

FORMULA

Free movement, labour market regulation and
multilevel governance in the enlarged EU/EEA
– a Nordic and comparative perspective

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From Bolkestein to Directive – and further

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A. Introduction

Free movement of workers takes place under the conditions of national law as well as the Community Law. This article ascertains if and how labour law and work relations in the EU/EEA are also influenced by the Services Directive (RL 2006/123/EC; hereinafter: **S.D.**). Although on the first glance the S.D. gives little evidence of such an influence, from its beginning – that is from its preliminary drafts – the S.D. was met with distrust because of potentially disastrous effects on labour relations and national labour law. How this could happen, and what impact the revised text still has will be shown in the following.

Part 1 will overview the history of the S.D., starting with the so-called Bolkestein draft (hereinafter: **B.D.**). Thereafter – to clarify the effects the B.D. would have had – the legal situation before the S.D. came into force will be explained and compared with the planned arrangements in the B.D. Part 1 concludes with a presentation of the criticisms of the B.D., which were ultimately responsible for its failure.

In **Part 2** the adopted S.D. will be scrutinised in detail. The focus is on whether the S.D. in its current version still affects national working conditions.

In **Part 3** will be ascertained, by taking into account the recent jurisdiction of the ECJ (*Viking Line*, *Laval* and *Rüffert*), if the S.D. read in conjunction with the fundamental Treaty freedoms influences national labour law of the Member States.

B. Part 1

I. The creation process: From the original B.D. to today's S.D.

1. B.D. and criticisms

Forerunner of today's S.D. was the draft on a “Framework Directive on Services in the Internal Market” (B.D.) presented by Frits **Bolkestein** on 13 January 2004. The draft differed from its predecessors that were regulating individual service sectors only through a horizontal approach. It pursued instead a comprehensive regulation of all kinds of services and all the conditions under which they could be provided across borders. This should be realised through introduction of one single basic principle, namely the “country of origin principle” (art. 16 B.D.). Moreover, the B.D. had a much wider scope than the later S.D. Among other things, it included labour law and the services of temporary work agencies. Another feature of the B.D. was a clear cut objective to override all other Community Regulations and Directives in its held. The draft was met with considerable **criticism** from legal scholars, trade unions, social organisations, and non-governmental organisations (in detail see below).

2. The adoption of the S.D.¹

Against the background of this criticism, an adoption of the initial draft in Parliament was politically not feasible. In a compromise EPP and PES in EU Parliament agreed on an amendment to the B.D. on 16 February 2006. Among other amendments, labour law, employment protection law and social security law were excluded from the scope of the S.D. (see in particular Art. 1 [6], [7] 2, Art. 2 [22] [e] and Art. 16 [3] 2 S.D.). Moreover, Art. 24, 25 B.D., which would have made an effective control of services providers virtually impossible, were modified. In contrast to the B.D., the S.D. is subsidiary to other Regulations and Directives, in particular to the Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereinafter: **Posting of Workers Directive**) and the Regulation (EEC) No. 1408/71. The amended draft was subsequently revised by the Commission² and the Council of the European Union³ and approved with amendments by the European Parliament in its 2nd. Reading on 15 November 2006; the Council assented

¹ Compare *Bercusson/Bruun*: “Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire”, in: *Ahlberg/Bercusson/et al.*: *Transnational Labour Regulation*, 2006, p. 263, 273 et seqq.

² COM (2006) 160.

³ „**Common Ground**“ (10003/06).

to the changes on 11 December 2006. The S.D. has to be implemented into national law, for which the timeframe is set until 28 December 2009.

II. Comparative Overview of the different legal situations

In this chapter the labour law situation before the B.D. (1.) will be compared with the legal situation if the B.D. had been realised (2.).

1. Legal situation before the B.D.

Concerning the cross-border provision of labour one has to differ between temporary work and the posting of workers while executing work and service contracts. Both types have in common that the workers concerned will remain in a contract relationship with a contractor in their home country. They therefore (from an ideal perspective) do not intend to participate in the labour market of the country of destination and do not invoke the free movement of worker's provision of the Treaty, Art 39 EC. As the similarity ends there, it is still necessary to differentiate between their contractual obligations.

a) Temporary work is, from a labour law perspective, characterised by a three-party-relationship with contractual obligations at all sides: The lender is obliged to lend to the borrower a person whose labour he is entitled to direct. Although no contractual relationship exists between borrower and employee, the employee *has to obey the borrower's orders* due to his contractual obligation towards the lender.

b) Very different standards apply in a situation of **posting of workers**, which is relevant when the employer enters into a work or service contract with a foreign third party, to be fulfilled with the help of his employees. In order to deliver on his contractual obligations the employer posts his workers to work in the foreign country. In contrast to temporary work the recipient of the workers efforts (the person who entered into the contract with the employer) here *is not legally entitled to instruct the employee*. Instead, during the whole working process the employee has to follow the instructions of his contractual employer only.

c) According to the general rules of International Conflict of Laws Rule, for both the temporary cross-border work and the temporary cross-border posting the law of the State in which employer (or distributor) and employee are established is applicable

(Art. 6 [2] lit. a Rome Convention; from mid December 2009 Art. 3, 8 [2] 1, 2 Rome I Regulation enters into force and displaces the Rome Convention).⁴

This follows from Art. 6 (2) (a) Rome Convention (Art. 8 [2] 1, 2 Rome I Regulation), stating that the law of the country of origin applies even if a worker is temporarily posted abroad. Due to that, in principle the **law of the country of origin is applicable**.⁵ So, if a foreign worker is temporarily dispatched to Germany by his employer (who also resides outside Germany), **foreign law** and not German labour law remains **applicable**.

d) However, on the secondary community law level the **Posting of Workers Directive** applies (96/71/EC). It covers cross-border posting of workers as well as temporary cross-border work, Art. 1 (3) (a), (c). Its purpose is both to protect workers posted cross-border and to prevent distorting competition between Member States and a process of displacing entrepreneurs from low-wage countries by entrepreneurs from high-wage countries.⁶ The gist of the Posting of Workers Directive (Art. 3) is that the Member State of destination shall ensure that amongst others

- maximum working hours and minimum rest periods
- minimum annual vacation with pay
- minimum wage rates
- conditions for temporary work
- occupational safety and health

can be influenced by issuing **statutory regulations or administrative fiats** binding also **all foreign employers** posting workers in that state.

⁴ Cf. *Ferrari/Leible* (editor): Ein neues Internationales Vertragsrecht für Europa, 2007; *Junker*: „Internationales Arbeitsrecht in der geplanten Rom I-Verordnung“, in: Recht der internationalen Wirtschaft 2006, p. 401; *Mauer*: „Die Kündigung komplexer grenzüberschreitender Arbeitsverhältnisse nach der EG-Verordnung ROM I, in: Recht der internationalen Wirtschaft 2007, p. 92; *Martiny*: „Europäisches Internationales Vertragsrecht in Erwartung der Rom I-Verordnung“, in: Zeitschrift für Europäisches Privatrecht, 2008, p. 79.

⁵ *Schlachter/Ohler*, Kommentar zur Dienstleistungsrichtlinie, Vor Art. 19, No. 9; *Bercusson/Bruun*: “Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire”, in: *Ahlberg/Bercusson/et. al*: Transnational Labour Regulation, 2006, p. 263, 301 et seq.

⁶ *Feuerborn*, in: Oetker/Preis, Europäisches Arbeits- und Sozialrecht, B 2500, Rn. 110; *Schlachter*, in: Erfurter Kommentar zum Arbeitsrecht, 8. Aufl. 2008, § 1 AEntG, Rn. 1; *Krebber*: „Die Bedeutung von Entsenderichtlinie und Arbeitnehmer-Entsendegesetz für das Arbeitskollisionsrecht“, in: Praxis des Internationalen Privat- und Verfahrensrechts 2001, p. 22, 23.

The Posting of Workers Directive also allows the building industry for applying to foreign employers all **universally applicable collective agreements**, Art. 3 (1). As collective agreements typically regulate minimum wages, this option is especially important in countries without a statutory minimum wage, like Germany and Sweden⁷. The Posting of Workers Directive allows also those Member States some influence on labour conditions for foreign workers in their territory by elevating their core conditions of work and service to the level of internationally binding rules not only by introducing statutory provisions but also by way of universally applicable collective agreements.

e) In Germany the Posting of Workers Directive was implemented by **Arbeitnehmer-Entsendegesetz** (employee posting bill, hereinafter: “**AEntG**”). Art. 7 AEntG states that regulations contained in laws or administrative instructions respecting (among others) maximum working hours, minimum annual leave with pay and minimum wages, must be observed by a foreign employer regarding his employees posted to Germany. This list mirroring the scope of application of the Posted Workers Directive, was inserted completely into the statute, even though Germany for the time being has no statutory regulation for minimum wages.

To use the directive’s options, Art. 1 AEntG as a sector specific regulation has become of particular importance. It obliges foreign employers in the fields of *building industry, providing postal services and building cleaner craft*⁸ who post employees within the territorial scope of a *universally applicable collective agreement* to apply to their workers the minimum wages including overtime rates and the rules governing the duration of the rest leave, holiday pay and extra holiday money stipulated in such a collective agreement.⁹ Concerning the construction industry, such collective agreements exist almost everywhere in Germany. To render the statutory obligation more effective, Art. 8 AEntG introduces a **special scheme** for jurisdiction. According to this provision, employees posted to Germany are able to sue their employer in Germany for all claims originating from the period of posting, even if they meanwhile returned to their country of origin.

⁷ Eklund/Sigeman/Carlson, Swedish Labour and Employment Law: Cases and Materials, 2008, p.28, 33, 44.

⁸ Bundesgesetzblatt vol. I 2007, 576.

⁹ Schlachter/Ohler, Kommentar zur Dienstleistungsrichtlinie, Vor Art. 19, No. 34.

f) Summary: Traditionally, the law of the State in which the worker and distributor/employer is established (according to Art. 8 [2] 1, 2 Rome I Regulation, "national law") is basically applicable for temporary cross-border posting of workers. But for certain areas the Posting of Workers Directive and national laws implementing this allow for an exception.

However, the statute's very limited scope has to be taken into account: (1) Universally applicable collective agreements have to be observed by foreign employers for their workers posted to Germany **only** in the **building industry, providing postal services and building cleaners craft**, but not in other industries as long as the legislator does not include other industries in the scope of the AEntG. (2) While e.g. legislation on the minimum paid annual leave exists, a **statutory minimum wage** is **not known** in German law. Due to that the Posting of Workers Directive cannot achieve the sought protection of workers in this very important sector.¹⁰ With the exceptions cited above the law of the country of origin remains applicable in this respect.

To what extent the Posting of Workers Directive can protect national standards for working conditions against erosion by posting of "cheap" foreign workers, depends essentially on the structure of the national law. Especially well protected are workers in countries which set their minimum working conditions by law or regulation. If such task is assigned to collective bargaining, the intended protection can be secured only if collective agreements are declared universally applicable. For states whose law does not provide for universally applicable collective agreements, the Posting of Workers Directive offers only little benefit.

3. *The legal situation due to the B.D.*

a) As mentioned before the original B.D. had a very wide material scope of application (Art. 2 B.D.), in particular including labour law. In addition, the B.D. should in principle have proceeded over other secondary Community Law.

b) However, all relations covered by the Posting of Workers Directive would have been exempted from the strict application of the country of origin principle¹¹ (Art. 16

¹⁰ *Schlachter/Ohler*, Kommentar zur Dienstleistungsrichtlinie, Vor Art. 19, No. 27.

¹¹ The meaning of the country of origin principle is described in detail sub e).

B.D.), **art. 17 No. 5 B.D.** Therefore, whenever the Posting of Workers Directive or the AEntG (in Germany) was applicable, the country of origin principle would have had no significance; instead, the Posting of Workers Directive or (in Germany) the AEntG would have prevailed. Insofar the Member State of destination would have also remained responsible for controlling the employer (art. 24 B.D.).

c) As shown above, the **importance** of the **Posting of Workers Directive** is **limited** in countries like Germany, in particular concerning protection against wage dumping, as long as commitment to universally applicable collective agreements exists only in the building industry, the postal providing services and the building cleaner crafts (section 1 I 1 AEntG) while a statutory minimum wage is not provided for.

d) Because apart from these constellations the exception of Art. 17 No. 5 B.D. was not applicable, the **country of origin principle would have applied in labour and social security law**. For illustration the following example: A foreign company concludes a contract with a German undertaking concerning software maintenance. To fulfill this contract the company posts its workers to Germany for two months. In this situation the scope of the AEntG is not opened, because the company does not belong to the construction industry, providing postal services or building cleaner's craft. As a statutory minimum wage does not exist in Germany, the AEntG is not able to provide for protection of posted workers. Moreover, because the exception of Art. 17 No. 5 B.D. is not applicable, the country of origin principle is still in force.

e) What practical **implications** does this country of origin principle have, particularly in the field of labour law? Unlike the Posting of Workers Directive/AEntG, it means that the law of their country of origin is applicable to any foreign worker employed by a foreign employer and posted to another Member State.¹² This means that not only eventually existing statutory minimum wage regulations of the Member State of destination but also all other statutory minimum regulations of labour and social law **cannot** be applied in favor of the employee. The usually less extensive protection standards of the country of origin have to be applied.

¹² *Bercusson/Bruun*: "Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire", in: *Ahlberg/Bercusson/et. alii*: Transnational Labour Regulation, 2006, p. 263, 278.

Responsible for the **supervision** of compliance of the statutory conditions of work and service would *not* be the Member State of destination. Quite to the contrary, while Art. 24 B.D. is inapplicable, the responsibility for supervising the employer remains with the country of origin. According to B.D., the judicial competence would rest with the jurisdiction of the Member State of destination as long as the worker is working there, but those courts would have to apply the law of the country of origin, Art. 5 No. 1 (b) Council Reg (EC) 44/2001¹³.

4. *Summary*

Following the original B.D., the country of origin principle would have not been applicable in situations governed by the Posting of Workers Directive. However, as the scope of the Posting of Workers Directive is limited, particularly in countries lacking a statutory minimum wage, the B.D. would have influenced labour law and social protection significantly. This holds true, although the current statutory framework also applies (Art. 6 [2] [a] Rome Convention respectively Art. 8 [2] 1, 2 Rome I Regulation) the country of origin principle. That is because the B.D. would not only have significantly extended the scope of the country of origin principle but also heavily restricted the possibility of the Member States to derogate from this principle.¹⁴

III. Criticism at the B.D.

Against this background the B.D. faced a lot of criticism. Critics argued primarily against the country of origin principle but also against the relocation of monitoring compliance with the legal provisions to the Member State of origin. The criticism in detail:

1. *Violation of the principles of contract approach*

Firstly, it was criticized that by the country of origin principle the B.D. one-sidedly favors the interest of the service provider.¹⁵ Determining the applicable law in

¹³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁴ *Körner*: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 233, 234.

¹⁵ *Mankowski*: „Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt“, in: *Praxis des Internationalen Privat- und Verfahrensrechts* 2004, p. 385, 386.

accordance with the service provider's head office runs contrary to the concept of a treaty to which at least two parties have to agree. Just as the national contract law strives to seek a fair balance between interests of both contracting parties, in the field of conflicts of law rules interests of both parties should be taken into account when determining the applicable law.¹⁶

2. *Creation of a legal chaos*

Critics of the draft also referred to the potential legal chaos, caused by the (permanent) coexistence of up to 27 jurisdictions within each Member State ("islands of foreign law"¹⁷).¹⁸ If each service provider providing services in another Member State is allowed to apply the law of his country of origin, this necessarily means that the same incidents in one and the same Member State can be covered by entirely different legal frameworks. Thus, e.g., to a contract on repairing a roof between a service recipient and a service provider based in foreign country F1, the F1 law is applicable, although the service is provided outside that country. If an enterprise from country F2 was a partner to that contract, that F2 -law was applicable. For the service recipient this would have had several disadvantages. In each case he must determine the potential content of all his potential contracting partner's law. That is in many cases difficult and costly, if not completely impossible.

3. *Lack of harmonisation of B.D. with the Council Reg (EC) 44/2001*

Critics of the draft also referred to its lack of harmonisation with the Regulations of the Council Reg (EC) 44/2001 in determining the local competency of courts of law, resulting in a falling apart of the applicable substantive law and procedural law. While the substantive law of the Member State of origin is applicable (Art. 4 No. 4 B.D.), for the decision of disputes the courts of the Member State of destination are locally competent.

¹⁶ *Sonnenberger*: „Kommissions-Vorschlag für eine Rahmenrichtlinie des Europäischen Parlaments und des Rates über Dienstleistungen im Binnenmarkt“, in: *Recht der Internationalen Wirtschaft* 2004, p. 321, 322.

¹⁷ *Reim*: „Ein Sieg der Vernunft“, in: *Arbeitsrecht im Betrieb*, 2006, p. 473, 474.

¹⁸ *Schlachter*: „Der Kommissionsentwurf für eine Richtlinie über Dienstleistungen im Binnenmarkt“, in: *Zeitschrift für Gemeinschaftsprivatrecht* 2004, p. 245, 247; *Davies*: „Services, Citizenship and the Country of Origin Principle“, in: *Mitchell Working Paper Series 2/2007*, 7; *Workers's Chamber Austria*, press release from 28.10.2004, accessible at: <http://www.arbeiterkammer.com/www-387-IP-17778.html>; *Comments of the Vereinten Dienstleistungsgewerkschaft (ver.di) concerning the Services Directive*, 16.10.2005, *Bundestags-Drucksache* 16(9)355, S. 7.

This leads to considerable additional expenditure for the courts (see below sub 4). In addition, the lacking synchronisation partially negates the B.D. purpose of eased services exchange. The advantage which – from the service provider’s point of view – is connected with the application of the law of his country of origin in the Member State of destination, according to the strict country of origin principle, is partially neutralised by the application of the procedural law of the posting state.¹⁹ To avoid disadvantages, the service provider is, for example, forced to hire a lawyer based in the posting state, which contradicts the goal of saving costs and effort.

4. *Considerable additional expenditure of the courts*

Moreover, the strict application of the country of origin principle would lead to a significant additional burden on the courts of the Member State of destination (without a corresponding discharge of the courts of the country of origin).²⁰ An inevitable consequence of the B.D. would be a significant increase of legal proceedings to which foreign substantive law applies. Any determination of the legal content of foreign law results in significant personnel expenses and costs, for example in translations and legal opinions. As it can hardly be expected that Member States would have increased the numbers of judges in their respective civil courts to meet that additional demand, this would also cause significant delays of all court proceedings. As in general judges have no (exact) knowledge of the applicable foreign law, the probability of errors in law would increase correspondingly. Due to a likely delay of court proceedings and an increased probability of errors in law the principles both of legal certainty and of effective law enforcement would be at risk.

5. *„Race to the bottom“; Reverse discrimination*

The B.D. was not only prevailing over other directives and regulations, but also covered social protection and labour law in totality. Therefore it triggered deep concern that the country of origin principle might lead to a "race to the bottom", to a downward spiral towards the lowest standards in labour law as well as in

¹⁹ *Mankowski*: „Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt“, in: *Praxis des Internationalen Privat- und Verfahrensrechts* 2004, p. 385, 390.

²⁰ *Mankowski*: „Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt“, in: *Praxis des Internationalen Privat- und Verfahrensrechts* 2004, p. 385, 390.

environmental and consumer protection laws.²¹ Companies might want to relocate their head quarter to Member States with the lowest legal standards only to offer their services subsequently across borders again to consumers in their original country of origin (under significantly different conditions).

This would add the risk that Member States deliberately reduce legal requirements in order to be more attractive for foreign companies (“race to the bottom”). Such a development would contradict intentions pursued by the EC. The fundamental Treaty Freedoms (see art. 136 EC) are based on the deliberation that any competition of service providers expected and encouraged by community law shall not take place through differences between social protection standards. To the contrary, social protection standards as competition parameter should be overcome.²² As mentioned above, the exception of Art. 17 No. 5 B.D. in referring to the prevailing Posting of Workers Directive would have changed little, given the limited reach of that directive and national laws transposing it. Therefore it could not have prevented the feared “race to the bottom”.

Moreover the country of origin principle could also undermine the **rules of national competition law**, as significant advantages of undertakings operating from a low-wage country could not be compensated by competitors governed by high labour standards.²³

²¹ Compare e.g. *Reim*: „Ein Sieg der Vernunft“, in: *Arbeitsrecht im Betrieb*, 2006, p. 473, 474; („law-shopping“); *Gebhardt*, EUPolitix.com, 4.10.2005, 1; *Bercusson/Bruun*: “Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire”, in: *Ahlberg/Bercusson/et. alii*: *Transnational Labour Regulation*, 2006, p. 263, 264, 271, 272; *Arnold*: „Polish plumber symbolic of all French fear about the Constitution”, in: *Financial Times*, 28.5.2005; *Attac Germany*, press release from 23.11.2005, accessible at: www.attac.de/bolkestein/.

²² *Kugelmann*: „Die Dienstleistungs-Richtlinie der EG zwischen der Liberalisierung von Wachstumsmärkten und europäischem Sozialmodell“, in: *Europäische Zeitschrift für Wirtschaftsrecht*, p. 2005, 327, 329; *Eichenhofer*, Schriftliche Stellungnahme der Sachverständigen zur Öffentlichen Anhörung: EU-Dienstleistungsrichtlinie, 16.10.2006, Bundestags-Drucksache 16(9)344, S. 6; Comments from *Graham Copp*, accessible at: <http://www.redpepper.org.uk/article346.html>; Comments from *Guy Van Gyes*, accessible at: <http://www.eurofound.europa.eu/eiro/2004/06/feature/-be0406302f.htm>.

²³ *Mankowski*: „Wider ein Herkunftslandprinzip für Dienstleistungen im Binnenmarkt“, in: *Praxis des Internationalen Privat- und Verfahrensrechts* 2004, p. 385, 387; vgl. *Schlachter*: “Der Kommissionsentwurf für eine Richtlinie über Dienstleistungen im Binnenmarkt”, in: *Zeitschrift für Gemeinschaftsprivatrecht* 2004, p. 245, 247.

This would lead to considerable competitive disadvantages for undertakings situated in the Member State of destination, because these entrepreneurs can not rely on Art. 16 B.D. (so called problem of “**reverse discrimination**”).²⁴

Due to the said disadvantages, an enterprise situated in the Member State of destination would have only two options: (1) Sue before the national courts for being treated equally with the foreign competitor (in Germany there is little to none prospect of success for that) or (2) relocate its headquarter to the Member State which has, from the company’s perspective more favorable, that is cheaper, legal standards.²⁵

6. *Fewer opportunities to control*

Another reason for strong objections was Art. 16 (3) B.D., stipulating that the country of origin - much rather than the country of destination - should control the employer’s compliance with legal requirements abroad.²⁶ This would quite predictable allow for circumvention of the – often already lower – protecting regulations of the country of origin. Administrative authorities of the country of origin even lack the competence to act on the territory of the Member State of destination.

Even if this problem may theoretically be overcome by judicial cooperation (e.g. administrative assistance among courts or supervising institutions), one has to keep in mind that authorities of the country of origin will have, more often than not, little interest in effectively controlling services provided in another Member State. Moreover, an extended judicial cooperation would face many problems (e.g. personnel

²⁴ *Albath/Giesler*: „Das Herkunftslandprinzip in der Dienstleistungsrichtlinie – eine Kodifizierung der Rechtsprechung?“, in: Zeitschrift für Europäisches Wirtschaftsrecht 2006, p. 38, 40; Kapitalismus brutal“, article from Helmut Lorscheid (13.12.2004), accessible at: www.heise.de/tp/r4/artikel/18/18965/1.html; Schriftliche Stellungnahme der IG BAU, Bundestags-Drucksache 16(9)337.

²⁵ „Kapitalismus brutal“, article from Helmut Lorscheid (13.12.2004), accessible at: www.heise.de/tp/r4/artikel/18/18965/1.html.

²⁶ *Lorenz*: “EU-Dienstleistungsrichtlinie und gesetzlicher Mindestlohn – rechtliche Bewertungen und mögliche Schlussfolgerungen”, in: Arbeit und Recht 2006, p. 91, 92; *Graue*: “Die geplante Richtlinie über Dienstleistungen im Binnenmarkt und das Europäische Arbeitsrecht”, in: Informationsdienst europäisches Arbeits- und Sozialrecht 2005, p. 126, 130; *Bercusson/Bruun*: “Free Movement of Services, Transnational Temporary Agency Work and the Acquis Communautaire”, in: *Ahlberg/Bercusson/et. alii*: Transnational Labour Regulation, 2006, p. 263, 272, 304 et seqq.; „Kapitalismus brutal“, article from Helmut Lorscheid (13.12.2004), accessible at: www.heise.de/tp/r4/artikel/18/18965/1.html; Stellungnahme der Vereinten Dienstleistungsgewerkschaft ver.di, a.a.O; Offener Brief der IG Bau an Bundeskanzler Schröder, accessible at: http://www.igbau.de/db/v2/inhalt.pl?e1=&e2=1&did=2749&mode=detail&edit=0&persid=1102529097_67755; *Kowalsky*: “The Services Directive: the Legislative process clears the first hurdle”, in: Transfer 2006, p. 231, 238: „this virtually destroyed the host country’s effectively to monitor compliance with the stipulated conditions for posted workers“.

and material costs).²⁷ In particular, because the B.D. would also affect situations within the scope of the Posting of Workers Directive, the lack of coordination between the B.D. and the Posting of Workers Directive was criticised. It was feared, that the Posting of Workers Directive would be eroded through the back door of reduced control opportunities of the Member State of destination.²⁸

7. *Inconsistence with the „Lisbon Strategy“*

Another fear was that the country of origin principle would favor those cross-border service providers who employ less qualified „cheaper“ workers. This contradicts the so-called Lisbon Strategy, aiming at turning the EU into the most competitive and most dynamic knowledge based economic area in the world by 2010 and thus explicitly supporting qualification based employment and advanced training.²⁹

8. *Circumvention of the Posting of Workers Directive?*

A frequent objection against the B.D. was its possibility of furthering circumvention of the Posting of Workers Directive: Even for permanent posting of workers the law of the country of origin could have remained applicable, by this evading existing employment protection regulations of the performance country.³⁰ This accusation, however, did never hold true. Although the B.D. was meant to precede other directives, the country of origin principle would **not** be valid in matters covered by the Posting of Workers Directive, Art. 17 No. 5 B.D, and certainly not in matters covered by the Treaty free movement provisions. Therefore, this reproach was invalid.³¹

Yet, there were rightful complaints about splitting-up control for compliance of protection standards between the country of origin and the Member State of

²⁷ *Albath/Giesler*: „Das Herkunftslandprinzip in der Dienstleistungsrichtlinie – eine Kodifizierung der Rechtsprechung?“, in: *Zeitschrift für Europäisches Wirtschaftsrecht* 2006, p. 38, 42; *Flower*: „Negotiating the Services Directive“, in: 9 *CYELS* (2006-7), p. 217, 223.

²⁸ *Graue*: „Die geplante Richtlinie über Dienstleistungen im Binnenmarkt und das Europäische Arbeitsrecht“, in: *Informationsdienst europäisches Arbeits- und Sozialrecht* 2005, p. 126, 131.

²⁹ Workers’s Chamber Austria, press release from 28.10.2004, accessible at: <http://www.arbeiterkammer.com/www-387-IP-17778.html>.

³⁰ *Lorenz*: „EU-Dienstleistungsrichtlinie und gesetzlicher Mindestlohn – rechtliche Bewertungen und mögliche Schlussfolgerungen“, in: *Arbeit und Recht* 2006, p. 91, 94; „Offener Brief der IG Bau an Bundeskanzler Schröder“, accessible at: <http://www.igbau.de/db/v2/inhalt.pl?e1=&e2=1&did=2749&mode=detail&edit=0&persid=1102529097.67755>.

³¹ *Wiesner/Wiedmann*: „Die Dienstleistungsrichtlinie – Marktöffnung oder Abschottung?“, in: *Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis* 2005, p. 1210, 1213.

destination in Art. 24, 25 B.D.³² Even though it permitted the Member State where the service is actually provided to check minimum working conditions provided for by the Posting of Workers Directive, control mechanisms were reduced to a relatively limited scope and the creation of certain commitments was prohibited, Art 24 I lit. 1 B.D.³³ This included several measures that would have greatly simplified the execution of controlling the minimum working conditions, e.g. the obligation to previously apply for permission, the appointment of a responsible contact as a „representative“ in the Member State of destination, the carrying and keeping of social security documents, as well as – in the building industry with a transitional period till 31 December 2008 – the obligation to register the service with administrative bodies in the state of destination in advance.

9. *Restriction of the Fundamental Freedom of Services (art. 49 EC)*

Under certain circumstances the country of origin principle, as it was stipulated in the B.D., may even have restricted the Fundamental Freedom of Service (Art. 49 EC).³⁴ If a trans-nationally operating services provider did not want to invoke the law of his country of origin – complying with said principle – but rather a more favorable law of the Member State of destination, this would not be possible under the B.D. Only service providers ready to transfer their head quarter to another Member State would be allowed to invoke that countries laws for their services provided in that country. This would act contrary to Art. 49 EC treating him less favorable than a competitor from the Member State where the service is actually provided.

IV. Summary part 1

The original B.D. with its strict country of origin principle could have had a massive influence on labour law of the Member States. It failed because of the above mentioned points of criticism.

³² *Schlachter*: „Der Kommissionsentwurf für eine Richtlinie über Dienstleistungen im Binnenmarkt“, in: *Zeitschrift für Gemeinschaftsprivatrecht* 2004, p. 245, 248.

³³ Respecting the legal situation of the Posting of Workers Directive the ECJ ruled that obligations to report for foreign services providers are legally only when these obligations are in accordance with the principle of proportionality. (ECJ, 23.11.1999 – C-369/96 = EuGHE I 1999, 8453). The obligation to report the posting of workers to the authorities of the Member State where the service is actually provided substitute legally the obligation to apply for a work permit or a visa. (ECJ, 21.10.2004 – C-455/06 = EuGHE I 2004, 10191).

³⁴ *Albath/Giesler*: „Das Herkunftslandprinzip in der Dienstleistungsrichtlinie – eine Kodifizierung der Rechtsprechung?“, in: *Zeitschrift für Europäisches Wirtschaftsrecht* 2006, p. 38, 41; *Basedow*: „Dienstleistungsrichtlinie, Herkunftslandprinzip und Internationales Privatrecht“, in: *Europäische Zeitschrift für Wirtschaftsrecht*, 2004, p. 423, 424.

C. Part 2

I. Preface

After „looking back in time“, this second part introduces the employment law regulations of the implemented S.D. (II.). Subsequently is to be examined, whether the S.D. influences national employment law of the Member States and if so, under which conditions this would be possible (III.).

II. Content of the Directive

1. *Extraction of employment law from the scope of the S.D.*

Unlike the original B.D., which in principle included employment law and only exempted affairs that fell under the Posting of Workers Directive (Art. 17 No. 5 B.D.) from the country of origins principle, the wording of the Services Directive meanwhile excludes employment law completely:

Recital 14 already states that the S.D. does, inter alia, neither extend to conditions of work and employment nor to services of temporary work agencies. Social partner's right to negotiate and conclude collective agreements, freedom to strike and the right of industrial action is acknowledged and affirmed in **Recital 15**.

These topics are revisited in **Art. 1 (6), (7) 2 S.D.** Thereafter, the S.D. does neither affect statutory or contractual terms of conditions of work and employment nor the right to negotiate or conclude collective agreements or to take industrial action, as foreseen under national law and national customs. **Art. 2 (2) (e) S.D.** excludes services of temporary work agencies from the scope of the directive. **Art. 3 (1) (a) S.D.** lays down the antecedence of the Posting of Workers Directive. **Art. 4 No. 7 S.D.** stipulates that collective agreements concluded by social partners do not have to meet any standards of the directive, i.e. they are not considered forbidden requirements, restraints, conditions or limitations. **Art. 16 (3) 2 S.D.** clarifies that Member States are not a priori hindered to apply terms and conditions of employment, including those in collective agreements, to foreign employers, even if this limits the freedom of services.³⁵ Finally, **Art. 17 (1) No. 2 S.D.** states that art. 16 S.D., as a secondary law

³⁵ In the light of art. 1 (6), this provision appears to be superfluous. It seems that these provisions remained in the Services Directive due only to political reasons, see: *Barnard*: “Unravelling the Service Directive”, in: *Common Market Law Review* 45, p. 368 et seq.

warranty of the freedom of services, is not applicable to any matters regulated by the Posting of Workers Directive.³⁶

2. *Interim Result*

Following the wording of respective regulations, the S.D. – unlike the B.D. – excludes employment law completely. The B.D. – as shown above – would have led to an application of the country of origin principle in many employment law cases, even while allowing an exemption for affairs under the Posting of Workers Directive. Contrary to that, the wording of the S.D. leaves employment law untouched at a first glance.³⁷ Consequentially, the legal situation (**B. II. 1.**) formed through an interplay of Art. 8 (2) 1, 2 Rome I Regulation, the Posting of Workers Directive and respective national implanting statutes, will remain untouched.

3. *„Precedence of Community Law“*

However, the exemptions described above are limited by the S.D. itself, as they always refer to the precedence of community law: Art. 16 (3) 2 S.D. stipulates that Member States are not prevented from applying their rules for conditions of employment, including those laid down in collective agreements, **in accordance with community law**. Other passages quoted above contain a comparable clause, too (e.g.. Art. 1 VI S.D.: “This Directive does not affect labour law [...] which Member States apply in accordance with national law **which respects Community law**.”). The S.D. does not expose what these caveats aim at and which exact consequences they are meant to have. Thus one can not safely predict whether or not the coming into force of the S.D. will impact national employment law regulations.

III. Possible consequences of the S.D. for the labour law of the Member States

Keeping in mind that the limitations of the employment law exemptions are amply vague, one has to ask if – and if so, under which preconditions – the S.D. can have consequences for national conditions of work and employment. Firstly, there is the problem that (naturally) exceptions in that area apply for employment law only, and consequently, one has to distinguish that from regulations concerning self-

³⁶ Because of Art. 3 (1) (a) this provision also seems not necessary, see: *Barnard*: “Unravelling the Service Directive”, in: *Common Market Law Review* 45, p. 369, footnote 269.

³⁷ *Körner*: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 233.

employment and disguised self-employment (see 1.). Secondly, one has to examine whether references to Community Law imply a limitation of justification grounds for restrictions of the freedom of services or consequences for collective labour law (see 2.). Finally, one has to scrutinize Art. 2 (2) (e) S.D. (exemption of the services of temporary work agencies) (see 3.).

1. *Problem of differentiation between employment and (disguised) self-employment*

The afore-mentioned exceptions only refer to employment law regulations but not to services of self-employed persons. This can be problematic insofar, as the majority of “classic” working activity can just as well be performed by a self-employed person. Thus exceptions in that area could be evaded by assigning (disguised) self-employed workers.³⁸ For example, if a foreign undertaking enters into a contract with a German undertaking for maintenance of their production sites (situated in Germany) and the foreign undertaking assigns this task to a self-employed subcontractor, the S.D. (and especially art. 16 S.D.) is applicable.

This shows the problem of the differentiation of employment and (disguised) self-employment, which can be very difficult in borderline cases. As the distinction also has enormous consequences, the importance of this problem must not be underestimated. Indeed, one has to highlight that even if the S.D. would pose no threat to employment *law* of the Member States – as labour law by definition does not govern services of the self-employed – there may very well be the danger of a factual influence on the employment situation as long as the exceptions in the area of employment law can be circumvented by a clever wording of the contract. E.g., the foreign employer in the above mentioned example could pass the people performing the service off as self-employed subcontractors, while in reality they are dependent jobholders in the meaning of employment law and therefore employees. On the other hand, one may not overlook that differentiating employees from self-employed persons is no specific problem under the S.D. Suchlike distinction problems occur frequently in national and community labour law. Nevertheless it remains

³⁸ *Lorenz*: “EU-Dienstleistungsrichtlinie und gesetzlicher Mindestlohn – rechtliche Bewertungen und mögliche Schlussfolgerungen”, in: *Arbeit und Recht* 2006, p. 91, 94; *Körner*: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 233, 234; *Reim*: „Ein Sieg der Vernunft“, in: *Arbeitsrecht im Betrieb*, 2006, p. 473, 475.

questionable, which set of law governs the distinction. Options would be to either employ Community Law (Art. 39 EC), the law of the Member State of establishment or the law of the Member State where the service is actually provided.³⁹

Most problematic consequences would arise from applying the law of the Member State of establishment, as this would render impossible an effective control of compliance with employment law regulations for the Member State of destination. The S.D. itself contains no rule for this situation. Nevertheless, in Recital 87 one statement can be found, which at least clarifies that the law of the Member State of establishment is not defining. In its second phrase this Recital leaves it to each Member State to make the necessary distinction. However, this statement is immediately challenged by phrase 3, which refers to Art. 39 EC and the term “employee” used there. Thus, it remains unclear if the distinction between employee and (disguised) self-employed has to be made according to the law of the Member State where the service is actually provided or follows the term “employee” as used in Art. 39 E.C.⁴⁰ What is clear from the interpretation given by the Recital is not more than that the distinction should not be governed by the law of the Member State of establishment.

With this background in mind, the danger of a circumvention of the exceptions in the area of employment law in Art. 1 (6) S.D. and of the connected factual influence on the factual employment situation by assignment of disguised self-employed workers is rather **low**.

2. *Reference to „Precedence of Community Law“*

However, unlike the problem debated above, the S.D. could influence the employment law of Member States to some extent, insofar as due to the S.D. national employment law regulations may only be applied as long as they “respect Community Law” (Art. 1 [6] S.D. and above II. 3.). German legal literature voiced apprehension that the S.D. might therefore still have considerable impact on national labour law. There were two concrete worries:

³⁹ See *Schlachter/Ohler*, Kommentar zur Dienstleistungsrichtlinie, Vor Art. 19 No. 5.

⁴⁰ *Barnard*: “Unravelling the Service Directive”, in: *Common Market Law Review* 45, p. 332 footnote 53.

a) Restriction of possible grounds of justification

aa) Firstly, the reference to Community Law in **Art. 1 (6)** and **Art. 16 (3) 2 S.D.** could lead to the conclusion that national employment law will only be acceptable within very strict limitations as it might be considered as restricting Treaty freedoms. As soon as national regulations are fit to render a cross-boarder provision of services „less attractive“, they are limitations in this sense and are in need of a special justification, according to the ECJ’s opinion. Here, the stipulation in **Art. 16 (3) 1 S.D.**, which limits accepted grounds of justification to only four (public policy, public security, public health and the protection of the environment), can lead to a comparably stricter standard.⁴¹

Over and above these restrictive reasons the ECJ has acknowledged other grounds of justification in case of a limitation to the Treaty freedom of services. Especially in the area of employment law, the Court issued several decisions naming reasons of occupational health and safety and individual protection of workers as justification for a limitation of the freedom of services by national, non-discriminatory regulations.⁴²

As the S.D. does not contain more grounds of justification than just the four mentioned above, this could be understood as if the directive by its reference to Community Law in Art. 1 (6) and Art. 16 (3) 2 S.D. might be aiming at reducing employment law grounds of justification for infringed freedom of services.⁴³ As a consequence employee protection standards reasons might no longer be a valid justification to limitations of the freedom of services, Art. 49 EC.

This could not be overcome by broad interpretation of the grounds of justification laid down in Art. 16 (3) 1 S.D.: allocating all additional grounds of justification earlier acknowledged by the ECJ to the exemption of “public security” would defy both the recognisably complete enumeration in Art. 16 (3) 1 S.D. and the definition of “public security“ in Recital 41.⁴⁴

⁴¹ Korte: “Was bleibt vom ursprünglichen Verständnis der Dienstleistungsfreiheit?”, in: *Europäisches Wirtschafts - & Steuerrecht* 2007, p. 246, 250.

⁴² E.g. EuGH v. 3.2.1982 – C-62/81 = Slg. 1982, 223 (*Seco*); v. 27.3.1990 – C-113/89 = Slg. 1990, I-1417 (*Rush Portuguesa*); v. 23.11.1999 – C-369/96 = Slg. 1999, I-8453 (*Arbelade*).

⁴³ Lemor: „Auswirkungen der Dienstleistungsrichtlinie auf ausgesuchte reglementierte Bereiche“, in: *Europäische Zeitschrift für Wirtschaftsrecht*, 2007, p. 135, 138 et seq.; Körner: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 233, 234.

⁴⁴ Korte: “Was bleibt vom ursprünglichen Verständnis der Dienstleistungsfreiheit?”, in: *Europäisches Wirtschafts - & Steuerrecht* 2007, p. 246, 250.

bb) Comment: Already on the basis of the S.D., these worries should prove to be unsubstantiated. Taking the text for a starting point and paying attention to the history of origins of the S.D., it has to be understood that even by the reference to Community Law in Art. 1 (6) and Art. 16 (3) 2 S.D. national employment law standards were **not** meant to be influenced. Especially, the limitation of grounds of justification for restricting freedom of services is to apply to the freedom of services of Art. 16 (3) 1 S.D. only, but **not** to the freedom of services of Art. 49 EC. Hence it remains that in the area of employment law, restrictions to the freedom of services under Art. 49 EC can still be justified by criteria developed by the ECJ including individual employment protection rules.⁴⁵

Arguments for this interpretation of the S.D. can be drawn from the directive itself and from its history of origins. Recitals 82, 86, 89 repeatedly emphasize that the S.D. should not interfere with national employment law regulations. Especially Recital 82 highlights that restrictions of the freedom of services can be justified by non-discriminatory, necessary, and proportionate reasons. Moreover, Art. 17 No. 2 S.D. contains a clear rule for cross-boarder posting of workers, according to which solely the Posting of Workers Directive shall remain applicable. With the history of origins the argumentation flows in the same direction. According to Commissioner *McCreevy*, Art. 1 (6) S.D. should distinctly clarify that national employment law should remain untouched by the S.D.⁴⁶ To the European Parliament *McCreevy* explained:

„The Commission wants to state unambiguously that the Services Directive does indeed not affect labour law laid down in national legislation and established practices in the Member States and that it does not affect collective rights which the social partners enjoy according to national legislation and practices.“

Moreover, the “Handbook on implementation of the Services Directive” emphasizes that the Art. 43 EC et seqq., 49 EC et seqq. on basis of the case law of ECJ – and not the regulations of the S.D. – remain applicable for matters exempted from the scope of the S.D.:

“It should also be clear that matters excluded from the scope of the Services Directive remain fully subject to the EC Treaty. Services excluded remain, of course, covered by the freedom of establishment and the freedom to provide

⁴⁵ *Schlachter/Ohler*, Kommentar zur Dienstleistungsrichtlinie, Vor Art. 19, No. 2.

⁴⁶ Evidence given by Rt Hon Ian McCartney to the House of Lords EU Select Committee on 17 May 2006, annexed to the House of Lords EU Select Committee 38th Report 2005-6, p. 23.

services. National legislation regulating these service activities must be in conformity with Article 43 and 49 of the EC Treaty and the principles that the European Court of Justice (ECJ) has developed on the basis of the application of these articles have to be respected.”⁴⁷

As regarding the reference to Community Law in Art. 1 (6) S.D., it is highlighted that this displays (only) a reference to the Posting of Workers Directive:

“Article 1(6) furthermore states that the application of national legislation must respect Community law. This means that, as regards posted workers, the receiving Member State is bound by the Posting of Workers Directive.”⁴⁸

In conclusion, the S.D. has to be understood as having no – not even collateral – impact on employment law of the Member States in the sense of a restriction of grounds of justification.

b) Influencing the rights of social partners

Another line of reasoning highlights worries about a restriction of the rights of social partners and national regulations on industrial action.

aa) Art. 4 No. 7 S.D.

In the S.D., the meaning of undue “requirements” imposed on services providers is very special, e.g. in Art. 16 (1) 3 S.D. Member States are prohibited from making the uptake or exercise of a service provision in their territory dependent on special requirements. Those „requirements“ are defined in Art. 4 No. 7 S.D., stating that *“Rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive.”*

Indeed, collective agreements are no requirement in the meaning of the S.D., so that they are not seen as providing for any restrictions of the freedom of services (laid down in Art. 16 S.D.) requiring a justification. However, the meaning of the expression „as such“, remains unclear. In German legal literature, there is some doubt whether in particular cases collective agreements could still be presented as illegal requirements.⁴⁹ The danger was considered especially high for universally applicable collective agreements.

⁴⁷ Handbook on implementation of the Services Directive, p. 8.

⁴⁸ Handbook on implementation of the Services Directive, p. 17.

⁴⁹ Körner: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: Neue Zeitschrift für Arbeitsrecht 2007, p. 233, 235.

These worries are to be rejected. The expression „as such“, by its mere wording could mean that a collective agreement once it became universally applicable by governmental act could therefore be classified as a requirement. But due to the consequences flowing from that interpretation, the S.D. could not possibly be understood that way. Such interpretation would require a more precise wording in order to avoid that all universally applicable collective agreements would come under constant danger of a conflict with the S.D. Considering the restriction on grounds of justification (see above), in many cases this would lead to the inadmissibility of the terms of universally applicable collective agreements. As can be seen easily from the Posting of workers Directive, universally applicable collective agreements are seen as established means for acknowledged restrictions of Treaty freedoms. Furthermore, Recital 86 – in connection with the Posting of Workers Directive – explicitly mentions universally applicable collective agreements as such. The European legislator obviously was aware of the distinction; yet, in Art. 4 No. 7 S.D. the more extensive term of collective agreement is used without any qualifier. If the Directive wanted to exclude also universally applicable collective agreements from the exemption in Art. 4 No. 7 S.D., this would have been stated explicitly (as in Recital 86).

Lastly Recital 14 clearly states that

*„This Directive [...] nor does it affect relations between social partners, including the **right to negotiate and conclude collective agreements**, the right to strike and to take industrial action in accordance with national law and practices which respect Community law [...].”*

Again, only collective agreements in general are mentioned, thus it can be **concluded** that Art. 4 No. 7 S.D. exempts all collective agreements from the term “requirements“, so that all terms of collective agreements are exempted from Art. 16 (1) 3 S.D.

bb) Reference to „Precedence of Community Law

Art. 1 (7) S.D. stipulates that the directive does not affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law, and again these rights have to be practiced with “**respect [to] Community law**”. Again it remains dubious, what effect this reference to Community Law is meant to have. In Germany, fears were widespread that the reference must be

understood as a gateway for intervention rights of the Commission in national labour law rules.⁵⁰

As a starting point it is noteworthy that under Art. 137 (5) EC the EC has no competence for regulating the right of industrial actions and, probably, of collective agreements⁵¹. Nonetheless, according to the recent jurisdiction of the ECJ (decisions *Laval*⁵² and *Viking Line*⁵³) collective agreements as well as industrial actions are to be balanced against the Treaty fundamental freedoms (especially the freedom of establishment and freedom to provide services). Against this background it is not totally pointless to argue that Art. 1 (7) S.D. does limit the rights of collective bargaining partners and the right to take industrial action. This line of reasoning is based on two different aspects:

(1) The reference can be interpreted that future collective agreements and/or industrial action will have to be regarded as requirements restricting free provision of services and therefore require justification. While considering the wording of Art. 1 (7) S.D. it is clear that free provision of services meant the Treaty freedom of services only, not the context of Art. 16 (1) S.D. To differentiate between those two freedoms is of considerable importance, since only the one based on the Treaty allows for grounds of justification accepted by the ECJ, which go beyond the enumeration in Art. 16 (3) 1 S.D. The well established justification by employment protection standards grounds allows many restrictions of Art. 49 EC by collective agreements and industrial action. According to this line of interpretation the reference to community law in Art. 1 (7) S.D. amounts to a mere **clarification**, not establishing any additional standard for justification.⁵⁴

(2) According to the alternative line of argumentation the reference could contain more than just a clarification but establish a subordination of national law of collective agreements and industrial action to the freedom of services.⁵⁵ In this case the reference to Community Law would establish an additional prerequisite for balancing of

⁵⁰ Stellungnahme der Gewerkschaft ver.di, Bundestags-Drucksache 16(9)334, p. 24.

⁵¹ Contentious, cf. Callies/Ruffert/Krebber, EUV – EGV, 3. Aufl., Art. 137 EGV, Rn. 11.

⁵² EuGH v. 18.12.2007 – C-341/05 (*Laval*).

⁵³ EuGH v. 11.12.2007 – C-438/05 (*Viking Line*).

⁵⁴ Compare *Bercusson*, “The Trade Union Movement and the European Union: Judgment Day”, in: *European Law Journal*, Vol. 13, No. 3, p. 279, 301 et seq.

⁵⁵ Stellungnahme der Gewerkschaft ver.di, Bundestags-Drucksache 16(9)334, S. 24..

interests at the justification stage. However, a statement in the Commission's handbook can be held against this interpretation:

*“Article 1(7) does not take any position as to whether negotiation, conclusion and enforcement of collective agreements are fundamental rights. In the context of this article, Recital 15 is of particular importance. It spells out the basic principle that there is no inherent conflict between the exercise of fundamental rights and the fundamental freedoms of the EC Treaty, and **that neither prevails over the other.**”⁵⁶*

This can be understood as excluding any influence of S.D. on the balancing process at Community Law level. On the other hand some doubts remain as the handbook also refers back to **Recital 15**, saying:

*„This Directive respects the exercise of fundamental rights applicable in the Member States and as recognised in the Charter of fundamental Rights of the European Union and the accompanying explanations, **reconciling** them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights **include the right to take industrial action in accordance with national law and practices which respect Community law.**”*

What is meant with “respecting Community Law“ leaves room for doubts. In conclusion, one can say that the reference to Community Law in Art. 1 (6) S.D. may remain of importance for future assessment of collective agreements and industrial action in the light of freedom of services of Art. 49 EG. A restrictive influence therefore **cannot** be ruled out.

3. Art. 2 (2) (e) S.D.

According to Recital 14 and Art. 2 (2) (e) S.D. the services of “temporary work agencies” have been excluded from the scope of the directive.⁵⁷ This phrasing has led to discussions in German literature, because national law differentiates between various forms of temporary work.⁵⁸ Whether all these forms are included in the scope of Art. 2 (2) (e) S.D. is unclear. However, concerning labour law this question is not

⁵⁶ Handbook on implementation of the Services Directive, p. 15.

⁵⁷ Moreover Recital 86 speaks from „the protection of workers hired out by *temporary employment undertakings*”.

⁵⁸ Compare *Reim*: „Ein Sieg der Vernunft“, in: *Arbeitsrecht im Betrieb*, 2006, p. 473, 475; *Lorenz*: “EU-Dienstleistungsrichtlinie und gesetzlicher Mindestlohn – rechtliche Bewertungen und mögliche Schlussfolgerungen”, in: *Arbeit und Recht* 2006, p. 91, 94; *Körner*: „EU-Dienstleistungsrichtlinie und Arbeitsrecht“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 233, 235; *Stellungnahme der Gewerkschaft ver.di*, BT-Drucks. 16(9)334, p. 25 et seq.

relevant as Art. 1 (6) 2 S.D. applies to all forms of temporary works existing under German Law.

IV. Conclusions for part 2

1. As a starting point one has to emphasize that the wording of the S.D. completely excludes labour law from its scope. Yet, impacts on employment relationships still remain possible, as the exception in that area can be evaded by assigning (disguised) self-employed workers. As the distinction between both groups is not always easy, an application of the S.D. rather than national labour law of the host country can be applicable.

2. The S.D.'s frequent reference to Community Law should have no impact on the area of individual labour contract law. Especially, employment protection clauses should still remain grounds of justification for a restriction of the Treaty freedom of services.

3. Possible consequences for collective agreements and industrial actions cannot be ruled out. Even if the S.D. cannot be applied directly in that area, the reference to community law has to be interpreted at least as a clarification that collective agreements and industrial action have to be balanced against the Treaty fundamental freedoms of establishment and services. Whether the reference to community law in Art. 1 (7) S.D. could additionally establish a precedency of freedom of establishment and freedom of services over the right of negotiating and concluding collective agreements, remains somewhat uncertain even if this scenario is highly unlikely.

D. Part 3

I. Introduction

The S.D. excludes labour law from its scope only under the condition that regulations in national law have to be in accordance with Community law. National labour law therefore is exempted from the scope of the S.D. only insofar as it respects all relevant Treaty provisions. Those implicit boundaries to the exemption of labour law leads to the further question, whether the S.D. could still have an impact on the labour law of the Member States – with a detour via primary community law. Three recent judgements of the Court (*Viking Line*; *Laval*; *Rüffert*) are of particular interest, because they significantly limit the influence of collective regulations of work relations on national level.

Against this background many legal opinions questioned that the restriction to Community's competency in regulating collective labour relations at EU level might not be respected in the future⁵⁹. Much rather than leaving this task to collective bargaining, the Court could try to interfere by regulating collective bargaining through balancing it against the Treaty freedoms. Therefore, it has to be examined if the S.D. can widen any "attack" on collective agreements and industrial action in the Member States. Such an option would be particularly controversial, because under the S.D. – unlike the Posting of Workers Directive concerning only a small excerpt of labour law – national rules for collective agreements and industrial action in all areas of labour law would be concerned. In order to review their possible restrictive influence on national collective bargaining, the three decisions mentioned above will be introduced shortly, their impact on national labour law will be described and possible consequences in connection with the S.D. will be shown.

II. Viking Line⁶⁰

1. Facts⁶¹ (substantially simplified)

Viking, a company incorporated under Finnish law, is a large ferry operator that owns and operates the ferry *Rosella*, which is registered under Finnish flag. Most of *Rosellas* crew is Finnish and therefore covered by a collective agreement conducted

⁵⁹ European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)) Rec.No.3, 5.

⁶⁰ ECJ 11.12.2007 – C-438/05 (*Viking Line*).

⁶¹ Compare also: Norrby, Fler frågor om fri rörlighet, in: Lag & Avtal, 15.12.2005, p. 11.

by the Finnish Seamen's Union (*FSU*). In 2003 *Viking* decided to reflag the *Rosella* to Estonia; this would have allowed *Viking* to hire an Estonian crew and negotiate lower terms and conditions of employment with an Estonian trade union. After negotiations between *Viking* and *FSU* failed, *FSU* gave notice of industrial action. Hereupon, *Viking* commenced an application in order to stop the *FSU* and their international affiliates from taking any action to prevent the reflagging of the *Rosella*.

2. *Decision (abridged)*

The ECJ had to decide, if in such a case Art. 43 EC is **applicable**, although this restriction was not caused by the state itself but by a private party. The ECJ was of the opinion, that collective actions initiated by a trade union against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, are **not** excluded from the scope of Art. 43 EC (para. 37). Although the ECJ ruled this for the first time with respect to collective actions initiated by trade unions, the decision refers to the settled case-law, according to which Art. 39 EC, 43 EC and 49 EC do not apply to actions of public authorities only but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (para. 33).⁶² Art. 137 (5) EC, which states, that the Community has no competence to regulate the right to strike, is no obstacle for this assumption, because in regulating the right to strike the Member States must nevertheless comply with Community law (para. 40).⁶³

In a second step the ECJ ruled that

“Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.” (para. 61)

⁶² ECJ 12.12.1974 – C-36/74 (*Walrave and Koch*), ECJ 14.7.1976 – C-13/76 (*Donà*); ECJ 11.4.2000 – C-51/96 and C-191/97 (*Bosman*); ECJ 6.6.2000 – C-281/98 (*Angonese*); compare also *Mestre*, European Law Reporter, 1/2008, p. 2, 8.

⁶³ *Zwanziger*: “Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen ‘Laval’ und ‘Viking’”, in: *Der Betrieb* 2008, p. 294, 295; different view: *Novitz*: “The right to strike and re-flagging in the European Union – free movement provisions and human rights”, in: *Lloyds maritime and commercial quarterly*, 2006, p. 242, 245; *Thüsing*: “Blick in das europäische und ausländische Arbeitsrecht, in: *Recht der Arbeit* 2007, p. 307, 308.

Therefore under certain conditions, obviously fundamental freedoms laid down in a provision of the Treaty are not only **binding** for the Member States, but also for individuals.⁶⁴

In a third step the ECJ ascertained if a collective action can constitute a **restriction on freedom of establishment** in the meaning of Art. 43 EC. It approved that, because

*“[...] it cannot be disputed that collective action such as that envisaged by FSU has the effect of making **less attractive, or even pointless** [...] Viking’s exercise of its right to freedom of establishment, inasmuch as such action prevents Viking [...] from enjoying the same treatment in the host Member State as other economic operators established in that State.”* (para. 72)⁶⁵

The most important question remains, whether this restriction to freedom of establishment can be **justified**. This is the case only if the restriction pursues a legitimate aim compatible with the Treaty, justified by overriding reasons of public interest, and is suitable for securing the attainment of the objective pursued without going beyond what is necessary in order to attain it.⁶⁶

In *Viking Line* the ECJ for the first time acknowledged that

“[...] the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, [...] and by instruments developed by those Member States at Community level or in the context of the European Union [...].” (para. 43)

*“[...] the right to take collective action, including the right to strike, must therefore be recognised as a **fundamental right** which forms an integral part of the general principles of Community law the observance of which the Court ensures[...].”* (para. 44).

However, in the same paragraph the Court states that the exercise of this right to take collective action may none the less be subject to certain restrictions. Although the protection of fundamental rights is a legitimate interest which, in principle, justifies a

⁶⁴ Different view *Rebhahn*: „Grundfreiheit vor Arbeitskampf – der Fall Viking“, in: Zeitschrift für europäisches Sozial- und Arbeitsrecht 2008, p. 109 et seqq.; *Wendeling-Schröder*: „Streikrecht und gemeinschaftsrechtliche Grundfreiheiten“, in: Arbeitsrecht im Betrieb 2008, p. 179, 182.

⁶⁵ This statement is also applicable to the freedom of services, Art. 49 EC.

⁶⁶ See e.g. C-55/94 (*Gebhard*), ECR I-4165, paragraph 37, and *Bosman*, paragraph 104.

restriction of a fundamental freedom guaranteed by the Treaty, the exercise of the fundamental rights does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (para. 46).

Summing up, the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty, because the protection of workers is one of the overriding reasons of public interest recognised by the Court. Therefore,

*“the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital **must be balanced** against the objectives pursued by social policy, which include [...] inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.”* (para. 79)

In one of the final paragraphs the ECJ clarified that a collective action which intends **only**⁶⁷ to prevent an undertaking from dislocating sites (or registering vessels) in a State other than that of which the beneficial owners of those sites or vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified.

3. *Analysis*

Now it is to be examined which consequences this decisions can have in practice. There will be no comment on the statements of the ECJ in the sense of an annotation. Instead, the main focus will be on the presentation of possible consequences for industrial actions, which are in any way able to prevent, render unattractive or complicate the cross-boarder relocation of production sites.

The ECJ does indeed recognize the right of taking industrial action as an (unwritten) fundamental right (see a) but likewise emphasizes the importance of fundamental

⁶⁷ If the objective of pursued policy is also to protect and improve seafarers' terms and conditions of employment, the collective action can be justified in accordance with the rules mentioned above.

freedoms (see b). That the S.D. could be relevant in this context can not be ruled out (see c).

a) Right to industrial actions

For the first time (as far as evident) the ECJ acknowledges that the right to take industrial action including strikes is a fundamental right stemming from legal traditions of the Member States.⁶⁸ However, one has to highlight at this stage that – unlike the fundamental freedoms⁶⁹ – this fundamental right has not been secured in the meaning of a dependable and binding legal source. Because of that it is in a weaker position than actions protected by the fundamental freedoms. The right to industrial action has indeed been included in the Constitution for Europe⁷⁰ and in the European Social Charter⁷¹ to which the EC refers. Yet, these sources no Treaty provisions and therefore weaker. Against this background, the right to industrial action is not protected from being ignored or at least very restrictively interpreted by the Court.

b) Relation to fundamental freedoms, esp. Art. 43 and 49 EC

Moreover it is very significant how the ECJ determined the relation between the fundamental right to industrial action and fundamental freedoms. Obviously, the ECJ does **not** consider the fundamental right to industrial action and the fundamental freedoms **to be on an equal footing** but defines industrial action primarily as

⁶⁸ *Mestre*: “The ruling *Laval un Partneri*: clarification and innovation” in: *European Law Reporter*, 1/2008, p. 2, 7.

⁶⁹ Strongly critical towards such a result: European Parliament Resolution of 22 October 2008 (2008/2085(INI)) Rec. No. 19, 31, 35.

⁷⁰ Art. II-88 Constitution for Europe states: “*Right of collective bargaining and action* Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

See also art. III-213: “*right of association and collective bargaining between employers and workers*”.

⁷¹ Art. 6 ESC states: “*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:*

- 1 *to promote joint consultation between workers and employers;*
 - 2 *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
 - 3 *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
- and recognise:*
- 4 *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.”*

restricting Art. 49 EC.⁷² This has far-reaching consequences: with this conviction and context, the fundamental right to collective measures is not one of the civil rights and liberties serving as a defence against any state intervention, but merely an interference right. Therefore its application is in need of justification whenever it restricts the exercise of fundamental freedoms in any way.

Following this line of reasoning, the Court has **not balanced** the right to strike against the freedom of establishment for reaching a fair balance between conflicting interests. Instead, the exercise of the right to strike was seen as restriction to the freedom of establishment and needed justification following the principle of **proportionality**.⁷³ This principle says that a measure restricting a fundamental freedom is in accordance with Treaty law only if this measure is *suitable, necessary*⁷⁴ and *appropriate* to protect an overriding reason of public interest. A check like this has a tendency to disadvantage the intervening right, i.e. in this case the right to collective actions.⁷⁵ Again, it shows that the ECJ places the right to strike in a weaker position as the fundamental freedoms. While ascertaining whether all of the collective measures were necessary and appropriate, the ECJ has based its decision exclusively on the general public interest in individual protection of employees. The right to collective measures as a right of the trade unions was not mentioned (different in the decision *Laval*, see below).⁷⁶ It can be concluded that the ECJ has degraded the collective right of the trade union to a mere handyman of employment protection and does not ascribe it any creditable worth as constituting in itself a general public interest.⁷⁷ A consequence of

⁷² Different view: *Bercusson*: “The Trade Union Movement and the European Union: Judgment Day”, in: *European Law Journal*, Vol. 13, No. 3, p. 279, 303: “*in balancing the rights in this case the question is not whether fundamental rights justify restrictions on free movement; rather free movement must be interpreted to respect fundamental rights*”; *Rebhahn*: „Grundfreiheit vor Arbeitskampf – der Fall Viking“, in: *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 2008, p. 109, 114 et seq.

⁷³ Different view from *Brücker*: „Die Rosella-Entscheidung des EuGH zu gewerkschaftlichen Maßnahmen gegen Standortverlagerungen: der Vorhang zu und viele Fragen offen“, in: *Neue Zeitschrift für Arbeitsrecht* 2008, p. 212, 215; *Wendeling-Schröder*: „Streikrecht in Europa – nicht mehr, aber auch nicht weniger Rechte!“, in: *Arbeitsrecht im Betrieb* 2007, p. 617; *Wendeling-Schröder*: „Streikrecht und gemeinschaftsrechtliche Grundfreiheiten“, in: *Arbeitsrecht im Betrieb* 2008, p. 179, 182; *Pießkalla*: „Unmittelbare Drittwirkung der Grundfreiheiten des EG-Vertrags bei Boykottaufrufen durch Gewerkschaften“, in: *Neue Zeitschrift für Arbeitsrecht* 2007, p. 1144, 1147.

⁷⁴ That is if the measure is the most lenient measure of all equally suitable measures to reach the goal.

⁷⁵ *Zwanziger*: “Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen ‘Laval’ und ‘Viking’”, in: *Der Betrieb* 2008, p. 294, 298.

⁷⁶ *Bayreuther*: „Das Verhältnis zwischen dem nationalen Streikrecht und der EU-Wirtschaftsverfassung“, in: *Europäische Zeitschrift für Arbeitsrecht* 2008, p. 395, 401; *Rebhahn*: „Grundfreiheit vor Arbeitskampf – der Fall Viking“, in: *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 2008, p. 109, 110.

⁷⁷ *Kocher*: „Kollektivverhandlungen und Tarifautonomie - welche Rolle spielt das europäische Recht?“, in: *Arbeit und Recht* 2008, p. 13, 15 et seq.

this point of view could be that the ECJ denies the trade union that took collective measures any margin of appreciation whether collective actions were necessary and appropriate for reaching their objectives. Particularly, as some Member States allow trade unions some margin of appreciation in these questions⁷⁸, Community law threatens to become a „spoilsport“.⁷⁹ While the EU cannot award rights to trade unions because of the lack of regulating competence (cf. Art. 137 [5] EC), it can still establish significant restrictions to their rights by limiting them through fundamental freedoms of undertakings.⁸⁰

Finally, the ECJ construed relatively narrow the possible justification for a restriction to the freedom of establishment. Collective measures aiming at employee protection could only be justified if the jobs or working conditions of the workers concerned were “jeopardised or under serious threat” (para. 81 ff.). This disallows a justification not only in cases where there is a mere – distant – possibility of a deterioration of working conditions but also in cases where collective measures aim at improvement of working conditions.

Conclusion: It cannot be ruled out that “Viking-Line” will have extensive consequences for collective measures of trade unions in cross-boarder records, because the ruling emphasizes strongly the fundamental freedoms. Fundamental rights are in a much weaker position, as their exercise must be justified. National regulations characterised by strike and other collective measures could be heavily impacted⁸¹, as strikes lawfully under national law could nevertheless become unjustifiable restrictions of fundamental Treaty freedoms when applied in a transnational labour conflict.⁸²

⁷⁸ With respect to German Law see *Preis*, *Arbeitsrecht – Praxis-Lehrbuch zum Kollektivarbeitsrecht*, 2003, p. 306 und BAG 31.10.1958 AP Nr. 2 zu § 1 TVG Friedenspflicht.

⁷⁹ *Bercusson*: “The Trade Union Movement and the European Union: Judgment Day”, in: *European Law Journal*, Vol. 13, No. 3, p. 279, 303; *Kocher*: „Kollektivverhandlungen und Tarifautonomie - welche Rolle spielt das europäische Recht?“, in: *Arbeit und Recht* 2008, p. 13, 14.

⁸⁰ *Thüsing*: “Blick in das europäische und ausländische Arbeitsrecht, in: *Recht der Arbeit* 2007, p. 307, 308.

⁸¹ European Parliament Resolution of 22 October 2008 (2008/2085(INI)), Rec. No. 3, 5.

⁸² *Bercusson*: “The Trade Union Movement and the European Union: Judgment Day”, in: *European Law Journal*, Vol. 13, No. 3, p. 279, 289, 293 et seq.; *Rebhahn*: „Grundfreiheit vor Arbeitskampf – der Fall Viking“, in: *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 2008, p. 109, 110.

c) Relation to the S.D.

Given these influences, it remains one open question whether the S.D. might add to those consequences for the right to take collective actions protected by national law. As Art. 1 (7) S.D. explicitly issues a caveat for the exercise of the right to strike and for the right to negotiate and conclude collective agreements, it affirms the attitude of the ECJ to balance collective measures for employee protection against fundamental Treaty freedoms. For the line of reasoning as handed down in “*Viking*”, the ECJ can now additionally refer to a secondary law source. Additionally, also the vague caveat in Art. 1 (7) S.D. could be interpreted as fortifying the „attack“ on collective rights of trade unions as in *Viking-Line*. Firstly, the caveat could be interpreted that the S.D. intended the reference to the adherence of community law to be a hint on the antecedence of the fundamental freedoms to the right to take collective measures. Secondly, the reference to community law could otherwise mean that such collective measures not in compliance with Community Law still fall in the scope of the S.D. and are therefore liable to stricter rules.⁸³

III. Laval⁸⁴

*I. Facts*⁸⁵ (substantially simplified)

Laval, a company incorporated under Latvian law, posted 35 workers to Sweden to construct a school building at Vaxholm. *Byggnads* is a trade union which groups together workers in the construction sector in Sweden. *Byggnads*, to which 87% of Swedish building sector workers were affiliated, has conducted a collective agreement with the central organisation for employers in the construction sector. *Laval*, which had signed collective agreements with the Latvian building sector’s trade union, was not bound by any collective agreement entered into with *Byggnads*, none of whose members were employed by *Laval*. *Byggnads* demanded that *Laval* (1) should sign the collective agreement for the building sector in respect of the Vaxholm site, and (2) guarantee that the posted workers would receive an hourly wage of SEK 145. After *Laval* had refused that, *Byggnads* blockaded the building site by, inter alia, prohibiting Latvian workers and vehicles from entering the site.

⁸³ *Barnard*: „Unravelling the Services Directive“, in: *Common Market Law Review* 45, p. 323, 346 et seq.

⁸⁴ ECJ 18. 12. 2007 –C 341/05 (*Laval*).

⁸⁵ Compare: *Bylund/Niklund, Arbetsrätt i praktiken*, p. 283.

With respect to Swedish law, it is noteworthy that no system exists for declaring collective agreements universally applicable. Moreover, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not even all Swedish employers are bound by a collective agreement. The Posting of Workers Directive (hereinafter: PWD) was transposed in Sweden by the “Law on the posting of workers” which regulates terms and conditions of employment applicable to posted workers but does not provide for minimum rates of pay as referred to in the Art. 3 (1), (c) of the PWD.

2. *Decision (substantially abridged) and analysis*

The decision deals mainly with two questions⁸⁶:

a) Right to take industrial actions

aa) Decision

Like in *Viking* the ECJ in *Laval* ascertains whether the collective action taken by the trade union is in accordance with Art. 49 EC. In respect to this question a lot of statements in *Laval* paralleled those in *Viking*.⁸⁷ Beyond that there are some **noticeable statements** in *Laval* departing from the lines of reasoning in *Viking*. In *Laval* there are hints that the ECJ may even have considered collective rights of trade unions while ascertaining the justification of the restriction of Art. 49 EC.⁸⁸

*“In that regard, it must be pointed out that the **right to take collective action for the protection of the workers** of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.”* (para. 103).

However, one has to point out that the ECJ has drawn no obvious conclusions from such a possible reference to a collective right, especially not with regard to any assessment prerogative of the trade unions whether collective measures are necessary and appropriate.

⁸⁶ Sigemann, *Arbetsrätten*, p. 88, 124.

⁸⁷ E.g.: although the right to take collective action is recognised as a fundamental right which forms an integral part of the general principles of Community law (paragraph 91) a strike constitutes a restriction of the freedom to provide services within the meaning of art. 49 EC; such a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; furthermore it must be suitable for securing the attainment of the pursued objective and not go beyond what is necessary in order to attain it (paragraphs 99, 101).

⁸⁸ *Kocher*: „Kollektivverhandlungen und Tarifautonomie - welche Rolle spielt das europäische Recht?“, in: *Arbeit und Recht* 2008, p. 13, 17.

Moreover, the ECJ ruled that the restriction cannot be justified with the objective of protecting workers in a situation such as that at issue in the main proceedings, because

“[...] the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 [...].” (para. 108, 81)

and

*„with regard to workers posted in the framework of a transnational provision of services, their **employer is required**, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.”* (para. 108)

bb) Analysis

Concerning the relation between fundamental Treaty freedoms and the fundamental right to take collective measures, “*Laval*” unsurprisingly affirms the essentials of “*Viking*”.⁸⁹ Therefore, it can be essentially referred to the observations above. However, it is notable that the statements quoted in aa) could be understood as restricting the means of collective bargaining parties even further than the statements in the *Viking* decision. The basis of the *Laval* decision is that in cases of cross-border posting, employers have already been obliged to stick to a minimum of worker protection by the Posting of Workers Directive. Thus, the (principally acknowledged) goal of protecting individual employees could not justify the restriction of *Laval*’s freedom of services. (para. 108). Put to extreme this could be interpreted as assigning the task of reaching an adequate level of worker protection primarily to the **legislator** instead of **the labour market parties**.⁹⁰ According to this line of argumentation a minimum standard (Posting of Workers Directive) could mark what is automatically “adequate”, therefore containing both the upper and the lower limit of any level of employee protection justifying the restriction of a fundamental freedom⁹¹. Labour law models essentially developed on collective bargaining⁹², would be heavily impacted

⁸⁹ *Rebhahn*: „Grundfreiheit vor Arbeitskampf – der Fall Viking“, in: Zeitschrift für Europäisches Sozial- und Arbeitsrecht 2008, p. 109.

⁹⁰ *Zwanziger*: “Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen ‘Laval’ und ‘Viking’”, in: Der Betrieb 2008, p. 294, 297

⁹¹ European Parliament Resolution of 22 October 2008 (2008/2085(INI)), Rec. No. 11,17.

⁹² See *Evju*: “Labour Courts and Collective Agreements – The Nordic Model”, in: Europäische Zeitschrift für Arbeitsrecht 2008, p. 429 et seqq.

by this assumption.⁹³ The future will show if the ECJ actually intended to restrict collective bargaining rights to such an extent.

b) Posting of Workers Directive

aa) Decision

Besides, the Court reasoned on the relation between Posting of Workers Directive and Art. 49 EC:

*“[...] Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 **expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe.**”* (para. 80).

Therefore,

“the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71.” (para. 81).

bb) Analysis

Like the *Rüffert* decision, the *Laval* decision brings up the question of the relation between the Posting of Workers Directive and the fundamental freedom of service provision. Among other things, this allows for conclusions about the relation between S.D. and art. 49 EC. As both decisions need to be taken in conjunction, this question will be discussed in detail following a brief description of the *Rüffert* decision.

⁹³ *Köhler*: „Das kollektive Arbeitsrecht Schwedens auf dem europarechtlichen Prüfstand“, in: *Zeitschrift für Europäisches Sozial- und Arbeitsrecht* 2008, p. 65, 74; *Sigemann*, *Laval* domén sätter spärr mot social protectionism in: *Lag & Avtal*, 31. 1. 2008, p. 34 – 35; *Örnerborg*, *Bara minimilöner kann stoppa lönedumpning*, in: *Lag & Avtal*, 31. 1. 2008, p. 7.

IV. **Rüffert**⁹⁴

1. *Facts (substantially simplified)*

The ECJ had to decide if a law like the Law of the German Land Niedersachsen on the award of public contracts ('the Landesvergabegesetz') is in accordance with Treaty law. Paragraph 3(1) of the Landesvergabegesetz states:

*“Contracts for building services shall be awarded only to undertakings which, when lodging a tender, **undertake in writing** to pay their employees, when performing those services, **at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement.**”*

In 2003 Niedersachsen awarded a Polish undertaking a contract for the structural work in a building. The contract demanded compliance regarding payment to employees working on the building site of at least the minimum wage in force at the place where those services were to be performed pursuant to the collective agreement mentioned in a list of attached sample collective agreements. It is noteworthy that these collective agreements **are not** universally applicable under German law.

The Polish undertaking came under suspicion of having employed workers on the building site at a wage below that provided for in the 'Buildings and public works' collective agreement. After investigations a penalty notice was issued against the person primarily responsible at the undertaking established in Poland.

2. *Decision (substantially abridged)*

In *Rüffert* the ECJ ruled that the Directive 96/71/EC, interpreted in the light of Art. 49 EC, **precludes** a Member State from adopting a legislative measure requiring the contracting authority to designate for public works contracts only those undertakings which agree in writing to pay their employees at least the remuneration prescribed by a collective agreement regulating the minimum wage in force at the place where those services are performed.

Reasons for the decision:

a) In a first step the ECJ ascertained if such a measure constitute a minimum rate of pay within the meaning of **Art. 3 (1) (c) Posting of Workers Directive**. As

⁹⁴ ECJ 3. 4. 2008 – C 346/06 (Rüffert).

mentioned before, this Directive enables Member States to set certain minimum requirements for undertakings established in another Member State, which posts, in the framework of the transnational provision of services, workers on its account and under its direction to the territory of the host Member State. However, this is possible only if these requirements are set by law, regulation or administrative provision, and/or by collective agreements which have been declared universally applicable (Art. 3 [1] Posting of Workers Directive). The ECJ ruled that the reviewed terms of the Landesvergabegesetz **cannot** be considered to be a law or even a collective agreement which has been declared universally applicable.⁹⁵

b) In a second step the ECJ looked upon Art. 49 EC.

aa) The Court decided that such a condition is capable of constituting a **restriction** within the meaning of **Art. 49 EC** (para. 37), because it may impose on service providers established in another Member State (where minimum rates of pay are lower) an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.

bb) As a “restriction” that law is in accordance with Art. 49 EC only if it is justifiable. Hereby the ECJ ascertained if such a measure can be justified by the objective of ensuring the **protection of workers** and/or the objective of **ensuring the financial balance of the social security systems**. At the end of the day the ECJ negated both questions. For our purposes the detailed reason for this decision is not important. However, it is notable and important that the Court seems to be of the opinion that basically a restriction of Art. 49 EC can still be justified by the objective of ensuring the protection of workers⁹⁶ and the objective of ensuring the financial balance of the social security systems⁹⁷.

⁹⁵ Therefore: “It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that provided for by the ‘Buildings and public works’ collective agreement.” (paragraph 35)

⁹⁶ See paragraph 38: “In addition [...] such a measure cannot be considered to be **justified by the objective of ensuring the protection of workers**.” This statement can be interpreted only in the manner that the EC still accepts the objective of ensuring the protection of workers as a reason with which a restriction of art. 49 EC can be justified.

⁹⁷ See paragraph 42: “Lastly, with regard to the objective of ensuring the financial balance of the social security systems [...] an **objective which the Court has recognised** [...]”

3. *Analysis*

The importance of the decision lies not in its concrete result but in its ruling on the relation between Posting of Workers Directive and Art. 49 EC (see a). As the relevant statements of the *Laval* decision are acknowledged, both decisions are evaluated in a synopsis, as important conclusions to the relation of S.D. to Art. 49 EC – also for the labour law aspect – could be drawn (b).

a) Relation of PWD – Freedom of Services

The *Rüffert* decision, just like “*Laval*”, brings up the question, which relation the Directive has to the freedom of services under Art. 49 EC. Two possible interpretations come into consideration on the merits:⁹⁸

aa) The Posting of Workers Directive for this line of reasoning constitutes an exception to the country of origin principle rooting in Art. 49 EC. Art. 49 EC otherwise guarantees the service provider that in trans-national cases he is fundamentally subject to regulations of his country of origin only. This is held to be necessary for the creation of a single market, as long as national laws of Member States are not completely harmonised – which is unthinkable at the moment. The Posting of Workers Directive was meant to deviate from the country of origin principle in order to protect the employees as well as services providers in the host country. Seen as an exception to the rule, the Posting of Workers Directive would contain a **completed catalogue of grounds of justification for admissible restrictions to the Treaty freedom of services**. As a consequence, national regulations restricting the freedom of services in the factual scope of the Posting of Workers Directive (Art. 1) can only be **in conformity with European Law if they could stand up to the criteria of Art. 3 Posting of Workers Directive**. In the *Rüffert* case conformity could not be concluded, as the “Landesvergabegesetz” was not seen as a generally applicable statutory regulation or administrative fiat and no universally applicable collective agreement existed. Already because of that, the “Landesvergabegesetz” would contradict European Law.

bb) But there are also other options of determining the spirit of the Posting of Workers Directive. If that Directive is regarded as a tool to protect employees and

⁹⁸ *Kocher*: “Die Tariftreueerklärung vor dem EuGH”, in: *Der Betrieb* 2008, p. 1042, 1043.

their rights to bargain for minimum standards protecting against ruinous competition, the Posting of Workers Directive would contain a **catalogue of grounds of justification** which could always justify the restriction of the freedom of services that accompanies national regulations, but this catalogue would **not be complete**. Under this line of argumentation a national regulation that restricts the freedom of services of Art. 49 EC and does not meet the criteria of Art. 3 I Posting of Workers Directive could still be justified if the restriction is justified by general principles. **Employee protection** would still act as a ground of justification for restricting Art. 49 EC, because it constitutes an important public interest.

cc) How the Posting of Workers Directive is to be understood and how its relation with the freedom of services is interpreted is therefore of utmost importance for the admissibility of the Member States issuing regulations for protection of employees and local industry from a race to the bottom. When following the interpretation under **aa)**, all measures of Member States that are connected to cross-boarder constellations as in Art. 1 (3) Posting of Workers Directive, are automatically contrary to European Law if they infringe fundamental freedoms without coming under the scope of Art. 3 PWD.

However, the interpretation presented in **bb)** would allow Member States to balance any restriction of the freedom of service providers against general grounds of justifications earlier acknowledged by the ECJ. If the said regulation was necessary and appropriate for the protection of employees, it would not contradict Art. 49 EC and therefore be in conformity with European Law.

dd) The **ECJ's** understanding of the relation between Posting of Workers Directive and Art. 49 EC was neither in *Laval* nor in *Rüffert* explicitly announced. Quite to the contrary, there are clues for both interpretations in both decisions.

(1) In both decisions, some remarks speak in favour of acknowledging the Posting of Workers Directive as the standardisation of a completed catalogue of justification grounds for admissible restrictions of the freedom of services (the interpretation as under **aa)**):

As soon as in paragraph 2 of the *Rüffert* case the ECJ highlights that

“in order to give a useful answer to the national court, it is necessary to take into consideration the provisions of Directive 96/71 when examining the question referred for a preliminary ruling.” (*Rüffert* para. 18)

Similarly the Court argued in “*Laval*”:

“In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.” (*Laval* para. 58).

Nevertheless, both decisions ignore Art. 49 EC while ascertaining the respective national regulations exclusively in the light of Art. 3 (1) Posting of Workers Directive. Since these statutes are not considered to represent a minimum wage regulation in compliance with Art. 3 (1), the ECJ ascertains if they could be regarded as more favourable working conditions in the meaning of Art. 3 (7) Posting of Workers Directive. The ECJ negates this since

“As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe.” (*Rüffert* para. 33; see also *Laval* para. 80)

and

“Therefore the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g), of Directive 96/71 [...]” (*Rüffert* para. 34; see also *Laval* para. 81).⁹⁹

The ECJ therefore concludes that

„It follows that a Member State is not entitled to impose, pursuant to Directive 96/71, on undertakings established in other Member States, by a measure such as that at issue in the main proceedings, a rate of pay such as that

⁹⁹ Compare also ECJ 19.6.2008 – C-319/06 (Commission vs. Luxemburg), especially paragraphs 26, 31.

provided for by the 'Buildings and public works' collective agreement." (Rüffert para. 35).

The following statement also speaks in favour of the interpretation presented in aa):

*"That interpretation of Directive 96/71 is confirmed by reading it **in the light of Article 49 EC**, since that **directive seeks in particular to bring about the freedom to provide services**, which is one of the fundamental freedoms guaranteed by the Treaty."* (Rüffert para. 36)

This allows for the conclusion that the Posting of Workers Directive is apparently meant to realise the freedom to provide services, thereby leading to the assumption of a decisive completed catalogue of grounds of justification for a restriction of Art. 49 EC.

(2) On the other hand, both decisions also contain evidence that the ECJ does **not** want the Posting of Workers Directive to be interpreted as a complete enumeration of grounds of justification. National regulations are balanced against the Posting of Workers Directive only, because if they comply with its requirement, there will be no need for question of a justification of the restriction to Art. 49 EC. This line of reasoning could invoke the following arguments:

At first, the ECJ itself does not expressively refer to interpreting Art. 49 EC in the light of the Posting of Workers Directive, but emphasizes that the Posting of Workers Directive has to be interpreted against the background of Art. 49 EC:

*"[...] the first question must be examined with regard to the provisions of **that**¹⁰⁰ **directive interpreted in the light of Article 49 EC** (Case C-60/03 Wolff & Müller [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself."* (Laval paragraph 61)

"That interpretation of Directive 96/71 is confirmed by reading it in the light of Article 49 EC, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty." (Rüffert para. 36)

¹⁰⁰ That is the Posting of Workers Directive.

Additionally, the Court indeed does examine national regulations under Art. 49 EC after they failed to meet the requirements of Art. 3 (1) Posting of Workers Directive. After characterising the regulations as a restriction¹⁰¹, the ECJ examines if that measure can be justified. As grounds for justification the decision invoked the objective of worker protection and as a newly added reason the **financial balance of the social security systems**.

„In addition [...] such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.” (Rüffert para. 38)

“[...] it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty [...]” (Laval para. 103)

“[...] with regard to the objective of ensuring the financial balance of the social security systems [...] an objective which the Court has recognised [...].” (Rüffert para. 42).

Even though in “Rüffert” both justification grounds were actually rejected, for the sake of the argument this outcome makes no difference. What could be drawn from the Court’s line of reasoning is in both cases that possible grounds for justification the respective restriction of fundamental freedoms were not restricted to the ones laid down in Art. 3 (1) Posting of Workers Directive but also included the general interest of protection of workers. This contradicts the idea of the ECJ wanting the Posting of Workers Directive to contain a completed catalogue of grounds for justification. If the list of admissible grounds for justification were meant to be completed, any further consideration of justification according to Art. 49 EC would be superfluous.

ee) Nevertheless, the final interpretation of the relation between Posting of Workers Directive and other acknowledged grounds for justification remains an open question. Both possible interpretations (aa and bb) are backed up by passages in the decisions. One even cannot determine a clear tendency of the ECJ.

¹⁰¹ “Therefore, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 49 EC.” (Rüffert paragraph 37).

In conclusion: It cannot be ruled out that the ECJ means to restrict Member States regulations of cross-boarder situations as listed in Art. 1 (3) Posting of Workers Directive to statutory provisions of Art. 3 (1) Posting of Workers Directive.

b) Conclusion for the Services Directive?

It is even more debatable whether this would have consequences for the S.D. and its relation to fundamental freedom of services. Should the ECJ regard the Posting of Workers Directive to entail a complete catalogue of grounds for justification for a restriction of the freedom of services, this reasoning may have to be transferred to the relation between **Services Directive** and Art. 49 EC. As a consequence, all cross-boarder constellations contained in the S.D., any restriction of the Treaty freedom of services could be justified only if one of the grounds mentioned in **Art. 16 (3) 1 Services Directive** was at hand. There would be no possibility to come back to one of the grounds acknowledged earlier by the ECJ under Art. 49 EC such as worker or consumer protection. If this was the case, some consequences for national labour law might follow from the S.D. considering that exempting labour law and labour relations from the S.D.'s scope are always limited by a reference to Community law. Given that it is the S.D.'s objective to implement and render operational the Treaty fundamental freedom of service provision, those references to Community law could very well exclude from the scope of the Directive only national measures/regulations otherwise compatible with EU law.

Despite these considerations, it is highly unlikely – at least in the area of labour law – that the ECJ will draw these effects from the S.D. The S.D. distinctly excludes labour law from its scope and thereby realises the explicit and unmistakable will of the legislator (detailed above Part 2). It could not be brought in line with that exception if the S.D. influences national law by invoking Treaty provisions. Additionally, it would be less than convincing to apply the S.D. only where there is already stated nonconformity with European Law. A possible (additive) breach of the S.D. would be meaningless. Even the fact that the S.D. was issued almost at the same time as the decisions in *Laval* and *Viking Line* does not lead to another conclusion; instead, one can assume that it was a temporal coincidence.¹⁰²

¹⁰² *Bercusson*: “The Trade Union Movement and the European Union: Judgment Day”, in: *European Law Journal*, Vol. 13, No. 3, p. 279 (“coincidentally”).

V. Conclusion

1. In the *Laval* and *Viking Line* decisions, the ECJ indeed acknowledges a fundamental right to take collective measures (including strikes), but first and foremost considers such measures to be a restriction of fundamental freedoms of Art. 43, 49 EC legitimate only in case of justification. This could lead to an extensive limitation of collective actions otherwise legal under national law.

2. It is not safe to conclude which relation the Court acknowledges between the Posting of Workers Directive and Art. 49 EC. Either the Court might interpret the Posting of Workers Directive as containing a completed catalogue of measures admissible for protecting posted workers in cases of cross-border posting from other Member States. If this holds true, Member States could not fall back on other grounds of justification (esp. general worker protection) that have been acknowledged as admissible under Art. 49 EC.

3. If the Court indeed has to be understood that way, it still remains questionable whether these observations can be applied also to the S.D. According to our view taken here, this is not the case, instead the **S.D.** will have **no consequences** of its own for national labour law. Consequences, which can be extensive by all means, will be caused by applying fundamental Treaty freedoms themselves and the secondary law implementing them. As the S.D. excludes labour law from its scope, it does not fortify the already existing hazardous potential of Community Law.

E. Conclusions

1. The original version of the S.D. – i.e. the Bolkestein Draft (B.D.) – would have heavily influenced national labour law by a strict realisation of the country of origin principle. The draft failed politically due to ferocious criticism, which was particularly based on the worries that it could lead to a “race to the bottom” towards the lowest work and social standards.
2. In the area of individual labour relations, the S.D. in its final version should have no consequences, as general worker protection remains a viable ground of justification for any restriction of the Treaty freedom of services.
3. In the area of industrial relations, things might differ a bit as the reference to community law in Art. 1 (7) S.D. can be understood as a secondary law affirmation of the legal opinion of the Court, which has to be applied as a standard for balancing collective agreements and forms of industrial action against Treaty freedom of services and freedom of establishment
4. According to our view, statements in the decisions *Laval* and *Riiffert* concerning the relation between Posting of Workers Directive and the Treaty freedom of services under Art. 49 EC cannot be transferred to the relation between the S.D. and Art. 49 EC. Even if the Court’s line of reasoning indeed could be transferred, no additional restrictions of national law would result from this, since the S.D. in itself does not contain any additional standards for labour law. What influences national industrial relations are the Treaty fundamental freedoms and/or the Posting of Workers Directive; standards set by these legal provisions are in no way changed or amended by the entering into force of the S.D.