Norway) and Joanna Unterschütz (Poland). The national reports have not been published.

<sup>44</sup> Lag 7.6.1946/346 om kollektivavtal.

account the injured parties' interest in compliance with statutory provisions and/or provisions in the collective agreement (*punitive damages*). The leading principle is that punitive damages (together with the economic damages, as the case may be) should be at such a level that it ensures respect for compliance with laws and collective agreements. The distinction between economic and punitive damages is not strictly upheld in case law.

According to the Co-determination Act,<sup>45</sup> damages may be reduced or waived entirely when it is reasonable under the circumstances (s 60). One reason for this possibility is that the awarded damages should not be disproportionate in relation to the solvency of the liable subject. Reduction of economic damages has not been dealt with very often. One reason for this is that there have been only a few cases in which the Labour Court has awarded damages for unlawful collective action. During the 1980s the Labour Court imposed punitive damages amounting to SEK 15,000 to 30,000 (approximately 1,690 to 3,380 €). However, in the *Laval* case, the Labour Court imposed considerably a higher amount, 500,000 SEK, as well as compensation for legal costs that amounted to just over 2 million SEK (cf AD 2009 no 89).

It merits being noted that in its 2013 Report the ILO Committee of Experts denounced this posterior decision by the Swedish Labour Court on the trade unions' liability in damages for what was effectively lawful collective action at the time it was undertaken; cf Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 102nd Session, 2013 (ILO 2013) 179–180.

In contrast to Denmark and Sweden, in *Norway* only compensation for economic loss is available. In principle, compensation is to be paid to the full amount of the economic loss suffered and there is no specific limit on the amount that an organisation or individual worker may be held liable to pay. However, the Labour Court shall consider, besides the economic loss suffered, the blameworthiness, the economic capacity of the party at fault and the circumstances of the party suffering the loss.

Due to their economic strength, trade unions are often held liable to compensate fairly high amounts. The Labour Court rarely reduces the amount of compensation if the party is an organisation, whereas the amounts for which individual workers are held liable are consistently fixed at quite modest sums.<sup>46</sup>

In *Finland*, according to the Collective Agreements Act, a compensatory fine can be imposed on the organization as well as a local trade union branch (or employer) that has either implemented unlawful collective action or has neglected the active duty to maintain collective peace (Section 9). The maximum amount of the fine that can be imposed repeatedly, if the collective action continues, is 29,500 €. The fine can be imposed both on the national trade union federation and its member organization and the maximum amount applies to both of them.

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<sup>45</sup> Lag (1976:580) om medbestämmande i arbetslivet.

<sup>46</sup> Cf lov 27. januar 2012 nr. 9 om arbeidstvister (the Labour Disputes Act), s 9 and 10.

The Labour Court is the exclusive forum in disputes concerning the application, interpretation or breach of collective agreements. Therefore, the Court decision in a dispute is usually handed down within a few months, or, in disputes concerning collective action, often in a few days.

*Other EU Member States.* In *Germany* trade unions may, due to their financial status, be held liable to pay considerable amounts. Some trade unions have therefore agreed upon liability limits with employer's associations.

On the other hand, the employer has to prove that the damage is caused by the collective action. He or she must also convince the court that all possible measures have been taken to minimize the damage. Due to this, the liability might be fairly limited despite the fact that no statutory cap on the amount of damages exists.

In the *United Kingdom*, trade unions' liability in tort was reinstated in 1982. Since then there have been some damages claims, but the primary remedy sought by employers is injunctive relief in order to put an end to the collective action.

According to section 22 TULRCA,<sup>47</sup> the maximum amount a trade union can be liable to pay is £ 250,000 for the largest trade unions and £ 10,000 for the smallest trade unions. Damages are awarded according to general principles in the law of tort. Punitive damages are very rarely awarded in tort claims.

It should be stressed that damages claims are not the most common way to deal with unlawful collective action in any of the countries surveyed. This is even more apparent in the Netherlands and in Austria, although for different reasons.

In *The Netherlands*, three cases concerning trade unions' liability in damages arising in the context of collective action have been tried by the Supreme Court. Two of them concerned atypical collective action such as plant occupation, followed by bankruptcy. The extreme circumstances illustrate that liability proceedings against trade unions are highly unlikely in the Dutch context.

In *Austria*, there are no specific labour law sanctions but an employer can sue for damages based on general tort law. However, due to the scant use of collective action and thus a lack of case law on this matter, there is much legal uncertainty. In practice, damages claims have not had any real relevance in Austria.

In *France*, trade unions are not considered the main actor when it comes to collective action and therefore the trade unions' liability is fairly limited. However, a trade union can be held liable when it organises or instigates an unlawful collective action. This situation arises more often in the public service sector since the procedural requirements require that the trade union is involved.

Only if a trade union itself participates in criminal offences, or in the realisation of acts that cannot be considered a normal exercise of the right to strike, can it be liable in

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<sup>47</sup> Trade Union and Labour Relations (Consolidation) Act, 1992.

damages for loss that such acts may have caused to the employer. It is not sufficient that trade union officials participate in an unlawful strike or commit illegal acts; the trade union itself must organise or instigate the illegal conduct.

For *Italian* trade unions organising workers in an essential services sector, the criteria pertaining to what constitutes a lawful strike are much more restrictive compared with other sectors in Italy. They are also at a larger risk of being held liable in court. A trade union calling for unlawful collective action can be obliged to pay a minimum of 2,500 € to a maximum of 25,000 € depending on the gravity of the violation with regard to its effect on the functioning of the public service in question.

The only other way to deem a collective action unlawful in Italy is either if it constitutes a criminal offence or if it causes damage to business productivity.

Violent picketing, sabotage and plant occupation are activities which have been considered to be regulated by the penal code. Scholars argue that this type of action should not be considered collective action at all and the use of the term 'unlawful collective action' is therefore not relevant in this context.

There are only a few cases in which damage to business productivity has been held to occur and those have been cases of destruction of equipment and devices necessary for the undertaking's production. Analysing the case law on this subject matter reveals that even in those cases where damage to business productivity is proven, no real compensation of the damage suffered by the employer is awarded.

*Spanish* law stipulates that trade unions can be held liable for actions and agreements which are within the scope of their powers. However, there are no labour law rules constituting a system for compensatory claims in labour disputes. Instead, reference must be made to the general laws of the Civil Code regarding liability in damages.

Trade unions cannot be held liable for acts committed by their members if it cannot be proved that such acts were carried out on union instructions.

When the right to strike is considered an individual right and, therefore, the trade union does not exclusively own that right, problems arise in identifying which damages originate from the actions of a trade union. In the case of a collective action that has been deemed unlawful, the trade union can be held liable for the damages resulting from the non-compliance with procedural requirements, any damages resulting from (unlawful) political or sympathy strikes and damages resulting from the union's strike committee's refusal to collaborate on safety and maintenance services and minimum levels of service in essential services. On the other hand, participating in a strike and in that sense exercising an individual right is each worker's free choice which, in the case of an unlawful strike, implies that a plurality of individual actions may be the basis of the damage caused.

The liability of trade unions is a non-issue in *Belgium*, because trade unions lack a legal status entailing a legal capacity that involves extra-contractual liability. This is a unique feature compared with trade unions in other European countries.

In the new EU Member States, which lack a tradition of collective bargaining and trade unions, the issue of economic liability for trade unions has rarely been formulated in more than purely theoretical terms. In practice, measures are not taken against trade unions but instead towards active individuals undertaking collective action. For instance, in *Estonia* the organisers of an unlawful collective action are held liable.<sup>48</sup> A collective action must be preceded by negotiations and a conciliation procedure. If the trade union fails to fulfil its duties according to the Collective Labour Dispute Resolution Act regarding negotiation and conciliation it can be held liable. It is the court that determines whether a collective action is lawful or not.

In *Slovakia*, the trade union that has called the collective action can be held liable if the collective action is declared unlawful or if the trade union does not fulfil its duties to the employer during the collective action.

## 7 Conclusions

The review of the various legal regimes shows a fairly complex variety of solutions and traditions developed within the framework of the different national systems of industrial relations. One can argue about whether common legal principles exist regarding trade union liability for unlawful industrial action. One such principle might be the general starting point that unlimited economic liability for damages is not acceptable as a general sanction. On the other hand, economic sanctions clearly are applied in most countries.

As argued above, it is far from obvious that the CJEU would – by analogy with *Courage* and *Manfredi* – consider that, for instance, Article 56 TFEU must be interpreted to mean that an employer must be able to claim compensation for the harm suffered from an ‘EU-unlawful’ collective action if the Member State provides other effective methods of preventing such collective actions. Another solution – taking into account the diversity of national laws – would strongly undermine the predictability and legitimacy of EU law. Furthermore, it would not be in line with the tradition in EU law of promoting the role of the social partners, taking into account the diversity of national systems (Article 152 TEUF).<sup>49</sup>

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<sup>48</sup> Cf Act on resolution of collective labour disputes of 5 May 1993 (consolidation), s 26.

<sup>49</sup> See also, eg, Article 28 EU Charter of Fundamental Rights, and the so-called Monti regulation from 1998, Council Regulation of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among Member States [1998] OJ L 337/8.

Instead, the crucial question is whether damages will be awarded in similar cases *according to national law in the Member States*. It follows from the principle of equivalence that remedies for 'EU-unlawful' collective actions must not be less favourable in comparison with domestic remedies for collective actions unlawful according to national law. Against this background it seems that the starting point should be that the national principles for economic liability for unlawful collective action embedded in national law should also be applicable in cases of 'EU unlawful' collective actions. The comparative overview shows that 'caps' or other limitations of the amount of economic compensation are commonly applied in national law. Only in the rare cases in which national law does not provide any economic sanctions at all, or any other effective enforcement mechanisms, does it seem reasonable to argue that principles of effectiveness of EU law might enter into play and justify specific solutions within EU law.



# Public Procurement and Labour Rights: Governance by Scaremongering?

*Kerstin Ahlberg and Niklas Bruun*

## 1 Introduction and background

With the *Rüffert* case,<sup>1</sup> the CJEU demonstrated that the Posting of Workers Directive<sup>2</sup> imposes some restraints on Member States not only in their capacity as legislators, but also as buyers and contractors on the market. However, the special EU regime on public procurement, too, confronts Member-State authorities with challenges when they want to make sure that their contractors live up to certain standards as employers. The procurement regime is technical and extremely complex, and what is allowed in this respect is to some extent unclear, not to mention controversial. From a governance perspective the public procurement legal regime is special, because it interferes in the contractual relations between public and private actors and it also involves – in various ways – different actors on multiple levels: a large part of public contracting takes place at local level, for example on behalf of municipalities, which means that local authorities are involved. But contracting – and to some extent regulation of public procurement – can also take place at regional level, which is the case for example in a federal state, such as Germany. The national level is important both as the level where general legislation is adopted, and also because this is where administrative and judicial governance of public procurement usually takes place. Last but not least, the EU is significant as the overall regulatory level, and as the level for judicial review in the form of preliminary rulings and direct actions in the Court of Justice of the European Union (CJEU).

There is an evident link between labour rights and public procurement, as the vast majority of public procurement projects are performed by paid labour and the costs of wages and other working conditions have to be calculated when bidding for public contracts. However, as the CJEU's decision in Case C-271/08 *Commission v. Germany*<sup>3</sup>

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<sup>1</sup> Case C-346/06 *Rüffert* [2008] ECR I 1989

<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> Case C-271/08 *Commission v. Germany* [2010] ECR I-7091.

has shown, there are other, less self-evident connections between public procurement and labour rights as well.<sup>4</sup>

In this chapter we explore how labour rights are dealt with in the context of public procurement, and what implications the multi-level structure of the procurement regime has had for this. By way of background we touch upon the general debate on the scope for taking into account social considerations in public procurement, a subject that we dealt with in detail in a report published in 2010 (in Swedish).<sup>5</sup>

In parallel with our work on this chapter, a revision of the EU Directives on public procurement has been under way, and early in 2014 the Council adopted new directives. However, since our primary aim is to analyse how the interplay between different levels of governance and actors affects labour rights, rather than to explain the details of the existing law, we still take the ‘old’ Directives of 2004 as our starting point. Deadline for transposition of the new Directives is 18 April 2016, and as yet we can only imagine how they may change these processes. Thus, we confine ourselves to some short remarks about the new Directives under section 5 below.

## 2 The EU rules on public procurement – an overview

Much – but by no means all – public procurement in the Member States is governed by EU legislation. The purpose of this regulation is to improve the functioning of the single market and to eliminate the risk of national authorities discriminating, directly or indirectly, against foreign undertakings in the course of their procurement.

Since 2004, the main provisions underlying the Member States’ regulation of public procurement are contained in two directives, namely, the ‘Utilities’ Directive on procurement of water, energy, transport and postal services, and the ‘Classic’ Directive on the awarding of public works contracts, public supply contracts and public service contracts.<sup>6</sup> A third directive specifically concerns procurement in the fields of defence and security.<sup>7</sup> These three directives are supplemented by two more that are aimed at

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<sup>4</sup> See under section 4.3 in this chapter

<sup>5</sup> K Ahlberg and N Bruun, *Upphandling och arbete i EU* (SIEPS 2010:3).

<sup>6</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1; 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.

<sup>7</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L 216/76.

ensuring that the Member States have effective procedures for examining the propriety of a procurement.<sup>8</sup> In addition, there are a couple of legal instruments of a more ‘technical’ nature, aimed at simplifying public procurement procedure.<sup>9</sup>

Early in 2014, the Council adopted new directives that will replace the two central Directives,<sup>10</sup> plus a directive on the awarding of concession contracts, which have not previously been subject to secondary legislation. All three are to be transposed into national law by 18 April 2016.<sup>11</sup>

One thing that all these legal instruments have in common is that they apply only to procurements above certain threshold values. But the threshold values are not the only things that decide whether the provisions of the Directives are applicable. Certain services are exempted altogether. In addition, procurement of certain types of service—such as health and social services, education and vocational education and hotel and restaurant services – is subject to a less rigid regime and, in the new Directives, considerably higher threshold values than procurement of other types of services.

This is not to say that the Member States can do as they please in procurements that do not come under the Directives. The CJEU has laid down that the rules of the Treaty and the principles of the single market apply to those procurements as well – provided that the procurement is of transnational interest in the first place. Thus, this case law applies only to contracts of importance for the single market. In the case of procurements that do not come under the directives, it is for the procuring authorities themselves to judge whether the procurements may be of any interest to economic players in other Member States. If not, then EU law will not be applicable.

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<sup>8</sup> 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; 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.

<sup>9</sup> Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) [2002] OJ L 340/1; Commission Implementing Regulation (EU) No 842/2011 of 19 August 2011 establishing standard forms for the publication of notices in the field of public procurement and repealing Regulation (EC) No 1564/2005 [2011] OJ L 222/1.

<sup>10</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

<sup>11</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

The Directives, needless to say, are based on the same Treaty articles and principles as CJEU case law, but on at least one point of particular importance for our purposes they include a rule that has no counterpart in case law. The Directives require the contract to be awarded either to the economic operator offering the lowest price or to the one submitting ‘the most economically advantageous tender’.<sup>12</sup> But the case law on procurements that do not come under the Directives has nothing to say concerning the criteria for the award of contracts, as long as they are transparent, non-discriminatory and verifiable. The same applies to procurement of the services, which are subject to the Directives’ ‘lighter’ regimes.

### **3 The procurement procedure – an overview**

Procurement is a strictly structured procedure, and the Directives contain rules for all its phases, to guarantee that economic operators everywhere in the EU/EEA will be given genuine and equal opportunities to take part and to prevent the inclusion of irrelevant considerations in the selection process. Various kinds of societal considerations may come into consideration in each of these phases, but what type of social policy requirements a procuring entity can lay down varies from one phase to another, and so one must be careful to distinguish between them. Here two aspects can be observed:

- To what extent can contracting authorities prevent enterprises that compete on the basis of poor employment and working conditions from taking part in procurement? There is no doubt that all contractors should comply with all applicable rules of labour law, but it is not equally clear what means the authority may use to safeguard that this will in fact happen.
- To what extent can the authorities use their purchasing power to promote positive measures aimed at realising social policy objectives beyond the minimum requirements of applicable legislation?

#### *3.1 Determining the subject of the procurement*

As the EU provisions are concerned with procurement procedure, they have nothing to do with what happens beforehand. In principle, an authority that has identified a need is at liberty to decide how that need will be provided for, if indeed the need occasions any purchase at all, or whether the need should be met through activities under the authority’s own aegis. The only restriction that applies if the authority decides to resolve the problem by procurement is that the subject of the procurement, the subject matter of the contract, may not be defined in such a way that tenderers from other Member States are disfavoured.

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<sup>12</sup> Article 55 of Directive 2004/18/EC. In Article 67 of Directive 2014/24/EU ‘the most economically advantageous tender’ is used as an overall notion that may mean ‘price only’ as well as ‘best price-quality ratio’.

### 3.2 *Description of the subject matter of the contract*

The way in which the subject matter of the contract is described in the invitation to tender can, in itself, decide whether or not a certain operator will be able to participate in the procurement. Therefore the directives include rules on this point. Among other things it is stipulated (Article 23)<sup>13</sup> that technical specifications ‘shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition’. Accordingly, the specifications are to be stated either as references to standards of different kinds or in terms of performance or functional requirements, or as a combination of these.

The technical specifications define the quality of the goods or services to be procured. This means that there is limited room for requirements that concern the employment and working conditions of those who will perform the work, unless this can contribute to the quality of the subject matter of the contract. However, as part of the technical specifications for works, supply or service contracts, production processes and methods can explicitly (although put away in an Annex to the Directive) be taken into account.<sup>14</sup> Thus, for example, the technical specifications for public works contracts may include technical requirements aimed at protecting the health and safety of the workers on the construction site.

### 3.3 *Delimitation of those eligible to participate*

The question of which undertakings can join in competing for the contract is then decided by two types of selection criterion.

First, the contracting authority may require that candidates and tenderers meet a minimum level of economic and financial standing and of professional and/or technical ability. The Directives contain an exhaustive list of criteria that the contracting authority is allowed to use in order to assess whether candidates have sufficient professional and/or technical ability to fulfil the requirements specified in the contract. Other criteria cannot be applied. Also, the minimum levels of professional and/or technical ability required by the procuring authority must be proportionate and related to the subject matter of the contract.

Thus if it is necessary that the contractor have special skills in the social field or specific technical equipment in order to be able to fulfil certain social aspects of the contract, then this can be used as a selection criterion.

The second type of selection criterion lays down that candidates may, or indeed shall, be excluded from participation on grounds of personal unsuitability. In the 2004 Directives, two of these grounds for exclusion are related to social issues: an economic operator may (but need not necessarily) be excluded if it has neglected to pay social security contributions or has been guilty of grave professional misconduct, proven by

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<sup>13</sup> Article numbers refer to Directive 2004/18/EC.

<sup>14</sup> Directive 2004/18/EC, Annex VI, Article 1(a)

any means that the contracting authority can demonstrate (Article 45(2)). The definition of what is ‘grave professional misconduct’ is left to the Member States, but it is clear from the examples in the Recitals of the Directive’s Preamble that it may consist of failure to comply sufficiently with certain provisions of labour law:

Recital (34): ‘The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, 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 (1) lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.’

From Recital (43): ‘Non-observance of national provisions implementing the Council Directives 2000/78/EC (1) and 76/207/EEC (2) concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.’

### 3.4 *Award of the contract*

When the tenders have been opened and tenderers that do not meet the selection criteria have been weeded out, the remaining tenders have to be compared. As we have seen, there now remain only two possibilities if the procurement is of a kind to which one of the Directives of 2004 is fully applicable. The contract must be awarded either to the tenderer quoting the lowest price or to the tenderer submitting the tender that is most economically advantageous from the viewpoint of the contracting authority (Article 53). In the latter case, in other words, various qualitative factors can be balanced against the price.

If the contract is to be awarded to the tenderer quoting the lowest price, the matter is fairly straightforward. Judging what is most economically advantageous can be more difficult; furthermore, opinions differ concerning the type of criteria to be included in this assessment. They must, however, be ‘linked to the subject-matter of the public contract in question’, and Article 53 gives examples, including environmental characteristics. It is clear from Recital 46 of the Preamble that criteria aimed at meeting social requirements may also be included, but this has not been given expression in the

Article.<sup>15</sup> The examples given in the Preamble do not concern labour rights, and the question of what types of social criterion a procuring authority can take into account for judging what is most economically advantageous is one of the most controversial.<sup>16</sup> However, in a case from 2012, C-368/10 *Commission v the Netherlands*,<sup>17</sup> the CJEU commented on the relevance of this Recital, indicating a broad interpretation of its coverage (see under 4.3 below).

Regardless of whether one is to choose the tender with the lowest price or the tender that is most economically advantageous, there is a possibility of rejecting tenders which are abnormally low. First, however, the contracting authority must give the tenderer a chance to clarify the conditions on which the tender is based. The clarifications may, for example, concern the compatibility of the tender with the rules of employment protection and working conditions in the place where the service is to be provided.

### 3.5 *Drawing up the contract*

Once the authority has decided which tenderer is to be awarded the contract, it remains for the contract to be drawn up. Here it is permissible, under Article 26, to ‘lay down special conditions relating to the performance of a contract’ and the Article specifically provides that the requirements may include social and environmental considerations.

It goes without saying that any contractor is supposed to comply with all applicable national law, including the rules on workers’ rights. However, the procuring entity may want to underline this in the contract and couple this requirement with some kind of contractual sanction, should the contractor fail to do so. Even more, the procuring entity may want to impose conditions that go beyond mere compliance with mandatory minimum rules and aim at furthering positive social policy objectives, for example that the contractor has to pay its workers according to the collective agreement in place where the work is performed or that it should take measures aimed at promoting equality between men and women or ethnic diversity during the performance of the contract. Other examples are instanced in Recital 33 of the Directive’s Preamble.<sup>18</sup>

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<sup>15</sup> From Recital 46: ‘Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.’

<sup>16</sup> Ahlberg and Bruun (above n 5) 38 *et seq.*, 73 *et seq.*

<sup>17</sup> Case C-368/10 *Commission v the Netherlands* (judgment of 10 May 2012) [2012] ECR I-0000.

<sup>18</sup> From Recital 33: ‘They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic

There is no doubt that authorities that want to use their purchasing power to further social policy objectives have the widest room to maneuver when laying down the conditions for the performance of the contract. The reason is that these are conditions that any tenderer will have to accept if it is awarded the contract. Thus they do not affect the choice of contractor.

However, here too there are some limitations. First, contract performance conditions must have been indicated already in the call for tenders, so the tenderers are able to take them into consideration when calculating their offers. Second, they must be linked to the performance of the contract. In other words, they cannot be related to the contractor's business in general, only to the work covered by the contract in question and the workers performing this work. Third, the contract performance conditions must be compatible with Community law. As is well known after *Laval*<sup>19</sup> and *Rüffert*, this neutral wording means that if the contract may be performed by workers posted from another country, authorities cannot make participation in the procurement conditional on the observance of terms and conditions in just any type of collective agreement in place where the work is performed. However, this restriction does not follow from public procurement legislation, but from the Posting of Workers Directive. Thus it does not apply if the procurement lacks transnational interest and the work is to be performed by workers employed by domestic companies.

#### **4 The multilevel governance of labour rights in public procurement**

##### *4.1 The points of departure*

Many Member States have a long tradition of using their procurement for promoting various social policy objectives. However, in a number of cases before the CJEU from the 1980s and onwards the European Commission had demonstrated that it did not accept how this was done.<sup>20</sup> Similarly, in 1998 officials in the Directorate-General for the Internal Market warned the Swedish Government in a 'non-paper' not to ratify ILO Convention No 94 on labour clauses in public contracts, as this might be contrary to EU law on public procurement and posting of workers.<sup>21</sup> As a consequence, when the EU Procurement Directives came up for revision at the beginning of the millennium a

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International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.'

<sup>19</sup> Case C-341/05 *Laval* [2007] ECR I-11767.

<sup>20</sup> See Case 31/87 *Beentjes* [1988] ECR I-4635; Case C-225/98 *Commission v France* [2000] I-7445; Case C-513/99 *Concordia Bus* [2002] ECR I-7213; Case C-448/01 *EVN* [2003] ECR I-14527.

<sup>21</sup> See K Ahlberg, 'Kommissionens tjänstemän varnar för ratifikation: ILO-konvention hindrar konkurrens' (1998) *EU & arbetsrätt* 1, 1.

number of Member States – among them Sweden and Denmark, often supported by Belgium and France and by the Parliament – eagerly advocated that the scope for taking social considerations into account should be expressly defined in the Directives.<sup>22</sup> On the trade union side voices were even heard calling for them to directly enjoin the integration by national authorities of social considerations in their procurement activities.

The Commission, represented by the Internal Market and Services Directorate General, opposed all of this. Its arguments went primarily along two lines. One was systematic: as the object of the projected Directives was to coordinate procedures for the awarding of public contracts and not to impose specific obligations concerning social or other legislation on companies, the substantive provisions of these Directives were simply not the right place. The second line of argument concerned the appropriateness of allowing procuring entities wide scope for using social criteria at different stages of the procedure. This would leave the field open for all sorts of irrelevant considerations, the Commission argued. Only as an exception did it bring forward legal arguments, notably against Sweden's proposal that the Directives should explicitly allow the contracting authority to oblige economic operators to apply working and employment conditions not less favourable than those established in the trade or industry concerned, and the introduction of a recital implying that the Directives would not affect the application of ILO Convention No 94 or prevent a Member State from ratifying it. This would be contrary to EU law, according to the Commission.

The great debate ended in a kind of neutrality approach. As shown above, parts of the Preambles confirm the existence of some scope for considerations prompted by social policy. It is up to the Member States to decide to what extent they want to make use of this scope, as long as they respect the general principles of transparency, non-discrimination and equal treatment. Thus the first point of departure is that the public procurement regime is neutral to the question of whether it is advisable or not to use procurement for safeguarding labour rights.

The second point of departure is that the EU has no say in how Member States want to spend tax payers' money. If they want to maintain high standards of work environment or high minimum wages it is primarily a policy matter for the Member State. No direct obligation on Member States to secure more 'value for money' can be inferred from the procurement Directives.<sup>23</sup>

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<sup>22</sup> A thorough record of different actors' positions and arguments during the negotiations over the Directives can be found in Ahlberg and Bruun (above n 6), 28 *et seq.*

<sup>23</sup> For a thorough and knowledgeable analysis of this matter see S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (CUP 2009). See also K Ahlberg and N Bruun, 'Public procurement and labour law – friends or foes?' in M Rönmar (ed.), *Labour Law Fundamental Rights and Social Europe*. Swedish Studies in European Law Volume 4 (Hart Publishing 2011).

#### 4.2 *Labour rights in the public procurement context become primarily a national issue*

Thus, EU law leaves it more or less explicitly to the Member States to decide how to handle the issue of labour rights in their public procurement. As we will show, the individual Member State's policy in this area, in turn, is a result of interplay between decisions taken at national and at regional and local levels, which is not always propitious for the development of socially responsible public procurement.

- At national level, the legislator has to deal with this when preparing the legislation for implementing EU Directives. In most Member States public procurement is a 'competition issue', so if labour ministries are at all involved in the implementation phase, they are likely to have a mere consultative role.
- In line with this, the administrative guidance on how to handle public procurement is given primarily by competition authorities.
- The judicial review takes place in administrative courts or other courts that are unfamiliar with labour rights.

All this taken together is likely to lead to a kind of imbalance, where social considerations are to some extent neglected in favour of economic considerations. If we are allowed to generalize: experts on procurement law are often inclined to agree with the kind of arguments against 'procurement alien factors' put forward by the European Commission's Directorate-General for the Internal Market.

In several countries there is another factor that adds to this imbalance. While rules on procurement are primarily an issue for the national legislator, regulation of labour rights are to a great extent left to the social partners (for example, in the Nordic countries) or the regional legislator (as in Germany).

But if openness and neutrality at the EU level is combined with a lack of interest and motivation to take a stand at national level, this may cause difficulties for procuring entities when they are to apply the legislation. For example, municipalities, county councils and regions may want to buy only ethical goods, to promote persons with a weak position on the labour market or to prevent the undermining of collective agreements. However, without positive guidance from legal expertise in the field, it is safer to resort to a 'precautionary principle' and refrain from using criteria and conditions aimed at securing labour rights. The procurement procedure is complex and time-consuming and the procuring authority does not want to risk a delay caused by a judicial review. The consequence is an overreliance on the European Commission's opinion, expressed in its interpretative communication<sup>24</sup> or Guide,<sup>25</sup> which are the outcomes of compromises within the Commission and are not legally binding.

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<sup>24</sup> COM(2001) 566, Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement [2001] OJ C 333/27.

Three examples illustrate how this multi-level governance can function in the Member States.<sup>26</sup>

The situation in *Sweden* is a pointed example of the above. Paradoxically, the political will demonstrated by the Swedish Government in the negotiations in the Council is not mirrored in the legislation transposing the Directives adopted in 2004. The text of the Public Procurement Act more or less mirrors the Directives and, as such, reproduces their neutral approach to the inclusion of social policy considerations in public procurement. The preparatory works, which are very important for the interpretation of Swedish legislation, do not pay much attention to the issue, apart from repeating some phrases from the Commission's Communication of 2001. In fact, the Swedish legislator does not even utilise the scope expressly provided for in the Directives. As a consequence, contracting authorities that want to use their purchasing power to promote social policy objectives are not given any guidance on how, let alone any incitement, to do so. In addition, the Public Procurement Act makes most of the provisions of the Directives applicable even to procurements that are not, or only partly, governed by the Directives.

The proper application of the Act is monitored by the Swedish Competition Authority, which explicitly has disfavoured obligations or even recommendations to include social criteria as being too burdensome – for the contracting authorities in the first place, not so much for the contractors.<sup>27</sup> Also, it is symptomatic that when the Competition Authority has published opinions on the use of labour clauses in procurement contracts, it focuses on what is prohibited and has obvious difficulties in explaining (correctly) what is allowed. Judicial review takes place in the administrative courts. There are examples where these courts have excluded the application of the rules on protection of workers in the event of transfers of undertakings<sup>28</sup> in procurement cases, basing their conclusions exclusively on procurement law arguments and without trying one single argument that is relevant for deciding whether a transfer has taken place or not.

In *Germany*, it has been a widespread practice among authorities since the 1970s to integrate social considerations in their procurement. At that time, tenderers who could show that they had taken positive action to promote equal opportunities for men and women or who were open to employ apprentices were often given preference before other tenderers. Also, it was usual practice to require that tenderers sign a 'loyalty

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<sup>25</sup> *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (Publications Office of the European Union 2010).

<sup>26</sup> The examples are taken from a comparative research project published in Ahlberg and Bruun (above n 5).

<sup>27</sup> *Utvärdering av antidiskrimineringsförordningen* (Konkurrensverkets rapportserie 2009:2) 79; *Miljöhänsyn och sociala hänsyn i offentlig upphandling* (Konkurrensverket 2011) 10.

<sup>28</sup> See Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses [2001] OJ L 82/16.

declaration’ in which they undertook to pay their employees the collectively agreed rate for the area. These practices were based on circulars, ordinances or regulations at *Land* level, or simply on custom. As time went by, they were called into question by national authorities, such as the *Bundeskartellamt* (the Competition Authority), as being contrary to EU law, as well as to national law.<sup>29</sup> Thus, the tension between authorities responsible for competition issues and authorities that have a broader mission is not unfamiliar in Germany. However, the current German legislation approaches public procurement from the broader perspective.

Procurement over the Directives’ thresholds is governed by Part 4 of the federal Act against Restraints of Competition, *GWB*.<sup>30</sup> Already in its initial s 97 on General Principles it underlines that contract performance conditions can be applied that concern, in particular, ‘social, environmental and innovative considerations’. In the preparatory works, the Government specifies that undertakings that do not respect, inter alia, generally binding collective agreements, the equal pay principle or the principles and rights enshrined in ILO core Conventions are to be excluded from competing for public contracts. Procurements under the thresholds are regulated by legislation at *Land* level. The *GWB* authorizes the *Länder* to adopt more far-reaching requirements, a possibility that several of them have utilised, for example for adopting so-called *Tariftreuegesetze*; in other words, the kind of legislation that has become famous through the *Rüffert* case.

*Denmark* very much took the same position as Sweden during the negotiations over the Directives in the Council. However, unlike the Swedish Government, Denmark’s Government continued to pursue the same policy at national level after the Directives had been adopted. This is not immediately obvious from the legislation. First, Denmark has made the Directives as such binding through a decree, which applies exclusively on procurements fully governed by these. Second, it has adopted separate legislation for procurements that are not – or only partly – covered by the Directives. The text of this Act, too, is neutral on the issue of social considerations. Instead, this policy is manifested in circulars, guides and legislation in other areas. In line with ILO Convention No 94, a circular from the Ministry of Finance obliges all central state authorities to include labour clauses in their contracts and recommends local authorities to do likewise. Another circular gives detailed information on how state authorities can, and should, ensure that the interests of its employees are guaranteed when it is considering outsourcing part of its activities. The Work Environment Act obliges both private and public clients to take account of possible health and safety consequences when drawing up invitations for tenders and so on. Last but not least, the Danish

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<sup>29</sup> In 2006 the Constitutional Court finally ruled that the *Tariftreueklausel* in Land Berlin’s Public Procurement Act was compatible with the Constitution, as well as with other parts of German law, BVerfG, 11 BvL 4/00 vom 11.7.2006.

<sup>30</sup> Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints on Competition), BGBl (Bundesgesetzblatt – Federal Gazette) I 1998, 2546.

Competition and Consumer Authority has issued a guide with positive examples on how to act in order to integrate social considerations in procurement within the limits set by law. It underlines that the scope is much wider in procurements that do not come under the Directives. It is an encouraging and independent piece of work, which even questions the European Commission's interpretation of the CJEU's case-law.

#### 4.3 *Cases brought before the CJEU refer the issue back to the EU level*

As stated above, as point of departure EU law is neutral to the issue of social considerations in public procurement as long as the general principles of transparency, non-discrimination and equal treatment are respected. However, when cases that have a bearing on labour rights are brought before the CJEU, the Court seems to attach very little importance to the characteristics of national systems for industrial relations, even when different economic actors are treated equally, as in *Rüffert*. In Germany, collective agreements on wages are concluded at regional, that is, *Land* level, and the wages agreed can differ considerably between these, especially after German re-unification in 1989. There are also a few examples of collective agreements that cover the entire Federal Republic and that have been declared generally binding between employers and employees who are not bound by a collective agreement at *Land* level. *Rüffert* concerned the conditions used in public contracts for building services in Niedersachsen, which obliged contractors to pay their employees at least the remuneration prescribed by the collective agreement at the place where the services were performed; in other words, the regional collective agreement. This applied equally to all contractors. Nevertheless, this was an infringement of EU law, the Court concluded. The regional collective agreement was not declared generally binding, and because Germany has such a system it is reduced to using it when posted workers are involved. The Court's strong emphasis on internal market values and formal equal treatment between the Member States when interpreting the Posted Workers Directive seems to undermine the principle of neutrality of the Procurement Directives that the EU legislator chose as a compromise solution.

In Case C-271/08 *Commission v. Germany*, national industrial relations traditions had to submit to EU public procurement law, even though the question was in fact not about spending public money, but workers' own wages. The background to the action was the right according to German law of an employee to demand from the employer that part of his or her earnings be paid into an occupational old-age pension scheme (conversion of earnings). Under a collective agreement for local authority employees, the administration of the conversion of earnings had to be entrusted to certain types of insurance institution defined in the agreement. As a consequence, local authorities and local authority undertakings entered into service contracts in respect of occupational old-age pensions directly with such institutions, without a call for tenders at European Union level. Thus the point at issue in the case was whether a public employer can negotiate a collective agreement in which it agrees with the trade unions on entrusting the administration of the employees' old age pension to a specific insurance institution, without applying the rules on public procurement.

One of the arguments put forward by the German Government in defence of the collective agreement was that mandatory application of public procurement law would be contrary to the autonomy of management and labour protected in the German *Grundgesetz*. However, the Court concluded that Germany had failed to fulfil its obligations by not ensuring that the pension services at issue were contracted in accordance with the procurement directives. It recognized that the right to bargain collectively and to conclude collective agreements is afforded special protection, but asserted that the exercise of these rights must be reconciled with the requirements stemming from the freedoms protected by the TFEU.<sup>31</sup> It added that, unlike the objective of enhancing the level of pensions, the designation of bodies and undertakings that provide pensions does not affect ‘the essence of the right to bargain collectively’. Having said that, it gave its view on how the social objectives pursued by the parties to the collective agreement could be reconciled with the requirements of the procurement Directives.

Seen from a procurement law perspective, the Court actually developed in a positive way what scope the Directives might leave for taking social considerations into account. For example, it stated that it is possible to let workers or their representatives participate in the contracting entity’s decision-making on which insurer that is to be awarded the contract.<sup>32</sup> This had not been self-evident for ‘hard core’ procurement lawyers. From a labour law perspective, on the other hand, the ruling intrudes on the autonomy of the social partners in an unprecedented manner and makes public procurement a part of collective bargaining in the public sector.

As mentioned above under 3.4, the CJEU further developed its view on the scope for integrating social considerations in public procurement in its 2012 decision in Case C-368/10 *Commission v the Netherlands*.

The case concerned a tendering procedure in which the province of Noord Holland wanted to procure supply and management of coffee machines. The contract notice was drawn up in a way that gave the impression that the coffee and tea for the machines would have to bear two specific labels, EKO and Max Havelaar, a Dutch fair trade label that certifies that the product was purchased at a fair price under fair conditions from organizations of small-scale producers in developing countries. In addition, the province preferred that the other ingredients too – for example sugar and milk – bore the same labels. Thus, tenderers that offered such ingredients would be given extra points when the authority came to identify the most economically advantageous tender. In other words, the fact that the products had an EKO and/or a Max Havelaar label was an award criterion.

The Court found that the province had done most things wrong and that the Netherlands had failed to fulfil its obligations under Directive 2004/18/EC. It did not rule out the

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<sup>31</sup> Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47.

<sup>32</sup> Para 55.

possibility of procuring authorities' giving preference to organic products or products of fair trade origin, but Noord Holland had not done it in the right manner. Instead of requiring that the products bore the labels, Noord Holland should have listed the criteria underlying them, and allowed other means of proof that the products satisfied those criteria. Thus, its mistakes were primarily of a technical nature.

So far, the judgment is far from surprising. The more interesting part is a passage in which the Court rejects the Commission's first argument against using the two labels as an award criterion. According to the Commission, such an award criterion is not linked to the subject matter of the contract – as required by Article 53(1)(a) of the Directive – as the criteria underlying them do not concern the products themselves, but the general policy of the tenderers, especially in the case of the Max Havelaar label.

The Court did not agree. It starts by noting that Article 53 on award criteria is further elucidated by Recital 46 in the preamble, which indicates that a contracting authority may use criteria aimed at meeting social requirements in response in particular to the needs of disadvantaged groups to which those receiving or using the works, supplies or services belong. It concludes:

‘It must therefore be accepted that contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, *but also other persons*’ (para 85; emphasis added).

The Court continues by assessing whether there was a sufficient link between the contested award criterion and the subject matter of the contract. It notes, first, that it concerned environmental and social characteristics falling within the scope of Article 53 and, second, that it covered only the ingredients to be supplied within the framework of the contract, without any bearing on the general purchasing policy of the tenderers. Finally, the Court concludes that

‘... there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof ... Therefore there is nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin’ (para 91).

Thus, in sum, the Court held that the award criterion at issue was in fact linked to the subject matter of the contract.

In order to fully understand the significance of these statements one should know that the question of whether criteria aimed at meeting social requirements can be used as award criteria caused the most protracted controversy during the negotiations over the Directives.<sup>33</sup> The Commission would accept this only if the requirements concerned the

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<sup>33</sup> K Ahlberg and N Bruun (above n 5) 38 *et seq.*

needs of those who would use or receive the works, supplies or services. Now the Court has ruled that also considerations of a social nature concerning *other* persons can be included among the award criteria. Another controversy concerned the question of how closely the award criteria must be related to the object of the contract. Through the years, the Commission has advocated the most restrictive interpretation possible. After the Court's judgment in Case C-513/99 *Concordia Bus*, which came while the negotiations over the 2004 Directives were in progress, it had to yield a little. With Case C-368/10 *Commission v the Netherlands* the Court has again ruled that this link does not have to be as strict as advocated by the Commission. As we see it, the Court's clarification opens up new promising perspectives for integrating social criteria in public procurement, including those that concern labour rights. Why, for example, could not these 'other persons' be those who perform the work under the contract?

#### 4.4 Member States adapt to the Court's judgments

Before its decisions in *Rüffert* and Case C-271/08 *Commission v. Germany*, the CJEU had often demonstrated a comparably permissive approach to including other than purely economic aspects in public procurement. Unlike the Commission, in Case C-225/98 *Commission v. France* the Court accepted that the tenderers' ability to contribute to a local project to combat unemployment could be used as an additional award criterion. In Case C-513/99 *Concordia Bus* it approved of an award criterion connected with protection of the environment, and concluded that it did not violate the principle of equal treatment solely because it could be met only by very few undertakings (among which were the contracting entity's own transport company). But with *Rüffert* and Case C-271/08 *Commission v Germany*, which deal more specifically with labour rights, it took a way which serves to reinforce restrictive practices at national level. However, if one looks at what has in fact happened, the picture is ambiguous.

The greatest consequences at national level so far have followed from *Laval* and *Rüffert*, although neither of them dealt with the interpretation of EU law on public procurement.

In this context, an interesting development has taken place in Germany. On one hand, *Länder* that had laws similar to Niedersachsen's legislation on public procurement (which was at issue in *Rüffert*) could not continue to apply them. On the other hand, this seems to have occasioned a new resolution among the legislators to prevent public procurement from being an arena for social dumping – as far as possible with regard to EU law. As one author puts it: 'A few years after the preliminary ruling, Germany has overcome the "Rüffert shock"'.<sup>34</sup> At the time of the CJEU's decision, nine German states had so-called *Tarifreuegesetze*. In November 2013, thirteen states had adopted

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<sup>34</sup> T Schulten, 'Renaissance of Pay Clauses in German Public Procurement and the Future of the ILO Convention 94' (Global Labour Column 2012), <http://column.global-labour-university.org/2012/01/renaissance-of-pay-clauses-in-german.html> (accessed 2 April 2014).

new such laws.<sup>35</sup> In other words, at present more states have *Tarifreuegesetze* than before *Rüffert*. Of course, for procurements where the German Posting of Workers Act<sup>36</sup> is applicable, the contractors' obligations are limited to guaranteeing their employees the conditions in collective agreements declared generally binding and/or the minimum wages specific to certain sectors that have been introduced under the federal Act on minimum conditions of employment (*Mindestarbeitsbedingungengesetz*).<sup>37</sup> However, this does not apply to contracts for services in the public transport sector, where *Rüffert* is deemed not to be relevant. Here, most of the new laws require that the contractors apply the full terms and conditions of the most representative collective agreement in place where the service is provided. A third novelty is that eleven states have introduced procurement-specific minimum wages that must be applied in procurements that do not belong to either of the two earlier categories. By January 2014, the sums vary between 8.50 euros and 9.18 euros per hour. The latter figure is valid for Schleswig-Holstein, where the law states that the procurement-specific minimum wage should relate (*orientiert sich*) to the lowest pay grade in the collective agreement for public employees in the Länder.<sup>38</sup>

Even though Germany has not ratified ILO Convention No 94 on labour clauses in public contracts, the legislation ruled incompatible with EU law in *Rüffert* was built on the same principle as the Convention. Thus, what conclusions did those Member States that have ratified it draw?

At the 97<sup>th</sup> session of the International Labour Conference in May 2008, the Danish Government representative, who spoke on behalf of Norway as well, gave a fervent speech in defence of the Convention (which both countries have ratified) and underlined that it is useful especially when foreign service providers win a tender and perform a contract with posted workers.

What was less well-known was that the Internal Market Affairs Directorate of the EFTA Surveillance Authority, ESA, had sent a letter to the Norwegian Government already two weeks after the preliminary ruling in *Rüffert*, asking it to clarify the content and scope of application of Norway's rules on pay and working conditions in public contracts, in light of the Court's judgment. ESA was not satisfied with the Government's response, and in July 2009 it sent a letter of formal notice to Norway for

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<sup>35</sup> *Tarifreue-Regelungen in Deutschland*. Stand: November 2013; Quelle: WSI Tarifarchiv 2013 (Hans Böckler Stiftung 2013), [http://www.boeckler.de/pdf/wsi\\_ta\\_tarifreue\\_uebersicht.pdf](http://www.boeckler.de/pdf/wsi_ta_tarifreue_uebersicht.pdf) (accessed 2 April 2014)

<sup>36</sup> Arbeitnehmer-Entsendegesetz (AEntG) 1996, BGBl I 1996, 227. Cf M Schlachter, 'The Posting of Workers Directive – German Reactions and Perceptions' in S Evju (ed), *Cross-Border Services, Posting of Workers, and Multilevel Governance* (Department of Private Law, University of Oslo, Skriftserie 193, 2013) 137.

<sup>37</sup> Gesetz über die Festsetzung von Mindestarbeitsbedingungen (Mindestarbeitsbedingungengesetz – MiArbG) 1952, Zuletzt geändert durch Art. 1 G v. 22.4.2009, BGBl I 2009, 818.

<sup>38</sup> Cf *Tarifreue-Regelungen* (above n 35).

failure to ensure compliance with Article 36 EEA and the Posting of Workers Directive.<sup>39</sup> The problem, as ESA saw it, was that these rules oblige contractors and subcontractors to give their employees pay and other working conditions at least as favourable as those provided for by ‘the applicable nationwide collective agreement or what is otherwise normal for the relevant place and profession’, that is, all conditions in the collective agreement in question, irrespective of whether it had been declared generally applicable or not. The Norwegian Government replied that the CJEU had not had the opportunity to examine the obligations that the ILO Convention imposes on ratifying Member States, and insisted that its rules were consistent with EEA law.<sup>40</sup> On 29 June 2011 ESA submitted a reasoned opinion. Later the same year the Norwegian Government amended the regulation in order to meet some, but not all, of ESA’s concerns.<sup>41</sup> The Minister of Labour announced that she was prepared to let the EFTA Court decide the case rather than reverse the Government’s policy solely based on ESA’s opinion.<sup>42</sup> However, it never went that far. In December 2012 ESA closed the case.<sup>43</sup> It concluded that, even though the contested regulation had been amended, it still included a reference to collective agreements which had not been declared universally applicable. As a result, in some sectors, the Norwegian authorities could still impose working conditions on workers posted from abroad which were not the same as those applicable to other workers employed in the same sector in Norway, ESA noted. Nevertheless, because the rules had been amended and the number of universally applicable agreements had increased, ‘the scope of the infringement has significantly been reduced’, for which reason the Authority considered it appropriate not to proceed further with the case. At the same time it warned the Government that the decision was without prejudice to any future decision to open a new case on this or a related issue. In sum, ESA’s decision clearly stands out as a political compromise.<sup>44</sup>

Unlike Norway, *Denmark* has not yet seen any reason to reconsider its rules implementing ILO Convention No 94, and procuring authorities are supposed to apply them in the same manner as before. A standard wording used in invitations to tender require the contractors to guarantee their employees ‘pay (including special benefits), working time

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<sup>39</sup> Letter of formal notice to Norway for failure to ensure compliance with Article 36 EEA and Directive 96/71/EC, 15 July 2009, Case No: 64849.

<sup>40</sup> K Alsos, ‘Pay clauses in public contracts challenged by ESA’ (EIRO 2012), [www.eurofound.europa.eu/eiro/2012/01/articles/no1201029i.htm](http://www.eurofound.europa.eu/eiro/2012/01/articles/no1201029i.htm) (accessed 2 April 2014).

<sup>41</sup> S Evju, ‘Norge backar om arbeidsklausuler men ESA anser inte att det räcker’ (2011) *EU & arbetsrätt* 4, 4.

<sup>42</sup> K Alsos (above n 40).

<sup>43</sup> EFTA Surveillance Authority Decision of 19 December 2012 closing an own-initiative case against Norway concerning labour clauses in public procurement, Case No: 64849, Event No: 653338, Dec. No: 510/12/COL.

<sup>44</sup> S Evju, ‘ESA ger sig om arbeidsklausuler vid offentlig upphandling’ (2013) *EU & arbetsrätt* 1, 3. See for a critical comment on the ESA’s decision K Weltzien, ‘Feil i faktum og feil i jus – ESA om lønns- og arbeidsvilkår’ (2012) *Arbeidsrett* 174.

and other working conditions not less favourable than those laid down in a collective agreement, arbitration award, national legislation or administrative regulation which applies to work of the same kind in the profession or industry concerned in the area where the work is performed'.<sup>45</sup> In November 2011, the Danish Government and the Opposition agreed that the use of labour clauses in public contracts should be promoted even further. Thus, early in 2012 a commission was set up to map how they are used at present and to analyse the legal preconditions for increasing their use and enforcing them effectively. The commission's report was submitted in October the same year.<sup>46</sup> It presented several proposals for how the use of labour clauses could be further increased, either by widening the scope of the mandatory rules, or by encouraging procuring entities to use labour clauses more often on a voluntary basis. Early in 2014, the Government is still considering the alternatives.

*Sweden* has not pledged itself to give effect to ILO Convention No 94. Nevertheless, it has been common practice among Swedish authorities to stipulate that contractors pay wages in accordance with current collective agreements, guided, for example, by a circular from the Swedish Association of Local Authorities and Regions. Immediately after the judgments in *Laval* and *Rüffert*, the Swedish Competition Authority started to question this practice, and without positive guidance on what they could do without infringing EU law, many procuring entities felt that they had to abstain from contract conditions saying anything at all about the terms and conditions of employment during the performance of the contract. The Competition Authority added to the confusion by publishing a decision that could easily be misinterpreted.<sup>47</sup> A public debate followed in summer 2010 after which the Authority elucidated its position and made clear that, in its view, foreign service providers can be required to apply collective agreement conditions meeting the requirements of the revised Posting of Workers Act ('*Lex Laval*').<sup>48</sup> Unfortunately, in a guide on socially responsible procurement published in 2011, the Competition Authority again dropped a brick. It drew far-reaching and partly misleading conclusions from *Rüffert* (which concerned posted workers) for purely national procurements and, as usual, it was angled from the perspective of what is forbidden, not what is permitted. Thus, it was likely to cause new confusion and to reinforce the 'precautionary principle'.

The effects of the decision in Case C-271/08 *Commission v. Germany* are as yet only to be imagined. The judgment has the potential to intrude directly on the construction of

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<sup>45</sup> K Ahlberg and N Bruun (above n 5), 76.

<sup>46</sup> Rapport fra Udvalget om modvirkning af social dumping, 27 October 2012; <http://bm.dk/-da/Aktuelt/Publikationer/Arkiv/2012/Rapport%20fra%20Udvalget%20om%20modvirkning%20af%20social%20dumping.aspx> (accessed 2 April 2014).

<sup>47</sup> Konkurrensverkets beslut 2010-04-15.

<sup>48</sup> C-M Jonsson, D Holke, I Hamskär, 'Konkurrensverket vilseleder om EU-rätten', *Dagens Industri*, 15 June 2010; D Sjöblom and C Frenander, 'Rätt att ställa krav i upphandling', *Dagens Industri* 22 June 2010.

collective agreements on pensions and other insurances in several Member States. At the same time, even if the parties to these agreements have entrusted the administration of the insurances to a given insurer without a call for tenders at European Union level, the constructions differ in their details, and it is not given that all of them are hit by the CJEU decision. Also, it is not clear what measures must be taken with agreements that are in fact affected.

However, in the Commission's view, they must be immediately renegotiated. In March 2011 it sent a letter to the German Government and gave it two months to say what measures it had taken to comply with the Court's decision. According to the Commission, all framework contracts between local authorities and pension service providers concerned by the judgment had to be terminated in order to eradicate the infringement identified in the Court ruling, and the provisions of the Collective Agreement must be brought into line with EU law.<sup>49</sup> Negotiations in order to amend the collective agreement were obviously going on between the German trade unions and the employers' organization in May 2011. According to a press release from the trade union confederation DBB Tarifunion, the parties agreed that, immediately, only contracts whose value exceeds the Directive's threshold should be subject to Europe-wide calls for tenders, while all other contracts remain unaffected.<sup>50</sup> They continued to negotiate over what terms of insurance prospective tenderers would have to offer to be able to participate in the tendering procedure.<sup>51</sup> However, in August, the employers' organization *Vereinigung der kommunalen Arbeitgeberverbände* (VKA) informed its members that after three negotiation rounds, the efforts to reach an agreement 'in due time' (*zeitgerecht*) were fruitless. 'In order to avert damage to the Federal Republic of Germany', VKA unilaterally decided to adopt a binding guideline for the employers' application of the Collective Agreement, saying that the contested clause should not be applied in cases where, according to EU law, a formal procurement procedure must be carried out.<sup>52</sup> Thus, the Commission's warning had been effective.

The Governments of *Sweden* and *Denmark*, which intervened in support of Germany in the case before the Court, have kept a low profile. They have analysed the possibly relevant collective agreements together with the social partners in order to identify similarities and – even more – differences compared with the German collective

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<sup>49</sup> Press release IP/11/287 Public procurement: 'Commission seeks Germany's compliance with Court judgment on pension schemes for local authority employees', Brussels 14 March 2011.

<sup>50</sup> The contract value is calculated on the basis of the number of employees of each local authority/undertaking.

<sup>51</sup> 'Tarifverhandlungen zur Änderung des TV-Entgeltumwandlung VKA ohne Ergebnis', (press release DBB Tarifunion 11 May 2011); 'Tarifverhandlungen zur Änderung des TV-EUmw/VKA am 27. Mai 2011 fortgesetzt' (Rundschreiben 13/2011, 31 May 2011).

<sup>52</sup> VKA Nachrichten August 2011.

agreement, and seem to have decided not to do anything unless the Commission starts asking questions.<sup>53</sup>

## 5 New EU Directives elucidate the scope for social considerations

On 11 February 2014, the Council finally endorsed the European Parliament's decision on the three new EU Directives mentioned in Section 2, above.<sup>54</sup> One of the objects of the revision is 'to enable procurers to make better use of public procurement in support of common societal goals'.<sup>55</sup> In this context we can only shortly assess to what extent this aim is realised. What is immediately clear is, for example, that labour rights are *more visible* in the new texts. While the Directives of 2004 rest on an *implied* assumption that all contractors should comply with applicable labour law, several of the provisions of the new Directives explicitly underline this.

Article 18(2) of the new Directive 2014/24/EU, on 'Principles of procurement', states:

'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'<sup>56</sup>

What is not evident from this text, but repeatedly pointed out in the Recitals, is that procuring entities are (not very surprising) still supposed to abide by the restrictions stemming from *Laval* and *Rüffert*.<sup>57</sup> Thus, this Article does not expand the scope for applying labour rights, but the EU legislator has moved from the neutral to acknowledging that there is a need to take special measures to ensure that labour rights are respected in the performance of public contracts. In addition, Member states will

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<sup>53</sup> J Kristiansen and M Edling, 'Avvaktande reaktioner på tyska pensionsdomen: Stora skillnader mot danska och svenska system' (2012) *EU & arbetsrätt* 3, 4.

<sup>54</sup> Cf above at n 11 and 12.

<sup>55</sup> Cf Recital 2 of Directive 2014/24/EU.

<sup>56</sup> International labour law provisions listed in Annex X are the eight ILO core Conventions. Convention No 94 concerning Labour Clauses in Public Contracts is *not* among them.

<sup>57</sup> 'The relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council ...' (from Recital 37); 'award criteria or contract performance conditions ... should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union ... Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive' (from Recital 98).

even be obliged – under EU law – to do so. This is further emphasized in the provisions on exclusion grounds, abnormally low tenders and subcontracting.

Also, as a matter of course, the CJEU's case-law in the Dutch 'Fairtrade coffee case' referred under 4.3 above<sup>58</sup> is incorporated in the provisions on award criteria and on conditions for performance of contracts. Thus the new Directives elucidate and confirm that the scope for different policy options is wider than often argued both by the European Commission and at national level.

## 6 Conclusions

The focus of this chapter is the relationship between the legal regime for public procurement in the EU, on one hand, and social policy and labour rights in the EU/EEA Member States, on the other. We have found that there is a tension within this relationship, because measures aimed at furthering labour rights may be regarded as obstacles to the implementation of an efficient and transparent public procurement process.

We have shown that the development of the EU public procurement regime, especially at the beginning of the millennium, when the 2004 Directives were negotiated, was marked by an attempt by the European lawmakers to take a neutral position towards this tension, within the broad margin of appreciation set up by the fundamental principles of EU law, such as non-discrimination and equal treatment, openness and transparency. Because it was understood and agreed that this tension should be dealt with at national level, they also confirmed that national legislators and public authorities might develop different approaches.

Our main findings are that this neutrality approach has not been fully upheld within the complicated multi-level framework of public procurement. Although the picture is far from clear-cut the interaction between different levels and actors has in some instances had the effect of undermining national labour rights, boomeranging into well-functioning industrial relations systems. This outcome is primarily a spill over effect of other policies and institutional settings and it can also come about as an unintended side-effect.

Another problem is that the effects for labour rights of the public procurement regimes seem very difficult to foresee within this multi-level framework. Quite naturally this uncertainty, too, together with the factors described above under 4.2, serves to contribute to procuring entities' recourse to a precautionary principle. It might even be used by actors who, from a policy point of view, think that 'procurement-alien factors' should be left out of procurement, and who can dress up their opinion on what is

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<sup>58</sup> Case C 368/10 *Commission v the Netherlands*.

advisable in legal arguments. On the other hand, we also find several examples of national countermeasures both in law and practice against the undermining of social policy by public procurement. In the end, the local level at which public procurement takes place is crucial for how practice evolves.

However, the judgment in Case C-368/10 *Commission v the Netherlands* and the new Directives confirm that it requires a high level of professionalism by those who are to realise these policy options, as the system is so complicated and highly specialised. They need in-depth knowledge of the different mechanisms that can be used. Thus, instead of scaring contracting authorities away from making use of this scope, national legislators and authorities that oversee application of the procurement legislation should provide positive guidance on how to do it in the right manner. The new Directives provide a better basis for this, but the outcome still depends on the political choices that Member States make when they transpose them. Only few of the ‘social’ provisions of the Directives are mandatory. In this respect, the neutrality approach is upheld.

The multilevel governance structure provides opportunities for those who want to promote socially responsible public procurement. Such activities have to start locally in order to develop best practices, which can then be enforced nationally in administrative and legal practice and finally in the CJEU.



# Equal Treatment for Transnational Temporary Agency Workers?

*Monika Schlachter*

## 1 Introduction

Among the various facets of transnational provision of services, cross-border temporary agency work represents an ever increasing share of intra-EU labour mobility.<sup>1</sup> The need to protect employees from particularly low working conditions while working abroad furthers regulatory efforts at EU level. Expectations grew when regulation of other forms of atypical work, such as fixed-term or part-time contracts, was implemented as stated in the Social Action Programme of 1990/91.<sup>2</sup> In the case of temporary agency work, however, social partners' negotiation efforts failed spectacularly in 2001. One of the major points of disagreement between negotiators was the applicability – or lack thereof – of an equal treatment principle benefitting agency workers. Such a principle develops the option of excluding contracts concluded with a view of substantially lowering wages and other working conditions for agency workers replacing regular employees. While such a regulation would help to increase worker protection, especially in cases of cross-border work under the labour law regime of a low wage country, the competitive advantage of service providers would be diminished. Even though terms and conditions of employment for posted workers (including posted agency workers) in general had already been regulated by the Posting of Workers Directive,<sup>3</sup> applying 'equal treatment' has the potential to achieve far higher standards. To finally establish this principle not only took several rounds of political discussions but also compromises on substantial elements of the principle itself, finally resulting in the adoption in 2008 of the Temporary Agency Work Directive.<sup>4</sup>

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<sup>1</sup> For empirical aspects see Houwerzijl, Chapter 3, this volume; Dølvik, Eldring and Visser, Chapter 4, this volume.

<sup>2</sup> See K Ahlberg, 'A Story of Failure – But also of Success' in Kerstin Ahlberg *et al*, *Transnational Labour Regulation – A case study of temporary agency work* (Peter Lang 2008) 191.

<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. For details see Evju and Novitz, Chapter 2, this volume.

<sup>4</sup> 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 (TAWD).

## 2 Temporary agency work

Temporary agency work is a form of employment involving the supply of workers by intermediaries (temporary work agency) for assignment in other undertakings (user undertaking) where they work temporarily under the user undertaking's direction and supervision. Once such work is performed cross-border, it represents transnational temporary agency work. The most common form of transnational temporary agency work involves agencies sending workers they employed at their place of establishment abroad to work at a user undertaking in a foreign country.

The notion of 'temporary agency worker' according to Article 3(1)(c) TAWD includes workers whose contractual duties are not restricted to exclusive assignment to a user undertaking but also allow for working at the agency between assignments. Generally, a temporary agency work contract can be fixed term or of indefinite duration. The permissible duration of the worker's assignment to the user undertaking, however, remains an open question: for all contractual relationships coming under the scope of the Directive it is decisive, however, that the assignment as such has to be temporary in nature to be in compliance with Article 1(1). The notion of agency work being 'temporary in nature' has been interpreted by some<sup>5</sup> as limiting the Directive's material scope of application. If the temporary agency work Directive dealt only with assignments of a temporary nature all agency workers assigned on indefinite or consecutive contracts would be left unprotected by EU law. Such a consequence is not in keeping with the spirit of Art. 5 § 5 of the Directive, obliging Member States to 'prevent successive assignments designed to circumvent the provisions of the Directive'. This obligation clearly indicates that agency workers on consecutive assignment need special protection, not less protection than other employees. The Directive therefore is to be understood as regulating all forms of temporary agency work but allowing for assignments of specific duration only.<sup>6</sup>

This limitation of agency work goes back to the CJEU's *Jouini* ruling<sup>7</sup>: in essence, for reasons of worker protection agencies should provide temporary replacements but not replace the regular workforce. An additional argument flows from the Directive's goal to further the 'stepping stone effect' of temporary agency work: agency workers, according to Article 6(3) TAWD, should have the chance to be recruited by the user undertaking after carrying out an assignment there, which would almost disappear if an assignment could be kept in place for indefinite duration.

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<sup>5</sup> B Boemke, 'Die EG-Richtlinie und ihre Einflüsse auf das deutsche Recht' (2009) *Recht der internationalen Wirtschaft* 177, 179.

<sup>6</sup> G Kiss and Z Bankó, 'Die Arbeitnehmerüberlassung im ungarischen Arbeitsrecht und die Richtlinie über Leiharbeit' (2010) *Europäische Zeitschrift für Arbeitsrecht* 208, 214; P Sansone, *Die Gleichstellung von Leiharbeitnehmern nach deutschem und Unionsrecht* (Nomos 2011) 459, 461.

<sup>7</sup> Case C-458/05 *Jouini* [2007] ECR I-7301, paras 35 and 37.

When representing a precondition for establishing agency work, the temporary nature of assignments needs a more precise definition. The directive itself does not provide for such precision. The meaning of ‘temporary’ nevertheless needs to be in accordance with other EU instruments dealing with forms of atypical work. Of relevance for determining the permissible duration of assignments might be the conditions set for renewing fixed term contracts: The duration of assignment of an agency worker is ‘temporary’ for the length of time the user undertaking may have offered to contract with the worker had he been employed by this undertaking directly on a fixed-term basis. The CJEU’s decision in the pending case *Shell Aviation Finland* will probably shed more light into this difficulty.<sup>8</sup>

### 3 The Temporary Agency Work Directive

Of crucial importance for finally agreeing to a political compromise in preparation of the Directive was the consent of the European social partners in the temporary agency work sector, Eurociett and Uni-Europa, laid down in their May 2008 joint declaration. Thereby the social partners agreed as a general objective to the principle of equal treatment which will include all agency workers from their first day of assignment onwards. One aspect that persuaded the business side to concede such standards may have been the necessity for the agency business to attract more, and in some countries even better qualified, workers for their business model to thrive. In that case, working conditions must become more attractive, increasing social acceptance of the temporary agency work sector. Nevertheless, this political compromise accepts that Member States will allow collective agreements to derogate from this general principle or create exceptions themselves (Article 5 TAWD).

The final version of the Directive pursues the aim of reconciling worker protection with employer flexibility. Difficult as this reconciliation may seem, the Directive obliges not only implementation of the equal pay/equal treatment principle but additionally expressly states (Article 4(1)) that any political measure discriminating against the temporary agency work industry should be prevented. Member States are therefore obliged to regularly review and finally abolish any restriction to or prohibition of temporary agency work, with the notable exception of requirements of registration, licensing, certification or monitoring (Article 4(4)). On the other hand, the CJEU had already set a liberalizing agenda for licensing requirements by controlling them against the freedom to provide services.<sup>9</sup> The flexibility approach therefore is likely to be applied thoroughly, whereas the equal treatment obligation can be pre-empted, according to the generous

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<sup>8</sup> Case C-533/13 *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v. Öllytuote ry, Shell Aviation Finland Oy*, pending as per 10 June 2014.

<sup>9</sup> Case C-397/10 *Commission v Belgium* [2011] ECR I-95 (Summary publication).

exception clauses Member States are allowed to introduce. As the Directive's two main objectives are not easily reconcilable, they give rise to much debate.

Some additional measures to prevent abusive contractual design of temporary agency work are included in Article 5(5), which explicitly obliges Member States to take appropriate measures for the prevention of successive assignments that could be misused for circumventing the equal treatment principle. Regulations intended to restrict the renewal of assignments therefore are deemed to be compatible with the Agency Directive without much specific justification. Astonishingly, one example for a ground of general interest to prohibit the use of temporary agency work is not mentioned explicitly, namely the protection of workers on strike, which is mentioned only in Recital No 20 of the Directive. This Recital states that Member States 'may' prohibit the replacement of workers on strike by agency workers, thereby leaving it to the states' assessment whether or not to allow temporary agency work to replace strikers.

#### **4 Transnational TAW, Free Movement of Workers and Provision of Services**

Cross-border provision of services, the economic freedom for service providers to offer their services also in a Member State they are not established in, includes the posting of workers from the country of establishment to the country where the service is offered;<sup>10</sup> this situation is governed by the Posting of Workers Directive.<sup>11</sup> Posted workers are sent abroad by their employers to work temporarily in the country of destination. This may include not only the regular workforce of a service provider but also the workforce of a temporary work agency established for the purpose of hiring out workers to undertakings cross-border. The business contract between agency and user undertaking in principle – without any additional choice of law clause – will be governed by the law of the Member State where the agency is established, Article 4(1)(c) Rome I Regulation.<sup>12</sup> The contract of employment in principle will be governed by the same legal regime as long as the posting does not change the place where the work is habitually carried out, Article 8 § 2 Rome I Regulation. For workers temporarily performing work in another country, the place where they habitually work will not change, so that the law of the home state applies. The applicable legal regime can nevertheless be partially replaced by overriding mandatory provisions of the host state, Article 9 Rome I Regulation, which cannot be derogated from. Those would include the equal pay/equal treatment principle laid down not only in national laws for furthering an active labour market policy, but also prescribed by the EU Agency Work Directive. If, however, such an

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<sup>10</sup> Case C-279/80 *Webb* [1981] ECR I-3305, para 9; Case C-298/09 *RANI Slovakia* [2010] ECR I-81 (Summary publication), para 36.

<sup>11</sup> For details, see Evju and Novitz, Chapter 2, this volume; see also below at 4.2.

<sup>12</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

agency is providing workers for cross-border services only, so that no substantial activity (other than administration) takes place in the country where the agency is established, the applicable law will become the law of the host country.<sup>13</sup> This country is the one where the employee is obliged to work ‘habitually’, so that the contract is in principle governed by its legal order, Art. 8 (2) Rome I Convention.

#### 4.1 *Provision of Services and Free Movement of Workers*

The EU Services Directive<sup>14</sup> excluded generally all issues relating to labour force movements from its scope of application,<sup>15</sup> so that neither posting of workers nor transnational temporary agency work are regulated by this Directive. More specifically, Article 2 § 2(e) Services Directive explicitly excludes temporary work agencies and the service they provide from the Directive’s scope. Whether such workers instead may rely on the *free movement of workers provisions* depends on their relevant contractual situation: once persons leave their home country and move cross-border for the purpose of taking a job<sup>16</sup> abroad, this arrangement represents the classic case of free movement that is not regulated by the Posting of Workers Directive, as no employer is responsible for sending this worker abroad. The contract concluded in the country of destination is immediately subject to that country’s domestic legislation. The foreign worker will be entitled to the same working conditions as domestic workers, including the equal pay/equal treatment principle if the employer is a temporary work agency. If the contract of employment the migrant worker concludes in the host country is a purely ‘domestic’ contract, different rules concerning the applicable law do not apply. This in principle holds true also for cases in which the workers have been called upon – either by a temporary work agency or by a user undertaking co-operating with this agency – to move to the country of destination for contracting with the agency. These workers are treated as if they decided independently to move to the country of destination for the purpose of seeking a job there.

#### 4.2 *Posting of Workers*

The alternative regulatory framework that could be relevant for transnational temporary agency work is the Posting of Workers Directive<sup>17</sup> which, in the understanding of the CJEU, in principle is concerned with the free provision of services instead of protection

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<sup>13</sup> F Bayreuther, ‘Vollständige Arbeitnehmerfreizügigkeit zu Gunsten der MOE-Staaten’ (2011) *Der Betrieb* 706, 708.

<sup>14</sup> Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2008] OJ L 376/36 (SD).

<sup>15</sup> B Bercusson and N Bruun, ‘Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire’ in Ahlberg *et al* (above n 2) 263, 269ff, 314.

<sup>16</sup> Case C-279/80 *Webb* para 9; Joined cases C-307/09 to C-309/09 *Vicoplus* [2011] ECR I-453, para 27.

<sup>17</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 (PWD).

of workers, as it is not a labour law Directive.<sup>18</sup> As a consequence, the application of the country of destination's domestic labour market standards also to posted workers is not justified simply 'because' this serves the goal of worker protection; instead such protective standards have to comply with a strict proportionality test ensuring that they do not go beyond what is necessary for reaching the minimum standards that the Directive allows to apply.<sup>19</sup> Neither domestic legislation nor collective agreements in the country of destination may oblige foreign employers posting their workers there to provide for better working conditions than those minimum standards.<sup>20</sup>

The Posting of Workers Directive, which is dealt with in more detail elsewhere in this book,<sup>21</sup> in principle applies when workers already employed in their home country are temporarily sent abroad for the purpose of fulfilling their employer's contractual duties from a business contract. Also transnational posting by a temporary work agency constitutes the provision of services and not normally – at least in the understanding of the CJEU – an act of free movement of workers. The argument for reaching this conclusion regularly refers to posted workers not becoming part of the country of destination's labour market. At least for temporary agency workers, this reasoning was never really adequate. Also the CJEU nowadays acknowledges that posted agency workers 'gain access by means of making labour available'.<sup>22</sup> The consequences thereof in labour law, especially in terms of applicability of the law of the host country, need to be further developed.

Article 3(1)(d) PWD includes the conditions applicable to temporary agency work in the scope of those minimum standards the host country is entitled to impose on foreign service providers. The labour law contract between an agency and its posted workers will therefore be governed by the home country's regulations, except for conditions for hiring out workers and other minimum standards applied in the host country. Member States *may* provide that agencies must guarantee workers the (identical) terms and conditions of employment applicable to domestic agency workers, Article 3(9) PWD. This would then – as a condition applicable to agency work, Article 3(1)(d) PWD – also be applicable to foreign service providers sending workers to carry out work in that country. In practice, such a decision would have the effect of putting posted agency workers on an equal footing with domestic agency workers instead of guaranteeing them only

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<sup>18</sup> L Zappalà, 'Legislative and Judicial Approaches to Temporary Agency Work in EU Law – An Historical Overview' in Ahlberg *et al* (above n 2) 155, 166.

<sup>19</sup> S Evju, 'Implementing EU Law on Services: National Diversity and the Human Rights Dilemma' (2011) 5 *Arbeidsrett og arbeidsliv* 287, 290.

<sup>20</sup> In the view of the Commission (COM(2003) 458 final), communication from the Commission to the Committee of the Regions on the implementation of Directive 96/71/EC in the Member States: 'Member States are not free to impose all their mandatory labour law provisions on service providers established in another Member State.'

<sup>21</sup> Cf Evju and Novitz, Chapter 2, this volume; Houwerzijl, Chapter 3, this volume.

<sup>22</sup> Joined cases C-307/09 to C-309/09 *Vicoplus*, para 35.

the minimum standards that other posted (but non-agency) workers are entitled to according to Article 3(1) PWD. For an internal market it would be logical that the rules for posted agency workers do not differ in content depending on the category of either national or transnational posting. By following this line of reasoning, terms and conditions of work for posted agency workers could be harmonized at national level when transposing the Temporary Agency Work Directive by including also the conditions for the posting of agency workers.

#### 4.3 *Temporary agency work*

The Temporary Agency Work Directive can change perspectives for transnational temporary agency work significantly. Under this Directive, Member States in principle are no longer merely allowed to provide agency workers some form of equal treatment, but are obliged to do it: the principle of equal treatment and equal pay between agency workers and the user undertakings' regular workforce from the first day of assignment onwards finally emerged as a minimum requirement of the Directive. Under this legal regime, a considerably higher standard of important working conditions for transnational agency work could emerge than in posting situations. 'Basic employment and working conditions' as defining the scope of the equal treatment principle according to Article 3(1)(f) TAWD consist of working time, overtime, breaks, rest periods, night work, holidays and public holidays, and pay. In the Directive, the notion of 'basic working conditions' is exemplified but not finally listed and refers back to domestic legislation, regulations, collective agreements and so on. Among those relevant regulatory instruments only one type is missing: the individual contract of employment; the Directive explicitly refers to 'binding general provisions' to arrange for an abstract standard of equality that can be applied without demanding an individual comparator.

Member States are explicitly permitted to differ in what to include in the notion of 'pay': should this include all contractual entitlements, or exclude all extras not directly linked to the work undertaken, such as allowances or benefits if they are intended to further a long-term contractual relationship? A certain margin of discretion is explicitly foreseen for the most relevant of such occupational benefits: Article 5(4)(2) states that Member States may exclude from the application of the equal treatment principle all occupational social security schemes such as pensions, sick pay or financial participation schemes.

The general scope of the equal treatment principle nevertheless does not represent a non-discrimination clause: contrary to the generous provisions contained in Article 4 § 1 of the Fixed-term Work Directive 1999/70/EC,<sup>23</sup> the Agency Work Directive in principle allows for different working conditions for workers regularly employed by the user undertakings and staff provided by the agency. The Agency Work Directive does not guarantee workers the right not to be treated less favourably at the user undertaking

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<sup>23</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L 175/43.

‘because’ they are employed by the agency. The fact that the contractual employer remains the agency, not the user giving directions, determines the terms and conditions of employment even though the work is not normally carried out for the employer but for the user. With this standard the Directive moves away from the approach that was followed by the CJEU when establishing the relevant comparator in equal pay anti-discrimination cases: there, the equality principle could only be successfully invoked if there was a single source responsible for the wage disparity that could correct underpayment of one of the groups.<sup>24</sup> By way of the equal pay/equal treatment standard the Temporary Agency Work Directive restrains from formulating substantive minimum provisions, which the EU is not competent to provide for (Article 153(5) TFEU<sup>25</sup>), but sets a standard for measuring the level of protection<sup>26</sup> by comparison that national legislation or custom is competent to concretize.

#### 4.4 *Impact of the Directive on transnational agency work*

The impact that the Temporary Agency Work Directive will have depends on the transnational aspect of the relevant contract between worker and agency: if the employment contract was agreed upon before the worker moved to the country in which his work has to be carried out, this amounts to a typical posting situation. Essentially, such workers are subject only to the core labour standards of the country of destination as outlined in Article 3(1) PWD, providing only a minimum standard.<sup>27</sup> Apart from that, in principle the country of origin’s law will apply. The host country’s implementation of the Temporary Agency Work Directive will apply as one of those core standards; in all situations in which the Agency Work Directive has not been fully transposed into domestic law, it can be understood as a public policy provision of all EU Member States to guarantee that the basic employment conditions are applicable to transnational temporary agency work, too. If the employment contract between agency and worker was established only after the worker moved to the country of destination, this amounts to a typical instance of (temporary) migration for work, legally regulated by the equality principle of the free movement provisions. The workers are then subject to the same legal rules and the same conditions of employment as any domestic worker employed by the same agency. The Agency Work Directive adds to the standards the dimension of entitling temporary agency workers – nationals and foreigners alike – to the basic conditions of employment provided for workers at the user undertaking.

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<sup>24</sup> Case C-256/01 *Allonby* [2004] ECR I-873.

<sup>25</sup> Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47.

<sup>26</sup> Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, para 41; Case C-268/06 *Impact* [2008] ECR I-2483, para 124.

<sup>27</sup> *Evju* (above n 19) 294.

## 5 The Equal Pay/Equal Treatment Principle and Exceptions thereof

Providing several working conditions applicable to workers of the user undertaking also to agency workers avoids the necessity of defining the relevant comparator. Instead, the comparison remains hypothetical<sup>28</sup> as agency workers are entitled to such working conditions including pay as they would have received had they been recruited to the same job directly by the user. Working conditions therefore depend on the level of basic conditions that the user undertaking would normally agree on in contracts of employment, whether defined through statutory law, practice or policy or due to a collective agreement applicable to the undertaking. If there is another employee doing broadly the same work in the same undertaking, the comparison with this person's contractual terms would be the easiest proxy for what the agency worker would have received if he were employed by the user undertaking. But if there is no suitable comparator at the relevant organization and time, it will suffice to use the categories defined by an applicable collective agreement or by a pay scale regularly applied throughout this undertaking.

### 5.1 *Influence of collective agreements in general*

The potential influence of collective agreements on the terms of agency workers' employment contracts will depend on various external factors: agreements declared universally applicable, if provided for under the relevant legal system, will regulate conditions of employment in a certain sector. If the sector concerns the business activities of the user undertaking, due to the equal treatment principle this would also be applicable to agency workers temporarily working in that sector. Alternatively, the collective agreement may have been agreed upon for the temporary agency work sector, covering the agency as employer. The precondition for that would be the acknowledgement of temporary agency work as a specific business sector of its own, even though the relevant working activities change according to their respective business partners' branches. Where there are specific collective agreements for temporary agency work, the level of entitlements in these agreements presumably are lower than those applicable to the user undertakings' business sector.

According to the Temporary Agency Work Directive's equal pay/equal treatment principle, agency workers would see their relevant 'basic' employment conditions change according to their respective assignments. During the period of assignment, in principle only the basic conditions of a collective agreement applicable to that user undertaking seem to apply as minimum standards. Temporary agency work sector-specific agreements governing the employment contract of an agency worker would be relevant only concerning terms that are not 'basic' within the meaning of the Agency Work Directive. The main contractual duties, working time and wages, on the other hand, would not be covered by a temporary agency work collective agreement, unless they happen to be set at higher standards than those relevant for the user undertaking. Only where employ-

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<sup>28</sup> N Countouris and R Horton, 'The Temporary Agency Work Directive: Another Broken Promise?' (2009) 38 *Industrial Law Journal* 329, 333.

ment contracts with the agency do not cease to exist in synchronization with the business contract would temporary agency work sector-specific collective agreements govern the situation between two periods of assignment. This does not seem to amount to much regulatory influence on the part of those collective agreements. In practice, temporary agency work sector-specific collective agreements, quite to the contrary, gain huge relevance through their power to derogate from the Directive's standards.

### 5.2 *Power to derogate from equality principles*

The Directive vests Member States and social partners with a lot of influence over contract conditions for agency workers: Article 5(3) includes the possibility that social partners may derogate from the equal pay/equal treatment principle by self-regulation. This derogation power includes also the scope of the 'basic' working conditions. Where Member States are able to derogate from the general principle, they remain obliged to previously consult with social partners, Article 5(2) and (4). Article 5(2) allows for an exemption to the equal pay principle after consulting social partners. Article 5(4) allows Member States to derogate from both principles by statutory provisions once collective agreements cannot cover all similar undertakings in a distinct sector or geographical area. For technical reasons, in such legal systems the necessary general coverage has to be provided by law, even though social partners must be given decisive influence either through prior consultation or by making existing collective agreements the basis for any relevant derogatory provision. All solutions provided relay heavily on decisions made at national level: the interaction between European and national regulations are crucial for the level of protection guaranteed.

#### 5.2.1 Specific derogation for open-ended employment contracts, Article 5(2)

An explicit exception to the equal pay – not the equal treatment – principle is included in Article 5(2) TAWD, allowing for a lower level of remuneration where agency workers conclude a contract of employment of indefinite duration with the agency and continue to be paid between assignments. This option is modelled on the solution earlier used in Germany and meanwhile applied in Sweden.<sup>29</sup> It provides better protection to agency workers, who do not bear the risk of unemployment if there is no immediate consecutive assignment available after the previous one ends. For this additional protection workers can be exempted from the equal pay principle (Recital 15) so that their wage level may remain independent from any user undertaking's standards throughout the employment relationship with the agency. As there is no user undertaking in the period between assignments, there also would be no comparator whose wages could be mirrored by the contractual entitlements of the agency worker. Thus for the period between assignments an autonomous wage level needs to be set by individual or collective contracts, anyway. As the agency actually may have no use for the workers' services until they can be hired out again, also the wages during this period might be lower than

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<sup>29</sup> K Ahlberg and N Bruun, 'Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System' in K Ahlberg *et al* (above n 2) 37, 48.

entitlements during assignments. From this perspective, the overall level of protection is not diminished by providing for a generally lower standard of pay during assignments if this remuneration is then guaranteed also for the periods in which the employees cannot be assigned elsewhere.

However, such an exemption clause has the potential for abuse. Even an open-ended contract of employment does not guarantee continuation of the contractual relationship as it can be easily terminated for economic reasons immediately after the worker's assignment ends. Alternatively, agency and worker can agree to dissolve the contract at the end of the assignment, which is reported to be widespread in Austria.<sup>30</sup> The worker's consent to such an agreement is achieved either by the promise to re-hire or by signing such an agreement preceding the contract of employment itself. A comparable effect is obtained if employees are contractually obliged to accept unpaid extra-leave whenever they cannot be assigned to a user. In such situations the very reason for permitting derogation from the equal pay principle – the protection of a decent level of income also in periods when the agency worker cannot be hired out – is not guaranteed. If such constructions of employment contracts for agency workers are not ruled out,<sup>31</sup> the respective Member State will have to safeguard the necessary level of protection by other means. For compliance with Article 5(2) states would then become obliged to take appropriate measures to prevent misuse of this legal option, for example, by introducing a certain period of time during which the workers will have to receive remuneration even if they are put on extra-leave or the agency can dismiss them for economic reasons.

### 5.2.2 Collective agreements providing for general derogation, Article 5(3)

Vesting the derogative power directly with the social partners without special government intervention, Article 5(3), allows for the establishment of arrangements concerning the contractual conditions for agency workers 'which may differ from' the basic working conditions. This broad margin of discretion for collective agreements is subject only to the 'conditions laid down by the Member States' and the precondition that they 'respect the general protection of' agency workers. Collective agreements are therefore free to provide better standards for agency work than for regular contracts of employment, adding a sort of 'premium' for the precariousness of such a contract. On the other hand, they are equally able to level down the standards for basic conditions considerably. One of the objectives of this broad discretion is to protect the autonomy of the

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<sup>30</sup> R Schindler, 'Die neue Leiharbeitsrichtlinie – der Umsetzungsbedarf in Österreich' (2009) *Recht der Arbeit* 176.

<sup>31</sup> In the United Kingdom, Reg. 10(1)(d) Agency Work Regulation states that the agency is precluded from terminating the contract until it has complied with its obligation to pay during breaks between assignments for at least four weeks in aggregate.

social partners now guaranteed under Article 28 of the EU Charter of Fundamental Rights,<sup>32</sup> so that courts should not review the adequacy of a collective agreement.

This argument remains valid only for substantive regulations agreed upon by the social partners themselves. The power of derogating from equality standards is therefore not simply transferrable to other actors; a collective agreement cannot restrict its content to stating that any derogation from equal treatment in individual contracts shall be permitted. Also the practice common in Germany of allowing derogation in individual contracts by referring to collective agreements the workers are not otherwise bound by seems equally questionable. In this case, too, the derogation from the equal treatment principle is effectively set by the employer's superior bargaining power instead of the more balanced collective bargaining process.

Article 5(3) is intended to allow Member States with a tradition of regulating working conditions through collective agreements – as customarily applied by Nordic countries<sup>33</sup> – to implement the Directive on this basis. In principle, this provides a good opportunity to further collective bargaining and strengthen the influence of social partners. If they can reach high quality standards for agency workers through the means of collective bargaining, they are able to attract new members. Even though also the temporary agency work Directive implies the deregulating flexibility approach customarily applied in earlier instruments concerning atypical work, this strengthening of collective bargaining allows for re-regulation at national level. A necessary precondition for achieving a high standard of protection is the relative strength of the unions who apply this flexibility instrument. If the organization rate among workers, especially in the temporary agency work sector, is strong enough to vest unions with sufficient bargaining power, transposing the Directive through collective agreements will guarantee for an adequate standard of protection.<sup>34</sup> If the same model is applied by a Member State where such a precondition is not met, the outcome will be insufficient.

The German temporary agency work sector provides a specific example: in earlier years only a few agency workers ever became union members, so that traditionally there were no collective agreements specifically covering the temporary agency work branch. This approach changed dramatically when the relevant statute on Temporary Agency Work in 2002 introduced the option<sup>35</sup> of bargaining away the equal pay principle in collective agreements. Immediately after this legislative decision, new unions (so called 'Christian

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<sup>32</sup> Charter of Fundamental Rights of the European Union (Consolidated version) [2012] OJ C 326/391.

<sup>33</sup> Ahlberg and Bruun (above n 29) 52; Ahlberg (above n 2) 253.

<sup>34</sup> Ahlberg and Bruun (above n 29) 48.

<sup>35</sup> B Waas 'Temporary Agency Work in Germany: Reflections on Recent Developments' (2003) *International Journal of Comparative Labour Law and Industrial Relations* 387, 395, 401.

unions'<sup>36</sup>) were formed for contracting low wages and working conditions in the temporary agency work sector.<sup>37</sup> As they also had very low membership rates, they had no incentives to refrain from concessional bargaining in order to earn approval from members. The relevant Statute allowed individual labour contracts to refer to existing collective agreements derogating from the general equal treatment principle for the purpose of applying such agreements' standards also to employment relationships that are not regularly covered.<sup>38</sup> If only one such collective agreement for the temporary agency work sector exists, no matter how few workers had joined or approved such union which agreed to it, the equal pay/ equal treatment principle could be overcome for all workers in the sector.<sup>39</sup> As a consequence, also unions with a more regular approach to the collective bargaining process could not help but concede only slightly better working conditions. As they were equally unable to win many members among agency workers they did not have enough bargaining power to force agencies into concluding agreements with better terms but instead would have ceded the ground to the newcomer unions. For this reason, in a very short time the whole temporary agency work sector was indeed covered by collective agreements; but this does not amount to a high level of worker protection – its primary purpose was to derogate from the equal treatment principle at the expense of agency workers. Compensation was not provided for.

The revised German statute of 2011<sup>40</sup> implementing the Agency Work Directive still upholds this regulatory approach, while introducing a new minimum level of pay for agency work that cannot be undercut by collective agreement. This solution in a way combines the approaches of both the Posting of Workers Directive by setting minimum standards and of the Agency Work Directive by allowing derogation from the general principle of equality. Whether the result will be held to be in keeping with the Directives' standard of adequate protection depends on the interpretation of the notion that derogating collective agreements will have 'to respect the overall protection' of agency workers. Given this precondition, it may be for the social partners to create such overall protection of workers themselves. But if they do not, this obligation falls back on the member States themselves. Does a state meet this requirement by setting one common

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<sup>36</sup> They organise as members of the umbrella organisation 'Christlicher Gewerkschaftsbund' (CGB). One of its member organisations, CGZP, much later became famous following the decision of the Federal Labour Court indicating that CGZP lacks the legal capacity to conclude binding collective agreements: Bundesarbeitsgericht, 14.12.2010 – 1 ABR 19/10; Bundesarbeitsgericht, 23.5.2012 – 1 AZB 58/11.

<sup>37</sup> M Gouenoub, *Equal Pay and Equal Treatment im Leiharbeitsverhältnis* (Shaker 2009) 132ff.

<sup>38</sup> R Waltermann, 'Fehlentwicklungen in der Leiharbeit' (2010) *Neue Zeitschrift für Arbeitsrecht* 482, 483; M Schlachter and M Klauk 'Tarifdispositivität – eine zeitgemäße Regelung?' (2010) *Arbeit und Recht* 354.

<sup>39</sup> Landesarbeitsgericht Hamburg, 24.3.2009 – H 2 Sa 164/08.

<sup>40</sup> Erstes Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes, 28.4.2011, Bundesgesetzblatt (BGBl) I 2011, 642.

minimum standard that cannot be undercut by collective agreements? Or is ‘overall protection’ of workers only provided for if the basic working conditions for the great majority of agency workers remain at an at least comparable level to what the equal treatment principle guarantees?

A Member State invoking Article 5(3) TAWD is not thereby exempt from the obligation to guarantee an adequate level of protection in the temporary agency work sector. Once unions are – for whatever reason – too weak to guarantee adequate protection by collective bargaining it remains the states’ responsibility to comply with the Directive. Even though the autonomy of the social partners must be respected, this does not exclude collective agreements from the scope of the equal treatment principle, now enshrined also in Article 20 EU Charter of Fundamental Rights, when they act under the scope of the Temporary Agency Work Directive. The Directive’s binding objectives have to be met by whatever means a Member State uses for transposing it into domestic law. The equal treatment principle historically counts among the Directive’s main objectives, representing the counterweight to deregulating the temporary agency work sector;<sup>41</sup> to more or less set aside such a goal cannot happen without substantial compensation.<sup>42</sup> Given earlier statements of the CJEU concerning the equal treatment principle it does not seem probably that the Court will favour extensive derogations from this principle which the Court understands as articulating a principle of EU social law which cannot be interpreted restrictively.<sup>43</sup>

As the temporary agency directive does not differentiate between national and transnational agency work, any otherwise applicable collective agreement in the home country derogating from the equal pay/equal treatment principle generally also applies to agency workers temporarily posted to another country. This collective agreement will set conditions related to the labour market conditions in the posted workers home country. Once such an agreement is established for the purpose of derogating from the equal pay principle it is likely to set the remuneration at a lower level than what user undertakings in their home country would habitually pay. As this level is probably much lower than the one user undertakings in the host country pay their regular employees, home state collective agreements might set payments substantially lower for transnational agency workers than what co-workers at the user undertaking in the host country earn. The Posting Directive, however, provides for at least a common minimum standard: once the host country applies statutes or universally applicable collective agreements setting one level of pay for agency work throughout the country, that level must be respected also by foreign agencies posting their workers to that country. This

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<sup>41</sup> R Waltermann, (above n 38) 485.

<sup>42</sup> M Fuchs, ‘Das Gleichbehandlungsgebot in der Leiharbeit nach der neuen Leiharbeitsrichtlinie’ (2009) *Neue Zeitschrift für Arbeitsrecht* 57, 58.

<sup>43</sup> Joined cases C-395/08 and C-396/08 *INPS* [2010] ECR I-5119, para 32.

outcome would become even more obvious once the host country has made its domestic rules on agency work applicable pursuant to Art. 3(9) PWD.

### 5.2.3 Member States providing for general derogation, Article 5(4)

Member States are not free to use any regulatory option they might prefer. Derogating from the equal treatment principle through statutory provisions is permitted only where the respective legal system does not foresee universally applicable collective agreements and no other alternatives exist for covering whole sectors in specific areas. Whenever collective agreements can – legally or actually – cover the field, Member States cannot invoke Article 5(4) for intervening themselves. But where preconditions are met, Member States are competent to not only derogate from the material scope of the equal pay/equal treatment principle but may also introduce an unspecified ‘qualifying period’ until those principles actually apply. In the Directive it is also not determined whether a new qualifying period could be applied for separate assignments with the same undertaking. Once a Member State chooses to introduce that option it must meet the condition that an ‘adequate level of protection’ is still provided, Article 5(4)(2). This option is given to Member States only, social partners acting under Article 5(3) are not competent to do so.

This provision was meant to allow the United Kingdom to implement the Directive on the basis of an agreement between social partners at national level that allowed for a 12-week qualifying period of working ‘in the same role’ before agency workers become entitled to equal treatment.<sup>44</sup> This exemption can be very generous to agencies as there is virtually no time limit applied if the agency worker’s ‘role’ in the user undertaking continues to change.

With this wide margin of discretion the main obstacle to the United Kingdom’s consent to the Temporary Agency Work Directive was overcome by political compromise. Whether it will serve its purpose nevertheless remains an open question, as the safeguarding obligation to provide an ‘adequate level of protection’ intentionally reduces this margin of discretion. Whether this precondition for derogating from the general principle can be met, may to a large part depend on how many agency workers will be excluded and how long the qualifying period tends to become in practice. If the exception affects a considerable percentage of agency workers without compensating for lost equal treatment entitlements, there will be not much protection left that could qualify as amounting to an ‘adequate level’. Additionally, Article 5(5) obliges to implement measures to prevent misuses of all derogations admitted under Articles 5(2) to (4), especially successive assignments that might circumvent the provisions of the Directive.

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<sup>44</sup> For the details cf Adecco Group UK & Ireland, *Equal Treatment for agency workers – a guide to the Agency Workers Regulations* (2010) 7.

## **6 Conclusion**

Transnational temporary agency work represents a combination of a difficult triangular contractual relationship with a difficult practice of differentiating between already employed workers posted abroad and workers who are asked to move abroad before being employed. The respective construction of the contract between agency and worker sets the frame for different protective standards in applying some sort of equality principle. The Temporary Agency Work Directive provides for a new concept that allows agency workers to compare working conditions provided by the agency as their employer with those conditions provided by user undertakings to their regular employees. This approach goes clearly beyond what was hitherto understood as representing a suitable comparator under EU anti-discrimination law. Such a development seems to considerably add to the protection of cross-border work. The exception clauses of the Directive nevertheless allow for several ways to derogate from this general principle, so that Member States in transposing the Directive enjoy a wide margin of discretion concerning how much equality they will give to (foreign) agency workers. But the Directive does not allow simple extension of domestic practices to exclude agency workers in general or at least for a considerable period of time from enjoyment of most of the equality rights without compensation. In order to meet the Directive's objective of limiting the precariousness of temporary agency work and simultaneously establishing a good reputation for agencies as employers, any reasonable exception to the general principle must preserve an adequate level of protection, not merely low-key minimum standards. All in all, the Temporary Agency Work Directive represents potentially one of the more important EU labour regulations of the past decade. It indicates the principal ongoing option for the EU to re-regulate social matters even against fierce opposition. In order to obtain such option, however, it might become necessary to concede to deviations even from the main protective principles.

# The Development of an EU Policy on Workers from Third Countries – Adding New Categories of Workers to the EU Labour Market, Provided with New Combinations of Rights

Petra Herzfeld Olsson\*

## 1 Introduction

Worldwide migration flows have been growing considerably over recent decades.<sup>1</sup> Of the estimated 214 million international migrants in 2010, 90 per cent were migrant workers and their families.<sup>2</sup> Foreign-born workers comprise about 10 per cent of labour forces in western European countries. Migration is to a large extent driven by globalisation and the dynamics of capitalist development. Mobility of capital, goods and services and rapid evolution in technology and the organisation of work require that labour and skills are available where new investments are being made. At the same time, disparities in income, wealth, human rights and security are push factors towards migration.<sup>3</sup>

Promoting a forward-looking and comprehensive labour migration policy that can respond in a flexible way to the priorities and needs of European labour markets has thus been envisaged as a road to increased European competitiveness and economic vitality, as set out in the EU Strategy 2020 and the Stockholm Programme.<sup>4</sup> A new labour market scenario has developed in Europe due, among other things, to demographic trends and skill shortages, notwithstanding the high levels of unemployment.<sup>5</sup>

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<sup>1</sup> COM(2005) 669 Policy Plan on Legal Migration 1 referring to ILO Report 2004, World Bank Report 2005, EU Economy 2005 review.

<sup>2</sup> International Labour Organization, *International labour migration: a rights-based approach* (ILO 2010) 1–2.

<sup>3</sup> ILO 2010 (above n 2) 13, 18 *et seq.*

<sup>4</sup> COM(2010) 2020 final, Europe 2020 A strategy for smart, sustainable and inclusive growth, 18; The Stockholm programme, adopted by the European Council of 10 and 11 December 2009. See also COM(2010) 378 final, Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, 2.

<sup>5</sup> G Menz and A Caviedes, 'Introduction' in G Menz and A Caviedes (eds), *Labour Migration in Europe* (Palgrave Macmillan 2010) 1, 2.

Since 1999 the EU has been taken steps to harmonise the *conditions for admission* by third country nationals to the EU labour market and the *rights guaranteed while here*.<sup>6</sup>

As we shall see, it has been difficult to gain the necessary consensus on this issue. The Member States are reluctant to adhere to harmonised rules in this area. Even though it is clear that many Member States need workers from third countries, they are not ready to abandon their right to control the inflow of people into their countries,<sup>7</sup> particularly with regard to workers whose contributions to the welfare systems are insecure.<sup>8</sup> Some governments have general problems in gaining public support for labour migration due to high structural unemployment, hostile public opinion and social and political problems emanating from past migration waves accompanied by modestly successful attempts at their integration.<sup>9</sup> On the other hand, international economic forces push states towards greater openness.<sup>10</sup> BUSINESSEUROPE has, for example, been one of the warmest supporters of EU activity in this area, promoting demand driven and flexible procedures.<sup>11</sup>

The Member States' fear of burdensome commitments in relation to workers from third countries is not unproblematic. It risks generating an EU system that dehumanises workers from third countries, a system more directed towards economic units than human beings.<sup>12</sup> This strategy can lead to a situation in which the more a migrant can contribute economically to the host state, the more rights he or she will be guaranteed. Such a point of departure evidently reflects many national legal frameworks on labour migration. Taking this formula to the EU level will, however, expand the scope for regime shopping and counteract a coherent EU labour market. A common EU policy in this field providing for a high level of protection can, on the other hand, be an important

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<sup>6</sup> For an overview of the activities up to that date see B Ryan, 'The European Union and Labour Migration: Regulating Admission or Treatment' in A Baldaccini, E Guild and H Toner (eds) *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 500.

<sup>7</sup> S Carrera and M Formisano, *An EU Approach to Labour Migration What is the Added Value and the Way Ahead* CEPS Working Document No 232/October 2005 2-3; K Tamas, 'A European migration policy based on partnerships' in JO Karlsson and L Pelling (eds) *Moving beyond demographics – Perspectives for a Common European Migration Policy* (Global utmaning 2011) 34.

<sup>8</sup> H Kolb, 'Emigration, Immigration, and the Quality of Membership: On the political Economy of Highly Skilled Immigration Politics' in Menz and Caviedes (eds) 83.

<sup>9</sup> Menz and Caviedes (above n 5) 18.

<sup>10</sup> Kolb (above n 8) 78.

<sup>11</sup> See, for example, BusinessEurope; Position paper on an agenda for new skills and jobs, 16 February 2011 17; Position paper on the ICT proposal, 23 November, 2010; Position paper on seasonal work, 13 October 2010; Go for Growth, February 2010; Position paper on the highly skilled and the single permit, 31 January 2008.

<sup>12</sup> S Carrera, *Building a Common Policy on Labour Migration Towards a Comprehensive and Global Approach in the EU?* CEPS Working Document No. 256/February 2007, 2.

vehicle in combating a race to the bottom. But providing different rights and statuses to different kinds of third country workers will further complicate the already complex EU labour market scene. In other parts of this book it has been illustrated how different categories of EU workers are provided with different sets of rights when moving across borders, depending on their categorisation. These provisions deviate from the general EU rules on free movement of workers, which provide foreign workers with the same set of rights as nationals.<sup>13</sup> By setting EU standards below the level of equal treatment to new categories of workers further regime shopping and strategic recruitment in order to lower employment costs will probably be encouraged. These provisions will of course also interrelate with and affect intra-EU movements. Their framing will play a role when job vacancies are filled and services bought.

A struggle between different stakeholders has been taking place at EU level. The promoters of a stronger non-discriminatory based approach seem in the end to have achieved quite a lot. The fall-backs are however not without importance. This chapter will focus on labour migrants from third countries and EU legislation regulating their entrance to EU labour markets and their rights when working there.<sup>14</sup> This overview is intended to contribute to the overall picture of the challenges facing the EU and national labour market systems.

This chapter is structured in the following way. In Section 2 a starting point for the analysis is presented. In Section 3 the political turnabout and the first legal attempt to regulate is discussed. In Section 4 a presentation and comparison of four directives on labour migrants from third countries, the Framework Directive and the Directives on Highly Qualified Employment, on Seasonal Employment and on Intra-corporate Transfers is found.<sup>15</sup> Next a short description of the GATS commitments on Mode 4, move-

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<sup>13</sup> Article 45 TFEU; Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

<sup>14</sup> It is however also worth mentioning that other rules of course can have significance for the willingness to come and work in the EU. Hatzopoulos has for example pointed to the importance of the Services Directive (2008/123/EC) in this regard and the Directive on professional qualifications (2005/36/EC), V Hatzopoulos, 'Labour Immigration in the EU Trough the Back Door? The Free Provision of Services as a Facilitator of Migration Flows' in G Menz and A Caviedes (eds) *Labour Migration in Europe* (Palgrave Macmillan, 2010) 160 ff.

<sup>15</sup> Directive (2011/98/EU) of the European Parliament and of the Council on 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State [2011] OJ L 343/1; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; Directive (2014/36/EU) of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375; Directive 2014/66/EU of the European parliament

ment of persons, is included in order to better be able to evaluate the Directive on Intra-Corporate Transfers (above n 15). The chapter ends with a few concluding remarks.

## 2 Starting points for analysis

Demographic change and skill shortages have been the main driving forces behind the development of an EU policy on workers from third countries. It is challenging to argue for a common legal framework for attracting third country nationals to the EU while unemployment in the Member States is extremely high and the integration of the already present immigrants from third countries has been far from successful in many places. Giving away control of who to let into the nation state is, however, not tempting to any state at any time. The WTO Members' commitments in Mode 4 of the GATS are the only binding international obligation in place to limit sovereignty over the admission of foreigners.<sup>16</sup> On a regional basis, the Schengen commitments are far-reaching but not free from attack.<sup>17</sup>

The issue of how to cope with demographic change and skill shortages is also complex and much debated. The role of third country nationals is part of this debate. Anderson and Ruhs remind us of the fundamental economic starting point: when considering staff shortages it is necessary to recognise that employer demand and labour supply are inter-related and mutually conditioning. They argue that many employers could, in principle, pursue a number of responses to staff shortages, including raising wages and improving employment conditions and investing more in training local workers. But as long as migrant workers are available, the incentives for taking these steps are not particularly strong.<sup>18</sup> The activities of the state also play a crucial role in this discussion.<sup>19</sup> The identification of shortcomings, therefore, must be based on a complex analysis.<sup>20</sup>

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and of the Council on the conditions of entry and residence of third-country nationals in the framework of intra-corporate transfers [2014] OJ L 157/1.

<sup>16</sup> M Panizzon, Trade and Labour Migration – GATS Mode 4 and Migration Agreements, *Dialogue on Globalisation* No 47/January 2010, 10.

<sup>17</sup> 3172nd Council Meeting 7 and 8 June 2012 Decision on temporary reintroduction of border control at internal border in exceptional circumstances, Press release on the following web page [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/130761.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130761.pdf).

<sup>18</sup> M Ruhs and B Anderson, 'Migrant Workers: Who needs them? A framework for the Analyses of Staff Shortages, Immigration and Public Policy' in B Anderson and M Ruhs (eds) *Who needs migrant Workers: Labour Shortages, immigration, and public policy* (Oxford University Press 2011) 25.

<sup>19</sup> *ibid.*, 25–27.

<sup>20</sup> M Ruhs, 'Who needs migrant workers? The potential role of an independent expert commission in future labour immigration policy', in Karlsson and Pelling (eds) (above n 7) 61.

Demographic change is perhaps less complex to establish. According to Eurostat the 'the share of population of working age ... in the total population is expected to decrease strongly from 67.2% in 2004 to 56.7% in 20150, a fall of 52 million ...'.<sup>21</sup> Migration from third countries can be one of many ways to sustain welfare systems and safeguard economic development.<sup>22</sup>

On a global scale, the driving forces behind labour migration are, as indicated in the introduction, much more complex than the driving forces behind the new EU strategy. Migration also plays a role in development and elsewhere it is discussed how labour migration can contribute to such development. Those conclusions are not always compatible with intentions to safeguard the EU national workforce and avoid unfair competition. Demands for equal treatment in relation to nationals with regard to pay and working conditions has been viewed as protectionist and motivated 'to curb adjustment costs of globalisation to the domestic work force'.<sup>23</sup>

In parallel with the emerging EU legal framework on workers from third countries is an existing regime on movement of workers from third countries connected to the freedom to provide services within the WTO/GATS. The commitments made by the former EC and its Member States within the GATS are very limited and the Doha negotiations do not seem to alter that fact.<sup>24</sup> The emerging legal EU framework on economic migration is, however, drafted so as to be fully compatible with these limited commitments and to further facilitate the trade in services.<sup>25</sup>

In this chapter, I will analyse parts of the emerging EU legal framework on workers from third countries from an equal rights perspective. Guaranteeing third country nationals robust equal treatment with nationals with regard to working conditions and pay will be a crucial condition for avoiding social dumping, exploitation and other reasons for regime shopping within the EU. This condition was the starting point established by the Council and the Commission when initiating the regulatory work and also the starting point envisaged by such global actors as the ILO.<sup>26</sup> Many national legal

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<sup>21</sup> COM(2005) 669 final, Communication from the Commission – Policy Plan on Legal Migration, 4.

<sup>22</sup> J Ekberg, *Kan invandrare bidra till att förverkliga målen i Lissabonstrategin? Europaperspektiv* (Santéris 2006).

<sup>23</sup> Panizzon (above n 16) 18.

<sup>24</sup> JA Marchetti and M Roy, 'PTAs in Opening Markets for Services' in JA Marchetti and M Roy (eds) *Services Liberalization in the WTO* (Cambridge University Press 2008) 69.

<sup>25</sup> COM(2001) 386 final, Proposal for a council directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities [2001] OJ C 332E/248, Explanatory memorandum 3; COM(2010) 378 final, Preamble recital 10.

<sup>26</sup> Presidency Conclusions, Tampere European Council, 15–16 October 1999, Bulletin EU, 18; COM(2000) 757 final, Communication from the Commission to the Council and the European Parliament on a Community immigration policy, 15; International Labour Office,

frameworks provide third country nationals with fairly weak protection. The EU provisions are supposed to make the rights gap between intra- and extra-EU workers more narrow, thereby minimizing the risk for regime shopping. This is even more important because the ambition is to attract a large number of workers from third countries. These workers are not supposed to replace EU workers but to fill shortages – that is, to do work that the EU workers cannot or are not willing to do. It is, however, unavoidable that the provisions regulating the entry and stay of third country national workers will affect EU workers and their potential attractiveness on the EU labour market. This effect will, however, be less if these groups are provided with similar sets of rights and accordingly similar labour costs for the employer. The closer their respective statuses are the more likely it will be that a worker will be chosen because of her or his particular qualifications.

Being guaranteed formal equality with nationals with regard to working conditions and pay is a necessary first step for a rights-based approach. Real equality is, however, dependant on a number of other conditions. Being a migrant worker with no permanent status or citizenship in the country where the work is performed implies an inherent vulnerability. As expressed in an ILO report: ‘The more tenuous the worker’s migration status, the more barriers there are to seeking redress for unfavourable treatment.’<sup>27</sup> Anderson, Fudge and Vosko have considered different aspects relevant to the status and level of precariousness of the migrant worker.<sup>28</sup> Their research gives us tools to analyse the EU legal framework on workers from third countries. My analysis draws heavily on the work done by Fudge. This chapter addresses the overall question: is a robust rights-based legal framework taking form that includes the necessary components to avoid social dumping and exploitation in order not to broaden the basis for further regime shopping?

In order to conduct this analysis, we will look into three sets of conditions organised under the following headings laid down by Judy Fudge: *Admission conditions*, *Employment relations*, and *Institutional security*.<sup>29</sup> These sets of rights are interrelated and can strengthen or weaken each other. Under the heading *Admission conditions* the following questions are considered: Is the permit connected to a certain employer, sector or branch? For how long a period can a permit be issued? Is it possible to keep the permit during a period of unemployment? The more room for manoeuvre included in the

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*Multilateral framework on labour migration: non-binding principles and guidelines for a rights-based approach* (ILO 2005) Guideline 9.3.

<sup>27</sup> ILO 2010 (above n 2) 77.

<sup>28</sup> J Fudge, *The precarious migrant status and precarious employment: the Paradox of International Rights for Migrant Workers*. Centre of Excellence for Research on Immigration and Diversity, Working Paper No. 11–15 2011; LF Vosko, *Managing the Margins* (Oxford University Press 2010); B Anderson, *Migrations, immigration controls and the fashioning of precarious workers* (2010) 24 *Work, Employment and Society* 300.

<sup>29</sup> Fudge (above n 28) 14–15.

permit for the worker, the easier it will be to safeguard his or her employment-related rights. If the worker can leave an abusive employer and search for new employment, there is a greater likelihood that the worker will not accept exploiting conditions below the guaranteed standard. The framing of the admission conditions are based mainly on considerations related to safeguarding the national workforce. Limiting the freedom connected to the work permit could limit the risk that the third country national workers would start competing with a national worker on a particular job. The effect is, however, that the more limited the room for manoeuvre is the more likely it is that the worker cannot oppose exploiting working conditions. The heading *Employment relations* deals with issues such as: Can permanent employment be entered into? What level of employment and working conditions is protected (wages, working time, occupational health and safety, trade union rights)? Trade union rights have a very important role in upholding and safeguarding the other employment-related rights. These rights are fundamental conditions. But others, such as recognition of professional qualifications and rights to education and vocational training, are crucial for safeguarding the migrant worker's access to employment on equal terms with national workers.<sup>30</sup> Access to education and vocational training can help the migrant to improve his or her labour market position.<sup>31</sup> *Institutional security* includes aspects of social citizenship such as social protection, including unemployment benefits, and routes to more secure migrant status and family reunification.

In the following discussion, we will examine what level of protection is provided for in the EU legal framework. We will also focus on the issue of sanctions and monitoring procedures. Safeguarding those aspects effectively is fundamental for making the guaranteed rights real.<sup>32</sup>

The analysis will be limited to the directives adopted thus far relating to workers from third countries and which are based upon the 2005 Policy Plan on Legal Migration adopted by the Commission.<sup>33</sup> The commitments regarding movement of workers in the General Agreement on Trade in Services (GATS) adopted within the World Trade Organisation (WTO) will also be considered. Parts of the legal framework proposed in the 2005 policy plan are meant to facilitate the realisation of the commitments in GATS. It is important to clarify the scope of those commitments in order to evaluate some of the decisions that have been made when proposing a level playing field, in particular through the Directive on Intra-Corporate Transfers.

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<sup>30</sup> ILO 2010 (above n 2) 171; ILO 2005 (above n 26) Guideline 12.6.

<sup>31</sup> ILO 2005 (above n 26) Guideline 14.3.

<sup>32</sup> ILO 2010 (above n 2) 104, 173; COM(2012) 131 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>33</sup> COM(2005) 669 final.

### 3 The first round

#### 3.1 *The political turnabout*

At the Special European Council on Asylum and Immigration in Tampere in 1999, thirty years of zero-vision on labour migration from third countries was abandoned.<sup>34</sup> The European Council acknowledged the need to approximate national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin.<sup>35</sup> The EU should further ensure that these workers are treated fairly and are granted rights and obligations comparable to those of EU citizens.<sup>36</sup> The need for more efficient management of migration flows at every stage was, however, also stressed.<sup>37</sup>

The main reasons given for this turnabout were demographic change and shortages of skilled and unskilled workers.<sup>38</sup> A number of Member States had at that point begun to actively recruit third country nationals. The Commission formulated the challenge in the following way:

‘In this situation a choice must be made between maintaining the view that the Union can continue to resist migratory pressures and accepting that immigration will continue and should be properly regulated, and working together to try to maximize its positive effects on the Union, for the migrants themselves and for the countries of origin.’<sup>39</sup>

Even though the Tampere Conclusions clearly stated the ambition to develop a legislative framework, in the follow up Communication the Commission did not hide the fact that the Member States had strongly divergent views on admission and integration of third country nationals,<sup>40</sup> something it hoped to overcome in an open debate by, in particular, focusing attention on the connection of this issue to the EU economic reforms taking place at that time within the framework of the European Economic Strategy.

The Commission also emphasised that bringing the issue of labour migration into the discussion on the development of economic and social policy for the EU would provide an opportunity to reinforce policies designed to combat irregular work and the economic exploitation of migrants, which were fuelling unfair competition in the Union.<sup>41</sup>

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<sup>34</sup> COM(2000) 757 final, 3.

<sup>35</sup> Presidency Conclusions, Tampere European Council, 15-16 October 1999, *Bulletin EU*, 20.

<sup>36</sup> *ibid.*, 18.

<sup>37</sup> *ibid.*, 22–23.

<sup>38</sup> COM(2000) 757 final, 2, 6, 24 *et seq.*

<sup>39</sup> *ibid.*, 3.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*, 14.

‘A corollary of an economic immigration policy must be a greater effort in ensuring compliance with existing labour legislation by employers for third country nationals. Equality with respect to wages and working conditions is not only in the interest of migrants, but of society itself which then benefits fully from the contribution migrants make to both economic and social life.’<sup>42</sup>

At the time of writing, the EU has proposed substantial parts of a legal action programme on labour migration. Four directives have been adopted. The divergent views of the Member States on this topic have been more or less difficult to overcome. The Commission has tried to capture the need for this endeavour through the concepts of *managed migration* and *equality of treatment*.

Managed migration can be described as an aim to direct the inflow of labour migrants towards areas in which clear shortages have appeared. This management is based on different forms of economic need tests. The starting point is that the national workforce can or will not do the work being considered. The responsibility for establishing these shortages is shared between the state authorities and single employers. The permit must be connected to the expected length of the shortage and expire when there is no more shortage. At that point, the third country worker will lose the right to stay in the Member State.

The concept of managed migration is in itself fairly problematic – it is not possible, as it has been put, to turn migration on and off like a tap.<sup>43</sup> We are dealing with human beings and the concept of managed migration seems old fashioned and belonging to the era before globalisation.<sup>44</sup>

The tension between equal treatment and the management of migration flows has increased during the legislative process, which has resulted in a fragmented legislative framework on workers from third countries.<sup>45</sup>

Before discussing the content of the legal framework, the legal basis for this exercise is considered.

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<sup>42</sup> *ibid.*, 15.

<sup>43</sup> ILO 2010 (above n 2) 144f.

<sup>44</sup> K Newland, The governance of international migration: Mechanisms, processes and institutions. Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005, p 15, in ILO 2010 (above n 2) 144. See also G Menz, *The Political Economy of Managed Migration* (Oxford University Press 2009) 1 *et seq.*

<sup>45</sup> MacDonald and Cholewinski, however, argue that a robust version of the equal treatment principle was never envisaged in the EU context. They believe that this is confirmed by the Tampere conclusions and its qualified rhetoric of equality, E MacDonald and R Cholewinski, ‘The ICRMW and the European Union’ in R Cholewinski, P de Guchteneire, A Pécoud (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (Cambridge UP 2009) 360, 377.

### 3.2 *The legal basis*

The introduction of Title IV to Part III of the EC Treaty, as a result of the Treaty of Amsterdam in 1997, aimed to create of an area of freedom, security and justice and thereby transferred asylum and immigration matters to European Community law. Legal migration was dealt with in Article 63(3) and (4) EC. Until the Lisbon Treaty into force, the Council unanimously acted on a proposal from the Commission (or during the first five years after the entering into force of the Treaty of Amsterdam at the initiative of the Member States) after consulting the European Parliament (Article 67 EC). This competence has now been included in the ordinary legislative procedure; that is, the former co-decision procedure, in which the Council with a qualified majority co-decides with the European Parliament.

The relevant provision in the Treaty on the Functioning of the European Union is Article 79. In Article 79(1) the general context for the EU immigration policy to be developed is set. Its aim is to ensure efficient management of migration flows and fair treatment of third-country nationals residing legally in the member states. In Article 72(2)(a)–(b) the legal bases for adopting provisions on entry and residence, as well as definition of rights is provided for. In Article 79(5) it is underlined that the right of Member States to determine volumes of admission of job seeking third country nationals is not affected by the article.

Article 79 (Article 63 EC for the highly skilled) is the legal basis for the Directives and Directive proposals discussed in this section. Voices have, however, been raised demanding a referral to Article 154 TFEU as well and thus a requirement to include consultations with the social partners.<sup>46</sup> This has not, as yet, led to any results.

### 3.3 *The first attempts to regulate*

In a follow up communication to the Tampere conclusions, the Commission formulated the bases for a legal framework for admission of economic migrants into the EU.<sup>47</sup> The needs of the market place with regard to the kind of workers that should be attracted were the focus of this exercise. The admission policies should enable the EU to *respond*

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<sup>46</sup> Draft Opinion of the Committee on Employment and Social Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (COM(2010)0378)–C7/0179/2010-2010/0209(COD) Rapporteur: Liisa Jaakonsaari, PE464.975v02-00, 30.5.2011; Opinion of the European Economic and Social Committee on the Proposal for a directive of the European parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment COM(2010) 379 final – 2010/0210 (COD) CESE 801/2011 SOC/392 4 May 2013, 3; Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer COM(2010) 378 final – 2010/0209 (COD) CESE 802/2011 SOC/393 4 May 2011, 1.3.

<sup>47</sup> COM(2000) 757 final.

*quickly and efficiently to labour market requirements.* With this perspective in mind a need for *greater mobility between Member States* for incoming migrants because of the complex and rapidly changing nature of labour market requirements was identified. The persons admitted should enjoy broadly *the same rights and responsibilities* as EU nationals but these may be *related to the length of stay* provided for in their entry conditions. One aim should be to provide for a pathway *leading eventually to permanent status* for those who wish to stay and who meet certain criteria<sup>48</sup> (emphasis added).

From the beginning it was clear that the decision on the number of people that would be allowed into any given country should remain a national one:

‘Given the difficulties of assessing economic need it would not be the intention to set detailed European targets. The responsibility for deciding on the need for different categories of migrant labour must remain with the Member States.’<sup>49</sup>

The Commission’s first attempt to propose a Directive regulating the entry and residence conditions for all third-country nationals engaged in paid and self-employed activities was presented in 2001. The proposal included a broad horizontal approach. The starting point was that the same principles should apply to all third country workers permitted entry to an EU country, irrespective of whether they were highly-, medium-, or low skilled, or were intra-corporate transferees or seasonal workers. The distinctions between different types of labour migrants were limited to a minimum. The proposal failed, however, due to the deep criticism it generated from some Member States. In particular, the general/horizontal admission conditions in the proposal were controversial. Many Member States felt uneasy about abandoning their sovereign right to decide who to let into the country.<sup>50</sup> The Commission was unable to convince the Member States that there were sound reasons for overcoming the diversity of their approaches in the interests of achieving an EU standard.<sup>51</sup> The proposal was withdrawn in 2006.<sup>52</sup>

However, the attempt to regulate the conditions for long-term residents, which was negotiated in parallel with the above proposal, was easier, as were the negotiations on

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<sup>48</sup> *ibid.*, 15–18.

<sup>49</sup> *ibid.*, 16.

<sup>50</sup> COM(2001) 386 (withdrawn, see COM(2005) 462 final, Communication from the Commission to the Council and the European Parliament – Outcome of the screening of legislative proposals pending before the Legislator). See also Ryan (above n 6) 15–18; MacDonald and Cholewinski (above n 45) 371; Carrera and Formisano (above n 7) 2–3; Tamas (above n 7); COM(2004) 811 final, Green Paper on an EU approach to managing economic migration, 1.

<sup>51</sup> Ryan (above n 6) 18.

<sup>52</sup> The support for regulating the self-employed has until now not been strong enough to include them in the forthcoming legislative proposals. They will therefore not be considered further in this chapter.

some other proposals. A Directive on long-term residents was adopted in 2003.<sup>53</sup> It includes criteria for obtaining long-term residence status and the rights provided when holding that status. A third country national is entitled to this status after spending five years legally residing in a Member State. The long-term residence directive provides for a comprehensive set of rights and also for an indefinite stay. Equal treatment is, among other things, assured regarding conditions of employment and working conditions, including conditions regarding dismissal and remuneration.<sup>54</sup> The important Directive on the right to family reunification (2003/86/EC) was adopted in the same year, 2003.<sup>55</sup> It includes the right for a residence permit holder to bring parts of their family to the Member State. This right is reserved for a holder of a residence permit issued for a period of validity of one year or more and who has reasonable prospects of obtaining the right to permanent residence. A directive on a specific procedure for admitting third country nationals for the purposes of scientific research was adopted in 2005. It stipulates the conditions of admission of third country researchers to the Member States for the purpose of carrying out a research project under hosting agreements with research organisations approved for that purpose by the Member State.<sup>56</sup> Another Directive on conditions of admission for third country nationals for the purpose of, for example, studies (2004/114/EC) was adopted in 2004.<sup>57</sup>

## 4 The second round

### 4.1 *Introductory observations*

The EU did not give up on the idea of developing common regulations on labour migration. In 2004, the European Council adopted the Hague Programme, in which the Commission was invited to present a policy plan on legal migration, including admission procedures capable of responding promptly to fluctuating demand for migrant labour.<sup>58</sup>

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<sup>53</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third Country Nationals who are Long-Term Residents [2004] OJ L 16/44.

<sup>54</sup> For an analysis of the content of the directive see K Groenendijk, 'The Long-Term Residents Directive, Denizenship and Integration' in A Baldaccini, E Guild and H Toner (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 429.

<sup>55</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

<sup>56</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15.

<sup>57</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2005] OJ L 375/12.

<sup>58</sup> European Council 4-5 November 2004, European Council Conclusions, Annex I, § III I.4.

This time, the Commission wanted to proceed thoroughly. Through a Green paper,<sup>59</sup> an in-depth discussion was initiated of the most appropriate form of Community regulations for admitting economic migrants and on the added value of adopting such a common framework. This discussion resulted in the 2005 policy plan on legal migration.<sup>60</sup>

The consultations revealed a need for common EU rules to regulate the *conditions of admission* for some key categories of economic immigrants, notably highly qualified workers and seasonal workers.<sup>61</sup> However, in the 2005 Policy Plan the Commission still seemed to think that they had support for a horizontal instrument, including a common framework of *rights* for third country nationals in legal employment. Developments showed that that was not the case, however. This horizontal instrument was also to include simplified application procedures for immigrants and employers by means of a single application for a joint work/residence permit.<sup>62</sup>

Altogether, the 2005 Policy Plan on Legal Migration included proposals for five directives:<sup>63</sup>

- a general Framework Directive on a single permit for work and residence and rights for workers;

and four sectoral directives on:

- highly skilled workers;
- seasonal workers;
- intra-corporate transfers (ICTs); and
- remunerated trainees.

In 2007, as planned, two Directive proposals from the plan were presented: the General framework proposal and the Proposal on highly qualified employment. These directives were adopted in December 2011<sup>64</sup> and May 2009<sup>65</sup> respectively (hereafter the Framework Directive and the Directive on Highly Qualified Employment). In 2010, the two sectoral Directive proposals on seasonal workers and on intra-corporate transfers were presented. The Directive on seasonal workers was adopted in February 2014<sup>66</sup> and the

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<sup>59</sup> COM(2004) 811 final.

<sup>60</sup> COM(2005) 669 final, 5.

<sup>61</sup> *ibid.*, 6–8.

<sup>62</sup> *ibid.*, 6.

<sup>63</sup> *ibid.*, 6–8.

<sup>64</sup> Directive (2011/98/EU) of the European Parliament and of the Council on 13 December 2011 on a single application procedure for a single permit for third country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State [2011] OJ L 343/1.

<sup>65</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

<sup>66</sup> Directive 2014/36/EU.

Directive on Intra-Corporate Transfers was adopted in April 2014<sup>67</sup>. A proposal on remunerated trainees is included in the Commission's proposal on a recast Directive on conditions of entry and residence of third-country national researchers and students.<sup>68</sup> The latter proposal will not be dealt with in this chapter. The content of each of the adopted directives will now be analysed and compared. To a certain extent the discussion preceding their adoption is part of the analysis. The comparison will be structured under the headings 'personal scope', 'admission conditions', 'employment relations', 'institutional security' and 'effective enforcement'. But first a few words on the thoughts behind the proposals on the specific sector directives.

#### 4.2 *Incentives for the sector directives*

As envisaged in the 2005 Policy Plan, the Member States supported starting negotiations on admission criteria for a number of sectors. Even though it was clear that only some Member States were likely to attract highly skilled workers,<sup>69</sup> it seems that this group gained the broadest support from most actors.<sup>70</sup> Highly skilled workers are seldom perceived as a threat to the cohesion of national society.<sup>71</sup> The Commission is also of the opinion that the vast majority of Member States need these workers.<sup>72</sup> Attracting highly skilled immigrants is seen as part of the Lisbon Strategy to become 'the most competitive and dynamic knowledge-based economy in the world'.<sup>73</sup> The EU needs highly qualified workers and it is clear that it lacked the ability to attract them in the context of strong international competition. The low attractiveness in comparison to the United States, Canada and Australia was attributed the fact that highly qualified migrants had to face 27 different cumbersome and time consuming admission systems and had restricted possibilities in terms of moving from one country to another for work.<sup>74</sup> It was therefore no accident that the first sector-related directive to be proposed was on

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<sup>67</sup> Directive 2014/66/EU.

<sup>68</sup> COM(2013) 151 final, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing [RECAST].

<sup>69</sup> COM(2005) 669 final, 6.

<sup>70</sup> E Guild, *EU Policy on Labour Migration: A First look at the Commission's Blue Card Initiative*, CEPS Policy Brief, No. 145, November 2007, 1.

<sup>71</sup> L Cerna, *The EU Blue card: A bridge too far?* Paper prepared for the Fifth Pan-European Conference on EU Politics, Porto Portugal (23-26 June 2010) 6.

<sup>72</sup> *ibid.*, 7.

<sup>73</sup> Confirmed by, among other things, Recital 3 in the adopted Directive (2009/50/EC).

<sup>74</sup> COM(2007) 637 final, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, 3.

the conditions of entry and residence for third country nationals for the purposes of highly qualified employment.<sup>75</sup>

The aim was not only to improve the EU's ability to attract but also to *retain* third country highly qualified workers. In order to respond effectively and promptly to fluctuating demand for highly qualified immigrant labour – and to offset present and upcoming skill shortages – the Proposal also aimed to develop a level playing field at EU level to facilitate and harmonise the admission of this category of workers and to promote their *efficient allocation and re-allocation* in the EU labour market.<sup>76</sup> The generous attitude towards this workforce, as illustrated by the desire to create routes to long-term status and free movement rights, is exceptional and an indication of this sector's crucial anticipated positive economic input to the EU. These proposals were, however, intensely discussed during the negotiations, which resulted in new compromises.<sup>77</sup>

In July 2010, the Commission issued the sector-related Directive proposals on Seasonal Workers and Intra-Corporate Transfers (ICT). The proposed Directive on Seasonal Workers aims to contribute to the effective management of migration flows. According to the Commission, it sets out fair and transparent rules for entry and residence, at the same time providing for incentives and safeguards to prevent a temporary stay from becoming permanent.<sup>78</sup> The Commission points out that EU economies are facing a situation in which labour from within the EU is expected to become less and less available to meet their demand for seasonal workers. At the same time, there is a more permanent need for unskilled labour within the EU. It is expected to be increasingly difficult to fill these gaps in seasonal labour supply with EU national workers, primarily because these workers consider such work unattractive.<sup>79</sup> It is further pointed out that there is significant evidence that certain third country seasonal workers face exploitation and sub-standard working conditions, which may threaten their health and safety. The Directive proposal can, according to the Commission, serve as a safeguard against

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<sup>75</sup> COM(2007) 637 final. Cerna has, however, pointed out that the degree of support varied according to the self-interest of Member States, in other words, whether they perceived any benefit in increased EU legislation. The main support was from the countries lacking a specific national policy on highly qualified migrants. This Proposal could help them to shift the balance between their migrant groups; Cerna (above n 71) 22–24. Importantly, the directive will not affect those Member States with existing successful national schemes relating to highly qualified employees, Directive 2009/50/EC, Article 3.4.

<sup>76</sup> COM(2007) 637 final, 2.

<sup>77</sup> Cerna (above n 71) 26 .

<sup>78</sup> COM(2010) 379 Proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 2.

<sup>79</sup> *ibid.*, 2–3.

exploitation and protect EU citizens who are seasonal workers from unfair competition.<sup>80</sup>

The Proposal on intra-corporate transfers (ICTs) served a quite different purpose from the proposal on seasonal employment. Today, many multinationals wishing to transfer their personnel have, according to the Commission, encountered inflexibility and limitations, compounded with wide differences between Member States in terms of conditions of admission and restrictions of family rights.<sup>81</sup> The treatment granted to intra-corporate transferees at the EU level, combined with the conditions and procedures regulating such movements, have an impact on the attractiveness of the EU as a whole and influence the decisions of multinational companies to conduct business or invest in a certain area.<sup>82</sup>

The proposed Directive on ICTs is aimed specifically at responding effectively and promptly to demand for managerial and qualified employees for branches and subsidiaries of multinational companies, by setting up transparent and harmonised conditions of admission of this category of workers; creating more attractive conditions of temporary stay for intra-corporate transferees and their families; and promoting efficient allocation and re-allocation of transferees between EU entities.

This proposal is also intended to help meet the EU's international trade commitments, including specific rules on intra-corporate transferees.<sup>83</sup> Neither the EU25 Commitments under the General Agreement on Trade in Services (GATS) nor the Economic Partnership Agreements are intended to cover exhaustively the conditions of entry, stay and work.<sup>84</sup> The large differences between Member States in terms of entry procedures and temporary residency rights could hamper uniform application of the international commitments to which the EU and its Member States have agreed in the WTO negotiations.<sup>85</sup> It is important to keep these different motives in mind when evaluating the content of the different legislative texts.

#### 4.3 *More favourable provisions*

When discussing the content of the Directives it is important to keep in mind that parts of these provisions are minimum provisions and it is accordingly acceptable for the Member States to keep or adopt more favourable provisions in some areas. The balance between minimum and harmonised rules in the Directives differs, however. A common

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<sup>80</sup> *ibid.*, 3.

<sup>81</sup> COM(2010) 378 final, 3.

<sup>82</sup> *ibid.*, 7.

<sup>83</sup> *ibid.*, 2.

<sup>84</sup> *ibid.*, 3.

<sup>85</sup> *ibid.*, 7.

feature is that the provisions including labour and social rights are minimum provisions in all Directives.<sup>86</sup>

Another important characteristic in all Directives is that they apply without prejudice to more favourable provisions that are included in bilateral and multilateral agreements concluded by the European Union and/or one or more Member States on the one hand and one or more third countries on the other.<sup>87</sup>

#### 4.4 *Personal Scope*

In the 2005 Policy Plan on Legal Migration, the Commission had explained that guaranteeing a common framework of rights to all third country nationals in legal employment based on equal treatment with nationals would not only be fair toward those contributing by means of their work and tax payments to our economies, but would also help to establish a level playing field within the EU.<sup>88</sup> This argument was developed in the Framework directive proposal: equal treatment could also help in reducing unfair competition emanating from the existing rights gap, thus serving as a safeguard for EU citizens by protecting them from cheap labour at the same time as protecting migrants from exploitation.<sup>89</sup>

In reality, however, the Commission had already abandoned parts of the horizontal approach with regard to equal treatment. Exceptions from the personal scope of the Proposal were included. Third country nationals posted in accordance with Posting of Workers Directive (96/71/EC) were excluded from the scope as they were not considered to be part of the labour market of the Member State to which they were posted. Intra-corporate transferees, contractual service suppliers and graduate trainees under the European Community's GATS commitments were also excluded following the same principle.<sup>90</sup> Seasonal workers were also excluded – a decision justified by the specificities and temporary nature of their status.<sup>91</sup>

The European Parliament was highly divided with regard to the question of personal scope. The Committee on Employment and Social Affairs (EMPL) argued for a real horizontal instrument with no exclusions of temporary workers but lost the fight against the Committee responsible for this whole legislative package, the Committee on Civil

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<sup>86</sup> Directive 2011/98/EU Article 13(2); Directive 2009/50/EC Article 4; Directive 2014/36/EU Article 4; Directive 2014/66/EU Article 4.

<sup>87</sup> *ibid.*

<sup>88</sup> COM(2005) 669 final, 6.

<sup>89</sup> COM(2007) 638 final, Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, 3. This argument is included in the preamble, Recital 19, in the adopted Directive 2011/98/EU.

<sup>90</sup> On the GATS commitments, see Section 5 below.

<sup>91</sup> COM(2007) 638 final, 9.

Liberties, Justice and Home Affairs (LIBE), which thought that such an amendment would further delay the process.<sup>92</sup> The ILO's regional office published a note stating that it would prefer to see the establishment of a horizontal framework – which would be more in line with the approach taken by relevant International Labour Standards, including that underpinning the specific instruments protecting migrant workers.<sup>93</sup> ETUC also declared its discontent with the exclusion of certain groups from the coverage of the directive. Joël Decaillon, ETUC's Deputy General explained their position as follows:

‘We now have a draft directive which ignores the principle of equal treatment, adds to the number of exemptions and will result in a wide variety of workers’ statutes. This in turn will increase social dumping, the lack of job security, the instability and the vulnerability of groups of workers in Europe and will lead to further competition which is the exact opposite of the spirit in which the immigration package was initially intended.’<sup>94</sup>

These arguments did not influence the final decision, however. In the adopted directive, posted workers, intra-corporate transferees and seasonal workers, alongside other groups such as refugees and long-term residents who are in general already provided with stronger protection, are excluded from the scope.<sup>95</sup> In so doing, the EU is developing a regime providing different level-playing fields for different third country national workers. The extent of this rights-gap will, of course, be determined by the content of

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<sup>92</sup> EMPL explanatory statement in European Parliament Report on the proposal for a directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member State and on a common set of rights for third-country workers legally residing in a Member State (COM(2007)0638-C6-0470/2007-2007/0229(COD)) 5.10.2010 A7-0265/2010 40; LIBE explanatory statement in the same EP Report; European Parliament legislative resolution of 24 March 2011 on the proposal for a directive of the European parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (COM(2007)0638)-C6-0470/2007 – 2997/0229(COD)) P7\_TA-PROV(2011)0115 Article 3.2.b-d and recital 12 and the EP press release found at <http://www.europarl.europa.eu/en/pressroom/content/-20110323IPR16161/html/Equal-treatment-for-foreign-workers-under-new-EU-single-permit> (last accessed 25 May 2011).

<sup>93</sup> ILO Note based on International Labour Standards with reference to relevant regional standards – Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third country nationals for the purpose of seasonal employment, COM(2010)379. See also J Fudge (above n 28) who discusses the level of protection in the ILO legal framework on migrant workers.

<sup>94</sup> Stated in a meeting with the European Parliament in December 2010, at <http://www.etuc.org/a/8101>. See also the ETUC resolution on Equal treatment and non-discrimination for migrant workers, Brussels 1-2 December 2010 at <http://www.etuc.org/a/7954>.

<sup>95</sup> Directive 2011/98/EU Article 3(2)(c).

the sector directives. In general all low- and medium-skilled migrant workers will be covered by the provisions in the Framework Directive.

One group which is not excluded from the Framework Directive is highly qualified workers. They will accordingly, at least with regard to rights, be provided with a double set, where the most favourable in a particular situation will prevail. So who would qualify for this attractive status? In order to engage in 'highly qualified employment' a person must, as a general rule, have higher professional qualifications, defined as a post-secondary higher education of at least three years in duration (Article 2). The definition was intensely discussed during the negotiations. There was a concern that this favourable status would be misused. The discussion revolved around the question of whether workers without post-secondary higher education but with relevant professional experience could qualify for this status.<sup>96</sup> The compromise reached was that the Member States could themselves decide whether they wanted to extend this status to persons with at least five years of professional experience at a level comparable to higher education qualifications.

Who would then qualify for being a seasonal worker according to the Directive on Seasonal Workers? A seasonal worker is, according to the Directive, 'a third country national who retains a his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity, dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between the third country national and the employer established in that Member State' (Article 3(b)). An activity dependent on the passing of the seasons 'means an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are - significantly above those necessary for usual ongoing operations' (Article 3(c)). According to the preamble in the Directive such activities are typically to be found in sectors such as agriculture, during the planting or harvesting period, or tourism, during the holiday period (Recital 13).

LIBE proposed to specify the relevant economic sectors in the article and only allow inclusion of other sectors with the agreement of the social partners.<sup>97</sup>

Such a specification could limit the risk of abuse of these permits for work which is not intended to be covered by the directive.

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<sup>96</sup> COM(2007) 637 final, Article 2b. See for example Council document 5255/08 MIGR 1 SOC 19, Brussels 18 January 2008, fn 6.

<sup>97</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs Orientation Vote Result on the proposal for directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment (COM(2010)-0379 – C7-0180/2010 – 2010/0210(COD) Orientation vote result 25.04.2012v01-00, amendment 40.

As a compromise the Member States became obliged to list those sectors of employment which include activities that are dependent on the passing of the seasons when transposing the directive. Where appropriate, this listing shall be done in consultation with the social partners (Article 2(2)). The Member States accordingly keep the control of which sectors that shall be open to these migrant workers.

The Directive on Intra-Corporate Transfers is aimed at highly skilled workers. An intra-corporate transferee is a manager, specialist or trainee employee, temporarily seconded, from an undertaking established in a third country, to an entity belonging to the undertaking or group of undertakings inside the EU (Articles 2(1) and 3(b)). A manager means a person who primarily directs the management of the host entity receiving general supervision or guidance principally from the board of directors or equivalent. A specialist means a person working within the group of undertakings possessing specialised knowledge essential to the host entity's areas of activities, techniques or management. The question of whether the person has a high level of qualifications with regard to a type of work or trade requiring specific technical knowledge should be taken into account (Article 3(e) and (f)). There is, however, only a requirement connected to higher education qualifications for trainee employees. The original proposed Directive was criticised as being too vague, particularly with regard to the definitions of *specialist* and *manager*. This could leave the Directive open to abuse. The situation must be avoided in which de facto a wide range of employees could work for up to three years in a subsidiary or a branch in a Member State.<sup>98</sup> The definitions adopted are a bit more specific than those originally proposed by the Commission and it is yet to be seen if the changes are enough to avoid abuse. Particular groups of workers are also excluded from the application of the sector directives.<sup>99</sup> The groups covered by other specific sector directives, except for highly qualified employees, are in general excluded from the coverage of the others. Posted workers covered by Directive 96/71/EC are excluded from the scope of all directives.<sup>100</sup> The argument put forward in the Proposal on a Framework Directive was that those workers would not be part of the labour market of the Member State to which they were posted.<sup>101</sup> It also seems that workers being posted by a company in a third country are also excluded from the scope of these directives.

The relationships in the ICT Directive are similar to those covered by the PWD and the ambition – as will be seen – not to impose higher standards on this group than on workers posted in accordance with Directive 96/71/EC is, to a certain extent upheld.

There seems to be an emerging consensus to generally exclude posted workers from the equality of rights principle, irrespective of whether they are posted within the EU or

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<sup>98</sup> EESC SOC /393 (above n 46) 1.5 and 1.8, 4.15, EMPL p 3, amendment 10-14, PE464.975v02-00, 30.5.2011.

<sup>99</sup> Directive 2009/50/EC Article 3.

<sup>100</sup> ICT Article 2(2)(c).

<sup>101</sup> On the GATS commitments, see Section 5 below.

from a third country. The EU is obviously avoiding setting higher standards for other posted workers than for those workers covered by Directive 96/71/EC. That risks widening the scope for unequal terms on the EU labour market. A consequence discussed in more detail below. It is, however, difficult to interpret the discussed texts as preventing a third country worker who has been allowed a work permit from being posted by the employer to another Member State. The LIBE in its Orientation vote result, however, proposed to prohibit seasonal workers from being posted by an undertaking in one Member State to provide a service in another Member State.<sup>102</sup> That proposal did not make it into the adopted directive.

#### 4.5 Admission conditions

##### 4.5.1 Application procedures

A common simplified application procedure was set as a main target when developing this legal framework. The Framework Directive accordingly includes such a simplified application procedure, as well as a single application procedure for a *single* permit for third country nationals to reside *and* work in the territory of a Member State.<sup>103</sup> This procedure is supposed to simplify and coordinate application procedures within the EU, thereby making it more attractive for third country nationals to apply for a work permit in an EU Member State. The single permit would significantly simplify the administrative requirements for third country workers and employers throughout the EU.<sup>104</sup>

More rapid application procedures are a part of this target. A decision regarding an application for a single permit according to the Framework Directive must be given *as soon as possible* and, in any event, within four months (Article 5.2). For the specific sectors the procedures were supposed to be even more efficient. But already when negotiating the Directive on the Highly Skilled Employment the Commission had to abandon its far-reaching ambitions. In their Directive Proposal they suggested a time frame of maximum 30 days or in exceptional cases, 60 days for an application procedure. The adopted text states that the decision must be taken as soon as possible and at the latest within 90 days (Article 11(1)). Of course, this inability to set a common procedural time frame threatens the aim of minimising internal competition for highly skilled workers among the Member States. Tight time frames of 30 days were also proposed as a main rule for seasonal workers (Article 13) and intra-corporate transferees (Article 12) in the Directive Proposals. The negotiations however resulted in the same solution as in the Directive on Highly Qualified Employment (DSE Article 18(1); DICT Article 15(1)). Particular simplified procedures may also, according to the Directive on ICTs, be available for groups of undertakings, recognised as such by Member States.<sup>105</sup>

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<sup>102</sup> LIBE Orientation vote (above n 98) amendment 42.

<sup>103</sup> COM(2007) 638 final.

<sup>104</sup> *ibid.*, 3. That directive was adopted in 2011, Directive 2011/98/EU.

<sup>105</sup> Article 11(6).

#### 4.5.2 Content of the application

Provisions on admission conditions are excluded from the Framework Directive. All such decisions are left to the Member States. Thus we do not know whether the permits will be connected to a single employer or to a branch or whether it will be possible to keep the permit during unemployment while looking for a new job. Neither do we know for how long a permit may be valid, nor whether it can be renewed. The conditions will depend on a given Member State's choices and will probably continue to differ widely, as well as between groups within the Member States.<sup>106</sup> This important aspect, the admission conditions, when evaluating the robustness of the equality principle in the Framework Directive is therefore unknown. This lacuna affects all those categories of workers – for example, low- and medium skilled workers – covered by the Framework Directive and excluded from the sector directives.

Common admissions criteria could be agreed exclusively for particular sectors. The Member States, however, retain the right to decide whether vacancy tests or certain quotas are to be applied (DHQE Articles 6 and 8(2), DSE Articles 7 and 8(34), DICT Article 6). The only exception to this is the ICT Directive in which the possibility of requiring vacancy tests is not envisaged.

There are some common features in the admission criteria in the adopted sector directives. The applicant must, for example, present evidence of having – or having applied for – relevant sickness insurance (DHQE Article 5(1)(e); DSE Article 6(1)(b); DICT Article 5(1)(g)). There is also a common feature of the admission criteria in the provisions on highly qualified and seasonal workers. Applications must contain a valid work contract or a binding job offer. The permits on highly qualified workers and intra-corporate transferees deal only with stays exceeding three months. The application of the Directive on Seasonal Workers is however not limited to stays exceeding three months (Article 1(2)).

The most detailed admission criteria are included in the Directive for Highly Qualified Employment. In such applications, the valid work contract or binding job offer must apply for highly qualified employment of at least one year and specifying a certain wage level of, as a main rule, at least 1.5 times the average gross annual salary in the Member State concerned. Documents attesting to the required qualifications must also be presented (Article 5). The specification of a relative minimum wage was justified in terms of ensuring that the wage criteria would rendered worthless by setting a national level that would be too low for a national or EU highly qualified worker to accept.<sup>107</sup>

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<sup>106</sup> For an overview of the range of differences see, for example, M Ruhs, *Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle-income countries*. Centre on Migration, Policy and Society, University of Oxford. Working paper No 88, 2011. In this overview 18 of the EU Member States are included.

<sup>107</sup> COM(2007) 637 final, 9–10 and Articles 5, 6, 21–22.

The specification of a relative minimum wage was strongly opposed by Business-Europe.<sup>108</sup>

An application for a Seasonal Worker Permit must, according to the Directive and as in the case of highly qualified workers, contain a valid work contract or a binding job offer to work as a seasonal worker. The requirements with regard to the content of this document are quite different, however. The contract or work offer must specify the rate of pay and the working hours per week or month and, where applicable, other relevant working conditions (Articles 5(1)(a), 6(1)(a)). There were different reasons, according to the Commission, for specifying these two conditions. The rate of pay is required in order to verify that the proposed remuneration is comparable to that paid to nationals for the equivalent activity in the Member State concerned. The purpose is, therefore, two-fold: to avoid conferring an unfair advantage on the employer and to avoid exploitative working conditions for the seasonal worker. The reason put forward for requiring information on the working hours – to ensure that employers only request third country seasonal workers in situations of real economic need – makes the last part of the text – ‘when applicable, other relevant working conditions’ – reasonable. The other working conditions might not have anything to do with this calculation. Information about working hours is also likely to be connected to the requirement that the seasonal worker must have sufficient resources during his or her stay to maintain him- or herself without having recourse to the social assistance system of the Member State concerned (Articles 5(3), 6(3)). The formulation, however, gives the odd impression that only a very limited set of working conditions is necessary for seasonal workers.. The LIBE, however, proposed to require that all the essential aspects of the employment relationship as laid down in Directive 91/533/EEC should be specified in the contract or job offer.<sup>109</sup> In the end the European Parliament succeeded with including some additional requirements with regard to what should be specified in the work contract or job offer in the adopted Directive, like information on the duration of the employment and the amount of any paid leave.

Evidence of having accommodation that ensures an adequate standard of living is also required under the Directive. If rent is paid for such accommodation, the amount must not be excessive in relation to the remuneration (Articles 5(1)(c), 6(1)(c), and Article 20).

An application for permission to be an intra-corporate transferee is, according to the Directive on Intra-Corporate Transfers, based on a different starting point from those concerning highly qualified and seasonal workers. The possibility of obtaining a permit depends on whether the applicant can prove that a relationship to the transferring com-

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<sup>108</sup> At [http://www.cebrecz.cz/dokums\\_raw/businessseurope.pdf](http://www.cebrecz.cz/dokums_raw/businessseurope.pdf).

<sup>109</sup> LIBE Orientation vote (above n 98) amendment 53. Council Directive 91/533/EEC of 14 October 1991 on employers’ obligations to inform employees on the conditions applicable to the contract or employment relationship [1991] OJ L 288/32.

pany has been established before the application is made. In order for a permit to be granted, there must be proof that the different entities between which the transfer is to take place belong to the same undertaking or group of undertakings and that the worker has been employed by the company for at least 3 up to 12 uninterrupted months prior to the transfer. A similarity with the Directive on Highly Qualified Employment is that it must also be proved that the employee who is to take up the required position has the necessary qualifications (Article 5(d)). The application must also include information on the level of remuneration. This was an issue that generated some debate. In the Proposed Directive the level which the worker must be provided with was, surprisingly, the same level as the one applying to posted workers (96/71/EC) in a transfer (Article 5(2)). This however changed. The adopted Directive prescribes that the remuneration granted to the third country national must not be less favourable than the remuneration granted to nationals of the Host Member State concerned occupying comparable positions according to applicable laws and collective agreements (Article 5(4)). This issue will be further discussed below.

#### 4.5.3 The characteristics of the permit

If the authorities decide to approve the application of a highly qualified worker, the applicant will be issued with an EU Blue Card (Article 7). The idea was to come up with something that sounds as attractive as the US Green Card. However, the wording cannot disguise the fact that the two cards confer different statuses.<sup>110</sup> The Member States are granted the right to decide on a standard period of *between one and four years* for the validity of the EU Blue Card (Article 7(2)).<sup>111</sup> For seasonal workers a successful application can, according to the Directive on Seasonal Workers, result in one out of a six different permits (Article 12). The maximum length of stay can vary in the different Member States. The maximum period of stay must however not be less than five months and not more than nine months in any 12-month period (Article 14). It is clearly stated that these workers must return to a third country as soon as the permit expires (Article 14). According to the Directive, the Member State must, however, facilitate the re-entry of the seasonal worker (Article 16(1)). Four possible measures to achieve this facilitation are prescribed. It however seems that other alternative measures can also fulfil the obligation to facilitate the re-entry (Article 16(2)). This provision was watered down during the negotiation process. The original rationale behind the multi-seasonal permits was that they are appropriate for sectors where the labour market needs to remain stable over a period of time.<sup>112</sup> If this rationale will be upheld depends on the Member States' choices when implementing this provision.

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<sup>110</sup> Guild (above n 70) 4.

<sup>111</sup> Directive 2009/50/EC Article 7(2).

<sup>112</sup> COM(2010) 379 final, 10.

An intra-corporate transferee permit can be made valid for at least one year or less (if the duration of the transfer is shorter) and it may be extended to a maximum of three years for managers and specialists and one year for trainee employees.<sup>113</sup>

During the two first years, the EU Blue Card holder is limited to the employment fulfilling the criteria for admission. A change of employer must be subject to prior authorisation by the authorities, a process which can take up to three months (Article 12(1)–(2)). Importantly, the EU Blue Card holder can keep the permit during unemployment, for a period of up to three months (Article 13). Thus, in principle, the third country worker may be obliged to find a new job before leaving the original one. However, the worker has a right to remain on the territory until the necessary authorisation has been granted or denied (Article 13(3)). Thus in reality the worker's stay as an unemployed person can be longer than three months. While the right to keep the permit during unemployment is, of course, important, the Member States may withdraw the permit if the worker does not have sufficient resources to maintain himself and his family without having recourse to the social assistance system (Article 9(3)(b)). This provision, if used, can obviously limit the freedom of choice provided for through the provisions in Articles 12 and 13 for the permit holder. After the first two years, the Member States may, but are not required to, grant the persons concerned equal treatment with nationals with regard to access to highly skilled employment (Article 12(1)).

According to the Directive on Seasonal Workers the seasonal worker has a right to change employer once within the maximum period of stay applicable in the Member State, provided that the admission criteria are met (Article 15). The Commission justifies this provision on the grounds of avoiding abuses. Seasonal workers tied to a single employer may face a risk of abuse.<sup>114</sup> For intra-corporate transferees there is no room for manoeuvre with regard to an intra-corporate transferee permit. The permit is connected to a particular undertaking or group of undertakings.

#### 4.5.4 Free movement rights connected to a permit

Perhaps the most remarkable element of the proposed Directive on highly qualified employment was that it included a right for the permit holder to move to another EU Member State after two years in order to take up highly qualified employment *without* having to apply for a new Blue Card. The Proposal was in line with the Commission's ambitions to build flexibility into the system. The importance of being able to allocate and re-allocate this category of worker within the EU labour market was emphasised.<sup>115</sup> This proposal was controversial as it touched upon the sovereignty of borders. The negotiations resulted in a right for EU Blue Card holders to move to another Member State after *18 months* for the purpose of highly qualified employment, so that the worker could apply for a new EU Blue Card in that other Member State. The application must

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<sup>113</sup> Directive 2014/66/EU Article 13(2).

<sup>114</sup> COM(2010) 379 final, 10.

<sup>115</sup> COM(2007) 637 final, 2 and 7.

be made within one month of arrival (Article 18). The provisions on Community preference, however, continue to apply (Article 12(1) and (5)). The adopted directive obviously lessens the effect of the external free movement provision and, as with many other adaptations, will limit the fulfilment of its purpose.<sup>116</sup>

Intra-corporate transferees also have a possibility to move between the Member States. The Directive includes a right under certain conditions to perform the employment activity covered by the permit in any other entity belonging to the group of undertakings. The Member States are free to connect certain requirements to such transfer (Articles 20–23). The intra-EU mobility aspect of the permit was supported by the LIBE and proposed to be even more generous.<sup>117</sup>

‘This modus operandi will give rise to new and stronger collaborative and sharing mechanisms between Member States, which, as a result, will develop greater levels of mutual trust.’<sup>118</sup>

It must, however, also be clarified that the permit holder him- or herself cannot dispose of this free movement provision, only the employer/company. These rights will eventually equalize the position between EU companies and other companies in this area. The question of which labour market system should decide the wage level for these workers when moved is tricky. It has been underlined that, in order to avoid wage dumping, it is important that the transferee be paid the minimum wage applicable in the state where he or she is actually working.<sup>119</sup> The Directive suggests that the conditions applicable in the country issuing the permit should apply.

#### 4.5.5 Conclusions

The right to movement between the Member States, despite its limits, confers an important benefit on EU Blue Card holders. It will, according to Article 16, be possible to accumulate periods in the different Member States, if certain requirements are met, in order to obtain long-term resident status along with all the rights conferred by the Long-Term Residents Directive (2003/109/EC).

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<sup>116</sup> See comments on this in Cerna (above n 71) 26–27.

<sup>117</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs Orientation Vote Result on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals within the framework of an intra-corporate transfer PE Orientation vote 26.01.2012v01-00 amendment 82.

<sup>118</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals within the framework of an intra-corporate transfer (COM(2010) 0378-C7-0179/2010-2010/0209(COD) 31.5.2011 PE464.961v01-00 22).

<sup>119</sup> See, eg, LIBE Orientation Vote (above n 125) amendment 82, EESC SOC/393 (above n 45) 5.12.

It seems that the admission criteria in the three sector directives will differ considerably. As their framing is of enormous importance in establishing status for a migrant worker it is clear that the different admission criteria risk providing these workers with very different prospects with regard to upholding the rights they will be provided with in other parts of the Directives. *The admission criteria* give highly qualified employees an opportunity – theoretically at least – to leave an exploitative employer during the first two years. The possibility to change employer with regard to highly qualified employment can be unlimited after two years, should the Member State so decide. After 18 months, the worker is allowed to look for another job in another Member State, a right much more limited than originally proposed by the Commission, but hopefully of some value to workers. The Directive either does not limit the possibility for highly qualified workers to achieve a long-term stay as a permit can last up to four years and also be issued as many times as necessary. It is clear that these provisions have been framed in order to give workers an opportunity to remain within the EU.

The Directive on Seasonal Workers, on the other hand, is based on the fear of conferring possibilities that will enable these vulnerable workers to stay in an EU Member State for a longer period. This prospect has been heavily criticised. The LIBE was proposing, for example, that the Member States themselves determine the conditions under which seasonal workers may apply for a longer-term residence permit.<sup>120</sup> The right to apply for longer work permits in accordance with national rules would, of course, be open to this category of worker, as to any other. But it is questionable whether that is enough. The short period of validity of a permit is a clear weakness when evaluating the *admission conditions* in the Proposal. It is difficult for workers to exercise any of the given rights during this short period. And as will be seen, the short validity can in reality also make it difficult to exercise many of the social rights. The right to change employer is, however, a strength but is weakened by the absence of any right to keep the permit when unemployed and by other restrictions discussed below. As already mentioned the *admission conditions* in the Directive on Intra-Corporate Transfers include no flexibility for the worker. The permit is dependent on the company. If the company decides to dismiss the worker, the permit will be withdrawn and there is no possibility for the worker to apply for another permit. The provisions related to intra-EU movement are also in the hands of the employer. Consequently, the intra-corporate transferee is bound to his or her employer and the admission criteria have no value for the worker per se.

#### 4.6 *Employment relations*

##### 4.6.1 Working conditions and pay

According to both the Framework Directive (FWD) and the Directive on Highly Qualified Employment (HQD) third-country workers shall enjoy equal treatment with nationals with regard to working conditions, including pay and dismissal, as well as health and

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<sup>120</sup> LIBE Orientation Vote (above n 98) amendment 84.

safety in the workplace (HQD Article 14(1)(a), FWD Article 12(1)(a)). In the negotiations on the Framework Directive EMPL however, attempted to extend the scope of this provision.<sup>121</sup> Substantial parts of the EMPL proposal ended up in a recital in the final EP position<sup>122</sup> and then made it all the way into the preamble of the adopted Directive (recital 22), which reads: ‘Working conditions as referred to in this Directive should cover at least pay and dismissal, health and safety at the workplace, *working time and leave taking into account collective agreements in force*’ (emphasis added). Recital 22 gives us arguments for including working time and leave in the concept of ‘working conditions’. The general reference in the recital to applicable collective agreements indicates a new and more far-reaching approach than, for example, the one included in the Posting of Workers Directive (96/71/EC, Article 3(8)). Such a wider understanding of the concept would spill over to the highly qualified workers as they are not excluded from the application of the Framework Directive.

As regards working conditions, the 2010 Directive proposals did not use the equal treatment principle as a starting point.

In the Seasonal Employment Proposal, seasonal workers should have been entitled to working conditions, including pay and dismissal, as well as health and safety requirements in the workplace, applicable to seasonal work, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted. In those Member States where collective agreements were not declared universally applicable, the Member States could take as a basis collective agreements that were generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned; and/or on collective agreements that have been concluded by the most representative employer and labour organisations at national level and are applied throughout the national territory (Article 16(1)).

The fact that seasonal workers was not supposed to be granted equal treatment was criticised and questioned by the trade union movement,<sup>123</sup> the ILO,<sup>124</sup> the LIBE and the

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<sup>121</sup> Opinion of the Committee on Employment and Social Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (COM2007)0638-C6-0470/2007-2007/0229(COD) amendment 8.

<sup>122</sup> European Parliament legislative resolution of 24 March 2011 (above n 92) recital 14a.

<sup>123</sup> ETUC Resolution on equal treatment and non-discrimination for migrant workers, adopted at the Executive Committee on 1–2 December 2010.

<sup>124</sup> ILO Note based on International Labour Standards with reference to relevant regional standards – Proposal for a directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment (COM(2010) 379 final).

EECS.<sup>125</sup> The Commission did not give any reasonable explanation of this choice. In the explanatory memorandum, they simply state that this part of the Article defines the working conditions, including pay, dismissal and health and safety requirements in the workplace applicable to seasonal workers in order to ensure legal certainty. It is, however, difficult to interpret this proposed Article as placing any obligation on the Member States to treat third-country national seasonal workers on an equal footing with nationals.

The ILO also expresses concern over the reference to universally applicable collective agreements as among other things ILO Convention No 98 on Collective Bargaining, ratified by all Member States, also covers collective bargaining at workplace level by an individual employer.<sup>126</sup>

According to the LIBE Orientation Vote Result, seasonal workers should be entitled to equal treatment with nationals with regard to terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace. In addition to legal, administrative and regulatory provisions, collective agreements and contracts, concluded at any level, should be applied in accordance with the host Member State's national law and practices and on the same terms as those applicable to nationals of the host Member State.<sup>127</sup> Nevertheless, there was a strong support also among the Member States for providing seasonal workers with equal treatment regarding working conditions. In the adopted Directive on Seasonal Workers seasonal workers are entitled to equal treatment with nationals at least with regards to 'terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements'. This important step will not, however, remedy the weak protection offered to seasonal workers in general in many Member States. The ETUC have argued that establishing robust national protection with regard to working conditions and pay for seasonal workers ensuring equal treatment between seasonal workers, locals and migrants would be a more appropriate step.<sup>128</sup>

The extended reference to collective agreements *at all levels* in the proposal in the LIBE Orientation Vote Result is crucial. The ILO's argument concerning fundamental ILO standards is not insignificant here, either. Its value was once again tested in an EU context and this time the ILO-argument convinced the decision-makers. The adopted Directive on Seasonal Workers includes no reference to a limited type of collective agreement.

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<sup>125</sup> LIBE Orientation Vote (above n 92) amendment 94, EESC Opinion (above n 45) 4.13.

<sup>126</sup> ILO Note (above n 132) 3.

<sup>127</sup> LIBE Orientation Vote (above n 98) amendment 94.

<sup>128</sup> ETUC Resolution on equal treatment and non-discrimination for migrant workers. Adopted at the Executive Committee on 1–2 December 2010.

A third alternative regarding the level of the protection of working conditions was presented by the Commission in the Proposal on intra-corporate transferees. The proposal raises the issue of the identity of inter-corporate transferees. Are they a subset of third-country posted worker or are they exercising free movement of labour. And if they are posted is it evident that they should be provided with the same level of protection as intra-EU posted workers? The starting point in the Commission proposal is clear. Intra-corporate transferees shall be entitled to the terms and conditions of employment applicable to posted workers in a similar situation, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted pursuant to this Directive.

Where collective agreements are not declared to be of universal application, Member States may, if they so decide, base themselves on collective agreements that are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or on collective agreements that have been concluded by the majority of representative employers' and labour organisations at national level and are applied throughout national territory.<sup>129</sup> The formula from Article 3(8) PWD is, as in the proposed Directive on Seasonal Workers, also used here.

The opinion of the EMPL rapporteur on this topic was clear: She 'fundamentally disagrees with the Commission on what rules should be applied to Intra-Corporate Transferees',<sup>130</sup> and she argues that while the Posting of Workers Directive is meant to ensure the free movement of services, the objective of the ICT Directive is to ensure the free movement of labour. The Directive should therefore, according to the EMPL rapporteur, follow the principle that third-country nationals ought to be treated equally with EU citizens. The equal treatment principle should apply in relation to the nationals in the Member State where the inter-corporate transferee is currently working.<sup>131</sup> The EMPL rapporteur also proposed to widen the reference to collective agreements and puts forward a definition of collective agreement: 'any kinds of collective agreements, concluded at any level, including at company level, in accordance with national legislation and practices of the host Member State, by the most representative social partners'.<sup>132</sup> The opinion of the EMPL rapporteur is reflected in the LIBE Orientation Vote<sup>133</sup> and is also supported by the European Economic and Social Committee.<sup>134</sup> The LIBE proposes to include a provision on equal treatment with nationals in the host Member State as regards the terms and conditions of employment laid down by law, regulation or administrative provision and/or arbitration awards and collective agree-

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<sup>129</sup> COM(2010) 378 final, Article 14(1).

<sup>130</sup> EMPL Draft Opinion (above n 46) 3.

<sup>131</sup> *ibid.* and amendments 4 and 21.

<sup>132</sup> *ibid.* amendments 16, 18, 19, 21.

<sup>133</sup> EP Orientation Vote Result (above n 125) amendments 49 and 78.

<sup>134</sup> EESC Opinion, SOC/393 (above n 46) 1.5.

ments applicable at the workplace in the Member State in which they are currently working.

This time the European Parliament was not as successful as in relation to the seasonal workers. The adopted Directive on Intra-Corporate Transfers was only amended with regard to the provision on pay – the remuneration granted to the intra-corporate transferee shall not be ‘less favourable than the remuneration granted to nationals of the host Member State concerned occupying comparable positions according to applicable laws or collective agreements or practices in the Member State where the host entity is established’ (Articles 5(2)(b) and 14(1)).

The issue of whether there are justifiable grounds for treating intra-corporate transferees as posted workers needs further discussion. In the following section the GATS provisions on similar working groups are presented in order to provide a reference point. The conclusion from that overview is that there are no grounds in the GATS for using the Posting of Workers Directive as a starting point. The Posting of Workers Directive was adopted in order to safeguard the special requirements connected to the Treaty’s regulation of freedom to provide services. The corresponding right to provide services according to GATS is constructed in a different way and it is obvious that this freedom within that legal framework does not prevent the Member States from requiring that workers moved to an EU Member State to provide a service should be treated on an equal basis with nationals. The argument that they are not entering the labour market of that particular Member State seems artificial when comparing the Member States’ previous arguments in relation to the GATS commitments. The overall question of why the particular balancing between the free movement of services and the protection of workers made within the EU context should be exported to other relationships is not answered. The Commission has anticipated that around 16,000 workers would be covered by this Directive. There is, however, no evidence that the figure may not be much higher. It is unfortunate that the equal treatment principle were set aside for a given group, without any convincing arguments in favour of such a decision.

One question to be dealt with, however, concerns whether Article 1(4) PWD has any role to play in relation to intra-corporate transferees. According to Article 1(4), undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. More favourable treatment should in this context be understood as a level of protection below the minimum level provided for in the Posting of Workers Directive. Nothing in Article 1(4) seems to include any limits for providing the workers posted by undertakings established in a non-Member State with stronger protection.

#### 4.6.2 Freedom of association

In both the Framework Directive and the Directive on Highly Qualified Employment, as well as in the Directives on Seasonal Workers and Intra-Corporate Transfers equality with nationals is provided for with regard to freedom of association. This includes freedom of association and affiliation and membership of an organisation representing

workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security.

In the negotiations on seasonal workers the LIBE Orientation Vote sought to clarify the content of the freedom of association provision by adding ‘inter alia the right to negotiate and conclude collective agreements and the right to strike and take industrial action, in accordance with the host Member State’s national law and practices’.<sup>135</sup> The European Parliament succeeded, framed a bit differently though, to include these clarifications in the adopted Directive on Seasonal Workers (Article 23(1)(b)). Such an understanding of the concept of freedom of association could be implicit. There is no reason to exclude migrant workers from all aspects included in the concept of freedom of association according to, among other things, the basic ILO Conventions Nos 87 and 98 ratified by all Member States.<sup>136</sup> The clarification in the Directive on Seasonal Workers can anyway have a spill over effect and benefit other migrant groups if they would be denied these rights.

#### 4.6.3 Recognition of qualifications and rights to education

Equal treatment with regard to recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures was finally guaranteed in all Directives. The proposed Directive on Seasonal Workers, however, lacked such a provision. In the LIBE Orientation Vote on Seasonal Workers it was proposed to include this right in the general provision on equal treatment.<sup>137</sup> Even if seasonal workers are, in general, considered to be low-skilled workers, it is important that any qualifications achieved should be recognised. For example, work in the tourist sector can require certain qualifications. In the advice given to host countries on how to handle labour migration, the ILO stresses recognition of qualifications.<sup>138</sup>

Equal treatment is also provided for in the Framework Directive and in the Directive on Highly Qualified Employment with regard to education and vocational training. Some possible restrictions with regard to these rights are included in the directives, however. In the Framework Directive they deal with the possibility to impose certain time frames and to restrict the right to education and vocational training for those in employment or those previously employed (2004/114/EC, Article 12(2)(a)). In the Directive on Highly Qualified Employment the possible restrictions are more limited and concern mainly the right to take up study and maintenance grants when studying and requirements regarding place of residence (Article 14(2)).

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<sup>135</sup> EP Orientation Vote (above n 98) amendment 94.

<sup>136</sup> International Labour Office, *Freedom of association – Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4<sup>th</sup> edn, ILO 2006) 214–215.

<sup>137</sup> EP Orientation Vote (above n 98) amendment 94.

<sup>138</sup> ILO 2010 (above n 2) 164 and 171.

It was not, however, proposed in the draft Directives to grant either seasonal workers or inter-corporate transferees any rights in relation to education and vocational training. Due to the temporary nature of their stay, equal treatment with regard to education and vocational training were considered irrelevant by the Commission.<sup>139</sup> The LIBE - proposed to include these rights in the general provision on equal treatment for seasonal workers.<sup>140</sup> Such right was also included in the adopted Directive (Article 23(1)(g)) accompanied with some restriction possibilities (Article 23(1)(g) and (2)(ii)). No similar proposal was included in the LIBE Orientation Vote on intra-corporate transferees. The exclusion of education and vocational training from the equal treatment principle is questionable. Should intra-corporate transferees be excluded from personal and professional development? In the advice given to host countries on how to deal with labour migration, the ILO stresses access to education.<sup>141</sup>

#### 4.6.4 Conclusion

To conclude, in terms of *employment relations* strong protection is provided for in the Framework Directive, in the Directive on Highly Qualified Employment and in the Directive on Seasonal Workers. The possible restrictions related to education and vocational training, however, limit the options somewhat. Any possibility of connecting rights to employment, as is possible in the Framework Directive in this field, reduces the likelihood of the worker reacting to exploitation if such action could result in loss of work. Safeguarding this level of protection for the seasonal workers was of crucial importance however. Such weak protection as was provided for in the proposal from the Commission contained the risk of legalising a sector with a second class of workers. Ensuring formal equality for this often vulnerable workforce is essential for avoiding such a development. The overall strong protection provided for in these Directives can be contrasted with the weak protection provided for with regard to employment relations in the Directive on Intra-Corporate Transfers. No equal treatment is guaranteed with regard to working conditions besides remuneration. The problem with treating intra-corporate transferees as EU posted workers with regard to the level of employment relations has already been discussed. If the minimum level provided for should be that low Member States can take advantage of this possibility when trying to attract third-country based companies. Such a development would not improve cohesion within the EU. The ambition to eliminate competition between EU Member States by unfair means would obviously be difficult to sustain.<sup>142</sup>

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<sup>139</sup> COM(2010) 378 final, 11.

<sup>140</sup> EP Orientation Vote (above n 98) amendment 94.

<sup>141</sup> ILO 2010 (above n 2) 164 and 171.

<sup>142</sup> COM(2007) 637 final, 7.

#### 4.7 Institutional security

##### 4.7.1 Social rights

A number of social and economic rights are included in general Article 12(1)(e–g) on equal treatment in the Framework Directive. Third-country workers shall enjoy equal treatment with nationals with regard to:

- certain aspects of social security, as defined in Regulation (EC) No 883/2004;
- tax benefits, in so far as the worker is deemed to be resident for tax purposes in the Member State concerned;
- access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing as provided for by national law;
- advice services afforded by employment offices.

A right to bring acquired old age, invalidity or death statutory pensions, for survivors and for workers when moving to a third country is also provided for (Article 12(4)). The aspects of social security included in Regulation 883/2004/EC are sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits.

The possible restrictions in the original Commission proposal were relatively far-reaching. The ILO underlined, in its note concerning the negotiations, that equal treatment in the field of social security between nationals and non-nationals is laid down in ILO's flagship convention on social security, the Social Security (Minimum Standards) Convention, 1952 (No. 102), ratified by 21 EU Member States.<sup>143</sup>

The possible restrictions were limited in the adopted directive, however, due to joint efforts by the European Parliament<sup>144</sup> and some Member States, but they can still have substantial effects.<sup>145</sup> It is, for example, possible to restrict social security rights, except for those in employment or for those who have been employed for a minimum period of six months and who are registered as unemployed (Article 12(2)(b)). This seems to indicate that a worker could be left quite unprotected during the first six months of his or her stay if he or she becomes unemployed during that period. Access to goods and services, including housing, can also be restricted, except to those in employment (Article 12(2)(d)). In countries taking advantage of these possible restrictions, it can, for exam-

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<sup>143</sup> ILO comments on the EU single permit directive and its discussions in the European Parliament and Council – The social security and equal treatment/non-discrimination dimensions. 14.2.2011.

<sup>144</sup> European Parliament, Common rights and single work and residence permit for non-EU workers, press release 13.12.2011.

<sup>145</sup> S McLoughlin and Y Pascouau, *EU Single Permit Directive: a small step forward in EU migration policy* (European Policy Centre 2012), 3.

ple, be difficult for a third-country national worker to leave an abusive employer and look for another job during the first six months of the stay.

In the Directive on Highly Qualified Employment the provision on equal treatment with nationals with regard to social rights is framed somewhat differently from the Framework Directive. That is explained mainly by the fact that it was adopted more than two years earlier and Regulation 2004/883 had not yet entered into force. In principle, the social security rights in the Directive on Highly Qualified Employment correspond to those in the Framework Directive. The only possibility to restrict the rights included in this directive is limited to procedures for obtaining housing (Article 16(2)). But, as highly qualified workers are not excluded from the personal scope of the Framework Directive, they should implicitly be eligible for the rights provided in that directive, in situations where these are more favourable.

It was proposed that seasonal workers and inter-corporate transferees should be provided with the same set of social rights provided for in the Framework Directive. Public housing and counselling services afforded by employment services were excluded from the equality provision, however<sup>146</sup> The ILO points to the fact that ensuring equal treatment for seasonal workers generally may require special adjustments to be made, for example, in terms of the qualifying period, the waiting period and duration of payment of unemployment benefits. Provision for such special adjustments has also been laid down in Article 24(4) of ILO Convention No 102. Similar adjustments, therefore, can also be foreseen for migrant seasonal workers, not only in respect of unemployment benefits but also other benefits such as old age pensions.<sup>147</sup> Whether any such adjustments will be made remains to be seen.

In the Commission proposal, no possible restrictions were envisaged. It would, however, be extraordinary if seasonal workers could be totally excluded from certain services. How will they find new employment if they are subject to abuse? In the adopted Directive on Seasonal Workers a number of changes were made in this regard, however. As a compromise advice services on seasonal work afforded by employment offices shall be provided on an equal basis with nationals (Article 23(1)(f)) as well as tax benefits, 'in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned' (Article 23(1)(i)). New restriction possibilities are also provided for. For example, seasonal workers can be excluded from rights to family benefits and unemployment benefits (Article 23(2)(i)). The omission regarding intra-corporate transferees is explained by the temporary nature of their stay. Those rights were therefore considered irrelevant by the Commission.<sup>148</sup> And that starting point seems to have gained support as no substantial amendment was made in the adopted Directive except

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<sup>146</sup> COM(2010) 379 final, Article 16(2)(d).

<sup>147</sup> ILO Note (above n 132) 5.

<sup>148</sup> COM(2010) 378 final, 11.

for the inclusion of a possibility to restrict the right to family-benefit for stays shorter than 9 months (Article 18(3)).

#### 4.7.2 Family reunification

Favourable derogations made from the Family Reunification Directive (2003/86/EC) are included in the Directive on Highly Qualified Employment (Article 15) and in the Directive on Intra-Corporate Transfers (Article 19). These directives are directed towards highly qualified workers and the advantages of being able to attract these particular workers are obviously considered more important than the risks connected to hosting family members. The EU Blue Card holder is also allowed to bring his or her family if moving to a new Member State if the family were already residing in the first Member State (Article 19). Nothing comparable was proposed in the proposed Directive on Intra-Corporate Transfers. The adopted Directive however contain such a right for transfers to a second Member State lasting longer than 90 days (Article 19(1)).

For those workers covered by the Framework Directive or the Directive on Seasonal Workers the above balancing obviously took another turn as no derogations with regard to family members are included in these texts.

#### 4.7.3 Conclusion

In general, the social rights dimension of *institutional security* in the Framework Directive is relatively strong, in particular for workers in employment. The possibility to restrict social rights and the absence of rules facilitating family reunification or permanent stay give the Member States significant room for manoeuvre with regard to the general level of protection. The situation can differ significantly between the Member States and also depends on the eagerness of the Member States to use the possible restrictions.

In the Directive on Highly Qualified Employment the level of *institutional security* is strong. The possible restrictions are left to a minimum. The right to family reunification is facilitated. There are no restrictions on the number of permits issued and accordingly no obstacles to qualifying for a more secure status, as a long-term resident, if the Member States so provides. The worker can even aggregate permits issued in different Member States when qualifying for long-term residence status.

This level of protection is in stark contrast to the proposed provisions for seasonal workers. It is not proposed to give them any special rights with regard to family members. Neither is there any provision for a route to a more secure migrant status. On the contrary, the aim of the Directive is to ensure that these workers return home as soon as their permits expire, as will be further explored in the section on effective enforcement. It is obvious that the level of *institutional security* is much lower in the Directive on Seasonal Workers than in the other directives. The political support for strengthening these provisions is, worryingly, weaker than the support for strengthening the *employment relations* provisions and could further entrench the vulnerable status of this group.

The *institutional security* provided for in the Directive on Intra-Corporate Transfers is partly stronger than the corresponding level for seasonal workers due to the generous family reunification rights. The rest of the provisions, in general, correspond to the level of the proposal on seasonal workers. But as there is no possibility for inter-corporate transferees to change employer, the social rights will have no effect in a transitory situation.

#### 4.8 *Effective enforcement*

Neither the Framework Directive nor the Directive on Highly Qualified Employment contain specific enforcement provisions. The general obligation in Article 4(3) TEU, which stipulates that Member States must take all appropriate measures to ensure fulfilment of, for example, the obligations resulting from the acts of EU institutions, do of course apply. This means that, in general, enforcement rules must guarantee real and effective judicial protection.<sup>149</sup> The more specific requirements in this regard are, however, flexible and not always completely clear.<sup>150</sup> Already in the proposal on Seasonal Workers, in contrast to the other Directives, two provisions on sanctions were included. The enforcement related provisions however developed considerably during the negotiations. There are many different factors that make seasonal workers vulnerable. One of the most important is the short period of their stay and the drastic implications of loss of employment. These circumstances do not encourage workers to ensure that decent employment conditions are maintained. The European Parliament proposed relatively far-reaching amendments in this regard. In order to find a consensus the sanction-related provisions are constructed as a mix of obligatory and optional clauses. The Member states are obliged to provide for sanctions against employers who have not fulfilled their obligations under the directive and those sanctions must be effective, proportionate and dissuasive. For employers who are in serious breach of their obligations under the directive these sanctions must include their exclusion from employing seasonal migrant workers (Article 17(1)). According to the Directive an authorisation must or may be withdrawn when the employer has acted inappropriate in different ways including having been sanctioned in accordance with article 17 (Article 9). Article 17(2) requires the employer to be liable for any outstanding obligations which the employer would have had to respect if the authorisation for the purpose of seasonal work had not been withdrawn

A purely optional clause relates to liability in subcontracting chains (Article 17(3)) whose value totally depends on the Member States' willingness to implement it.

The European Parliament proposed that the Member States should be obliged to put monitoring mechanisms in place and to ensure that adequate inspections are carried out to ensure that the provisions in the Directive are fully respected during the duration of

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<sup>149</sup> Case 14/83 *von Colson* [1984] ECR 1891, para 23.

<sup>150</sup> See more on this topic in J Malmberg (ed) *Effective Enforcement of EC Labour Law* (Kluwer 2003) 33 *et seq.*

the stay.<sup>151</sup> They were quite successful in this regard and the Directive contains a quite robust provision on monitoring, assessment and inspections (Article 24)

It can also be difficult for a seasonal worker, who is only permitted to stay in the country for a short time, to take legal action against the employer for not fulfilling the obligations arising out of the work contract. The proposed Directive on Seasonal Workers therefore included a provision according to which the Member States shall enable third parties to engage either on behalf of or in support of a seasonal worker (Article 25). The possibility to engage third parties in the process is justified by evidence suggesting that seasonal workers are often either unaware of the existence of such mechanisms or are reluctant to use them on their own behalf, as they are afraid of the consequences in terms of future employment possibilities.<sup>152</sup> The LIBE proposed with success to strengthen this provision further by including a provision protecting seasonal workers against dismissal or other adverse treatment by the employer in reaction to a complaint or to any legal proceedings aimed at achieving compliance with this Directive (Article 25(3)).<sup>153</sup> The general lack of effective enforcement provisions in all Directives with, to a certain extent, the exception of the Directive on Seasonal Workers is problematic. The difficulties involved in ensuring that the required provisions are adhered to in employment where the workers are only staying temporarily are clearly illustrated by discussion that preceded the proposed Directive on Enforcement of the Posting of Workers Directive.<sup>154</sup> It is obvious that the Member State must take responsibility in safeguarding that the adopted level of rights will be enforced. Otherwise there is a risk that the provisions agreed upon will have limited value in practice. That is partly a consequence of the weak position of third-country workers when their work permit is connected to a specific employer and the room for changing employer is quite limited.

In the Directive on Intra-Corporate Transfers there is, however, a provision clarifying that the Member States may hold the host entity responsible and provide for penalties for failure to comply with the conditions of admission. Those penalties shall be effective, proportionate and dissuasive (Article 9). According to Article 9(c) the Member States ‘shall lay down measures aimed at preventing possible abuses and at sanctioning infringements’. Those measures shall include ‘monitoring, assessment and, where appropriate, inspection measures, in accordance with national law or administrative practice’. The European Parliament succeeded to include this last part of the provision during the negotiations.<sup>155</sup> It remains to be seen what effect it will have.

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<sup>151</sup> *ibid.*, amendment 96.

<sup>152</sup> COM(2010) 389, 12.

<sup>153</sup> LIBE Orientation Vote (above n 98) amendment 97.

<sup>154</sup> COM(2012) 131 final (above n 32).

<sup>155</sup> Council document 15033/13, 15 October 2013, amendment 96.

## 5 The right to post workers in accordance with GATS

In this last section before the concluding remarks, some points in the WTO General Agreement on Trade in Services (GATS) will be presented. This is to illustrate that the GATS does not seem to include any obstacles to providing a robust equal treatment principle in the EU legal framework on workers from third countries. This is particularly relevant when discussing the EU draft Directive on Intra-Corporate Transfers.

The international trade in services is regulated by the WTO General Agreement on Trade in Services, GATS, which was adopted in 1995. According to GATS a service can be supplied in four different modes (Article I.2 GATS):

- (i) cross border supply;
- (ii) consumption abroad;
- (iii) commercial presence; and
- (iv) presence of natural persons.

GATS is based on a positive listing approach.<sup>156</sup> This means that a member, in general, must make specific commitments which indicate to what extent the Member will be bound by the specific provisions in the treaty.

GATS divides services into 12 broadly defined sectors. These, in turn, are divided into a number of subsectors.<sup>157</sup> Each Member State can choose to commit itself to a limited number of sectors and subsectors and *to a limited extent*. In relation to a sector in which a Member State has made commitments, foreign service providers in that sector must, to the extent of the commitment, be granted access to that particular market (Article XVI GATS). Once a service is allowed access to a certain market, it must be treated no less favourably than national service providers (Article XVII GATS). Discriminatory treatment is considered to undermine market access for foreign competitors by distorting competition.<sup>158</sup> The Member States, however, retain flexibility and can decide to limit, qualify and condition equal market access.

Also important is the most-favoured-nation (MFN) treatment obligation in Article II GATS, which is fundamental and general and applies to all commitments made. It basically means that any market access or national treatment offered to one Member should immediately be granted to all other WTO Members as well. Only if an original WTO Member scheduled an exemption from the MFN obligation in 1994 can that Member deviate from the MFN principle.<sup>159</sup>

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<sup>156</sup> Panizzon (above n 16) 12.

<sup>157</sup> Business services, communication services, construction, distribution, education, environmental services, financial services, health and social security, tourism and travel, recreational and cultural services, transport, other. World Trade Organisation doc. MTN.GNS/W/120, 10 July 1991.

<sup>158</sup> S Tans, 'The unwanted service provider: implementation of WTO and EU liberalisation of service mobility in the Dutch legal order' *Refugee Survey Quarterly* 2011, 1, 3–4.

<sup>159</sup> Panizzon (above n 16) 14.

Mode 4 – the presence of natural persons – is the mode for provision of services which will be discussed in this chapter. Mode 4 covers natural persons who are service suppliers of a Member and natural persons who are employed by a service supplier, in respect of the supply of a service (Article 1 Annex on movement of natural persons supplying services under the Agreement, hereafter referred to as ‘Annex’). The first group covers self-employed workers who are remunerated directly by the customers.<sup>160</sup> This discussion will be limited to the second group, which covers workers employed and remunerated by the service supplier. It is, however, not necessary for the service supplier to have established a commercial presence in the territory where the service is delivered. Because of Mode 4’s connection to migration and domestic labour market policies it has been described as an ‘almost revolutionary approach’ to place Mode 4 in the multilateral framework of the WTO.<sup>161</sup> It is, therefore, not surprising that its scope is fairly limited. The Annex states that the Agreement shall not apply to measures affecting natural persons seeking *access to the employment market* of a Member, nor shall it apply to measures regarding citizenship, residence or *employment on a permanent basis* (Article 2 Annex). The exclusion of those seeking access to the employment market of a Member State in our case simply means that the worker must already be employed by a service provider in another country to be covered by the provisions. There is no provision for unemployed persons to seek employment, for example, in an establishment set up through Mode 3 on commercial presence.<sup>162</sup> The regime is oriented towards foreign employment as foreign employment forms part of trade in services under GATS, while domestic employment, which is qualified as ‘labour migration’, is not.<sup>163</sup>

Moreover, the persons covered by Mode 4 shall only stay in the other members’ territory on a temporary basis. The GATS itself does not provide any information on how to define a permanent stay. The decision has to be made on a case-by-case basis. The members can limit the commitments on Mode 4 to specific categories of persons (Article 3 Annex). The categories of persons covered are mainly highly qualified, intra-corporate transferees and business visitors.<sup>164</sup> Others are contract service suppliers and other high-level management officials/specialists. The commitments made in relation to the different categories of persons can include time limits for periods of stay. These range from three months to five years. But a majority of commitments do not even include a maximum time limit.<sup>165</sup>

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<sup>160</sup> J Bast, ‘Annex on Movement of Natural Persons Supplying Services; Under the Agreement’ in R Wolfrum, P-T. Stoll, C Feinäugle (eds), *WTO – trade in services*. Max Planck Commentaries on World Trade Law, Vol. 6 (Brill 2008) 573, 579.

<sup>161</sup> Bast (above n 160) 575.

<sup>162</sup> *ibid.*, 586.

<sup>163</sup> Panizzon (above n 16) 27.

<sup>164</sup> World Trade Organization, *World Trade Report 2004. Exploring the linkage between the domestic policy environment and international trade* (WTO 2004), 46.

<sup>165</sup> *ibid.*, 55.

The EU commitments with regard to Mode 4 are, in general, very limited and oriented towards highly skilled workers.<sup>166</sup> The potential of the application of Mode 4 is therefore far from being realised. The ILO has raised concerns about Mode 4 permitting differential treatment of workers, leading to discrimination.<sup>167</sup> A major reason for taking up such limited commitments for Mode 4 seems to be fears about social dumping and competition with the national workforce.<sup>168</sup> It has been suggested that the GATS' scheduling structure is inadequately prepared for managing the risks associated with increased cross-border movement of persons, in particular unskilled labour; also, the binding of market access commitments on a most-favoured-nation clause does not allow for flexibility, nor the possibility of control.<sup>169</sup>

The EU Member States, however, have used the flexibility provided with regard to market access in order to protect their domestic workforce from unfair competition.<sup>170</sup> Conditions such as quotas and economic needs tests are frequent.<sup>171</sup>

The EU has ensured wage parity and equal working conditions for GATS migrants.<sup>172</sup> A footnote to the consolidated schedule presented in 2006 reads: 'All other requirements of Community and Member States' law and regulations regarding entry, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages, as well as collective wage agreements.'<sup>173</sup>

This condition gives the EU Member States the right to make the entry of Mode 4 service suppliers conditional on wage and working conditions based on safeguards connected to the application of national laws and collective agreements.

One question to be dealt with here is whether Article 1(4) of the Posting of Workers Directive has any role to play in relation to the GATS commitments. According to Article 1(4), undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. More favourable treatment should be understood as a level of protection below the minimum level provided for in the Directive. It seems, however, that this provision is directed towards service providers operating in the EU Member States outside the GATS commitments or any other agreements concluded by the EU. Recital 20 in the preamble of the Directive states that the Directive should not affect the agreements concluded by the Community with third countries. As international agreements ratified by the Community take prece-

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<sup>166</sup> Tans (above n 158) 23 and 26.

<sup>167</sup> ILO 2010 (above n 2) p 56.

<sup>168</sup> Tans (above n 158) 27.

<sup>169</sup> Panizzon (above n 16) 9.

<sup>170</sup> *ibid.*, 14.

<sup>171</sup> WTO Report 2004 (above n 179) 55.

<sup>172</sup> Tans (above n 158) 28.

<sup>173</sup> WTO, Council for Trade in Services, EU Consolidated GATS Schedule, footnote 17.

dence over EC legislation<sup>174</sup> Article 1(4) PWD does not seem to be applicable within the GATS context.

To sum up: the commitments related to GATS generate a very limited flow of workers.<sup>175</sup> The scheme is connected to a specific employer and there is no provision for permanent stay. The possible length of the stay differs between the EU Member States and between the different categories of worker. After a certain length of stay, it should be possible for the worker to apply for a long-term residence permit. No specific rules on family reunification are included. The EU Directive on Family Reunification could apply. A few things should be noted, however. Mode 4 is not about free movement of workers but about free movement of services – it does not generate any independent status for the worker – the presence on other members' territory is totally dependent on the workers' contract of employment with the service provider.<sup>176</sup> Nevertheless, the Member States ensure that these workers will be treated on an equal footing with national workers. Mode 4 workers shall, according to the EU25 commitments, be provided with the same level of working conditions, pay and social security protection as the national workforce. The commitments in relation to GATS accordingly do not prevent the level of working conditions and pay provided for inter-corporate transferees being based on an equal rights principle in relation to nationals.

## 6 Concluding remarks

Third country national workers have been operating on the EU labour market for quite some time. Until recently, the admission criteria and working conditions for this workforce were dealt with mainly on a national basis. Since 1999 the EU has adopted common rules in this area in order to make the EU labour market more attractive for third-country nationals and create a level playing field for everyone.

The starting point for initiating this regulatory regime was that the EU needs workers from third countries. It may otherwise be difficult to maintain existing levels of eco-

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<sup>174</sup> S Peers, 'EU Migration Law and Association Agreements' in B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security-New Challenges for EU External Relations* (Brussels University Press 2008) 59.

<sup>175</sup> See, *ia*, Tans (above n 158) 13. He points out that the GATS Mode 4 type of work permit has never been granted in the Netherlands.

<sup>176</sup> The EU has also concluded agreements with third countries which include provision of services. In the majority of those agreements the EU has accepted the entry, residence and work of employees of agreement countries in subsidiaries and branches based in the EU where the employees meet the criteria of key personnel without time limits. For an overview from 2007 on the different agreements, see E Guild, 'European Union and Third Party Service Trades: Four Essays on EU services', in *Quaker United Nations Office*, April 2007, 11 *et seq* and 24.

conomic productivity, to sustain pensions and social security systems and to find the caregivers required to meet the needs of an ageing population.<sup>177</sup> A common EU playing field is supposed to maximize the positive effects for all involved.

This overview has illustrated how an initially strong equality principle with regard to working conditions and pay for workers from third countries, proposed by the Commission in 2001, has been replaced by a segmented and fragmented legal framework that treats workers differently. The Member States' fear of losing control over their borders can explain this development, as well as their fear of sponsoring a legal framework that would lead to effects contrary to those anticipated in terms of national unemployment and burdens on welfare systems. Each proposal discussed has led to different results with regard to where the vertex is established.

It is clear that the presence of a workforce from third countries in the EU Member States has effects on both national labour markets and the functioning of the EU labour market. These effects are likely to increase as this part of the workforce is intended to grow. The effects will evidently depend on how the conditions for their presence are framed.

A third-country national worker will have an inherent disadvantage in comparison to the national workforce, as well as to EU-based workers. As long as third-country national workers are not provided with a right to free entrance to the EU labour market an employer has to await and to a certain extent be involved in an admission procedure before the worker can take up employment. From the employer's perspective this can be characterized as an administrative burden and accordingly a disadvantage in relation to EU-based workers. This leads to the conclusion that the added value for the employer in choosing a third-country national worker must be found somewhere else. The starting point for the Commission is that the employer in these cases does not have any choice because the targeted workforce is not available within the EU. That could of course be the case, but there can be other advantages connected to a third-country national worker that could favour their position in relation to existing EU workers. One such advantage could be lower labour costs. When calculating labour costs the rights provided to third-country national workers with regard to working conditions and pay are of course crucial. But as has been discussed in this chapter other conditions connected to a work permit can also play an important role. The roles of the *admission conditions* and of *institutional security* are not insignificant. If workers have no practical means to enforce them, their rights mean little.

It has been illustrated that different categories of third-country national worker have been provided with different statuses in this regard. Highly qualified workers and workers that will be covered by the Framework Directive will be treated equally with nation-

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<sup>177</sup> Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration (Global Commission on International Migration (GCIM) 2005) 6.

als with regard to working conditions and pay. After intense discussions such equality was also provided for the Seasonal Workers. The admission conditions and institutional security for workers covered by the Directive on Highly Qualified Employment give them quite a good chance of upholding their rights. For the workers covered by the Framework Directive the picture is less clear as the admission conditions are not dealt with at EU level and the institutional security provided for is not as strong as for the workers covered by the Directive on Highly Qualified Employment. This will lead to a situation in which the Member States can decide how robust they want the equality principle to be for these workers. The result will finally depend on how the Member States frame their admission conditions and whether they strengthen institutional security for the different groups of migrant workers. The provisions in the Framework Directive cover all legal third-country national workers except certain groups such as seasonal workers and intra-corporate transferees. All low- and medium-skilled workers admitted to an EU Member State to work will be affected by the choices made by the Member States in this regard. The Member States accordingly will play a very important role when they take these decisions. If these workers are provided with a robust equality principle the likeliness is that the ambition that third-country workers will not oust EU workers will be realised.

If an employer is considering whether to buy a service from a company in another Member State or employ third-country national workers covered by the Framework Directive or the Directive on Highly Qualified Employment to perform a particular service the costs connected to the worker are still likely to be lower if the workers who perform the service are intra-EU posted in relation to third-country nationals as the Posted Workers Directive does not include an equality principle with regard to working conditions and pay.<sup>178</sup> But if the employer chooses between a particular EU worker from another Member State and a third-country national worker the cost differences are more difficult to predict, in particular for those covered by the Framework Directive. The possibility for the employer to reduce wages will be affected by the status provided for third-country national workers according to the admission procedures and the level of institutional security. It is, however, clear that EU nationals are provided with a more robust equality principle than any third-country national discussed in this chapter when exercising their right to movement as a worker because, among other things, of their right to stay in another Member State to look for a work for several months and the broad coverage of rights that are included in the equality principle.<sup>179</sup>

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<sup>178</sup> See Evju and Novitz, Chapter 2, this volume.

<sup>179</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1 Articles 1–10; Case C-292/89 *Antonissen* [1991] ECR I-745; 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,

It is easy to conclude that the level of protection provided for seasonal workers in the proposed Directive on Seasonal Workers was likely to bring much lower labour costs in connection to third-country seasonal workers than to EU-based seasonal workers as no equality principle with regard to working conditions and pay was included in the draft. The Commission's starting point when proposing this text, however, was that no EU workers are willing to conduct such seasonal work. The risks involved in relation to the EU-based workforce are thus perhaps not that dangerous. On the other hand very poor working conditions can be established in the seasonal employment sector. Hopefully this scenario will be avoided through all the important amendments agreed on in the adopted Directive which are likely to strengthen the position of the seasonal worker.

The outcome of a comparison of the wage costs of intra-EU posted workers and intra-corporate transferees is however not evident. Intra-corporate transferees as a minimum are provided with the same level of working conditions as intra-EU posted workers except for remuneration where equal treatment with nationals is required, but their general status is weaker. They can, for example, not leave an exploitative employer and stay as a job seeker. The categories covered by the Directive on Intra-Corporate Transfers are limited mainly to highly qualified workers, however. The risks involved in this scenario are therefore quite low. It is clear, however, that the Directive on Intra-Corporate Transfers risks exporting the intra-EU posting level to new categories of workers. Again, to the extent as the level of protection provided for in the Posting of Workers Directive is upheld in the Directive on Intra-Corporate Transfers it is open to the Member States to decide if they want such a development or whether they want foreign companies to compete on the same footing as national companies. It is, however, important to keep in mind that through this low minimum level the Member States can choose whether they want to attract multinationals by giving them an opportunity to provide their seconded key personnel with worse working conditions than their national colleagues.

The EU legal framework discussed in this chapter will affect both the national labour markets and the functioning of the EU labour market. The starting point when this legal exercise started was a very fragmented scene. All Member States could adopt the legal frameworks on third-country nationals they wanted. From that perspective the new EU legal framework might bring a more level playing field. The effect will depend on the extent to which the new legal framework will affect the existing national legal frameworks.

All member states must, however, adopt procedures connected to the permits discussed. New avenues into the EU labour market can thus be established. Low-wage EU countries could for example be providers of third-country seasonal and low-skilled workers.

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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, Articles 7(3), 14(4)(b).

In that way extra- and intra-EU movements can interact in order to keep labour costs down in certain sectors.

It is obvious that the different levels of protection provided for the different working groups and the flexibility included in the adopted Directives can establish new ground for regime shopping. Such a development will nourish those actors who are interested in pursuing a race to the bottom when it comes to labour costs. The most effective way to combat such a development would probably be to establish a very robust equality principle applicable to all actors on the EU labour market.

It is interesting that the Member States' fear of making robust commitments in the social field makes third-country workers more vulnerable to exploitation. Through these mechanisms third-country workers are more likely to be preferred by employers who are striving to cut labour costs and thereby oust EU workers.

It is, of course, problematic if an EU regime for third-country workers is being created that does not establish a legal framework robust enough to combat exploitation and social dumping. That might have adverse effects on the functioning of the EU labour market. A basic requirement ought to be that third-country nationals are guaranteed the same employment and working conditions as the national workforce. A heavy responsibility thereby rests on the Member States to complement the requirements of the directives with robust provisions safeguarding equality. The directives are, to varying degrees, minimum directives and weaknesses in the EU legal framework may, to a certain extent, be overcome by national measures.

# Free Movement and Labour Rights: Squaring the Circle?

Catherine Barnard\*

## 1 Introduction

When the Treaty of Rome was signed in 1957, its main focus was on creating a single market where free movement of goods, persons, services and capital could be ensured. It therefore regarded labour above all as a factor of production in respect of which the principle of free movement was to apply. The Treaty did contain a Title on Social Policy but its content was derisory, with only one substantive provision which labour lawyers would recognize as an employment right – on equal pay for men and women. The reasons for this reticence were twofold: first, that labour law was seen as a domestic issue, not to be interfered with by the EU. Second, the development of social policy was seen as a consequence of the realization of the single market, not an essential element of achieving that single market.

Subsequent Treaty amendments and the emergence of a body of secondary legislation in the form of various directives and other instruments helped to adjust this perspective on labour issues, but nevertheless, by the late 2000s, no comprehensive labour code had emerged at EU level. Whole areas of labour law which were intensively regulated at Member State level, in particular the right to strike, were formally excluded from the legislative competences of EU law-making bodies, at least under the social provisions in Article 153.<sup>1</sup> Other areas of labour law, including individual rights on termination of employment, were within the competences of the Union, but had failed to become EU directives, largely because of a lack of political will. Despite this, it could be convincingly argued that by the early 2000s European labour law had become a distinctive body of norms and principles which had achieved ‘an identity going beyond [EU] law and national labour law systems’.<sup>2</sup> The patchwork of EU rules on social policy, complemented and supplemented by domestic rules, is something that the EU has become

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\* The author has been involved in a number of the conferences organized by the Commission examining the implications of the decisions in *Viking* and *Laval* and discussions about the content of the 2012 proposals.

<sup>1</sup> Article 153(5) TFEU (Treaty on the Functioning of the European Union (Consolidated version) [2012] OJ C 326/47).

<sup>2</sup> B Bercusson, *European Labour Law* (2<sup>nd</sup> ed, Cambridge UP 2009) 15.

proud of, and the Commission regularly talks of the ‘European Social Model’ which it views as an important element of connecting the EU with its citizens.<sup>3</sup>

However, that very social model is now under threat. The threat stems from a variety of sources. First, there have been concerns expressed for over a decade that the existing European social model is too rigid, that it is not capable of adapting to the changing nature of production, and that it prioritizes ‘insiders’ (those on a standard, permanent contract) over outsiders (those on atypical contracts and those without work altogether).<sup>4</sup> The Commission has led attempts to achieve the holy grail of reconciling flexibility with security (so-called flexicurity).<sup>5</sup> While the Commission is adamant that security should not be sacrificed on the altar of flexibility, many think the reality is somewhat different. This challenge is ongoing and continues to underpin the reforms to national social policy required by the EU as part of the European semester programme.

The second threat has come from the crisis which has exposed the vulnerability of national labour law systems. The limits on government expenditure in order to help balance the books have tied the hands of national governments to spend their way out of the crisis. This has forced them to look to other sources to deliver savings: labour law has become a prime target to achieve ‘internal devaluation’. For those states in receipt of an EU/IMF bailout the threat to domestic labour law regimes is particularly acute: those states are already in the process of making radical cuts to their unfair dismissal and redundancy regimes while also removing the extension effect of collective agreements and cutting wages, especially in the public sector.<sup>6</sup>

The third threat came from an unexpected quarter: the European Court of Justice. Traditionally seen as a supporter of the development of EU social policy,<sup>7</sup> its decisions in

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<sup>3</sup> ‘The social dimension is thus a core component of the internal market which cannot function properly without a strong social dimension and the support of citizens’: ECOSOC Opinion on ‘The Social Dimension of the internal market’ [2011] OJ C 44/90.

<sup>4</sup> See eg COM(2006) 708 final, Green Paper – Modernising labour law to meet the challenges of the 21st century; COM(2007) 359 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards Common Principles of Flexicurity: More and better jobs through flexibility and security.

<sup>5</sup> See eg COM(2007) 359 final.

<sup>6</sup> See European Parliament resolution of 13 March 2014 on the Employment and social aspects of the role and operations of the Troika (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007 (INI); ETUI, *Benchmarking Working Europe* 2014; C Barnard, ‘The Financial Crisis and the Euro Plus Pact: A Labour Lawyer’s Perspective’ (2012) 41 *Industrial Law Journal* 98; A Koukiadaki and L Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’ (2012) 41 *Industrial Law Journal* 276.

<sup>7</sup> Through its generally pro-employee reading of, for example, the equality legislation; see eg Case C–13/94 *P v S and Cornwall County Council* [1996] ECR I–2143; Case C–144/04 *Mangold* [2005] ECR I–9981.

*Viking* and *Laval*<sup>8</sup> came as a shock. As is now well known, these cases pitted the EU's four freedoms against national social policy, to the detriment of national rules. In some ways this collision should have been anticipated following the Court's embrace in the 1990s of the *Säger*<sup>9</sup> 'market access' or 'restrictions' approach. This approach largely replaced the discrimination analysis which the Court had previously used, an approach which managed to maintain the careful balance between the preservation of national labour law and EU rules on free movement. Since most national employment rules were non-discriminatory on the grounds of nationality they did not breach EU law. By contrast, the market access/restrictions approach asks whether the national rule hinders/restricts the ability of the out-of-state actor to gain access to the market or to exercise freedom of movement, irrespective of any discriminatory treatment. So non-discriminatory national rules permitting strike action, while lawful under the discrimination analysis, become presumptively unlawful under the market access approach because they impede an entrepreneur's freedom to, for example, reflag its vessel.<sup>10</sup>

A full scale application of the market access test, combined with the doctrine of supremacy of EU law, has the potential to threaten the maintenance of the entire edifice of national labour law. This risk was more than amply demonstrated by the decisions in *Viking* and *Laval*. These cases, and their implications, are considered in section 2 below. For the present it is sufficient to note that against the backcloth of the flexicurity debates and the Eurzone crisis, the Court's failure in *Viking* and *Laval* to appreciate the domestic industrial relations context of the dispute, and its unwillingness to engage in a genuine balancing between the economic and social dimension of the EU, meant that these cases became totemic for the trade union movement of all that was bad about the EU.<sup>11</sup>

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<sup>8</sup> Case C-438/05 *Viking* [2007] ECR I-10779, and Case C-341/05 *Laval* [2007] ECR I-11767.

<sup>9</sup> Case C-76/90 *Säger* [1991] ECR I-4221, para. 12, Article 56 TFEU required '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' (emphasis added).

<sup>10</sup> For a discussion of the meaning of the market access approach, see eg J Snell, 'The notion of market access: a concept or a slogan?' (2010) 47 *Common Market Law Review* 437; C Barnard and S Deakin, 'Market access and regulatory competition' in C Barnard and J Scott (eds), *The Legal Foundations of the Single Market: Unpacking the Premises* (Hart Publishing 2002); G Davies, 'Understanding market access: exploring the economic rationality of different conceptions of free movement law' (2010) 10 *German Law Journal* 673; E Spaventa, 'From *Gebhard* to *Carpenter*: towards a (non-)economic European Constitution' (2004) 41 *Common Market Law Review* 743, 757–758.

<sup>11</sup> TUC's response to the EU Commission's Consultation on the Single Market Act, [http://circa.europa.eu/Public/irc/markt/markt\\_consultations/library?l=/single\\_market\\_act/registered\\_organisations/tuc\\_enpdf/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/single_market_act/registered_organisations/tuc_enpdf/_EN_1.0_&a=d).

In the light of the criticisms levelled at the Court, the remainder of the chapter is devoted to considering the options available to the Court of Justice to help address the problem generated by *Viking* and *Laval*. I identify four options for reform. I will consider the advantages and disadvantages of each option in turn, particularly in light of the Commission's (doomed) proposal for a so-called Monti II Regulation (section 3). Section 4 concludes. Section 2, however, begins with a brief consideration of the cases, in so far as is relevant to the argument in this chapter, and the action proposed by the Commission in Monti II.

## 2 *Viking, Laval and Monti II*

### 2.1 *The decisions*

The decisions in *Viking* and *Laval* and their progeny, *Rüffert* and *Luxembourg*,<sup>12</sup> unsettled the general deference shown in the past by the Court to national labour law rules.<sup>13</sup> As is well known, in *Viking* a Finnish employer challenged a threat by Finnish trade unions to take industrial action, protesting about the re-registering of a Finnish vessel in Estonia, as being contrary to Article 49 TFEU on freedom of establishment. In *Laval*, a Latvian service provider refused to respect Swedish collectively agreed terms and conditions for the Latvian workers it was 'posting' to Sweden to fulfil a building contract it had won. *Laval* would respect only Latvian terms of employment (which gave it a competitive advantage). The Swedish trade unions called their members out on strike (in accordance with Swedish law) and the Latvian service provider (supported by the Swedish employers) argued that the industrial action contravened Article 56 TFEU on free movement of services.

The facts thus presented an incendiary cocktail: (1) a collision between EU fundamental economic rights on the one hand and national fundamental social rights on the other; and (2) a collision between the rights and expectation of workers from the new Member States as opposed to the interests of those from the old Member States. The Court of Justice could have avoided the problem by saying, as it had done in previous cases that EU law did not apply in these situations.<sup>14</sup> However, it refused to take this easy route and insisted that Articles 49 and 56 TFEU did in principle apply. Furthermore, and more controversially, it said that these Treaty provisions, traditionally viewed as being addressed to states, also applied to trade unions. It then used the *Säger* market access approach and found that the collective action was a 'restriction' on free movement in both cases and so breached Article 49 TFEU (*Viking*) and Article 56 TFEU (*Laval*). The collective action could be justified on the grounds of worker protection ie where the

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<sup>12</sup> Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg* [2007] ECR I-4323.

<sup>13</sup> Case 167/73 *Commission v France* [1974] ECR 359, paras 44–45.

<sup>14</sup> See eg Case C-67/96 *Albany* [1999] ECR I-5751.

jobs or conditions of employment of the trade union members were jeopardised or under serious threat (although this was unlikely on the facts in *Viking*)<sup>15</sup> but, in the view of the Court, the collective action was probably not proportionate in *Viking*, and was definitely not in *Laval*.

There is now an extensive body of literature considering every aspect of these cases.<sup>16</sup> For the purposes of this chapter I want to highlight three points. First, although the Court claimed to be striking a balance between economic and social rights,<sup>17</sup> in practice the structure of the *Säger* market access approach inevitably prioritised the economic right to free movement over the social interest. Once a rule is found to be a restriction it is presumptively unlawful. The burden then shifts to the defendant (ie the trade unions) to show not only that the collective action in question can be justified in principle, now according to significantly tightened criteria, but also that its application in the particular context in question is proportionate. More recently this approach has been criticized by the European Committee of Social Rights when considering a complaint from the Swedish trade union movement on the Swedish government's rule changes following the decision in *Laval*:<sup>18</sup>

‘... the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other states – which constitute important and valuable economic freedoms within the framework of EU law – cannot be treated, from the point of view of the system of values, principles and fundamental right embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers’.

Second, the Court applied the proportionality principle to industrial action. While some systems do consider whether the strike action is proportionate, the proportionality principle is applied by labour courts against a constitutional context which guarantees a

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<sup>15</sup> It seems that collective action is not possible to *improve* jobs and conditions, the traditional role of collective action.

<sup>16</sup> See eg chapters 17–22 of 10 *Cambridge Yearbook of European Legal Studies 2007–2008* (C Barnard, ed); 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; C Kilpatrick, ‘*Laval*’s regulatory conundrum: collective standard-setting and the Court’s new approach to posted workers’ (2009) 34 *European Law Review* 844; 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>17</sup> eg *Laval*, para 105.

<sup>18</sup> Complaint No 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Decision on admissibility and merits, 3 July 2013, public on 20 November 2013, para 122.

right to strike. Other systems, such as the British system, which lay down strict procedural conditions before strike action can take place, do not apply a substantive proportionality principle (this is considered further in section 3 below). Many in the UK trade union movement are concerned that the application of the proportionality principle, now required by *Viking* where a transnational dispute is at issue, makes it even more difficult lawfully to call their members out on strike. They worry about the paradox that the more disruption the strike action causes, and thus the more successful it is from the perspective of the trade union, the less likely it is to be proportionate. They worry, too, that if they misread the rules laid down in *Viking* and do take action which proves to be disproportionate they will be liable in uncapped damages which is likely to bankrupt the union. This is why *Viking* and *Laval* are seen as having a chilling effect on industrial action.<sup>19</sup>

My third point is that in *Viking* and *Laval* the Court identified the right to strike as a fundamental right. However, it then appeared to strangle that right at birth. It did this in two ways. On the one hand, it did not protect the right to strike as such. Rather, it protected the ‘notion – inherent in that fundamental right – of protection of workers’.<sup>20</sup> On the other hand, the Court interpreted the limitations on the right in such a way as largely to subsume the right. The limitations, as identified in Article 28 of the Charter,<sup>21</sup> are that the right to strike is subject to the rules laid down by national law *and* EU law. The limitations laid down by national law rules relate to, for example, balloting and notice requirements. Following *Viking* and *Laval* the limitations laid down by EU law are potentially more difficult for a trade union to satisfy: the strike can be justified only where jobs or conditions of employment are ‘jeopardized or under serious threat’ (*Viking*) or where the terms of the complex Posting of Workers Directive<sup>22</sup> are satisfied (*Laval*), and where the trade unions have exhausted all other means (*Viking*). As the British Airlines Pilots Association (BALPA) discovered to its cost in the High Court of England and Wales, it is difficult to satisfy these thresholds and the liability in damages is potentially enormous.<sup>23</sup> No wonder John Monks, General Secretary of the European Trade

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<sup>19</sup> L Hayes, T Novitz and H Reed, ‘Applying the *Laval* quartet in a UK context: chilling, ripple and disruptive effects on industrial relations’, in A Bucker and W Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Ruffert* (ETUI 2011) 195.

<sup>20</sup> Trstenjak AG, Case C-271/08 *Commission v Germany* [2010] ECR I-7091, para 181.

<sup>21</sup> Charter of Fundamental Rights of the European Union (Consolidated version) [2012] OJ C 326/391.

<sup>22</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>23</sup> K Apps, ‘Damages claims against trade unions after *Viking* and *Laval*’ (2009) 34 *European Law Review* 141. The ILO’s committee of Experts is critical of the EU’s position, cf Report III (1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 99th Session, 2010, 209 reiterated in

Union Confederation (ETUC), said to the European Parliament in February 2008 that ‘... we are told that the right to strike is a fundamental right but not so fundamental as the EU’s free movement provisions. This is a licence for social dumping and for unions being prevented from taking action to improve matters’.<sup>24</sup>

## 2.2 *The political response to the decisions*

There has been on-going concern at all levels about these decisions. For the trade union movement the cases have become totemic of the threat to social policy by the EU, an EU which has, as an express objective, the raising the standard of living. Employers, especially from the EU-8, are now faced with an unpalatable dilemma: take advantage of their competitive position and the rulings in *Viking* and *Laval* to challenge labour market regulations of the host Member States or avoid the burden of litigation and industrial unrest and accept the rules of the host state. There is evidence that many adopt the latter approach;<sup>25</sup> but when they fight back, decisions like *Viking* and *Laval* ensue.

The Commission was well aware of these concerns and organized various conferences to discuss what could be done.<sup>26</sup> The trade unions who consider the judgments ‘anti-social’ called for a Social Progress Protocol to be included in the Treaties giving primacy to social interests over economic ones, but the employers have rejected this.<sup>27</sup> The intractability of these problems was summed up by Mario Monti in his 2010 report on the single market:<sup>28</sup> the Court rulings, he said, exposed ‘the fault lines that run between the single market and the social dimension at national level’. They did no more than revive ‘an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and breaking up regulatory barriers is code for dismantling social rights protected at national level’.

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2011 and 2012. See also K Ewing, *Fighting back: resisting ‘union busting’ and ‘strike breaking’ in the BA dispute* (Institute of Employment Rights, 2011); S Evju, ‘Fundamental Social Rights vs. Fundamental Freedoms’ (2013) *Europäische Zeitschrift für Arbeitsrecht* 312, 317–319. More generally, see J Malmberg, ‘Trade union liability for EU-unlawful collective action’ (2012) 3 *European Labour Law Journal* 5; Bruun and Malmberg, Chapter 6, this volume.

<sup>24</sup> [http://www.etuc.org/IMG/pdf\\_ETUC\\_Viking\\_Laval\\_-\\_resolution\\_070308.pdf](http://www.etuc.org/IMG/pdf_ETUC_Viking_Laval_-_resolution_070308.pdf).

<sup>25</sup> 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>26</sup> See eg <http://ec.europa.eu/social/main.jsp?langId=en&catId=471&eventsId=347&further-Events=yes>; [http://www.eu-spocs.eu/index.php?option=com\\_content&view=article&id=217:single-market-forum-krakow-declaration&catid=9:news&Itemid=56](http://www.eu-spocs.eu/index.php?option=com_content&view=article&id=217:single-market-forum-krakow-declaration&catid=9:news&Itemid=56).

<sup>27</sup> For their divergent views, see The Report on joint work of the European social partners on the ECJ rulings in *Viking*, *Laval*, *Ruffert* and *Luxembourg* cases, judgment of 19 March 2010 [http://www.etuc.org/IMG/pdf\\_Joint\\_report\\_ECJ\\_rulings\\_FINAL\\_logos\\_19.03.10.pdf](http://www.etuc.org/IMG/pdf_Joint_report_ECJ_rulings_FINAL_logos_19.03.10.pdf).

<sup>28</sup> [http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf).

In other words, there continues to be a major division between those who think economic freedoms should prevail, on the one hand, and those who think social rights should prevail on the other. The former group derives support from the original conception of the Treaty: that social progress would be the consequence of greater integration and, in particular for the EU-8 states, progress will be attained by giving them access to the markets of the wealthier EU-15.<sup>29</sup> The latter group, by contrast, would argue that daily experience does not reflect the model on which the original Treaty is based,<sup>30</sup> and that social progress has not gone hand-in-hand with market creation. Further, they would point to the revised Treaty which now mandates a greater balance between economic and social rights, in particular Article 3(3) TEU<sup>31</sup> which refers to a ‘social market economy’, and to the Charter which puts economic and social rights on (more or less) the same footing.<sup>32</sup> This suggests that economic and social rights need to be squared, not put in opposition, and that the Court’s interpretation of Articles 49 and 56 TFEU does not deliver this.

The Commission therefore committed itself, in the Single Market Act 2011, to presenting two proposals in this field. The first, an enforcement directive, intended to improve the application and enforcement of the Posting of Workers Directive.<sup>33</sup> This is currently (April 2014) working its way through the legislative process. The second, the Monti II Regulation,<sup>34</sup> inspired by the so-called Monti I Regulation in the field of free movement of goods,<sup>35</sup> introduced an alert mechanism requiring Member States to notify the Member State of establishment or origin of the service provider and/or other relevant Member States concerned, as well as the Commission, ‘whenever serious acts or cir-

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<sup>29</sup> D Kukovec, “Myths of Social Europe: The *Laval* judgment and the prosperity gap”, talk delivered to the Harvard Law School, 16 April 2010 available on SSRN: “... like Wittgenstein’s duck-rabbit picture, what appears as economic is social and what social is economic, depending on the angle from which we see the dilemma. The debate could just as well be framed in terms of social rights of Latvian workers against the Swedish interpretation of the freedom of movement provisions which ignores their realisation”.

<sup>30</sup> See also the Krakow Declaration 3-4 October 2011 for a clear statement of this: [http://ec.europa.eu/internal\\_market/top\\_layer/docs/simfo-declaration-op-conclusions\\_en.pdf](http://ec.europa.eu/internal_market/top_layer/docs/simfo-declaration-op-conclusions_en.pdf).

<sup>31</sup> Treaty on European Union (Consolidated version) [2012] OJ C 326/13.

<sup>32</sup> See also the Solemn Declaration on Workers’ Rights, Social Policy and other issues, European Council 18/19 June 2009, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/108622.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf).

<sup>33</sup> COM(2012) 131 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

<sup>34</sup> COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services:.

<sup>35</sup> Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States [1998] OJ L 337/8.

cumstances affecting the effective exercise of the freedom of establishment or the freedom to provide services which could cause grave disruption to the proper functioning of the internal market and/or which may cause serious damage to its industrial relations system or create serious social unrest in its territory or in the territory of other Member States'.<sup>36</sup>

Although this was its intended purpose, in fact the Regulation really provided guidance as to when trade unions can use the right to strike in the case of cross-border operations. It was this aspect of the proposal which met with howls of protests from a number of quarters, in particular the trade union movement.<sup>37</sup> The proposal also faced fervent political opposition: it was the first draft legislative measure to be subject to the Lisbon yellow card procedure.<sup>38</sup> This, combined with the legal basis of Article 352 TFEU which requires unanimous voting,<sup>39</sup> had the effect of killing the proposal.<sup>40</sup>

However, the proposal continues to be of interest for what it says about reconciling economic and social rights. Further, given that its drafting was already more in the style of an interpretative communication<sup>41</sup> than a directly effective measure, it might enjoy

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<sup>36</sup> Even this provision is controversial: what constitutes 'serious' damage to the industrial relations system. The industrial action in Sweden which was so roundly condemned by the Court *Laval* was unremarkable from the perspective of Swedish law where such action was lawful.

<sup>37</sup> See eg ELDH statement 'European Labour Lawyers demand: The Right to strike must be guaranteed without neo-liberal restrictions. For an immediate withdrawal of the draft Monti I Regulation' <http://www.eldh.eu/publications/publication/european-labour-lawyers-demand-the-right-to-strike-must-be-guaranteed-without-neoliberal-restrictions-110/>; 'S&D Euro MPs urge Commission to revise the Monti II proposals', [http://www.socialists-anddemo-crats.eu/gpes/public/detail.htm?id=137020&request\\_locale=EN&section=NER&category=NEWS](http://www.socialists-anddemo-crats.eu/gpes/public/detail.htm?id=137020&request_locale=EN&section=NER&category=NEWS); 'ETUC Declaration on the Commission proposals for a Monti II Regulation and Enforcement Directive of the Posting of Workers Directive', <http://www.etuc.org/a/9917>; 'ETF strongly opposes proposal for Monti II Regulation', <http://www.itfglobal.org/etf/etf-press-area.cfm/pressdetail/7265>.

<sup>38</sup> F Fabbrini and K Granat, "'Yellow card, but no foul": The Role of national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike' (2013) 50 *Common Market Law Review* 115.

<sup>39</sup> There was an early attempt to draft the proposal on Article 197 TFEU (on administrative cooperation) but it proved impossible to deliver all aspects of the final draft on this legal basis.

<sup>40</sup> [http://ec.europa.eu/dgs/secretariat\\_general/rerelations/rerelations\\_other/npo/letter\\_to\\_nal\\_parl\\_en.htm](http://ec.europa.eu/dgs/secretariat_general/rerelations/rerelations_other/npo/letter_to_nal_parl_en.htm). For concerns about the operation of the Yellow card procedure, see the British House of Lords European Union committee report, *The Role of National Parliaments in the European Union*, <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/151/151.pdf>.

<sup>41</sup> This prompts N Bruun and A Bucker, 'Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy the social imbalances', *ETUI Policy*

some sort of life after death as a soft law measure, although the political sensitivities surrounding its brief existence may deny it even that limited possibility. With the demise of Monti II, the ball is back with CJEU. What are the options available to the Court should it wish to address some of the criticisms leveled at it following *Viking* and *Laval*?

### 3 The options

Given the criticisms of the Court’s judgment in *Viking* (and *Laval*), is there a way forward for the Court? I will discuss four possibilities:

1. Be more robust about the scope of application of EU law;
2. Reverse the priority of rights;
3. Engage in proper balancing;
4. Modify the proportionality principle.

I examine the strengths and weaknesses of each proposal, how it relates to the Monti II Regulation, and then draw some conclusions

#### 3.1 *More rigour in determining the scope of EU law*

##### 3.1.1 The issue

If the basic problem is the conflict between the EU’s four freedoms and national social policy, is it possible to ring-fence national social policy from the application of EU law? In essence, this is what the Court did in *Albany*.<sup>42</sup> The case concerned a collective agreement negotiated by representative organizations of employers and workers setting up a supplementary pension scheme, managed by a pension fund, to which affiliation was compulsory. The Dutch Minister of Employment had, on the request of the Social Partners, made affiliation to the scheme compulsory for all workers in the sector. One of the questions raised was whether the compulsory affiliation was compatible with EU competition law. The Court said:

‘59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of

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*Brief* No.4/2012, 3, to suggest that Article 26(3) TFEU could have been used as a legal basis.

<sup>42</sup> Case C-67/96 *Albany*. See also Case C-437/09 *AG2R Prévoyance* [2011] ECR I-973.

such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101(1)] of the Treaty.’

Thus, the Court said that competition law did not apply at all, provided that the collective agreement was aimed at improving working conditions<sup>43</sup> and this covered guaranteeing a certain level of pension to all workers in the sector. Similarly, in *van der Woude* the Court said that a collective agreement establishing a health care insurance scheme contributed to improving the working conditions of employees, not only by ensuring that they had the necessary means to meet medical expenses but also by reducing the costs which, in the absence of a collective agreement, would have to be borne by the employees.<sup>44</sup> By reason of its nature and purpose, the agreement did not therefore fall within the scope of Article 101(1) TFEU.<sup>45</sup>

The so-called ‘Monti’ clause in the draft Monti II Regulation (there are equivalent clauses in the Monti I Regulation,<sup>46</sup> the Services Directive,<sup>47</sup> and the Regulation on macroeconomic imbalances<sup>48</sup>) was intended to achieve a similar ring-fencing effect by means of legislation. This provided:

‘This Regulation shall not affect in any way the exercise of fundamental rights as recognised in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.’

For trade unions, this was a useful starting point and could have formed the basis of diluting the effects of *Viking*. However, the Court seems reluctant to extend the *Albany* approach outside the area of collective bargaining (and even here the Court may be reining in this ‘exception’, as Case C-271/08 *Commission v Germany (occupational pensions)*, considered below, demonstrates). In *Viking* itself the Court expressly refused to apply the *Albany* principle to strike action.<sup>49</sup> The Court said ‘it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collec-

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<sup>43</sup> AG Fennelly in Case C-222/98 *van der Woude* [2000] ECR I-7111, para 26 said that ‘[A]s an exception to the general field of application of Article [101 TFEU], the scope of the *Albany* exception should be narrowly construed’.

<sup>44</sup> Para 25.

<sup>45</sup> Para 26.

<sup>46</sup> Article 2 of Council Regulation (EC) No 2679/98.

<sup>47</sup> Article 1(7) of Directive 2008/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2008] OJ L 376/36.

<sup>48</sup> Article 1(3) last sentence of Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306/25.

<sup>49</sup> Para 59.

tive action that those fundamental freedoms will be prejudiced to a certain degree'<sup>50</sup> (even though collective bargaining (which is exempt from competition law) is unlikely to succeed in the absence of a threat of collective action (which is not exempt), a linkage that the Monti II proposal did recognize in its first preamble<sup>51</sup>). The Court added that the fact that an agreement or an activity were excluded from the scope of the provisions of the Treaty on competition did not mean that that agreement or activity also fell outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions were to be applied in different circumstances.<sup>52</sup>

More generally, the Court rejected the idea that fundamental rights could be excluded from the application of EU law. On balance this is probably a good thing because otherwise proposals such as Monti II on fundamental rights, if ever adopted, might also be declared *ultra vires*.

### 3.1.2 The inter-state element and labour law

So if it is not possible to exclude collective action altogether from the scope of EU law, is there another way of tackling the problem? It is a truism that EU law applies only where there is an inter-state element. This is a jurisdictional question: national law applies where the matter is wholly internal to the state; EU law applies where there is an inter-state element. In recent years the boundaries have become increasingly blurred<sup>53</sup> but, when asked directly whether the distinction should continue, the Court has broadly sought to hold the line.<sup>54</sup>

This issue has particularly relevance in the field of collective action. Take for example the case of the postal service (or any other utility e.g. transport). Let's imagine there is a dispute in a local post office sorting office over the dismissal of a particular employee. The trade union is so incensed by the treatment of this individual that it calls its members out on strike to protest. The trade union knows that it must comply with the requirements of domestic law before it asks its members to take strike action (in the case of the UK this would mean that the action has to be in contemplation and furtherance of a trade dispute between the workers and their employers and that there has been a ballot and proper notice given to the employer). Following *Viking* the question is whether the union must also comply with the *Viking* criteria (strike action can only be taken where

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<sup>50</sup> Para 52.

<sup>51</sup> 'The right to take collective action, which is the corollary of the right to collective bargaining, is recognised both by various international instruments ... and by instruments developed by those Member States'. Indeed, Monti II suggests that EU law very much applies to cross-border industrial action and thus does affect its exercise.

<sup>52</sup> Paras 53–54.

<sup>53</sup> See eg Case C–60/00 *Carpenter* [2002] ECR I–6279, para. 29; Case C-200/02 *Kunqian* [2004] ECR I-9925; Case C-34/09 *Zambrano* [2011] ECR I-1177.

<sup>54</sup> Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683; Case C-434/09 *McCarthy* [2011] ECR I-3375.

jobs or terms and conditions of employment are seriously jeopardized and that the strike action is the last resort). Instinctively, this situation feels wholly internal to the Member State and so the *Viking* criteria should not need to be satisfied. Yet, since the Court has ruled that EU law applies where there is a potential effect on inter-state trade then the postal worker dispute might engage EU law since it would clearly affect parcels and post from other EU Member States. This would suggest that the *Viking* criteria should apply (and there is uncertainty as to whether the *Viking* criteria would be met: does the reference to jobs being jeopardized refer merely to economic dismissals or should it be construed more broadly?).

This uncertainty on when EU law, and the *Viking* requirements in particular, actually apply helps explain why trade unions so object to the *Viking* decision. An early version of the proposed Monti II Regulation, which was widely leaked at the end of 2011/start of 2012 (the ‘leaked version’),<sup>55</sup> tried to provide some reassurance. The original Article 2(3) provided:<sup>56</sup>

‘When cross border elements are lacking or hypothetical, any collective or industrial action shall be assumed prima facie not to constitute a violation of the freedom of establishment or the freedom to provide services and therefore in principle be legitimate and lawful under Union law.

This presumption is rebuttable and without prejudice to the conformity of the collective action with national law and practices.’

This text was removed from the final draft of the proposal but its substance was retained in the explanatory memorandum,<sup>57</sup> with hints of it in the Preamble.<sup>58</sup> Article 2(3), as originally conceived, would not, of course, have resolved all the problems with the wholly internal rule but it would have sent a strong message that there are outer limits of EU law and it would have provided some leverage to the courts not to apply EU law too readily.

So, with the failure of Monti II and thus Article 2(3), does EU law more generally offer a solution? Evidence gleaned from related areas of EU law would suggest that national courts should not be too quick to intervene in cases of minor breaches of EU law such as the dispute in the local sorting office in the example outlined above. So for example, in two important cases involving Italy, Case C-110/05 *Commission v Italy (trailers)*<sup>59</sup>

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<sup>55</sup> On file with the author.

<sup>56</sup> This is mentioned in Bruun and Bucker (above n 43).

<sup>57</sup> P 12.

<sup>58</sup> Thirteenth recital: ‘In order to provide the necessary legal certainty, avoid ambiguity and prevent solutions being unilaterally sought at national level, it is necessary to clarify a number of aspects relating in particular to the exercise of the right to take collective action, including the right or freedom to strike, as well as the extent to which trade unions may defend and protect workers’ interests in cross-border situations.’

<sup>59</sup> Case C-110/05 *Commission v Italy (trailers)* [2009] ECR I-519.

and Case C-518/06 *Commission v Italy (motor insurance)*<sup>60</sup> the Court laid down a threshold before EU law could be engaged.

The *Trailers* case concerned an Italian prohibition on motorbikes towing trailers. The Court indicated that market access could only be hindered by a rule which has ‘*considerable* influence on the behaviour of consumers, which, in its turn, affects the access of that product to the market of that Member State’.<sup>61</sup> In the *Motor Insurance* case the Court said that the obligation of an insurance company to provide third-party cover to every potential customer constituted a ‘substantial’ interference in the operators’ freedom to contract,<sup>62</sup> and that the obligation was likely to lead, in terms of organization and investment to ‘*significant* additional costs for such undertakings’.<sup>63</sup> Further, in *An Post*,<sup>64</sup> decided in the context of Article 258 TFEU enforcement proceedings in a case on procurement of Annex IIB services to which the full rigors of the procurement directives do not apply, the Court insisted that the Commission produce actual evidence to show the existence of an interstate element<sup>65</sup> which it had failed to do in this case: ‘A mere statement by [the Commission] that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations.’<sup>66</sup> Applying these decisions to the sorting office example would suggest that where any effect on inter-state trade is not considerable and so EU law should not apply.

### 3.2 *Reversing the priority of rights*

#### 3.2.1 The trade union argument

The suggestion considered in the previous section only shields national industrial action from the full force of EU law in some, uncertain, situations. It does not guarantee total protection for trade unions. For the trade unions, this would not be good enough. For them, the answer is easy: include a social progress protocol in the Treaty which prioritises social rights. The ETUC has already produced a draft of what such a clause might look like:

‘Nothing in the Treaty, and in particular neither fundamental freedoms nor competition rules shall have priority over fundamental social rights and social progress. In case of conflict, fundamental social rights shall take precedence.’<sup>67</sup>

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<sup>60</sup> Case C-518/06 *Commission v Italy (motor insurance)* [2009] ECR I-3491.

<sup>61</sup> Para 56, emphasis added.

<sup>62</sup> Para 66.

<sup>63</sup> Para 68.

<sup>64</sup> Case C-507/03 *Commission v Ireland* [2007] ECR I-9777.

<sup>65</sup> Para 33.

<sup>66</sup> Para 34.

<sup>67</sup> [http://www.etuc.org/IMG/pdf\\_ETUC\\_Viking\\_Laval\\_-\\_resolution\\_070308.pdf](http://www.etuc.org/IMG/pdf_ETUC_Viking_Laval_-_resolution_070308.pdf). The rest of the proposed Protocol would say:

With this as a yardstick, it comes as no surprise that the Monti II proposal was a grave disappointment to the unions. The leaked version of Monti II said:

‘The exercise of the fundamental right to take collective action, including the right or freedom to strike, should fully respect the economic freedoms enshrined in the treaty, in particular the freedom of establishment and to provide services, and conversely, the exercise of these economic freedoms shall fully respect fundamental social rights. No primacy exists between the two.’

This falls well short of prioritizing social rights over economic rights. The trade unions argued that the approach adopted by the European Court of Human Rights in *Demir and Enerji Yapi Yol*<sup>68</sup> where, under Article 11 of the European Convention of Human Rights (ECHR), any interference with freedom of association rights was presumptively unlawful and needed to be justified, supported their argument that social rights should prevail over economic freedoms. This, they insist, is the approach that the EU should adopt and Monti II fell far short of this. And since the trade union movement thought it could get a better deal by waiting for the EU’s accession to the Convention,<sup>69</sup> it became in their interests to object vociferously to the Monti II proposal. And because the *trade unions* were doing all the running to block a ‘social’ measure, the employers, and certain governments who also opposed to the Monti II proposal but for different reasons, could simply sit back and wait for the political process to take its course.

‘Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Community/Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

The protection of workers shall be interpreted in such a way as to recognize the right of trade unions and workers to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions and to demand equal treatment of workers regardless of nationality or any other ground.’

<sup>68</sup> *Demir and Baykara v Turkey*, Judgment 12 November 2008 (Application n° 34503/97); and *Enerji Yapi-Yol Sen*, Judgment 21 April 2009 (Application n° 68959/01). These decisions are fully discussed by K Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 2. For the implications of these cases for Monti II see M Rocca, ‘The proposal for a (so-called) “Monti II” Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. Changing without Reversing, Regulating without Affecting’ (2012) 3 *European Labour Law Journal* 19.

<sup>69</sup> For support, see F Dorssemont, ‘How the European Court of Human Rights gave us *Enerji* to cope with *Laval* and *Viking*’ in MA Moreau (ed), *Before and After the Economic Crisis. What implications for the “European Social Model”* (Edward Elgar 2011); F Dorssemont, ‘Values and Objectives’ in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2011).

## 3.2.2 The Monti II proposal and the question of reversal of the priorities

Yet a more careful reading of the final version of the Monti II proposal tells a somewhat different story. Article 2 of the final draft provided:

‘The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.’

The striking feature is the reversal of the order of priorities from the leaked version: the economic rights must now respect the social rights and only then must the social rights respect the economic rights.<sup>70</sup> This of course does not go so far as the ETUC’s social clause but it is a gentle hand on the tiller in that direction, while remaining within the framework of the existing Treaty and its mandate for creating a social market economy. The requirement to legislate “without reversing the case law of the Court of Justice”<sup>71</sup> was part of the mandate given to the drafters of the Monti II proposal.

Further, a careful lawyer might have read Article 2 of the proposal in the light of the Preamble which begins with a recognition of the ‘*right to take collective action*’ as prescribed by various international instruments (first recital), the reference to Article 11 ECHR and the *Demir* line of case law (second recital), the *right to take collective action* as recognized by the Court of Justice in *Viking* and *Laval* (third recital) and the Charter (fourth recital). The first reference to the economic rights comes only in the sixth recital. This again suggests a certain reorientation of priorities towards the social.

There is a further, more complex point: the final (sixteenth) recital to the proposal makes reference to a number of provisions of the Charter which are touched upon by the proposal. This makes it abundantly clear that the Charter is engaged. Any reference to the Charter includes Article 52(3). This provides that:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.’

The early preambular references to the Convention indicate that the Regulation was intended to give effect both to the Charter and the Convention. The effect of Article 52(3) is that any interpretation of the Monti II Regulation would have had to be in the light of the Charter which in turn would have had to be in light of the European Convention, including the *Demir* line of case law. This might also indicate a more socially biased reading of the Monti II Regulation. Finally, by dropping the phrase contained in the leaked version ‘No primacy exists between the two’ (even though it is still men-

<sup>70</sup> See also p 12 of the explanatory memorandum, second paragraph and p 13.

<sup>71</sup> Third paragraph under point 3.1 COM(2012) 130 final, 10.

tioned in the explanatory memorandum<sup>72</sup>), space was created for a more social reading of the Regulation.

But the demise of Monti II means that these modest gains for the trade unions have been lost. The matter is therefore put back in the hands of the courts (Court) which were responsible for delivering the judgments in *Viking* and *Laval* in the first place. This is not a triumph for the trade union movement.

### 3.2.3 Criticisms of the approach

But let's suppose for a moment that the Court recognized the problems its decisions have generated for the trade unions and, in the next case before it, decided to prioritise social rights over economic rights. Would this necessarily be a good thing? Would it not leave the business community making equivalent complaints to those made by the trade unions about the inherent disequilibrium in the EU system, that the Treaty of Rome is first and foremost about creating a single market in which freedom of movement of goods, persons and capital is ensured, about the fact that the Court of Justice is not a human rights court, and about the denial of opportunities for those from Eastern European states to take advantage of the single market to better themselves, a different manifestation of a social right.

All of this suggests that it would not be (politically and possibly legally) possible – at least in the EU context – to prioritise either economic or social rights and that there does need to be some sort of genuine balancing between the economic and social dimension. How can this be done? Inevitably it points in the direction of making more effective use of the proportionality principle.

## 3.3 *Proper balancing through proportionality*

### 3.3.1 Introduction

As we saw in section 2, trade unions fear the application of the proportionality principle to strike action. It is particularly problematic for the UK, the country with the strictest strike rules in Europe. As we have seen, provided the strike has satisfied the criteria of the statute – in essence that the strike is in contemplation and furtherance of a trade dispute between the workers and their employers and that the notice and balloting rules are complied with – then the strike will be lawful no matter how grave the disruption caused. It could be argued that the requirements as to balloting of potential strikers and notice to employers is a form of procedural proportionality. This already imposes significant constraints on UK trade unions. It is therefore understandable why they are particularly keen on ensuring that a substantive proportionality principle is not introduced over and above the domestic requirements by the back door of EU law.

In other systems, the proportionality principle does have a role to play but it is often applied by specialist labour courts with an understanding of industrial realities. This is the situation in Germany where Bernd Waas explains:<sup>73</sup>

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<sup>72</sup> P 12, first paragraph.

‘Though an *ultima ratio* principle is known in the German law on strikes and lock-outs, it is very reluctantly applied by the courts<sup>74</sup> because, among other things, it is regarded as the very aim of a strike to make the employers suffer. As a consequence a strike might only be regarded as “out of proportion” if it aims at destroying the employer economically.’<sup>75</sup>

By way of evidence he cites the example of strikes involving train drivers which had severe financial consequences on the employers but the courts still did not issue interim injunctions preventing the trade union from taking (further) action.<sup>76</sup> So, for these systems too, a European notion of proportionality might also cause problems.

These two examples help explain the trade unions’ opposition to the Monti II proposal where the proportionality principle (but not the name) played a key role, at least in the leaked version. This provided:

‘In case of labour disputes resulting from the exercise of the right or freedom to strike by one side of management and labour with the objective of protecting workers or workers’ rights, it is ultimately for the national court in the Member State where the industrial action is planned or has started, which has single jurisdiction to assess the facts and interpret national legislation, to determine whether and to what extent such collective action is suitable for ensuring the achievement of the objectives pursued and does not go beyond what is necessary to attain that objective, without prejudice to the role and competences of the Court of Justice under Article 267 TFEU.’

While this appeared to give some space for diverse national approaches, it did not address UK concerns. In this respect the final version of the Monti II proposal was more interesting. Once again the proportionality principle is not referred to by name (although the word is expressly mentioned in the 11<sup>th</sup> and 12<sup>th</sup> recitals of the Preamble) but reference to the substance is made in Article 3(4):

‘Recourse to alternative non-judicial dispute mechanisms shall be without prejudice to the role of national courts in labour disputes in the situations as referred to in paragraph 1, in particular to assess the facts and interpret the national legislation, and, as far as the scope of this Regulation is concerned, to determine whether and to what extent collective action, *under the national legislation and collective agreement law* applicable to that action, does not go beyond what is

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<sup>73</sup> Private correspondence on file with the author.

<sup>74</sup> Indeed, some argue that following the so-called third “*Warnstreikentscheidung*” (warning strike decision) of the BAG (BAGE 58, 364) the BAG has abandoned the *ultima ratio* principle.

<sup>75</sup> See also M Weiss, *Labour Law and Industrial Relations in the Federal Republic of Germany* (Kluwer 1989) 136.

<sup>76</sup> For another example of the relaxed proportionality test see the “flash mob” decision of the Bundesarbeitsgericht, BAG 1 AZR 972/08 (2009) *Neue Zeitschrift für Arbeitsrecht* 1347.

necessary to attain the objective(s) pursued, without prejudice to the role and competences of the Court of Justice' (emphasis added).

What is striking about Article 3(4) is the reference to 'national legislation and collective agreements'. This suggests a *renvoi* to the national systems and thus space for them to apply their own version of proportionality, whether it be a 'soft' substantive proportionality review as in Germany or a procedural proportionality review (if that is the appropriate terminology) in the UK.

### 3.3.2 Commission v Germany (occupational pensions)

But now that Monti II is dead, it means that the Treaty – as interpreted by *Viking* and *Laval* – continues to apply. As we have seen, one of the major criticisms of the *Viking* decision is that the Court took as its starting point the fact that strike action was a restriction on free movement and thus presumptively unlawful, with the burden then shifting to the trade unions to show both that (1) the collective action under Union law was justified where jobs or conditions of employment were jeopardized or under serious threat, and (2) that collective action is the last resort. This double burden for trade unions explains why they think that, despite the talk of balancing between the economic and the social interests,<sup>77</sup> most commentators consider the Court prioritised the economic interests.

This was recognized in particular by Advocate General Trstenjak in her Opinion in *Commission v Germany (occupational pensions)*.<sup>78</sup> Having noted that fundamental rights and fundamental freedoms are of equal rank,<sup>79</sup> she was critical of the approach adopted in *Viking* that suggested the existence of a 'hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification'.<sup>80</sup> She offered a different perspective:

'188. ... [I]t must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom.

189. For the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. . .

190. A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right

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<sup>77</sup> *Viking*, para 79.

<sup>78</sup> Case C-271/08 *Commission v Germany (occupational pensions)* [2010] ECR I-7087.

<sup>79</sup> Para 183.

<sup>80</sup> Para 184.

on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.’

In other words, AG Trstenjak was proposing a ‘symmetrical’ approach, checking that the economic right was limited to the least extent possible and that the social right was also limited to the least extent possible. In essence, she adopted a mixture of the Court of Justice’s approach (the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right) and a Court of Human Rights approach (the restriction on a fundamental right by a fundamental freedom must not go beyond what is appropriate, necessary and reasonable to realize the fundamental freedom). However, even she found it difficult to realize this in practice and her opinion came down in favour of the economic freedom.

The case itself concerned a collective agreement entered into by a number of local authorities in with the trade unions identifying a limited list of pension providers entrusted with implementing a pension scheme. The selection of pension providers was not put out to tender, as required by EU rules on public procurement directive. This, she found, contravened EU law. The Court of Justice agreed and its judgment largely resonated with its approach in *Viking*: expressing a need for balance between the freedoms but then finding that the free movement provisions had been breached.<sup>81</sup>

AG Trstenjak’s approach is reminiscent of the German Constitutional Court’s approach to balancing rights of equal weight,<sup>82</sup> namely “practical concordance” (*praktische Konkordanz*). According to Kommers:<sup>83</sup>

‘Professor Konrad Hesse [to whom the idea of “practical concordance” is attributed<sup>84</sup>] wrote “The principle of the constitution’s unity requires the optimisation of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.”’<sup>85</sup>

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<sup>81</sup> Para 44. See generally C Kilpatrick, ‘Internal market architecture and the accommodation of labour rights: as good as it gets?’ *EUI Working Paper Law* 2011/04.

<sup>82</sup> See the Federal Constitutional Court’s decision in *Lüth*: BVerfGE 7, 198, 210.

<sup>83</sup> DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed, University of Chicago Press 1996), 46.

<sup>84</sup> K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (new print of 20<sup>th</sup> ed, Müller 1999) para 72.

<sup>85</sup> For an example, see BVerfGE 30, 173 (*Mephisto-Urteil*).

At first sight, this approach has much to commend it: balancing is a well-established principle of constitutional law, that these matters require a nuanced approach, and that this is what Article 3(3) TEU now mandates: a social market economy (a point expressly recognized by Advocate General Cruz Villalon in *Santos Palhota*<sup>86</sup> who suggested that the introduction of Article 3(3) required a rethink of the *Viking* approach).<sup>87</sup>

### 3.3.3 Criticisms of balancing

However, as Freedland has said, there is a risk that AG Trstenjak's approach to balancing becomes meaningless since it involves 'infinite regression' leading to 'self-cancelling'.<sup>88</sup> In order to break this deadlock one interest will eventually have to prevail – and the Treaty still contains a strong pull towards prioritizing the economic freedom. Other critics of the balancing approach argue that the language of balancing in fact disguises a decision ultimately to prioritize the factor with which the decision-maker has greatest sympathy. The outcome in *Commission v Germany (occupational pensions)* might support these critics: both the Advocate General and the Court dressed up policy choices to favour the economic interests (of free movement of services) over the social interest (in collectively agreed pension arrangements) in the garb of balancing.

Nevertheless, the Monti II Regulation appeared to endorse balancing in the sense used by AG Trstenjak in para 190 of her opinion. The 13<sup>th</sup> Recital says:

‘A fair balance between fundamental rights and fundamental freedoms will in the case of conflict only be ensured when a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.’

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<sup>86</sup> Case C-515/08 *Santos Palhota* [2010] ECR I-9133, para 53, expressly referred to in n 40 of COM(2012) 130 final. Para 53 provides:

‘As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.’

<sup>87</sup> See further S Deakin, ‘The Lisbon Treaty, the *Viking* and *Laval* judgments and the financial crisis: In Search of New Foundations for Europe's “Social Market Economy”’ in Bruun, Lörcher and Schömann (eds) (above n 72).

<sup>88</sup> Comments made at a conference hosted by CELS held at the University of Cambridge, 27 April 2012.

The explanatory memorandum expressly acknowledged the influence of the Advocate General. It provided:

‘Article 3 paragraph 4 further clarifies the role of national courts: if, in an individual case as a result of the exercise of a fundamental right, an economic freedom is restricted, they will have to strike a fair balance between the rights and freedoms concerned and reconcile them.’

There is a footnote reference then to paragraphs 188-190 of the AG’s Opinion (although note also the asymmetrical approach to balancing envisaged by this sentence and just how easy it is to slip into this mindset). Later in the same paragraph the memorandum repeats verbatim paragraph 190 of her Opinion.

### 3.4 *Re-examining the proportionality principle*

#### 3.4.1 The Proportionality Principle and Monti II

The balancing envisaged by Advocate General Trstenjak equates with applying the proportionality principle. What is meant by proportionality? It will be recalled that in *Viking* the Court adopted a two-limbed test to proportionality: whether the collective action initiated by FSU was (1) suitable for ensuring the achievement of the objective pursued, and (2) did not go beyond what was necessary to attain that objective.<sup>89</sup> On question (1), suitability, the Court said that ‘collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members’. This reasoning coincides with a labour lawyer’s understanding of the right to strike. However, this is undermined by the Court’s approach to question (2), necessity, where the Court said in paragraph 87 that it is for the national court to examine whether the ‘FSU did not have other means at its disposal which were less restrictive of freedom of establishment’ to bring to a successful conclusion the collective negotiations entered into with Viking, and, ‘whether that trade union had exhausted those means before initiating such action’. How will a trade union ever know when it has exhausted all other means when a well advised employer keeps dangling the prospect of a settlement just round the corner?

The Monti II proposal itself supported a two-limbed approach to proportionality. Article 3 of the leaked version said:

‘In case of labour disputes resulting from the exercise of the right or freedom to strike by one side of management and labour with the objective of protecting workers or workers’ rights, it is ultimately for the national court in the Member State where the industrial action is planned or has started, which has single jurisdiction to assess the facts and interpret national legislation, to determine whether and to what extent such collective action is suitable for ensuring the achievement of the objective(s) pursued and does not go beyond what is neces-

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<sup>89</sup> Para 84.

sary to attain that objective, without prejudice to the role and competences of the Court of Justice under Article 267.’

When compared with para 87 of the Court’s judgment, Article 3 is much less prescriptive on the question of necessity. Gone is all reference to strike action being a last resort and, when combined with the reference to the ‘ultimate’ role of the national court, gives much more latitude to the national systems.

Article 3(4) of the final draft is the successor provision to Article 3. As we saw above, it provides that the role of national courts in labour disputes includes determining ‘whether and to what extent collective action, under the national legislation and collective agreement law applicable to that action, does not go beyond what is necessary to attain the objective(s) pursued, without prejudice to the role and competences of the Court of Justice.’

Reference to the suitability limb of the proportionality test has gone, although it may be implicit;<sup>90</sup> the open-textured approach to necessity remains.

For some, Article 3(4) is particularly problematic because it makes no reference at all to balancing; it assumes that collective action is in breach of the fundamental freedoms and it applies the substantive proportionality principle to strike action. It therefore sits uncomfortably with Article 2 (discussed above) which talks about the exercise of the freedom of establishment and the freedom to provide services respecting the fundamental right to take collective action (and vice versa). For others who resent the intrusion of EU law into this sensitive (national) arena, Article 3(4) offered the most hope since it could be interpreted as simply saying that if national law applies, national courts are to interpret it, and when doing so they should draw on the national understanding (if any) of the proportionality principle.<sup>91</sup>

#### 3.4.2 Reforms to the proportionality principle

The discussion above suggests that the proportionality principle is – and will continue to be – key. I have argued elsewhere that it is possible to envisage reforms to the general proportionality principle to ensure that it can be adapted to the industrial relations context.<sup>92</sup> One possibility would be to urge the Court to consider adopting a margin of

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<sup>90</sup> This is confirmed by the Explanatory memorandum, p 11: ‘respect for the subsidiarity principle is further ensured by recognition of the role of national courts in establishing the facts and ascertaining whether actions pursue objectives that constitute a legitimate interest, are suitable for attaining these objectives, and do not go beyond what is necessary to attain them.’

<sup>91</sup> See also the 11<sup>th</sup> Recital of the Preamble: ‘The exercise of the right to take collective action, including the right or freedom to strike and the requirements relating to the freedom of establishment and the freedom to provide services may thus have to be reconciled, in accordance with the principle of proportionality, which often requires or implies complex assessments by national authorities’.

<sup>92</sup> C Barnard, ‘A Proportionate Response to Proportionality in the field of collective action’ (2012) 37 *European Law Review* 117.

appreciation approach: having delivered a shot across the bows of the trade union movement in *Viking* and *Laval*, it should now back off. In other words, it could delegate the decisions on proportionality (if any) to the national courts to be decided according to their domestic standards, albeit while complying with their duties of cooperation under Article 4(3) TEU to consider the EU implications. As we saw above, there are hints that Article 3(4) of the proposed Monti II Regulation points in this direction. Bruun and Bücker (above n 43) would agree with this. Writing for the European Trade Union Institute, they say:

‘Just as companies do not need to justify using economic freedoms, trade unions should not need justification for collective action and should be provided with a broad margin of freedom for negotiations and collective bargaining.’

They argue strongly against the application of the proportionality principle, pointing to the ILO’s Report of the Committee of Experts on the Application of Conventions and Recommendations which says ‘that when elaborating its position in relation to the permissible restrictions that may be placed on the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services’<sup>93</sup> Yet, as we have seen, the pass has been already been sold on this; proportionality is firmly enshrined. So now the aim is to limit the full effects of a substantive proportionality review.

Another possibility would be for the Court of Justice to proceduralize the approach to proportionality, ensuring that the trade unions keep a paper trail of how they have considered the alternatives to strike action and that they had engaged effectively in negotiations before calling their members out on strike. This would be a lower threshold than having to show, as in *Viking*, that collective action is the last resort. Ultimately such an approach might mutate from a proportionality analysis to a simple procedural requirement – more akin to the current position under UK law. This would avoid the courts having to engage in any way with the ultimate dilemma that strike action is by definition disproportionate in the substantive sense.

There is some support for this procedural approach in *Schecke*.<sup>94</sup> In this, the first case that the Court of Justice declared an EU act incompatible with the Charter, the Court had to strike a ‘proper balance’<sup>95</sup> between the interests of taxpayers, who had a right to be kept informed of the use of public funds, with the right to privacy of individuals in receipt of public money. It concluded that there was nothing to show that when adopting the legislation ‘the Council and the Commission took into consideration methods of

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<sup>93</sup> Cf in n 24, above. See also the Swedish trade union confederation’s comments on the Monti II proposal which argues that it is in contravention of Sweden’s ILO commitments: [http://www.lo.se/home/lo/home.nsf/unidview/B4AF2E12EAD31C62C12579F70026A33C/\\$file/LO%20TCO%20Saco%20comments.pdf](http://www.lo.se/home/lo/home.nsf/unidview/B4AF2E12EAD31C62C12579F70026A33C/$file/LO%20TCO%20Saco%20comments.pdf).

<sup>94</sup> Joined cases C-92/09 and C-93/09 *Schecke* [2010] ECR I-11063, para 81.

<sup>95</sup> Para 79.

publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular'. Because the institutions did not properly balance the competing interests 'the Council and the Commission exceeded the limits which compliance with the principle of proportionality imposes.'<sup>96</sup>

If the margin of appreciation approach and the procedural approach to reforming the judicial understanding of proportionality are deemed too radical, a third possibility would lie with the proportionality principle itself. While in cases involving challenges to *national* legislation – such as *Viking* - the Court tends to adopt a two-pronged test to proportionality, in cases involving challenges to *EU* legislation the Court adopts a three limbed approach. This third limb would consider whether the application of the proportionality principle might result in undermining the essence of right being protected. Could this be extended to the industrial relations context? This would require the courts to consider not only whether the strike action is suitable and necessary but also whether any restrictions on it justify undermining the right to strike.

Such an approach already receives some support from the Charter. Article 52(1) (expressly cited in the 12<sup>th</sup> Recital of the Preamble to the Monti II proposal) provides:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and *respect the essence of those rights and freedoms*. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others' (emphasis added).<sup>97</sup>

Although, under the Charter, the essence test and the proportionality test are separate, some commentators argue that respect for the essence of a right would 'typically overlap with the third stage of the proportionality test'.<sup>98</sup>

The essence test is already beginning to feature in the case law, particularly that on social policy. Take for example, *Alemo-Herron*<sup>99</sup> on the question whether future collective agreements continued to apply to a transferee under Directive 2001/23<sup>100</sup> even if he was not party to the new collective agreement. The Court said 'by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a

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<sup>96</sup> Para 86.

<sup>97</sup> Joined cases C-92/09 and C-93/09 *Schecke*, para 50. See also para 60.

<sup>98</sup> M Bobek, note on *Schecke* (2011) 48 *Common Market Law Review* 1947.

<sup>99</sup> Case C-426/11 *Alemo-Herron* [2013] ECR I-0000.

<sup>100</sup> Council Directive 2001/23/EC of 12 March 2001 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 undertakings or businesses [2001] OJ L 82/16

contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'.<sup>101</sup> The Court then noted that because the transferee was unable to participate in the collective bargaining body, its contractual freedom was 'seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'.<sup>102</sup>

The explanatory memorandum accompanying the Monti II proposal also envisages a three limbed test to the proportionality principle:<sup>103</sup>

'In line with the case law of the Court, a three stage test is required where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question have to be reviewed.'

Again, this draws on paragraph 190 of the Advocate General's Opinion in Case C-271/08 *Commission v Germany (occupational pensions)*. The reference to reasonableness is weaker than the more robust question of whether the essence of the right is infringed. Nevertheless, it is a step in the right direction.

The significance of the three limbed approach to proportionality can be seen if we return to the postal sorting office example given above. Let's assume that, contrary to the arguments above, it is found that the strike action does constitute a restriction on free movement. Since a job is being lost then the strike action might be justified on the grounds of worker protection. On proportionality, the two limbed test would suggest that while the strike action might be suitable it will probably be more restrictive than necessary since the costs of the strike action (potentially tens of thousands of pounds/euros in breached/lost contracts) might outweigh the benefits (saving one man's job). Adding a third limb might produce the opposite result: that despite the impediment to free movement, strike action, as a fundamental right cannot be curtailed in this way; the workers should be allowed to go on strike to protest at what they perceive as an injustice.

#### 4 Conclusions

In the current climate it is going to be difficult to square economic freedoms with social rights. As the eurozone crisis has shown, social rights are easily expendable on the pyre

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<sup>101</sup> Para 33.

<sup>102</sup> Para 35.

<sup>103</sup> P 14.

of economic salvation. This point was put most bluntly by Adrian Beecroft, in his report to the UK government on reforms to its law on unfair dismissal:<sup>104</sup>

‘... much of employment law and regulation impedes the search for efficiency and competitiveness. It deters small businesses in particular from wanting to take on more employees: as a result they grow more slowly than they otherwise might. Many regulations, conceived in an era of full employment, are designed to make employment more attractive to potential employees. That was addressing yesterday’s problem. In today’s era of a lack of jobs those regulations simply exacerbate the national problem of high unemployment.’

The Monti II proposal has been described as an exercise in intellectual flexibility and doing the impossible. It was unlikely to satisfy anyone and it did at least succeed in doing that. However, its failure has created a problem for trade unions: they are back to the post *Viking* and *Laval* position. It has also created a problem for the Commission which, in its response to the financial crisis, has been seen backing cuts to labour standards in Member States. The near absence of any significant EU-level social legislation in recent years casts doubt on the Commission’s continued claim of its commitment to a full social dimension to the European Union, a point the Commission itself noted in the impact assessment accompanying the Monti II proposal. And into this vacuum will eventually step the Court of Justice.<sup>105</sup> It is well aware of the controversy surrounding the judgments in *Viking* and *Laval*, although strongly rejects the criticisms.<sup>106</sup> It will have to decide whether it is possible to square the circle, possibly inspired by the Monti II proposal, or whether it is content for (generally unpopular) status quo to remain.

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<sup>104</sup> <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/12-825-report-on-employment-law-beecroft.pdf>.

<sup>105</sup> Note also the dispute between between the EFTA Court and the Norwegian Supreme Court over the interpretation of Article 36 EEA and the Posting of Workers Directive 96/71 in Case E-2/11 *STX Norway Offshore AS and Others and The Norwegian State, represented by the Tariff Board*, judgment of 23 January 2012 [2012] EFTA Ct Rep Book 3, 4, and Rt. 2013, 258 *STX OSV AS m.fl. mot Staten v/Tariffnemnda* (judgment of 5 March 2013), discussed in C Barnard, ‘Posting Matters’ (2014) *Arbeidsrett* 1.

<sup>106</sup> V Skouris, ‘Das Verhältnis der Grundfreiheiten zu den Gemeinschaftsgrundrechten’ [2009] *Recht der Arbeit Beilage* Heft 5, 25.



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## **Treaties and Legislation**

### **International Treaties and Declarations**

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# Tabula Gratia

## Researchers and Collaborators in the FORMULA Project

### The FORMULA Researcher Group

#### *'Executive Committee'*

Stein Evju	Professor of Labour Law, Department of Private Law, University of Oslo; Director of the FORMULA Project
Jon Erik Dølvik	Senior Researcher, Fafo Institute for Labour and Social Research, Oslo
Jonas Malmberg	Professor of Private Law, Uppsala University; now Chairman, the Swedish Labour Court

#### *Members*

Kerstin Ahlberg	Director, Institute for Social Private Law, Faculty of Law, Stockholm University
Catherine Barnard	Professor of European Union Law and Employment Law, University of Cambridge and Fellow of Trinity College
Brian Bercusson	Professor of European Law, King's College, University of London († 2008)
Niklas Bruun	Professor of Private Law, Hanken School of Economics, Helsinki, and University of Helsinki
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### **Collaborators at Researcher Workshops and FORMULA Conferences 2008 – 2012**

Kristin Alsos	Researcher, Fafo Institute for Labour and Social Research, Oslo
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Jan Cremers	Guest Researcher, University of Amsterdam
Filip Dorssemont	Professor, Université Catholique de Louvain
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Johannes Heuschmid	Deputy Director, Hugo Sinzheimer Institute for Labour Law, Frankfurt
Antoine Jacobs	Professor (emeritus) of Labour and Social Law, Tilburg University
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Dagmar Schiek	Professor of Law, Jean Monnet ad personam Chair for EU Law & Policy, Queen's University Belfast
Claudia Schubert	Professor of Civil Law and Labour Law, Free University of Berlin (2014: Ruhr-Universität Bochum)
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